

# Transgenderism and Policy Exchange policy capture in the criminal justice system

Why criminal justice policy needs to  
prioritise sex over 'gender identity'

Maureen O'Hara

Foreword by Joanna Cherry QC MP





---

# Transgenderism and policy capture in the criminal justice system

Why criminal justice policy needs to prioritise sex over 'gender identity'

Maureen O'Hara

Foreword by Joanna Cherry QC MP



---

Policy Exchange is the UK's leading think tank. We are an independent, non-partisan educational charity whose mission is to develop and promote new policy ideas that will deliver better public services, a stronger society and a more dynamic economy.

Policy Exchange is committed to an evidence-based approach to policy development and retains copyright and full editorial control over all its written research. We work in partnership with academics and other experts and commission major studies involving thorough empirical research of alternative policy outcomes. We believe that the policy experience of other countries offers important lessons for government in the UK. We also believe that government has much to learn from business and the voluntary sector.

Registered charity no: 1096300.

Trustees

Alexander Downer, Pamela Dow, Andrew Feldman, David Harding, Patricia Hodgson, Greta Jones, Andrew Law, Charlotte Metcalf, David Ord, Roger Orf, Andrew Roberts, Robert Rosenkranz, William Salomon, Peter Wall, Simon Wolfson, Nigel Wright.

## About the Author

**Maureen O'Hara** is a legal academic and former solicitor. Her research interests relate to criminal justice responses to sex-based violence against women and children.

# Acknowledgements

I would like to thank the voluntary organisation 'Keep Prisons Single Sex' (KPSS) and their Director, Dr Kate Coleman. KPSS campaign for the rights of female prisoners to same-sex accommodation and same-sex searching, and for criminal justice data to be recorded on the basis of sex rather than gender. Their website (<https://kpssinfo.org/>) has been an invaluable source of information about the impact of the Ministry of Justice's policy of placing trans-identifying males in women's prisons, and about recent attempts by Parliamentarians to bring about an end to this policy and make prisons genuinely single-sex.

© Policy Exchange 2022

Published by  
Policy Exchange, 1 Old Queen Street, Westminster, London SW1H 9JA

[www.policyexchange.org.uk](http://www.policyexchange.org.uk)

ISBN: 978-1-913459-96-3

# Contents

About the Author	2
Acknowledgements	3
Foreword	5
Executive Summary	7
PART I: An overview of the approach to sex and gender in law and policy	9
Introduction	9
Sex and gender in law	11
PART II: The policies and practices of four key criminal justice institutions	16
Police Policy	16
Police searches of suspects and detainees	21
Crown Prosecution Service Policy	25
Guidance for judges	27
Prison Service Policy	33
Prison policy on compelled use of preferred pronouns	36
Undermining the Prison Services' policy of providing a trauma-informed approach to women prisoners	38
Intimate searches of prisoners	39
The current policy on the allocation of trans-identifying prisoners	41
Challenges to the current prison policy	45
The role of policy capture in criminal justice policy	50
Conclusion	57
Recommendations	59
Appendix 1	64
Appendix 2	66
Appendix 3	68

---

# Foreword

Joanna Cherry QC MP  
Scottish National Party MP for Edinburgh South West

As the public debate about sex versus gender continues to generate more heat than light, Maureen O'Hara is to be commended for producing this masterly survey of the result of the stealthy adoption of gender identity theory by our criminal justice institutions. Likewise, Policy Exchange is to be commended for publishing it. As a politician of the left, a Remainer and a Scottish independence supporter, I don't normally look to Policy Exchange to shape my views on policy development, but I am very grateful to them for publishing this paper. With the notable exception of the Observer newspaper, it has fallen to newspapers and journals of the right, with their commitment to free speech, to give left-wing feminists like me a platform to discuss legitimate concerns.

When politicians from the left and right such as Annaliese Dodds, Nicola Sturgeon and Ruth Davidson refuse to define what a woman is for fear of being branded 'transphobic', it is depressingly difficult to have an informed debate about the implications of the wholesale and often unquestioning adoption of gender identity theory by our institutions, both public and private. Many politicians describe the debate as toxic and use that as an excuse to avoid addressing issues of the sort set out in this article. It is a quite shocking abdication of their responsibility as law makers. Even worse, some parliamentarians have abused their privilege to brand as bigots organisations such as Sex Matters, For Women Scotland and LGB Alliance set up by women and same sex attracted people to publicise these issues. To their shame, some politicians have even gone so far as to take steps to try to prevent these organisations from contributing to the public debate. Meanwhile across the public and private sectors, women and indeed some men have lost or been hounded from their jobs for daring to question the adoption of gender identity theory in their workplaces. Our universities have been particularly craven in their failure to defend academics such as Professor Kathleen Stock who have attempted to address these issues in a scholarly fashion. It is positively McCarthyite.

So, it is refreshing to read such a scholarly exploration of the approach to sex and gender in law and policy. While this paper focuses on England and Wales many of the problems which it identifies are replicated in Scotland and have been documented by the Edinburgh based independent policy collective Murray, Blackburn, Mackenzie (MBM).

O'Hara takes an in-depth look at the police, the Crown Prosecution Service, the judiciary, and the prison service. Her survey shows that *de facto* self-declaration of 'gender identity' has been introduced by all these

key criminal justice institutions and that their publications and policy documents frequently adopt the concepts and language of gender identity theory. She demonstrates that this has happened without any foundation in law and in the absence of democratic scrutiny or any established political consensus. Furthermore, the introduction and shaping of these policies has taken place solely by reference to one interest group, those who identify as transgender and their advocates, and without consideration of the interests of other affected groups, particularly women. This is what policy capture looks like.

The solution, O'Hara argues, is to end de facto self-declaration of 'gender identity' and bring practice into alignment with the law. This would involve recording criminal justice data based on sex, ending the practice of compelled speech, whereby women are effectively pressured to refer to the men who raped and assaulted them as "she", and making all prisons single sex. O'Hara concludes that the law requires a fairer balancing of the interests of women and trans-identifying males, and that this could be achieved within the constraints imposed by the Gender Recognition Act with some amendments.

As Scotland teeters on the edge of introducing self-identification of sex into law, this paper could not be timelier. Many of the problems it identifies for data collection and the safety and dignity of women within our criminal justice system have been enshrined in policy north and south of the border, and, in Scotland, now risk being enshrined in law without a proper debate about the presumably unintended consequences for women and girls. This paper is a very significant contribution to a debate that urgently needs to take place respectfully and with full intellectual vigour.



## Executive Summary

This publication addresses the impact of policies and practices within the criminal justice system in England and Wales which classify and treat suspects, defendants in criminal trials, and convicted offenders on the basis of their 'gender identity' rather than their biological sex. It focusses particularly on the treatment by criminal justice institutions of biologically male suspects, defendants and offenders who are alleged to have committed, or have been found guilty of committing, sexual or violent offences, and who identify as transgender.

The Gender Recognition Act 2004 makes provisions enabling individuals to obtain a Gender Recognition Certificate (GRC) which changes their gender in law provided that they meet certain criteria specified in the Act. Self-declaration of 'gender identity' has not been incorporated into law in England and Wales, and the proposal that it should be was explicitly rejected by the government in 2020. Nevertheless, in recent years self-declaration of 'gender identity' has been adopted as policy by all of the key criminal justice institutions, despite the fact that this is not aligned with the law. These institutions now all effectively subscribe to the ideological belief that individuals' subjective sense of 'gender identity' should take precedence over their biological sex. The adoption by criminal justice institutions of this belief appears to have come about largely as the result of policy capture, as it is a widely contested belief and has been adopted without public scrutiny.

In recent years many police forces have recorded suspected and convicted offenders who identify as transgender on the basis of their self-declared 'gender identity' rather than their biological sex. Recently announced Home Office plans suggest that the recording of self-declared 'gender identity' may be brought to an end, but that the sex of trans-identifying male suspects and offenders will be recorded as female if they have a GRC, and that their biological sex will not be recorded. The Crown Prosecution Service has a national policy of recording suspects on the basis of their 'gender identity' and referring to them using their preferred pronouns in court. Guidance for judges on the treatment of witnesses at court generally adopts the same approach. The Prison Service houses biologically male offenders in the women's prison estate, including some who have committed sexual offences against women. These offenders include some who are legally male but have declared themselves to be women; as well as those who are biologically male but have a GRC.

The National Police Chiefs' Council have recently introduced a policy which allows trans-identifying police officers to carry out intimate searches

of detainees of the opposite sex on the basis of the officer's self-declared 'lived gender identity'; and the Ministry of Justice are considering a similar policy in relation to trans-identifying prison officers who hold a Gender Recognition Certificate.

Criminal justice policy which treats suspects, defendants and offenders on the basis of their 'gender identity' rather than their sex, and the adoption of practices which prioritise the 'gender identity' of police and prison officers over their sex, can have particularly detrimental effects on the fair operation of the criminal justice system for those reporting alleged offences to the police, those who give evidence as complainants at criminal trials, those who are detained by the police, and women who are imprisoned with biologically male trans-identifying offenders. Current criminal justice policy prioritise the wishes and feelings of those who identify as transgender over the rights of others, and particularly over the sex-based rights of women, such as rights to single-sex facilities. This publication examines the detrimental effects of this approach and makes recommendations about the development of policies which are based on acknowledgment of the significance of biological sex in the field of criminal justice.

# PART I: An overview of the approach to sex and gender in law and policy

## Introduction

The approach that criminal justice institutions take to defining sex and gender is crucially important to the maintenance of a fair and effective criminal justice system because, as Jo Phoenix, a Professor of Criminology, has noted,

“Sex is the single strongest predictor of criminality and criminalisation. Since criminal statistics were first collected (in the mid 1850’s) males make up around 80% of those arrested, prosecuted and convicted of crime. Violent crime is mostly committed by males... This remains the case regardless of stated gender identity.”<sup>1</sup>

1. Jo Phoenix, ‘What Do we Stand For? Criminology, Politically Induced Ignorance and Gender Identity Politics’, (*Sex Matters in Criminal Justice*, 1 January 2022) <https://jop-phoenix.substack.com/p/what-do-we-stand-for?s=r>
2. Ministry of Justice, *Statistics on Women and the Criminal Justice System 2019*, A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991, 26 November 2020 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/938360/statistics-on-women-and-the-criminal-justice-system-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938360/statistics-on-women-and-the-criminal-justice-system-2019.pdf)
3. Sherrelle Parke and Kairika Karsna, *Measuring the scale and changing nature of child sexual abuse Analysis of 2017/18 official and agency data*, Centre of Expertise on Child Sexual Abuse, July 2019 <https://www.csacentre.org.uk/csa-centre-prodv2/assets/File/Scale%20and%20nature%20update%202019.pdf>
4. Office for National Statistics, *Homicide in England and Wales: year ending March 2020*, *Analyses of information held within the Home Office Homicide Index, which contains detailed record-level information about each homicide recorded by police in England and Wales* 25 February 2021 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/homicideinenglandandwales/yearendingmarch2020>
5. Office for National Statistics, *Sexual offences victim characteristics, England and Wales: year ending March 2020* *Characteristics of victims of sexual offences based on findings from the Crime Survey for England and Wales and police recorded crime* 18 March 2021 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesvictimcharacteristicsenglandandwales/march2020#sex>
6. Kairika Karsna and Professor Liz Kelly, *The scale and nature of child sexual abuse: Review of evidence*, Centre of Expertise on Child Sexual Abuse, June 2021 <https://www.csacentre.org.uk/documents/scale-nature-review-evidence-0621/>
7. [2021] EWHC 1746 (Admin) [12]-[14] Lord Justice Holroyde noted that the Ministry of Justice data provided to the court about transgender prisoners lacked clarity.

This overrepresentation of males in offending behaviour is particularly pronounced in relation to sexual offending and offences involving violence. Ministry of Justice figures published in 2020 show that 98% of those prosecuted for sexual offences in 2019 were male.<sup>2</sup> Research indicates that this pattern holds for sexual offences against both adults and children. For example, an analysis of Ministry of Justice data which was published in 2019 found that 98% of those convicted for sexual offences against children in 2017 were males.<sup>3</sup>

A significant majority of those prosecuted for non-sexual forms of violence against the person are also men. Data published by the Office for National Statistics in 2021 for the three-year period ending in March 2020 showed that 93% of those convicted of homicide were male.<sup>4</sup>

The majority of those who are sexually assaulted are female. For the year ending March 2020, the Crime Survey for England and Wales estimated that 618,000 women and 155,000 men aged 16 to 74 years experienced sexual assault (including attempts) in the previous year. This is a prevalence rate of approximately 3 in 100 women and 1 in 100 men.<sup>5</sup> In a research report published in 2021, Kairika Karsna and Professor Liz Kelly estimated that 15% of girls and 5% of boys experience some form of sexual abuse before the age of 16.<sup>6</sup>

The evidence suggests that biological males who identify as transgender often retain male patterns of criminality. Information about the prison population, for example, indicates that the proportion of trans-identifying males who have been convicted of sexual offences is higher than the proportion of convicted sex offenders in the general male prison population. Figures presented by the Ministry of Justice in the case of *R (on the application of FDJ v Secretary of State for Justice* <sup>7</sup> (FDJ) suggested that data collected across the prison estate in March/April 2019 indicated that 49.69% of trans-identifying prisoners had convictions for sexual offences;

and that data for 2020 indicated that fewer than 20% of male prisoners in the general prison population, and 5% of the female prison population were serving sentences for sexual offences. On 14 January 2022, in a reply to a written question from Tim Loughton MP, Justice Minister Victoria Atkins stated that the latest data, collected on 31 March 2021, showed that there were 146 prisoners who were legally male and identified as female in all prisons across England and Wales. This figure did not include prisoners who identify as transgender who have a GRC. Taking into account only the offences which had led to an individual's current imprisonment, and not previous offences, she stated that 87 of these prisoners who were housed in the men's estate had a conviction for at least one sexual offence. The Minister also stated that the number of trans-identifying prisoners held in the women's prison estate with a conviction for at least one sexual offence was fewer than 5, and that this included prisoners with a GRC. She did not say how many trans-identifying males in total were held in the women's estate.<sup>8</sup> These latest figures suggest that the proportion of trans-identifying males in the prison estate who have been convicted of sexual offences is in the region of 60 per cent. The exact percentage would depend on how many prisoners the 'fewer than 5' in the female prison estate represented.

There are a range of possible explanation for the high proportion of trans-identifying male offenders who have committed sexual offences. These figures do not necessarily indicate that males who identify as transgender are more likely to commit sexual offences than other males, but they clearly indicate that many trans-identifying males retain patterns of criminality which are much more typical of men than of women.

It is impossible to understand the nature of sexual and violent crime without understanding the ways in which it is shaped by the wider context of social relationships between the sexes. Accurate information about the sex of suspects and offenders is crucial to the development of law and policy aimed at reducing and seeking to prevent sexual and violent crime at a societal level, and to the identification, investigation and prosecution of sexual and violent crime at the individual level. The acknowledgement of the significance of biological sex is also crucial to the safety, dignity and privacy of female prisoners and detainees.

Part I of this publication examines the ways in which current law defines sex, and its approach to enabling individuals to change their gender in law.

Part II examines the policies and practices of four key criminal justice institutions, namely the police, the Crown Prosecution Service, the courts, and the Prison Service, as they relate to sex and 'gender identity'; and discusses their practical consequences.

8. Prisoners: Gender Recognition, Question for Ministry of Justice, UIN 98878, tabled on 6 January 2022 <https://questions-statements.parliament.uk/written-questions/detail/2022-01-06/98878>

## Sex and gender in law

The Gender Recognition Act 2004 makes it possible for individuals to apply to change their gender in law. Such an application must be supported by a diagnosis of gender dysphoria,<sup>9</sup> with a report from a registered medical practitioner or psychologist practising in the field of gender dysphoria, and an additional report from a medical practitioner who may or may not practice in that field. It also requires the applicant to have lived as the other 'gender' for a minimum of two years. The application must be accepted by a Gender Recognition Panel, which is made up of members who have legal and medical qualifications.

The Gender Recognition Act uses the terms 'sex' and 'gender' interchangeably and does not define either term. The difference between the two was succinctly expressed by a group of doctors writing to *The Lancet* in 2018, who stated: "Sex has a biological basis, whereas gender is fundamentally a social expression."<sup>10</sup>

A similar distinction is made in the UN Women's Gender Equality Glossary, which defines sex as "the physical and biological characteristics that distinguish males from females."<sup>11</sup>

It defines gender as the:

*"... roles, behaviors, activities, and attributes that a given society at a given time considers appropriate for men and women... These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities."*

These definitions recognise that sex has a biological basis while gender is socially constructed. The Gender Equality Glossary suggests that it is generally constructed in ways which help to maintain and reinforce social and economic inequalities between women and men.

However, the concept of 'gender identity' frames gender as an individual, subjective identity based on an idea. Some of those who subscribe to this concept believe that 'gender identity' should take precedence over biological sex as a social and legal category. Some believe that there is a spectrum of gender identities.

The Yogyakarta Principles<sup>12</sup> define 'gender identity' as follows:

9. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5) defines gender dysphoria in adolescents and adults as 'a marked incongruence between one's experienced/expressed gender and their assigned gender, lasting at least 6 months'. In order to meet the criteria for the diagnosis, the condition must also be associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning. <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>
10. Richard Byng, Susan Bewley, Damian Clifford, Margaret McCartney, 'Gender-questioning children deserve better science' (2018) *The Lancet*, 392, Issue 10163, 2435 <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2818%2932223-2/fulltext>
11. UN Women Training Centre eLearning Campus, 'Gender Equality Glossary' <https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=letter&hook=G&sort-key=&sortorder=>
12. The Yogyakarta Principles, 'Principles on the application of international human rights law in relation to sexual orientation and gender identity' were launched in 2007. [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf)

“Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”

The Yogyakarta Principles were developed by a voluntary self-selected group consisting mostly of lawyers. They have no formal status in law but are often presented by lobbyists as international best practice.

The phrase ‘sex assigned at birth’ is used to imply that the categorisation of a baby’s biological sex at birth is an arbitrary label given by medical professionals or others, as is the more recent phrase ‘gender assigned at birth’. The latter phrase is now widely used in the policy documents of criminal justice institutions in England and Wales.

The organisation amaze, an organisation based in the United States which produces online sex education for young people, explains the use of the word ‘assigned’ as follows:

“Sex assigned at birth” refers to the label a medical professional gives to a baby when it is born. A medical professional may say a baby is male, female or intersex, depending on what the medical professional observes about the baby’s body. For example, a baby with a vulva will be labeled a girl, and a baby with a penis will be labeled a boy. . . Sex assigned at birth is about how someone else sees our bodies and does not take into consideration how we feel inside.

Gender identity is all about how we feel inside about our gender. It is an internal feeling or sense a person has of being male, female, somewhere in between or something else altogether. Sometimes people’s gender identity matches their bodies, and sometimes it does not.”<sup>13</sup>

However, the group of doctors cited above state,

“...sex is not assigned – chromosomal sex is determined at conception and immutable. A newborn’s phenotypic sex, established in utero, merely becomes apparent after birth, with intersex being a rare exception.”<sup>14</sup>

Thus, while it is possible for people to adopt styles of dress which are customarily worn by the other sex within a particular culture, and to undergo medical procedures which may make them look more like people of the other sex, it is not possible to actually change sex.

This is the position at common law. It was established in the case of *Corbett v Corbett*, which held that biological sex is immutable. In *Corbett*, Mr Justice Ormrod stated,

“It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent’s operation, therefore, cannot affect her true sex. The only cases where the term ‘change of sex’ is appropriate

13. amaze, ‘Sex Assigned at Birth and Gender Identity: What Is The Difference?’ <https://amaze.org/video/gender-identity-sex-at-birth/>

14. Byng et al, *Op. cit* (10)

are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.”<sup>15</sup>

This was reiterated in the Employment Appeal Tribunal in the case of *Forstater v CGD Europe and Others*, in which Mr Justice Choudhury stated,

“...the Claimant’s belief that sex is immutable and binary is, as the Tribunal itself correctly concluded, consistent with the law. The leading case is still *Corbett v Corbett*. . . the position under the common law as to the immutability of sex remains the same, and it would be a matter for Parliament . . . to declare otherwise.”<sup>16</sup>

The Gender Recognition Act implicitly recognises that a GRC does not change a person’s sex. Section 9 (1) of the Act states that where a full GRC is issued to a person, that person’s gender becomes for all purposes the acquired gender. However, section 9 (3) goes on to state that this is subject to other provisions made in the Act itself or made in other legislation. One such provision within the Act is section 16, which states that the granting of a GRC does not affect the descent of any peerage or dignity or title of honour. In effect this means that a biological woman who identifies as a man and obtains a GRC cannot inherit a peerage or title which would normally be inherited by a male.

The Equality Act 2010 also effectively recognises that a GRC does not change an individual’s sex in that it distinguishes between the protected characteristics of sex and gender reassignment.<sup>17</sup> Schedule 2 of the Equality Act makes provisions for exceptions for single-sex accommodation and provisions of services. These exceptions allow for female single-sex spaces and services which exclude biological males who identify as transgender, including those who hold a GRC, if this pursues a legitimate aim and does so in a proportionate way.

The GRA has essentially created a legal fiction.

The GRA came about in large part as a result of the European Court of Human Rights’ decision in the case of *Goodwin v UK*<sup>18</sup> which specifically focussed on the status of post-operative transsexuals, that is, those who have undergone surgery to change their bodies so as to make them resemble the other sex more closely. The Court found that the UK was in breach of the applicant’s right to respect for private and family life under Article 8 of the European Convention on Human Rights, and of the right to marry under Article 12, because it did not have a mechanism whereby post-operative transsexuals could change their gender in law. The applicant, who was biologically male, wished to marry a man. Neither same sex marriage nor civil partnership existed in law at the time. The Court acknowledged that introducing a mechanism for legally changing gender would cause difficulties and have important repercussions in areas such as “access to records, family law, and criminal justice” (amongst others), but stated that these difficulties would be “manageable and acceptable if confined to the case of fully achieved or post-operative transsexuals.”<sup>19</sup>

The GRA does not require any specific bodily changes, and therefore applies to a wider group than post-operative transsexuals. The proportion

15. *Corbett v Corbett (otherwise Ashley)* (no. 1) [1971] P.83 [104]

16. *Forstater v CGD Europe and Others* UKEAT/0105/20/JOJ [114]-[115]. The Employment Appeal Tribunal in *Forstater* found that ‘gender-critical belief’, the core of which is that biological sex is immutable, and ‘gender identity belief’, which is the belief that everyone has a gender identity which may be different to their sex at birth and which effectively trumps sex, are both protected beliefs under the Equality Act 2010, as is a lack of ‘gender identity belief’.

17. Section 7(1) Equality Act 2010 states that a person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex.

18. [2002] ECHR 588

19. *Ibid* [91]



of the population who now identify as transgender, or trans, are a larger group than those who see themselves as transsexual.

The lobbying organisation Stonewall's glossary describes the term 'transsexual' as one that "...was used in the past as a more medical term (similarly to homosexual) to refer to someone whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. This term is still used by some although many people prefer the term trans or transgender."<sup>20</sup>

Stonewall includes cross-dressers within its definition of the term 'trans', which it defines as follows:

*"An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. Trans people may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, transsexual, gender-queer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois."*<sup>21</sup>

This open-ended definition means that any change in gender recognition law, especially if it takes the form of self-declaration without any assessment process or prerequisites, will have much wider social repercussions than the GRA has had in its current form.

In 2016 the House of Commons Women and Equalities Committee's Report on 'Transgender Equality' recommended that the GRA be reformed to remove all of the current assessment processes and enable people to change their legal gender by a process of self-declaration.<sup>22</sup> This would involve completing a statutory declaration, which is a written statement signed in the presence of a solicitor or public notary.

The Committee raised the possibility that the UK government should adopt the overarching principles on 'trans equality' embodied in two international declarations, one of which was the Yogyakarta Principles. As stated above, this document has no status in law.

In 2017 the Yogyakarta Principles plus 10, a supplemental set of principles, were published. Principle 31(A) of the 2017 document calls on states to "...end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality."<sup>23</sup>

In other words, the ultimate aim of the Yogyakarta Principles is the complete elimination of all sex and gender markers from the law. Self-declaration of 'gender identity' is seen as a stage on the route to this aim. The Yogyakarta Principles state that, while sex or gender continue to be registered, states should ensure that no eligibility criteria are used as a prerequisite to changing legal sex or gender. They specifically state that there should be no prerequisites based on age or mental capacity, and that a person's criminal record should not be used to prevent a change of legal sex or gender.

The Women and Equalities Committee's recommendations, if

20. Stonewall, 'List of LGBTQ+ terms' <https://www.stonewall.org.uk/help-advice/faqs-and-glossary/list-lgbtq-terms>

21. *Ibid*

22. House of Commons Women and Equalities Committee, 'Transgender Equality First Report of Session 2015-16 Report, together with formal minutes relating to the report, Ordered by the House of Commons to be printed 8 December 2015; HC390, 14 January 2016 <https://publications.parliament.uk/pa/cm/cm201516/cmselect/cmwom-eq/390/390.pdf>

23. 'Yogyakarta Principles plus 10 Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles', 2017 <https://yogyakartaprinciples.org/principles-en/yp10/>

implemented, would have put many of the Yogyakarta Principles into effect. The Committee even went some way to recommending an approach which would remove all sex and gender markers in law, in proposing that the government should adopt a general “non-gendering” approach to the official recording of information about individuals.<sup>24 25 26</sup>

Proposals to amend the Gender Recognition Act to incorporate self-declaration were the subject of a public consultation between July and October 2018. In September 2020 in a Written Ministerial Statement to the House of Commons, the Minister for Women and Equalities stated that the Gender Recognition Act would not be amended and expressed the view that “the balance struck in this legislation is correct, in that there are proper checks and balances in the system and also support for people who want to change their legal sex.”<sup>27</sup>

However, despite the government’s decision to reject the proposals for incorporating self-declaration of ‘gender identity’ into law, criminal justice institutions apply self-declaration in practice. The “checks and balances” to which the Minister referred have been significantly eroded by these *de-facto* forms of self-declaration.

24. House of Commons Women and Equalities Committee, *Op. cit* (22), para 299

25. In the case of *R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent)* [2021] UKSC 56 the Supreme Court rejected the claim that the UK was in breach of the applicant’s rights under Article 8 of the European Convention in not allowing passports to be issued which do not record the passport holder as either male or female.

26. In December 2021 a differently constituted Women and Equalities Committee called for the government to remove the requirement for a diagnosis of gender dysphoria from the Gender Recognition Act by 2023. They proposed a form of self-declaration involving ‘appropriate safeguards’ and ‘robust guidance’. They suggested that male prisoners with a record of sexual assault or domestic violence, who self-identify as a woman, should not be transferred to a woman’s prison. House of Commons Women and Equalities Committee *Reform of the Gender Recognition Act Third Report of Session 2021–22 Report, together with formal minutes relating to the report*, 15 December 2021, 33 <https://committees.parliament.uk/publications/8329/documents/84728/default/>

27. Written Ministerial Statement: Response to Gender Recognition Act (2004) consultation

The Minister for Women and Equalities, ‘Written Ministerial Statement to the House, on the Government’s response to the consultation on the Gender Recognition Act 2004’, 22 September 2020 <https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation>

## PART II: The policies and practices of four key criminal justice institutions

## Police Policy

### Recording of suspects' and offenders' 'gender identity'

In England and Wales there are forty-three regional police forces of varying size, which are known as territorial police forces. There are thirty-nine in England and four in Wales. There are also some specialist national forces and other local forces. Governance arrangements for UK police forces are built on the principal of operational independence. Forces operate under the “direction and control”<sup>28</sup> of their chief officers, who are independently responsible for all operational matters concerning their force. There is therefore considerable variation in operational policing between forces.

At the time of writing, police policy relating to the recording of suspects' and offenders' sex appears to be in a state of flux.

In 2021 a petition to Parliament called on the government to introduce law requiring all criminal justice institutions to record the biological sex of all individuals investigated, charged, convicted or imprisoned for sexual offences. On 14 October 2021 the government stated in response that it did not plan to require biological sex to be recorded across the criminal justice system in this way. It also stated that Home Office officials were working with the police to promote a standardised approach to recording “basic demographic characteristics of victims and suspects of crime” but went on to state that there were no plans for the police or Her Majesty's Prison and Probation Service (HMPPS) to record the biological sex of prisoners.<sup>29</sup> It therefore appeared unclear what “basic demographic characteristics” meant.

However, in April 2022 the Home Office responded to a Freedom of Information request stating that it would be asking police forces to record both suspects and victims of crime on the basis of their sex as recorded on their birth certificate or GRC where they have one, and to record their 'gender identity' separately if this differs from their legal sex. The Home Office stated that this new approach to data standards was being introduced from April 2022 on a voluntary basis.<sup>30</sup>

As the new approach is currently voluntary and implementing it will require the development of national standards, it is likely that it will take considerable time before it becomes standard practice in all police forces in England and Wales, if indeed this happens. If it does happen it may partially solve some of the current problems with police data recording, but will give rise to others. This is discussed in more detail below.

This section focusses on current police guidance about the treatment of trans-identifying suspects and detainees and examines the findings of

---

28. The Policing Protocol Order 2011, para 21.

This is a statutory instrument issued under the powers conferred by section 79(1) and (5) of the Police Reform and Social Responsibility Act 2011(a). <https://www.gov.uk/government/publications/policing-protocol-order-2011-statutory-instrument>

29. Petitions UK Government and Parliament, 'Require sex of VATP & sexual offenders be recorded throughout justice system' <https://petition.parliament.uk/petitions/590123>

30. FOI request made by T. Stock to the Home Office, Response 68559, April 2022 <https://img.theepochtimes.com/assets/uploads/2022/04/07/FOI-68559-Terence-Stock.pdf>

research based on Freedom of Information requests about police practices in this area.

National guidance for police forces relating to the treatment of detainees who identify as transgender is contained in the *Police and Criminal Evidence Act 1984 Code of Practice C, Annex L*, (PACE Code guidance),<sup>31</sup> and the *College of Policing's Authorised Professional Practice on Detention and Custody* (APP).<sup>32 33</sup>

Both documents state that where there is doubt as to whether a person should be treated as being male or female, that person should be asked to indicate their preference and treated in accordance with that preference except where there are grounds to doubt that the expressed preference accurately reflects the person's predominant lifestyle. If a detainee asks to be treated as a woman but documents and other information make it clear that they live predominantly as a man, or vice versa, they should be treated in accordance with what appears to be their predominant lifestyle, and not their stated preference.

The PACE Code guidance states that the person's gender as established under this guidance must be recorded in the person's custody record.

In 2019 the non-governmental organisation Fair Play for Women submitted a series of Freedom of Information (FOI) requests to find out how police forces record the sex of suspects. They submitted requests to all the territorial forces and five national forces, which were the Transport Police, the Civil Nuclear Constabulary, the Ministry of Defence Police, the National Police Air Service and the Port of Dover Police. The FOI requests included a specific question about how the service recorded the sex of those suspected or convicted of rape. The offence of rape as defined in section 1 of the Sexual Offences Act 2003 involves penile penetration without consent. It is therefore an offence which can only be committed by a biological male, although women can be charged as accomplices to rape.

The individual questions in the FOI requests were answered fully by only fourteen forces. Overall, sixteen forces stated that they recorded the sex of suspects and offenders based on self-identified gender. One of these sixteen forces made an exception to this where a suspect was charged with rape, in which case they would record the suspect as male. Eight forces confirmed in answer to the specific question relating to the offence of rape that they would record the sex of a rape suspect who identifies as transgender as female. Asked whether there would also make a separate record of the fact that the suspect identified as transgender, most forces said there would not do so unless the suspect was thought to be a victim of a 'hate crime' as a result of that status.<sup>34</sup>

In 2021 the non-governmental organisation Keep Prisons Single Sex submitted Freedom of Information requests to all police forces in England and Wales asking how they record suspects' sex in crime and incident reporting. Of the twenty-four police forces who replied, fifteen said that they recorded suspects' 'gender identity'. Thirteen of the fifteen stated that they did so on the basis of the suspect's self-declaration. Only two police forces stated that they recorded the suspects' sex registered at birth.

31. Home Office, *Police and Criminal Evidence Act 1984 PACE Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers*, August 2019 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/903473/pace-code-c-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903473/pace-code-c-2019.pdf)
32. College of Policing *Authorised Professional Practice, Detention and Custody Equality and individual needs* First published: 23 October 2013 Last modified: 18 January 2022 <https://www.app.college.police.uk/app-content/detention-and-custody-2/detainee-care/equality-and-individual-needs/>
33. The PACE Codes are delegated legislation. Authorised Professional Practice (APP) is guidance authorised by the College of Policing. Police forces are generally expected to follow it but may deviate from it provided there is a clear rationale for doing so.
34. Fair Play for Women, 'UK police record male rapists as female under self-ID policy', 19 January 2021 [https://fairplayforwomen.com/police\\_record\\_males\\_as\\_female/](https://fairplayforwomen.com/police_record_males_as_female/)

These FOI requests asked how police forces would record the sex of suspects who identify as ‘non-binary’. Four out of the ten forces who answered this question stated that they would record the suspect’s sex as ‘indeterminate’ or ‘unspecified’, or would leave this part of the record blank.<sup>35</sup> There is no category of ‘non-binary’ in English law, and the Supreme Court has rejected the claim that not allowing passports to be issued which do not record the passport holder as either male or female is a breach of the Article 8 rights of those who identify as ‘non-binary’.<sup>36</sup> Yet some police forces are recording suspects as being neither male nor female.

The police forces who responded to these two surveys appeared to make no distinction between those who self-declared a ‘gender identity’ which differed from their sex and those who held a GRC. In either case the practice of recording suspects and offenders who are biologically male as women is concerning both because it leads to inaccurate police data, and because of its potential impact on the conduct of investigations and the questioning of those who report alleged offences. What seems to be a developing practice of recording some suspects as neither male nor female raises similar concerns.

The data recorded by individual police forces affects data recording within the criminal justice system more widely, as it is transferred to other data management systems. Misleading data created by police forces is particularly concerning in relation to the recording of data about offences which are predominantly committed by biological males, such as sexual and violent offences.

The UK is a signatory to the United Nations Declaration on the Elimination of Violence Against Women (1993). Article 4(k) of this Declaration places an obligation on states to “promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public.”

Accurate data about offending behaviour is crucial to the development of law and policy aimed at preventing or reducing offending and responding appropriately to it. Inaccurate data about patterns of sexual and violent offending creates a significant impediment to the development of effective law and policy aimed at the elimination of violence against women and girls. It may also hinder accurate recording of the patterns of violence directed against people who identify as transgender.

Alice Sullivan, a Professor of Sociology and data specialist, stated in her submission to the Scottish Parliament’s Citizen Participation and Public Petitions Committee in 2021,

*“Quantitative social scientists, including criminologists, have made clear that accurate data on sex remains fundamentally important. The quantitative social*

---

35. Keep Prisons Single Sex, ‘How Police Forces in England & Wales Record Suspects’ Sex in Crime & Incident Reporting’, April 2022, <https://kpssinfo.org/wp-content/uploads/2022/04/POLICE-FOIAS-REPORT-FINAL-2022.04.08.pdf>

36. *R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent)*, Op. cit (25)

science community have made this case in an open letter to the census authorities, signed by 80 UK quantitative social scientists, and in a submission to Roger Halliday's consultation on draft guidance issued on the collection of data on sex and gender in Scotland, signed by 91 UK quantitative social scientists. The signatories to these letters include some of the most eminent scholars in their fields, including leaders of major studies... While sex is an important predictor of outcomes across the board, crime represents a particularly extreme example. The overwhelming majority of individuals convicted of violent crime are male, and females represent a tiny minority of those convicted of sexual assault of any kind."<sup>37</sup>

Professor Sullivan also refuted the argument that, since the number of people who identify as other than their biological sex is small, any data error generated by recording 'gender identity' rather than sex for this group will also be small. She noted that small numbers of misallocated cases can have a large effect on research findings in any sub-group analysis where one sex is dominant, and suggested that crime statistics generally, and sexual crime statistics in particular, provide a clear example of this.

Recording suspects' 'gender identity' rather than recording their biological sex will also shape the conduct of investigations and the questioning of those who report alleged offences. Individuals who have had sexual or violent offences committed against them are likely to have been traumatised by their experiences and may find the process of being questioned about their allegations extremely distressing. Someone who is questioned by the police about an allegation of rape, for example, is likely to be very distressed and possibly disorientated if police officers refer to the suspect as a woman. Where they do so, this may create considerable pressure on the person making the report to do the same. This is likely to be detrimental to that person's ability to give a clear and accurate account of any assault committed against her or him. Children or adults with learning disabilities who report a sexual or violent assault committed by a male are likely to be particularly distressed and disorientated if a police officer who questions them refers to that male as a woman.

Similar problems arise in relation to the practices of the Crown Prosecution Service, and to the approach taken to the self-declaration of 'gender identity' by defendants and witnesses at criminal trials, which are discussed below.

The new approach recently announced by the Home Office in relation to data recording by the police which is outlined above will ameliorate these problems to some extent in that it will remove recording by self-declared 'gender identity'. However, it will not solve them entirely, and in some respects it will create new problems.

If the new approach becomes standardised at a national level, police forces will be required to record trans-identifying male suspects and offenders who have a GRC as women, and will lose the discretion they currently have to record their biological sex. Misleading data will therefore continue to be produced by police forces, and this data will be replicated in other criminal justice data. The practice of prioritising legal gender over

37. The Scottish Parliament, Citizen Participation and Public Petitions Committee, 'Professor Alice Sullivan submission of 27 August 2021 PE1876/H: Accurately record the sex of people charged or convicted of rape or attempted rape' [https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-citizen-participation-and-public-petitions-committee/correspondence/2021/pe1876\\_h-professor-alice-sullivan-submission-of-27-august-2021](https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-citizen-participation-and-public-petitions-committee/correspondence/2021/pe1876_h-professor-alice-sullivan-submission-of-27-august-2021)

biological sex is likely to become more entrenched in police practice if this approach to data recording becomes a requirement, and this is likely to influence the practices of other criminal justice institutions.

The only way to avoid the creation of misleading data is to record all suspects and offenders according to their biological sex. The possession of a GRC where an individual has one could then be recorded separately.



# Police searches of suspects and detainees

## Searching by trans-identifying police officers

There are four types of searches which may be carried out by police officers on those they detain, which are searches involving the removal of outer clothing only, more thorough searches, strip searches and intimate searches. They are explained in more detail in Annex 2. The provisions of the Police and Criminal Evidence Act 1984 (PACE) and its Codes of Practice state that any search involving the removal of more than an outer coat, jacket, gloves, headgear or footwear, or any other item concealing identity, may only be made by an officer of the same sex as the person searched, and may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it (sections 54-55 PACE, Code C paragraph 4.1, and Annex A paragraphs 5, 6, and 11 ).

In April 2022 policy from the National Police Chiefs' Council (NPCC) about the searching of detainees by trans-identifying police officers, which was introduced in December 2021, was revealed in a national newspaper.<sup>38</sup>This guidance relates to all forms of searches, including strip searches and intimate searches. It states,

*“Employers should treat people in accordance with their lived gender identity, whether or not they have a GRC, and should not ask Transgender colleagues if they have a GRC or new birth certificate. Accordingly, with regards to the issue of searching, Chief Officers are advised to recognise the status of Transgender colleagues from the moment they transition, considered to be, the point at which they present in the gender with which they identify... Thus, once a Transgender colleague has transitioned, they will search persons of the same gender as their own lived gender...”*<sup>39</sup>

United Nations rules about the treatment of women prisoners, known as the ‘Bangkok Rules’, apply to detainees at a police station. They state that,

*“Effective measures shall be taken to ensure that women prisoners’ dignity and respect are protected during personal searches, which shall only be carried out by women staff who have been properly trained in appropriate searching methods and in accordance with established procedures.”*<sup>40</sup>

However, the NPCC policy would allow female detainees to be searched by police officers who are biologically male on the basis of the officers’ self-declared ‘lived gender identity’. This would permit female detainees to be strip-searched or intimately searched by officers who are both biologically and legally male. This is an extraordinary example of senior police officers

38. Max Aitchison, ‘Women can be strip-searched by trans officers who were born male, say police’ (*Mail Online*, 10 April 2022) <https://www.dailymail.co.uk/news/article-10703327/Women-strip-searched-trans-officers-born-male-say-police.html>

39. National Police Chiefs’ Council, Chief Constables Council, Title: ‘Searching by Transgender Officers and Staff’, 09\_12\_21 Agenda Item, Appendix A. This policy does not appear to be in the public domain. I obtained it from a journalist.

40. United Nations Office on Drugs and Crime, *The Bangkok Rules United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary*, 2010, Rule 19 [https://www.unodc.org/documents/justice-and-prison-reform/Bangkok\\_Rules\\_ENG\\_22032015.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf)

deciding to go beyond the law in introducing *de facto* self-declaration of ‘gender identity’ for police officers. The policy document states that some forces’ policies already provide for this practice.<sup>41</sup>

The policy goes on to say,

“If the person being searched objects to being searched by any colleague, it may be advisable for them to be replaced by another team member to search that person. This is regularly done in practice, regardless of the reasons for objection, to de-escalate any potential conflict. . . If the refusal is based on discriminatory views, consideration should be given for the incident to be recorded as a non-crime hate incident unless the circumstances amount to a recordable crime.”<sup>42 43</sup>

There is no consideration in this policy of the potentially traumatic effects on a female detainee of being intimately searched by a male police officer. No mention is made of the rights to safety, privacy or dignity of the detainees involved. The only potential motivation for objecting to such a search to which the NPCC refer is the holding of ‘discriminatory views’. Whether the NPCC believe that the belief that sex cannot be changed, which is protected under the Equality Act,<sup>44</sup> is discriminatory is not clear.

The overall approach to confidentiality about trans-identifying officers’ biological sex within the document strongly suggests that detainees will not be informed if an officer proposing to carry out a strip-search or intimate search on them is of the opposite biological sex. The extent to which someone detained by the police could give valid consent to this kind of search is questionable under any circumstances, but free and informed consent could clearly not be given in circumstances where the detainee is not aware of the officer’s sex, or where the police can record the refusal of consent as a non-crime hate incident.

Where a person who is not authorised to carry out a search on a suspect under the provisions of PACE does so, this amounts to assault or battery in law.<sup>45</sup> Where the search is a strip search or intimate search, it can amount to a sexual assault. The NPCC guidance amounts to the police instituting a practice which would normally constitute sexual assault. Arguably, it could constitute inhuman or degrading treatment contrary to Article 3 of the European Convention on Human Rights, as well as a violation of detainees’ right to respect for their private life under Article 8.<sup>46</sup> This would be the case whether or not the police officer concerned has a GRC, as that is unlikely to make a difference to the way in which a female detainee would experience the search.

The NPCC policy was agreed in December 2021 but was not made public. It only came to light following research by Cathy Larkman, a retired police superintendent, who wrote to the College of Policing, the Police Federation and the NPCC in October 2021 seeking clarification of police policy in this area. She eventually received a copy of the policy in April 2022.<sup>47</sup>

This lack of transparency about the policy is concerning. The searching of those detained by the police is not simply a matter of internal police policy. It is an area of operational policing which involves the public

41. National Police Chiefs’ Council, *Op. cit* (39)  
The NPCC’s document states that police research indicates that as of December 2020 there were 11 forces permitting searching on the basis of ‘lived gender’, 7 forces requiring an individual to possess a GRC before being allowed to search in accordance with their ‘lived gender’, 1 force deciding on a case-by-case basis, 2 forces not permitting transgender employees to conduct strip searches, and 18 forces having no policy or draft policy.

42. *Ibid*

43. A ‘non-crime hate incident’ is an incident which is subjectively perceived by the victim, or any other person, as motivated wholly or partly by hostility or prejudice, but which does not amount to a criminal offence. They are recorded by the police. Police policy on such recording was challenged in the case of *R (on the application of Harry Miller) v The College of Policing* [2021] EWCA Civ 1926. The policy of recording such incidents regardless of whether there was evidence of hostility was found to constitute a breach of the right to freedom of expression under Article 10 of the European Convention.

44. See the note on the case of *Forstater v CGD* at footnote 16.

45. An assault is an act with causes another person to apprehend the infliction of immediate unlawful force on his or her person: a battery is the actual infliction of unlawful force on another person (*Collins v Wilcock* [1984] 3 All ER 374 QBD). Force includes any form of physical contact for which there is no consent or lawful excuse.

46. In the case of *Yunusova and Yunusova v Azerbaijan* (No.2) (Application no. 68817/14) 16 July 2020 the European Court of Human Rights found a violation of Article 8 in respect of the unjustified intrusion of a male police officer into a toilet which resulted in a female applicant being exposed to him in a state of undress. No physical contact was involved.

47. Max Aitchison, *Op. cit* (38)

and which the public have a right to know about. The document takes a highly partisan approach in relation to current debates about definitions of sex and 'gender identity'. It is rooted in gender identity theory and uses concepts and language which are widely contested. For example, it refers to people who do not identify as transgender as 'cis'. It is in the public interest not only to know about the content of this policy, but to know who contributed to its development.

The Ministry of Justice has recently been considering proposals for allowing trans-identifying prison officers who hold a GRC to carry out intimate searches of prisoners of the opposite biological sex. These proposals are discussed in more detail below in the section about the Prison Service.

### **The searching of trans-identifying detainees**

Police guidance on the searching of trans-identifying detainees mirrors the general policy relating to the recording of sex. Where a trans-identifying detainee has a GRC, their sex in law would be that of their acquired gender. However, guidance prevents police officers from asking detainees whether they have a GRC.

An intimate search may only be carried out by a registered medical practitioner or registered nurse, unless an officer of at least inspector rank considers this is not practicable and it is necessary in certain circumstances that it be carried out by a police officer. It is more common for police officers to carry out strip searches. In relation to strip searches, the APP guidance states that, where there is doubt about whether the person should be treated, or continue to be treated, as being male or female, officers should ask the person what gender they consider themselves to be and should treat the person according to their preference except where there are grounds to doubt that the stated preference accurately reflects the person's predominant lifestyle. This guidance mirrors the guidance in Annex L of PACE Code C, which deals with all forms of searches in broad terms.

The police approach to asking detainees whether they have a GRC seems to be due to an over-cautious interpretation of section 22 of the Gender Recognition Act, under which it is a criminal offence for a person who has acquired information in an official capacity about an individual's application for a GRC, or about an individual's gender before they obtained a GRC, to disclose that information to any other person. The information covered by section 22 is known as 'protected information'. However, section 22 (4)(f) of the Act states that disclosure of protected information will not constitute an offence if the disclosure is for the purpose of preventing or investigating crime. Where the biological sex of a suspect or detainee, or the question of whether they have a GRC, is relevant for these purposes, requesting or disclosing 'protected information' would not be an offence. When a decision needs to be made about whether a search of a detainee should be carried out by a male or a female officer, this information is clearly relevant.

The APP guidance states,

*“Once a decision has been made about which sex a trans detainee is to be treated as, the officer or staff member who will carry out the search should be advised of that decision, and the reasons supporting it, prior to carrying out the search. This is important in order to maintain the dignity of the officer or staff member concerned.”*<sup>48</sup>

However, this guidance says nothing about officers having a choice about whether or not they carry out strip searches of detainees who are not the same sex as themselves. Many officers may find carrying out such a search demeaning. For female police officers, being required to carry out a strip search of a biologically male prisoner may be experienced in a similar way to being sexually assaulted, particularly where that prisoner is a known or suspected sex offender, retains male genitalia, or is aroused by the search.

It is therefore arguable that in some circumstances requiring a female policer officer to strip search a biological male could amount to a violation of her right to private life under Article 8 of the European Convention. Where the trans-identifying detainee involved does not have a GRC and is therefore legally male, it is difficult to see what foundation there is in law for requiring female officers to carry out these searches. Where a trans-identifying male detainee does hold a GRC, a search by a male police officer could arguably give rise to a potential claim under Article 3 and/or Article 8 of the European Convention. This is an area in which there are clear potential conflicts between the rights of female officers to safety, privacy and dignity and the rights conferred on those holding a GRC to be treated according to their ‘acquired gender’.

As discussed below, the Prison Service requires prison officers to carry out intimate searches of trans-identifying prisoners who are not of the same sex in some circumstances. This raises similar issues for staff who are required to carry out such searches.

---

48. College of Policing Authorised Professional Practice, *Op. cit* (32) 3

# Crown Prosecution Service Policy

The police and the Crown Prosecution Service (CPS) are independent of each other but work closely together. The CPS prosecute cases following investigation by the police. They decide which cases should be prosecuted and determine the appropriate charges in more serious or complex cases, on which they also advise the police during the early stages of investigation.

In 2018 Karen White, a trans-identifying male, was convicted of two rapes and other sexual offences against women.<sup>49</sup> The prosecutor at White's trial was reported as referring to White in the following way,

*"Her penis was erect and sticking out of the top of her trousers."*<sup>50</sup>

The policy which gave rise to this use of language is contained in the CPS Trans Equality Statement, which states,

*"Prosecutors should address Trans victims, witnesses and defendants according to their affirmed gender and name, using that gender and related pronouns in all documentation and in the courtroom."*<sup>51</sup>

As illustrated by the case of Karen White, this guidance is applied even in relation to defendants charged with rape. This is an offence which can only be committed by a biological male, as discussed above.

White pleaded guilty to the offences, which meant that the women White sexually assaulted did not have to attend court to give evidence. If they had given evidence, they might, at that time,<sup>52</sup> have been faced with the possibility of being required to refer to White as 'she' by the judge, and certainly would have felt pressure to do so given that the judge and both the prosecution and defence lawyers were doing so.

The CPS policy of recording defendants' 'affirmed gender' rather than their sex is based on self-declaration of 'gender identity' and is not aligned with the law. Their Trans Equality Statement makes no distinction between defendants who have a GRC and those who do not. It includes identities which are not recognised in law in its definition of 'gender identity', which is as follows:

*"Gender identity is one of the most commonly used terms to acknowledge the gender spectrum. It includes those who identify as male and female and incorporates intersex, gender nonconforming or gender variance, for example those who might identify as nongender, non-binary or gender fluid as well as those within the gender reassignment definition in the Equality Act 2010."*<sup>53</sup>

49. Some of these offences were committed against women prisoners while White was held on remand in a women's prison. This is discussed in the section about the Prison Service below.

50. Martin Evans, Kate McCann and Olivia Rudgard, 'Transgender person accused of rape is remanded into female prison and sexually assaults inmates within days' (*Daily Telegraph*, 06 September 2018) <https://www.telegraph.co.uk/news/2018/09/06/transgender-person-accused-rape-remanded-female-prison-sexually/>

51. Crown Prosecution Service, *Trans Equality Statement*, July 2019, 1 <https://www.cps.gov.uk/sites/default/files/documents/publications/Trans-equality-statement-July-2019.pdf>

52. At the time of White's trial, guidance for judges was generally interpreted as meaning that all witnesses should refer to trans-identifying people using preferred pronouns in court. This approach was modified in December 2021. See the discussion about guidance for judges in the *Equal Treatment Bench Book* below.

53. Crown Prosecution Service, *Op. cit* (51) 2

Whether or not this definition is leading to the CPS recording some defendants as neither male nor female is not clear. However, it is clear that they are recording biologically male defendants and offenders who identify as transgender as women, whatever the nature of the offence involved.

For example, the offence of rape is increasingly being recorded as having been committed by women by both the police and the CPS. CPS data published by the Office for National Statistics (ONS) in 2018 showed that between 2012 and 2018 a total of 436 people who were prosecuted for rape were recorded as women. The proportion of rape defendants classified as women during this seven-year period varied between 1.2 per cent and 1.8 per cent each year.<sup>54</sup>

This practice is concerning both because of its potential impact on those who report alleged offences and give evidence at criminal trials, which is discussed in the section below about guidance for judges; and because it leads to inaccurate data recording.

---

54. Office for National Statistics, 'Sexual offending; Crown Prosecution Service appendix tables', 13 December 2018 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/sexualoffending-crownprosecutionserviceappendixtables>

## Guidance for judges

In 2017 Maria MacLachlan was waiting to attend a public meeting about the implications for women of the Women and Equalities Committee's proposals to introduce self-declaration of 'gender identity' (which are discussed above) when she was assaulted by a group of activists who were trying to prevent the meeting from taking place. One of her attackers, Tara Wolf, who self-defined as a 'trans woman', was convicted of assault by beating in April 2018. While MacLachlan was giving evidence at Wolf's trial in the Magistrates Court, the presiding District Judge instructed her to call Wolf "she" or "the defendant", as a matter of "courtesy". MacLachlan has said that she tried to do this, but that because she was nervous while giving her evidence, she kept reverting to calling Wolf "he". The judge is reported to have described this as "bad grace" on MacLachlan's part, and to have given this as one of the reasons for his decision not to award her financial compensation for the assault. MacLachlan has stated:

*"My experience of court was much worse than the assault... I was asked "as a matter of courtesy" to refer to my assailant as either "she" or the "defendant". I have never been able to think of any of my assailants as women because, at the time of the assault, they all looked and behaved very much like men and I had no idea any of them identified as women... I tried to refer to him as the "the defendant" but using a noun instead of a pronoun is an unnatural way to speak. It was while I was having to relive the assault and answer questions about it while watching it on video that I skipped back to using "he" and earned a rebuke from the judge. I responded that I thought of the defendant "who is male, as a male". The judge never explained why I was expected to be courteous to the person who had assaulted me or why I wasn't allowed to narrate what had happened from my own perspective, given that I was under oath."<sup>55</sup>*

The source of the judge's instructions about preferred pronouns was the version of the guidance on 'Trans People' in chapter 12 of the Equal Treatment Bench Book (the ETBB) which was in operation at the time. The ETBB is published by the Judicial College, who carry out training for the judiciary on behalf of the Lord Chief Justice. Its stated purpose is to guide judges in treating all participants in court proceedings fairly.

However, as the barrister Thomas Chacko has pointed out, the ETBB goes beyond its initial purpose, and attempts to provide a guide to the life of minorities in the UK. Chacko suggests that chapter 12,

55. Julie Moss, 'Interview: Maria MacLachlan on the GRA and the aftermath of her assault at Speakers' Corner', (*Feminist Current*, 21 June 2018) <https://www.feministcurrent.com/2018/06/21/interview-maria-maclachlan-gra-aftermath-assault-speakers-corner/>



“...goes well beyond advising judges how to help a trans litigant take full part in proceedings. Rather, it attempts to give an authoritative explanation of what transgenderism is and the problems trans people face in society. It does this in a partisan and didactic fashion. Major ideological claims, such as gender being “assigned at birth”, are used without warning judges that they are hotly contested.”<sup>56</sup>

The ETBB which was in use at the time of Maria MacLachlan’s trial stated,

“It is important to respect a person’s gender identity by using appropriate terms of address, names and pronouns. Everyone is entitled to respect for their gender identity, private life and personal dignity.”<sup>57</sup>

This was not elaborated on. Before December 2021, none of the versions of the ETBB which included this requirement, provided any guidance about how it should be implemented in practice in relation to witnesses other than those who identify as transgender, or about how judges should treat witnesses who perceive defendants in terms of their sex rather than their ‘gender identity’. The guidance was written as if the use of a defendant’s preferred pronouns is simply an emotionally neutral administrative matter which would have no detrimental effects on witnesses, or on the trial process. The ETBB included no guidance for judges about balancing the interests of those who identify as transgender with the interests of other participants in court proceedings and did not recognise that the interests of different participants might be in conflict.

Some judges interpreted the guidance as requiring them to compel all witnesses to use the preferred pronouns of defendants and other parties to proceedings who identify as transgender. This had particularly serious implications for witnesses who were giving evidence about traumatic events, such as being subjected to physical and sexual violence. Previous versions of the ETBB did not address the impact on these witnesses of being required to describe a defendant in criminal proceedings, or an alleged perpetrator of domestic abuse in family proceedings, in ways which amount to a denial of their own perceptions of reality.

In trials for sexual offences the majority of complainants are women and children, and the overwhelming majority of defendants are male. The logic of the earlier ETBB guidance was that a complainant in a rape trial could be required to call a trans-identifying defendant who had raped her ‘she’, despite the fact that the offence of rape can only be committed by a biological male. By extension, it could also have required her to use female possessive pronouns to refer to the defendant’s body parts, to which she would have to refer when giving her evidence. This could also have applied to child witnesses and vulnerable adult witnesses, who are likely to be particularly confused and distressed by an instruction from an authority figure like a judge to refer to a biological male as ‘she’. This type of compelled speech undermines access to justice, particularly for women and children. The right to accurately describe the sex of those who have assaulted them sexually or in other ways is crucially important to the ability of women and children, and men, to report violence and

56. Thomas Chacko, ‘Prejudging the transgender controversy? Why the Equal Treatment Bench Book needs urgent revision’, *Policy Exchange*, 6 July 2021 <https://policyexchange.org.uk/wp-content/uploads/Prejudging-the-transgender-controversy-pdf>

The ETTB in operation at the time of Tara Wolf’s trial was published in February 2018. The version in operation at the time of Thomas Chacko’s publication was published in February 2021. The ETBB was revised in December 2021. This current version retains much of the content which Chacko discusses.

57. Judicial College, *Equal Treatment Bench Book* (February 2018) 12-2 <https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf>

The interim revised edition of the ETBB published in December 2021 contains very similar wording in relation to the use of preferred pronouns, but explicitly recognises the right of some witnesses not to use them. This is discussed below.



give evidence against their abusers.

In December 2021 a new interim version of the ETBB was published. Its guidance in chapter 12 includes significant amendments which take account of some of the criticisms of earlier versions made by gender critical feminists and lawyers.

Criticisms of the previous ETBB guidance related to broadly four areas. These were compulsion in relation to the use of the preferred pronouns and modes of address of trans-identifying parties to court proceedings, particularly in relation to witnesses giving evidence about their experiences of sexual and physical violence;<sup>58</sup> the implementation of self-declaration of 'gender identity' in court proceedings;<sup>59</sup> the adoption of tenets of gender identity theory as if they were fact;<sup>60</sup> and the lack of transparency about who contributes to the ETBB's content.<sup>61</sup>

The revised ETBB recognises for the first time that witnesses have a right to refer to trans-identifying people using pronouns which align with their biological sex, at least in some circumstances. It also acknowledges that there may be circumstances where this is required by the interests of justice. The new ETBB states,

"There may be situations where the rights of a witness to refer to a trans person by pronouns matching their gender assigned at birth, or to otherwise reveal a person's trans status, clash with the trans person's right to privacy. It is important to identify such potential difficulties in advance, preferably at a case management stage, but otherwise at the outset of the hearing. A decision would then have to be made regarding how to proceed, bearing in mind factors such as:

... Why the witness is unwilling or unable to give evidence in a way which maintains the trans person's privacy. For example, a victim of domestic abuse or sexual violence at the hands of a trans person may understandably describe the alleged perpetrator and use pronouns consistent with their gender assigned at birth because that is in accordance with the victim's experience and perception of the events. Artificial steps such as requiring a victim to modify his/her language to disguise this risks interfering with his/her ability to give evidence of a traumatic event.

There will be occasions when, after these and other relevant factors have been considered, the interests of justice require that a witness or party may refer to the trans person using their former pronouns or name."<sup>62</sup>

This revision should mean that complainants giving evidence in trials for sexual offences, or other forms of violence, will not be required to call male defendants 'she'; and that women giving evidence in family proceedings about their experiences of domestic abuse will not be required to refer to their current or former male partners as though they were women. While it does not explicitly refer to other forms of physical violence, it seems likely that its provisions will be extended to any witness who is giving evidence about an experience of any form of assault.

The use of the language of rights in the amendment is significant.

58. Maureen O'Hara, 'Compelled speech: gas-lighting in the courtroom' (2019) *Coventry Law Journal* 24(1), 55-69

59. O'Hara, *Ibid*, Chacko, *Op.cit* (56)

60. Chacko, *Ibid*

61. Chacko, *Ibid*, Melanie Newman, 'Warning over transgender guidance to judges' (*Law Society Gazette*, 24 February 2020) <https://www.lawgazette.co.uk/news/warning-over-transgender-guidance-to-judges/5103196.article>

62. Judicial College, *Equal Treatment Bench Book*, February 2021 (December 2021 revision), ch 12, para 26 <https://www.judiciary.uk/wp-content/uploads/2021/12/Equal-Treatment-Bench-Book-December-2021-interim-update.pdf>

However, while this is an important step forward, many of the problems raised by the ETBB's general guidance about the use of preferred pronouns are not addressed in the new version. While the revised ETBB makes exceptions to the requirement to use preferred pronouns in relation to witnesses giving evidence about alleged assaults committed against them, it appears to retain this requirement for other witnesses and for lawyers in court proceedings. In practice witnesses' ability to exercise their right to use pronouns which align with the sex of trans-identifying parties to proceedings will be limited by the fact that the ETBB is likely to be interpreted to mean that the judge, the lawyers representing all parties in the proceedings, and perhaps other witnesses, should use preferred pronouns based on self-declared 'gender identity'. The ETBB does not discuss the implications for a witness of calling a trans-identifying male 'he' while everyone else who speaks in the court room calls that person 'she'. Where this happens it is likely to confuse and unnerve witnesses, who may feel pressurised to use the preferred pronouns themselves.

In criminal proceedings this problem is likely to be compounded in cases where witnesses have already experienced the local police force and the Crown Prosecution Service referring to trans-identifying defendants according to their 'gender identity' rather than their sex before the case reaches the trial stage.

The pre-trial process is not specifically addressed in the ETTB. However, the question of how any expectations of witnesses in relation to the use of language which signifies a person's sex are dealt with at the different stages of the criminal justice process needs to be addressed. Consistency in the approaches of the different criminal justice institutions to language use is important for all potential witnesses, but is particularly significant for child witnesses and some vulnerable adult witnesses.

In relation to child witnesses and certain vulnerable adult witnesses (such as those with learning disabilities) guidance in respect of pre-trial recorded interviews places considerable emphasis on examining the witnesses' understanding of the difference between truth and lies. In respect of recorded pre-trial interviews with children, this guidance states,

*"Toward the end of the rapport phase of an interview with a child witness, when ground rules have been explained to the child, the interviewer should advise the witness to give a truthful and accurate account of any incident they describe. There is no legal requirement to do this, but since the video may be used as evidence, it is helpful to the court to know that the child was made aware of the importance of telling the truth."*<sup>63</sup>

The importance of telling the truth will also be emphasised at court in those cases which proceed to trial. A child or vulnerable adult witness may experience considerable difficulty in reconciling this emphasis on truthfulness and accuracy with the experience of hearing police officers, lawyers and judges referring to a biologically male defendant as 'she'. It seems likely that witnesses who lack the sophistication to understand the concept of 'gender identity' may feel that they are simultaneously being

---

63. Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures*, March 2011, 72, para 3.18. <https://www.gov.uk/government/publications/achieving-best-evidence-in-criminal-proceedings>

told to tell the truth and to lie.

Many people who do understand the concept of ‘gender identity’ do not agree with it. It is the subject of considerable public debate. Some people see the use of pronouns which reflect a person’s ‘gender identity’ rather than their biological sex as an expression of a political belief with which they profoundly disagree, and which they consider to be harmful to the rights of women, or to society as a whole. Some see the use of pronouns based on ‘gender identity’ rather than sex as appropriate or acceptable in some circumstances, but not in others.

Despite its recent amendments, the ETBB is still effectively promoting the imposition of a form of compelled speech on many witnesses. Arguably this is an infringement of witnesses’ rights to freedom of thought, conscience and religion, and freedom of expression, under Articles 9 and 10 of the European Convention on Human Rights respectively. Both these Articles protect the right not to be obliged to manifest beliefs that one does not hold, as stated in the case of *Lee v Ashers Baking Co.*<sup>64</sup>

The revised edition of the ETBB seems to have been influenced to some extent by the Employment Appeal Tribunal judgment in *Forstater* in which it was held that gender critical beliefs are protected beliefs under the Equality Act 2010. It is somewhat more even-handed than previous editions in that it gives a brief explanation of gender-critical beliefs, notes that they are protected, and acknowledges for the first time that there is a debate in this area. However, the revised ETBB’s framing of the *Forstater* judgment arguably expresses implicit bias.

While it notes that gender critical beliefs are protected, the revised edition does not explicitly state that this is the result of the decision in *Forstater*, except in its Appendix on the Equality Act. Its only clear reference to the judgment in *Forstater* in chapter 12 relates to what the EAT said about ‘misgendering’.

At paragraph 78, the revised ETBB states,

“‘Gender-critical’ is a phrase which, broadly speaking, refers to a belief that sex is immutable and binary, and that people cannot transition. Very often it is linked to concerns that allowing the definition of women to include trans women would make the concept of ‘women’ meaningless and undermine protection for vulnerable women and girls. There is also often concern about what is seen as potential encroachment into ‘safe spaces’. Feelings can run very strongly on both sides of this debate. Clearly the ETBB takes no sides on this matter. The ETBB’s concern is simply that judges have some understanding of the perspectives of the variety of litigants and witnesses who appear before them. Gender-critical beliefs (as long as they do not propose for example to destroy the rights of trans people) are protected beliefs even if they might offend or upset trans people (and others). However, holding a belief is different from behaviour. As explained in the well-publicised *Forstater* case, ‘misgendering’ a trans person on a particular occasion, gratuitously or otherwise, can amount to unlawful harassment in arenas covered by the Equality Act 2010.”

64. *Lee v Ashers Baking Company* [2018] UKSC 49

The ETBB omits to note that the EAT reiterated that the position at common law as established in the case of *Corbett* is that sex is immutable, and that the Tribunal also stated that,

“...it is relevant to note, and it was not in dispute before us, that the Claimant’s belief is shared by many others.”<sup>65</sup>

*Forstater* is a landmark case in relation to the protection of gender critical beliefs which has significant implications for the treatment of witnesses who are gender critical or who do not share what the EAT in *Forstater* called “gender identity belief”. Given the significances of this case, a more neutral summary of the EAT’s judgment, and an exploration of its implications in relation to judicial attempts to require witnesses to use the preferred pronouns and modes of address of trans-identifying parties in court proceedings, might have been expected.

While the revised ETBB states that it ‘takes no sides’ in the debates about how sex and ‘gender identity’ should be categorised in law, its content and use of language remain firmly founded in gender identity theory. It continues to use language which is widely contested, such as ‘gender assigned at birth’. As discussed above, the word ‘assigned’ is used instead of ‘observed’ to imply that the categorisation of a baby’s biological sex at birth is an arbitrary label given by medical professionals or others. The ETBB’s overall approach remains imbued with gender identity theory, on which the implementation of self-declaration of ‘gender identity’ is based.

The earlier versions of the ETBB effectively introduced self-definition of ‘gender identity’ into the conduct of court proceedings, despite the fact that self-definition is not aligned with current law. The revised edition has not changed this approach. It makes no significant distinctions between people who identify as transgender who have obtained a GRC, and those who have not.

---

65. *Forstater*, Op. cit (16) [52] (Mr Justice Choudhury)

# Prison Service Policy

## Trans-identifying males in women's prisons

In September 2017 Karen White, a trans-identifying male formerly known as Stephen Wood and as David Thompson, was placed in New Hall women's prison while on remand on charges of grievous bodily harm, burglary, rape, and other sexual offences against women. White did not have a GRC and was placed in New Hall on the basis of self-declaration. White already had convictions for indecent assault and gross indecency with a young child, for which White had been imprisoned for eighteen months. While at New Hall, White sexually assaulted two female prisoners. In September 2018 White pleaded guilty to these assaults and to the other charges and is serving a life sentence.<sup>66</sup>

White is now held in a men's prison, and prison policy has been amended since White's conviction with the aim of improving the risk assessment process involved in decisions about whether trans-identifying males should be placed in the women's prison estate. However, current policy still enables trans-identifying males, including sex offenders, to be placed in women's prisons. These offenders include those with and without GRCs. This is despite the fact that Prison Rules state that women prisoners should normally be kept separate from male prisoners,<sup>67</sup> and the United Nations minimum rules for the treatment of prisoners state that men and women should be detained in separate institutions so far as possible, and that when an institution houses both sexes the whole of the premises allocated to women should be entirely separate.<sup>68 69</sup>

As discussed in the introduction, men commit the overwhelming majority of sexual offences and other offences involving violence. For example, Ministry of Justice figures published in 2020 show that 98% of those prosecuted for sexual offences in 2019 were male.<sup>70</sup> This pattern does not change in relation to biological males who identify as women. As discussed above, recent figures suggest that the proportion of trans-identifying males in the prison estate overall who have been convicted of sexual offences is approximately 60 per cent,<sup>71</sup> which is higher than the proportion of convicted sex offenders within the general male prison population.<sup>72</sup> The majority of those who are sexually assaulted are female.<sup>73</sup>

Trans-identifying males who are assessed as very high risk are currently housed in the male prison estate, including some who hold a GRC. They can be accommodated safely within the male estate, which separates other groups of prisoners within the male estate for their own safety. In a recent judicial review of current Prison Service policy,<sup>74</sup> which is discussed

66. Nazia Parveen, 'Karen White: how 'manipulative' transgender inmate attacked again' (*The Guardian*, 11 October 2018) <https://www.theguardian.com/society/2018/oct/11/karen-white-how-manipulative-and-controlling-offender-attacked-again-transgender-prison>

67. Prison Rules 1999, s.12

68. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), rule 11(a)

69. Trans-identifying females who hold Gender Recognition Certificates may be placed in the men's prison estate but are normally placed in the female prison estate because of the risks they would face in the male estate.

70. Ministry of Justice, *Statistics on Women and the Criminal Justice System 2019*, Op.cit (2)

71. Prisoners: Gender Recognition, Question for Ministry of Justice, UIN 98878, tabled on 6 January 2022, Op.cit (8)

72. Figures for 2020 presented by the Ministry of Justice in the case of FDJ (Op. cit (7)) suggested that less than 20% of male prisoners in the general prison population were serving sentences for sex offences.

73. Office for National Statistics, *Sexual offences victim characteristics, England and Wales: year ending March 2020 Characteristics of victims of sexual offences based on findings from the Crime Survey for England and Wales and police recorded crime 18 March 2021*, Op. cit (5)

74. FDJ, Op. cit (7)

further below, the court's decision that the policy of housing some trans-identifying males in the female estate is lawful was not based on concerns for their safety, but on their 'right' to live in their 'chosen gender'. This 'right' is viewed as taking precedence over concerns about the safety of women, even where the trans-identifying prisoners concerned are convicted sex offenders.

Andrea Albutt, the president of the Prison Governors Association, who has managed both men's and women's prisons, has stated,

*"I have seen women feeling very threatened by transgender prisoners' presence. Women prisoners are very vulnerable. A lot have abusive men in their lives, who are part of the reason they have ended up in prison."*<sup>75</sup>

While many female prisoners feel threatened by the fact of being incarcerated with males, especially if those males are sex offenders, it is also the case that some trans-identifying males in the women's estate behave in ways which are intended to be threatening or distressing to women.

Dr Kate Coleman has described a meeting she had with a former woman prisoner who told her that,

*"...all bar one of the male prisoners she had encountered, who were so much bigger and stronger than she, had been convicted of sexual offences. She told me that almost all retained their male genitalia: she knew that they did because they often liked to show them off, either by wearing tight clothing or by moving the shower curtain to one side when showering..."*<sup>76 77 78</sup>

Similar kinds of sexual exhibitionism are described by Rhona Hotchkiss, the former governor of Cornton Vale women's prison in Scotland, who has said,

*"...I witnessed completely inappropriate sexual behaviour from trans women doing it to wind women up.... A trans women who walked about in tight leggings with an obvious erection to the obvious discomfort of the women around them."*<sup>79</sup>

Non-contact sexualised abusive behaviour of the kind described by Coleman and Hotchkiss, some of which would be clearly seen as the criminal offence of exposure<sup>80</sup> (formerly called indecent exposure) in other contexts, is difficult for women to complain about in a closed environment such as a prison.

Hotchkiss also describes direct threats of sexual violence to female prisoners and prison officers:

*"A trans woman who decided that they were male and demanded to be moved back to the male estate, and when they didn't do it quick enough threatened to rape the female prisoners and staff. And when they got back to the male estate they decided they were female again."*<sup>81</sup>

Comments which are implied threats or are made in order to make women feel anxious and uncomfortable can be made in ways which are difficult

75. Aletha Adu, 'It could lead to attacks; Prison governors warn trans women convicted as male sex offenders could prey upon vulnerable female inmates' (*The Sun*, 3 Jun 2018) <https://www.thesun.co.uk/news/6438348/trans-women-convict-sex-offender-uk-prison-threaten/>

76. Kate Coleman, "If we don't we get a punishment:" No freedom of speech for women in prison says Dr Kate Colman Director of Keep Prisons Single Sex' (*Lesbian and Gay News*, October 12 2021) <https://lesbianandgaynews.com/2021/10/if-we-dont-we-get-a-punishment-no-freedom-of-speech-for-womn-in-prison-says-dr-kate-coleman-director-of-keep-prisons-single-sex/>

77. The extent to which women prisoners are forced to use shower facilities at the same time as trans-identifying males within the women's prison estate is difficult to establish. Former prisoners have discussed this practice in relation to English prisons, and it has been raised in the Scottish Parliament in relation to Scottish prisons, which operate under different policies to those in England and Wales. See footnote 78.

78. Izzy Lyons, 'Female prisoners share shower facilities with trans offenders who are still 'anatomically male', MSP says' (*The Telegraph*, 16 January 2022) <https://www.telegraph.co.uk/politics/2020/01/16/female-prisoners-share-shower-facilities-trans-offenders-still/>

79. Rhona Hotchkiss, Speech at For Women Scotland meeting, 31 January 2020 <https://www.youtube.com/watch?v=KpfTBEX-qGQM>

80. Sexual Offences Act 2003, section 66

81. Hotchkiss, *Op.cit* (79)

to challenge or report, such as the following comment discussed by one of the participants in research carried out by Matthew Maycock, who interviewed 15 women prisoners about their experiences of living with trans prisoners within the female prison estate in Scotland.

“...I’m not saying I’m a prude, but this person (Miriam) sat down, within the first five minutes of meeting him, ‘oh aye, that 50 Shades of Grey, that’s too timid, that’s too mild for me.’ This is a big heavy man...he’s a big intimidating man.”<sup>82 83</sup>

The anxiety and distress which being imprisoned with trans-identifying males causes women is compounded when they are effectively forced to pretend that these males are in fact women. As discussed below, prison policy compels female prisoners to use the preferred pronouns of trans-identifying prisoners with whom they are housed.

Rhona Hotchkiss has described the kinds of response new women prisoners receive when they question the presence of males in the prison as follows:

“Perhaps the first other prisoner that you see is someone you think, whoa that’s a man. And you say to the officer,

That’s a man.

No it’s not. It’s a woman.

No. it’s a man.

No. It’s a woman.

This is the ridiculous carry on we’re putting people through.”<sup>84</sup>

As with the compelled use of preferred pronouns in court proceedings, its imposition in prisons can have the effect of hindering women’s ability to describe assaults because it robs them of the language with which to do so. Dr Kate Coleman recounts the following from a former female prisoner who told her about the Prison Service’s policy of punishing ‘misgendering’:

“...she told me that female offenders generally don’t complain because there’s simply no point. If a woman did make a complaint about the actions of a male prisoner, she would have to use female pronouns...But it wasn’t a woman who was aggressive to her, or threatened her, or assaulted her, or showed her his penis. It just wasn’t...The language she is compelled to use means she is forced to describe an incident that involved a woman. She is forced to agree that this prisoner is a woman, is female.”<sup>85</sup>

82. Matthew Maycock, ‘She Was Just Like A Lassie’ Analysing the Views of Cis-Women in Custody About Their Experiences of Living With Transgender Women In The Scottish Prison Estate’ (2021) *The British Journal of Criminology* XX, 1-19, 10.

83. *Ibid*, 8 Maycock reports that 3 of the 15 women prisoners he interviewed said that they felt safe around trans-identifying prisoners if they saw them as making an ‘authentic and genuine’ change.

84. Hotchkiss, *Op. cit* (79)

85. Coleman, *Op. cit* (76)



## Prison policy on compelled use of preferred pronouns

On 27 September 2021 Justice Minister Lord Wolfson of Tredegar responded in the House of Lords to a written question from Lord Hunt asking what the government's policy was on whether female prisoners should use female pronouns to refer to male prisoners who identify as female, and whether there would be any consequences for failing to use female pronouns. Lord Hunt also asked whether the approach would differ according to whether the male prisoner did or did not have a GRC. Lord Wolfson replied that prisoners could be disciplined for using 'incorrect pronouns' for another prisoner, whether or not the prisoner they referred to has a GRC.

He stated that,

*"The Ministry of Justice and Her Majesty's Prison and Probation Service are committed to advancing equality and eliminating discrimination, harassment and victimisation, including based on gender reassignment status as defined in section 7 of the Equality Act 2010. The prohibition on discrimination in relation to gender reassignment applies regardless of whether someone has a GRC.*

*Incidents where a prisoner uses incorrect pronouns for another prisoner will be considered on a case-by-case basis, in line with the Prisoner Discipline Procedures policy and the Prison Rules. Prisoners may sometimes make an honest mistake in relation to pronouns and disciplinary action would not usually be appropriate in those circumstances. However, if an officer deems it appropriate to place a prisoner on report, the rule against 'using threatening, abusive or insulting words or behaviour' (PR 51 (20)) may apply. The adjudicator will weigh each incident on its own merits. The policy stipulates that an offence motivated by another person's protected characteristic(s) under the Equality Act 2010 is an aggravating factor and may merit referral to an Independent Adjudicator."*<sup>86</sup>

Under the Prison Discipline Procedure policy, cases brought against prisoners are normally adjudicated on by the prisoner governor, who in this context is referred to as an adjudicator. It is generally only in cases where the adjudicator considers the allegation to be so serious that a punishment of additional days in prison would be appropriate if the prisoner is found guilty that the case is referred to an Independent

---

86. UK Parliament Written questions, answers and statements, Prisoners: Females, UIN HL2647, tabled on 13 September 2021 <https://questions-statements.parliament.uk/written-questions/detail/2021-09-13/HL2647>



Adjudicator (IA). The IA must be a District or Deputy District Judge. Due to the potential consequences of a guilty finding at an IA hearing, prisoners who are referred to them are entitled to legal representation. The standard of proof at IA hearings is the criminal standard of beyond reasonable doubt.<sup>87</sup>

This policy amounts to the imposition of criminal penalties for ‘misgendering’, which is not a criminal offence. The Crown Prosecution Service’s policy states that when ‘misgendering’ is used as a deliberate tactic during the commission of an offence, it can form the basis of a ‘transphobic hate crime.’<sup>88</sup> However, the ‘misgendering’ would not in itself constitute a criminal offence. Rather, it could be seen as evidence of hostility for the purposes of section 66 of the Sentencing Act 2020, which allows for an increased sentence for any offence where an offender demonstrates or is motivated by hostility based on the victim’s actual or perceived transgender status.

While the Prison Discipline Procedure policy states that an offence motivated by a protected characteristic under the Equality Act 2010 is an aggravating factor and may merit referral to the IA, it also states that the test for seriousness which must be met in order for such a referral to be made is whether the offence poses a very serious risk to the order and control of the establishment, or the safety of those within it. Using an ‘incorrect pronoun’ to refer to a person does not amount to threatening them and would not amount to abusing them if it is intended merely as a statement of fact. Even if it is accepted that in some circumstances it may amount to using ‘insulting words or behaviour’ contrary to Prison Rule 51(20), it is difficult to see how it could meet the test of constituting a very serious risk to prison order or safety.

The policy amounts to the imposition of compelled speech in its most authoritarian form in this jurisdiction. As suggested above in relation to the ETBB’s imposition of the use of preferred pronouns on witnesses in court proceedings, it is arguably an infringement of prisoners’ rights to freedom of thought, conscience and religion, and freedom of expression, under Articles 9 and 10 of the European Convention on Human Rights respectively.

---

87. HM Prison and Probation Service, *Prisoner Discipline Procedures (Adjudications) Prison adjudications policy*: PSI 05/2018 <https://www.gov.uk/government/publications/prison-adjudications-policy-psi-052018>

88. CPS, *Trans Equality Statement, Op.cit* (51) 1

## Undermining the Prison Services' policy of providing a trauma-informed approach to women prisoners

The impact of placing trans-identifying males in women's prisons, and compelling women prisoners to refer to them as if they are women, needs to be understood in the context of the high levels of physical and sexual violence which women in prison have experienced from men.

The Ministry of Justice's strategy for working with female offenders acknowledges that,

*"Female offenders can be amongst the most vulnerable of all, in both the prevalence and complexity of their needs. Many experience chaotic lifestyles involving substance misuse, mental health problems, homelessness, and offending behaviour – these are often the product of a life of abuse and trauma."*<sup>89</sup>

In a report published in 2015, the National Offender Management Service noted that almost 60% of female offenders supervised in the community or in custody, who had had an assessment, had experienced domestic abuse.<sup>90</sup> A longitudinal study of prisoners published in 2012 found that 36% of women prisoners had been sexually abused as children.<sup>91</sup>

The Ministry of Justice's female offender strategy states that it is committed to developing a trauma-informed approach to working with women in prison. The development of the Prison Services' work in this area is based on a set of principles developed by Stephanie Covington and Barbara Bloom, which include creating a women-only environment based on safety, respect, and dignity.<sup>92</sup> The presence of males in women's prisons runs counter to the aim of creating this kind of women-only environment, however these males identify.

Karen Ingala-Smith, who is the Chief Executive Officer (CEO) of a domestic and sexual violence charity working to end violence against women and girls based in London, suggests that,

*"You are not offering a trauma informed environment if you, in your position of power, gaslight traumatised women and pretend that someone that you both really know is a man, is actually a woman. It is furthering the abuse to then expect women to share what you say is women-only space with males who say that they are women, because you and they know are not."*<sup>93</sup>

89. Ministry of Justice, *Female Offender Strategy*, June 2018, CM9642, 5, para 2 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/719819/female-offender-strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719819/female-offender-strategy.pdf)

90. National Offender Management Service, *Achieving Better Outcomes for Women Offenders Evidence-based commissioning principles for women offenders*, 2 September 2015 Last updated 21 September 2015, 8 <https://www.gov.uk/government/publications/achieving-better-outcomes-for-women-offenders>

91. Williams, Kim, Vea Papadopoulou, and Natalie Booth, *Prisoners' Childhood and Family Backgrounds: Results from the Surveying Prisoner Crime Reduction (SPCR) Longitudinal Cohort Study of Prisoners (2012)* Ministry of Justice Research Series 4/12 [https://www.researchgate.net/publication/296701221\\_Prisoners%27\\_Childhood\\_and\\_Family\\_Backgrounds](https://www.researchgate.net/publication/296701221_Prisoners%27_Childhood_and_Family_Backgrounds)

92. Stephanie Covington and Barbara Bloom, 'Gender Responsive Treatment and Services in Correctional Settings' (2007) *Women and Therapy*, 29, Issue 3-4, 9-33

93. Karen Ingala-Smith, 'The importance of women only spaces and services for women and girls who've been subjected to men's violence', Speech to Scottish Parliament, January 14 2020 <https://kareningalasmith.com/2020/01/20/the-importance-of-women-only-spaces-and-services-for-women-and->

# Intimate searches of prisoners

Prison Service guidance about the full (intimate) searching of prisoners states that prisoners with a GRC should be searched in accordance with their acquired gender, regardless of their bodily characteristics. This means that males with a GRC, some of whom retain male genitalia, must be searched by female members of staff; and females with a GRC must be searched by males, unless the prisoner prefers otherwise and enters into a voluntary agreement, known as a compact, with the Prison Service which would permit searches to be carried out by staff who are the same biological sex as the prisoner.

Prisoners with a GRC who have not undergone surgery or any significant level of non-surgical treatment to change their bodies have the right to be searched by staff who are members of the sex of their acquired gender if they prefer this, although the guidance advises that the prison should seek an agreement with the prisoner to being searched by members of their biological sex.

Prisoners who do not hold a GRC and have not undergone surgical or non-surgical procedures aimed at changing their bodies are normally searched by members of their biological sex. Prisoners without a GRC who have completed surgery may be searched by staff who are legally of the opposite sex if this is seen as appropriate and a compact is established allowing this to happen.

The guidance acknowledges that, “Some staff may not feel comfortable with searching individuals who are still undergoing surgery and have genitalia of the opposite sex”, but it nevertheless states that, “Staff may only be exempt from searching transsexual prisoners in exceptional circumstances, for example, where there are genuine religious or cultural reasons for an objection.”<sup>94</sup>

Requiring prison officers to search prisoners of the opposite sex where these limited exceptions do not apply raises the same concerns as those discussed above in relation to police officers. A significant proportion of trans-identifying male prisoners are convicted sex offenders, as discussed above. Many retain male genitalia. Requiring female prison officers to carry out intimate searches of trans-identifying male prisoners could in some circumstances amount to a violation of their rights under Article 8 of the European Convention on Human Rights. The fact that the prisoner involved has a GRC is unlikely to make a difference to the ways in which a female prison officer may experience the search.

94. Her Majesty's Prison and Probation Service (HMPPS) *National Security Framework 3.1 Searching of the Person, PSI 07/2016*, 61 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/899420/psi-07-2016-searching-of-the-person.pdf-girls-whove-been-subjected-to-mens-violence/](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899420/psi-07-2016-searching-of-the-person.pdf-girls-whove-been-subjected-to-mens-violence/)

### **Policy relating to searches by trans-identifying prison officers**

At present, trans-identifying male prison officers are not permitted to search female prisoners. This includes officers who hold a GRC. However, the Prison Service has been re-considering this approach. In March 2021 Lord Hunt of Kings Heath tabled a written question in the House of Lords asking whether the government had any plans to revise the current policy that women prisoners have the right to be searched only by officers of the same sex. The response of the Justice Minister Lord Wolfson of Tredegar was that the national policy on the searching of the person was under review, and he stated that,

*“Prisoners and staff members in receipt of a GRC have the right to be treated as their acquired gender in every respect.”<sup>95</sup>*

This response raises the prospect of a future change in policy which would allow trans-identifying prison officers who hold a GRC to carry out intimate searches of prisoners of the opposite sex. The effects of this on women prisoners in particular, many of whom are already traumatised by their experiences of sexual and physical violence, could be devastating.

As discussed above in relation to new guidance relating to police searches, such a practice could constitute inhuman or degrading treatment contrary to Article 3 of the European Convention on Human Rights, as well as a violation of prisoners’ rights to respect for their private life under Article 8. The fact that the proposals relating to prison searches would require the trans-identifying prison officer to hold a GRC would not change the nature of this experience for the prisoners who were being searched.

---

95. UK Parliament Written questions, answers and statements, Prisons: Body Searches, Question for Minister of Justice, UIN HL 13968, tabled on 8 March 2021 <https://questions-statements.parliament.uk/written-questions/detail/2021-03-08/hl13968>

## The current policy on the allocation of trans-identifying prisoners

In an article which charts the history of the placement of trans-identifying males in women's prisons in England, Michael Biggs notes that the criteria for allocating males to women's prisons was initially a requirement for genital surgery, then it became legal change of sex under the Gender Recognition Act, and finally self-declared 'gender identity' was included in the criteria.<sup>96</sup> Not all male prisoners who declare themselves to be women while remaining legally male are placed in the female prison estate, but many are.

Biggs suggests that initially the practice of placing trans-identifying males in women's prisons was influenced by two distinct forces. These were, firstly, judicial decisions applying human rights principles in the fields of health care and imprisonment, which interacted to produce unintended consequences; and secondly, the influence of queer theory.

In relation to the first factor, Biggs notes that,

*“Prisoners won the right to health care equal to that provided outside prison; transsexual patients won the right to genital surgery. Put together, these cases established a right for prisoners to obtain genital surgery, which in turn enabled them to move to the women's estate. When clinicians decreed that the prerequisite for genital surgery—living as a woman—could be met only in a women's prison, then it naturally followed that male prisoners desiring genital surgery had to be transferred **before** surgery.”<sup>97</sup>*

The first placement in a women's prison of a trans-identifying male who was a convicted sex offender came about because of the Administrative Court's decision in the case of *R (on the application of AB) v The Secretary of State for Justice and the Governor of HMP Manchester*.<sup>98</sup> The Claimant in this case, AB, had convictions for manslaughter and attempted rape. While in prison AB began taking cross-sex hormones and obtained a GRC. AB wanted to undergo genital surgery, but the NHS Gender Identity Clinic involved would not agree to this until AB had spent some time living “in role” as a woman and specified that AB could only do this if housed in a women's prison.

96. Michael Biggs, 'The Transition from Sex to Gender in English Prisons: Human Rights and Queer Theory', May 2020, DOI - 10.31235/osf.io/43f2t, 2 [https://www.researchgate.net/publication/341447115\\_The\\_Transition\\_from\\_Sex\\_to\\_Gender\\_in\\_English\\_Prisons\\_Human\\_Rights\\_and\\_Queer\\_Theory/citation/download](https://www.researchgate.net/publication/341447115_The_Transition_from_Sex_to_Gender_in_English_Prisons_Human_Rights_and_Queer_Theory/citation/download)

97. *Ibid*

98. [2009] EWHC 2220 (Admin)

An expert witness in the case, Professor Grubin, stated that AB,

“...needs to control the threatening external world by imposing her own order and when this is not possible she resorts to stronger measures which incorporate narcissistic, compulsive, aggressive, violent and sadistic elements...”<sup>99</sup>

Despite this, and the nature of AB’s offences, the court found that keeping AB in a male prison was disproportionate and violated AB’s Article 8 rights.

The second factor which Biggs identifies, queer theory, is discussed below in the section about policy capture.

The current policy about the placement of prisoners who identify as transgender is set out in a document published by the Ministry of Justice and HM Prison and Probation Service called the *Care and Management of Individuals who are Transgender* (the Care and Management policy).<sup>100</sup> In summary, it requires all prisoners to be initially allocated to the part of the prison estate which corresponds with their legal gender. Subject to the approval of a Complex Case Board (CCB) who conduct risk assessments, prisoners who identify as transgender but do not hold a GRC may be placed in the part of the prison estate which corresponds to their self-declared ‘gender identity’. A trans-identifying prisoner with a GRC who is biologically male may be placed in the male prison estate in exceptional circumstances (as may female prisoners who are thought to require a level of security which is not available in the female estate). Exceptional circumstances in the case of a trans-identifying male with a GRC would involve a high degree of risk to female prisoners if the individual were to be housed in the female estate. However, the Care and Management policy does not explicitly state that a previous history of sexual offending against women is an exceptional circumstance for this purpose. Biological males who identify as transgender who have a history of sexual offending and do not hold a GRC may be placed in the women’s estate subject to CCB approval.

The potential for male prisoners with convictions for sexual offences to commit further sexual offences is normally assessed using a risk assessment tool known as the OASys Sexual Offender Predictor (OSP). In answer to a Parliamentary question in January 2022 Minister for Justice Victoria Atkins confirmed that, while trans-identifying male prisoners without a GRC who have committed sexual offences are assessed using OSP, those who hold a GRC are not, because they are not legally male.<sup>101</sup> There is no comparable risk assessment tool for female offenders.

Some trans-identifying male prisoners who hold a GRC and have been assessed as presenting a high risk of harm to women are held within a separate unit in Downview women’s prison, known as ‘E Wing’. The level of risk they represent to women is not considered to meet the exceptional circumstances criteria for placement in the men’s estate, but is regarded as so high that it cannot be managed within the women’s section of the prison. These prisoners participate in some activities along with female prisoners, such as exercise, the use of the library and gym, and association time.

99. *Ibid* [63]

100. Ministry of Justice, HM Prison and Probation Service, *The Care and Management of Individuals who are Transgender*, 27 January 2020 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/863610/transgender-pf.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863610/transgender-pf.pdf)

101. Prisoners: Gender Recognition, Question for Ministry of Justice, UIN 107677, tabled on 19 January 2022 <https://questions-statements.parliament.uk/written-questions/detail/2022-01-19/107677>

As outlined above, the proportion of trans-identifying male prisoners convicted of sexual offences appears to be considerably higher than the proportion of convicted sex offenders in the general male prison population. This does not necessarily indicate that the percentage of sex offenders within the general population of males who identify as transgender is higher than in the general male population, but it clearly indicates that many trans-identifying males retain male patterns of criminality.

One factor which may contribute to the higher percentage of sex offenders within the trans-identifying male prison population is that some sex offenders who claim a female 'gender identify' do so for strategic reasons. Psychologists working in this field who submitted evidence to the first House of Commons Women and Equalities Committee's Inquiry into 'Transgender Equality' reported that some do so for reasons such as wanting to obtain a transfer to the women's prison estate, and to make future sex offending easier. They expressed concerns about the proposed introduction of self-declaration of 'gender identity' for this reason.

In their submission to the Inquiry, the British Association of Gender Identity Specialists noted,

*"...the ever-increasing tide of referrals of patients in prison serving long or indeterminate sentences for serious sexual offences. These vastly outnumber the number of prisoners incarcerated for more ordinary, non-sexual, offences. It has been rather naïvely suggested that nobody would seek to pretend transsexual status in prison if this were not actually the case. There are, to those of us who actually interview the prisoners, in fact very many reasons why people might pretend this. These vary from the opportunity to have trips out of prison through to a desire for a transfer to the female estate (to the same prison as a co-defendant) through to the idea that a parole board will perceive somebody who is female as being less dangerous through to a [false] belief that hormone treatment will actually render one less dangerous through to wanting a special or protected status within the prison system and even (in one very well evidenced case that a highly concerned Prison Governor brought particularly to my attention) a plethora of prison intelligence information suggesting that the driving force was a desire to make subsequent sexual offending very much easier, females being generally perceived as low risk in this regard."<sup>102</sup>*

Similarly, the British Psychological Society's submission to the Inquiry stated that,

*"...psychologists working with forensic patients are aware of a number of cases where men convicted of sex crimes have falsely claimed to be transgender females for a number of reasons:*

- *As a means of demonstrating reduced risk and so gaining parole;*
- *As a means of explaining their sex offending aside from sexual gratification (e.g. wanting to 'examine' young females);*
- *Or as a means of separating their sex offending self (male) from their future self (female);*

102. British Association of Gender Identity Specialists, 'Written evidence submitted by British Association of Gender Identity Specialists to the Transgender Equality Inquiry, 20 August 2015 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19532.html>



- In rare cases it has been thought that the person is seeking better access to females and young children through presenting in an apparently female way.

Such strategies in no way affect risk and indeed may increase it. Some people falsely believe that taking oestrogen and blocking androgen in males will reduce risk of offending, however this is not necessarily the case.

Consequently the Society recommends that the Government give appropriate assistance to transgender people within the criminal justice system; while being extremely cautious of setting law and policy such that some of the most dangerous people in society have greater latitude to offend.”<sup>103</sup>

Many of the women prisoners interviewed by Maycock spoke about trans-identifying males they had been imprisoned with who had stopped identifying as transgender after their release. Maycock notes that,

“Several participants discussed transgender people who had transitioned in custody, but who had reverted to their birth gender following release. . . This for Ella resulted in a wider scepticism about the transitions of transgender people in custody:

The last one to get out, back living as a man. The one before that got out, back living as a man, while he was in the hall (prison), was telling people, I’m stopping taking my medication because I can’t get a hard on.”<sup>104</sup>

Where prison policy enables male offenders to transfer to female prisons on the basis of self-declaration of a female ‘gender identity’, this creates a strong incentive for men to claim to be transgender, for a wide range of reasons. Michael Biggs suggests that,

“If campaigners for gender identity achieve their goal, then the number of males in women’s prisons will multiply several times over. Given the obvious incentive for heterosexual men to transfer, and the huge sex imbalance in the incarcerated population, males would soon outnumber females in women’s prisons. The consequence for female inmates hardly needs to be spelled out.”<sup>105</sup>

The Ministry of Justice reports that on 30 June 2019, 5% of the prison population were female. This proportion had remained stable for the previous five years.<sup>106</sup> The possibility that trans-identifying males could potentially outnumber females in women’s prisons is therefore not as remote as it might seem.

---

103. British Psychological Society, ‘Written evidence submitted by British Psychological Society to the Transgender Equality Inquiry’, 20 August 2015, para 8 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19471.html>

104. Maycock, *Op.cit* (82) 14

105. Biggs, *Op. cit* (96) 13-14

106. Ministry of Justice, *Statistics on Women and the Criminal Justice System*, 2019, *Op.cit* (2)



## Challenges to the current prison policy

Prison policy relating to the placement of biological males who identify as transgender in the women's prison estate was judicially reviewed in the case of *FDJ*<sup>107</sup> referred to above. The Claimant was a woman who said she had been sexually assaulted by a trans-identifying male prisoner with a GRC in 2017, while she was held in HMP Bronzefield, which is a women's prison. Her claim challenged the lawfulness of the Ministry of Justice's Care and Management policy outlined above, and in particular the policy relating to the allocation to women's prisons of trans-identifying males who have been convicted of sexual or violent offences against women. It also challenged the E Wing Policy outlined above and alleged that prisoners held on E Wing had been left unsupervised during activities which brought them into contact with female prisoners at Downview.

The claim was based on two grounds. The first ground was that the policies are unlawful because they indirectly discriminate against women contrary to Article 14 of the European Convention on Human Rights (prohibition of discrimination) read with Article 3 (prohibition of torture and inhuman or degrading treatment) and/or Article 8 (the right to respect for private and family life); and contrary to section 19 of the Equality Act (which prohibits indirect discrimination).

The Claimant argued that the allocation of transgender prisoners to the estate corresponding to their 'gender identity' carries an increased risk which negatively impacts on women prisoners, who are exposed to an increased risk of sexual assault in prison; but does not have a comparable impact on male prisoners. It was an important part of the Claimant's case that many women in the female prison estate have experienced sexual abuse and/or domestic violence. This was not disputed by the Secretary of State, who accepted that women prisoners in general are vulnerable, and that past experiences of sexual abuse and rape are prevalent among them. Counsel for the Claimant argued that, because of the prevalence of previous adverse experiences at the hands of men among women prisoners, the presence of transgender prisoners, especially those who retain male genitalia, creates a risk that women prisoners will suffer fear, anxiety and re-traumatisation.

The second ground was that in formulating the policies there was a failure to properly take into account the exceptions for single sex accommodation and provisions of service under schedule 2 of the Equality Act 2010; and that the policies are unlawful because they misstate the law.

<sup>107</sup>*Op. cit* (7)

The Equality Act exceptions allow for female single-sex spaces and services which exclude biological males who identify as transgender, including those who hold a GRC, if this pursues a legitimate aim and does so in a proportionate way.

The claim failed. The court stated that the minister who approved the policies was under no obligation to apply the single sex exceptions, either in general or in particular cases, and found that the policy is lawful essentially because it requires risk assessments to be made when deciding where trans-identifying prisoners are going to be placed. The judgment emphasised the necessity of balancing competing rights.

In the leading judgment Lord Justice Holroyde stated:

*“I fully understand the concerns advanced on behalf of the Claimant. Many people may think it incongruous and inappropriate that a prisoner of masculine physique and with male genitalia should be accommodated in a female prison in any circumstances. More importantly for the Claimant’s case, I readily accept that a substantial proportion of women prisoners have been the victims of sexual assaults and/or domestic violence. I also readily accept the proposition... that some, and perhaps many, women prisoners may suffer fear and acute anxiety if required to share prison accommodation and facilities with a transgender woman who has male genitalia, and that their fear and anxiety may be increased if that transgender woman has been convicted of sexual or violent offences against women...Sexual assault is capable of attaining the level of gravity contemplated by art.3 (though not every sexual assault will necessarily do so). I accept Ms Monaghan’s submission that the taking by the Defendant of steps which increase the risk of art.3 mistreatment of women prisoners is within the ambit of art.3...However, the **subjective concerns of women prisoners** are not the only concerns which the Defendant had to consider in developing the policies: he also had to take into account **the rights of transgender women** in the prison system.”<sup>108</sup> (Emphasis added)*

Lord Justice Holroyde did not explain precisely which rights of trans-identifying prisoners he was referring to here, but it can probably be assumed that he meant what he went on to call “the rights to live in their chosen gender”. In the case of prisoners who hold a GRC, such a ‘right’ might be said to be founded in the provisions of the Gender Recognition Act. However, it is not clear on what basis trans-identifying prisoners without a GRC, who make up the majority of trans-identifying offenders within the prison estate,<sup>109</sup> can be said to have this right in law.

Whatever the basis of this ‘right’, the court effectively decided that it takes precedence over women’s right not to be put at risk of being subjected to sexual assault and not to be subjected to the fear and acute anxiety which the court accepted women may feel if forced to share prison accommodation with biological males, particularly if they are sex offenders. This is despite the fact that Article 3 of the European Convention is an absolute right.

When women are incarcerated with biological males who have already been convicted of committing sexual offences against women, their

---

108. *FDJ Op.cit* (7) [76]-[78]

109. In *FDJ* the court stated that the data provided by the Ministry of Justice indicated that no records are kept of the numbers of prisoners with a GRC, but that the numbers are thought to involve a single figure total across the prison estate as a whole. [para 13]

fear of sexual assault is objectively justifiable. Lord Justice Holroyde’s characterisation of these fears as ‘subjective’ trivialises them and frames them as an objectively lesser concern than concerns about the ‘rights’ of trans-identifying male prisoners. In doing so his approach arguably follows a long-established pattern identified by Michael Biggs, who suggests that,

*“In retrospect, what is striking is how policy has been animated solely by concern for male prisoners who identify as transgender...No thoughts were spared for the women who they were forcing to be confined with males who had usually proven to be violent or sexually predatory or both. Women were treated as the audience needed to validate the performance of transgender identity.”<sup>110</sup>*

Lord Justice Holroyde did not explain exactly what the right to live in a ‘chosen gender’ consists of, or precisely why trans-identifying males need to be placed in women’s prisons in order to exercise this right. In cases where trans-identifying males have GRCs but are placed in the male estate because of the level of risk they would represent in the female estate, the Care and Management policy states that they must be treated as female prisoners and held separately according to the women’s prison regime.<sup>111</sup> They are able to wear clothing and present themselves in ways they consider appropriate to their ‘gender identity’. All biologically male offenders who identify as transgender could potentially be held in the male estate while living ‘in their chosen gender’ in this way, or they could be housed in specialist units, without female prisoners being put at risk of sexual assault and experiencing the fear and anxiety associated with that risk. What prevents this appears to be a perceived need for women prisoners to validate the ‘gender identity’ of trans-identifying males by playing the role of audience, as Biggs suggests.

Unlike biological sex, ‘gender identity’ is essentially performative. We retain our biological sex regardless of the clothes or adornments we wear, or the people we associate with. As Byng et al<sup>112</sup> state, sex is biological and immutable. ‘Gender identity’ can only manifest through social expression.

The ‘expression of gender’ requires an audience, and an audience of women appears to be perceived as more validating than an audience of other trans-identifying males. This is implicit in the Equality Analysis prepared by the National Offender Management Service in relation to E Wing, the separate wing for trans-identifying male prisoners at Downview women’s prison, which places great significance on allowing these high-risk prisoners to have “association with other women”. It is implicit in the policy that the other trans-identifying male prisoners in E Wing do not fulfil the requirement for association with ‘other women’. The Service had the options of placing the high-risk prisoners in a separate unit in either the female or male estate, or placing them in the general women’s estate. They rejected the last option because of the risks it would pose to women in the estate and chose the first option over the second because it would enable these high-risk prisoners to have greater access to the women’s prison regime, including ‘risk assessed association with other women’. They decided against placing them in the male estate because association

110. Biggs, *Op. cit* (96) 13

111. Ministry of Justice, *Op.cit* (100) para 4.68

112. *Op.cit* (10)

with women would be difficult if they were placed there.

The Equality Analysis states,

*“In order to ensure that the policy fosters good relationships between the high risk transgender women on the unit and the other women at HMP Downview, staff at HMP Downview will continue to include the women on E wing in the normal regime as much as possible.”*<sup>113</sup>

This wording refers to the obligation under the Equality Act to foster good relationships between those who share a protected characteristic and those who do not. The Equality Analysis refers to the protected characteristic of gender reassignment but makes no mention of the protected characteristic of sex. It does not explain how women are thought to benefit from associating with trans-identifying offenders who have been assessed by the Prison Service as posing a high level of risk to them. It focusses entirely on the presumed benefits to trans-identifying males and downplays the risk they pose to female prisoners.

The Claimant in the case of FDJ, Amy Jones, was interviewed about her experiences in prison shortly after the judgment in the case. She said that while still in prison she had been transferred from HMP Bronzefield to HMP Downview, and discovered that ‘J’, the prisoner whom she alleged had sexually assaulted her, had also been transferred there. ‘J’ was in E Wing. She said that,

*“I felt like I had been punched in the stomach. They moved me for my own protection, and then I ended up back in the same prison as this person who had sexually assaulted me... Quite a few women were scared of J, because she would rub up against them in the dinner queue with an erect penis... She would wear very tight trousers which made it obvious she had male genitals. The prison officers protected her more than they did us. They were terrified of being accused of transphobia.”*<sup>114</sup>

Amy Jones also stated that she had reported to prison officers at HMP Bronzefield that J had assaulted her, and that the other female prisoner who had provided a statement in the judicial review had reported two assaults by J to them. She said that the prison did not report their allegations to the police.

Amy Jones’ account calls into question the picture painted by the Ministry of Justice about what is happening in prisons in relation to the assessment and management of risks presented by trans-identifying male prisoners; and suggests that prison officers’ fears of allegations of ‘transphobia’ are preventing them from taking appropriate action to safeguard female prisoners in some cases. If this is so, then there are important questions to be answered about what is fostering these fears.

As the High Court has found the current policy on trans-identifying prisoners to be lawful, and the Ministry of Justice seems not to be prepared to use the single-sex exceptions in the Equality Act to make prisons single-sex, it appears that the current policy can only be changed by Parliament.

During the passage of the Police, Crime, Sentencing and Courts Bill

---

113. National Offender Management Service, *HMP Downview E Wing Equality Analysis*, version 16.0 for publication, March 2019, 5 <https://fairplayforwomen.com/wp-content/uploads/2020/10/Equality-Analysis-Documents-E-Wing-Version-16.0-for-publication.pdf>

114. Julie Bindel, ‘I was sexually assaulted in a women’s prison... by a fellow inmate with male genitalia’: Read Amy’s story and decide - can it be right to put trans sex offenders in female jails?’ (*Daily Mail online* 23.07.21.) <https://www.dailymail.co.uk/news/article-9819631/I-sexually-assaulted-womens-prison-fellow-inmate-male-genitalia.html>

amendments were tabled in the House of Lords in attempts to change the policy. In November 2021 Lord Blencathra moved an amendment to reform the Gender Recognition Act to enable those with a GRC who are imprisoned for a violent or sexual offence, or remanded in custody on suspicion of having committed this type of offence, to be housed in the prison estate on the basis of their sex registered at birth.<sup>115</sup> In January 2022 Lord Blencathra moved an amendment to amend the Act so that all prisoners who have undergone gender reassignment, including those with a GRC, should normally be housed in the prison estate according to their sex registered at birth; and that where a case-by-case assessment determines that a prisoner should not be accommodated with prisoners of the same sex, separate accommodation should be provided for them in a specialist unit to ensure that there is no access to, or association with, prisoners of the opposite sex.<sup>116</sup> Neither amendment succeeded.

However, the Prime Minister Boris Johnson stated in a television interview in April 2022 that,

*“...women should have spaces, whether it’s in hospital, or prisons or changing rooms... which are dedicated to women.”<sup>117</sup>*

This suggests there may be hope of a change in the government’s approach to the placement of trans-identifying males in women’s prisons.

115.HL Deb 15 November 2021 vol 816 cc 99-102 <https://hansard.parliament.uk/Lords/2021-11-15/debates/DCFDDC1A-7C07-4A4E-BD6B-56C1E91D9C64/PoliceCrimeSentencingAndCourtsBill>

116.HL Deb 10 January 2022 vol 817 cc 878-881 <https://hansard.parliament.uk/Lords/2022-01-10/debates/DE31B0AB-B2E4-4687-B021-6D127741D254/Police-CrimeSentencingAndCourtsBill>

117.Sky News. ‘PM says ‘biological males’ should not compete in female sport and venues should have women only spaces’, 7<sup>th</sup> April 2022 <https://news.sky.com/story/pm-says-biological-males-should-not-compete-in-female-sport-and-venues-should-have-women-only-spaces-12583536>

## The role of policy capture in criminal justice policy

*“As a strategy to denaturalize and resignify bodily categories, I describe and propose a set of parodic practices based in a performative theory of gender acts that disrupt the categories of the body, sex, gender, and sexuality and occasion their subversive resignification and proliferation beyond the binary frame.”<sup>118</sup>*

*“The very subject of women is no longer understood in stable or abiding terms... there is very little agreement after all on what it is that constitutes, or ought to constitute, the category of women.”<sup>119</sup>*

The author of the two quotations above, Judith Butler, is a leading proponent of queer theory, the essence of which is summarised in the first quotation. What is described in this document as ‘gender identity theory’ is rooted in queer theory and could be said to be synonymous with it. Self-declaration of ‘gender identity’ is one of its central tenets. The political stances of key advocates of self-declaration, such as Stonewall and Gendered Intelligence, are founded in queer theory.

The policies and practices of all of the key criminal justice institutions currently operate on the basis of self-declared ‘gender identity’, which they prioritise over biological sex. The concepts and language of gender identity theory permeate the policy documents on which much current practice within criminal justice institutions is based. Current policy downplays the significance of sex in shaping patterns of criminal behaviour and shaping the experiences of those who come into contact with the criminal justice system as victims, witnesses, detainees and offenders.

Self-declaration of ‘gender identity’ is not aligned with the current law and, as discussed above, the government has rejected the proposal that it should be introduced into law. However, *de facto* self-declaration of ‘gender identity’ has been introduced by all the key criminal justice institutions, whose publications and policy documents frequently adopt the concepts and language of gender identity theory. The introduction of self-declaration of ‘gender identity’ has taken place without a foundation in law, and in the absence of democratic scrutiny or any established political consensus. The policies by which self-declaration has been introduced have been shaped solely by reference to one interest group, namely those who identify as transgender, and have excluded consideration of the interests of other affected groups, particularly women. These processes can reasonably be viewed as evidence of policy capture.

---

118. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (first published 1990, Routledge 2006) 1990 preface, xxxiv

119. *Ibid.*, 2

The Organisation for Economic Co-operation and Development (OECD) has defined policy capture as,

“...the process of consistently or repeatedly directing public policy decisions away from the public interest towards the interest of a specific interest group or person. Capture is the opposite of inclusive and fair policy-making, and always undermines core democratic values. The capture of public decisions can be achieved through a wide variety of illegal instruments, such as bribery, but also through legal channels, such as lobbying and financial support to political parties and political campaigns. Undue influence can also be exercised without the direct involvement of public decision-makers, by manipulating the information provided to them, or establishing close social or emotional ties with them.”<sup>120</sup>

This type of process is recommended as a strategy for promoting self-declaration of ‘gender identity’ in law in a document produced by the International Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Youth and Student Organisation (IGLYO), the Thomson Reuters Foundation, and Dentons’s law firm. The focus of this document is the promotion of self-declaration of ‘gender identity’ for minors, but its recommendations relate to the promotion of self-declaration more widely. The strategies it advocates include, among others, ‘getting ahead’ of the government agenda by publishing legislative proposals before government have had time to develop their own, intervening early to ‘sensitize the media’, tying campaigns to more popular reforms such as same-sex marriage, and avoiding ‘excessive press coverage and exposure’.<sup>121</sup>

One way in which policy changes can be brought about without public scrutiny is through the provision of training and consultancy.

Ivan Horrocks<sup>122</sup> has described the ways in which ‘experts’ who provide consultancy can use their influence to capture policy. His work relates to the relationship between e-government and the IT consultancy industry, but his analysis of the process of policy capture by perceived ‘experts’ potentially has wider application. While the nature of what might broadly be described as the ‘equalities’ industry is very different to the IT industry, both are perceived by the organisations who commission them as possessing very specialised forms of expertise which are not shared by staff within the commissioning organisations. Arguably this creates a power imbalance which facilitates policy capture by those perceived as experts, particularly where those experts can confer awards on their client organisations.

Many police forces are members of Stonewall’s Diversity Champions Programme. Until very recently the Crown Prosecution Service and the Ministry of Justice were also members. Employers pay to participate in this programme and receive advice and training from Stonewall on developing and implementing their inclusion and diversity policies. Members of the scheme are entered into Stonewall’s Workplace Equality Index and Global Workplace Equality Index, where they are benchmarked against other companies by Stonewall, who compile an annual list of the top 100 of

120. OECD, OECD Public Governance Reviews, ‘Preventing Policy Capture: Integrity in Public Decision-making’ (2017), 9 [https://read.oecd-ilibrary.org/governance/preventing-policy-capture\\_9789264065239-en#page9](https://read.oecd-ilibrary.org/governance/preventing-policy-capture_9789264065239-en#page9)

121. IGLYO, Dentons, NextLaw Referral Network, Thomson Reuters Foundation, *Only Adults? Good Practices in Legal Gender Recognition for Youth, A report on the current state of laws and NGO advocacy in eight countries in Europe, with a focus on the rights of young people*, November 2019, 18-21 [https://www.iglyo.com/wp-content/uploads/2019/11/IGLYO\\_v3-1.pdf](https://www.iglyo.com/wp-content/uploads/2019/11/IGLYO_v3-1.pdf)

122. Ivan Horrocks, ‘Experts’ and E-Government: Power, influence and the capture of a policy domain in the UK’, *Information, Communication & Society* (2009) 12 (1) 110-127 <https://doi.org/10.1080/13691180802109030>



these employers for LGBT inclusion. Inclusion in this list depends on being a member of the Diversity Champions Programme and implementing policies which are aligned with Stonewall's values. Stonewall have argued for the removal of the exceptions in the Equality Act 2010 which allow for the provision of single-sex services.<sup>123</sup>

In 2020 the barrister Akua Reindorf undertook a review of the circumstances surrounding the 'de-platforming' by Essex University of two external academics because of their gender critical views. Essex University is a member of Stonewall's Diversity Champions Programme. Reindorf concluded that the University's policy on supporting trans and nonbinary staff was founded on an erroneous understanding of the law, both in relation to the sex-based exceptions in the Equality Act and in relation to what constitutes 'hate crime' against those who identify as transgender.<sup>124 125</sup>

The University's policy suggested that it is unlawful under the Equality Act 2010 to discriminate against or treat someone unfairly because of their "gender identity or trans status". Its examples of "discrimination" included refusing to use someone's preferred name and gender pronouns and denying someone access to "appropriate single-sex facilities".

As Reindorf notes, "gender identity or trans status" are not protected characteristics under the Equality Act 2010. The protected characteristic is gender reassignment. She also states that it cannot be said that the examples given would invariably amount to unlawful discrimination (or, in some cases more accurately, harassment). In particular, Reindorf notes that "denying someone access to appropriate single-sex facilities" is a contested issue in relation to which the Equality Act 2010 contains specific sex-based exceptions. Reindorf notes that the policy also stated that the University "will not tolerate staff being questioned inappropriately about the facility they choose or being denied access to that facility". She suggests that the effect of this would be that single sex facilities may be used by whoever chooses to use them in accordance with their 'gender identity' rather than their sex, and notes that this would be a potential breach of health and safety legislation, which requires employers to provide toilets and changing rooms either on a single-sex basis or in individual lockable rooms.

Reindorf also notes that the examples of 'hate crime' included in the policy are misleading, as they erroneously give the impression that there is a stand-alone crime of inciting hatred on grounds of transgender identity, and that there is a crime of bullying and of making offensive comments on grounds of transgender identity.

Reindorf notes that Essex University's policy was reviewed annually by Stonewall, and states that,

*"In my view the policy states the law as Stonewall would prefer it to be, rather than the law as it is. To that extent the policy is misleading."*<sup>126</sup>

When asked about this conclusion Nancy Kelley, Stonewall's current CEO, said that she was "very comfortable with the quality of advice we give" and

123. Stonewall, 'Women and Equalities Select Committee Inquiry on Transgender Equality', 27 August 2015 <https://www.stonewall.org.uk/women-and-equalities-select-committee-inquiry-transgender-equality>

124. Akua Reindorf, 'University of Essex Review of the circumstances resulting in and arising from the cancellation of the Centre for Criminology seminar on Trans Rights, Imprisonment and the Criminal Justice System, scheduled to take place on 5 December 2019, and the arrangements for speaker invitations to the Holocaust Memorial Week event on the State of Antisemitism Today, scheduled for 30 January 2020, 21 December 2020, 16 September 2021 Publication version of report, updated to mirror the form of report disclosed in response to FOI requests and as required for FOIA compliance purposes', paras 222-226 <https://www.cloisters.com/reindorf-review-on-no-platforming/>

125. There is no specific offence of 'hate crime' in English law. However section 66 Sentencing Act 2020 imposes a duty on courts, when considering the seriousness of an offence for sentencing purposes, to treat as an aggravating factor that either at the time of committing the offence, or immediately before or after doing so, the offender demonstrated hostility towards the victim based on the victim being (or being presumed to be) transgender; or the offence was motivated (wholly or partly) by hostility towards persons who are transgender. The section 66 provisions also apply to hostility based on race, religion, disability and sexual orientation. Charles Wide has argued that the term 'hate crime' is misleading, as most of the statutory provisions in relation to which it is used refer to 'hostility' and not hatred; and suggests that 'hostility crime' is more accurate. (Charles Wide, *Hostility crime and the Law Commission, Policy Exchange*, 2021). I use the term 'hate crime' here in quotation marks, as it is used by the institutions under discussion, and is in common usage.

126. Reindorf, *Op. cit* (124) para 243.11



stated that best-practice recommendations commonly urge employers to “go beyond minimum requirements”.<sup>127</sup> The conclusions of the Reindorf report would suggest that this means making recommendations which ‘go beyond’ the law.

Reindorf’s report recommended that the University consider the relative benefits and disbenefits of its relationship with Stonewall in light of the drawbacks and potential illegalities identified in the report as having arisen from that relationship. Since the report was published, concerns about the nature of Stonewall’s influence have grown. A number of organisations have withdrawn from the Diversity Champions Programme, often citing concerns about perceived lack of impartiality on Stonewall’s part, and value for money.<sup>128</sup> Those who have withdrawn in recent months include the Ministry of Justice and the Crown Prosecution Service.

It is not possible to fully assess the extent to which policies which go beyond the law and adopt self-declaration of ‘gender identity’ on the part of police forces, the Crown Prosecution Service, and the Ministry of Justice have been influenced by their current or former relationships with Stonewall, or other organisations which promote self-declaration of ‘gender identity’. However, there are significant examples of the influence of these organisations on policy development.

One of these organisations is Gendered Intelligence, who provide training and consultancy to a wide range of organisations, including many in the public sector. They state that they trained the entire staff of Stonewall across England, Scotland and Wales “in support of Stonewall’s move to become trans inclusive”,<sup>129</sup> and describe their services as “...designed to develop, improve and enhance trans inclusion and gender diversity.”<sup>130</sup>

Gendered Intelligence advocate for self-declaration of ‘gender identity’ from the age of sixteen and take the view that ‘sex’ and ‘gender’,

“...are and should continue to be inherently interchangeable terms for legal purposes.”<sup>131</sup>

The Ministry of Justice review which first enabled trans-identifying male offenders to be housed in the women’s prisons estate on the basis of self-declaration states that it was internally commissioned, but that Jay Stewart, the Director of Gendered Intelligence, provided “independent oversight”.<sup>132</sup>

Gendered Intelligence have provided training for Employment Tribunal and Immigration and Asylum Tribunal judges.<sup>133</sup> A Freedom of Information request asking for details about this training made in March 2020 was refused on the basis that the judiciary are not a public body for the purposes of the Freedom of Information Act.<sup>134</sup> As discussed below, an FOI request for information about who contributes to the *Equal Treatment Bench Book* has received a similar response.

A clear example of policy capture is set out in the case study below of the Crown Prosecution Services’ publication of guidance on ‘hate crime’ for schools, which was developed in collaboration with Stonewall, Gendered Intelligence, and others.

127. Gabi Hinsliff, ‘The battle for Stonewall: the LGBT charity and the UK’s gender wars’ (*The New Statesman*, 03 November 2021) <https://www.newstatesman.com/politics/2021/11/the-battle-for-stonewall-the-lgbt-charity-and-the-uks-gender-wars>

128. Eleni Courea, ‘Ministers kept in dark on Stonewall diversity scheme’ (*The Times*, November 09 2021) <https://www.thetimes.co.uk/article/ministers-kept-in-dark-on-stonewall-diversity-scheme-hnvzgrhqp>

129. Gendered Intelligence, *Achieving Trans Inclusion and Gender Diversity in Employment and Services, Professional training, consultancy and support for the commercial, statutory and not-for-profit sector*, 2021 <https://genderedintelligence.co.uk/static/pdfs/GI%20Professional%20Services%20brochure%202021%20v1.0.pdf>

130. *Ibid*

131. Gendered Intelligence, ‘Written evidence submitted by Gendered Intelligence [GRA1485] Women and Equalities Committee Inquiry on ‘Reform of the Gender Recognition Act’, November 2020 <https://committees.parliament.uk/writtenevidence/17630/pdf/>

132. Ministry of Justice, *Review on the Care and Management of Transgender Offenders*, 9 November 2016 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/566828/transgender-review-findings-web.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/566828/transgender-review-findings-web.PDF)

133. Sian Davies, ‘Trans awareness training’, *Tribunals*, Edition 3 2018 <https://www.judiciary.uk/wp-content/uploads/2019/06/davies-2018-trans-awareness.pdf>

134. FOI request made by M. Raynard to the Courts and Tribunals Service, recorded at [https://www.whatdotheyknow.com/request/gendered\\_intelligence\\_training\\_t](https://www.whatdotheyknow.com/request/gendered_intelligence_training_t)

This case study is followed by a discussion of the Judicial College's lack of transparency about the individuals and organisations who contribute to the development of the *Equal Treatment Bench Book*, which is also indicative of policy capture.

### **The Crown Prosecution Service's former guidance for schools**

The CPS *Trans Equality Statement* states that the CPS “has worked for a number of years with a wide range of Trans organisations nationally and locally”.<sup>135</sup> This is partly the result of the CPS' work in relation to ‘hate crime’ directed at people who identify, or are perceived to identify, as transgender. Developing policy and practice for responding to ‘hate crime’ necessarily involves consulting with people who represent, or are perceived to represent, the groups affected by such crime. However, the CPS' work in this area has gone well beyond the role of a public prosecuting service and has involved the adoption of a highly partisan ideological approach to the issue of ‘gender identity’. One notable example of this was guidance they published for schools in 2020 (the *Guidance*).

The *Guidance* was issued in conjunction with the National Police Chiefs' Council and NASUWT The Teachers' Union, as well as Stonewall and Gendered Intelligence, both of whom campaign for self-declaration of ‘gender identity’ in law and have played a significant role in promoting gender identity theory in the UK. As noted above, Stonewall has argued for the removal of the exceptions in the Equality Act 2010 which allow for the provision of single-sex services.

The *Guidance* advised teachers to ‘inform themselves’ before using its materials, and directed them to the websites of Stonewall, Gendered Intelligence, and other organisations which actively promote or support gender identity theory. It conflated ‘hate crimes’ with ‘non-crime hate incidents’, which are not criminal offences, and included a list of ‘categories of anti-LGBT+ hate crime or LGBT+ hate incidents’ without clearly distinguishing between them.

Sarah Phillimore, a barrister who specialises in child safeguarding law, has written a commentary about the *Guidance* in which she states,

“... there is an alarming list of behaviour, some of which is trivial or undefined which is offered as examples of ‘hate’... Given that the guidance is very clear about how seriously such ‘hate crimes’ and incidents should be taken, I am worried that a clear incentive is being set up here to encourage students to report one another's behaviour or for a teacher to feel under pressure to refer it on to the police.”<sup>136</sup>

In April 2020 a 14 year old girl supported by her mother, who acted as her litigation friend, threatened a judicial review of the CPS in relation to the *Guidance*. She argued that the implication of the *Guidance* was that she could be prosecuted if she sought to exclude a boy who identified as a trans-girl from a girls' friendship group or from the girls' toilets at her school, expressed her disagreement with ‘trans-gender ideology’, or made contact with groups who campaign for women's sex-based rights and

---

135. Crown Prosecution Service, *Op. cit* (51) 3

136. Sarah Phillimore, ‘The Crown Prosecution Service in the Classroom’ (*Child Protection Resource*, 29 January 2020) <https://childprotectionresource.online/the-crown-prosecution-service-in-the-classroom/>

shared their information at school.<sup>137</sup> None of these are criminal offences, but the list of hate ‘crimes and incidents’ which was given in the Guidance could easily be interpreted as implying that they are.

After receiving a pre-action letter from the young woman’s solicitors, the CPS withdrew the Guidance and said they would review it. Following this decision, the young woman made an application to judicially review the CPS’ participation in Stonewall’s Diversity Champions Programme, on the basis that the CPS could not carry out a fair review of the Guidance while it remained in this programme.<sup>138</sup> This action was not allowed by the court, but nevertheless the CPS response was to announce that the Guidance had been permanently withdrawn.

In publishing this Guidance, the CPS attempted to promote a very partisan view about the nature of sex and ‘gender identity’ to teachers and young people in a context in which the law’s approach to these matters is the subject of public debate. It allied itself with groups representing only one side of this debate and produced materials which misrepresented the law and were likely to have a chilling effect on the expression of gender critical views by young people and teachers. This over-reach by a public body charged with prosecuting crime on behalf of the state is extremely concerning, as is the fact that the CPS seems to have avoided public scrutiny of the Guidance. Initially the Guidance was not made available to parents. As soon as it was challenged, the CPS withdrew it for review, and then withdrew it altogether when their relationship with Stonewall was called into question. If the CPS were confident that their involvement in the Guidance and their relationship with Stonewall were appropriate to their role, it is difficult to see why they avoided scrutiny in this way.

The CPS’s secrecy about the production of the Guidance and their relationship with Stonewall suggests policy capture which, as the OECD’s definition set out above suggests, undermines core democratic values, and is the opposite of inclusive and fair policy-making.

### **The Judicial College’s secrecy about the contributors to the *Equal Treatment Bench Book***

Secrecy is also a feature of the Judicial College’s approach to the development of the ETBB. The ETBB’s introduction of *de facto* self-definition of ‘gender identity’ happened without public consultation, and the process by which the ETBB guidance is developed is not open to public scrutiny. Melanie Newman reported in the *Law Society Gazette*<sup>139</sup> in 2020 that the Judicial College had refused to identify the external organisations involved in training and policy formulation in relation to the ETBB when asked to do so. The Judicial College has also refused to provide this information in response to a Freedom of Information request. It takes the view that it holds information about judicial training on behalf of the judiciary, and that therefore this information is not subject to the Freedom of Information Act.<sup>140</sup>

In view of the partisan nature of the ETBB’s guidance in chapter 12, and the Judicial College’s secrecy about the individuals and organisations

137. Sinclairlaw, Pre-Action Protocol Letter for Judicial Review, 03 April 2020 [https://safeschoolsallianceuk.net/wp-content/uploads/2020/04/cps-pre-action-protocol-letter-03.04.20\\_z.pdf](https://safeschoolsallianceuk.net/wp-content/uploads/2020/04/cps-pre-action-protocol-letter-03.04.20_z.pdf)

138. Fiona Hamilton, ‘Girl seeks judicial review of Crown Prosecution Service transgender ‘bias’ (*The Times*, 8 January 2021) <https://www.thetimes.co.uk/article/girl-seeks-judicial-review-of-crown-prosecution-service-transgender-bias-97ckpxj2q>

139. Melanie Newman, *Op. cit* (61)

140. FOI request made by N. Cunningham to the Judicial College, Response 210116008, 09.02.21. [https://www.whatdotheyknow.com/request/training\\_provided\\_to\\_judges\\_by\\_s#comment-96472](https://www.whatdotheyknow.com/request/training_provided_to_judges_by_s#comment-96472)

involved in developing it, it is reasonable to conclude that this guidance is to a significant extent the product of policy capture. The Judicial College's lack of transparency certainly suggests an environment which is conducive to policy capture.

Transparency about the organisations and individuals who influence judicial practice is a fundamental aspect of a well-functioning democracy. Both the public and judges themselves are entitled to know who is influencing guidance for judges. Withholding this information is not in the public interest, and it undermines public confidence in the justice system.

The revised ETBB has clearly taken some account of the criticisms of previous versions, as discussed above. This suggests more potential openness to a wider range of opinion in the future. Perhaps there is hope that before the next edition of the guidance the Judicial College will develop a more transparent and publicly accountable process and consult a wider range of opinions in producing it.

---

## Conclusion

However current policies may have evolved, all four of the institutions under discussion have adopted policies which 'go beyond' the law, and which are having significant detrimental effects on the operation of the criminal justice process.

Accurate data on patterns of criminality is crucial to developing law and policy aimed at reducing and deterring offending and finding effective ways of rehabilitating convicted offenders. Recording suspects, defendants and convicted offenders on the basis of 'gender identity' is distorting data relating to crime and patterns of criminality. This is particularly damaging in relation to sexual offences and other forms of offences against the person, which are overwhelmingly committed by males. New Home Office policy which will involve recording suspects and offenders according to either their sex registered at birth or their legal sex where they have a GRC will reduce the inaccuracies being created by recording on the basis of self-declared 'gender identity', but it will not eliminate them.

Practices within the criminal justice system which treat biological males as if they are women are causing harm to victims of crime, to some of the staff working in criminal justice institutions, to female detainees and prisoners, and perhaps to some trans-identifying offenders, whose rehabilitation is not helped by policies which allow them to 'play the system' more easily.

The trauma of victims of sexual assault and other forms of violence is exacerbated when police officers, lawyers and judges undermine their perceptions of reality by referring to males who have assaulted them as 'she', and implicitly or explicitly suggesting that they should also do this. Their ability to give evidence in court about their experiences may be significantly undermined by this practice, especially in the case of children and vulnerable adults, such as those with learning disabilities. The fear and anxiety experienced by women prisoners as a result of the practice of housing trans-identifying males in the women's prison estate is being exacerbated by the Prison Services' policy of compelling them to use the preferred pronouns of trans-identifying prisoners and punishing them when they do not do so. This practice makes it more difficult for women prisoners to report inappropriate sexualised behaviour, or sexual assaults committed against them, by trans-identifying males.

The National Police Chiefs' Council's policy permits trans-identifying male police officers to conduct strip searches and intimate searches of female detainees on the basis of self-declared 'gender identity'; and the Prison Service are considering a similar policy in relation to trans identifying

male prison officers who hold a GRC. Strip searches or intimate searches carried out by biological males are likely to result in some women being traumatised, regardless of how the individual carrying out the search identifies. The dignity of police and prison officers is undermined when they are required to conduct intimate searches of suspects or offenders of the opposite sex against their wishes. For female officers in particular this may be a traumatising experience, especially where a trans-identifying male is a known sex offender and/or is aroused by the search. In view of the large proportion of sex offenders among trans-identifying males in the prison system, this is not an unlikely event.

The safety of female prisoners is being put at risk, and their dignity and privacy undermined, by being incarcerated with biological males, some of whom are known sex offenders. The Ministry of Justice acknowledges that this is causing high levels of fear and anxiety to women who are often already traumatised by their experiences of sexual assault and domestic abuse, yet the wish of trans-identifying males to be placed in the women's estate is given priority. The claim that this is a fair balancing of rights does not stand up to scrutiny, particularly in view of the fact that alternative arrangements could be made within the existing prison regime which would enable trans-identifying male prisoners to safely 'live in their acquired gender' without being housed in the women's estate.

The policies of the criminal justice institutions which are examined in this publication are rooted in an extreme ideology in which claims to rights based on 'gender identity' take precedence over the rights of others, and particularly the sex-based rights of women, even where this involves denying their rights to safety. These policies are not aligned with the law and have developed in the absence of public scrutiny or democratic consensus. They need to be reviewed as a matter of urgency.

---

## Recommendations

Many of the problems identified in this publication could be significantly ameliorated by ending the *de facto* self-declaration of ‘gender identity’ within the criminal justice system. There are no legal barriers to doing so, as such self-declaration is not aligned with the law in England and Wales. The government have stated that they do not intend to introduce it into the law, which raises questions about why they allow it to continue in practice.

However, bringing *de facto* self-declaration to an end would not solve all of the problems identified here, as some of them have their roots in the provisions of the Gender Recognition Act. For example, as the law stands a biological male who holds a GRC and is therefore treated as a woman for most legal purposes, can generally only be intimately searched by a female police or prison officer. Biological males who hold a GRC include sex offenders and those who retain male genitalia. As discussed above, requiring female police and prison officers to carry out strip searches or intimate searches of biological males could potentially constitute a breach of their Article 8 rights in some circumstances. However, a trans-identifying male who holds a GRC may also have potential claims under Article 3 and/or 8 if strip-searched or intimately searched by a male police or prison officer. This illustrates a fundamental tension in the Act between women’s sex-based rights to safety, dignity and privacy and the rights conferred on trans-identifying males by a GRC.

The recommendations below focus on how a fairer balancing of the interests of women and trans-identifying males might be achieved within the constraints imposed by the Gender Recognition Act. They include suggestions for some amendments to the Act which could be achieved without a major overhaul of its provisions, as such an overhaul seems unlikely at present.

### **Ending *de facto* self-declaration of ‘gender identity’ and bringing practice into alignment with the law**

The policies of the police, the Crown Prosecution Service and the Prison Service, as well as guidance for the judiciary, should all be reviewed with the aim of ending the practice of *de facto* self-declaration of ‘gender identity’ which has been introduced without public scrutiny, and bringing the practices of these criminal justice institutions into alignment with the law. In view of the close links between the Prison and Probation Services, and the role of Her Majesty’s Prison and Probation Service in relation to each of them, the practices of the Probation Service should also be reviewed.



These reviews should involve consultation with a wide range of organisations and individuals. Criminal justice institutions seem to have developed their current policies in consultation with a very narrow range of organisations, all or most of whom advocate for self-declaration of ‘gender identity’. Future consultation should involve a range of organisations, including those representing women’s interests and holding gender critical views.

Those who have responsibility for, or a role in shaping, the work of these institutions are listed in Appendix 3.

Where reviews are initiated, this should be with a view to bringing about the following changes:

### **Recording criminal justice data on the basis of sex**

The police, the Crown Prosecution Service, the courts, and the Prison and Probation Services should record all suspects, defendants and offenders on the basis of their biological sex rather than their ‘gender identity’.

Where an individual holds a GRC, they should also record this fact separately.

All these institutions should be able to establish whether or not a trans-identifying suspect, defendant or offender holds a GRC in order to appropriately maintain accurate records.

It appears that in some cases this information is not being recorded due to institutions taking a very cautious approach in their interpretation of the prohibition of disclosure of ‘protected information’ under section 22 of the Gender Recognition Act. However, this caution seems not to be justified in view of section 22 (4) of the Act.<sup>141</sup> To the extent that it is believed that section 22 is a genuine bar to recording the possession of a GRC for the purposes of effective and legitimate data recording by criminal justice institutions, the Act should be amended accordingly.

### **Ending the compelled use of language based on ‘gender identity’ within the criminal justice system**

The rights of everyone involved in the criminal justice process not to be compelled to use forms of speech which are based on ‘gender identity’ rather than biological sex should be respected.

When interviewing complainants/victims of crime and other witnesses, police officers and prosecutors should acknowledge their right to use the pronouns and forms of address which are appropriate to the biological sex of suspects, defendants and others involved in the criminal justice process.

The *Equal Treatment Bench Book* should be amended to reflect the right of all witnesses in both criminal and civil proceedings to refer to others in a way which aligns with those persons’ biological sex.

While trans-identifying males continue to be placed in the women’s prison estate, the Secretary of State for Justice should end the practice of compelling prisoners to use pronouns and forms of address based on ‘gender identity’, and of punishing prisoners for using pronouns and forms of address which are aligned with biological sex.

---

141. Section 22 (4) states that disclosing protected information will not be a criminal offence where:

(d) the disclosure is in accordance with an order of a court or tribunal,

(e) the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal,

(f) the disclosure is for the purpose of preventing or investigating crime.



### **Referring to suspects and defendants on the basis of their sex**

Complainants and potentially other witnesses in criminal trials who perceive the alleged offender in terms of biological sex will be undermined if police officers refer to them on the basis of ‘gender identity’ during the investigative process, or if prosecutors, judges and lawyers do this at court. This is particularly likely in relation to offences where the sex of a suspect or defendant is a significant aspect of the alleged offence, such as sexual offences, offences relating to domestic abuse, and other violent offences.

In respect of trans-identifying suspects and defendants who do not hold a GRC, and whose sex in law is therefore aligned with their biological sex, the following recommendations could be acted upon without changes to the law.

The police, Crown prosecutors, judges and lawyers in court proceedings should generally refer to suspects and defendants using language which aligns with their biological sex. Exceptions could be made where a complainant perceives a suspect or defendant in terms of ‘gender identity’, which may happen in some cases. However, this situation should not involve compelling other witnesses to use preferred pronouns based on ‘gender identity’.

Where a case proceeds to trial, decisions about the use of pronouns and forms of address can be considered at a case management hearing. The default position recommended in the current *Equal Treatment Bench Book* is that defendants’ preferred pronouns and forms of address should be used, but that witnesses giving evidence about their experiences of sexual assault or domestic abuse may be permitted to use language which aligns with the defendant’s biological sex. Fully recognising the rights of these groups of witnesses to give evidence in a way which does not belie their own perceptions would require changing the default position, so that everyone involved in the trial process in a professional capacity uses language which aligns with the defendant’s biological sex.

Where trans-identifying suspects or defendants hold GRCs, the requirement in section 9(1) of the Gender Recognition Act to treat them according to their ‘acquired gender’ for legal purposes may require judges, lawyers and others involved in court proceedings in an official capacity to use their preferred pronouns and forms of address. However, the Act places no requirement on others to do so.

Consideration should be given to amending the Gender Recognition Act to create an exception which would permit judges, lawyers and others involved in court proceedings in an official capacity to use pronouns and forms of address which are aligned with biological sex in cases in which biological sex is a significant factor. This would include criminal proceedings relating to alleged sexual offences, and other kinds of violent offences, particularly where the proceedings relate to domestic abuse or other forms of sex-based violence.

### **Requiring all searches of police detainees and prisoners to be**

---

### **carried out by police and prison officers of the same biological sex as the person being searched**

The new NPCC policy which would enable trans-identifying police officers to search detainees and prisoners in accordance with their 'gender identity' rather than their biological sex should be abandoned; as should the proposals being considered by the Prison Service to allow this practice in relation to trans-identifying prison officers who hold a GRC. Both institutions should develop clear policies stating that intimate searches or strip searches of detainees and prisoners should only be carried out by officers of the same biological sex as themselves. This approach would protect the rights of detainees to safety, dignity and privacy.

Many detainees and prisoners would experience intimate searches or strip searches carried out by a member of the opposite sex as demeaning. Female detainees and prisoners in particular are likely to find them degrading and potentially traumatising.

The practices of requiring police and prison officers to conduct strip searches or intimate searches of trans-identifying detainees and prisoners of the opposite biological sex should be ended, and provisions made for exempting officers who object to carrying out such searches from having to do so. Female police and prison officers in particular may find the experience of searching trans-identifying males distressing, particularly where the person being searched retains male genitalia and/or is a suspected or convicted sex offender.

Where trans-identifying detainees or prisoners do not have a GRC and are therefore legally of their sex as registered at birth, policies which require that they should only be searched by police or prison officers of the same biological sex as themselves could be developed without any changes to existing statutory provisions.

Where trans-identifying detainees or prisoners hold a GRC, the situation is more complex. Trans-identifying males who hold a GRC may have claims on the basis of their deemed legal sex that their rights under Articles 3 and/or 8 of the European Convention would be breached if they were stripped searched or searched intimately by male police or prison officers. As discussed above, this is a fundamental tension within the law.

### **Making all prisons single-sex**

The practice of placing biological males in women's prisons should be brought to an end as soon as possible. In relation to trans-identifying males who do not hold a GRC and are therefore legally male, no legislative provisions would be needed to make this possible.

Arguably no changes to legislation would be needed in relation to those with a GRC, in view of the Secretary of State's ability to use the single-sex exceptions in the Equality Act 2010 to maintain single-sex prisons. However, if it is thought that this approach is not workable, then the Gender Recognition Act could be amended to introduce a specific exception requiring that prisoners who hold a GRC are housed in the prison estate on the basis of their biological sex. There are already exceptions in

the Gender Recognition Act which prevent those with a GRC from being treated as their acquired gender for all purposes. Adding this exception would be a straightforward matter.

All trans-identifying prisoners should be housed within the prison estate which aligns with their biological sex or housed in a separate unit which does not form part of the women's estate if being housed in the general men's estate is considered unsafe for them. Trans-identifying females are already normally housed in the women's prison estate because of the risks which being housed in the men's estate would pose to them. This policy would enable that practice to continue. This is the approach which was set out in Lord Blencathra's proposed amendment of 10 January 2022. It would ensure the safety, dignity and privacy of all prisoners.

# Appendix 1

## **The Equality Act 2010: The protected characteristics and provisions for single-sex spaces and services**

The Equality Act protects those with protected characteristics from discrimination, harassment and victimisation.

### **The protected characteristics**

Section 4 of the Act sets out the nine protected characteristics, which are:

age

disability

gender reassignment

marriage and civil partnership

pregnancy and maternity

race

religion or belief

sex

sexual orientation.

**Definition of sex:** Section 11 states that a reference to a person who has the protected characteristic of sex is a reference to a man or to a woman.

**Definition of gender reassignment:** Section 7 states that a person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing, or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex. The Act uses the term 'transsexual' to refer to a person with this protected characteristic.

Having the protected characteristic of gender reassignment is not the same as having a GRC. A trans-identifying male who does not have a GRC remains legally male but may have the protected characteristic of gender reassignment.

## The single-sex exceptions

The Act includes exceptions which allow for the provisions of single-sex services, spaces and activities. Trans-identifying males, including those with a GRC, may be excluded from women's single-sex services and single-sex accommodation where this is a proportionate means of achieving a legitimate aim. The Equality and Human Rights Commission's guidance on single-sex provisions states that justifiable reasons for excluding trans-identifying people from a single-sex service could include promoting dignity or privacy, preventing trauma, or ensuring the health and safety of others.<sup>142</sup> All of these are applicable to the provision of single-sex women's prisons.

Sections 26, 27 and 28 of Schedule 3 of the Act allow for the provision of single-sex services where:

- Only one sex needs the service
- Providing the service jointly to both sexes would not be sufficiently effective
- A joint service for persons of both sexes would be less effective, and the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.
- The service is provided at a hospital or other establishment for persons requiring special care, supervision or attention
- The service is provided for, or is likely to be used by, two or more persons at the same time, and the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.
- The service involves physical contact, and a person might reasonably object if another service user was of the opposite sex.

Section 3 of Schedule 23 relates to communal accommodation and allows for residential accommodation which includes dormitories or other shared sleeping accommodation to be used only by persons of the same sex, for reasons of privacy.

<sup>142</sup>Equality and Human Rights Commission, 'Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment provisions', Last updated 04 April 2022 <https://www.equalityhumanrights.com/en/advice-and-guidance/separate-and-single-sex-service-providers-guide-equality-act-sex-and-gender>

## Appendix 2

### **Types of searches carried out by the police**

Any search involving the removal of more than an outer coat, jacket, gloves, headgear or footwear, or any other item concealing identity, may only be made by an officer of the same sex as the person searched and may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it.

There are 4 forms of searches which the police carry out, which are outlined below. The first two may take place during stop and search.

#### **Searching of outer garments only**

This may occur during stop and search. There is no power to require a person to remove any clothing in public other than an outer coat, jacket or gloves (except under section 60AA of the Criminal Justice and Public Order Act 1994 which empowers a constable to require a person to remove any item worn to conceal identity). A search in public of a person's clothing which has not been removed must be restricted to superficial examination of outer garments. This does not prevent an officer from placing his or her hand inside the pockets of the outer clothing, or feeling round the inside of collars, socks and shoes if this is reasonably necessary in the circumstances to look for the object of the search, or to remove and examine any item reasonably suspected to be the object of the search. For the same reasons, subject to restrictions on the removal of headgear, a person's hair may also be searched in public.

#### **More thorough searches**

Where on reasonable grounds it is considered necessary to conduct a more thorough search (e.g., by requiring a person to take off a T-shirt), this must be done out of public view, for example, in a police van or police station if there is one nearby.

Searches involving exposure of intimate parts of the body may be carried out only at a nearby police station or other nearby location which is out of public view.

(PACE Code A; *Exercise by police of officers' statutory powers of stop and search*, Paras 3.5, 3.6 and 3.7)

### **Strip searches**

A strip search is a search involving the removal of more than outer clothing. Outer clothing includes shoes and socks.

A strip search may take place only if it is considered necessary to remove an article which a detainee would not be allowed to keep, and the police officer reasonably considers the detainee might have concealed such an article. Strip searches should not be routinely carried out if there is no reason to consider that articles are concealed.

### **Intimate searches**

An intimate search consists of the physical examination of a person's body orifices other than the mouth.

An intimate search may only be carried out by a registered medical practitioner or registered nurse, unless an officer of at least inspector rank considers this is not practicable and the search is authorised by an officer of inspector rank or above who has reasonable grounds for believing that the person may have concealed on themselves anything which they could and might use to cause physical injury to themselves or others at the station. Any proposal for a search to be carried out by someone other than a registered medical practitioner or registered nurse must only be considered as a last resort and when the authorising officer is satisfied the risks associated with allowing the item to remain with the detainee outweigh the risks associated with removing it.

(PACE Code C: *Detention, treatment and questioning of persons by police officers*, Annex A, 'Intimate and strip searches')



## Appendix 3

### **Those with responsibility for or influence over the criminal justice institutions discussed in this publication**

**The Police Service:** The Home Secretary is responsible to Parliament for the work of the police.

**The Crown Prosecution Service:** The Attorney General is responsible to Parliament for the work of the Crown Prosecution Service and appoints the Director of Public Prosecutions.

**The Judicial College:** The Lord Chief Justice is the Head of the Judiciary of England and Wales and the President of the Courts of England and Wales. The Lord Chief Justice's statutory duties under the Constitutional Reform Act 2005 include the training and guidance of the judiciary of England and Wales, which is exercised through the Judicial College.

**Her Majesty's Prison and Probation Service (HMPPS):** The Secretary of State for Justice is the Minister responsible to Parliament for prisons and probation (as well as for the judiciary and the court system).

There is no regulator with powers to hold prisons to account against performance standards. HMPPS set their own policies and performance metrics. Public accountability is provided by HM Inspectorate of Prisons. The Inspectorate publish thematic reports as well as reports on individual prisons, the focus of which is on the treatment and conditions experienced by prisoners.

The following bodies could play a role in any reviews of current policy and practice which takes place:

HM Inspectorate of Prisons cannot direct HMPPS to follow a particular policy, but their views are likely to be persuasive.

The Minister of State for Prisons and Probation has responsibility for prison operation, policy and reform, as well as for female offenders and transgender offenders.

The Justice Select Committee has a role in scrutinising the policies of the Ministry of Justice and associated bodies. This includes the Prison and Probation Services. This Committee has the authority to initiate reviews.



£10.00  
ISBN: 978-1-913459-96-3

Policy Exchange  
1 Old Queen Street  
Westminster  
London SW1H 9JA

[www.policyexchange.org.uk](http://www.policyexchange.org.uk)