

## **Maryland Senate Bill 550**

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

Position: Unfavorable

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Dear Judicial Proceedings Committee,

As you consider Senate Bill 550, I appreciate the opportunity to raise issues in opposition to the Bill.

### **SB 550 would place housing decisions in the hands of inmates, in particular incarcerated males**

Maryland adheres to the regulations under the Prison Rape Elimination Act (PREA). This means that, after conducting an assessment of risk of victimization and abusiveness, Maryland correctional facilities will "consider on a case-by-case basis" "whether to assign a transgender...inmate to a facility for male or female inmates." (28 CFR Sec. 115.42.)

In contrast to this individualized assessment by professionals tasked with ensuring the safety of all inmates, Bill 550 hands the housing placement decision to the "inmate who is transgender, nonbinary, or intersex, regardless of anatomy" based on his preference. ("[A]n inmate **shall be housed** at a correctional facility designated for men or women **based on the inmate's preference**." (Sec. 9-620(C).) (Emphasis added.)

Under the Bill anyone can opt into the category of people privileged with the power to select themselves into cross sex housing. The categories specified in the Bill include:

- "all gender identities different from the gender a person was assigned at birth"
- "transsexual"
- "two-spirit"
- "neither exclusively male nor female"
- "is in between or beyond both [male or female] both of those genders"
- "gender fluid"
- "agender"
- "without gender"
- "third gender"
- "genderqueer"
- "gender variant"

- “gender nonconforming”

None of those categories is verifiable or disprovable.

Further, no demonstrated history or commitment of any kind to these categories is required to take advantage of the opportunity to self-select housing placement. The Bill describes that this is a “deeply personal experience that may involve some combination of social transition, legal transition, medical transition, **or none of these.**” (Emphasis added.)

**Housing placement decisions should be based on the objective, stable category of “sex” not the mutable, unverifiable, self-selecting category of “gender identity”**

Prison housing placement decisions should be based on the objective, stable category of “sex,” not the changeable, unprovable category of “gender identity.” Even the articulated terms (“gender fluid,” “gender nonconforming” (which could simply be men with long hair), etc.) make plain that the categories on which the Bill would permit males to opt into women’s prison are mutable and unverifiable and, also, easily accessible. Further emphasizing the fluidity of self-identification, any inmate, at any time, may “update” his declaration of “gender identity” (9-619(C)) and then be housed in accordance with his preference. (9-620(C).) Again, 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 identify themselves as women and took pre-incarceration steps to present themselves in a stereotypically “feminine” manner, should be housed and made safe in the men’s prison. A sincere belief in “gender identity” does not change one’s sex; those individuals are and will always be male.

However, 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 identifying as a gender different than one’s sex are not observable or verifiable and can be expressed in an entirely superficial manner (e.g., hair style, wearing nail polish), 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. For the women who would have these men housed with them, there is no difference in the adverse effects; they should not be forced to be housed with biological males.

## **SB 550 puts incarcerated women's safety, well-being and constitutional rights at risk**

As noted above, the Bill provides that the inmate's housing preference cannot be denied based on anatomy. It also provides that sexual orientation and other "discriminatory reason[s]" cannot be a basis for denial. This means a man with fully intact male genitalia, a sexual attraction to women, and legally protected medical disorders (which may include some sexual paraphilias) cannot be denied housing in a women's prison on those bases. No crimes, not even crimes of sexual violence, automatically render a man ineligible for being housed in a women's prison. That there are "trans" identifying males who would fall into any one, or several, of these categories would not be unusual: 85% of males identifying as "trans" retain male genitalia (i.e., have not had genital surgery),<sup>1</sup> a substantial majority have a sexual attraction to women,<sup>2</sup> and rates of sexual offending are significantly higher than the general prison population.<sup>3</sup>

In other states with law or policy similar to Bill 550, men who have committed violent crimes targeting women -- such killing of multiple female prostitutes<sup>4</sup> and torture and sodomy of a woman in front of her mother<sup>5</sup> -- are housed in women's prisons.

By processing this Bill for passage, you would be endorsing that such men -- no matter how petrifying to the women who would have to share toilets, showers or sleeping quarters with them -- should be housed in women's prison in Maryland.

You have the benefit of considering this law after enactment of a similar law in California. According to a court action 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, Eighth and Fourteenth Amendments.<sup>6</sup> 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

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<sup>1</sup> [www.ncbi.nlm.nih.gov/pmc/articles/pmc6626314/](http://www.ncbi.nlm.nih.gov/pmc/articles/pmc6626314/)

<sup>2</sup> [transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](http://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf)

<sup>3</sup> In the federal Bureau of Prisons, 48.47% of males who identify as "trans" have committed "sex offenses" ([usa.kpssinfo.org/transgender-inmate-report-from-bop-12-04-2021-2/](http://usa.kpssinfo.org/transgender-inmate-report-from-bop-12-04-2021-2/)) compared to approximately 11.6% (as of 12 Feb. 2022) of the general inmate population ([www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp))

<sup>4</sup> Transgender woman convicted for slayings of 3 women who worked as prostitutes - CBS News

<sup>5</sup> People v. Masbruch - 13 Cal.4th 1001 S047206 - Mon, 08/26/1996 | California Supreme Court Resources ([stanford.edu](http://stanford.edu))

<sup>6</sup> Chandler v CDCR Complaint ([squarespace.com](http://squarespace.com))

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.

Additionally, in considering Eighth Amendment concerns, I would also like to highlight just one of many factors: punishment that would be rejected by society. International norms are very clear on this.

- Rule 11 of the United Nation's Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) provides that "Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate."<sup>7</sup>
- The Geneva Conventions articles, applicable during wartime conditions, have multiple provisions requiring that prisoners of war and civilians be accommodated in "separate dormitories" for men and women.<sup>8</sup>

Forcing incarcerated women to be housed with men or to exist in a perpetual state of fear that one may be housed with men, is a punishment our society does not accept. It is extraordinary that the State of Maryland is contemplating a law which would provide its incarcerated female population less consideration and protection on the basis of sex than is provided to prisoners of war.

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

### **SB 550 is likely to cause harm to employees of Maryland's incarceration facilities**

The Bill also provides:

- "the inmate shall be searched according to the search policy for the inmate's gender identity or according to the gender designation of the facility in which the inmate is housed, based on the inmate's preference" (9-620(E))
- "staff ... shall use the gender pronouns and honorifics an inmate has specified in all verbal and written communications" (9-619(D))

The Bill's search policy requirements 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.<sup>9</sup>

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<sup>7</sup> [www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf)

<sup>8</sup> THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (icrc.org)

<sup>9</sup> Sheriff Faces Lawsuit for Not Protecting Female Employees from Harassment by Detainees | Chicago News | WTTW

Further, the Bill's requirement to use preferred pronouns and honorifics means Maryland's correctional facilities' employees, as government employees, will be 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 resulting from this Bill should be a consideration as well.

### **Purported "bases" for SB 550 do not support its passage**

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

#### 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. And, further, this liability standard applies equally to any "deliberate indifference" shown to incarcerated women forced to be housed with males.

#### Victimization rates:

Notably absent from the data referenced here is the rate of sexual violence experienced by incarcerated women prior to confinement. A 2016 report cited that 86% of women in jail had experienced pre-incarceration sexual violence.<sup>10</sup> The Bill fails to consider the potential impact on an already traumatized and vulnerable group of women. Incarcerated women have a right to await trial, serve their sentences and conduct their rehabilitation without being forced to cohabit with criminal men.

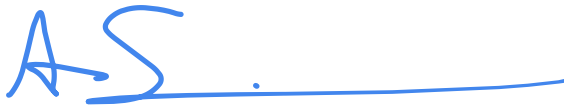
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<sup>10</sup> overlooked-women-and-jails-fact-sheet.pdf (vera.org)

## **Conclusion**

Despite claims to the contrary, it is not a human rights violation for male inmates (however they self-identify) to be denied access to showering with and sharing toilets and sleeping quarters with an already traumatized population of incarcerated women. The state owes a duty of care to all persons in its custody. It is the responsibility of the State to protect all vulnerable incarcerated men who are housed in the men's prison. It is not the responsibility of incarcerated women to be shields for men against violence from other men. Consistent with Maryland's obligation to protect the rights of incarcerated women in its custody, I ask that you reject SB 550.

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



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