

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

1.0 Introduction

1.1 Keep Prisons Single Sex was established in 2020 to campaign for the rights of women in prison to be housed in prisons that are single-sex. This is their right according to the provisions in the Equality Act (2010). We believe that single-sex prisons are necessary for the dignity, privacy and safety of women in prison and to afford them the best possible chance of rehabilitation. This submission is written by Director Dr Kate Coleman FRSA.

1.2 A note on language: we use the words *male* and *female* to refer to persons of the male sex and the female sex respectively, regardless of gender identity or whether they have obtained legal recognition of acquired gender. The intent is to achieve clarity in communication in an area where language is often confusing, not to cause offence.

2.0 Executive Summary

2.1 Government commitment to the exceptions in the Equality Act (2010) that permit all males to be excluded from separate-sex and single-sex spaces and services for females is clear.

2.2 These exceptions permit the lawful exclusion of males with protected characteristic gender reassignment or legal recognition of acquired gender as provided for in the Gender Recognition Act (2004): the exceptions in the Equality Act concern *sex*, whilst the Gender Recognition Act concerns *gender*, the legal mechanisms in no way intending to affect a change of sex.

2.3 The evidence in respect of the female prison estate and female prisoners demonstrates that:

- the female prison estate meets the threshold for a separate-sex and single-sex space under the Equality Act;
- it is a proportionate means to a legitimate aim to exclude all male prisoners from the female prison estate, including those with protected characteristic gender reassignment and/or those who have obtained legal recognition of acquired gender.

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

2.4 The current Ministry of Justice and HM Prisons and Probation Service policy framework on the care and management of transgender prisoners allows for males to be housed in the female estate. This decision was not based on evidence, there having been no impact assessment on the effects of this policy on female prisoners.

2.5 Further guidance is required to bring prison policy and practice in line with the law.

2.6 Our submission concludes with recommendations to keep all prisoners safe and secure, in line with the law.

3.0 The Provision of Single-Sex Spaces in the Context of the Equality Act (2010) and the Gender Recognition Act (2004)

3.1 We note the statement by the Rt Hon Elizabeth Truss, Minister for Women and Equalities following publication by the Government Equalities Office of the report on the Gender Recognition Act Consultation on 22 September 2020. This reaffirmed the Government's commitment to the exceptions in the Equality Act (2010), hereafter referred to as *the Act*, that provide for separate-sex and single-sex spaces, services and communal accommodation for women, hereafter referred to as *single-sex spaces*.

3.2 Under the Act (Schedule 3, paragraphs 26, 27 & 28, and Schedule 23, paragraph 3) males may be excluded from single-sex spaces where this is *a proportionate means to a legitimate aim*. A male may be excluded even if in possession of the protected characteristic gender reassignment and even if in possession of a Gender Recognition Certificate (GRC) stating that the bearer has obtained legal recognition of acquired gender, here that a person of the male sex is 'a woman in law'.

3.3 We note that a GRC obtained under the Gender Recognition Act (2004), hereafter referred to as *the GRA*, concerns legal recognition of acquired *gender*. By contrast, the exceptions in the Act concern *sex*. Notwithstanding that possession of a GRC enables the bearer to obtain a new birth certificate to reflect the new name adopted and to change the sex-marker there being no 'gender marker' on a birth certificate, the GRA does not intend that an individual has changed sex.

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

- 3.4 The GRA provides clear statements that sex is not assumed to have changed, as possession of a GRC does not affect e.g. recording of parenthood, i.e. one's status as the mother or father of a child (Section 12). Further statement is at Section 20 where the possibility of being convicted of a crime defined as one that only a male can commit is unaffected by possession of a GRC, as is the possibility of being the victim of a crime defined as one that only a female can be the victim of.
- 3.5 The exceptions in the Act enable the provision of spaces on the basis of unchanged male or female sex. To exclude from single-sex spaces those males who have obtained legal recognition of acquired gender, or who have protected characteristic gender reassignment, is lawful where it is a proportionate means to a legitimate aim to exclude males from the space. This is because obtaining legal recognition of acquired gender does not mean that individual has changed sex.
- 3.6 We note that the Act at Section 212 defines 'woman' as 'a female of any age', providing a definition based on sex. 'Woman' in the Act does not include males who have obtained legal recognition of acquired gender and are 'women in law'.
- 4.0 A proportionate means to a legitimate aim: decisions are made with regard to spaces**
- 4.1 The exceptions in the Act are intended to ensure the safety, privacy and dignity of females using spaces where the activities that transpire therein are such that females would reasonably object to the presence of males.
- 4.2 On a plain reading of the Act, decisions are made concerning spaces, not concerning individual males who may seek to use those spaces. Thus spaces that, after consideration of the purpose of the space, the activities taking place therein and the reasonable assumptions females have concerning the presence of males, are defined as single-sex have criteria for admission set on the basis of sex.
- 4.3 Thus once a space is judged to fulfil the criteria of a single-sex space for females, it is a proportionate means to a legitimate aim to exclude all males. Specific reference in the Act to males with protected characteristic gender reassignment is to provide clear statement that exclusion of individuals in this group is legal as they are included in the group 'males', the GRA enabling legal recognition of acquired gender, not a change of sex.

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

4.4 To state that decisions concerning admission to single-sex spaces for females are to be made on a case-by-case basis with reference to the males who seek to use them undermines the definition of single-sex spaces as *single-sex*. In a case-by-case situation, a single-sex space for females is defined by female sex *unless and until a male wishes to gain access*. At that point, considerations of *gender* are prioritised over sex. If this male's *gender* is that of 'a woman in law', the question is asked whether it is a proportionate means to a legitimate aim to exclude that male. If it is decided to admit this male, the space ceases to be single-sex. At that point it becomes mixed-sex.

4.5 Laws cannot be self-contradictory: the single-sex exceptions in the Act cannot be such that their operation renders them self-negating in that the space ceases to be single-sex.

4.6 We note that the GRA excludes any requirement for reassignment surgery or medical treatment from the criteria for obtaining a GRC. Thus a male with wholly unaltered and fully-functioning male anatomy can obtain legal recognition of acquired gender and become a 'woman in law.'

5.0 Prisons Policy Framework

5.1 The current Ministry of Justice (MoJ) and HM Prisons and Probations Service (HMPPS) policy framework on the management and care of transgender prisoners was written in 2019 and came into force in January 2020. It can be found here:

<https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>

5.2 The relevant sections concerning the housing of transgender prisoners are at Sections 4.6 and 4.7. These state:

- Male prisoners in possession of a GRC and who have thereby obtained legal recognition of their acquired gender *must* be housed in the female estate. Considerations of male anatomy and conviction are irrelevant.

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

- Male prisoners who are not in possession of a GRC and who have not obtained legal recognition of their acquired gender *may* be housed in the female estate, subject to consideration of risk and the merits of the case.

5.3 This policy framework does not reflect the exceptions in the Act, which permit all males to be excluded from single-sex spaces for females on the basis of their male sex, considerations of legal recognition of acquired gender or other considerations of gender being irrelevant to this.

6.0 Female prisons fulfil the criteria for a single-sex space where it is a proportionate means to a legitimate aim to exclude males

6.1.0 *The physical nature of prison*

6.1.1 Female prisons comprise communal accommodation, shared shower and toilet facilities, where women live together in close proximity. Privacy is minimal. Women in prison have no choice in whom they share their spaces with.

6.1.2 This absence of choice is worth emphasising in light of the argument sometimes made when a woman objects to males being included in single-sex spaces: if she does not like it, she is free to choose to not use that space. Even assuming the validity of this argument, it does not apply to women in prison. A woman in prison who objects to the presence of a male prisoner has no freedom to choose to avoid those spaces.

6.1.3 We consider that in consideration of the physical nature of the female prison estate and the everyday activities that occur within it, it is a reasonable expectation of female prisoners that these should be single-sex and that female prisons meet the threshold for being single-sex spaces. Indeed Schedule 23 of the Act specifically relates to the provision of single-sex communal accommodation.

6.2.0 *The purpose of prison: rehabilitation*

6.2.1 It is accepted throughout the criminal justice system that female offenders do best in environments away from males. The first comprehensive study concluding this was the Corston Report (2007). This concluded that the fundamental differences between male and female offenders and those at risk of offending meant a distinct approach was needed for women. Female-only spaces and services were seen as

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

vital in order to enable female offenders to tackle the complex issues around their offending.

6.2.2 Since the Corston Report, the importance of women-only spaces has been consistently emphasised by the MoJ and HMPPS. Evidence shows that female-only services work, leading to reductions in arrests, in prosecutions and in the number of women sent to immediate custody. Female-only services have been demonstrated as effective and cost-effective in breaking the cycle of reoffending. See e.g.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719771/guide-to-whole-system-approach.pdf

6.2.3 From the perspective of the rehabilitative function of prison, we believe that the evidence demonstrates that it is a proportionate means to a legitimate aim to exclude all males in accordance with the Act.

6.3.0 *Women in prison*

6.3.1 It is accepted throughout the criminal justice system that female offending is very different to male offending. Women comprise only 5% of the prison population and commit significantly fewer serious and fewer violent offences than men. For example:

- Women comprise 3% of all arrests for sexual offences
- Women comprise 5% of murder convictions receiving a life sentence

6.3.2 There are strong links between women's acquisitive crime and their needs to provide for their children, links that are considerably less likely amongst men. Coercion is also an important factor in female offending: almost 50% of women committed their offence to support the drug use of someone else, usually a male partner. This compares to under a quarter of men.

6.3.4 As a group, women in prison are very different to men in prison. Women are more likely to have experienced violence and abuse from men, including sexual abuse, often since childhood. For example:

- Over 30% report a history of sexual abuse
- Almost 60% report experiencing domestic violence

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

- At 65%, there is a high prevalence of traumatic brain injury, with the majority of these injuries caused by a male partner

6.3.5 Unsurprisingly, female prisoners report high rates of mental health problems. For example:

- Almost 50% have mental health problems, compared with under 20% of male prisoners
- Whilst women comprise 5% of the prison population, around 25% of self-harm incidents occur in the female estate. The rate of self-harm incidents per individual is also higher for women (6.4 incidents/self-harming individual) than for men (3.0 incidents/self-harming individual).

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721190/police-guidance-on-working-with-vulnerable-women-web.pdf

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759770/women-criminal-justice-system-2017..pdf

6.3.6 We believe that evidence of female prisoners' experiences of male violence and their vulnerability demonstrates that it is a proportionate means to a legitimate aim to exclude males in accordance with the Act.

7.0 Evidence of Impact on Female Prisoners

7.1 We understand that no impact assessment has been conducted either prior or subsequent to the implementation of the policy of housing transgender male prisoners in the female estate.

7.2 Whilst evidence of the impact on female prisoners has not been officially gathered, some evidence is in the public domain. This takes the form of media reports, submissions to the 2015 WEC Inquiry into Transgender Equality and accounts from female prisoners published in the monthly prisoners' journal, *Inside Time*. We present this here. Please note that this should not be considered exhaustive.

7.3 *Appendix 1, Assaults and Other Incidents in the Female Estate* documents nine males reported to have been held in the female estate where incidents involving female

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

prisoners have occurred. Links to media reports are provided. An additional male prisoner held in the male estate is included because on the basis of professed transgenderism was successful in the demand that only female prison officers do strip searches: it is not only female prisoners who are affected.

- Convictions include: murder; rape; torture; harassment.
- Incidents include: sexual assault; 'consensual' sexual relations; threats of rape; showering with female prisoners; engaging in public sexual activity.

7.4 *Appendix 2, Submissions to WEC Transgender Equality Inquiry 2015* provides quotes from the submissions made by the British Psychological Society and the British Association of Gender Identity Specialists. Links to the relevant sections of data.parliament.uk are provided.

7.5 Both organisations cautioned against a blanket policy of housing males who are transgendered in the female prison estate. Firstly, because of the risk to female prisoners that may persist despite hormone treatment. Secondly, because of cases where male prisoners have sought to 'game the system' or claim transgender status in an attempt to further their offending.

7.6 Two reports from female prisoners have been published in *Inside Time*.

7.7 *July 2019*: A prisoner at HMP Downview writes:

[The transgender prisoners] are high-risk to women, yet they share the education, gym and library with us. I mean the authorities cannot be serious. These people still have their male-parts and women here do not feel safe. It is only a matter of time before one, or more, of us gets raped.

7.8 Here, she describes the 'transgender' Unit at Downview. This unit is intended to house those male prisoners with a GRC who cannot be managed in the general female population. We discuss Downview below at 8.6 - 8.10.

7.9 *July 2020*: A prisoner at HMP Bronzefield writes in respect of the transgender unit at Downview that the process of "weeding out" those male prisoners with a GRC who are too dangerous to be housed in the female estate itself puts female prisoners at risk. (She implies that at least one female prisoner must be sexually assaulted before the male

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

prisoner is considered dangerous enough to justify removal from the general population.)

She also notes:

Due to my own experiences I feel very uncomfortable around transwomen.

7.10 We have spoken to current and former prison staff about their experiences in the female estate. As we trust Committee members will appreciate, not least because of the requirements of the Official Secrets Act, it has been challenging to find prison staff who are willing to speak on the record. We have obtained two statements, which are in *Appendix 3, Statements by Former Prison Staff*. One is by former prison governor Rhona Hotchkiss. The second is anonymous.

7.11 They report that female prisoners felt unsafe and at risk. Female prisoners were confronted with sexualised behaviour, aggressive behaviour, sexually-threatening behaviour and had to contend with males in their intimate living accommodation, including shower facilities with doors that were unlockable and could be looked over.

7.12 We urge Committee members to read the evidence in these Appendices.

7.13 We believe that the evidence of risk to female prisoners when males are housed with them means that it is a proportionate means to a legitimate aim to exclude males from the female prison estate, including those males who have the protected characteristic gender reassignment and those who have obtained legal recognition of acquired gender in accordance with the GRA.

8.0 Recommendations and Conclusions

8.1 We consider the Act to be adequate for the provision of single-sex spaces for females where all males may be lawfully excluded as a proportionate means to a legitimate aim on the basis of the interpretation of the single-sex exceptions we have given above.

8.2 Thus we do not believe that reform of the Act is required and note that gender reassignment is rightly a protected characteristic.

8.3 Nevertheless, the example discussed here of prison policy and practice demonstrates that guidance is urgently required concerning the interpretation, scope and application of the law.

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

- 8.4 All prisoners have the right to be safe and secure in prison. Many male prisoners may be vulnerable in the male estate including: disabled males; gay males; old males; religious males; BAME males. Vulnerability and the challenges arising from this are not only experienced by males who are transgender.
- 8.5 Meeting the needs of these prisoners and ensuring their safety is a challenge which the male estate must meet. The solution cannot be to house vulnerable male prisoners in the female estate. This is against the provisions in the Act and is manifestly against the interests of female prisoners.
- 8.6 We note the establishment in 2019 of the 'transgender' Unit at HMP Downview, a women's prison. The HMPPS policy framework for this unit is unavailable on any official HMPPS or MoJ website, but can be found here:

<https://fairplayforwomen.com/wp-content/uploads/2020/03/E-Wing-Policy-Version-16.0-For-Publication.pdf>

- 8.7 Paragraph 1.1 states that the Unit is intended for:

Transgender women holding Gender Recognition Certificates who have been assessed as presenting a high risk of harm to other women in custody... where the risk cannot safely be managed on normal location within the Women's Estate.

- 8.8 Paragraph 4.1 indicates that placement at the Unit is not intended to be permanent, rather prisoners should progress back into the wider female estate.
- 8.9 Section 10.0 indicates that prisoners held at the Unit remain able to access activities within the main prison at Downview and to mix with the female prisoners for the purposes of those activities.
- 8.10 For these reasons, we believe that the Unit at Downview does not provide a legitimate solution to meeting the needs of male prisoners who are transgender.
- 8.11 A solution to meeting the needs of these male prisoners, including those with a GRC stating they have obtained legal recognition of acquired gender, must be grounded in law and in the evidence-based needs of female prisoners. These prisoners must be housed away from female prisoners and cannot be accommodated in the female estate.

Written evidence submitted by Keep Prisons Single Sex [GRA0826]

8.12 Our proposed solution, where the needs of these male prisoners cannot reasonably be met within the main body of the male estate, is the establishment of transgender units within the male estate. We propose that a feasibility study is conducted.

November 2020