

- the current process operated by Corrections allows transgender prisoners to successfully seek a change in their determined sex without the need of a birth certificate, and
 - the current legal process to change the nominated sex on a birth certificate is complex, costly, and intrusive.
18. Managing transgender prisoners can be challenging for Corrections. We have found that the lived gender of some transgender prisoners can be quite fluid. For example, a small number of prisoners who were previously transferred to female prisons have since sought to return to a male prison. We have also found that female prisoners may be unwilling to participate in group activities when they know that a transgender prisoner will be present.

Implication of new provisions in the Bill

19. If the Bill is enacted as currently proposed, it will be significantly easier for people (including prisoners) to change the nominated sex on their birth certificate, through a request to the Registrar General. This would make it much more likely that prisoners seeking a change to their determined sex may present a birth certificate with a different nominated sex to support their application.
20. Under current regulations, Corrections would be required to place these people in a prison that corresponds with their nominated sex. This creates a significant issue, as this placement would be required to occur, irrespective of:
- whether or not the person appears to be genuinely living in the nominated sex on their birth certificate – the previous Family Court process provided some scrutiny of the genuineness of applications to change nominated sex, but this is largely removed with the proposed administrative process
 - whether the person has been involved in serious sexual offending against their nominated gender.
21. This issue can be summarised in two cohorts:
- prisoners who may see an opportunity to make an application to change their determined sex which is not genuine, as a way of being moved to a prison that corresponds with that sex
 - prisoners who make a genuine application to change their determined sex, but who are on remand for, serving a sentence for, or have a recent history of serious sex offending against victims of their nominated sex.
22. Corrections is concerned about:
- the potential for male prisoners who are not genuinely transgender to use the new birth certificate process as a way to compel Corrections to allow them access to female prisons – though it is unclear to what extent this situation is likely to eventuate in practise
 - a small group of transgender prisoners with histories of sexual offending against girls and women, who may seek to use this process to access female prisons.
23. In both cases this would present a threat to women in female prisons, and could adversely impact both their actual and perceived safety, as well as their rehabilitation.

24. There is a third group, who make up the majority of transgender prisoners that Corrections currently manages, who are not a concern. These are prisoners who Corrections has determined are genuinely transgender, and who are not on remand for, serving a sentence for, or have a recent history of serious sex offending against victims of their nominated sex.

What other countries do

25. The rights of transgender people in prison systems vary significantly across different countries, with many countries either not having transgender policies at all, or managing these prisoners on an informal basis.
26. Corrections has undertaken a brief scan of the policies employed by other prison systems to manage transgender prisoners, and identified transgender policies in different parts of the UK, the Australian States and Canada. A short summary is provided in Appendix 1.
27. These policies largely aim to house transgender prisoners in prisons that fit with their lived gender as much as possible. However, what is most interesting in terms of the issues raised in this paper, is that all of these policies include exceptions or clauses that allow the correctional agency to exercise some discretion not to house certain transgender prisoners in a prison that aligns with their lived gender. The reasons for these provisions are quite consistent, and involve considering the risk that a particular prisoner would pose to the safety and welfare of other prisoners, especially where there is a history of sexual offending.

Responding to this issue

28. Corrections has examined a number of potential approaches to addressing the issue with the two groups noted above, from both a policy and operational perspective. s9(2)(h)
[REDACTED]
29. It is important to note that none of these approaches would affect prisoners who request a change in their sex determination without changing the sex on their birth certificate. These people will continue to be treated as they are now, using the review process referenced above.

Option One: An operational response that involves managing all prisoners in a prison of their nominated gender

30. The Government could choose to pass the Bill as drafted, without making any further changes to regulations or legislation. This would mean that Corrections is be required to manage all prisoners in a prison that corresponds with the nominated gender on their birth certificate, regardless of any other considerations (such as prisoner preference, previously sexual offending, etc).
31. This would place Corrections in a difficult position, particularly with regard to women's prisons – as it would have to balance the welfare of a small group of transgender prisoners with the welfare of a larger group of women in these facilities.
32. The operational response employed by Corrections is likely to involve some transgender prisoners being moved into female prisons, but kept physically separate from other female prisoners at all times, where this is deemed necessary to manage risk. Given the length of some sentences, this could mean that some transgender prisoners are effectively

segregated for many years, raising significant prisoner welfare and human rights concerns.

33. Housing transgender prisoners together in a separate unit could be considered, however these prisoners may also present a significant risk to each other (e.g. where there is a background of sexual offending) creating other welfare and human rights issues.
34. Transgender prisoners may need to be moved to different parts of the country, away from family and support networks, in order to be housed in an appropriate unit, as the women's prison estate is small (three prisons, with only one that is really suitable for housing a transgender prisoner with a history of sexual offending against girls and women).
35. They may also have limited access to rehabilitation programmes and other day-to-day activities, given restrictions on them associating with other female prisoners, and practical issues.
36. Corrections does not recommend responding to these issues with a purely operational response.

Option Two: Amend Corrections Regulations so that nominated sex on a birth certificate can be considered as one factor within the existing process

37. Corrections consider that the current process set out in regulations for determining the sex of each prisoner is effective. This is because it:
 - allows prisoners to indicate where they believe Corrections has determined their gender incorrectly
 - allows for a range of different evidence to be considered when undertaking a review of this determination
 - provides flexibility so that transgender prisoners can be placed in a prison that corresponds with their birth sex, or a prison that corresponds with their lived gender, taking into account their personal preference
 - imposes reasonable limitations on transgender prisoners whose sexual offending history means they present a risk to other prisoners of their lived gender.
38. The exception to this is the provision that allows the nominated sex on a birth certificate to override the rest of the process (section 65(3)).
39. This provision makes some sense when there is a Family Court process for determining the genuineness of applications (concluding that an applicant has psychologically, socially and physically assumed a nominated gender). However, introducing self identification reduces the strength of birth certificates as a source of evidence of a person's sex, opening these up to potential misuse. Further, the current provision allows the nominated sex on a birth certificate to override restrictions that otherwise apply to transgender prisoners with sexual offending histories.
40. Corrections recommends amending the regulations so that people who present a birth certificate with a different nominated sex can be managed using the current process. The nominated sex on a person's birth certificate would be considered as part of the process, along with the other factors described previously in paragraph 12.

41. Uncertainty about how provisions in the Bill will be interpreted by the Courts mean the Government may also want to consider modifying the Bill to reduce the risk of successful legal challenges to determinations made by Corrections under the regulations (see below).
42. There are other options for how the Corrections Regulations could be amended – for example, by retaining the prison for special treatment of birth certificates, but extending the exclusion that applies to people with sexual offending histories, so it applies to people who change the sex on their birth certificate as well. While this doesn't provide all the benefits of the current process, it would address the most critical issue for Corrections.

Option 3: Amend Corrections Regulations and the Bill to provide Corrections with an explicit legal protection (recommended option)

43. The Bill includes a clause (221), which states that despite sections of the Bill that allow for a change in nominated sex on a birth certificate, the sex of every person must continue to be determined by reference to the general law of New Zealand. This wording implies that registering a person's nominated sex on a birth certificate does not automatically determine the person's legal sex in all respects.
44. This clause provides some latitude for agencies that need to treat men and women differently, so that they can adopt other means to determine the legal sex of an individual in certain circumstances, as long as this is done with reference to 'the general law of New Zealand'.

45. s9(2)(h) [Redacted]

46. s9(2)(h) [Redacted]

47. s9(2)(h) [Redacted]

48. s9(2)(h) [Redacted]

s9(2)(h) [Redacted]

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49. This change would be made, in addition to amending the Corrections Regulations (2005), and provide greater protection for Corrections to manage the placement of transgender prisoners taking into account a range of factors.
50. This would not prevent Corrections from being challenged on existing grounds, such as if the regulations were applied incorrectly.

Other options considered

51. In examining this issue, Corrections also considered the option of amending the Corrections Act to provide Corrections with a discretionary power to place any prisoner in a part of the prison estate where it judges it can best manage the prisoner's risk — irrespective of their sex.
52. s9(2)(h)

[REDACTED]

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Appendix A – How prison systems in other countries determine which prisons transgender prisoners should be held in

Jurisdiction	Policy	In legislation or policy	Policy last updated
England and Wales	<p>People whose gender identity does not match their legal gender can apply to the Transgender Case Board to be housed in a prison of their identity.</p> <p>People who have a Gender Recognition Certificate which legally recognises their gender identity must be located accordingly, although there is an exemption for female transgender people. Male to female transgender people can be refused transfer to the female estate if their risk to other offenders or staff is considered too high to manage, and any women with the same risk profile would need to be accommodated in the men's estate. This is normally applied to people with serious sexual offences against women.</p>	<p>Gender Recognition Act 2004 allows people to apply to have gender identity legally recognised. The case is considered by a Board, and does not require the person to have hormone treatment or gender reassignment surgery.</p> <p>The exemption to housing people in a prison of their legally recognised gender is in policy, not legislation.</p>	<p>The policy was updated in 2016. In the previous policy, most people were expected to be housed in a prison of the legal gender (by having a GRC), but there was some flexibility.</p> <p>The government is currently considering making the process to obtain a GRC less intrusive and bureaucratic, which includes considering self declaration as a process.</p>
Scotland	<p>People must be accommodated in the part of the estate which reflects their lived gender identity. However, exceptions can be made due to safety and risk management concerns. The exception includes people who have had their gender identity legally recognised.</p>	<p>Scotland is also subject to the Gender Recognition Act 2004.</p> <p>The exception to refuse to house people in a prison of their legally recognised gender is in the Scottish Prison Service policy.</p>	<p>The policy has been in force since 2014.</p>
Northern Ireland	<p>Northern Ireland does not have a policy on people who identify as transgender in prison. There is no record of any person identifying as transgender since 2011. Guidelines indicate that any case would be considered on a case-by-case basis which considers the needs and risks of the individual.</p>		-
NSW	<p>A transgender person is to be housed in a prison of their gender identity, unless it is considered more appropriate for the person to be housed in a prison of their biological sex. Placement decisions are made by a specialist case management team and consider: the nature of their current and past offending, custodial history and any perceived risk(s) to safety.</p> <p>A person who has undergone gender reassignment surgery and has had their gender identity legally recognised must be treated as a member of that sex.</p>	<p>This is in policy.</p> <p>It is not contained in the Crimes Act 1999 or Crimes Regulations 2014.</p>	<p>The policy has been in force since 2015.</p>
Queensland	<p>Transgender people can be housed in a prison of their gender identity after consideration by the Prison Director and the General Manager of Sentence Management. Factors considered include risk posed, personal preference, nature of offending, and stage in transition.</p> <p>People who have had gender reassignment surgery and have their gender identity legally recognised are still subject to placement considerations.</p>	<p>This is in policy. It is not covered in the Corrective Services Act 2006.</p>	<p>The policy has been in force since 2018.</p>
Victoria	<p>A person should, where possible, be</p>	<p>This is in policy, not legislation.</p>	<p>This policy has been</p>

	accommodated in a prison of their gender identity, not their assigned or assumed sex at birth. Each person's case is considered by a panel to determine their placement. Factors considered include the person's preference, safety and risk, and the nature of their offending. It is not clear what the process is for people who have had their gender identity legally recognised.		in force since 2017.
Canada	People must be placed in a prison according to their gender identity, unless there are overriding health and safety concerns which can not be resolved. Information on the placement of people who have completed gender reassignment surgery or have had their gender identity legal recognised is not available.	This is in Corrections Policy, not in the Criminal Code. The change in policy has come about due to an amendment to the Canadian Human Rights Act to include 'gender identity and expression' as a prohibited ground of discrimination.	The policy was updated in 2017. The previous policy only allowed transgender people to be accommodated in a prison of their gender identity following gender reassignment surgery.

Information on transgender policies in prisons in Scandinavian countries is not available, including Finland, Sweden and Norway. Sweden and Norway have recently removed the requirement for people who are transgender to be sterilised before their gender identity will be legally recognised. In Finland people are still required to be sterilised. This is in opposition from recommendations of the European Court on Human Rights.

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Internal Affairs briefing

Hon Tracey Martin
Minister of Internal Affairs

Title: Information briefing: Births, Deaths, Marriages, and Relationships Registration Bill – Background information and talking points for meeting on 16 October 2018 on transgender issues

Date: 12 October 2018

Key issues

The Rt Hon Winston Peters has requested a meeting to discuss concerns raised in recent correspondence about the proposal to replace the requirement for a Family Court declaration to change the nominated sex on a birth certificate with an administrative process based on self-identification. Talking points to assist you at the meeting are attached.

In addition, this briefing (a) provides background information on the main concerns raised in recent correspondence to MPs and Ministers about the proposed self-identification process, and (b) updates you on the Department of Internal Affairs' work with the Department of Corrections on placement of transgender prisoners.

Action sought

Read and review the talking points on transgender issues and self-identification of nominated sex on birth certificates before your meeting with The Rt Hon Winston Peters on 16 October 2018.

Timeframe

At your convenience

Contact for telephone discussions (if required)

Name	Position	Direct phone line	After hours phone	Suggested 1 st contact
Rachel Groves	Director Policy Services	s9(2)(a)		
Cathy Nijman	Senior Policy Analyst			✓

Rachel Groves
Director Policy Services

Hon Tracey Martin
Minister of Internal Affairs

Return to	Cathy Nijman, Level 9, St Paul's Square, 45 Pipitea Street	
Cohesion reference	FYHHWTPX5PK5-1235327737-291	
Ministerial database reference	IA201800924	

Purpose

1. This briefing provides talking points in advance of your meeting with The Rt Hon Winston Peters on 16 October 2018 (**Appendix A**). The meeting has been requested to discuss proposed changes included in the Births, Deaths, Marriages, and Relationships Registration Bill (the Bill) to replace the current Family Court process to update nominated sex on a birth certificate with an administrative process based on self-identification. A summary comparing the Family Court process and the self-identification process is attached (**Appendix B**).
2. This briefing also provides (a) background information on the main concerns raised in recent correspondence to members of Parliament and Ministers about the proposed self-identification process; and (b) an update on the Department of Internal Affairs' (the Department) work with the Department of Corrections (Corrections) on placement of transgender prisoners.

Department of Internal Affairs' comment on concerns raised in recent correspondence to MPs and Ministers concerning self-identification of nominated sex

3. The Department notes those opposed to self-identification focus their comments on male-to-female trans-individuals. However, the proposed changes apply equally to female-to-male trans-individuals, intersex individuals, and non-binary individuals who do not identify as female or male.

Concerns about lack of stakeholder/public consultation

4. Although the proposed change to self-identification was not included in the Bill as introduced, the Department is confident this did not impact on the public's ability to make their views known. Publicity generated by the Bill's first reading and the Government response to Petition 2014/86 of Allyson Hamblett saw 51 of the 64 direct submissions focused directly on the self-identification issue.
5. The Department has been unable to identify any issue/s raised in recent correspondence to members and Ministers that were not raised in submissions to the Governance and Administration Committee (the Committee).
6. The Bill includes a requirement for a statutory review of the recommended changes after five years. This will be a public process. The review will enable everyone to have their say on whether the Committee's recommendations strike the right balance.

Concerns that self-identification would impact negatively on (women's) rights guaranteed by the Human Rights Act 1993

7. The Human Rights Act 1993 (HRA) already recognises a transgender individual's right to freedom from discrimination. This does not limit women's (or men's) rights; it reflects the equal application of the law. The proposed move to a self-identification process to update sex on birth certificates will not affect anyone's rights under the HRA.
8. A 2006 Crown Law opinion,¹ released by the Attorney-General, confirmed the Solicitor-General's view that (a) "sex discrimination"² in the HRA included gender identity, and (b) this

¹ [Crown Law opinion on transgender discrimination](#) (23 August 2006). The Human Rights Commission believes any remaining legal uncertainty could (should) be addressed by making gender identity, gender expression, and sex characteristics explicit prohibited grounds of discrimination ([Briefing to the Incoming Minister of Justice](#), 17 November 2017) at [68].

² Human Rights Act 1993, s 21(a).

meant transgender individuals are protected by the prohibition on sex-based discrimination. The right to freedom from sex-based discrimination is not dependent on whether an individual has updated their sex on official documentation.

9. The Human Rights Commission (HRC) and the National Council for Women (NCW) confirmed their support for self-identification in submissions to the Committee. The HRC issued a media release welcoming the Committee's recommendation to move to self-identification. The NCW wrote to you on 14 August 2018 noting their continued support.

Concerns that self-identification means men could enter (women's only) sex-segregated spaces such as changing rooms and women's refuges, and would increase the risk of violence and/or sexual assault

10. The sex that appears on a person's birth certificate is not an indication that person is more or less likely to commit a crime. Offences under the Crimes Act 1961 are not sex-specific even if they have a sexual element.³ Similarly, none of the qualifying "three strike" serious violent offences listed in s 86A of the Sentencing Act 2002 can be committed only by someone who is (or identifies as) female or male.
11. The Department has noted in previous briefings we have been unable to locate any evidence, in New Zealand or internationally, that men (or women) take advantage of self-identification laws to commit crimes. HRC research indicates transgender individuals are much more likely to be victims rather than offenders.⁴ This is consistent with overseas research.
12. The Department notes the HRC supports the recognition of trans-women (recorded as male at birth) as women. Similarly, the NCW recognises trans-women as women. In response to a recent news item about a trans-women denied membership of a female-only gym, the NCW said in a media statement:⁵

The [NCW] supports the rights of transgender women to access services as women – **including women's gyms and other spaces** – because trans women are women. ... "Trans women's rights are women's rights – and women's rights are human rights" says Gill [Greer] ...

13. The Department notes, too, the Ministry of Justice and other government agencies support the New Zealand Family Violence Clearinghouse (NZFVC).⁶ While the NZFVC does not mandate access to women's services and spaces, it has published guidance that supports trans-women's access to women's refuges.⁷
14. For completeness, the Department notes the Ministry of Justice's 2015 discussion paper on family violence law reform stated:⁸

Lesbian, gay, bisexual, transgender and intersex people may also be more vulnerable to intimate partner violence due to discrimination and the use of threats to 'out' individuals to control their behaviour.

³ See, eg, s 125: an indecent act in a public space (exhibitionism); s 128B: sexual violation (including rape); and ss 216G: intimate visual recording (voyeurism).

⁴ See, eg, Human Rights Commission *To be who I am* (January 2008).

⁵ National Council for Women "[Feminism and trans-rights must go hand-in-hand](#)" (3 July 2018) (emphasis added).

⁶ The NZFVC is hosted at the University of Auckland. It is the national centre for family and whānau violence research and information. It was launched in 2005 in association with the Ministry of Social Development's *Te Rito: New Zealand Family Violence Prevention Strategy* (2002). Until its disestablishment on 29 June 2018, the NZFVC was also supported by Superu (previously the Families Commission).

⁷ NZFVC "[Resources for supporting transgender victims of relationship violence and sexual assault](#)" (2 October 2014).

⁸ Ministry of Justice *Strengthening New Zealand's legislative response to family violence* (September 2015). The Family and Whānau Violence Legislation Bill completed its second reading on 11 September 2018.

Update on implications of self-identification for Department of Corrections' management of transgender prisoners

15. The Department briefed you on 15 August 2018 and 30 August 2018 on the operational impact for Corrections if transgender prisoners change their nominated sex on their birth certificate. We advised:
 - there is currently no restriction on prisoners' eligibility to change their nominated sex; the Bill does not change this;
 - the Corrections Regulations 2005 require Corrections to place a prisoner in a prison that accords with the sex on their birth certificate (this could be the sex recorded at birth or a later change of nominated sex);
 - a prisoner who has not changed the nominated sex on their birth certificate can apply to be placed in a female or male prison in accordance with their gender identity (but this option is not available to serious sex offenders);
 - Corrections have robust policies in place to ensure the safe placement of all prisoners—this includes an assessments of the risks individual prisoners face, and the risk they pose to others; and
 - at-risk prisoners, or prisoners who pose a risk to others, can be placed on voluntary or directed segregation.
16. The Department met with Corrections on 12 October 2018. The Department and Corrections agree that the Bill and the Corrections Regulations 2005 are not inconsistent. Corrections confirmed they are not concerned about offenders making "non-bona fide" applications to change their nominated sex. Consistent with our previous advice, Corrections confirmed they have not found any evidence, in New Zealand or elsewhere, of offenders trying to "game the system" in this way.
17. However, there is a small cohort of prisoners (10 out of 10,000 as at September 2018) whose previous sexual offending makes them ineligible to apply for a change of placement based on their gender identity. None of this cohort has changed the nominated sex on their birth certificate, although they could do so now.
18. If one of these prisoners did change their nominated sex Corrections would have to place them in a prison that matches the sex on their (new) birth certificate. A change in placement would trigger a new risk assessment, and possible directed (compulsory) segregation. This could have unintended consequences. For example, an extended period of directed segregation could raise human rights concerns.
19. The Department and Corrections discussed whether it would be possible to:
 - include a minor amendment in the Bill that would clarify a change of nominated sex did not affect Corrections' ability to determine where a prisoner should be placed; and
 - amend the Corrections Regulations 2005 to provide the current prohibition on serious sexual offenders applying for a change of placement based on their gender identity could be extended to those who had changed their nominated sex on their birth certificate.
20. The Department and Corrections have agreed to work together on a possible legislative response to concerns raised about placement of transgender prisoners.

Next steps

21. Further to our briefing of 9 October 2018, the Ministry of Justice is completing a supplementary New Zealand Bill of Rights (NZBORA) assessment of clauses 22A–22J and 147A of the Bill (the self-identification and five year review clauses). They hope to complete the assessment by 19 October 2018. The Department will update you as soon as the NZBORA report is received.
22. As noted in our briefing of 15 August 2018, the Committee indicated it would like a briefing from the Department and Corrections on how concerns about placement of transgender prisoners would be addressed.⁹ The options discussed in para. 19 above are likely to form the basis of this advice. The Department will provide an update as soon as possible.
23. The Department is working on key messages and FAQs on self-identification that could be published in conjunction with the Bill's second reading. The aim is to provide an objective response to concerns raised in recent correspondence with links to relevant, independent and external sources.

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⁹ Although the Bill is no longer before the Committee, the Committee indicated it would open a brief as a new item on its agenda and request advice from the Department and Corrections.

Appendix A: Talking points for meeting on 16 October 2018

Although the change wasn't included in the Bill as introduced the publicity surrounding the Hamblett Petition meant the public had every opportunity to make their views known

- I referred to the Hamblett Petition in my first reading speech, and the Government response to the Hamblett Petition confirmed the Governance and Administration Committee would consider self-identification
- 51 of the 64 direct submissions on the Bill focused on self-identification
- All of the issue/s raised in recent correspondence to MPs and Ministers were raised in submissions considered by the Governance and Administration Committee; nothing new has been raised.

It is 10 years since the Human Rights Commission issued its report on the discrimination trans and gender diverse individuals in the community

- The right to freedom from sex-based discrimination is not dependent on whether an individual has updated their sex on official documentation. The proposed move to a self-identification process to update sex on birth certificates will not affect anyone's rights under the Human Rights Act
- There is no evidence in New Zealand or elsewhere that trans or gender diverse individuals pose a threat to anyone in public (or private) spaces
- Trans and gender diverse individuals are much more likely to be victims rather than offenders
- It is 10 years since the Human Rights Commission issued its report on the discrimination trans and gender diverse individuals face on a daily basis, including access to employment and health services, or just walking down the street

Access to "women's spaces" and impact on sex-based protections for women

- The Human Rights Commission and the National Council for Women support trans-women's right to be recognised as women; they wouldn't be supporting self-identification if there was any reason to be concerned about the impact on (other) women's rights

Transgender prisoners

- The Bill is consistent with the Corrections Regulations; prisoners are already able to apply to change their nominated sex using the Family Court process
- Prisoners—but not serious sexual offenders—can apply to be placed in a prison that matches their gender identity even if they haven't changed the nominated sex on their birth certificate
- Around 10 out of 10,000 prisoners are currently ineligible to apply for a change of placement based on their gender identity because of their offending history—but they could apply to change their nominated sex
- Corrections is not concerned about the risk of offenders trying to "game the system" if the Family Court process is changed to allow individuals to complete a statutory declaration to change their nominated sex (there is no evidence this has ever happened, anywhere)
- My officials are working Corrections on a possible legislative response to concerns raised about placement of transgender prisoners, eg:
 - a minor amendment in the Bill that would clarify a change of nominated sex did not affect Corrections' ability to determine where a prisoner should be placed; and
 - extend the Corrections Regulations' prohibition on serious sexual offenders applying for a change of placement based on their gender identity to those who change the nominated sex on their birth certificate

Appendix B: Births, Deaths, Marriages, and Relationships Registration Bill

The Governance and Administration Committee considered a large number of submissions for and against replacing the Family Court process with an administrative process based on self-identification before making its recommendations

- The issues raised in recent correspondence to MPs and Ministers (both for and against a change to the status quo) are similar to those raised in submissions and considered by the Committee
- The National Council for Women and the Human Rights Commission support the Committee's recommendations
- The current law and the Bill both provide the process for updating the nominated sex affects only the birth register and birth certificates, not other law or legislation

A birth certificate isn't currently and won't be a "passport to entry" to women's (or men's) changing rooms, sports events, etc, any more than a passport or driver licence is now

- Individuals can already update the sex on their driver licence or passport by completing a statutory declaration; these processes have been in place for several years, without problems
- Many countries already have self-identification processes to change the sex on a birth certificate (eg, Ireland, Denmark, The Netherlands, Norway, Sweden, Argentina, Colombia, Malta)
 - These countries' experience supports the conclusion that concerns about, eg, increased risk to women from male violence, or people trying to "game the system" are unfounded

The statutory declaration process will make it easier for someone to change the nominated sex on their birth certificate. Apart from making it clear medical evidence is not required, the basic principles underlying the current law are not affected

BDMRRA 1995 – Family Court declaration	BDMRR Bill – Statutory declaration
<ul style="list-style-type: none"> • Lives and will continue to live as someone of the nominated sex (intended permanent change) 	<ul style="list-style-type: none"> • Only one application permitted unless special reasons exist (intended permanent change)
<ul style="list-style-type: none"> • Available to eligible adults and children 	<ul style="list-style-type: none"> • Available to eligible adults and children
<ul style="list-style-type: none"> • BDMRRA refers to "medical treatment" but Family Court does not apply a minimum threshold, and there is no requirement for some (or any) surgery 	<ul style="list-style-type: none"> • Medical evidence not required, but an application by or on behalf of someone under age 18 will require a supporting recommendation from a health professional
<ul style="list-style-type: none"> • Court can attach conditions to an application on behalf of someone under age 18 (and if the conditions aren't met, the Registrar-General can delete the change from the birth record) 	<ul style="list-style-type: none"> • If an application is made on behalf of a child (under age 16) by their legal guardian, the child must confirm the change at age 18; R-G could delete the change if not confirmed
<ul style="list-style-type: none"> • Female to male, or male to female 	<ul style="list-style-type: none"> • Addition of X (unspecified) to recognise non-binary gender identities, and I (intersex)
<ul style="list-style-type: none"> • Registrar-General must give effect to Court declaration 	<ul style="list-style-type: none"> • Registrar-General must accept a statutory declaration that meets the statutory criteria
<ul style="list-style-type: none"> • Right of appeal to the Family Court 	<ul style="list-style-type: none"> • Right of appeal to the Family Court
<ul style="list-style-type: none"> • Section 33: New [nominated sex] information not to affect general law of New Zealand 	<ul style="list-style-type: none"> • Clause 22I: New [nominated sex] information not to affect general law of New Zealand

The Bill includes a requirement for a statutory review of the recommended changes after five years. This will be a public process. The review will enable everyone to have their say on whether the Committee's recommendations strike the right balance.

From: s9(2)(a)
To: [BEALES, Neil \(WELLHO\)](#)
Subject: HPRM: RE: BDMRR discussion follow-up
Date: 15 October 2018 01:46:00 p.m.
Attachments: [image006.png](#)
[image009.png](#)
[image011.png](#)

Yes, I sat with Derek when he wrote it and we bcc'ed all the Departmental representatives.

s9(2)(a) | Principal Custodial Adviser
s9(2)(a)

From: BEALES, Neil (WELLHO)
Sent: 15 October 2018 1:45 p.m.
To: s9(2)(a)
Subject: RE: BDMRR discussion follow-up

Thanks s9(2)

Is Suzanne aware?

Regards
Neil

Neil Beales | Chief Custodial Officer |
National Office | Department of Corrections *Ara Poutama Aotearoa* |
44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140 |
s9(2)(a) | Neil.Beales@corrections.govt.nz |

From: s9(2)(a)
Sent: 12 October 2018 5:23 p.m.
To: BEALES, Neil (WELLHO)
Subject: FW: BDMRR discussion follow-up

Neil,

As the policy recipients and myself received the document and were very perturbed by the incorrect information in it, Derek responded as below.

Our policy rep has noted our Minister will receive all relevant and correct information as required....

s9(2)(a) | Principal Custodial Adviser
s9(2)(a)

From: SENIOR, Derek (WELLHO)
Sent: 12 October 2018 4:47 p.m.
To: 'Cathy Nijman'
Cc: Rachel Groves; Hayden Kerr
Subject: RE: BDMRR discussion follow-up

Hi Cathy

Thanks for sending that report through.

I was a little confused by paragraph 10 in the paper, as this states:

- that the sex that appears on a person's birth certificate is not an indication that the person is more or less likely to commit a crime – except that sex *does* influence the propensity toward criminal offending. Men are significantly more likely to engage in criminal offending than women (as referenced by the significant difference between the number of men and women in prison, on community sentences, and in terms of recorded offenses). Men are also *much* more likely to engage in sexual offending – a key difference between the offending profile of our male and female prison populations is that the male population includes a substantial proportion of sexual offenders, while the female prison population doesn't
- offences under the crimes act are not sex specific – while most offences are not sex specific, there are a few that are, for example 'male assaults female'
<http://www.legislation.govt.nz/act/public/1961/0043/137.0/DLM329383.html>
- even if they have a sexual element – once again, this is true for most offences, but while sex isn't referred to specifically, sexual violation offences are based on a definition that explicitly references male genitalia
<http://www.legislation.govt.nz/act/public/1961/0043/137.0/DLM329051.html>

I realise you've sent your briefing so it might be too late to address this, but just thought I should note it.

Cheers
Derek

Derek Senior | Principal Policy Adviser – Corrections Policy | Service Development |
Department of Corrections Ara Poutama Aotearoa | 44-52 The Terrace, Wellington 6011 |
s9(2)(a) | derek.senior@corrections.govt.nz |

From: Cathy Nijman [<mailto:Cathy.Nijman@dia.govt.nz>]
Sent: 12 October 2018 3:52 p.m.
To: SENIOR, Derek (WELLHO)
Cc: s9(2)(a); CAMERON, Michael (WELLHO); BEALES, Neil (WELLHO); JONES, Robert (WELLHO); s9(2)(a); Rachel Groves; Hayden Kerr
Subject: RE: BDMRR discussion follow-up

Hi Derek – the briefing that has just been sent to the Minister IA is attached FYI – treat as In confidence, please; it is not in the public domain (yet)

The MoJ supplementary NZBORA vet on the self-identification clauses (select committee recommendation) may be completed by next Friday – I'll update you in due course. s9(2)(h)

[REDACTED]

[REDACTED]

[REDACTED]. Suzanne indicated this change could be progressed sooner rather than later, which Corrections would welcome, as there are other changes to the Regulations you would like to make. As discussed, I don't think the need for the change should be linked explicitly to the self-identification issue. Rather, the rationale for the reform could be presented as addressing an existing issue (a trans-prisoner can

already change the nominated sex on their birth certificate) that the discussion of the move to self-identification has highlighted.

Next steps: I was intending to draft a brief for the GA Committee based on what we discussed today (see para. 19 of the briefing) – exact detail of possible legislative change to be worked through, of course, as noted above. The Minister IA will need to approve any briefing for the GA Committee, but it goes without saying we will consult Corrections on the briefing to make sure we are on the same page before we brief our respective Minister. As the Minister in charge of the Bill, the Minister IA needs to approve the briefing to the GA Committee, but we'll suggest she share the briefing with the Minister of Corrections. When we have a working draft (subject to agreement on the legislative "clarification"—Bill and Corrections Regulations—and an indication of when the Government wants to proceed to a second reading, I'll contact the Clerk of Committee to discuss timing of the briefing.

I'll review your draft paper and get back to you on Monday with any comments.

Regards.

Cathy N.

Cathy Nijman | Senior Policy Analyst | Policy Group
The Department of Internal Affairs Te Tari Taiwhenua

s9(2)(a)

St Paul's Square | 45 Pipitea Street | PO Box 805, Wellington 6140, New Zealand | www.dia.govt.nz

newdialogo



From: SENIOR, Derek (WELLHO) [<mailto:Derek.Senior@CORRECTIONS.GOVt.NZ>]

Sent: Friday, 12 October 2018 3:21 PM

To: Cathy Nijman; Rachel Groves; Hayden Kerr

Cc: s9(2)(a); CAMERON, Michael (WELLHO); BEALES, Neil (WELLHO); JONES, Robert (WELLHO); s9(2)(a)

Subject: BDMRR discussion follow-up

Hi Cathy, Rachel and Hayden

Following on from the discussion this morning I thought I'd capture what was agreed, and also share a draft paper that my colleague s9(2)(a) and I have been working on, as this might help to inform some of your advice to your Minister.

First, I want to reiterate that the Department of Corrections supports the planned additions to the BDMRR Bill allowing transgender people to self-identify the sex on their birth certificate.

Corrections has sought to be progressive when it comes to the treatment of transgender prisoners, and believes that transgender individuals should be managed in a way which: is individualised according to need and risk, seeks to preserve their dignity, safety and privacy, and enables the maintenance of their gender identity. The issues we've identified related to the BDMRR are not 'showstoppers', but things that should be considered by Ministers, with a view to considering whether specific steps should be

taken to address them.

My take from this morning is that there is agreement about what we don't want to see – that is, Corrections forced to place transgender women with histories of sexual offending placed into women's prisons. There also seemed to be a consensus that this should be addressed through a combination of regulation changes and an amendment to primary legislation, though of course Ministers may still want advice on other options.

The actions I have down from here are:

- DIA needing to prepare some brief advice on this issue for your Minister – for a meeting on 18 October?
- s9(2)(h) [REDACTED]
- MoJ doing a new NZBORA vet on the self-identification clauses in the Bill, including testing the clause 221(2) s9(2)(h) [REDACTED] – is there any sense from MoJ on what the timing is likely to be for this?
- Developing a briefing for the Governance and Administration Committee on this issue, as we expect they will open an item of business to receive some further advice on these issues.

Corrections will also be expected to provide some advice on this issue to our Minister. With that in mind my colleague s9(2)(a) [REDACTED] and I have been working on a paper that we expect could form the basis of a briefing for our Minister. At this stage it's a draft, which we are looking to provide to our leadership team for feedback, but I thought I'd provide a copy as the content might be helpful in informing some of your advice.

We are very happy to receive any comments/feedback on the paper

Cheers
Derek

Derek Senior | Principal Policy Adviser – Corrections Policy | Service Development |
Department of Corrections Ara Poutama Aotearoa | 44-52 The Terrace, Wellington 6011 |

s9(2)(a) [REDACTED] | xxxxx.xxxxxx@xxxxxxxxxxxxx.xxxx.xx |

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From: [SENIOR, Derek \(WELLHO\)](#)
To: [s9\(2\)\(a\)](#)
Subject: HPRM:
Date: 31 October 2018 09:44:28 a.m.
Attachments: [Transgender prisoners briefing.docx](#)

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To: Hon Kelvin Davis, Minister of Corrections
To: Hon Tracey Martin, Minister of Internal Affairs

Addressing flow-on impacts from the Births, Deaths, Marriages, and Relationships Registration Bill on the placement of transgender prisoners

Date	9 November 2018	Decision needed by	16 November 2018
B number	Bxxxx	Priority	High

Cohesion reference	xxx
Ministerial database reference	xxx

Action sought
Agree/Note TBC

Consultation
Justice <input type="checkbox"/> Social Development <input type="checkbox"/> Police <input type="checkbox"/> Health <input type="checkbox"/> Other: <input type="checkbox"/>
Key comments: [enter comments or 'No consultations.']

Contacts for telephone discussion (if required)			
Name	Position	Contact number	First contact
Suzanne Kennedy	General Manager – Policy (Corrections)	s9(2)(g)(i)	<input type="checkbox"/>
Rachel Groves	Director Policy Services (DIA)		<input type="checkbox"/>
Derek Senior	Principal Policy Adviser (Corrections)		<input type="checkbox"/>
Cathy Nijman	Senior Policy Analyst (DIA)		<input type="checkbox"/>

Purpose

- 1 This paper discusses an issue that has been raised in relation to the Births, Deaths, Marriages and Relationships Registration Bill (2017), in terms of how it may impact the placement of transgender prisoners.
- 2 In this paper we describe how the placement of transgender prisoners is currently managed by Corrections, how the Bill could potentially impact on this, and several options for responding to this.

Background

- 3 The Births, Death, Marriages and Relationships Registration Bill¹ (the Bill) is set to replace the current Births, Deaths, Marriages, and Relationships Registration Act which was introduced in 1995. The Bill replicates most of the previous Bill, but using a more modern and accessible form. It also includes a small number of policy changes.

Something around how the proposal for self-identification of sex on birth certificates came to be included in the Bill

- 4 The Governance and Administration Select Committee (the Select Committee) has recommended the Bill to parliament with an amendment, which would allow people to change the sex that is recorded on their birth certificate through a process of self-identification.
- 5 Transgender groups have argued that because birth certificates are a common form of identity document, being able to amend the sex indicator will allow them to have identification that matches their lived identity. This will reduce the potential for transgender people to be 'outed' when they use this document to access services. This can also be seen as official acknowledgement by the state, recognising the legitimacy of a transgender person's lived identity.
- 6 There has been a lot of recent activity related to the recognition and rights of transgender people internationally, and this will continue to be a developing area of public policy over coming years. In recommending this change, a majority of the Select Committee noted that a change to self-identification will make New Zealand more consistent with global developments in this space.
- 7 However, it is worth noting that support for self-identification of sex in official documents is not universal. Opposition to self-identification comes from individuals and groups with both socially conservative, and some feminist perspectives. The arguments put forward against allowing self-identification of sex include:
 - that self-identification ignores a range of structural inequalities between females and males, including women being disproportionately likely to experience sexual and domestic violence perpetrated by men
 - that self-identification of sex replaces a robust and shared biological definition of sex with a socially constructed notion based on gender

¹ Current text of the Bill is available from:

<http://www.legislation.govt.nz/bill/government/2017/0296/latest/whole.html#LMS55955>

- that this undermines sex-based protections in society – specifically those created for women as a way of protecting them from the actions and behaviours of some men
- that this will result in men impinging on woman-only spaces including changing rooms, refuges, gyms, hostels and prisons
- that this creates opportunities for ‘predatory’ non-transgender men to find ways to abuse such access to reach vulnerable women.

The current situation

- 8 Under the existing Births, Deaths, Marriages, and Relationships Registration Act, an individual can apply to the Family Court to amend their birth certificate to show their nominated sex. In order to grant a change of this nature, the Court must be satisfied the applicant has assumed (or always had) and intends to maintain the gender identity of their nominated sex.
- 9 In most cases the Court must also be satisfied, on the basis of expert medical evidence, that the applicant:
 - has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons such as the applicant to acquire a physical conformation that accords with the gender identity of their nominated sex, and
 - will, as a result of the medical treatment, maintain a gender identity of their nominated sex.

How the placement of transgender prisoners is currently managed

- 10 The way Corrections manages prisoners of different sexes is determined by sections 65A–65E of the Corrections Regulations 2005². The regulations state that male and female prisoners must be detained in separate prisons, or in separate quarters secured by different locking systems within the same prison.
- 11 They require that where there is uncertainty about whether a prisoner is male or female, a determination is to be made by Corrections, with the prisoner able to apply for a review by the Chief Executive if they are dissatisfied.
- 12 When Corrections undertakes a review of the determined sex of a prisoner, it is required to consider a range of factors including:
 - the prisoner’s wishes
 - whether and for how long the prisoner has lived in their nominated sex
 - advice from custodial staff, prisoner health experts and medical practitioners
 - whether the prisoner has undergone, or is undergoing, medical treatment to acquire a physical conformation that accords with the gender identity of their nominated sex
 - the safety and well-being of the prisoner, and other prisoners with whom they may be accommodated, and the security of the prison
 - the possibility of the prisoner being segregated

² Full text of the regulations can be found at:

<http://www.legislation.govt.nz/regulation/public/2005/0053/latest/DLM315417.html>

- the likely effect on the prisoner's rehabilitation, including access to special treatment programmes.
- 13 Under the regulations a prisoner is not able to apply for a review of their determined sex if:
- they are on remand for, or serving a sentence of imprisonment for a serious sexual offence against a person of their nominated sex
 - or if they have previously served a sentence of imprisonment for a serious sexual offence that ended within the past seven years.

Treatment of birth certificates

- 14 Where a prisoner supplies a birth certificate, the regulations require Corrections to determine their sex according to the nominated sex on it, irrespective of any other considerations (including like those described above). This means that a birth certificate effectively overrides any other form of evidence in determining the sex of a prisoner.
- 15 This reflects a view at the time the regulations were passed that a birth certificate was a robust indicator of a person's lived gender, given that changes to a birth certificate were subject to a thorough Family Court process to ensure the genuineness of applications.
- 16 The regulations also appear to allow a birth certificate to override considerations related to the risk presented by a prisoner (e.g. their sexual offending history). This means that a prisoner could currently present a birth certificate with a different nominated sex, and be placed into a prison of their nominated gender, irrespective of the risk they present to others in that prison.
- 17 This has not happened to date, and this effect appears to be an error, as it is unlikely that this outcome would have been intended when the regulations were introduced.

Current transgender prisoners

- 18 The number of people in prison who identify as transgender changes regularly as new people enter prison and others are released. On 28 September there were 34 people in prison who Corrections had identified as transgender.
- 19 Transgender prisoners in the prison system are predominately people who were born biologically male, but identify as female, though a small number of people born biologically female but identifying as male occasionally come into the system.
- 20 Of the 34 prisoners identified as transgender:
- 16 were being held in male prisons, and had not sought to be transferred to a female prison – some transgender prisoners have indicated that they prefer living in a male prison
 - 7 were being held in female prisons – having either previously applied for a change in determination so they could move to a female prison, or been placed there when they entered the system

- One was being held in a male prison, but had applied for a change in determination so they could move to a female prison (a review of this prisoner's determined sex is currently underway)
- 10 were being held in male prisons, and are not eligible to seek a change in determination due to previous serious sexual offending against girls and women.

21 To date, the provision which requires Corrections to determine a prisoner's sex in line with the nominated sex on their birth certificate has not been used. This is because no prisoner has presented a birth certificate to the Department of Corrections as a means to seek a different determination of their sex.

22 This is probably because:

- the current process operated by Corrections allows transgender prisoners to successfully seek a change in their determined sex without the need of a birth certificate, and
- the current legal process to change the nominated sex on a birth certificate is complex, costly, and intrusive.

Implication of new provisions in the Bill

23 Assuming the Bill is enacted as currently proposed, it will make it much easier for people (including prisoners) to change the nominated sex on their birth certificate. This increases the likelihood that prisoners will present a birth certificate with a different nominated sex to support applications for a change in the determination made by Corrections.

24 Under current regulations, Corrections would be required to place these people in a prison that corresponds with their nominated sex, because a birth certificate overrides all other forms of evidence.

25 This presents an issue best summarised by two potential cohorts:

- prisoners who may see an opportunity to make an application to change their determined sex which is not genuine, as a way of being moved to a prison that corresponds with that sex (e.g. a male prisoner who is not genuinely transgender using a changed birth certificate to compel Corrections to place them in a female prison)
- prisoners who make a genuine application to change their determined sex, but who are deemed to be significant risk to people of their nominated sex (e.g. people with a history of serious sex offending against victims of their nominated sex).

26 The extent to which this legislative change may result in non-genuine applications to change the sex on a birth certificate is open to debate. DIA and Corrections have been unable to locate evidence from New Zealand or internationally of people taking advantage of self-identification laws to commit crimes, suggesting a low likelihood of non-genuine applications. However, while the risk of someone making a non-genuine application appears to be low, it is still a risk.

27 In terms of the second group described above, current figures show that there are a small number of transgender people in prison who would present a risk to people of their

nominated sex if they were able to use a birth certificate to transfer to a prison of that sex. While we don't know how many of these people would actually choose to do this, some of these people have previously expressed an interest in transferring to a prison that aligns with their nominated sex, but have been declined under existing regulations.

- 28 It is important to note that there is a third group who are not a concern. This group covers the majority of transgender prisoners that Corrections currently manages, who are not on remand for, serving a sentence for, or have a recent history of serious sex offending against victims of their nominated sex.
- 29 While the Bill will not impact on these people directly, they may be impacted if some of them decide to take the opportunity to change their birth certificates, as Corrections would then be required to place them in a prison that aligns with their nominated sex, regardless of what their personal preference might be.

What this would mean in practice

- 30 If the Bill is passed as drafted, and no further actions are taken to address the issues described above, Corrections would be required to place all prisoners in a prison that corresponds with the nominated sex on their birth certificate, regardless of considerations such as risk, or personal preference.
- 31 Corrections would be obliged to find ways to minimise the risk that some of these people may present to other prisoners, as well as the risk that other prisoners may present to these people.
- 32 Given that most transgender prisoners identify as female, much of this risk would need to be managed within women's prisons. This would present challenges as the women's prison estate is much smaller than the mens, being made up of three small facilities. It also has limited capacity for managing high risk prisoners, with no maximum security capacity, and high security facilities in only one prison.
- 33 Where Corrections believes a transgender prisoner presents a risk to women in a female prison, its response is likely to involve keeping these people physically separate from other female prisoners at all times. However, some transgender prisoners with sexual offending histories are serving lengthy sentences, meaning they would effectively be segregated for many years, which raises significant prisoner welfare and human rights concerns.
- 34 Housing transgender prisoners together in a separate unit could be considered, however the types of prisoners who present a risk to other female prisoners may also present a significant risk to each other, creating other welfare and human rights issues.
- 35 The limited scale of women's prisons mean that transgender prisoners may need to be moved to different parts of the country, away from family and support networks, in order to be housed in an appropriate unit. Transgender prisoners who are considered a risk to other prisoners may also have limited access to rehabilitation programmes and other day-to-day activities, given restrictions on them associating with other female prisoners, and practical issues.

What other countries do

- 36 The rights of transgender people in prison systems vary significantly across different countries, with many countries either not having transgender policies at all, or managing these prisoners on an informal basis.
- 37 Corrections has identified formal policies for the placement of transgender prisoners in different parts of the UK, various Australian states and Canada. A short summary is provided in Appendix 1.
- 38 These policies generally aim to house transgender prisoners in prisons that fit with their lived gender as much as possible.
- 39 However, all of these policies also include some form of exception that allows the relevant correctional agency to exercise discretion not to house certain transgender prisoners in a prison that aligns with their lived gender. The reasons for these provisions are fairly consistent, and involve considering the risk that a particular prisoner would pose to the safety and welfare of other prisoners, especially where there is a history of sexual offending.
- 40 Any public discussion of this issue is likely to touch on the case of Karen White, a transgender woman from the UK. She was recently found to have committed sexual assaults against two women while being held on remand in a woman's prison. Further information on this case is provided for your information in Appendix B.

Responding to this issue

- 41 Corrections believes that its current process for managing the placement of transgender prisoners is largely effective, as it:
- allows prisoners to indicate where they believe Corrections has determined their gender incorrectly, and provides for a range of different evidence to be considered when undertaking a review of this determination
 - provides flexibility so that transgender prisoners can be placed in a prison that corresponds with their birth sex, or a prison that corresponds with their lived gender, taking into account their personal preference
 - imposes reasonable limitations on the placement of transgender prisoners whose sexual offending history means they present a risk to other prisoners of their nominated sex.
- 42 The core issue is the way birth certificates are treated within current the Corrections regulations, combined with the fact that the Bill is likely to increase the likelihood of prisoners presenting birth certificates when they seek a change to their determined sex and/or a transfer to a prison that aligns with that sex.

Amending regulations

- 43 The most straightforward and obvious solution to this issue is to make an amendment to the Corrections regulations, to remove the provision that requires the special treatment of birth certificates, and instead include these on the list of evidence to be considered when reviewing a prisoner's determined sex.

- 44 The effect of this change would be for all transgender prisoners to continue to have their sex determined through the process that has operated to date. Prisoners would be free to present a birth certificate as part of this process, with this considered as one form of evidence alongside the other factors currently set out in the regulations (including personal preference).
- 45 This change would have no impact on existing transgender prisoners, as no one has presented a birth certificate to date. However, it would allow Corrections to continue to avoid placing transgender prisoners with histories of sexual offending against their nominated sex into prisons of that sex. It would also provide Corrections with flexibility to respond to any applications for a change in determined sex that are supported by a birth certificate but do not appear to be genuine.

Going further

- 46 While this change to regulations would address the issues outlined above...
- 47 The Government could add a provision to section 221 of the Bill to...
- 48 This section states that despite sections of the Bill that allow for a change in nominated sex on a birth certificate, the sex of every person must continue to be determined by reference to the general law of New Zealand.
- 49 This wording implies that registering a person's nominated sex on a birth certificate does not automatically determine the person's legal sex in all respects. It provides some latitude for agencies that need to treat men and women differently, so that they can adopt other means to determine the legal sex of an individual in certain circumstances, as long as this is done with reference to 'the general law of New Zealand'.
- 50 An additional clause could be added to this section of the Bill to state that provisions which allow for change to the sex on a birth certificate do not affect the ability of Corrections to determine a prisoner's sex for the purposes of their placement in prison.

Need to cover would this give us over and above a change to regulations?

Also need to cover risks/issues associated with it – NZBORA related to exercise of this provision, etc?

Opportunity to improve the regulations

- 51 Current regulations conflate the determination of sex and the placement of prisoners – could address this by breaking up the decision making process for a review into a determination of sex (determining which sex a prisoner should be treated as), and then a determination of placement (which prison it would be appropriate to place the person in, given their determined sex, and a number of other considerations). This is effectively what happens now

Next steps

- 53 A change to the Corrections Regulations will require agreement by Cabinet, as will further changes to the Bill. We therefore recommend that you consult on the options discussed in this paper with your ministerial colleagues before deciding how to proceed. We can then provide you with the relevant advice to seek a formal decision from Cabinet.
- 54 We understand that the Select Committee has indicated that its members would like to receive some further advice on this issue before the Bill has its second reading in the house. We expect that this is so that some members of the committee can determine whether their parties will support the Bill through its second and third reading.
- 55 You may want to consider sharing a copy of this briefing to the committee when you have made a decision, or if you wish to seek feedback from the committee on the appropriate response.

DRAFT
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Recommendations

1 It is recommended that you:

- a) **Agree/Note** YES/NO
- b) **Agree/Note** YES/NO
- c) **Agree/Note** YES/NO

Jo Field
Deputy Chief Executive
– Service Development

Name
Title

Hon Kelvin Davis
Minister of Corrections
Date signed:
/ /

Hon Tracey Martin
Minister of Internal Affairs
Date signed:
/ /

Minister's comments

Appendix A – How prison systems in other countries determine which prisons transgender prisoners should be held in

Jurisdiction	Policy	In legislation or policy	Policy last updated
England and Wales	<p>People whose gender identity does not match their legal gender can apply to the Transgender Case Board to be housed in a prison of their identity.</p> <p>People who have a Gender Recognition Certificate which legally recognises their gender identity must be located accordingly, although there is an exemption for female transgender people. Male to female transgender people can be refused transfer to the female estate if their risk to other offenders or staff is considered too high to manage, and any women with the same risk profile would need to be accommodated in the men's estate. This is normally applied to people with serious sexual offences against women.</p>	<p>Gender Recognition Act 2004 allows people to apply to have gender identity legally recognised. The case is considered by a Board, and does not require the person to have hormone treatment or gender reassignment surgery.</p> <p>The exemption to housing people in a prison of their legally recognised gender is in policy, not legislation.</p>	<p>The policy was updated in 2016. In the previous policy, most people were expected to be housed in a prison of the legal gender (by having a GRC), but there was some flexibility.</p> <p>The government is currently considering making the process to obtain a GRC less intrusive and bureaucratic, which includes considering self declaration as a process.</p>
Scotland	<p>People must be accommodated in the part of the estate which reflects their lived gender identity. However, exceptions can be made due to safety and risk management concerns. The exception includes people who have had their gender identity legally recognised.</p>	<p>Scotland is also subject to the Gender Recognition Act 2004.</p> <p>The exception to refuse to house people in a prison of their legally recognised gender is in the Scottish Prison Service policy.</p>	<p>The policy has been in force since 2014.</p>
Northern Ireland	<p>Northern Ireland does not have a policy on people who identify as transgender in prison. There is no record of any person identifying as transgender since 2011. Guidelines indicate that any case would be considered on a case-by-case basis which considers the needs and risks of the individual.</p>		-
NSW	<p>A transgender person is to be housed in a prison of their gender identity, unless it is considered more appropriate for the person to be housed in a prison of their biological sex. Placement decisions are made by a specialist case management team and consider: the nature of their current and past offending, custodial history and any perceived risk(s) to safety.</p> <p>A person who has undergone gender reassignment surgery and has had their gender identity legally recognised must be treated as a member of that sex.</p>	<p>This is in policy.</p> <p>It is not contained in the Crimes Act 1999 or Crimes Regulations 2014.</p>	<p>The policy has been in force since 2015.</p>
Queensland	<p>Transgender people can be housed in a prison of their gender identity after consideration by the Prison Director and the General Manager of Sentence Management. Factors considered include risk posed, personal preference, nature of offending, and stage in transition.</p> <p>People who have had gender reassignment surgery and have their gender identity legally recognised are still subject to placement considerations.</p>	<p>This is in policy. It is not covered in the Corrective Services Act 2006.</p>	<p>The policy has been in force since 2018.</p>
Victoria	<p>A person should, where possible, be accommodated in a prison of their</p>	<p>This is in policy, not legislation.</p>	<p>This policy has been in force since 2017.</p>

	gender identity, not their assigned or assumed sex at birth. Each person's case is considered by a panel to determine their placement. Factors considered include the person's preference, safety and risk, and the nature of their offending. It is not clear what the process is for people who have had their gender identity legally recognised.		
Canada	People must be placed in a prison according to their gender identity, unless there are overriding health and safety concerns which can not be resolved. Information on the placement of people who have completed gender reassignment surgery or have had their gender identity legal recognised is not available.	This is in Corrections Policy, not in the Criminal Code. The change in policy has come about due to an amendment to the Canadian Human Rights Act to include 'gender identity and expression' as a prohibited ground of discrimination.	The policy was updated in 2017. The previous policy only allowed transgender people to be accommodated in a prison of their gender identity following gender reassignment surgery.

Information on transgender policies in prisons in Scandinavian countries is not available, including Finland, Sweden and Norway. Sweden and Norway have recently removed the requirement for people who are transgender to be sterilised before their gender identity will be legally recognised. In Finland people are still required to be sterilised. This is in opposition from recommendations of the European Court on Human Rights.

DRAFT

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Appendix B – The Karen White case

The case of Karen White, a transgender woman, who committed sexual assaults against two women while held on remand in a woman's prison, has been widely reported in the media.

Karen White was remanded in custody facing charges for grievous bodily harm, burglary, multiple rapes and other sexual offences. She had previously been convicted of indecent assault and gross indecency against a child. In September 2017 she was transferred from a men's prison to a women's prison, under prison policy in the UK.

The policy allows for transgender people to apply to be transferred to a prison of their gender identity, regardless of their legal gender or whether they have undergone any medical interventions. These decisions are made by a Transgender Case Board, which can decline the application of transgender women to be transferred to a woman's prison "where the risk posed to other offenders and/or staff prevents location on the female estate". This exception also applies to transgender women who have had their legal gender identity changed, through obtaining a Gender Recognition Certificate which is granted after consideration of the case by a Panel. In the case of Karen White she did not have a Gender Recognition Certificate.

During the three months White was in the women's prison she admitted sexually assaulting two female prisoners. She was transferred back to the men's estate after police began investigating. The prosecution alleged during the trial that her transition was not genuine, and she used her "transgender persona to put herself in contact with vulnerable persons". She pleaded guilty to the two assault charges, among others she was originally remanded for, and received a life sentence in October 2018.

The Ministry of Justice has apologised regarding mistakes made in White's case, and said her previous offending history had not been taken into account when making the decision to transfer her to a women's prison.

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From: SENIOR, Derek (WELLHO)
To: s9(2)(a)
Subject: HPRM: RE: More important information request :-)
Date: 09 November 2018 09:05:15 a.m.
Attachments: [image006.png](#)
[image012.png](#)

Thanks, this is very helpful

Derek Senior | Principal Policy Adviser – Corrections Policy | Service Development |
Department of Corrections Ara Poutama Aotearoa | 44-52 The Terrace, Wellington 6011 |
s9(2)(a) | derek.senior@corrections.govt.nz |

From: s9(2)(a)
Sent: 08 November 2018 2:12 p.m.
To: SENIOR, Derek (WELLHO)
Subject: RE: More important information request :-)

Hi Derek,

By all means, check my numbers as attached – and let me know if you need anything else.

s9(2)(a) | Principal Custodial Adviser
s9(2)(a)

From: SENIOR, Derek (WELLHO)
Sent: 06 November 2018 11:38 a.m.
To: s9(2)(a)
Subject: More important information request :-)
Importance: High

Hi s9(2)

As discussed, could you please update the information below on numbers of transgender prisoners, and get this to me by COP Thursday

The number of people in prison who identify as transgender changes regularly as new people enter prison and 11 others are released. On 7 November there were 36 people in prison who Corrections had identified as transgender.

Transgender people in the prison system are predominately people who were born biologically male, but identify as female, although there are a small number of people who were born biologically female but identify as male.

Of the 36 prisoners identified as transgender:

- 29 were being held in male prisons
 - Of these, 11 are not eligible to seek a change in determination due to previous serious sexual offending against females
 - One of these 11 prisoners, one has expressed an interest in moving to a female prison
- 7 were being held in female prisons – having either previously applied for a change in determination so they could move to a female prison, or been placed there when they entered the system
- One was being held in a male prison, but had applied for a change in determination so they could move to a female prison (a review of this

~~prisoner's determined sex is currently underway)~~

- ~~10 were being held in male prisons, and are not eligible to seek a change in determination due to previous serious sexual offending against girls and women.~~

Thanks

Derek

Derek Senior | **Principal Policy Adviser – Corrections Policy** | Service Development |
Department of Corrections *Ara Poutama Aotearoa* | 44-52 The Terrace, Wellington 6011 |

s9(2)(a) [REDACTED] | xxxx.xxxxxx@xxxxxxxxxxxx.xxxx.xx |

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s9(2)(a)

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From: [SENIOR, Derek \(WELLHO\)](#)
To: s9(2)(a)
Subject: HPRM: FW: BDMRR discussion follow-up
Date: 26 November 2018 08:46:28 a.m.
Attachments: [image001.png](#)
[BDMRR Bill - Joint briefing for Ministers IA and Corrections re amendments to address concerns about placement of transgender prisoners.docx](#)
[image009.png](#)
[image010.png](#)
Importance: High

Draft briefing from DIA, let me know if you have any feedback (they're implied all our current trans prisoners are all male-to-female, is that right?)

Derek Senior | **Principal Policy Adviser – Corrections Policy** | Service Development |
Department of Corrections *Ara Poutama Aotearoa* | 44-52 The Terrace, Wellington 6011 |

s9(2)(a) | xxxxx.xxxxxx@xxxxxxxxxxx.xxx.xx |



From: Cathy Nijman [mailto:xxxxx.xxxxxx@xxx.xxx.xx]
Sent: 23 November 2018 4:09 p.m.
To: SENIOR, Derek (WELLHO)
Cc: Hayden Kerr; KENNEDY, Suzanne (WELLHO); s9(2)(a)
Subject: RE: BDMRR discussion follow-up
Importance: High

Hi Derek

Preliminary draft attached. Hopefully I have accurately captured the information you sent to me on Tuesday. **Could you please let me have any feedback by 2.00 pm Monday**, and I'll update the briefing before it is circulated for signature. If at all possible I'd like to get it signed by Friday 30 November as we have to get another brief to the Minister IA (which I'll consult you on) by Monday 3 December. That brief will cover the s9(2)(h), and the advice to the GA Committee for 19 December. And we'll need confirmation/approval of the current recommendations to finalise that briefing.

The current draft briefing doesn't include comment on overseas jurisdictions' operational practices for managing transgender prisoners or changes to the Corrections Regulations unrelated to the Bill. That information could be included in a Corrections-specific briefing for your Minister (which will obviously be required if the proposal to revoke the "birth certificate rule" is approved because you'll need to do a LEG paper). I don't think that info is needed for this briefing, but if you have a different view, please let me know.

NB: Very quick proof read only completed so no points for spotting typos – but feel free to point any out!

Thanks for your help.

Regards.

Cathy N.

Cathy Nijman | Senior Policy Analyst | Policy Group
The Department of Internal Affairs Te Tari Taiwhenua

s9(2)(a)

St Paul's Square | 45 Pipitea Street | PO Box 805, Wellington 6140, New Zealand | www.dia.govt.nz
newdialogo



From: Cathy Nijman

Sent: Tuesday, 20 November 2018 4:52 PM

To: 'SENIOR, Derek (WELLHO)'

Cc: Hayden Kerr; KENNEDY, Suzanne (WELLHO); s9(2)(a)

Subject: RE: BDMRR discussion follow-up

A week is a long time in politics ...

We may not have that long. I'll try and get something to you by the end of the week. Given the timeframes that have been suggested for the ministerial roundtable the A-G has proposed before we brief the GA Committee, the turnaround time could be 2 or 3 days – not within officials' control. We'll be similarly squeezed.

Regards.

Cathy N.

Cathy Nijman | Senior Policy Analyst | Policy Group
The Department of Internal Affairs Te Tari Taiwhenua

s9(2)(a)

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From: SENIOR, Derek (WELLHO) [mailto:xxxxx.xxxxxx@xxxxxxxxxxxxx.xxxx.xx]

Sent: Tuesday, 20 November 2018 4:45 PM

To: Cathy Nijman

Cc: Hayden Kerr; KENNEDY, Suzanne (WELLHO); JOHNSON-s9(2)(a)

Subject: RE: BDMRR discussion follow-up

Hi Cathy

s9(2)(h)

I've also attached the suggested text from us for the joint briefing. Happy to review a draft when needed. I'm picking that the senior managers here will want a bit of time to review and discuss before they sign-off so maybe allow a week for that.

I think I mentioned the 19 December committee date to s9(2) from s9(2)(h)

Cheers
Derek

Derek Senior | **Principal Policy Adviser – Corrections Policy** | Service Development |
Department of Corrections *Ara Poutama Aotearoa* | 44-52 The Terrace, Wellington 6011 |
s9(2)(a) | derek.senior@corrections.govt.nz |



From: Cathy Nijman [mailto:Cathy.Nijman@dia.govt.nz]
Sent: 20 November 2018 3:57 p.m.
To: SENIOR, Derek (WELLHO)
Cc: Hayden Kerr
Subject: RE: BDMRR discussion follow-up

Hi Derek,

As discussed, the letter from the s9() is attached. Interestingly, the letter refers to the proposed briefing for the GA Committee on 19 December. s9(2)(g)(i)

I'm asking PCO to advise urgently if they think there is a practicable way to amend cl 22I (similar to the change already proposed) to provide greater clarity but with our falling foul of NZBORA. Initial thoughts are it may not be practicable to list specific criteria/guidance along the lines suggested on p 3 of the letter.

s9(2)(h)

Regards.

Cathy N.

Cathy Nijman | Senior Policy Analyst | Policy Group
The Department of Internal Affairs Te Tari Taiwhenua
s9(2)(a)

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From: Cathy Nijman
Sent: Thursday, 15 November 2018 10:17 AM
To: 'SENIOR, Derek (WELLHO)'
Cc: s9(2)(a) 'KENNEDY, Suzanne (WELLHO)'; Hayden Kerr; 'JONES, Robert (WELLHO)'
Subject: RE: BDMRR discussion follow-up

Importance: High

Hi Derek,

FYI (in confidence) extract from our briefing to the Minister IA attached. This covers the issues related to the placement of transgender prisoners, and options for amending the Bill and the Corrections Regulations. Everything has been covered in our previous discussions so there should be no surprises. You will note we are seeking the Minister's approval for a joint DIA-Corrections briefing on this issue. I will need confirmation of Corrections' position on proposed amendments to the Corrections Regulations as a matter of urgency so this can be incorporated into the joint briefing—and a briefing to the GA Committee.

You will note the GA Committee wants to receive the promised update briefing before the end of the year. I've left a couple of voicemail messages for you, but in short, the Clerk got back to me on Monday to ask if the DIA/Corrections could brief the Committee on 28 November on the transgender prisoner issue and other issues raised in the National Party minority view in the Committee's report. I indicated 28 November not practicable, but 12 or 19 December should be do-able. Yes, the Committee is meeting on 19 December! The Clerk was relatively relaxed about that as she agreed there is no point in DIA (and Corrections) fronting up on 28 November without the finalised briefing. She was going to speak to Brett Hanson about the timing for the briefing.

Pending confirmation from the Minister IA on how she wants to proceed on the other issues covered in our process and options briefing, I am starting work on the joint briefing and the parallel briefing for the GA Committee. If we are to brief the Committee in December, there won't be much time to finalise the briefings after we receive instructions from the Minister IA.

s9(2)(h)

s9(2)(h)

As far as we aware, the A-G (S-G?) has yet to write to the Minister IA. When/if that happens, we'll need to address any issues raised in the joint briefing.

Please do not hesitate to get in touch if you have any questions.

Regards.

Cathy N.

Cathy Nijman | Senior Policy Analyst | Policy Group
The Department of Internal Affairs Te Tari Taiwhenua

s9(2)(a)

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From: s9(2)(a)
To: [SENIOR, Derek \(WELLHO\)](#)
Cc: [BEALES, Neil \(WELLHO\)](#)
Subject: HPRM: 20181126 BDMRR Bill - Joint briefing for Ministers IA and Corrections re amendments to address concerns about placement of transgender prisoners
Date: 26 November 2018 12:03:00 p.m.
Attachments: [20181126 BDMRR Bill - Joint briefing for Ministers IA and Corrections re amendments to address concerns about placement of transgender prisoners.docx](#)
[image008.png](#)

Hi Derek,

No substantive changes but one requested insertion re Visiting Justices and some deletions/rewording about the trans prisoners as at 7 November 2018.

We can see you're working to tight timeframes (as usual) so let us know if/when you need any additional input.

Many thanks,

s9(2)(a) | Principal Custodial Adviser
Corrections Services | National Office | Department of Corrections *Ara Poutama Aotearoa* |
44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140, New Zealand |

s9(2)(a)

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From: s9(2)(a)
To: s9(2)(a); BEALES, Neil (WELLHO)
Cc: s9(2)(a)
Subject: HPRM: RE: BDMRR paper for sign off
Date: 27 November 2018 02:14:00 p.m.
Attachments: [image008.png](#)
[image012.png](#)

Hi s9(2)(a)

Thank you for checking – Derek from policy invited comment and information prior to it being finalised.

s9(2)(a) | Principal Custodial Adviser
s9(2)(a)

From: s9(2)(a)
Sent: 27 November 2018 2:11 p.m.
To: BEALES, Neil (WELLHO); s9(2)(a)
Cc: s9(2)(a)
Subject: FW: BDMRR paper for sign off
Importance: High

Hi Neil and s9(2) – just making sure you know about this and are across it?

Many thanks

s9(2)(a) | Manager Ministerial Services, Corporate Services | National Office |
Department of Corrections *Ara Poutama Aotearoa*
44-52 The Terrace, Wellington 6011 | Private Box 1206, Wellington 6140
s9(2)(a)

From: JONES, Robert (WELLHO)
Sent: 27 November 2018 1:27 p.m.
To: s9(2)(a)
Cc: s9(2)(a); SENIOR, Derek (WELLHO)
Subject: FW: BDMRR paper for sign off
Importance: High

Hi s9(2)(a)

See below regarding a joint briefing between Corrections and Internal Affairs on the Births Deaths Marriages and Relationships Registration Bill (I've just popped down and explained the situation to s9(2)(a))

Assuming Jo signs the briefing today, we will be aiming to get it over to the Ministers Office **today or first thing tomorrow morning at the latest.**

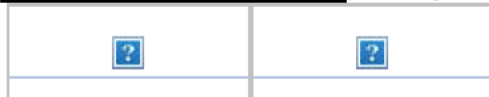
DIA have mentioned that the ideal timeline would be to get the sign-out by the Minister of Corrections completed by **Friday morning**, and get our Minister's office to deliver the signed original to the Minister IA's private secretary, s9(2)(a), by **midday.**

Jo has called s9(2)(a) and explained the rationale for the timing. Are you able to give me a call to

discuss if there are concerns re timing.

Cheers, Rob

Robert Jones | Service Development – Manager Corrections Policy |
National Office | Department of Corrections Ara Poutama Aotearoa |
44 – 52 The Terrace, Wellington 6140 | Private Bag 1206 |
s9(2)(a) | robert.jones@corrections.govt.nz |



From: JONES, Robert (WELLHO)

Sent: 27 November 2018 1:04 p.m.
To: FIELD, Jo (WELLHO)
Cc: SENIOR, Derek (WELLHO); s9(2)(a)
Subject: FW: BDMRR paper for sign off
Importance: High

Hi Jo

As discussed, DIA have provided the attached Joint Briefing that we've developed together. DIA will drop off the original at around 2.00pm and I'll bring it down.

The briefing is based on advice that was provided to SDSLT several weeks ago on implications of the BDMRR Bill for our management of transgender prisoners. At the time SDSLT were supportive of the direction of the advice.

It's taken longer than we would have liked as we had to wait on s9(2)(h) which ended up taking three weeks to come through.

The next step is for this paper to go to both Ministers (one after the other) for their agreement, with our Minister asked to agree to the regulation change, and their Minister asked to agree the additional clause to be included in the BDMRR Bill. DIA have mentioned that the ideal timeline would be to get the sign-out by the Minister of Corrections completed by **Friday morning**, and get our Minister's office to deliver the signed original to the Minister IA's private secretary, s9(2)(a), by **midday**.

Assuming this is agreed, we will need to progress the regulation change in the first quarter of next year (potentially alongside other changes we've previously identified). The paper will be presented to ELT next Tuesday.

DIA have are keen to get agreement from Ministers quickly as:

- their Minister is set to meet with the Attorney General on **10 December** to discuss the Bill and confirm the resolution to this issue – DIA are currently preparing some advice to inform this meeting
- the Select Committee has set aside a hearing on **19 December** to discuss this issue, and a briefing needs to be provided to them (including confirming the way forward) by **14 December**

On a related note, 19 December is also the day when Corrections is due to have it's Annual Performance Review hearing at select committee, so we may receive some questions about this at that session.

Cheers, Rob

Robert Jones | Service Development – Manager Corrections Policy |
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