

Written evidence from Keep Prisons Single Sex

Introduction

Keep Prisons Single Sex was founded in 2020 to campaign for the rights of women in prison to be held in single-sex prisons and to only be searched by officers of the same sex. This is in accordance with Article 3 of the Human Rights Act (1998) and Schedule 3, paragraphs 26, 27 & 28 and Schedule 23, paragraph 3 of the Equality Act (2010).

This submission focuses on question 9:

- Does the custodial estate offer a trauma-informed environment for females? Could more be done? If so, what?

This submission is written by Director Dr Kate Coleman FRSA. We would like to put ourselves forward to give oral evidence.

A note on language and definitions

We are aware that the MoJ and HMPPS policies in respect of the female prison estate relate to three cohorts of 'women':

- 'Women' who are of the female biological sex. In this submission this is the only cohort we shall refer to as 'women' or 'female'.
- 'Women' who are of the male biological sex, who identify as women and who have obtained legal recognition of acquired gender in accordance with the Gender Recognition Act (2004). Members of this cohort have been issued with a Gender Recognition Certificate and the sex marker on their birth certificate will have been changed from male to female. In this submission we shall refer to this cohort as 'prisoners of the male sex who identify as transgender and who have obtained a GRC'.
- 'Women' who are of the male biological sex and who identify as women. In this submission we shall refer to this cohort as 'prisoners of the male sex who identify as transgender and who have not obtained a GRC'.

We have made these decisions in respect of language and definitions in order to enable effective communication. Our decision to refrain from using the word 'woman' to refer to any member of the male sex is not intended to cause offence.

Prison policy provides that all prisoners of the male sex who identify as transgender and who have obtained a GRC must be initially allocated to the general population of the female estate. Further, prisoners of the male sex who identify as transgender and who have not obtained a GRC may be transferred to the general population of the female estate. However, this submission concerns the needs of the first cohort of 'women': offenders of the female biological sex.

Vulnerabilities of women in prison

The vulnerabilities of women in prison are known and accepted throughout the criminal justice system. In this respect, women in prison, as a group, are distinct from both women in the community and from men in prison. This is notwithstanding that both women in the community and men in prison may also have high levels of vulnerability and exhibit significant mental health problems.

The following is a selection of vulnerabilities and mental health issues in the female prison population reported in the literature. This is not intended to be exhaustive:

- Nearly 60% of women in prison report having experienced domestic violence.
- Over 50% of women in prison report having experienced abuse in childhood.
- A study of women in one prison found that nearly 65% had likely experienced a traumatic brain injury. The majority of these were reported to have been caused by a male partner.
- 65% of women in prison suffer from depression.
- Women in prison account for 23% of all prison self-harm incidents, despite representing under 5% of the prison population.

Sources:

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Women/PRI-Women-in-prison-and-mental-well-being.pdf>

<https://publichealthmatters.blog.gov.uk/2018/03/08/improving-the-health-and-wellbeing-for-women-in-prison/>

It is known and accepted throughout the criminal justice system that women in prison have often been subjected to violence and sexual violence at the hands of the men in their lives. For a significant proportion, this is intimately tied to their pathways into offending. It is for good reason the prison environment for women needs to be ‘trauma informed’

(https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687146/Gender_specific_standards_for_women_in_prison_to_improve_health_and_wellbeing.pdf).

Time in prison can be viewed for many women as the first opportunity to tackle the complex issues around their offending, improve their health and access the services they need

(<https://publichealthmatters.blog.gov.uk/2018/03/08/improving-the-health-and-wellbeing-for-women-in-prison/>). It is with good reason that it is accepted throughout the criminal justice system that female offenders do best in female-only environments. See e.g.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719819/female-offender-strategy.pdf

This consultation is both welcome and timely.

Policy on allocation prisoners of the male sex who identify as transgender

The policies regarding the allocation of transgender prisoners can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863610/transgender-pf.pdf

<https://www.keep-prisons-single-sex.org.uk/hmp-downview-e-wing-policy>

These policies provide that a subset of prisoners of the male sex, who meet certain criteria, may be housed in the general population of the female prison estate. This renders women’s prisons mixed sex facilities. The mixed sex nature of the female prison estate is unaffected by the transgender identity, with or without a GRC, of the prisoners of the male sex who are housed there.

Thus prisoners of the male sex who have obtained legal recognition of acquired gender in accordance with the Gender Recognition Act (2004) and are in possession of a Gender Recognition Certificate are initially allocated to the general population of the female estate. Conviction, offending history and anatomy are not taken into consideration. Here, we note that there is no requirement for any medical or surgical 'reassignment' in order to obtain a GRC.

There is provision for those prisoners of the male sex with a GRC where the risk they present is proved to be too high to manage in the general female population to be moved to a separate unit in the female estate at HMP Downview. The absence of adequate risk assessment for prisoners of the male sex who have a GRC means that in practice at least one female prisoner needs to have been sexually assaulted in order to demonstrate that the risk is 'too high'. Prisoners at the unit remain able to mix with women in the general population at Downview for the purpose of accessing activities. Allocation to the unit is intended as a temporary measure, with prisoners assisted in progressing back to the general female population.

There is additional provision that where the level of risk remains unacceptably high, a prisoner of the male sex with a GRC may be removed to the male estate. The test for this is one of 'exceptionality' where the criteria that must be met would also lead to the removal of a female prisoner to the male estate. We know of no occasion where this has happened and consider this provision to be theoretical only. Similarly, we know of no case where a female prisoner has been removed to the male estate.

Initial allocation of prisoners of the male sex who identify as transgender and who do not have a GRC is to the male estate. The prisoner can then apply to be transferred to the female estate. The application will go before a case board. Conviction and offending history are taken into account in the assessment of risk.

The lawfulness of these policies is currently the subject of judicial review with reference to Articles 3, 8 and 14 of the Human Rights Act (1998) and Schedule 3, paragraphs 26, 27 & 28 and Schedule 23, paragraph 3 of the Equality Act (2010). *R (FDJ) v SSJ* was heard at the High Court in March 2021. At the time of writing, judgement had not been handed down.

Data collection and risk assessment of prisoners of the male sex who identify as transgender

Offenders are recorded on HMPPS systems according to the sex marker **currently** on their birth certificate. This means that prisoners of the male sex who identify as transgender and who have obtained a GRC are recorded as women/female and only as women/female (as explained above, an individual of the male sex who has obtained a GRC has the sex marker on their birth certificate changed to female).

Offenders who are recorded as women/female will not have an OASys Sexual Offending Predictor Score (OSP) displayed, because this is not triggered for women. This means that there is no risk assessment score for sexual offending for prisoners of the male sex who have obtained a GRC, even if they have been convicted of serious sexual offences.

Source: MoJ, Implementation and use of OASys Sexual reoffending Predictor (OSP) (Reissue date: 27 Yay 2021)

Here, we note that a prisoner of the male sex who has obtained a GRC may be (temporarily) removed to E Wing at HMP Downview, where they present a level of risk that is too high to be managed in the general population of the female estate. Where an OSP score cannot, by definition, be calculated for this cohort of prisoners, we suggest that it is simply not possible to determine whether risk posed is 'too high'. This creates the situation where evidence of risk that is 'too high' must be gathered via cumulative assaults and sexual assaults of women in prison.

We consider this to be unacceptable. We have submitted a FOIA request to the MoJ for a copy of the Equality and Human Rights Impact Assessment that informed the decision to not use the OSP for a cohort of prisoners who, absent possession of a Gender Recognition Certificate, would have an OSP score calculated. Again, we note that there is no requirement for any surgical or medical reassignment treatment in order to obtain a GRC.

The impact on women in prison: the presence of prisoners of the male sex

We consider that prison policy and practice which allows a subset of prisoners of the male sex to be housed in the general population of the female estate is a violation of the Article 3 rights of women in prison not be subjected to inhuman or degrading punishment or treatment. We consider that these practices mean that the answer to Question 9: does the custodial estate offer a trauma-informed environment for females? is no. The remedy is for all prisoners of the male sex to be removed from the female prison estate. The existing legal mechanisms in the Equality Act at

Schedule 3, paragraphs 26, 27 & 28 and Schedule 23, paragraph 3 provide that this may be lawfully done.

Accommodation in a mixed-sex environment is not an ordinary consequence of lawful detention. Hence Prison Rule 12(1) which provides that women prisoners shall normally be kept separate from male prisoners. The reasons for this are self-evident.

The accommodation of male prisoners in the female estate introduces a level of risk that does not arise from female prisoners, notwithstanding that the risk of assault and of sexual assault female prisoners pose to one another is not zero. At the extreme, this risk includes that of rape and of pregnancy (including through consensual sexual relations). We suggest that a transgender identity with or without a GRC makes no material difference to this.

It is arguable that imprisonment with male prisoners constitutes an ‘unofficial punishment’ that is experienced solely by female prisoners, there being no comparable experienced by male prisoners in the male estate. Notwithstanding the aforementioned policies, prison practice is to not place female prisoners who identify as transgender in the male estate, regardless of whether the prisoner has obtained a GRC. This is for reasons of safety. In any event, placement of female transgender prisoners in the male estate would have a very different impact on male prisoners.

The Female Offender Strategy must be trauma-**responsive**, not merely trauma-informed. We suggest that the traumatising and retraumatising impact on women in prison that occurs when any prisoner of the male sex is housed with them, not merely those whose offending history includes violent or sexual offences against women, contradicts a trauma-responsive approach.

Notwithstanding the reported incidents of aggressive or sexualised behaviour by prisoners of the male sex in the female estate, even the presence of ‘well-behaved’ prisoners of the male sex has a detrimental effect on women in prison. The reasons for this should be self-evident given the known vulnerabilities of female offenders. We suggest that a transgender identity, with or without a GRC, makes no material difference. The psychological impact on female prisoners of knowing that they may be housed with a male prisoner should also not be underestimated.

The impact on women in prison: ‘misgendering’ prisoners of the male sex

The recently published *Expectations: Criteria for assessing the treatment of and conditions for women in prison, Version 2, 2021* (HM Inspectorate of Prisons, 2021) states at Section 68:

Prisoners are routinely addressed as and referred to in the gender they identify with, using their preferred pronouns and by their chosen name.

Further at Section 62 it states:

- *All forms of discriminatory language and conduct are challenged.*
- *Women and staff know what behaviour and language are unacceptable.*
- *There are effective interventions to support women experiencing discrimination and to challenge and educate perpetrators.*
- *Women who have been involved in racist or other hate crime or incidents are identified and managed appropriately, including being supported to change their behaviour.*

We are concerned that women will feel pressured, or may actually be instructed, to use the pronouns 'she' and 'her' to refer to a prisoner who they correctly identify as of the male sex. Prisoners of the male sex may be perceived through the lens of trauma and the experience of having to refer to such prisoners as women may have the damaging effect of retraumatising these female prisoners. This also contradicts the provision of trauma responsive services.

The right to express and manifest one's beliefs under both Article 9 (right to freedom of thought and conscience) and Article 10 (right to freedom of expression) also encompasses a right not to be obliged to express and manifest beliefs that one does not hold. Being compelled to use female pronouns to refer to a prisoner of the male sex implies a belief that the group 'women' also includes adult human males and that the male prisoner in question is legitimately included in the group 'women'. This is a belief that many reject and the entitlement to do is not diminished by dint of imprisonment.

We are concerned that where a woman objects to the presence of a prisoner of the male sex, or the behaviour of such a prisoner where the behaviour in question would be unproblematic were the prisoner of the female sex, the problem will be seen to be hers. We are concerned that she will be required to change her thinking and agree that the prisoner of the male sex she is required to share her space with is a woman who, like her, is rightfully entitled to be housed in the female estate. Where this to occur, we would consider it to be gaslighting and coercion. We are concerned that

this will inhibit women housed with prisoners of the male sex from speaking out when they object to their presence or their behaviour, whether or not their objections will in fact be perceived as 'hateful' by prison officers.

The impact on women in prison: full searching

We have been informed that Prison Service Instruction PSI 07/2016 Searching of the Person is currently under review and will include a new section on transgender prison officers and searching. We understand that it is proposed that prison officers of the male sex who identify as transgender and who have a GRC will be permitted to full search (i.e. strip search) female prisoners.

We consider that depriving women in prison of their existing rights to only be searched by officers of the same sex is a violation of Article 3 rights and will actively frustrate trauma responsive services. The reasons for this should be self-evident. We contend that transgender identity with or without a GRC makes no material difference.

Conclusions

We consider that the policy and practice of housing a subset of prisoners of the male sex in the general female prison population results in a detrimental, traumatising and retraumatising effect on women in prison.

We consider that these policies and practices violate the Article 3, 9 and 10 rights of women in prison and that these violations in and of themselves have a detrimental traumatising and retraumatising effect on women in prison.

We consider that these policies and practices actively frustrate the rehabilitation of women in prison and contradict the best practice statements which are to provide women in prison with supportive female-only environments and that women's prisons need to be trauma responsive.

June 2021