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Lamble, Sarah (2012) Rethinking gendered prison policies: impacts on transgender prisoners. ECAN Bulletin (16), pp. 7-12.

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## Feature

### Rethinking gendered prison policies: Impacts on transgender prisoners

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Law enforcement officials have a long history of targeting, punishing and criminalising people who do not conform to gender norms. As feminist criminologists have shown, for example, women who fail to conform to femininity norms are often policed and punished more harshly in the criminal justice system than those who adhere more closely to societal gender expectations (Carlen, 1983, 1985; Heidensohn, 1996). Likewise, traditional norms around masculinity and femininity still operate as key modes of discipline, power and regulation within carceral settings (Sim, 1994 ; Carrabine and Longhurst, 1998; Crewe, 2006). Although the role of gender norms within the penal system is widely recognised, little attention has been paid to their specific impact on transgender people.



The term 'transgender' is used and defined in many different ways; see for example, Currah and Paisley (2006). It is commonly used as an umbrella term to describe people who identify or express gender differently than what is traditionally associated with the sex they were assigned at birth. This includes people who

undergo a process of gender reassignment to live permanently in their self-expressed gender (which may or may not involve medical interventions such as surgery or hormone treatment), as well as those who express less fixed and more fluid gender identities and those who self-define as gender variant or gender non-conforming. Gender non-conforming, refers to people whose gender presentation or identity does not conform to gender norms or expectations but who do not necessarily identify as transgender (e.g. women who present in a masculine way, but nonetheless identify as women, as well as androgynous, gender-fluid and gender ambiguous people).

#### **Transgender prisoners in Britain**

We do not know exactly how many transgender people are currently incarcerated in Britain. This is partly because prison officials do not collect information on the gender identity of prisoners (as opposed to legal sex status) and partly because prisoners are not always safe to disclose non-conforming gender (and sexual) identities. However, a growing body of evidence suggests that transgender and gender non-conforming people are over-policed and over-imprisoned in many jurisdictions, including Britain.

Transgender and gender non-conforming people end up in prison for many reasons, but systemic discrimination is often a key factor. Transgender people face high rates of housing and employment discrimination, bullying in schools, estrangement from family, street harassment and hate-based violence – factors which greatly increase the risks of social exclusion, economic insecurity and criminalisation (Whittle, Turner and Al-Alami, 2007; Mitchell and Howarth, 2009). A transgender young person, for example, might initially drop out of school because of harassment and bullying. Coupled with problems at home, the young person may find themselves homeless and unemployed. Once on the street, accessing services and support becomes difficult, particularly as many homeless shelters and social services are not safe or accessible for gender non-conforming people. In such situations, survival can sometimes mean working in criminalised economies like the drug and sex trade, which can in turn lead to prison.

### Gender segregation in prisons

Once in prison, transgender people face numerous challenges. First, as sex-segregated and highly gendered institutions, prisons restrict the right of transgender people to self-determine and express their gender identity. Transgender people are usually placed in prison according to their perceived genitals rather than their self-expressed gender identity. This means that trans-women are often held in men's prisons and trans-men are held in women's prisons. Until recently, even when transgender individuals obtained a Gender Recognition Certificate (a document which legally recognises a person's acquired gender under the Gender Recognition Act 2004) they were still classified according to their birth-assigned gender. However, in 2009, a transgender woman won her case against the Ministry of Justice, which had refused to transfer her to a women's prison despite a Gender Recognition Certificate that recognised her status as female (*AB, R (on the application of) v Secretary of State for Justice and Anor* [2009] EWHC 2220 (Admin) (04 September 2009)). The High Court judge ruled that the Ministry's actions breached Article 8 of the European Convention on Human Rights. While this case set an important precedent, which, when coupled with the new Equality Act 2010, offers greater protection for transgender people in prison, there are still reports of inconsistent placement decisions, raising questions about whether such rights are being upheld in practice.



Transgender prisoners may be held in solitary confinement on 'security' or 'protective custody' grounds as a response to the dilemmas posed by sex-segregation. In such cases solitary confinement becomes a de facto form of punishment as such status usually means reduced access to recreational and educational programmes, and increased psychological

stress as a result of isolation. Such practices effectively treat transgender people as 'the problem', rather than addressing the underlying issues of transphobia in prison or rethinking existing policies around sex-segregation.

Indeed, official concerns about a transgender person's safety and risk can sometimes mask an unwillingness to adequately address systemic issues of transphobia in prison.

### **Other problems faced by transgender prisoners**

Transgender people are frequently denied access to trans-specific healthcare and other necessary supports (including gender appropriate clothing and make-up, hormone treatment, surgery, etc.). This can cause problems for people who have already begun gender transition and are forced to stop or delay the process, but also for those who wish to begin the process once they've entered prison. Many trans-people also fear negative reprisals from disclosing their status, and choose to conceal their trans-identity entirely or wait to begin formal transition until they are released from prison – often at considerable emotional stress and anguish. Such emotional trauma is cause for concern, particularly as rates of self-harm and suicide are already high in prison and trans-people have been specifically identified by the prison service as an 'at risk' group in this area.

Perhaps most alarming is the level of harassment, assault and abuse that transgender people can face in prison. While such abuses are more widely documented in other jurisdictions (particularly in the US, see Stop Prisoner Rape and American Civil Liberties Union, 2005 ; Sylvia Rivera Law Project, 2007 ; Arkles, 2009), evidence from individual prisoners, prison inspectorate reports and advocacy groups suggest that the problem is also acute in British prisons.

### **New guidelines on the care and treatment of transsexual prisoners**

In March 2011, the Ministry of Justice issued mandatory guidelines (PSI 07/2011) on *The Care and Management of Transsexual Prisoners*. Written to comply with the Equality Act 2010 (where gender reassignment is specified as a protected characteristic in law), the 20-page guidelines identify a number of duties and responsibilities that prisons must fulfil to respect the rights of trans-identified prisoners. Prison officials must:

Allow transgender people to live permanently in their new gender. This includes enabling prisoners to dress in clothes appropriate to their acquired gender and to adopt gender-appropriate names and modes of address.

Enable transgender prisoners to access clothing, makeup and other gender-specific items that they need to live in their new gender.

Provide transgender prisoners with the same quality of medical care that they would expect to receive from the NHS if they had not been sent to prison.

Put in place measures to manage the risk of transphobic harassment and transphobic hate crime.

Importantly, the guidelines stipulate that access to necessary items such as gender-appropriate clothing and makeup is *not* a privilege and cannot be

taken away as a form of punishment or treated as part of the Incentives and Earned Punishment Scheme.

The guidelines also stipulate that a trans-person whose gender is legally recognised through a Gender Recognition Certificate must be placed in prison according to the gender on the certificate, unless there are security reasons for not doing so. Trans-prisoners who do not have a Gender Recognition Certificate may also be placed in a gender appropriate prison on a case-by-case basis. The guidelines specify that 'this is a legal issue rather than an anatomical one, and under no circumstances should a physical search or examination be conducted for this purpose.' This protection is vital, as trans-people in various jurisdictions have reported being regularly subjected to cruel, demeaning and abusive strip-searches (Sylvia Rivera Law Project, 2007; Arkles, 2009).

While the 2011 guidelines are much needed and long overdue, they are nonetheless limited by some problems. First, the guidelines define transgender identity on narrow terms, using the medical definition of someone who has been diagnosed with gender dysphoria and using the more narrow terminology of 'transsexual' rather than 'transgender' throughout the document ('transgender' is conventionally understood as encompassing a broader range of identities and experiences, including those who may not want (or are unable to access) medical intervention). By defining a transsexual person as 'someone who lives or proposed to live in the gender opposite to the one assigned at birth', the document also relies on a binary definition of gender (i.e. there are only two) rather than a more fluid understanding (i.e. there are many gender expressions).

Secondly, the guidelines are highly discretionary, leaving most decision-making power in the hands of prison officials and members of the medical establishment. This leaves considerable room for discrimination to persist, particularly when prison officials or medical staff may not have the specific knowledge or training to deal appropriately and sensitively with gender identity issues. Moreover, the broader problem of 'gatekeeping' (where medical and legal officials have the power to determine whether a person's transition decisions are legitimate) is likely to be exacerbated in the prison context where social stigma and discrimination against prisoners may shape perceptions of who is deserving and undeserving of support. At the same time, however, the level of discretion leaves room for flexibility, which can be positive. For example, the guidelines state that a prisoner's wishes should be taken into consideration when placement decisions are made. This means that if a transgender man feels vulnerable being housed in a male unit and therefore prefers to remain in a women's prison, his wishes need to be considered. The guidelines also stipulate that careful consideration should be made if placement decisions are likely to result in the prisoner being held in long-term segregation.

Finally, while the guidelines set vital standards that offer much promise for improving conditions for transgender people in prison, the gap between official policy and actual practice is likely to remain wide. Transgender prisoners report considerable administrative hoops, attitudinal barriers and lack of

support to access basic needs, which will require more than policy to overcome.

Transgender prisoners do report some positive experiences inside, particularly when peer support is available inside prison and support from family, friends and advocacy groups is available from outside. Transgender prisoners are developing both formal and informal support networks to assist each other in prison which can increase safety and well-being (see [www.bentbarsproject.org/resources/newsletter](http://www.bentbarsproject.org/resources/newsletter) for example). Despite this, the underlying problem is a more deeply entrenched one: namely, that the prison system at large continues to enforce and regulate gender norms in ways that cause considerable harm and damage at both individual and societal levels. Addressing these issues over the long term will require far more fundamental change that strikes at the heart of prison system itself.

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