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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

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Submission Cover Sheet

Inquiry into Community Corrections

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Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020
Canberra ACT 2601

AGA submission to the Inquiry into Community Corrections 2021

Dear Members of the Standing Committee on Justice and Community Safety,

A Gender Agenda (AGA) is pleased to make this submission to the Inquiry into Community Corrections. We work with and on behalf of transgender, gender diverse, and intersex (TGI) people and their families, friends and allies. Members of the TGI community experience disproportionate levels of stigma and discrimination and as a consequence are more likely to have had encounters with the criminal justice system. There is a growing body of literature on transgender people, a core demographic represented by AGA in the Australian Capital Territory (ACT), and the challenges they face within the Australian criminal justice system.^{1, 2, 3} AGA has both direct and recent experience in supporting TGI people with experiences in the Community Corrections system in the ACT.

Input regarding underlying approach to Community Corrections in the ACT

It is important that Community Corrections (and its component parts as outlined in the terms of reference for this inquiry) is understood as part of the broader justice and corrections environment in the ACT. AGA understands that the purpose of Community Corrections is to provide community-based alternatives to full-time imprisonment, in response to various types of offending.⁴ While AGA welcomes community-based, non-custodial approaches to crime, Community Corrections responses should nonetheless be viewed as an avoidable endpoint. Community Corrections approaches to crime, no matter how well managed or resourced, are less likely to be successful if there is insufficient investment

¹ Blight, J (September 2000), Transgender Inmates, *Australian Institute of Criminology: trends & issues in crime and criminal justice* (No. 168): Canberra.

² Lynch, S & Bartels, L (2017), Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy, *Flinders Law Journal* (No. 19): Adelaide.

³ Rodgers J et. al. (Feb 2017), Cisnormativity, criminalisation, vulnerability: Transgender people in prisons, *Tasmanian Institute of Law Enforcement Studies* (No. 12): Hobart.

⁴ Yang J (2020), Community Corrections (v.3), *AustLII Communities*: Canberra. Link: [https://austlii.community/foswiki/ACTLawHbk/CommunityCorrections]

in addressing the primary, underlying causes of offending. Investing in the systems and supports that address social and economic wellbeing and providing appropriate mechanisms for social intervention, especially in regard to marginalised social groups such as TGI people and Aboriginal and Torres Strait Islander people, is both more cost effective and yields better social outcomes. Trying to rehabilitate offenders when the factors that led them to offending remain unresolved is unlikely to be effective and likely to lead to re-offending. No matter how effective Community Corrections systems are, they are less economically efficient and more socially costly than preventing the circumstances that give rise to offending. This approach is widely acknowledged across a broad range of justice reinvestment literature as a best practice approach to criminal justice in Australia.⁵

Key recommendations:

- To prevent crime through investment in addressing the underlying social and economic causes of crime.
- A preference for non-custodial, community-based pathways when it comes to dealing with offenders.

Input regarding the Inquiry's Terms of Reference

Parole system (1) and Intensive Correction Orders (2)

In line with the above input regarding the prevention and treatment of crime, AGA believes that a parole system is only as good as the support services provided to the person on parole. Without adequate economic and social support systems in place, the possibility of failure to meet parole conditions is heightened. The same goes for Intensive Correction Orders (ICOs). For TGI people in particular, this means providing adequate financial support to cover the sometimes extensive healthcare costs that can be associated with gender affirmation. It also means providing employment opportunities which neither discriminate against one's history within the justice system nor against one's gender and sexuality. When assessing compliance with parole obligations and ICOs, the added challenges faced by TGI individuals around living as a gender diverse person in society should be taken into account.

Key recommendations:

- Extensive investment in the provision of economic and social support to those on parole and ICOs to reduce recidivism.
- Supporting TGI people's healthcare needs financially and administratively.
- Providing extensive support to TGI people looking for employment opportunities.
- Taking the added challenges faced by TGI individuals into account when assessing compliance with parole obligations and ICOs.

3. Sentence Administration Board

⁵ Willis M & Kapira M (2018), Justice reinvestment in Australia: A review of the literature, *Australian Institute of Criminology* (Research Report No. 9): Canberra.

Under section 171 of the *Crimes (Sentence Administration) Act 2005*, the Sentence Administration Board has a range of powers in dealing with various sentencing breaches.⁶ When it comes to TGI inmates, AGA would like to highlight that a lack of competency regarding the unique challenges faced by TGI peoples may lead to unnecessarily harsh or inappropriate decisions regarding breaches. Consulting with community organisations such as AGA when it comes to breaches by TGI people may lead to a better understanding of the drivers behind sentencing breaches and ultimately lead to more appropriate and effective decisions regarding sentencing breaches.

Key recommendations:

- Taking into account the unique challenges faced by TGI individuals when it comes to breaches by TGI people.
- Consulting with community organisations such as AGA to better understand circumstances and challenges faced by TGI people.

4. Drug and alcohol treatment orders

Drug and alcohol abuse are often underlying drivers of crime. AGA welcomes the implementation of Drug and Alcohol Treatment Orders (DATOs) as a substitute for incarceration and calls for a further expansion of this program in the ACT. Treating drug and alcohol abuse as a health issue and addressing it through rehabilitation programs has shown to be effective in other Australian jurisdictions, with a 2008 evaluation of the NSW Drug Court by the Bureau of Crime Statistics showing that participants were 17 percent less likely to be reconvicted for any offence, 30 percent less likely to be reconvicted for a violent offence, and 38 percent less likely to be reconvicted for a drug offence.⁷

As a consequence of social stigma, TGI people, like many other minorities, are more likely to be affected by drug and alcohol abuse as these substances are used as a coping mechanism. For TGI people it is important to highlight that discrimination as well as gender dysphoria is often the root cause of substance abuse and addiction, which in turn can lead to violence and other crimes if not addressed appropriately. Addressing the underlying issues of drug and alcohol abuse, such as a lack of access to gender affirming healthcare, has been shown to reduce substance abuse and offending behaviour in trans people.⁸ It is imperative to frame substance abuse as a health issue and to address it not through punitive and carceral measures but through better healthcare and rehabilitation services. Additionally,

⁶ <https://www.victimsupport.act.gov.au/criminal-justice-system/after-court/sentence-administration-board>

⁷ Weatherburn D et. al. (Sep 2008), The NSW Drug Court: A re-evaluation of its effectiveness, *Crime and Justice Bulletin* (No. 121), *NSW Bureau of Crime and Statistics Research*: Sydney.

⁸ Wilson, Erin C et al. "Connecting the dots: examining transgender women's utilization of transition-related medical care and associations with mental health, substance use, and HIV." *Journal of urban health : bulletin of the New York Academy of Medicine* vol. 92,1 (2015).

because of the increased risks of sexual and physical violence faced by incarcerated trans people^{9, 10} alternatives to incarceration, such as DATOs and ICOs, should actively be pursued for TGI people.

Key recommendations:

- Treating substance abuse issues as health issues and prioritising rehabilitation over punitive measures. This means expanding the use of DATOs in the ACT.
- Addressing the underlying causes of substance abuse, specifically in the context of TGI individuals this means addressing barriers in accessing gender affirming care.
- Taking into account the significant dangers faced by TGI people in prisons and actively pursuing alternatives to incarceration such as DATOs and ICOs.

5. Recidivism outcomes

Evidence to date is that harsher penalties are not an effective deterrent to re-offending and may even cause escalation in offending behaviour for first time offenders.^{11, 12} As laid out above, recidivism can be reduced by providing appropriate support to the individual. This may involve social and economic support as well as healthcare support, which is particularly important for TGI people. Healthcare support should consist of mental healthcare support as well as access to gender affirming treatment (through financial and administrative support).

Investment in housing and homelessness strategies, in particular implementing a “housing first” strategy to manage the needs of people presenting with complex and intersecting needs, is also likely to be effective in the short to medium term in reducing rates of re-offending.

Key recommendations:

- Providing appropriate and extensive social, economic and healthcare support to reduce recidivism. Specifically investing extensively in mental healthcare, gender affirming healthcare, and housing.

6. Experiences of offenders and their families

The offender is not the only person impacted by interaction with the criminal justice system. Unless there is adequate support for families to support the offender, the likelihood of reoffending is increased. This can be because of family breakdown, the poverty caused by income being removed from the family

⁹ Irving I (1998), Transgender Prison Policy, *On the Record newsletter of the NSW Community Legal Centres* (No. 46): Sydney.

¹⁰ Australian Human Rights Commission (2015), *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights National Consultation Report*: Canberra. P. 69.

¹¹ Ritchie D (April 2011), Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence, *Sentencing Advisory Council*: Melbourne.

¹² Knight, B (2020), Do harsher punishments deter crime?, UNSW Newsroom: Sydney. Link: [<https://newsroom.unsw.edu.au/news/business-law/do-harsher-punishments-deter-crime>]

due to incarceration, or the impact of family violence. Addressing these issues of concern as part of Community Corrections practice will have a positive impact on preventing and reducing reoffending.

Key recommendations:

- Taking a broader view beyond the individual offender and addressing the needs and issues of an offender's family.

7. Experiences of victims and survivors

Restitution and reconciliation schemes as well as reparative conferencing options may be more effective alternatives to incarceration, not just in terms of costs and recidivism outcomes, but also to victims and survivors who might prefer to have a more active role in the sentencing process and who might seek more than punitive measures for offenders. Many victims and survivors do not necessarily seek retribution but instead wish that the underlying causes of offending are addressed so that offending behaviour does not occur again. Once again, punitive measures might not necessarily be the ideal way to prevent re-offending and as such non-carceral alternatives can also align with the wishes of victims and survivors.

Key recommendations:

- Providing victims and survivors with a range of options through which to seek justice, beyond punitive measures.

8. Any other relevant matter

Many over-represented groups in the corrections system are over-represented because stigma and discrimination means they are more easily targeted in both the reporting and investigation of crime. For example, there is evidence that factors such as race, class, socio-economic status, gender identity and sexual orientation can all increase the likelihood of an interaction with the criminal justice system and poor outcomes within it. There is now substantive research in Australia on these often subconscious biases, especially in the context of the incarceration of Aboriginal people.¹³ Appropriate training and engagement of community organisations which address these biases might help in understanding how to identify and deal with them.

Key recommendations:

- Drawing on the expertise of community organisations (e.g. through training) in bringing about awareness of subconscious bias towards minority groups such as TGI peoples.

Further specific input regarding TGI people in Community Corrections

¹³ Cunneen C (March 2006), Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues, *Current Issues in Criminal Justice* (Vol. 17 No. 3): Sydney.

AGA notes that members of the community who already experience stigma and discrimination are more likely to have had encounters with the justice system, as crime is often a response to social, economic and other forms of marginalisation. This is especially true for those whose identity attracts stigma and provocation, such TGI people. It is therefore important that Community Corrections prevents and avoids further stigmatisation of vulnerable groups, including intersex, trans, and gender diverse people. All people, including those undergoing community corrections interventions, are deserving of dignity, integrity of process, and protection of their human rights, regardless of the crimes of which they are convicted.

Concrete recommendations to address the stigmatisation of TGI people include:

- *Respecting TGI people's gender identity*

Particularly for the people we work with, the system needs to avoid gender binary classifications and heteronormative ways of thinking. For example, in deciding which service a person should be referred to, it is not enough to think in terms of presumed gender or gender presentation. It is crucial that a person's needs in terms of their gender identity are met. This means accepting the way someone chooses to identify. Currently, ACT Corrective Services policy contains a provision that allows for a detainee's self-identification to be overridden if "... it is determined through risk assessments that the detainee should not be placed there." It is our view that an offender's self-identification should always be respected.

- *Addressing issues around safety for incarcerated TGI individuals*

TGI individuals in Australia face disproportionate levels of sexual and physical violence as well as elevated levels of self-harm when incarcerated.^{14, 15, 16, 17} A 2015 report by the Australian Human Rights Commission found that "[t]he capacity for correctional services to meet the needs of LGBTI people is an evolving area of public policy, particularly related to providing safe environments for transgender people."¹⁸ More needs to be done to address the risks faced by TGI people in the criminal justice system. Doing so will ultimately also yield significantly better outcomes in terms of recidivism and offender management.

- *Addressing issues around healthcare provision to TGI individuals*

¹⁴ Blight, J (September 2000), *Transgender Inmates, Australian Institute of Criminology: trends & issues in crime and criminal justice* (No. 168): Canberra. P.2.

¹⁵ Irving I (1998), *Transgender Prison Policy, On the Record newsletter of the NSW Community Legal Centres* (No. 46): Sydney.

¹⁶ Edney R (2004), 'To Keep Me Safe From Harm?' *Transgender Prisoners and the Experience of Imprisonment, Deakin Law Review* (Vol. 9 No. 2): Melbourne. PP. 327 - 336.

¹⁷ Rodgers J et. al. (Feb 2017), *Cisnormativity, criminalisation, vulnerability: Transgender people in prisons, Tasmanian Institute of Law Enforcement Studies* (No. 12): Hobart.

¹⁸ Australian Human Rights Commission (2015), *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights National Consultation Report*: Canberra. P. 69.

Continuity of healthcare is important for everyone, but especially so for TGI people who need to access treatment from medical professionals with experience in supporting people through gender affirmation. In general we recommend that a Community Corrections order should allow such treatment to continue. This means, for example, that an ICO may be more suitable than full-time imprisonment in order to enable an individual to continue receiving appropriate care. It is also important that any order not contain conditions that prevent continuity of care. Where an order is made that impacts on continuity of care, the offender should be assisted to obtain critical health care, including medication and psychological support.

Trans and gender diverse people who are under the care of Community Corrections should have a right to access gender affirming care. Currently the ACT Corrective Services *Management of Transgender Detainees and Detainees born with Variations in Sex Characteristics* policy does not explicitly state this right to access gender affirming care. All healthcare management of TGI offenders currently falls under the purview of Justice Health.

Australian research has pointed out that while continuation of gender affirming care during incarceration is generally possible, significant issues persist around commencing gender affirming care whilst incarcerated, with discretion given to prison authorities.^{19, 20} In the ACT specifically, the General Manager of Custodial Operations and prison doctors ultimately determine access to hormones or surgery, taking away a TGI prisoner's right to self-determination when it comes to gender affirmation. Insufficient expertise in gender affirming healthcare by prison health professionals can further exacerbate this issue. TGI inmates should be able to access high-quality gender affirming healthcare. Medical staff within the justice system need to be either appropriately trained or external medical professionals should be involved in the provision of gender affirming care. AGA can help mediate between external medical professionals and the criminal justice system.

For those with a disability, services need to be accessible and take into account the unique needs of every individual. NDIS services should be available and better use made of the training that is available through the NDIS on supporting an NDIS participant in a corrections, including community corrections setting.

- *Providing better and more extensive mental health support to TGI individuals*

There needs to be additional emphasis on TGI affirming community based mental health supports and better funding for crisis intervention, particularly for those at risk of homelessness because of their gender identity or intersex status. Such an investment is likely to reduce the level of the crimes which traditionally lend themselves to a community corrections approach. It is perhaps more important to

¹⁹ Lynch, S & Bartels, L (2017), *Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy*, *Flinders Law Journal* (No. 19): Adelaide. P. 195.

²⁰ Rodgers J et. al. (Feb 2017), *Cisnormativity, criminalisation, vulnerability: Transgender people in prisons*, *Tasmanian Institute of Law Enforcement Studies* (No. 12): Hobart.

realise that these interventions will improve the effectiveness of community corrections approaches by reducing confounding and compounding factors.

- *Providing culturally, linguistically appropriate and accessible services and extending resourcing of the Office of Aboriginal and Torres Strait Islander Affairs*

For TGI people who are Aboriginal and/or Torres Strait Islander, it is also important that a service is culturally and psychologically safe and linguistically accessible. The same goes for migrants, refugees and any person of a culturally or linguistically diverse background.

The overrepresentation of our First Nations people, including TGI First Nations people, needs to be properly understood and addressed as a priority, including by addressing stigma and discrimination across society and in the criminal justice system. As pointed out above, significant bias against First Nations people has been shown to exist throughout the criminal justice system in Australia.²¹ In addition to work currently underway, this will require adequately resourcing the Office of Aboriginal and Torres Strait Islander Affairs to be able to work effectively across government to improve consultation and partnership with First Nations peoples, and the development of culturally safe and appropriate practices for community corrections, especially in cases of lateral violence.

- *Actively involving community organisations such as AGA in the management of TGI offenders*

AGA recommends actively involving community organisations in the management of marginalised populations such as TGI people. This involvement may include consultation when developing new policies, regular training on how to engage with and understand the struggles of TGI people, as well as putting offenders in touch with community organisations for support.

Key recommendations:

- It is crucial that the way someone chooses to identify in terms of gender is respected.
- Continuity of care must be maintained.
- ACT Corrective Services and Justice Health should enshrine a right to access gender affirming care.
- For intersex, trans, and/or gender diverse people with a disability should be able to access NDIS services, and training on how to support NDIS participants should be undertaken.
- More funding for mental health support services and crisis intervention is crucial.
- Active involvement of community organisations in management of marginalised communities, the provision of training, and development of new policies.
- Ensuring cultural and linguistic competency of Community Corrections when dealing with Aboriginal, Torres Strait Islanders, as well as migrants, refugees and any other person of a culturally and linguistically diverse background.

²¹ Cunneen C (March 2006), Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues, *Current Issues in Criminal Justice* (Vol. 17 No. 3): Sydney.

AGA is appreciative of the opportunity to provide input and recommendations into this Inquiry.

Sincerely



Sel Cooper

Executive Director

A Gender Agenda Inc

30 November 2021