

## Chapter 11

# **Gender identity and prisons in England and Wales: The development of rights and rules; checks and balances.**

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### Abstract

Prisons in England and Wales, in common with prisons across the world, segregate prisoners according to the gender binary: male and female. Until relatively recently, those who identify with or express other gender identities were largely ignored. This chapter traces the international developments in the care and management of prisoners with non-binary gender identities. It also critically considers developments in England and Wales, including policy, statute and prison service instructions. The policy context has been particularly fast moving in recent years - often in response to events - and the Prison Service has attempted to strike the appropriate balance between addressing the care and management needs of those prisoners with non-binary gender identities and the safety and wellbeing of all prisoners. Certainly, much progress has been made in prisons in England and Wales over the last two decades and certainly challenges remain. The resourcing of the Prison Service, and the inconsistencies between the rights and rules and the lived experience of prisoners who disclose non-binary gender identities, remain significant issues.

### 1. Introduction

There are many points of difference between human beings, but prisons in England and Wales in common with other jurisdictions have divided prisoners on the assumption of the gender binary: female and male. Until relatively recently, little account has been taken of those who identify with or express other gender identities. While there is much academic literature about men and women in prison in England and Wales, there is very little about the gender identity and the sexual orientation of prisoners: 'The academic literature about LGBT prisoners is very limited and is dominated by, mainly, North American scholarship focusing on transgender prisoners.' (Dunn, p. 3)

The Yogyakarta Principles define gender identity as:

'... 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 (2007), p.6).

The diversity of gender identities include those people who wish to transition to another gender (female to male or male to female) and seek legal recognition of this; those who wish to live consistently in the gender with which they identify but not seek legal recognition; those who are non-binary (and therefore do not identify with a single gender); those who are gender fluid (their gender identity varies over time); those who are transvestite (cross dressers); and those who are intersex (have variations of sex characteristics or under-developed sex

characteristics) who wish to retain the sex assigned to them at birth<sup>1</sup> or alternatively wish to identify as intersex. 'Transgender' or 'Trans' are often used as umbrella terms for people whose gender identity and/or gender expression differs from their legally recognised birth sex. 'Transgender' or 'Trans' may also be used to describe those transitioning to a new gender.<sup>2</sup>

The number of trans people in prison in England and Wales is certainly small and it is not possible to give anything more than an indication in the hundreds out of a total prison population of around 85,000. (Before 2015, statistics were not collected at all on trans prisoners in the custodial estate.) The number of trans people in the prison system is always in flux due to admission and release. Those prisoners who do not disclose their gender identity clearly cannot be counted.<sup>3</sup> Those prisoners with a gender recognition certificate are usually located in the custodial estate of their legally recognised gender and are therefore not counted (BBC, 2018a).<sup>4</sup>

In one survey by the HM Chief Inspector of Prisons for England and Wales, 2% of prisoners in adult male prisons identified themselves as 'transgender' or 'transsexual'.<sup>5</sup> In another survey, only those prisoners whose cases had been before a Transgender Case Board<sup>6</sup> were counted, with the result that 1.6 transgender prisoners were reported per 1,000 prisoners. 139 transgender prisoners were counted in total in this survey, 42 in women's prisons (22 identified their gender as female, 17 as male, 3 provided no response), 97 in men's prisons (92 identified their gender as female, 2 as male, 3 provided no response). When the 139 transgender prisoners were asked to self-identify their gender identity, 27 self-identified as gender fluid, 10 as intersex and 4 as non-binary.<sup>7</sup> Trans women<sup>8</sup> prisoners are then very much in the majority and have tended to dominate the discourse about gender identity in society and in prisons. As a consequence, there is a 'cycle of invisibility' (Dunn, 2013). Many people in prison with different gender identities, such as non-binary, gender fluid and intersex, as well as trans men, are hardly visible and so prison staff are often unlikely to be aware of their needs. Critically, various research projects have concluded that people with different gender identities experience higher rates of mental health issues, self-harm, and suicide than the wider population.<sup>9</sup> These are exacerbated by the prison environment.

While the overall number of trans prisoners may be low, this still matters: human rights are of universal application. Article 8 of the European Convention on Human Rights (ECHR) protects the right to respect for private life.<sup>10</sup> This is a broad term and judgments have determined that

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<sup>1</sup> These are the definitions provided by 'The Care and Management of Individuals who are Transgender' Transgender Policy Framework. The Ministry of Justice and HM Prison and Probation Service (2019).

<sup>2</sup> In this chapter, 'transgender' and 'transsexual' will be used where a source uses these terms. Otherwise, 'trans' or 'trans woman' or 'trans man' or 'trans people' will be used.

<sup>3</sup> In inspections of HMP Leeds and HMP Wormwood Scrubs by HM Inspectorate of Prisons in 2019, no transgender prisoners were identified at the time of the inspection despite each prison holding over 1000 prisoners. A recommendation in the HMP Wormwood Scrubs report suggested that 'The prison should affirm LGBT identities in practical ways so that all prisoners feel able to speak openly about their sexuality if they so wish.' (HM Inspectorate of Prisons, 2020, para. 2.39). The recommendation should ideally have included reference to gender identity, in addition to sexuality.

<sup>4</sup> Exceptionally dangerous women prisoners may, however, be located in women's units in men's prisons.

<sup>5</sup> HM Chief Inspector of Prisons for England and Wales Annual Report 2018-19.

<sup>6</sup> Transgender Case Boards were introduced by Prison Service Instruction 17/2016 'The care and management of transgender prisoners.' See the chapter section on this.

<sup>7</sup> MOJ and HMPPS (2019), pp. 5 – 6.

<sup>8</sup> A trans woman is a person who was legally recognised as male at birth but who self-identifies as a woman.

<sup>9</sup> Bashford, J; Hasan, S; Marriott, C and Patel, K 'Inside Gender Identity: A report on meeting the health and social care needs of transgender people in the criminal justice system.' (2017) Bradford: Community Innovations Enterprise, cited in Ministry of Justice and HM Prisons & Probation Service 'The Care and Management of Individuals who are Transgender'. (2019)

<sup>10</sup> ECHR ARTICLE 8 Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the

this covers the physical and psychological integrity of a person, including their gender identification, name and sexual orientation.<sup>11</sup> Article 8 ECHR relates to the way a person lives and their quality of life and therefore encompasses gender expression and the safeguarding of mental health in the custodial estate. The scope of Article 8 as regards gender identity is recognised in more recent prison service instructions and policy frameworks.<sup>12</sup> Any interference with the Article 8 right must be in accordance with the law, have a legitimate aim and be necessary in a democratic society. Where the interference is with an intimate part of an individual's life there must be particularly serious reasons to justify the interference.<sup>13</sup> ECHR Article 8 and other human rights provided the foundation for the development and formulation of specific rights concerning gender identity and it is to these that we now turn.

## 2. International and national developments in gender identity and gender rights

In the 1970s, at the beginning of the fifty-year period considered by this book, the prevailing social attitudes and the law of England and Wales barely recognised the diversity of gender identities. Further, the judicial decision in the matrimonial case of *Corbett v Corbett* in 1970 had a far-reaching effect on the law for decades. The case concerned a marriage between a man and a trans woman who had extensive surgery. It was held that a person's sex was fixed at birth (save where a mistake was made about sex assignment) and could not be changed by any circumstances – whether by medical and surgical interventions or by the natural development of sex organs. The psychological integrity of a person, including their gender identification, was deemed irrelevant.<sup>14</sup>

In 1975, the Sex Discrimination Act was passed by the UK Parliament. As the title of the statute suggests, it was solely concerned with gender binary (male and female) sex discrimination and consequently there was no provision for gender identity discrimination.<sup>15</sup> It was decades before trans activist campaigning began to influence social attitudes, judicial decisions, and legislative innovation.

Since the 1990s, there have been a series of developments in the recognition of gender identity rights, including in the prison context. The following sections of this chapter consider international developments, legislation in England and Wales, and prison service instructions as set out in Figure 1, together with the lived experience of trans prisoners 'in the "hyper-gendered" world of prisons' (Newcomen, 2017).

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interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>11</sup> For a detailed analysis of the Article 8 right including leading judgments, see *Pretty v The United Kingdom* [2002] 2 FLR 45, judgment of 29 April 2002, p.33, para 61. Available at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-60448"\]}](https://hudoc.echr.coe.int/eng#{)

<sup>12</sup> See for instance para 4.124 in Ministry of Justice and HM Prisons & Probation Service 'The Care and Management of Individuals who are Transgender' (2019).

<sup>13</sup> *Smith and Grady v UK* (1999) 29 EHRR 493 at p.530 para 89.

<sup>14</sup> In *Corbett v Corbett*, Mrs Corbett was found never to have been female and could not therefore have entered a marriage with Mr Corbett. So, their marriage was void. The decision in *Corbett v Corbett* was given statutory effect by the Nullity of Marriage Act 1971 and later by the consolidating statute, the Matrimonial Causes Act 1973.

<sup>15</sup> This statute was tested in the landmark case of *P v S and Cornwall County Council Case C-13/94*, [1996] IRLR 347. The case concerned discrimination in an employment context, where the plaintiff, a trans woman, was dismissed for reason of redundancy following disclosure of her proposal to undergo gender reassignment. It was held by the tribunal that the Sex Discrimination Act did not apply in these circumstances – the Act was drafted more narrowly than the provisions of the Equal Treatment Directive. It was however held by the European Court of Justice that dismissal for a reason related to gender reassignment was contrary to Article 5(1) of the Equal Treatment Directive.

Figure 1 Key international and national developments

Year	Development
1993	International Bill of Gender Rights
2004	Gender Recognition Act
2006	Equality Act
2007	The Yogyakarta Principles
2009	The United Nations Office on Drugs and Crime 'Handbook on Prisoners with Special Needs'
2010	Equality Act
2011	Prison Service Instruction 07/2011 'The Care and Management of Transsexual Prisoners'
2016	Prison Service Instruction 17/2016 'The Care and Management of Transgender Prisoners'
2019	Ministry of Justice and HM Prison & Probation Service 'The Care and Management of Individuals who are Transgender'

Up until relatively recently, prisoners were located in a prison on the basis of their sex assigned at birth. The gender in which they had led their lives was considered entirely irrelevant. The thinking and debate about gender identity, in contrast to sex assigned at birth, developed during the 1990s and a significant milestone was the International Bill of Gender Rights.

### 3. The International Bill of Gender Rights

Various iterations of this document were drafted by trans activists in the United States between 1993 and 1996. The International Bill of Gender Rights (IBGR) sets out ten principles, of which six are relevant to trans people in the context of imprisonment:

- The right to define gender identity

- The right to free expression of gender identity
- The right of access to gendered space and participation in gendered activity
- The right to control and change one's own body
- The right to competent medical and professional care
- The right to freedom from psychiatric diagnosis or treatment

While these gender rights are without legal force, they were intended to validate the decisions and actions taken by individuals; frame trans activist discourse; and influence the development of policy and legislation internationally.

'The IBGR is not a human rights instrument, is not ratified by any States, and its legal status is no higher than a wish-list. Nevertheless, it signified a sea change in conceptualising 'gender identity' as a fundamental human right to be protected by law and for individuals who identify as transgender to be entitled to medical care.' (Brunskell-Evans, 2019)

The echoes of the IBGR loom large in trans activist campaigns, in legislative change and in the development of prison rules. The IBGR principles state that: 'All human beings have the right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role.' The principles also support gender fluidity: '... individuals have the right to define, and to redefine as their lives unfold, their own gender identities' (IBGR).

Of particular resonance with the debate about trans prisoners in the custodial estate are those principles dealing with the right of access to gendered space and the right to freedom from psychiatric diagnosis or treatment. The principle concerning the right of access to gendered space supports access by trans women prisoners to women's prisons and by trans men<sup>16</sup> prisoners to men's prisons: 'No individual shall be denied access to a space by virtue of a self-defined gender identity which is not in accord with chromosomal sex, genitalia, assigned birth sex, or initial gender role' (IBGR). As we shall see in the next section, the procedure required to attain a gender recognition certificate under the Gender Recognition Act 2004 takes a different stance to the principle of the right to freedom from psychiatric diagnosis or treatment: 'Given the right to define one's own gender identity, individuals should not be subject to psychiatric diagnosis or treatment solely on the basis of their gender identity or role' (IBGR).

#### 4. The Gender Recognition Act 2004

Before 2004, prisoners were sent to prisons according to the sex recorded on their birth certificates (provided at birth) in line with Prison Rule 12(1),<sup>17</sup> which provides that 'Women prisoners shall normally be kept separate from male prisoners'. This changed following the coming into force of the Gender Recognition Act 2004 (GRA 2004).<sup>18</sup> This Act provides a procedure by which a trans person may legally change their gender, and this is set out in Figure 2. A medical diagnosis of gender dysphoria - which is where there is a mismatch

<sup>16</sup> A trans man is a person who was legally recognised as female at birth but who self-identifies as a man.

<sup>17</sup> The Prison Rules 1999, SI 1999/728.

<sup>18</sup> The Gender Recognition Act 2004 was introduced following concerns about those who were then described as 'transsexual' people who could not marry as they did not have legal recognition of their gender reassignment. Preceding the enactment of the Gender Recognition Act 2004, were judgments by the European Court of Human Rights in the cases of *Goodwin v The United Kingdom* and *I v The United Kingdom* [2002] 35 EHRR 18 and the judgment of the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21. The European Court of Human Rights held that the UK was in breach of ECHR rights under Articles 8 (the right to respect for private life) and 12 (the right to marry).

between a person's sex assigned at birth and their deeply felt gender and this mismatch causes that person distress - is required.

## Figure 2 Legal procedure for issue of a gender recognition certificate

- *A trans applicant who is aged eighteen and over applies to the Gender Recognition Panel for a gender recognition certificate.*
- *The Panel issues a certificate when it is satisfied by evidence that the applicant has, or has had, gender dysphoria; has lived in the acquired gender for a period of two years before the application; and intends to continue to live in the acquired gender until death.*
- *The applicant should provide diagnostic medical evidence of their gender dysphoria from an expert in the field, who is either a psychologist or a general practitioner with the requisite expertise.*
- *If the applicant has received or is planned to receive hormone treatment or any surgical procedures for the purpose of changing sexual characteristics, these must also be disclosed as part of the application (ss1-3 Gender Recognition Act 2004 and Explanatory Notes to the Act).*
- *The fee for the application is £140 and there are additional costs in providing the supporting documentation.<sup>19</sup>*

If all the evidential requirements are met, the eventual outcome is the issue of a gender recognition certificate (GRC). The certificate provides 'transsexuals' with legal recognition of their 'acquired gender'<sup>20</sup> and entitles those whose birth was originally registered in the UK to apply for a new birth certificate in their 'acquired gender'.<sup>21</sup> Approximately 300-350 GRCs are issued each year across the UK.<sup>22</sup>

Section 9 of the GRA 2004 requires that a person who has obtained a GRC must be treated in accordance with their acquired gender for all purposes. Accordingly, since 2004, a trans woman with a GRC is legally recognised as a woman and can be sent to a women's prison. The same applies to a trans man with a GRC who can be sent to a men's prison. Trans men without a GRC usually prefer to remain in the female custodial estate in any event. This, however, leaves the vexed question of where in the custodial estate to place trans women without a GRC, as they are particularly vulnerable.

The procedure to obtain a GRC set out in Figure 2 is quasi-judicial in nature and campaigns led by Gendered Intelligence, Stonewall and others condemn the current process as 'highly medicalised, bureaucratic and demeaning'. They instead favour a process of self-identification or self-declaration for gender recognition (Stonewall, 2017). As has been noted above, the right in theory to define one's gender identity was set out in the IBGR in 1993. The Government Equalities Office does acknowledge that: '... many trans people find the current requirements overly intrusive and bureaucratic' (Government Equalities Office, 2018). A public consultation on the reform of the GRA 2004 has been undertaken as the Equalities Office wished to

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<sup>19</sup> For information about the fee, applying for help with the fee if on benefits or on a low income and the supporting documents which must be provided, see: <https://www.gov.uk/apply-gender-recognition-certificate/how-to-apply>.

<sup>20</sup> The terms 'transsexual' and 'acquired gender' are used in the Gender Recognition Act 2004.

<sup>21</sup> The Act does not address the circumstances of those who are non-binary, intersex or whose gender has fluidity.

<sup>22</sup> Tribunal Statistics Quarterly.

evaluate the effectiveness of the legal gender recognition process for those who experienced it.<sup>23</sup> However, and pertinently for the subject of this chapter, the Equalities Office has also stated that the reform of the GRA ‘... will not change the exceptions under the Equality Act 2010 that allow provision for single and separate sex spaces’ and that ‘we are not necessarily proposing self-declaration of gender.’ (Government Equalities Office, 2018). It should also be noted that the GRA 2004 only allows trans people to move between the two binaries and does not provide any recognition of other gender identities.

## 5. The Equality Act 2006

The Equality Act 2006 (EA 2006) created the Commission for Equality and Human Rights (CEHR)<sup>24</sup> whose remit is to support the development of society by working towards the outcomes set out in the ‘general duty’ (s.3 EA 2006). The outcomes encompass valuing diversity; eliminating prejudice and discrimination; respecting the dignity of every individual; protecting human rights; fostering equality of opportunity in participation in society; and encouraging good relations between different groups in society (s.3 EA 2006 and Explanatory Notes to the Act). Through the lens of these outcomes, the CEHR scrutinises the activities and services of public authorities, which include bodies with functions of a public nature. It is presumed that the oversight of the custodial estate is included, as there is no definitive list of the bodies to which the Act applies. The provisions of the Act do include protection from unlawful discrimination or harassment on the grounds of sex or sexual orientation, but there is no mention of gender identity, gender recognition, and gender reassignment. This is curious given the 1996 decision of the European Court of Justice in *P v S and Cornwall County Council*<sup>25</sup> and the enactment of the Gender Recognition Act 2004.

## 6. The Yogyakarta Principles

The long title of the ‘Yogyakarta Principles’ (YP) is this: ‘Principles on the application of international human rights law in relation to sexual orientation and gender identity’. The Principles were drafted by an eminent group of human rights experts in Yogyakarta, Indonesia; first published in 2007; and reviewed and expanded in 2017 (YP plus 10). The Principles are respected as an authoritative interpretation of international law, but they do not have legal effect. They are however influential and persuasive – and far more so than their precursor, the International Bill of Gender Rights.

‘The Principles ... provide a definitional point for bills, resolutions and other documents. This has provided the fertile ground out of which Equality and Human Rights legislation in the UK and other European and non-European countries incorporate ‘gender identity’ as a component part of legal personhood.’ (Brunskell-Evans, 2019)

Some of the Principles are of direct relevance to trans prisoners and to those prisoners with other gender identities, such as the right to legal recognition and the right to treatment with humanity while in detention. According to the Principles, gender identity should be self-defined. If an individual decides to change their name, legal sex or gender on official identity documents such as a passport or driving licence, there should be no requirements as to age, medical and psychological diagnosis and interventions.<sup>26</sup> Principle 9 (YP 2007) is concerned with the right to treatment with humanity and dignity while in detention. This principle makes explicit that: ‘Sexual orientation and gender identity are integral to each person’s dignity’.<sup>27</sup> YP

<sup>23</sup> The consultation was closed in October 2018.

<sup>24</sup> The Commission for Equality and Human Rights is now known as the Equality and Human Rights Commission.

<sup>25</sup> See Footnote 13.

<sup>26</sup> Principle 3, YP 2007; Principle 31, YP plus 10 2017.

<sup>27</sup> Principle 9 is based upon Article 2 of the Universal Declaration of Human Rights (Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex,

plus 10 defines additional state obligations with respect to placement in prisons for policies to combat violence, discrimination and other harm concerning sexual orientation, gender identity, gender expression and sex characteristics.<sup>28</sup> Issues such as body or other searches in prison, items to express gender expression, access to gender affirming treatment and medical care and 'protective' solitary confinement<sup>29</sup> are covered.<sup>30</sup>

To conclude and to reiterate, YP and YP plus 10 are of no legal force. They are not international conventions ratified by signatory states, but the extent of their influence can be traced through subsequent international and national developments.

## 7. The UNODC Handbook on Prisoners with Special Needs

This Handbook was published by the United Nations Office on Drugs and Crime (UNODC) in 2009 and covers special needs such as disability, mental health, terminal illness, ethnicity, and those prisoners who are older or LGBT. (The Handbook arguably requires revision to include those with other gender identities.)

The Handbook specifically notes that where trans women prisoners are placed in men's prisons, as their birth sex is male, they are disproportionately subjected to victimisation, discrimination, physical, emotional and sexual abuse, including rape.<sup>31</sup> The Handbook expresses with clarity that states are required to protect all LGBT detainees and prisoners in their charge pursuant to a suite of international human rights instruments.

'Although there are no special rules that apply to LGBT prisoners, all provisions included in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment apply to all detainees and prisoners without discrimination.' (UNODC, 2009, pp. 109 – 110)

Furthermore, these international human rights instruments require positive action to be taken, via the principle of equal treatment, to eliminate any form of discrimination or risk of harm faced by prisoners with vulnerabilities, which includes trans people.<sup>32</sup> The argument being that punishment by imprisonment is a harsher experience for prisoners with vulnerabilities.

The Handbook refers to the Yogyakarta Principles and builds upon them at some length. It sets out the obligations of states, which include access to hormonal and surgical gender-reassignment treatment for trans prisoners; training for prison staff; and management guidelines for the care and protection of LGBT prisoners. The Handbook states that it is not possible to set out categorical guidance on the placement of trans prisoners in the male and female custodial estate, since many are at different stages of transition. It suggests instead

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language, religion, political or other opinion, national or social origin, property, birth or other status.) and Article 17 of the International Covenant on Civil and Political Rights (1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.)

<sup>28</sup> YP plus 10, 2017, p.18.

<sup>29</sup> When prisoners presenting with gender identity vulnerabilities are placed for their own safety in 'protective segregation' (which typically means solitary confinement with limited access to prison facilities), this amounts to discrimination and in effect a harsher sentence. There have been cases in Turkey and Israel on these issues.

<sup>30</sup> YP plus 10, p.18.

<sup>31</sup> UNODC 2009, pp.105 - 108.

<sup>32</sup> UNODC, 2009, p.110.



that placement in prisons be determined on a case by case basis, taking account of both safety concerns and the wishes of the trans prisoners.<sup>33</sup>

As with the Yogyakarta Principles, the obligations placed upon states in the UNODC Handbook are not legally binding, but instead exercise extensive influence.

## 8. The Equality Act 2010

The Equality Act 2010 (EA 2010) replaced existing anti-discrimination legislation in England and Wales with a single statute.<sup>34</sup> It introduced the public sector equality duty, which identified eight protected characteristics (s149 EA 2010). Gender reassignment was included for the first time as one of these protected characteristics, but gender identity which encompasses a wider group of disadvantaged people - non-binary, gender fluid, intersex and transvestite - was not. Sex remains a protected characteristic, which covers 'man' and 'woman'. The statute requires public authorities to eliminate direct and indirect discrimination, harassment and victimisation, and foster good relations between persons who share a relevant protected characteristic and those who do not, when developing policy, dealing with their employees and in delivering services.

There is no direct reference to prisons in EA 2010. Section 150(1) EA 2010 defines a public authority as a person who is specified in Schedule 19.

Schedule 19 provides a detailed and comprehensive list of public authorities which includes the Ministry of Justice, the police, court services, and criminal justice public authorities such as HM Chief Inspector of Prisons and the Parole Board. HM Prison Service is responsible for 109 public sector prisons in England and Wales,<sup>35</sup> but is not explicitly included in the Schedule 19 list. There are 14 prisons in England and Wales which are privately managed by Sodexo Justice Services, Serco Custodial Services and G4S Justice Services.<sup>36</sup> These appear to be brought within the ambit of the Act by s.149(2) which provides that a person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the public sector equality duty. The apparent difference in application between publicly and privately managed prisons under the Act appears to be an oversight and is clearly anomalous. Alternatively, by analogy with public sector prisons, private sector prisons are deemed to be outside the reach of the public sector equality duty.

Notwithstanding the above, HM Prison Service has clearly assumed that the public sector equality duty applies to it, as a series of prison service instructions (or their equivalent) have been developed in 2011, 2016 and 2019, which have attempted to address trans and other gender identity issues.<sup>37</sup> Indeed, as will be seen later in the chapter, the prison service instructions go beyond what is strictly required by EA 2010 (and GRA 2004).<sup>38</sup> Furthermore, HM Inspectorate of Prisons, which is one of the public authorities listed in Schedule 19, holds all prisons to account in their compliance with prison service instructions.

Turning now to the protected characteristic of gender reassignment, this is accorded to a person under EA 2010 if there is evidence that they are transitioning from their birth sex to their chosen gender. This evidence encompasses a wide range of circumstances - from planning to completion of a planned change. In the words of the Act, gender assignment takes

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<sup>33</sup> UNODC, 2009, p.115

<sup>34</sup> The EA 2010 replaced the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.

<sup>35</sup> <https://www.gov.uk/government/organisations/hm-prison-service/about>

<sup>36</sup> <https://www.justice.gov.uk/about/hmps/contracted-out>

<sup>37</sup> See for instance paras 4.122 and 4.123 in Ministry of Justice and HM Prisons & Probation Service 'The Care and Management of Individuals who are Transgender'. (2019)

<sup>38</sup> Bourne and Derry, p.74

place where a 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 (s.7(1) EA 2010). Under the Act, the protected characteristic is narrowly defined in terms of gender reassignment rather than a broader concept of gender identity. To reiterate, non-binary, gender fluid, intersex and transvestite people are not included within this protected characteristic.

The Code of Practice accompanying the Act makes clear that the reassignment of a person's sex may be proposed but not completed. Those who begin the process of gender reassignment but later end it, still have the protected characteristic of gender reassignment.<sup>39</sup> The process may include gender reassignment medical interventions such as hormone treatment and surgery, but such medical interventions are not mandatory for a person to be protected. 'Part of a process' includes a person being compelled by their gender identity to dress and present themselves in that gender – gender expression, in other words.<sup>40</sup> Where a person has a medical diagnosis of gender dysphoria or gender identity disorder and these have a substantial and long-term adverse effect on their ability to carry out everyday activities, they will also be protected under the disability discrimination provisions of the Act.<sup>41</sup> The duty to make reasonable adjustments for individuals with a disability is set out in s.20 EA 2010.

The Act makes explicit that it perceives gender reassignment to be a personal process rather than a medical process.<sup>42</sup> Under the Act, it seems then that gender is in effect self-defined, as called for by IBGR and the Yogyakarta Principles. This is a distinctly different approach to that adopted by GRA 2004 where the process to obtain a gender recognition certificate was described above as overly medicalised and bureaucratic. It is clear that a lower bar is set for the protected characteristic of gender reassignment under EA 2010: there is no time limit for living in the acquired gender and no requirement for a medical diagnosis of gender dysphoria.

The EA 2010 also contains provisions about separate services for the sexes, which are clearly pertinent for the subject of this chapter. Separate services for the sexes are permitted under s26 of the Act and do not contravene the statutory provisions as to sex discrimination if 'the limited provision is a proportionate means of achieving a legitimate aim'. Under s27(5) 'The condition is that the service is provided at a place ... for persons requiring special care, supervision or attention'. In the Explanatory Notes to the Act, examples are given of the exceptions allowed for in ss26-27. These exceptions include male and female hospital wards and homeless hostels.<sup>43</sup> By analogy, prisons would also appear to be given exceptional status. Another of the examples is applicable to group therapeutic interventions in women's prisons. This example concerns group counselling: 'A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.'<sup>44</sup>

In the years following the coming into force of the EA 2010, it has been seen that what may be workable in an open society with free movement of people, becomes much more difficult to implement in a prison system designed on the premise of the gender binary. The rest of this chapter is concerned with this issue.

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<sup>39</sup> EA 2010 Code of Practice, para. 2.20

<sup>40</sup> EA 2010 Code of Practice, para. 2.24

<sup>41</sup> EA 2010 Code of Practice, para. 2.25

<sup>42</sup> EA 2010 Code of Practice, para.2.19.

<sup>43</sup> EA 2010, Explanatory Notes, Sch.3, Part 7, para 740.

<sup>44</sup> EA 2010, Explanatory Notes, Sch.3, Part 7, para 740.

## 9. Prison Service Instruction 07/2011 'The Care and Management of Transsexual Prisoners'

As noted above, while the Equality Act 2010 makes no explicit reference to publicly managed prisons in Schedule 19, it is clearly assumed by prisons and HM Prison Inspectorate (which is listed as a public authority in Schedule 19) that the Act's provisions about the public sector equality duty and the protected characteristic of gender reassignment apply to the custodial estate. Prison Service Instruction (PSI) 07/2011 'The Care and Management of Transsexual Prisoners'<sup>45</sup>, which was introduced after the EA 2010, regulated the ways in which the National Offender Management Service (NOMS)<sup>46</sup> should address the needs of trans prisoners in England and Wales.

PSI 07/2011 set out the legal responsibilities of NOMS to 'transsexual' prisoners who were without a gender recognition certificate.<sup>47</sup> It provided that prisoners who defined themselves as trans and who wished to begin or continue the process of gender reassignment while serving their prison sentence, could live in their acquired gender - but in the custodial estate of their sex assigned at birth. This meant that prisoners were permitted to wear clothes appropriate to their acquired gender and access make-up or any other appropriate item to maintain their gender appearance. Prisoners could also choose a gender appropriate name and expect to be addressed by that name, together with the gender appropriate pronoun, by prison staff. PSI 07/2011 also provided guidance about the medical treatment to be made available to trans prisoners. However, this is not to say that all those staff in HM Prison Service were provided with appropriate training, nor that the provisions of PSI 07/2011 were universally applied.

Even more radically, PSI 07/2011 provided that if a trans prisoner asked to be placed in a prison different to their legally recognised birth sex, a case conference should be convened to consider all elements of the request. Following this, the case conference made a recommendation to a senior manager in the prison service, who made the final decision on prison location.

PSI 07/2011 additionally made certain assumptions. It assumed a trans prisoner would decide to opt for medical interventions such as hormone treatment and gender reassignment surgery and assumed they would wish to be issued with a gender recognition certificate (GRC) in due course. However, it came to be understood that not all trans prisoners necessarily desired medical interventions or GRCs '... 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'.<sup>48</sup>

In 2015, the Women and Equality Select Committee's Inquiry into 'Transgender Equality' recommended that NOMS review the location decision processes for trans offenders.<sup>49</sup> NOMS subsequently commissioned a review on the care and management of 'transsexual offenders' in the autumn of 2015 and in the course of this, sought evidence from trans people inside and outside prison. Independent oversight of the review was provided by the charities Prison Reform Trust and Gendered Intelligence. At the same time as the review was commissioned, the suicides of the trans women prisoners Vikki Thompson and Joanne Latham were widely reported by the media and these underlined the need for the review to be wide-ranging. The terms of reference of the review emphasised the need to find the right balance between

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<sup>45</sup> 'Transsexual Prisoners' follows the terminology of EA 2010.

<sup>46</sup> The National Offender Management Service is now called HM Prison and Probation Service.

<sup>47</sup> At the time of PSI 07/2011, prisoners were usually held in accordance with the legally recognised gender on their birth certificate or gender recognition certificate.

<sup>48</sup> Review on the Care and Management of Transgender Offenders, 2016, p.4.

<sup>49</sup> See: <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

meeting the needs of a trans prisoner and safeguarding the wellbeing of all prisoners.<sup>50</sup> The need to find the right balance continues to dominate both discourse and subsequent developments.

## 9.1 Vikki Thompson

Compelling stories can drive both private opinion and public policy. The suicides of trans women in prison are clearly compelling stories and make for sensationalist headlines. However, it is important and instructive to examine the complex life histories beneath the overly simplistic headlines and, more particularly, within the context of prison conditions and operating prison service instructions.

In November 2015, Vikki Thompson was found hanged in her cell in HMP Leeds, a men's prison. She was twenty-one. Her birth sex was recorded as male, but she had identified as female since the age of ten. Thompson had a history of physical and sexual abuse, substance abuse, mental illness (bipolar disorder), self-harm, numerous suicide attempts, criminal convictions, and custodial sentences. Her death was widely reported in the media, which tended to present this tragic event in highly reductive terms: a single cause resulting in a catastrophic effect. Thompson, however, presented with extremely complex issues.

In October 2015, Thompson had been convicted of theft and other offences. She had not undergone gender reassignment surgery and did not have a gender recognition certificate. Her legal representatives submitted to the court that she was essentially a woman and requested that she be placed in a women's prison. This request was not acceded to. Thompson was remanded to HMP Leeds before sentence and staff there initiated a detoxification programme and suicide and self-harm prevention procedures (known as ACCT: Assessment, Care in Custody and Teamwork). There are differing accounts from prison staff (and from her mother and partner) as to whether Thompson wanted to remain in HMP Leeds or to be located in a women's prison: she appears to have said different things at different times.<sup>51</sup> While Vikki Thompson was recognised as a vulnerable prisoner, she was not initially placed in the vulnerable prisoners' unit because she had worked as a sex worker and many of the prisoners on the unit were sex offenders. There was a concern that she would be at greater risk on this unit. Thompson was instead placed in Wing E where she experienced bullying, harassment, and verbal abuse, which prison staff did little to curtail. Thompson also behaved inappropriately by cropping her prison jumper to reveal her midriff and padding a bra with socks (Newcomen, 2016a). In the context of a men's Category B prison, this would have been viewed as provocative, even though PSI 07/2011 permitted gender expression. She was later moved to the vulnerable prisoners' unit at her request. While the staff were concerned about Thompson's location within HMP Leeds, they did not utilise the mechanism available in PSI 07/2011 and try to locate her instead in a women's prison which may have been better able to meet her needs. Whether this was owing to Thompson's equivocation, or to a lack of knowledge on her part or on the part of prison staff, or for some other reason, is not known.

The inquest into Thompson's death highlighted a catalogue of failures within the wider health and criminal justice systems beyond HMP Leeds, together with the failures of her own family. The inquest also determined that Thompson had not intended to take her own life at that time in HMP Leeds (Worley, 2017).

The independent investigation into the death of Thompson by the Prisons and Probation Ombudsman set out a series of case conferences and reviews, medical and supervisory interventions concerning her by staff at HMP Leeds, but it also recorded substantial failings in her care. The failings included a lack of mental health support, significant deficiencies in the

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<sup>50</sup> Review on the Care and Management of Transgender Offenders, 2016, p.3.

<sup>51</sup> See, for instance, Newcomen, 2016a, paras. 34, 36, 78 and 108.

operation of ACCT, and an inadequate level of observation given the suicide risk. It was also noted by the Prisons and Probation Ombudsman that HMP Leeds was under-staffed at the time (Newcomen, 2016a). The Prisons and Probation Ombudsman's report concluded that:

'Although Ms Thompson was not legally regarded as a woman, we consider that decisions about the location of transgender prisoners should be taken individually on their merits with the primary aim of the safety of the individual and others, rather than on blanket policies.' (Newcomen, 2016a, Findings and recommendations, pp 2-3).

## 9.2 Tara Hudson

At the same time as the events leading to the death of Vikki Thompson, a similar situation was playing out in another part of the country with a different and happier outcome. Tara Hudson was sentenced to twelve weeks in prison after pleading guilty to assault and battery (she head-butted a barman). She was twenty-six years old. Hudson was legally recognised as a man but had lived as a woman all her adult life. She had had reconstructive surgery and had worked as a glamour model. She served seven days of her sentence in the segregation unit of a men's prison, HMP Bristol, before she was transferred to HMP Eastwood Park, a women's prison. This decision was made on the basis that Hudson was considered sufficiently advanced in the gender assignment process, even though she was without a gender recognition certificate. More than 150,000 people had signed a petition in support of her transfer (BBC, 2015 and 2016). Arguably, Hudson's skills in self-publicity and in mobilising media and public support, rather than effective implementation of PSI 07/2011, greatly assisted in her transfer to the female custodial estate.

## 9.3 Joanne Latham

The death by suicide of Joanne Latham in Woodhill prison in November 2015 was again widely reported in the media.<sup>52</sup> She was found hanged in her cell at HMP Woodhill, a men's prison. Latham was thirty-eight years old, legally recognised as a man, but in the months before her death had asked to be considered as trans and changed her name.<sup>53</sup> Latham had a long history of self-harm and mental health issues, including anti-social and borderline personality disorder. She was sentenced to life imprisonment in 2001 following a conviction for attempted murder. She was later given additional life sentences for the attempted murders of a prisoner at HMP Frankland in 2007 and a patient at Rampton secure hospital in 2011. In 2014, Latham was transferred to the close supervision centre at HMP Woodhill. This is one of a few small centres across the custodial estate that deal with the most disruptive, violent and dangerous prisoners. While held there, Latham requested make-up brushes. There was an unnecessarily long delay in the clearance procedures to deal with the request by prison security staff. Latham was assessed at high risk of suicide. The close supervision centre did activate the ACCT procedures and did monitor her, although not with the frequency of observations that the high risk of suicide required. Latham barricaded herself in her cell, seriously self-harmed and did not respond to a welfare check. The Prisons and Probation Ombudsman determined that prison staff took too long to go into her cell – by which time she was found hanged. However, it should be noted that in close supervision centres there are rules about the number of prison staff required to be present before a prison cell is entered. The Prison and Probation Ombudsman report also concluded that Latham had received appropriate mental health support at the prison (equivalent to the care she could have expected in the community) and mostly appropriate support for trans issues (Newcomen 2016b, para 9). Even if Latham had had a GRC or the benefit of the 2016 prison service instruction for the care and management

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<sup>52</sup> See, for instance, Allison and Pidd, 2015.

<sup>53</sup> This may well be entirely coincidental, but there had been a highly successful glamour model of the same name.

of transgender prisoners, given her history it is not likely that she would ever have been transferred to the female custodial estate.<sup>54</sup>

## 10. Prison Service Instruction 17/2016 ‘The care and management of transgender prisoners’

The media presented the reforms contained in PSI 17/2016 as arising from the deaths of Vikki Thompson and Joanne Latham, but the review process was already in motion. The Women and Equality Select Committee’s Inquiry into ‘Transgender Equality’ in 2015 was closely followed by the NOMS review on ‘The Care and Management of Transsexual Offenders’. NOMS described the timing of the suicides as coincidental.

While the title of PSI 17/2016 specifically referred to transgender prisoners, its ambit went beyond trans men and women prisoners and included those of non-binary gender identity, fluid gender identity, those identifying as transvestite as well as those who are intersex. PSI 17/2016 introduced a voluntary agreement to be drawn up between the prisoner and the wing manager on behalf of the prison which included such matters as dress code (including make-up and jewellery), showers and bathing, searching agreement, and cell sharing risk assessment.<sup>55</sup>

One of the welcome step forwards in this prison service instruction concerned a change in terminology. ‘Transsexual’ as used in the GRA 2004, EA 2010 and PSI 07/2011 was replaced by ‘transgender’.<sup>56</sup>

‘The refreshed policy uses the broader term of ‘transgender’ as this places an emphasis on gender identity of the ‘whole person’ rather than sexual functioning. Being transgender is independent of sexual orientation. Transgender people may identify as heterosexual, homosexual, bisexual, asexual or may not identify with conventional sexual orientation labels.’ (PSI 17/2016, p.3)

PSI 17/2016 also introduced the preferred term of ‘affirmed gender’ instead of ‘acquired gender’ when a GRC was applied for or issued.<sup>57</sup> This term clearly had a positive endorsement for those who have experienced gender dysphoria.

PSI 17/2016 set out a more systematic approach than PSI 77/2011 to placing trans prisoners in the custodial estate of England and Wales if they were without a GRC but were able to provide evidence of living consistently in the gender with which they identified. At either the stage of preparing the pre-sentence report or within three working days of reception into custody, the view of the offender was sought as to whether they wish to be placed in a men’s or women’s prison. At this point, many trans offenders decided on the prison of their legally recognised gender as shown on their birth certificate. If they wished to be placed in a prison reflecting their preferred gender, then their case went before a local Transgender Case

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<sup>54</sup> ‘Fair Play for Women,’ which campaigns for the sex-based rights of women and girls, have asked the question: ‘Are transgender prison suicides being used as a weapon to promote a political agenda?’. Available at: <https://fairplayforwomen.com/prison-suicide/> (1 Dec 2017)

<sup>55</sup> PSI 17/2016, Annex D1.

<sup>56</sup> However, this is not to say that the change in terminology was universally welcome. For instance, those who consider the critical issue to be the incorrect identification of their sex at birth and who see gender as a social construct, may not have welcomed the change. It should also be noted that many prefer the use of the term ‘trans’ rather than ‘transgender’.

<sup>57</sup> PSI 17/2016, para.5.3.

Board.<sup>58</sup> Each offender was assessed on a case by case basis<sup>59</sup> and all risk factors were considered: risk to other offenders; risk from other offenders; risk to self; risk to staff. The Board also considered other issues, including the strength of evidence of living in the preferred gender.<sup>60</sup> As regards counter evidence, the Board examined whether there was any evidence that the prisoner's decision to transition was related to their sentence length; or a way of gaining access to future victims; or whether there was evidence that the offender sought to test or undermine the policy. Personality disorder diagnosis and/or narcissistic traits, for instance, may be indicative of an insincere motive to transition.<sup>61</sup>

It should be noted that all those women offenders (sex assigned at birth, together with those transgender women with GRCs) who posed an exceptionally high risk to others, would be located in women's units in men's prisons.<sup>62</sup> This would, no doubt, have been the eventual outcome for Joanne Latham.<sup>63</sup> Female to male transgender prisoners, on the other hand, were not refused a transfer to men's prisons.<sup>64</sup>

## 10.1 Jenny Swift

While PSI 17/2016 set out more systematic procedures for the placement of trans prisoners, this is not to say that a suicide risk will be eliminated even when they are followed, as other causal factors may be involved.

Jenny Swift was remanded to HMP Doncaster, a men's prison, on a charge of attempted murder in November 2016 (as the victim later died, this would no doubt have been replaced by a murder charge). She was forty-nine years old and, on her own account, had been in the armed forces. Swift had been a psychiatric inpatient and was volatile, aggressive, and confrontational during her time at HMP Doncaster. She was legally recognised as male, but had been living as a woman in name, dress, and appearance since 2009. Swift had registered with Leeds Gender Identity Clinic, had purchased hormone replacement therapy through the internet and had not yet had any surgery. She was found hanged in her prison cell at the end of December 2016. The report of the Prisons and Probation Ombudsman completely exonerated prison staff in terms of the operation of ACCT procedures. Furthermore, there had been compliance with PSI 17/2016, which was introduced shortly before Swift arrived at HMP Doncaster. Swift was asked whether she wanted a transfer to the female custodial estate and a local Transgender Case Board was convened to consider her case within 12 days of her arrival. She was later informed that there would be a recommendation of a transfer to a women's prison. Where there had been defects in her management as a trans prisoner, these had been in her clinical care. The Ombudsman's report noted staff shortages in the healthcare team. During the six weeks Swift had been held in HMP Doncaster, she had no appointment

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<sup>58</sup> Difficult or complex cases were usually referred to the Complex Case Board. Examples include transgender offenders who pose a very high risk of harm to others and those with a severe personality disorder or complex mental health problems (PSI 17/2016, Annex C2).

<sup>59</sup> Assessment on a case by case basis is recommended by the UNODC Handbook on Prisoners with Special Needs.

<sup>60</sup> PSI 17/2016, Annex C2.

<sup>61</sup> PSI 17/2016, Annex A and Annex C2.

<sup>62</sup> PSI 17/2016, para 6.3.

<sup>63</sup> PSI 17/2016, para 6.3: 'There may be exceptional cases where it is necessary to refuse a transfer to the female estate for a transgender (male to female) prisoner with a GRC. This can only happen if the risk concerns surrounding the prisoner are sufficiently high that other women with an equivalent security profile would also be held in the male estate. If a transfer is refused, the prisoner will be a female prisoner in the male estate. She must be held separately and according to a female prisoner regime as set out in PSO 4800. This provision exists as the male estate has greater capacity to manage prisoners who pose an exceptionally high risk to others.'

<sup>64</sup> PSI 17/2016, para 6.4: 'A female to male transgender offender with a GRC must not be refused a transfer to the male estate. This is because there are no security grounds that can prevent location in the male estate.'

with a GP and so had been without a prescription for hormone replacement therapy despite her frequent requests (Newcomen, 2017).

## 10.2 Karen White

While the provisions of PSI 17/2016 were seemingly thorough, the case of Karen White provides a stark example of what can occur when a decision to place a trans woman in the female custodial estate proves to be seriously flawed. The case also raises the issue of how best to ascertain that an apparently trans woman prisoner is genuinely experiencing gender dysphoria, as opposed to a sexual predator assuming the guise of a trans woman.

In 2018, Karen White, a trans woman aged fifty-two, received a life sentence for sexually assaulting two female inmates in prison and raping two other women outside prison. White was legally recognised as a man and lived most of her life as Stephen Wood. Before 2017, White had previous convictions for violence and dishonesty; indecent assault, indecent exposure and gross indecency involving women and children. In 2017, she was charged after threatening to kill and stabbing an elderly neighbour. White was held on remand at HMP New Hall, a women's prison, and began a gender reassignment process, which included wearing a wig, make-up, and false breasts. While there, she sexually assaulted two female prisoners<sup>65</sup> and wrote to one of her rape victims whom she had met at a psychiatric unit in 2017. The investigating police officers additionally found that White had in 2003 allegedly raped another woman, but the prosecution had not proceeded. White pleaded guilty to rape and sexual assault and was transferred to HMP Leeds, a men's prison (Parveen, 2018; BBC, 2018b).

The extent to which White was genuinely committed to gender reassignment was questioned during her sentencing hearing at Leeds Crown Court. Before the sentence was handed down, the prosecuting barrister submitted that White '... is *allegedly* [emphasis added] a transgender female'. The judge as part of his sentencing remarks said that:

'The prosecution say *allegedly* [emphasis added] because there's smatterings of evidence in this case that the defendant's approach to transitioning has been less than committed ... The prosecution suggest the reason for the lack of commitment towards transitioning is so the defendant can use a transgender persona to put herself in contact with vulnerable persons she can then abuse.' (BBC, 2018b; Parveen, 2018)

The judge as part of his sentencing remarks addressed White in these terms: 'You are a predator and highly manipulative and in my view you are a danger. You represent a significant risk of serious harm to children, to women and to the general public.' After the case was concluded, the Ministry of Justice apologised for placing White in a women's prison and admitted that her offending history had not been fully considered (BBC, 2018b; Parveen, 2018).

If at some future point White secures a GRC, it is not considered likely that she will be transferred from the male custodial estate to the female because of the risk of harm she poses to women (BBC, 2018b). A prison service spokesman commented that: 'While we work to manage all prisoners, including those who are transgender, sensitively and in line with the law, we are clear that the safety of all prisoners must be our absolute priority.' (BBC, 2018b). This is a policy position that is frequently reiterated.

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<sup>65</sup> It should perhaps be noted in the interests of fairness that the offences of sexual assault (touching another person sexually without their consent) admitted by Karen White were towards the less serious end of the scale. She pressed herself against another prisoner while in a queue for medication at HMP New Hall; and while in a prison workshop, White made inappropriate comments to another prisoner and then grabbed their hand and put it on one of her breasts with the words 'Oh look, they are not real ones.' The BBC report used the word 'attacked', which appears to exaggerate the facts (Parveen, 2018; BBC, 2018b).



## 11. Ministry of Justice and HM Prisons & Probation Service ‘The Care and Management of Individuals who are Transgender’ 2019

The case of Karen White prompted a review which resulted in the above-named document. This is presented as a ‘Transgender Policy Framework’ and not as a Prison Service Instruction (although operationally this will make little difference). It replaces PSI 17/2016 and was implemented at the end of October 2019. Importantly, it provides procedures for managing prisoners with diverse gender identities.

Those prisoners who self-identify as non-binary, gender fluid, transvestite, intersex (who wish to remain in their sex assigned at birth), and trans but do not seek legal recognition of the gender with which they identify, are placed in prisons in accordance with their assigned birth sex and their cases are not routinely referred to Transgender Case Boards. (It should be noted that recent HMPPS equality data indicates that most trans people in prison do not seek legal recognition of the gender with which they identify, nor to be located in a prison which does not match their sex assigned at birth.)<sup>66</sup>

The Policy Framework (in common with the preceding PSI 17/2016) provides that those people self-identifying with different gender identities should be managed on a case by case basis through drawing up individual voluntary agreements.<sup>67</sup> Clearly voluntary agreements can only be drawn up following disclosure by prisoners of their gender identity and many prefer to remain invisible to better safeguard their wellbeing.

All individuals who are trans must initially be located in a prison which matches their legally recognised gender (or on the best available evidence where their legal gender is not confirmed),<sup>68</sup> whether that is their sex assigned at birth or their GRC – save where a decision to the contrary has been made by the Complex Case Board.<sup>69</sup>

Transgender Case Boards should be convened within fourteen days of arrival into custody and are provided mainly for those who seek to live consistently in a different gender to their assigned birth sex. Individuals are asked whether they would prefer to be held in a men’s or women’s prison. Where they wish to remain in the custodial estate of their birth sex, the Transgender Case Board discusses their appropriate management as a trans prisoner and produces a care and management plan. Where they wish to be transferred to the custodial estate of the gender with which they identify, the Transgender Case Board refers their case to the centrally managed Complex Transgender Case Board.<sup>70</sup> This referral is a new procedure which considerably tightens the pre-existing PSI 17/2016 regime. Neither is it automatic that

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<sup>66</sup> MOJ and HMPPS (2019), para 2.4. This is due, amongst other reasons, to cost and the bureaucratic nature of the process, as described in the section ‘The Gender Recognition Act 2004’ above. See also: Government Equalities Office (July 2018) pp. 19 – 20, which discusses the difficulty in accessing gender identity services and long waiting lists.

<sup>67</sup> The individual voluntary agreements include such matters as searching arrangements, promotion of well-being and expression of gender identity. Gender expression includes hair, make-up, prostheses and clothing, which is subject to relevant dress codes.

<sup>68</sup> The Transgender Policy Framework provides that a physical examination must not be conducted for the purpose of determining gender.

<sup>69</sup> This reflects Prison Rule 12(1) ‘Women prisoners shall normally be kept separate from male prisoners.’ (SI 1999 No. 728 Prisons. The Prison Rules 1999.)

<sup>70</sup> Other referrals to the Complex Transgender Case Board include:

- Where a transgender prisoner may present a risk to others and/or to themselves which requires special management.
- Where a transgender individual is at risk from other people in custody.
- Where a transgender individual with a GRC presents risks which are deemed to be unmanageable within the estate/AP of their legal gender and may need to be held in separate accommodation or in the estate of the opposite gender in accordance with Prison Rule 12.
- Where a person gains legal recognition of their gender during a custodial term or whilst on licence residing at an AP. (MOJ and HMPPS, 2019, p.15)

a trans prisoner with a GRC will be sent to the custodial estate of their legally recognised gender. There is an awareness of the impact this may have on the well-being and mental health of trans prisoners who may have lived in their affirmed gender for a considerable period of time - as SASH assessments (Suicide and Self-Harm) and ACCT procedures are highlighted in the Policy Framework.

The Transgender Policy Framework demonstrates a great deal of learning from the Karen White case. Safeguarding and decision-making processes have been made extremely rigorous and thorough. The Policy Framework places emphasis upon ‘... adopting a balanced approach which considers the safety and needs of those who are transgender, whilst ensuring that decisions do not negatively impact on the well-being and safety of others, particularly in custodial settings such as women’s prisons.’ (MOJ and HMPPS, 2019, p.2)

The template disclosure forms for use by the Case Boards now require far more extensive information, evidence, and non-disclosable intelligence about offending history (particularly concerning evidence of coercive control within a relationship and sexual and violent offences). The risk of harm summary has been extended to include risk to children and the public, as well as to the individual, prison staff, and to and from other prisoners. Where the individual is seeking to be placed in a women’s prison, information about previous actions which have not resulted in convictions, and the risk of sexual or violent assault to women prisoners, is required. This includes evidence about an individual’s anatomy, including considerations of physical strength and genitalia.<sup>71</sup> The disclosure form must be disclosed to the prisoner at least four days before the case comes before the Transgender Case Board – save for the non-disclosable element.<sup>72</sup>

The period for the convening of a Transgender Case Board has been extended from three (PSI 17/2016) to fourteen days to allow for the extensive information gathering exercise. This has caused concern, particularly amongst trans activist groups who see this as a regressive step for trans prisoners with vulnerabilities and the potential for them to suffer harassment, bullying, sexual assault and violence.<sup>73</sup> Some of the evidence required, for instance around anatomy (including physical strength and genitalia), has again caused concern about the infringement of human rights. While ECHR Article 8 (the right to respect for private life) is clearly engaged, following the Karen White case, it would seem that interference with this right is justified in the circumstances if it is in accordance with law ‘... for the prevention of disorder or crime ... or for the protection of the rights and freedoms of others’.<sup>74</sup>

## 12. Gender identity and the future of the custodial estate

As has been emphasised, the Ministry of Justice and HM Prisons & Probation Service have had to judge and execute a careful balance in their care and management of all prisoners and those expressing different gender identities to the gender binary. However, there remains a gap between the theory of technical guidance and the reality of practice in prisons. HM Chief Inspector of Prisons for England and Wales has recently concluded that: ‘Most individuals [with disclosed different gender identities] received support, but some prisons were not aware of the full extent of needs of these prisoners and had not yet identified and addressed them.’<sup>75</sup> It is clearly impossible to quantify this gap between theory and practice beyond the spotlight

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<sup>71</sup> MOJ and HMPPS, 2019, p.12.

<sup>72</sup> That part of the form relating to ‘intelligence’ is non-disclosable if it meets the criteria under the Data Protection Act 2018 as to its restricted or sensitive nature.

<sup>73</sup> See, for instance, <https://eachother.org.uk/transgender-prisoners-regressive-policy>

<sup>74</sup> ECHR ARTICLE 8 Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>75</sup> HM Chief Inspector of Prisons, 2019.

of reports from the prison inspectorate<sup>76</sup> and independent investigations of the prisons' ombudsman following the suicide of a prisoner. Undoubtedly the prison service is experiencing a serious shortfall of resources, in common with other parts of the criminal justice system:

'... as so often happens, the resources are limited and time is increasingly in short supply. Prisons may have policies in place, some training packages for staff delivered, but most are unable to realise the practical support that such policies recommend'. (Forder (a), p.6)

Accounts from serving prisoners unsurprisingly indicate highly variable experiences. Sarah Jane Baker, a trans woman, served a life sentence of over 30 years for the attempted murder of another prisoner, which took place while she was serving a prison sentence for kidnapping and torturing her stepmother's brother. While imprisoned, she wrote a book entitled 'Transgender Behind Prison Walls', which largely provides practical advice and guidance for trans women prisoners:

'... from my experience, prison Governors [sic] have tended to merely pay lip service (or even refused to acknowledge) many PSI recommendations ... At present, unless a Gender Recognition Certificate is produced by a prisoner, or evidence showing that they were being treated for gender dysphoria before coming into prison, a prison Governor [sic] may state, unchallenged, that prisoners who identify themselves as transgender are making a 'lifestyle choice'. This label is, in itself, to transgender prisoners, demeaning, humiliating and highly offensive, and it allows prison staff to avoid any discrimination claims.' (Baker, 2017, p.17).

More mixed experiences, including the positive, are recorded in a book entitled 'Released Inside. Conversations with transgender prisoners and the staff that care for them' (Forder (a)). Some prisons are clearly more progressive and PSI-compliant than others - so much depends on the ethos of prison management and on the type of prison.<sup>77</sup> Additionally, in these prisons, more prisoners feel safe in disclosing their gender identity and become visible to the prison regime.

In view of the inconsistencies in approach across the custodial estate, some trans women prisoners interviewed for Forder's book suggest that there should be dedicated units with appropriately trained staff for trans women prisoners in selected prisons. Trans women prisoners are often placed on the sex offenders' wing or in solitary confinement in segregation units for their own or others' safety, neither of which may be appropriate, and which may cause or exacerbate mental health issues.<sup>78</sup>

One academic commentator suggests a vision of a gender-neutral prison system, which is perhaps designed to spark debate more than anything else as most would see this as

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<sup>76</sup> For instance, the report by HM Inspectorate of Prisons following an inspection of HMP Parc, a men's prison, noted that while individual plans were in place for transgender prisoners, they were not always implemented effectively. The report recommended that transgender prisoners should be given greater assistance in accessing suitable clothes and make-up (HM Inspectorate of Prisons, 2020, paras. S22, 2.32, 2.34). By contrast, the report following an inspection of HMP Eastwood Park, a women's prison, noted there were two transgender prisoners at the time of the inspection and that they received good support (HM Inspectorate of Prisons, 2020, para. 2.24).

<sup>77</sup> There is much more 'churn' in local prisons where many prisoners are held on remand before court hearings. The prison population in these prisons is more transient and individual prisoners are less likely to disclose their gender identity.

<sup>78</sup> See, for instance, 'HMP Eastwood Park: Concern over segregated transgender women prisoners.' Available at: <https://www.bbc.co.uk/news/uk-england-bristol-51928421>

unacceptably radical, as well as increasing the risk of harm to some prisoners, particularly women.

‘Despite our legislative nonexistence, a growing number of us identify outside the gender binary ... It is becoming increasingly clear that the sex-segregated nature of our prison system is incongruous with the gendered realities of a significant minority of people. We are witnessing a shift in wider society towards non-gender specific services and facilities. Perhaps the future of our prison system is also gender-neutral.’ (Harris, 2016)

There remains intense debate about the Gender Recognition Act 2004 and what is considered by many to be its over-medicalised and bureaucratic approach to the gaining of a GRC.<sup>79</sup> The consultation on the reform of the gender identity laws closed in October 2018; a government response remains awaited; and the trans activist and feminist campaigns have set out their stalls. In 2019, a letter drafted by the LGBT Foundation and signed by over a hundred charities and campaigners was sent to Prime Minister Boris Johnson.

‘We have come together to reiterate how critical these reforms are to removing the barriers that trans and non-binary people face every day ... By introducing new legislation to allow changes to trans and non-binary people’s birth certificates without a judgement panel, high fees, doctors letters and evidence, the biggest change is that their dignity and rights are respected.’ (Paul Martin, quoted by Hunte, 2019)

‘Fair Play for Women’ which campaigns for the sex-based rights of women and girls, opposes reform.

‘GRA reform would mean any male could change their birth certificate to say they were born female ... Women have a lawful right to exclude males from female-only spaces when it’s necessary for privacy, safety and fairness ... It would make women’s existing legal rights "unworkable" ... advancing rights for one group at the expense of another vulnerable group’. (Nicola Williams, quoted by Hunte, 2019)

It is possible on a theoretical level to have empathy with both standpoints. However, when the debate is placed in the context of a gender binary prison system, finding solutions that are fair and just to all is exceptionally challenging. A significant number of women in prison have vulnerabilities, including previously suffering physical, sexual and psychological abuse, mostly at the hands of men. Nearly 60% of women in prison who have had an assessment have experienced domestic abuse.<sup>80</sup> The true figure is likely to be higher, taking account of both those who do not wish to disclose the abuse they have suffered and those who do not comprehend that they have suffered psychological abuse. Rhona Hotchkiss, formerly the governor of Cornton Vale, a women’s prison in Scotland, has said that in her experience:

‘... it is always an issue to have trans women in with female prisoners. I think you have to think beyond the obvious things like physical or sexual threat which are sometimes an issue to the very fact of the presence of a male bodied person in amongst vulnerable women causes them distress and consternation.’ (BBC News, 2020a)

Another issue which can be found in the literature but is not much discussed in the context of placing trans people in prisons, is the socialisation of men and women – that is, the adoption of behavioural norms that are acceptable to society. A hurdle many trans people face is being socialised in the gender with which they were assigned at birth and then transitioning to

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<sup>79</sup> There is also debate in Scotland on the same issue (Macaskill, M. and Hellen, N., 2020)

<sup>80</sup> MOJ, 2018.

another gender not just physically, but socially as well.<sup>81</sup> The challenges of understanding and conforming to another gender socialisation are amplified in prison.

In the section on the UNODC Handbook on Prisoners with Special Needs, it was noted that the Handbook states that it is not possible to set out definitive guidance on the placement of trans prisoners, since many are at different stages of transition. The Handbook suggests that placement in prisons be determined instead on a case by case basis. Suzy Dymond-White, the governor of HMP Eastwood Park, a women's prison, has expressed a view which is very much in alignment with the Handbook.

'I would prefer to maintain people as individuals and transgender people are at different states of transition and they have different backgrounds and they're in different states not just physically but emotionally and mentally as well ... A basic set of guidelines is always useful but actually we should assess the people as individuals and look at what their needs are.' (Dymond-White, BBC News, 2016)

On this basis, some men and women trans prisoners may be safely integrated into prison populations; others would be best placed in specialised units within prisons for their own or others' safety.

The first prison unit in England and Wales for trans women prisoners opened in March 2019. The wing is within HMP Downview, a women's prison in Surrey. The first inmates have GRCs, are male bodied and originally it was intended that they should not have access to other women prisoners due to safety concerns (Gilligan, 2019; BBC, 2019a). Access is currently limited.<sup>82</sup> This is an initiative by the MOJ and the prison service following the Karen White case to strike the appropriate balance between the rights of trans prisoners and the safety of other prisoners. There is no suggestion at the time of writing that specialised units for trans prisoners will be established in the male custodial estate or that the initiative at HMP Downview will be replicated in other women's prisons.

### 13. Conclusion

This chapter has traced the key developments internationally and nationally in the development of gender identity rights and the rules concerning the care and management of prisoners with different gender identities in England and Wales. Certainly, much progress has been made over the last two decades in what had been a barely visible issue and certainly challenges remain. The resourcing of the prison service, and the inconsistencies between the rights and rules and how they are applied to prisoners who disclose different gender identities, remain significant issues.

'Prisons are always difficult environments ... but they have a fundamental responsibility to keep prisoners safe and to protect and support those with particular vulnerabilities. Transgender prisoners are among the most vulnerable, with evident risks of suicide and self-harm, as well as facing bullying and harassment. Undoubtedly, managing transgender prisoners safely and fairly poses challenges for prison staff in the "hyper-gendered" world of prisons, but law and policy are unequivocal that this is what is required.' (Newcomen, 2017)

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<sup>81</sup> See, for instance, McBee, T.P. 'Amateur. A reckoning with gender, identity and masculinity' (2018)

<sup>82</sup> Owing to boredom and serious levels of self-harm, limited access to women prisoners was permitted. Access is via 'purposeful activity', which includes fitness sessions, library and chapel units (Gilligan A., 2019).

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International Covenant on Civil and Political Rights

Universal Declaration of Human Rights

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