

## 1. Introduction

1.1 I am Professor of Criminology at the Open University and a Trustee for the Centre for Crime and Justice Studies. I study criminal justice policy reform concerning sex, gender and sexualities. I am known for researching the unintended, often deleterious effects of criminal justice and social welfare policy reforms whose purpose has been to correct the harms done to marginalised groups by previous policy failures to recognise their vulnerabilities or the realities of their lives. I have a large body of work looking at child sexual exploitation as well as prostitution policy reform. Recently, I have become interested in policy reforms supporting trans people's rights and the unintended consequences of such viz-a-viz the administration of criminal justice.

1.2 This submission provides evidence pertinent to the 'Wider Issues' section of your Inquiry. It addresses:

- Are the provisions in the Equality Act for the provision of single-sex and separate-sex spaces and facilities in some circumstances clear and useable for service providers and service users? If not, is reform or further guidance needed?
- Does the Equality Act adequately protect trans people? If not, what reforms, if any, are needed
- What issues do trans people have in accessing support services, including health and social care services, domestic violence and sexual violence services?

My submission makes three points:

1.3 Regarding community based punishments for criminalised women, there is now a large body of high quality research evidencing the need to support and maintain single sex or separate-sex services (see, for instance, MoJ 2018), especially in these days of 'socially distanced' justice and the rise of domestic violence. There is also reason to assume it is necessary to develop trans specific services or trans specialist workers. These could be stand-alone projects or specialist projects administered through ordinary CRC's or multi-modal women's centres, established following the Corston Report (2007).

1.4 I argue that catering for criminalised trans and gender-diverse people through women-only services will not necessarily ensure that they have adequate protections (from transphobia) or services appropriate to their needs.

1.5 Regarding prison placement policy, this submission provides some additional evidence about Canadian prison officers' concerns regarding ensuring security and order in prisons where gender self-identification is basis of prison placement policy taken.

1.4 For clarity sake, my evidence refers to both biology and gender identity. I use the term women and men to refer to females and males. I also use the term male-bodied individuals

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who identify as women or as gender non-binary or female-bodied individuals who identify as men or gender non-binary. I do this because, regardless of the sympathies we might have for trans individuals' struggles for recognition, in complex organisations that are sex-segregated, to act *as though* there are no biological differences or as though those differences are not important is problematic.

1.5 To be clear, as an individual and in my professional academic work, I support the rights of trans individuals to be fully protected by the Equalities Act and welcome government reform of the Gender Recognition Act in ways that are sympathetic to their needs. However, supporting an individual's right to identify as trans, gender queer, gender non-binary, lesbian, gay, bisexual, or whatever cannot possibly be *the* organising principle in the provision and administration of criminal justice for two reasons.

1.5.1 Firstly, century of psychological and sociological research confirms: identities are fluid, not fixed and contextual. They change across time, place and in relation to social networks. For this reason, they do not provide a basis on which to organise complex institutions with statutory responsibilities. How an individual might identify at the beginning of a court order can and often does change. Indeed, that is exactly the logic of any desistance programmes in community punishments (to move an offender away from his / her 'offending identity' and towards a more law-abiding identity see for instance, Weaver and McNeill 2015).

1.5.2 Secondly, the claim of trans activists is that biology doesn't matter *as much as gendered identity*. Their argument is: biological differences are socially constructed and thus ought not be used as an organising principle in institutions. The problem with that argument however is: bodies and biology do exist outside how we make sense of them. Coronary heart disease presents differently in females. Risk of death from COVID is sex differentiated – even if the origins are social. Some forms of cancer appear only in males, some only in females. Gender identity may not be rooted in bodies, but that does not mean that consideration of bodies and biology ought to be dismissed. Bodies and biology *do*, sociologically, shape women's lives – including limiting their access to equally paid work, placing upon them a burden of child and elder care and other domestic responsibilities. Bodies and biological differences do matter when talking about men's violence against women.

## 2 Community based punishments

2.1 There is an extensive feminist criminological and sociological literature that charts the multiple disadvantages that women experience in the criminal justice system, particularly black and brown women and working-class women.

2.2 That literature conclusively demonstrated that most criminalised women are 'doubly deviant' and 'doubly damned'. Most offenders are male and the criminal justice system – from courts through to custody and community-based punishments – is organised around a notional male offender. Sentencers and criminal justice workers find themselves having to invoke extra explanations for why *a woman* is in the system. Mostly, that explanation

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focuses on the degree to which each individual conforms to established gender norms about her domestic situation, her sexuality and her mental health. During the 1990s, sentencing studies established that women were often sentenced based on their offence *as well as* sentencers' assessments of them as women (see esp Worrall 1991). Of course, there also applies to trans and gender-diverse people given that the dynamic at play is sentencers' assessment of \*gender\* (not biological sex) (see Buist and Lenning 2015).

2.3 There are other, very rich veins of research into women's 'pathways' into offending and the different pains of punishment between men and women. These studies look at the realities of women's and men's lives and what took them to the point of being criminalised. Framing a lot of this research is the recognition of the difference between formal and substantive justice and that the provision of \*formal\* justice (where men and women are treated the same) often produces substantive \*injustice\* because it does not take account of women's and men's different biological, social and economic realities. Whilst this research tradition goes back to the mid-1980s, the Corston Report (2007) is the clearest and most influential expression of this knowledge base. For that reason, it is worth quoting at length:

*"I have seen little evidence that much preparatory work is in hand in respect of the imminent statutory duty or of any real understanding that treating men and women the same results in inequality of outcome. Equality does not mean treating everyone the same. The new gender [sic] equality duty means that men and women should be treated with equivalent respect, according to need. Equality must embrace not just fairness but also inclusivity. This will result in some different services and policies for men and women. There are fundamental differences between male and female offenders and those at risk of offending that indicate a different and distinct approach is needed for women. For example:*

- *Most women do not commit crime;*
- *Women with histories of violence and abuse are overrepresented in the criminal justice system and can be described as victims as well as offenders;*
- *The biological difference between men and women has different social and personal consequences;*
- *Proportionately more women than men are remanded in custody;*
- *Women commit a different range of offences from men. They commit more acquisitive crime and have a lower involvement in serious violence, criminal damage and professional crime;*
- *Relationship problems feature strongly in women's pathways into crime;*
- *Coercion by men can form a route into criminal activity for some women;*
- *Drug addiction plays a huge part in all offending and is disproportionately the case with women;*
- *Mental health problems are far more prevalent among women in prison than in the male prison population or in the general population;*
- *Outside prison men are more likely to commit suicide than women but the position is reversed inside prison;*

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- *Self-harm in prison is a huge problem and more prevalent in the women's estate;*
- *Women prisoners are far more likely than men to be primary carers of young children and this factor makes the prison experience significantly different for women than men;*
- *Because of the small number of women's prisons and their geographical location, women tend to be located further from their homes than male prisoners, to the detriment of maintaining family ties, receiving visits and resettlement back into the community;*
- *Prison is disproportionately harsher for women because prisons and the practices within them have for the most part been designed for men;*
- *Levels of security in prison were put in place to stop men escaping;*
- *The women's prison population suffers disproportionately because of the rapidly increasing male prison population and the pressure to find places for men, leading to re-rolling of female prisons;*
- *30% of women in prison lose their accommodation while in prison; and*
- *Women and men are different. Equal treatment of men and women does not result in equal outcomes.*

2.4 As a result, community based single-sex and separate-sex provision for community services were created so that probation could address the *different* needs of women, and especially those needs that related to the links between being victimised by men and criminalised women's offending histories. Whilst never fully implemented, the Corston Report still forms the basic framework for criminal justice provision for criminalised women on probation. Much of that day to day work now focuses on male inflicted trauma, on adverse childhood experiences, on childcare issues and the provision of basic social welfare.

2.5 The newly emerging subfield of queer criminology makes similar arguments about the differential treatment and needs of gender-queer, non-binary and trans individuals i.e. that they are often assessed according to stereotypical ideas of femininity or masculinity and that there are significant differential experiences of punishment and justice between cis-gendered and gender-queer, non-binary or trans people. In other words, and regardless of the campaigning rhetoric, research establishes that the needs and experiences of trans individuals ***\*are not the same as\**** either cis-women's or cis-men's needs viz-a-viz resettlement and rehabilitation or cis-gendered people's experiences of punishment. New research is starting to trace the effects of transphobia and how this relates to trans individuals' experiences of criminalisation and punishment (as an introductory text, please see Buist and Lenning 2015). One of the main arguments in this literature is the need for the criminal justice agencies to recognise these different needs – from the need for specialist health care to the need for community and recognition of transphobic experiences.

2.6 Prisons are particularly challenging places to work through the complexities of managing and respecting the social and personal consequences of biological differences (between men and women) and differences in gender identification (between gender diverse and non gender diverse populations). Recent research on the implementation of a prison placement policy based on self-identification demonstrates this. Prison officers noted the tensions that

were created, for them, of maintaining security and safety for all those incarcerated when male-bodied people who identify as women were placed in female prisons, often with women with long histories of violence and abuse from men. They also noted the problems created by placing female bodied people who identify as men in men's prisons (Ricciardelli, Phoenix and Gacek 2019). The fairly conclusive implication is that where in the context of sex-segregated prisons, bodies and biology do matter in maintaining prison order and ensuring the maximum possible chances for rehabilitation and resettlement of prisoners.

2.7 There is no reason to assume that provision of community-based punishments would not be similarly affected if placement into women-only probation centres and access to women-only services was based on self-identification. The histories of women in prison are remarkably similar to the histories of women on community-based orders. The needs are similar. The services have been developed with those needs in mind. As queer criminologists would argue, these services are probably not directly relevant to the needs of gender-queer, trans or non-binary people. Further, it is likely that \*not\* maintaining sex-separate provision in community based punishments can have very similar effects as it does in prisons. It may retraumatising criminalised women. More likely, the (quite right) need to expand service provision to include the different needs of trans, gender-queer or gender non-binary people may well reduce what few services there are for women especially in a context of dwindling resource and the challenges of working within social distancing guidelines. Simply, the already established needs of women will get marginalised in the process of catering for those who identify as women but whose life experiences are specifically trans, gender non-binary or gender-queer.

2.8 This is not a matter of linguists or polemic. The issue now facing the organisation and provision of criminal justice in the UK is how to balance these differential needs (between men and women, between trans and non trans) in relation to the Equalities Act 2010. There is an absence of easy solutions to this highly complex **organisational** problem. My recommendation would be to frame reform to criminal justice policy within that most basic of legal principles: treat like things alike. As Corston established though, treating men and women alike produces unjust and unequal treatment. Ignoring the differential needs of trans, gender-non-binary or gender queer individuals in the name of treating trans women as women or trans men as men will and does produce unjust and unequal treatment.

2.9 Therefore and in relation to community-based punishments and services, I would encourage the committee to strengthen its commitment to the provision of women-only, single sex spaces and services for women offenders *at a minimum*. This is particularly important given that the global pandemic and the imposition of social distancing is now trapping many criminalised women in unsuitable housing and accommodation, often with their male assailants and the men who have coerce them into lawbreaking, prevented them accessing appropriate social and personal welfare support and structure their drug taking, alcoholism and other issues. Evidence from numerous sources is now indicating that the lives and experiences of women who end up in the justice system is getting \*worse\* and not \*better\*. Now more than ever it is not the time to reduce any type of sex-based service for criminalised women.

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2.10 That said, given the rise of political populism and the way that it creates a face of acceptability for expressing and acting in ways contrary \*to the spirit\* of the Equalities Act 2010, this is absolutely not the time to ignore the needs of gender diverse people in criminal justice. Leaving aside the argument about whether trans women or men ARE women or men, government does need to recognise that there is a demographic of individuals (i.e. gender diverse people) whose needs are not best met within a justice system that is organised via sex-segregation. In the spirit of Corston, and given the way in which community punishments are going (i.e. socially distanced supervision in the community which often equates to telephone or video conferencing), it is possible to explore new and different ways of creating just community justice practices that service gender diverse people more appropriately. For instance, one of the main political criticisms of separate services for trans and gender diverse people is that it requires gender diverse people to 'come out' as trans or gender diverse. This can be particularly painful for individuals who have transitioned fully – meaning no longer identify as 'trans' at all but fully identify as men or women, regardless of any biological modifications (see previous written submission to GRA 2015). The provision of socially distanced community-based punishments may well facilitate the development of a more individualised service for any trans person because it does not require a face to face 'segregated' service. Similarly, video conferencing may help to address the challenge that often within any one geographical locality there may be only one or two gender-diverse people accessing probation at any one time. In short it may now be possible to create communities of common interest for gender-diverse people in order to identify their specific needs in relation to resettlement and probation. The point here is that COVID has created a scenario in which it is possible to both maintain and strengthen the commitment to single-sex women only services for criminalised women whilst also ensuring that criminalised trans and gender-diverse peoples' needs are recognised and addressed.

### 3 Recommendations

3.1 I urge the Committee to provide explicit guidance on the importance of single-sex women-only provision and spaces in the criminal justice system (including prison and community rehabilitation centres) in its report and recommendations.

3.2 I also urge the Committee to provide explicit guidance on the need to further develop policy, practice and services based on respect and dignity for justice-involved trans and gender-diverse people's needs and requirements viz-a-viz rehabilitation and resettlement but to do so in a way that does not impinge on the provision of single sex women-only services and spaces.

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