

Maryland House Bill 453

"Correctional Facilities – Transgender, Nonbinary, and Intersex Inmates
(Transgender Respect, Agency, and Dignity Act)"

Testimony in Opposition, February 8, 2022 Hearing

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Dear Committee,

As you consider House Bill 453, I appreciate the opportunity to draw your attention to some of the most concerning aspects of the Bill.

The Bill defines "transgender" as:

"the term "transgender" is broad and inclusive of all gender identities different from the gender a person was assigned at birth, including transsexual, two-spirit, and māhū. "Nonbinary" is an inclusive term used to describe individuals who may experience a gender identity that is neither exclusively male nor female or is in between or beyond both of those genders, including gender fluid, agender or without gender, third gender, genderqueer, gender variant, and gender nonconforming. The term "intersex" is a broad and inclusive term referring to people whose anatomy, hormones, or chromosomes fall outside the strict male and female binary"

The Bill describes "gender transition" as:

"Gender transition is a deeply personal experience that may involve some combination of social transition, legal transition, medical transition, or none of these. Some transgender, nonbinary, and intersex people experience gender dysphoria that requires medical treatment, while others do not experience gender dysphoria. Due to safety concerns, inconsistent medical and mental health care, insufficient education and resources, and other factors, incarceration often serves as a barrier to gender transition. Regardless of the ways in which a person chooses or is able to express the person's gender or to take medical, social, or legal transition steps, the person deserves respect, agency, and dignity"

The definitions and descriptions of "transgender" and "gender transition" demonstrate that these are not objective, verifiable terms in the same manner that "sex" is a stable category. Nothing about "experience[ing] a gender identity that is ... [for example] genderqueer, gender variant," alters the stable sex categories which are the bases for establishing single sex spaces. This lack of grounding in anything objective is further evidenced in this Bill permitting "self-ID," meaning that anyone, anytime can declare themselves "transgender." There is no requirement of genital surgery, hormone use, diagnosis of gender dysphoria, legally changing name, or even pre-incarceration use of a different name or assertion of a particular "gender identity."

To be clear, even for those males who could demonstrate pre-incarceration medicalization or diagnoses, there would still remain an objection to housing those males in the women's prison. Even males who sincerely believe themselves to be female and took pre-incarceration steps to present themselves in a stereotypically "feminine" manner, should be housed and made safe in the men's prison. Their sincerity in this belief is not a factor in making them female; they are and will always be male.

That there are no objective requirements for those who wish to declare themselves out of the category of "male," means it is also ripe for abuse by those who do not sincerely believe themselves to be "transgender." This Bill does not purport to try to make those distinctions. This may be an acknowledgment that, because internal feelings of "transness" are not observable or verifiable, for purposes of creating a meaningful category in the law, there is no distinction between the group who is sincere in their belief and those who are not.

The Bill provides for those inmates who are "transgender, nonbinary, or intersex, regardless of anatomy"...

- "an inmate shall be housed at a correctional facility designated for men or women based on the inmate's preference;"
- "The Department may not deny an inmate's...housing placement preference based on a discriminatory reason, including the inmate's anatomy or sexual orientation."

This means that any male inmate who claims to be "neither exclusively male nor female" or who is "in between or beyond both of those genders, including gender fluid, agender or without gender, third gender, genderqueer, gender variant, and gender nonconforming" may elect to be housed in a women's prison.

In considering passage of a Bill to become law, do these terms in the above paragraph have an objective, stable meaning to you? In our society, "gender nonconforming" could simply be a man with long hair or who likes to wear makeup. Are you comfortable having these terms be the basis for mandating that Maryland's correctional facilities permit males to opt into women's prison?

The Bill, as noted above, provides that the inmate's housing preference cannot be denied based on anatomy or sexual orientation. This means a man with fully intact male genitalia and a sexual attraction to women cannot be denied housing in a women's prison on those bases. Such a "trans" identifying male would not be unusual: 85% of males identifying as "trans" retain male genitalia (i.e. have not had genital surgery)¹ and 70% have a sexual attraction to women.²

1 www.ncbi.nlm.nih.gov/pmc/articles/pmc6626314/

2 transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf

There is no requirement in the Bill that such an inmate not be an actual or perceived threat to female inmates, or that the women would not find it petrifying to share toilets, showers or sleeping quarters with him. So, for example, a male murderer or rapist who has a penis and is sexually attracted to women could be permitted to be housed in a woman's prison under the Bill. No category of crimes – such as sexual violence – are identified in the Bill as precluding men being housed in the women's prison. Men who have committed violent crimes such multiple killing of female prostitutes³ and torture and sodomy of a woman in front of her mother⁴ are housed in women's prisons in Washington and California under their policy (Washington) and law (California) similar to Bill 453.

By passing this Bill, you would be endorsing that such men should be housed in women's prisons.

The Bill also provides:

- "the inmate shall be searched according to the search policy for the inmates gender identity or according to the gender designation of the facility in which the inmate is housed, based on the inmate's preference"
- "staff ... shall use the gender pronouns and honorifics an inmate has specified in all verbal and written communications"

This means your female correctional officers may be required, as a condition of their employment, to be exposed to male genitalia. Even more routine encounters between male inmates and female guards can escalate into conduct resulting in a lawsuit by female employees.⁵

Further, this means as government employees, the staff is being compelled to use words in a manner they may find violative of their own religious beliefs, potentially threatening their own First Amendment rights.

In addition to concern for the well-being of government employees, protecting Maryland from the risk of future litigation as a result of this Bill should be a consideration as well.

As to items in the Preamble which purport to provide a basis for the Bill's requirement to house people identifying as "trans" according to their preference:

3 Transgender woman convicted for slayings of 3 women who worked as prostitutes - CBS News
4 People v. Masbruch - 13 Cal.4th 1001 S047206 - Mon, 08/26/1996 | California Supreme Court Resources (stanford.edu)

⁵ Sheriff Faces Lawsuit for Not Protecting Female Employees from Harassment by Detainees | Chicago News | WTTW

The Supreme Court decision referenced:

Although not cited by name, the case referred to here is Farmer v. Brennan, 511 U.S. 825 (1994). The particulars of the case are important because it did not stand for the proposition that males who identify as “trans” are entitled, or even permitted, to be housed in women’s prisons. The Plaintiff was not seeking to be housed in a women’s prison; see footnote 1 of the decision: “Petitioner also sought an order requiring the Bureau of Prisons to place petitioner in a ‘co correctional facility’ (i.e., one separately housing male and female prisoners but allowing coeducational programming). Petitioner tells us, however, that the Bureau no longer operates such facilities, and petitioner apparently no longer seeks this relief.” The holding in the case, not specific to “transgender” inmates, was about the legal standard for liability on prison officials for claims of “deliberate indifference.” This decision does not compel, or even speak to, the housing of male inmates in women’s prison.

Victimization rates:

Notably absent from the data referenced here is the rate of sexual violence experienced by incarcerated women prior to confinement. A 2016 study found that of the women in jail, 86% had experienced pre-incarceration sexual violence.⁶ The Bill fails to consider the potential impact on an already traumatized and vulnerable group of women who will be forced to share showers, toilets and sleeping quarters with males.

You have the benefit of considering this law after enactment of a similar law in California. According to a suit against that law, moving men into the women’s prison there has resulted in the availability of condoms, of posters describing options should inmates become pregnant while incarcerated and of sexual assaults. That suit challenges the California law on the bases of the First, Eight and Fourteenth Amendments.⁷ A link to the Complaint is below, but I would like to highlight just one of several First Amendment arguments made in that case. If there are incarcerated women in Maryland who have sincerely held religious beliefs – which are shared by women of many faiths – concerning sharing intimate spaces with unrelated males, including exposure of a woman’s unclothed body or uncovered hair or their being exposed to unclothed bodies of males to whom they are not related, placement of males in those spaces is a refusal to accommodate those women’s constitutionally guaranteed right to free exercise of religion.

Again, in addition to concern for the well-being of incarcerated women in the State’s care, protecting Maryland from the risk of future litigation as a result of this Bill should be a consideration as well.

⁶ overlooked-women-and-jails-fact-sheet.pdf (vera.org)

⁷ Chandler v CDCR Complaint (squarespace.com)

In conclusion, no matter how many times this may be suggested by activists, it is not a human rights violation for male inmates (however they identify) to be denied access to showering with and sharing toilets and sleeping quarters with an already traumatized population of incarcerated women. It is the responsibility of the State to protect vulnerable men, not the responsibility of incarcerated women to be shields for men against violence from other men.

Thank you for the opportunity to present this testimony to you.

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