

**Book Chapter**

**Transgender people in prison in England and Wales: policy and practice in a culture of penal populism' in Transgender People Involved with Carceral Systems**

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# 17 Transgender People in Prison in England and Wales

## Policy and Practice in a Culture of Penal Populism

*Caroline Gorden and Caroline Hughes*

### Introduction

#### *Equality data on transgender people in prison in England and Wales*

The first prison policy on the care and management of transgender people in England Wales (PSI 07/2011) was reviewed in 2016. One encouraging development following the review is that equality data are now collected on gender identity. Prior to this, the number of transgender people in prison in England and Wales was unknown. In November 2016, the Ministry of Justice published the first official statistics, and in 2018, 139 transgender people in prison were recorded (Ministry of Justice, 2019). A year later, there was an increase to 163 and an increase again in 2021 to 197 transgender people in prison. There were also 21 transgender people in prison from a Black, Asian, and Minority Ethnic (BAME) background, accounting for 11 per cent of the transgender prison population (Ministry of Justice, 2021). There were ten transgender people in prison known to have a Gender Recognition Certificate (GRC).<sup>1</sup> However, these statistics are likely to be an underestimate because most may not declare their transgenderism (or identify with this category) and therefore cannot be counted. Until 2021, transgender people with a GRC were not counted because their legal gender is that declared on their GRC. Thus, a transgender woman, for example, is legally a woman and will be housed in a female prison and recorded as female, and therefore not show up in these statistics (Bent Bars, 2020). Notwithstanding this, for various reasons, most transgender people do not apply for a GRC. For example, a GRC may not be felt as necessary since they are afforded the same protections as those with one. The Equality Act 2010 protects them from unfair discrimination, victimisation, and harassment, and the Criminal Justice Act 2003 protects them from hate crimes. Furthermore, their rights to marry anyone of their choosing is upheld under the Marriage (Same Sex Couples) Act 2013. Some transgender people may also be deterred by the onerous GRC application process (Fair Play for Women, 2020).

The Inspectorate findings of 2020–21 highlight that there were 40 transgender people in female prisons, where almost all reported their legal gender

as female with the remaining reporting their legal gender as male. There were 157 transgender people in male establishments, and all reported their legal gender as male. However, in the women's prisons, 37 self-identified as male and the remaining identified as female or non-binary. For men's prisons, 145 identified as female, nine as non-binary, and the remaining did not respond (Ministry of Justice, 2021). These statistics indicate that most transgender people in prison are transgender women, who, legally recognised as male, are residing in men's prisons.

There is a dearth of prison research in relation to transgender people in England and Wales, perhaps because of the low number of transgender people in prison and the difficulty in conducting research with this prison population (Brömdal et al., 2019). Or indeed, it is possible that prison research reflects heteronormative and cisnormative assumptions about the estate. Additionally, extant papers are not based on empirical research (see Dunn, 2013; Gorden et al., 2017; Jones and Brookes, 2013; Poole et al., 2002).

Transgender people are a unique population in prison to manage. Deleuze's (1994) concept of two types of difference, 'kind and degree', illuminates why. Difference in kind refers to a difference in type or category. For example, appropriate showering arrangements and health care for transgender and cisgender people in prison are differences in kind; with regard to the former, transgender people will experience showering differently due to the lack of privacy and increased risk of sexual assault compared to their cisgender counterparts. Difference in degree refers to differences in magnitude. For example, transgender people may experience physical, sexual, or verbal violence to a greater degree. Such violence can also be a difference of kind when it stems from the transgender person having been placed in a prison that is misaligned with their chosen gender. This leads to a difference of degree in violence because the risk of it occurring is increased among this prison population. Thus, transgender people are disproportionately affected by the 'pains of imprisonment' (Sykes, 1958) along multiple dimensions.

### *The gendered pathway to crime*

Transgender people experience systematic discrimination, stigma, and social exclusion (Melendez and Pinto, 2007; Moolchaem et al., 2015; Maycock, 2021). In the US, Grant et al. (2011) found that unemployment among transgender and non-conforming people was double the rate of the general population. Those employed experienced 'near universal harassment' (p. 51) at work, and almost half said they experienced an adverse outcome such as not being offered employment, being denied promotion, or being fired. Almost half of transgender and non-conforming people experience unemployment and consequently face 'debilitating negative outcomes' (p. 3), and many turn to the underground economy, for example, selling drugs and performing sex work, as their source of income. Thus, higher levels of imprisonment, homelessness, and negative health outcomes are observed in this population.

Notwithstanding this, other research in the US indicates that transgender men may be more likely to receive promotions and salary increases than transgender women (Schilt and Connell, 2007).

Research has demonstrated a link between gender dysphoria and offending (Peterson et al., 1996). Because gender conformity begins in childhood, not conforming can result in conflict with parents, authorities, and peers. In turn, young transgender people may be forced to leave home (Oparah, 2012). Not unrelated to these trends, transgender people are more likely to suffer with mental health problems, including depression and suicidality (Coleman et al., 2012). Because of widespread discrimination, transgender people are also at risk of police stereotyping and biased sentencing decisions (Brömödal et al., 2019; Grant et al., 2011; James et al., 2016; National Center for Transgender Equality, 2018; Wolff and Cokely, 2007).

For the transgender BAME community, these issues may be further aggravated, illuminating the ways in which inequalities of race, class, and gender ‘often operate together and exacerbate each other’ (Crenshaw, 2020). Unstable employment and discriminatory landlords mean that transgender people are also more vulnerable to insecure housing and homelessness (Sexton et al., 2009). Thus, their pathway to offending is highly gendered. Inequalities transgender people experience are also likely to be exacerbated upon release from prison, particularly since the removal of priority need status for homeless prison leavers in England and Wales (see Madoc-Jones et al., 2019; Gorden et al., 2020). The link between homelessness and offending is well established (Madoc-Jones et al., 2019; Gorden et al., 2020).

### **The evolution of prison policy in England and Wales**

Despite the dearth of research about the lived experiences of transgender people in prison, international research indicates that ‘mistreatment, violence, and indifference are the norm rather than the exception for incarcerated transgender people’ (Brömödal et al., 2019: 2). However, locally specific research helps to reveal deeper insights into these experiences. Tracing the introduction and evolution of prison policy in England and Wales contextualises the conditions that trans prisoners face in these places as well as the way trans prisoners’ experiences have shaped the wider system. As well as adapting to wider social views, prison policy has developed to respond to failing operational practices that have been highlighted in some high profile and widely reported cases as well as observations from HM Inspectorate Annual Reports.

#### *The 2011 policy*

The first policy was introduced following the Equality Act 2010, whereby gender reassignment was first included as one of the nine protected characteristics. The Gender Recognition Act 2004 enabled transgender people in prison to be detained according to their acquired gender, and therefore

the 2011 policy stipulated that people in prison must be placed according to their legally recognised gender. A GRC may be issued to an individual if they have a diagnosis of gender dysphoria, have lived in their chosen gender for two or more years, and intend to live that way until death. Thus, under the 2011 policy, a GRC was required to place the transgender person in the estate of their acquired gender, although the policy extended to those who were advancing through the process of gender reassignment (Lloyd Bright, 2018). It was also advised that in the absence of a GRC, a case conference and multi-disciplinary risk assessment should be undertaken to facilitate a discretionary decision (Garton Grimwood, 2015). In the event that a transgender individual was to be placed in a prison according to their sex assigned at birth, the policy directed that the person's preferred name and gender-suitable clothing must be permitted. Indeed, Simopoulos and Khin Khin (2014) suggest that an integral part of the care and management of transgender people in prison is ensuring these needs are met.

A key criticism of the 2011 policy in England and Wales was that it assumed that all transgender people desired to undergo medical treatment to live in their acquired gender. This is not the case. Additionally, some may not be able to afford the treatment, which in the UK is currently offered by the National Health Service (NHS) in a limited capacity (Go, 2018). Indeed, campaign groups have criticised the process for obtaining a GRC as demeaning and bureaucratic; they have also critiqued that it fails, like the Equality Act 2010, to recognise other gender identities such as non-binary, gender fluid, intersex, and transvestite (Lloyd Bright, 2018), thereby forcing transgender people to opt between the male and female binary.

Then, in 2015, the Minister for Women, Equalities and Family Justice, Caroline Dinenage, confirmed that the 2011 policy was under review, suggesting that there were a 'number of representations expressing concern that the present system doesn't sufficiently address the needs of transgender prisoners' (Dinenage, 2015: n.p.). The suicides of two transgender women who were both placed in male prisons, Vikki Thompson, 21, and Joanne Latham, 38, within weeks of each other in November 2015 further sparked a broader scope in the review. Following a failed application to be placed in a women's prison, Vikki Thompson was placed at the men's prison, HMP Leeds. Although she had not undergone gender reassignment surgery or had a GRC, she had lived as female since a child. An independent investigation by the Prisons and Probation Ombudsman into her death underscored the failure to offer Thompson mental health support, suggesting there were inadequacies of the programme of detoxification and suicide and self-harm prevention procedures (Lloyd Bright, 2018). It was further pointed out that despite Thompson's suicide risk, she was not sufficiently observed. Despite the 2011 policy stipulating that gender expression be enabled accordingly, Thompson was subject to bullying and harassment with limited staff intervention taking place. Also, following the death of Joanne Latham at HMP Woodhill, the Prisons and Probation Ombudsman observed that there was an 'unnecessarily

long delay' in providing Latham with her requested make-up brushes (Lloyd Bright, 2018: 180). This highlights variability in implementing policy. Additionally, it demonstrates the necessity to support transgender women residing in male estates. It is noteworthy that both Vikki Thompson and Joanne Latham were found to have significant histories of mental health issues and self-harm (Lloyd Bright, 2018), which is reflective of the wider transgender population where suicide rate and suicidal tendencies are considerably higher compared to the general population (Butler et al., 2019; Virupaksha et al., 2016). It is important to note that there have been recorded suicides of transgender women in prison before and after Thompson and Latham's deaths.<sup>2</sup>

Because of the lack of research in England and Wales, widely reported, high profile cases indicating the pains of imprisonment (Sykes, 1958) for some transgender people is arguably the only real indicator of whether prison policy is effective or not. Around the same time of the deaths of Vikki Thompson and Joanne Latham, however, one case that received media attention for its positive outcome is that of Tara Hudson, who was successfully transferred from a male to female prison. Although legally recognised as male, Hudson was deemed to have progressed enough in the gender reassignment process and was transferred to HMP Eastwood Parc following a petition signed by more than 150,000 people (BBC, 2015, 2016; Lloyd Bright, 2018). However, Lloyd Bright (2018) argues that Hudson's success is more likely the result of her skills in publicity and ability to gain support rather than the effectiveness of the 2011 policy.

Despite the stipulations set out in the 2011 policy, 'Old School' (Tait, 2011) attitudes were noted in the HM Prison Inspectorate Annual Report (2014–15) when a custody officer at Kent prison was observed referring to a transgender person as 'it'. Additionally, the Inspectorate noted that while Northumberland was providing good one-to-one support, this support was 'undermined by insensitive staff continuing to refer to the transgender prisoner as a man and not always ensuring she had separate shower access'. Similarly, the 2014–15 Inspectorate Report, reflecting Maycock's (2021) research in Scottish prisons, demonstrated that transphobic comments were made by staff who misnamed, misgendered, and used incorrect pronouns when addressing the transgender person. The authenticity of the transgender person's motivations to transition was also sometimes questioned, which participants put down to the staff's 'old fashioned views' (Maycock, 2021: 13).

Although these reports offer some valuable insights, they are undoubtedly limited as a source of information. For instance, people in prison may not trust 'the system' and could be reluctant to disclose important issues to inspectors. When information is collected, some transgender people may have been recently transferred out of the prison, meaning that valuable insight into their experiences is lost. It is also worth noting that although inspectors are drawn from a range of backgrounds, many include seconded or former prison managers and therefore biased relations with present governors may exist (HM Inspectorate of Prisons, 2017a).

*Review of the 2011 policy*

The 2016 review of the 2011 policy noted that ‘All staff should understand their responsibility to confront discrimination, bullying, or unwarranted attention aimed at transgender people’ and that best practice is when both people in prison and prison staff are trained together (Ministry of Justice, 2016: 8). This indicates that there are most likely variations across establishments about the nature and style of training, which will inevitably give rise to inconsistencies. During the period of the first policy, this was evidenced in the HM Inspectorate of Prisons for England and Wales Annual Report (2014–15), which documented that the quality of care for transgender people varied between prisons. Liebling (2011) argues that people in prison describe remarkable differences in relation to their treatment, interpersonal relationships in prison, and the use of authority. The differences in these standards of management influence perceived fairness and safety. Distress resulting in suicide is further linked to varying levels of respect and fairness shown to people in prison by staff. To this end, Liebling suggests that the difference in quality of life in prisons means that ‘some prisons are more survivable than others’ (Liebling, 2011: 532).

The 2016 review of the 2011 policy in England and Wales, which coincided with the deaths of Thompson and Latham, recognised that the previous policy failed at enabling individuals to be respected as their gender (Review on the Care and Management of Transgender Offenders, 2016), regardless of whether these individuals sought to undergo medical treatment or applied for a GRC. As Stohr (2015) notes, possessing a GRC is an unreliable indicator of an individual’s transgender status because not all transgender people feel it necessary to undergo a full gender affirming surgery (SRS) and some may not wish to or be able to undergo a painful and major medical procedure. Indeed, the review recognised this issue:

It is apparent that the treatment of transgender people in courts, probation and prison services has not kept pace with the development of a more general understanding of the issues surrounding gender in society.

(MoJ, 2016: 4)

Furthermore, the review acknowledged that SRS and GRC are not ‘equally important to all transgender people’ and that:

Many successfully live their lives without such interventions and therefore policy in this area needs to evolve and take as its starting presumption a wish to respect someone in the gender in which they identify, once in the care of the criminal justice system.

Importantly, the review appeared to appreciate the role progressive policy may play in successful rehabilitation. Finally, the review observed the need to collect

data on gender identity. As previously mentioned, prior to the review, the number of transgender people in prison in England and Wales was unknown (Beard, 2018).

### *The 2016 policy*

The 2016 policy implemented procedures regarding prison placement in their preferred wards for transgender people without a GRC but who had lived consistently in their preferred gender, regardless of whether they are intending to undergo gender affirming surgery (GAS) or acquire a GRC. This is more in line with policy in Scotland, whereby transgender people are not required to have a GRC for them to be recognised by their acquired gender in prisons (Scottish Prison Service and the Scottish Transgender Alliance, 2014). Furthermore, the language was changed accordingly from referencing 'transsexuals' to 'The care and management of transgender prisoners', therefore enabling the inclusion of other gender identities. In keeping pace with wider social views, the new policy noted that moving away from terminology like 'transsexual' further 'places emphasis on gender identity of the 'whole person' rather than sexual functioning' (PSI 17/2016: 3). The new policy introduced a new procedure whereby the transgender person and wing manager were able to draw up a voluntary agreement about dress code, showering, searches, and cell sharing, within frameworks of risk assessment and mitigation. Again, the implementation of this element of the policy may be dependent on the attitude of the wing manager and other staff. The policy also introduced the term 'affirmed gender' to replace 'acquired gender' following the receipt of a GRC (PSI 17/2016). As Lloyd Bright (2018) noted, the new terminology serves to validate the experiences of those who have experienced gender dysphoria.

For the first time in England and Wales, transgender people were asked their view about where they would prefer to be placed. When a person wished to be placed according to their preferred gender, a Transgender Case Board was to convene that would be reflective of penal policy in the UK and the pre-occupation with risk and the safety of other people in prison and staff, which were to be assessed by this board. The policy also anticipated the risk that some requests may not be genuine; to this end, transgender women deemed to pose an exceptionally high risk to others were to be placed in women's units in men's prison because of its higher capacities to manage high risk people. It was further recommended that transgender people be placed in a separate and supportive environment (while taking care to avoid isolation) until the local Transgender Case Board could be convened (PSI 17/2016). In the aftermath of this updated policy, it was noted in the HM Inspectorate of Prisons Annual Report (2017–18: 20) that 'Most [transgender people in prison] said they felt reasonably well cared for, although we found some staff not using prisoners' chosen pronoun or name'. This again reflects the variations in practice across prisons in England and Wales.

More high profile cases supplied some further insight into transgender women's experiences in prison. In 2016, Jenny Swift, a transgender woman held in a men's establishment, was found hanged in her cell. Swift was legally recognised as male but had been living as a woman for the previous seven years. Although she had not undergone surgery, she had started the process of hormone replacement therapy. The Prisons and Probation Ombudsman found that staff had complied with the 2016 policy because Swift had been asked if she wanted to move to a women's prison and a recommendation of a transfer was given. However, criticism was made of her clinical care and the report observed staff shortages in the health care team. In the six weeks Swift was in prison, she had not seen a GP and was without a prescription for hormone replacement therapy despite her frequent requests (Newcomen, 2017). In another case in 2017, Jade Eatough was serving a sentence in a male estate and began transitioning treatment while in prison. Eatough had begun taking hormone replacements when she died by suicide. The inquest report notes that despite it being known that Eatough considered herself transgender, staff were inconsistent in referring to her as female and recorded information using the male pronoun or her birth name. She was also incorrectly told by a staff member that she would need to change her name by deed pool. The inquest concluded that Eatough was subject to Assessment, Care in Custody and Teamwork (ACCT) monitoring several times (Moody, 2018). Less is known about the prison experiences of Nicola Cope, who died by suicide at the women's prison HMP Foston Hall in 2016, as there is no available inquest report online by the Prisons and Probation Ombudsman. However, a news report indicates that the inquest was told that days before her suicide, she had lost her job in the kitchen after she was caught brewing alcohol. While in prison, Cope was moved to a new wing, having been accused of sexual assault against a fellow inmate in prison. It was reported that Cope had experienced mental health issues for most of her life. Because of previous self-harm and suicide attempts, it is reported that Cope was under a supervision order at the time of her death, which meant she was visited three times an hour by prison staff (Kreft & Chubb, 2022). All three of these cases brought continued attention to trans experiences in prison and to questions of whether current policies were working adequately to prevent suicides.

The 2016 policy came under scrutiny when in 2018, another high profile case of a transgender woman in prison was widely reported in the media. Karen White, 52, was legally recognised as a man but because of her gender identity was held on remand at a women's prison, where she began the gender reassignment process and dressed in gender-appropriate clothing. It is reported in the media that White pleaded guilty to counts of sexual touching, and the victims were two fellow women in prison (BBC News, 2018). Having previous convictions of a violent and sexual nature, the sentencing judge remarked that White was a 'predator' who adopted a 'transgender persona' to facilitate access to vulnerable individuals (Parveen, 2018; Lloyd Bright, 2018). The Ministry of Justice later apologised for placing White in a women's prison, acknowledging

that the nature of her historical offences had not been thoroughly considered (Parveen, 2018; Lloyd Bright, 2018). Certainly, the prosecution and sentencing judges were of the view that White adopted a transgender persona so that contact with vulnerable people to enable later abuse could be made. White's case raised concerns about the policy on placing transgender women in female estates. Indeed, the campaigning and consultancy group Fair Play for Women ran a petition that highlighted the case, asking people to get the 'dangerous prison policy changed' (Fair Play for Women, 2018). This case shows the difficulties policymakers have had in balancing different kinds of gendered vulnerabilities and rights.

### *The 2019 policy*

Because the Gender Case Board did not follow policy in White's case, an updated policy was implemented: Ministry of Justice and HM Prisons and Probation Service 'The Care and Management of Individuals who are Transgender' 2020. Here, it might be argued that the case of Karen White served to reaffirm existing policy and train staff in its use. For example, the new policy in England and Wales outlines the process for managing people in prison with varied gender identities. Additionally, procedures for making decisions about where a transgender person may be placed within the estate has been tightened up. Although a commitment remains to assessing people identifying with different gender identities on an individual case-by-case basis, a copy of a GRC is no longer automatically sent to a prison documenting an imprisoned person's legally recognised gender. This is likely to be detrimental to transgender people who have long lived in their affirmed gender. The decision-making process about where to place a transgender person in the prison establishment is now characterised with safeguarding elements (Lloyd Bright, 2018) whereby it appears that particular emphasis has been placed on the safety of cisgender women in female establishments.

The new measures in the latest policy are seen as regressive for transgender people in England and Wales because they involve extensive evidence gathering on the individual's offending history, including actions that have not resulted in a conviction. This, of course, takes more time (14 days) for a Transgender Case Board to be convened, potentially leaving the transgender person waiting in a gender inappropriate establishment. Activists argue that such steps expose transgender people to risks of bullying, harassment, and abuse. Spending the first 14 days in prison waiting for a Transgender Case Board to be convened is important because an HMI paper about living conditions in prison pointed out that the first 24 hours in custody can be when people are at their most vulnerable and the risk of self-harm at this time is high. To this end, the HMI Inspectorate of Prisons (2017b) argues it is imperative that the individual's cell is clean with appropriate facilities, but this is not always the case, and inspections have found that sometimes empty cells are left in filthy conditions with the new occupant expected to clean it. For many transgender people in

prison, then, their well-being will likely be further eroded by poor conditions upon arrival in prison. However, as previously mentioned, the policy indicates that some transgender people may need to be placed in a separate and ‘supportive environment’ (p. 10) such as Care and Separation Units or in-patient health care units.

Additionally, activists have raised concerns that evidence collected about the transgender person’s physical strength and genitalia in this updated process represents an infringement on human rights, specifically in relation to Article 8 of the European Convention on Human Rights (the right to respect for private life) (Lloyd Bright, 2018).

### **The ‘pains of imprisonment’ for transgender people in prison**

As well as looking to high profile cases and Inspectorate Annual Reports, Maycock’s (2021) research in Scottish prisons and Suhomlinova and O’Shea’s (2021) research in English and Welsh prisons are perhaps the nearest we can get to understanding contemporary experiences of transgender people in prison in a UK context. Suhomlinova and O’Shea found that transgender people in prison experienced differential treatment that, in turn, affected their health as well as negatively impacted their ability to express their gender. Participants in Maycock’s study described transphobic comments that sometimes took sexualised or aggressive forms, although no transphobic violence was reported. It is notable, though, that the Ministry of Justice reported that since 2010, 11 transgender women, placed in the male estate, were sexually assaulted in prisons in England and Wales (Ministry of Justice, 2020a).

Like policy in England and Wales, the Scottish Prison Service policy stipulates that ‘the person in custody’s gender identity and corresponding name and pronouns must be respected’ (Scottish Prison Service, 2014: 6). However, for those transitioning in custody, Maycock’s (2021: 7) study indicated that doing so was much more challenging than if transitioning in the outside community, and that prison conditions have the potential to ‘curtail and divert’ the transitioning process. For example, it was highlighted that when placed in an establishment of their birth gender, transgender people experienced denial of gender-appropriate products and clothing that obstructed them from ‘their pursuit of the “real deal” to have more authenticity and validation’ (Maycock, 2021: 7). Interestingly, one transgender woman placed in a men’s prison was permitted only to wear clothing and make-up in her cell and not in other areas of the prison. Given that the study indicates a failure to live up to policy, a similar study across prisons in England and Wales may well highlight similar findings and cultural variations in the way staff use their power to influence the experiences of people in prison (Liebling, 2007; Maycock, 2021).

Turning again to HM Inspectorate Annual Reports, HMP Elmley was further mentioned in the more recent inspection report for its good practice whereby a care and management plan was drawn up to agree upon location, dress code, and procedures for searching and showering. However, the report

also observed ‘some examples of poor care’ in some prison establishments. No other detail was provided, but HMP Moorland was noted for its poor care with the example of a transgender person who had not been able to shower for more than a week because staff were unclear about her showering arrangements (HM Chief Inspector of Prisons for England and Wales Annual Report 2019–20: 43). This accentuates the difference in experiences according to the staff culture (where behaviour is shaped by informal and formal norms) (McKendy and Ricciardelli, 2021) and, indeed, resources at each establishment.

It is noteworthy here to mention that the physical conditions of prisons and facilities can vary significantly, as can the conditions *within* establishments. Newer wings for example, are often in better condition than older wings and may be more amenable to enacting updated policies and procedures. Although some cells are reported by HM Inspectorates as being clean, nicely decorated, well heated, and ventilated with properly partitioned toilets,<sup>3</sup> showers, and lockable cupboards, examples of cramped and squalid conditions abound. For example, many people eat meals next to their toilet (typically absent of a lid) and must defecate with their cellmate in the room, only separated by a curtain. Many live in damp, graffitied cells with broken windows and lack heating and ventilation. Perhaps one of the most concerning findings is that some cells have exposed wiring and vermin (HM Inspectorate of Prisons, 2017b). The poor and uninhabitable conditions of prisons is not uncommon and if located to a prison in poor condition, the obstacles and issues unique to transgender people will doubtlessly be exacerbated.

Outside of the UK, much of the research about transgender people and the pains they experience in prison has been conducted in the US. Although US-based research offers some much-needed insight, it needs to be remembered that cultural differences exist between American and British prisons. For example, American prisons adopt a more coercive culture whereby staff may carry firearms (James et al., 1997), therefore limiting generalisations to a European context. However, Dervan (2011) and Jenness (2011) link conditions and the culture of prison to the prevalence of victimisation against transgender people in prison. Dervan’s research highlighted the conditions of state prisons in the US that were described as over-crowded and uncared for with a lack of community atmosphere and very little for the people in prison to do. To this end, Dervan argues, prisons like this tend to observe more violence than those that promote a sense of community. Additionally, Jenness (2011) attributes the hyper-masculinised culture of male prisons to help explain the high prevalence of rape of transgender women in prisons. Other US research highlighting the pains of imprisonment for transgender people and the need for better policy includes Brown and McDuffie (2009); Brown (2014); Grant et al. (2011); James et al. (2016); Jenness and Fenstermaker (2014, 2016); Jenness et al. (2019); Oparah (2012); Routh et al. (2015); Sandor von Dresner et al. (2013); Sexton et al. (2009); Stohr (2015); and Sumner et al. (2014). Australian research includes Bartels and Lynch (2017); Blight (2000);

Brömdal et al. (2019); and Wilson et al. (2017). Finally, Suhomlinova and O'Shea's chapter within this volume offers a comparative review of policy and treatment of TGNC people in prison within England and Wales and the US.

### **The new punitiveness and preoccupation with risk**

Recent policy aims to reduce the risk of assumed disingenuous motivations by transgender women. Thus it is pertinent to note that of the 97 sexual assaults in five women's prisons in England and Wales between 2016 and 2019, seven of these incidents involved transgender people (whereby some of the cases relate to a single individual being involved). Six of the incidents involved a transgender person being the assailant or suspected assailant, and the seventh incident involved a transgender person having 'active involvement' (Ministry of Justice, 2020b). However, it should be noted it is possible that vexatious claims against fellow people in prison may occur and so some assaults may be reported but not corroborated by evidence. Although the risk of a transgender woman sexually assaulting someone in a women's prison is low, the new and extensive assessment procedures need to be understood in the context of the preoccupation with risk in the criminal justice system. Risk-based technologies routinely applied to those who offend are symptomatic of the punitive populist 'law and order' philosophies and the neoliberal culture observed in the UK since the decline of the rehabilitative ideal in the 1970s.

The 'punitive turn' (Garland, 2001) saw a growth of crime control measures emerge where imprisonment rates together with lengthier sentences increased. The new punitiveness gradually suppressed penal welfarism and, as well as embedding a 'culture of control' (Garland, 2001), it serves to exclude, marginalise, and criminalise 'the dangerous others' (Drake, 2012: 28). However, those who commit crime are also some of the most vulnerable members of society who require support – this is especially the case for transgender people, who face specific structural barriers and have multiple and complex needs. There are inherent problems with the prisons in England and Wales because firstly, they operate within a punitive context that has become embedded in staff culture and, sometimes, in the management and treatment of people in their care. Secondly, several prison inspections have brought to light the 'insanitary, unhygienic and degrading conditions' (HM Inspectorate of Prisons, 2017b: 3) of many prisons.

It is worth here delving some more into the findings of the HM Inspectorate of Prisons (2017b) report into living conditions in prison. As noted, the prison system in England and Wales operate in a culture that condemns people who break the law, and this seemingly manifests in poor and often uninhabitable living conditions for many people in prison. The condemnation of people in prison extends to being locked in their cells for unreasonably long times, with some people spending between 22 and 24 hours in their cells. This is despite the fact that the Ministry of Justice stipulates that people in prison should spend at least ten hours per day outside of their cell. Spending such lengthy

periods in a cell can lead to anger, frustration, and the use of illicit substances. Of course, this can lead to the deterioration of the person's health and exacerbate depression and suicidal feelings. The excessive time spent in a cell denies meaningful activities such as work, education, exercising, and socialising, all of which can create a sense of well-being. Again, it is noted that how much time a person spends out of their cell varies from prison to prison, reflecting staff culture and resources. Elmley was once again signalled as a prison of good practice when it was observed that time out of cells was organised consistently so that telephone calls and domestic tasks could always be expected to be fulfilled (HM Inspectorate of Prisons, 2017b).

Capacity to provide ample and secure time spent outside of cells has been significantly impacted across all prisons in England and Wales as a consequence of the Covid-19 viral epidemic. In March 2020, the Ministry of Justice (MOJ) announced that all prisons were to be placed under immediate lockdown in an attempt to contain the spread of the virus and limit transmission (MOJ, 2020c). This decision, supported by Public Health England, resulted in people in prison being confined to their cells for up to 23 hours per day (HM Inspectorate of Prisons, 2021–22). Suhomlinova et al. (2022) explored the mental health challenges faced by transgender and non-binary people in prison during the Covid-19 pandemic. They found that they experienced stressors associated with their gender minority positions, including prolonged solitary confinement, decreased access to gender affirming health care, and limited opportunities for interpersonal support as well as support from staff because of shortages. The authors argued that such conditions would likely elevate psychological distress for transgender people. While at the time of writing there is no information pertaining to transgender people in prison specifically, it is important to highlight that there have been an unparalleled number of suicides recorded in the months following Covid shutdowns, with 16 recorded between 23 March and 28 May 2020 alone (Grierson, 2020). For transgender people who possess a unique set of vulnerabilities while in prison, such conditions tend to aggravate and intensify their 'pains of imprisonment' (Sykes, 1958).

## **Conclusion**

Despite the exceptionally limited research about transgender people in prison in England and Wales, insights from high profile cases and HM Inspectorate Annual Reports suggest that transgender experiences mirror those reported in international research. That is, transgender people in prison present with multiple and complex needs and are disproportionately exposed to difficulties and abuse, making them uniquely vulnerable. Most transgender people in prison are women. However, there is no evidence that transgender women have similar offending patterns to men (Dhejne, 2011). Furthermore, it is unclear how transgender women feature in the Ministry of Justice Female Offender Strategy 2018, which, in recognition of women's multiple and complex needs,

comprises measures to divert women away from prison and produce better and more suitable conditions when in custody.

Similarly to cisgender women, transgender women would benefit from a whole-systems approach, which would incorporate a multi-agency strategy to address each woman's multiple and complex needs. In relation to custody specifically, Australian research by Brömdal et al. (2019) recommended a whole-incarceration-setting approach to support transgender people in prison and a series of recommendations were made to promote inclusivity, gender-affirmation, dignity, safety, and security in prison. Future research should seek to identify offending patterns and the specific needs of transgender women in the criminal justice system. To this end, research needs to be conducted with transgender people in prison in England and Wales to better understand their experiences and, in turn, develop recommendations that promote more inclusive, responsive, and dignified environments. There are clearly great challenges in trying to promote welfarist strategies in prisons that operate under a penal populist ethos. Notably, the Welsh government is known for upholding a social democratic approach and has a reputation for promoting gender equality (Gorden et al., 2020), but the justice system is not devolved to Wales, allowing for the new punitiveness and preoccupation of risk to prevail here as well. Ultimately, the neoliberal condemnation of people in prison has become embedded in the fabric of prison and staff culture. As Liebling (2011: 532) put it, prisons are 'inherently depriving and painful and deeply complex' and have increasingly become inhumane and degrading. The 2017 HM Inspectorate Report indicates that such conditions remain a contemporary problem.

## Notes

- 1 In the UK, the Gender Recognition Act 2004 enables transgender individuals to apply for a Gender Recognition Certificate. It affords people with gender dysphoria (discomfort with one's own birth gender) the legal recognition of the gender with which they identify. There are three different routes in which a person may apply for the Gender Recognition Certificate, details of which can be found here: [www.gov.uk/apply-gender-recognition-certificate](http://www.gov.uk/apply-gender-recognition-certificate).
- 2 Lisa Woodall was a transgender woman who died by suicide at HMP Eastwood in October 2006. Prisoner 'Y' was a transgender woman who died by suicide in July 2012. Nina/Senthooran Kangagashingham was a transgender woman who died by suicide at HMP Belmarsh in April 2013. Nicola Cope was a transgender woman who died by suicide at HMP Foston Hall in November 2016. Jenny Swift was a transgender woman who died by suicide at HMP Doncaster in December 2016. Jade Eatough was a transgender woman who died by suicide in a male jail, HMP Albany, in August 2017 (Fair Play for Women, 2017).
- 3 Until 1996 (when the practice was brought to an end), people in prison defecated and urinated in a bucket – usually at night – and then emptied it the following day. This practice is known as 'slopping out'. However, an Independent Monitoring

Board (IMB) report in 2010 noted that in-cell sanitation did not exist in ten prisons, which equates to 2,000 prison cells (Weightman, 2010). More recently, the IMB of Coldingley prison found that older wings in the prison do not have in-cell toilets, instead relying on a call system that required men to ring a bell where they would be put on a waiting system (Independent Monitoring Boards, 2022).

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### ***Legislation***

- Criminal Justice Act 2003* c. 44, Section 146. [www.legislation.gov.uk/ukpga/2003/44/section/146](http://www.legislation.gov.uk/ukpga/2003/44/section/146)
- Equality Act 2010* c. 15. [www.legislation.gov.uk/ukpga/2010/15/contents](http://www.legislation.gov.uk/ukpga/2010/15/contents)
- Marriage (Same Sex Couples) Act 2013* c. 30. [www.legislation.gov.uk/ukpga/2013/30/contents/enacted/data.htm](http://www.legislation.gov.uk/ukpga/2013/30/contents/enacted/data.htm)