

RIGHTS and WRONGS



How gender self-identification policy
places women at risk in prison

Jo Phoenix

February 2023





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Foreword by Heather Mason

Prisons were originally set up as male institutions. For women, prisons exist on the outside in the form of male violence, in the form of the feminization of poverty, in the form of substance abuse, and culminate in what the public recognizes as those tall towers, barbed fences, and places of punishment. For most women who have committed awful crimes, there were thousands of moments preceding those crimes when safeguards failed, and safety never came.

Prisons attempt to eliminate the survival skills that led us to criminalization by eliminating our ability to reason independently or make decisions. They aim to override our coping with unquestioning conformity in an environment conducive to further abuse, while doing nothing to address the external conditions that led us there in the first place. In many cases, some of the only safeguards we have ever received are those that come too little, too late. For some of us, this means that abusive men in our lives may be convicted alongside us and imprisoned away from us – the shame of our criminal justice and other systems is that this, for us women, is some small reprieve. Prisons are not *for* women.

From 2017 to 2018, I was imprisoned at the Grand Valley prison. There I witnessed countless injustices, and none were of more concern than the transfer of biological males to our units. I had friends inside –sisters – and we went through it together. I was somewhat disturbed when I began to hear about the experiences of my friends, who faced violence and sexual harassment from male transfers. Even after I was released, the incidents told to me only grew in number and severity.

Finally, at the Canadian Association of Elizabeth Fry Societies' national conference, I witnessed dozens of so-called advocates dismiss and shame one of my sisters for speaking out about her experience of sexual harassment at Grand Valley prison by a known child predator – a male transfer. I was no longer

disturbed. I was outraged. She was not only silenced but silenced in the face of losing the most basic and only respite of prison – separation from our abusers. From that moment on, I became determined to increase public awareness of this issue among others facing criminalized women.

Since that time, I have joined feminist advocates on issues of prison abolition for women, strip searching, segregation, the grievance system, and on many other issues. I have worked since 2021 as a part-time researcher under a doctoral supervisor to assist in studying the impacts of the COVID-19 pandemic on conditions for criminalized women. Through this work, I have seen first-hand the devastating consequences that pandemic policies have had on incarcerated women.

In 2019 I began documenting the impact of males in women's prisons, speaking to women newly released and to women inside to ensure that their voices are not silenced. Working with other advocates, we created a survey and collected data from an even wider array of women on what they experienced while inside. We amalgamated statistics and highlighted nuanced examples from the data we collected – this data has informed the articles I have written, and testimony I have provided to Parliament.

With the support of the Canadian Women's Sex-Based Rights (caWsbar) and We The Females (WTF), I organized a series of Keep Prisons Single Sex protests in Kitchener, outside of Grand Valley prison. Since our first protest in 2021, we have put on 19 additional protests, including two days of national protests.

Given my own personal and academic background on this subject, I was particularly pleased to read Jo Phoenix's paper on the danger of male inmates who self-identify as transgender being transferred into women's prisons. The paper provides a long overdue discussion of a real issue that need more attention from both Canadian decision-makers and the general public. As Phoenix poignantly asks, "Ensuring the well-being, safety, and security of prisoners is one of the primary tasks of CSC [Correctional Services Canada] and one of the main responsibilities of all those employed in the prison system. So why is the known and potential risk of placing males who identify as women in women's prisons acceptable?"

With all that I have learned from my advocacy, from research, from my own experiences, and from my sisters, I now know that prisons are not places *for* women. The first step to addressing women's pathways to prison must be

to address systemic and male violence in women's lives, and we cannot fix the chronic conditions of this violence while women are facing acute violence from male transfers: physical violence, coercive control, threats, sexual harassment, sexual assault, and rape. We cannot address what we do not acknowledge. We must therefore listen to what women tell us, acknowledge their experiences, and act accordingly. There is no other way forward on the path of justice, safety, and fairness. **MLU**

Heather Mason is a former federal prisoner and advocate for incarcerated women who lives in Sarnia, Ontario.

Foreword by Patricia Craven

The issue of transgender male prisoners in women's prisons has gained increasing media and public attention in recent years.

Prison services in Canada, United Kingdom and the United States struggle to balance the needs and rights of male transgender prisoners with women who are biologically female. It is a sensitive and difficult issue but no government can reasonably hope to address these conflicting needs and rights without expert and public consultation, and a robust evidence base.

That's why I am pleased to introduce this ground-breaking research study. It contains an excellent summary of known data not previously made public. It also uses pertinent and shocking case studies to illustrate the authorities' lack of evidence-gathering and consideration for female prisoners. I believe that its widely respected author has something significant to tell the Canadian government and the Correctional Service of Canada.

The contents of this report, sadly, are not entirely surprising to me, given my background as a former prison governor of 28 years standing, with extensive experience of working in women's prisons.

I was especially struck by the commonalities between the Canadian and UK prison systems. My own experience of working in several women's prisons in England mirrors that of my colleague in the Scottish Prison Service, Rhona Hotchkiss.

In an English closed prison, women are usually held in a small cell roughly 1.8 metre x 2 metre, which might be a single or a double cell but has a locked door. Movement from cell to exercise yard, to work or education, to association or visits, to showers: all are supervised. They mainly move from one locked room to another. They might also be in a dorm holding roughly 20 prisoners, but the dorm door will be locked too.

Those are the conditions in which women undress, shower, use the toilet, menstruate, sleep. If they feel their safety or their privacy is threatened or compromised by the behaviour of another prisoner, they can't just walk away. It's not physically possible. There is no privacy.

Some women can deal with it. They are veterans of the system and they have seen and heard it all before. They can stand up for themselves. Many, however, are terrified by it but they suffer in silence – or take it out on themselves by self harming. In a confined environment, where women are four times more likely to self harm than women in the community and far more likely than men anywhere, what other coping strategy, however desperate, is left to them?

As a new prisoner, the chances are that you have suffered domestic violence or have been subjected to emotional, physical or sexual abuse since childhood.

You are more likely to have mental health problems, physical disability, drug and alcohol issues, money worries and housing worries. In terms of the overall prison population, you are almost exclusively likely to have concerns about child care, custody of your children, and family breakdown.

You are more likely to have traumatic brain injury as the direct result of domestic violence. Such an injury is thought to increase the likelihood of violent behaviour, criminal convictions, mental health problems and suicide attempts. In 2019, nearly 65 percent of women prisoners in HM Prison Drake Hall in Staffordshire reported a history consistent with traumatic brain injuries caused by severe blows to the head, with 62 percent the result of domestic violence.

In fact, statistically speaking, you are far more likely to have all of those risk factors than not.

What I wasn't prepared for – and found quite shocking – is the fact that 50 percent of the female prison population in Canada is comprised of Indigenous women. Canada does not have a good record in its treatment of

Indigenous women in the general population. In some places, large numbers have gone missing or been murdered with little interest from the authorities and it is hard not to conclude that they are regarded as invisible.

There is no direct comparator in the UK and yet the decision of the UK government to place biologically male prisoners in women's prisons has been tested in ways that will be familiar to the widely respected author of this report.

In my experience, the dynamic of a female-only environment changes dramatically even when only one male is present. Some women vie for male attention but many more shun it. Their behaviour changes. They exclude themselves from the very activities that make the dull daily prison routine bearable and are intended to aid their mental and physical health: showers, exercise, work or education, association. They retreat to their cells. I have known women who have experienced a lifetime of male violence and sexual abuse, those who have endured coercive control, to be rendered mute by the presence of just one man.

The UK High Court, in passing judgment on the judicial review *R(FDJ) v Secretary of State for Justice* 2021, acknowledged the negative impact on the mental health of women compelled to share confinement in locked cells and dorms and shower rooms with a prisoner of the male sex, explicitly stating that this policy exposes women to increased risk and “understandable fear.”

Judges acknowledged that putting males in female prisons would be regarded by many people as “incongruous and inappropriate”; that “some, and perhaps many, women prisoners may suffer fear and acute anxiety if required to share prison accommodation and facilities with a transgender woman who has male genitalia, and that their fear and anxiety may be increased if that transgender woman has been convicted of sexual or violent offences against women.”

What, then, do women prisoners already traumatized by male violence gain by being in a mixed sex facility? How does this policy benefit women in prison and, specifically, in what way does it assist them to lead law-abiding and purposeful lives on release? How can prison programs be directed in the most effective way to challenge the most common offending behaviour patterns of women – acquisitive or property crime – when the very purpose of those programs must be diluted to take into account the very different, and very specific, offending behaviour of males?

And if you conclude, as I did, that this policy confers only detriments and risks for women, exactly who does benefit?

Unless and until the Correctional Service of Canada considers the impact – direct and indirect – on women in prison, it cannot claim to fulfill its core mandate “to rehabilitate and safely reintegrate offenders into our communities.” Nor can it claim that it is “committed to providing safe environments for those who work or live in its correctional institutions.”

I hope that this balanced and measured report, which provides a striking insight into an issue that is largely locked away from public view and yet affects the most vulnerable women in the country, will finally prompt decision-makers to ask themselves some long overdue questions, to gather the necessary data and to stop the baleful impact of this policy on women.

Of course, reasonable accommodations should be made for transgender male prisoners. However, for terrified, invisible women locked in a closed facility with no means of removing themselves from the very cause of their anxiety, care, common sense and change are needed. [MLI](#)

Patricia Craven is a former prison governor at HM Prison Service, England and Wales.

Executive summary | *sommaire*

Prior to 2017, Correctional Service Canada (CSC) placed offenders in facilities according to their anatomical sex. Exceptions were made for post-operative transgender women (i.e., anatomical males who had undergone sex reassignment treatment) who could be placed in a women's prison. Yet, in 2017, CSC adopted an interim policy in which gender diverse offenders were given the choice to state where they would like to be incarcerated – in women's prisons or in men's prisons, in accordance with their gender identity and expression. This interim policy eventually formed the basis of *Commissioner's Directive 100: Gender Diverse Offenders* (CD100), which was implemented in 2022.

It is unclear whether female offenders were consulted in the development of this policy, or what consideration was given to the tensions that might occur – and in fact have occurred – with housing potentially violent male prisoners who identify as women alongside vulnerable women. It appears as though CD100 was a unilateral decision to prioritize gender identity and expression over sex in the organization of prisons and, with that, to unilaterally redefine women's prisons as places that incarcerate by gender identity and not sex.

There is no scholarly evidence about the impact on transgender offenders of giving them a choice of where they are accommodated or of accommodating transgender women who are anatomically male in women's prisons, but we do have a mounting number of specific instances where women have been directly harmed as a result of such policies.

In England and Wales, and in Canada, there have been several instances where males who identify as women have been transferred into women's prisons, have committed acts of sexual violence against women offenders or have acted in highly inappropriate ways, and who make the female prisoners feel afraid. Further, there is, necessarily, a loss of privacy and dignity as women prisoners are forced to share often quite intimate spaces with anatomical males who identify as women.

Evidence is emerging that in Canada, the CD100 policy change *actively* places women at risk, *actively* undermines their rights, and *actively* disadvantages minority women disproportionately. Sex segregation may be an historical legacy, but its continued practice is grounded in evidence about the differences between male and female offending, and

in recognition that women prisoners have different needs and vulnerabilities to men and that the security risks they pose are different to those of men.

Poverty, ethnicity, and victimization are the main drivers of women's criminality. For many women who end up in the criminal justice system, their offending takes place against a backdrop of poor pay and higher poverty (relative to men), disproportionately high rates of violent victimization, and hugely disproportionately higher rates of sexual assault. The decision to include anatomical males who identify as women in a population of female prisoners creates a new layer of vulnerability for an already vulnerable group.

As this paper concludes, there is no substantial evidence to support a prison placement policy that permits transgender prisoners to choose the prison in which they will serve their time.

“*Why is the known and potential risk of placing males who identify as women in women's prisons acceptable?*”

Women prisoners who are retraumatized by the presence of male bodied individuals – especially in rehabilitation programs that may well be discussing male violence – cannot simply leave and find another group to attend. Ensuring the well-being, safety, and security of prisoners is one of the primary tasks of CSC and one of the main responsibilities of all those employed in the prison system. Why is the known and potential risk of placing males who identify as women in women's prisons acceptable?

There is little doubt that the rights of women offenders to single sex provision in prisons, to safety and well-being, and to privacy and dignity are in tension with transgender rights in prisons. To ask an already marginalized demographic to bear the burden of risk, the possibility of retraumatization, and the loss of dignity and privacy in order to validate the sense of identity and subjectivity of a relatively small number of individuals is, perhaps, the wrong balance of competing rights, especially given that there is so little evidence that such risks are worth bearing. [MLI](#)

Avant 2017, le Service correctionnel du Canada (SCC) effectuait le placement des délinquants et délinquantes conformément à leur sexe anatomique. Des exceptions étaient accordées pour les femmes transgenres au stade postopératoire (c'est-à-dire les hommes anatomiques ayant subi un traitement de conversion sexuelle), qui étaient incarcérées dans une prison pour femmes. Or, en 2017, le SCC adoptait provisoirement une politique en vertu de laquelle les personnes de genres divers pouvaient désigner la prison de leur choix – pour femmes ou pour hommes, conformément à leur identité et à leur expression de genre. Cette politique a servi de fondement à la Directive du commissaire 100 : Délinquants de diverses identités de genre (DC100) mise en œuvre en 2022.

La question reste ouverte de savoir si les délinquantes ont participé à l'élaboration de cette politique ou si l'on a tenu compte des tensions susceptibles de se produire – et avérées – en conséquence de la cohabitation de femmes vulnérables et d'hommes potentiellement violents se désignant comme femmes. La DC100 apparaît émaner d'une décision prise unilatéralement de peupler les prisons en accordant la priorité à l'identité et à l'expression de genre plutôt qu'au sexe, et dans ce contexte, de redéfinir unilatéralement le profil des prisons pour femmes afin d'en faire des lieux où l'on incarcère les personnes conformément à leur identité de genre et non pas à leur sexe anatomique.



La pauvreté, l'origine ethnique et l'expérience de victimisation sont les principaux moteurs de la criminalité féminine.

Toujours est-il qu'aucune preuve scientifique ne permet de présager des répercussions du choix de la prison sur les transgenres ou, encore, du choix d'une prison pour femmes sur les transgenres qui sont anatomiquement des hommes. On dispose toutefois d'un nombre croissant d'exemples précis de femmes directement lésées par de telles politiques.

Il est arrivé plusieurs fois en Angleterre, au Pays de Galles et au Canada que des hommes transférés dans des prisons pour femmes aient commis des actes de violence sexuelle contre ces dernières ou aient agi de manière très inappropriée, semant la terreur dans leur milieu. En outre, il y a forcément une perte d'intimité et de dignité pour les détenues contraintes de partager des espaces souvent très intimes avec des hommes anatomiques se désignant comme femmes.

De nouveaux éléments de preuve indiquent que la politique canadienne met activement les femmes en danger, sape activement leurs droits et désavantage activement et exagérément les femmes membres des minorités. La ségrégation sexuelle est peut-être un héritage du passé, mais le maintien de sa pratique est fondé sur les différences observées entre la délinquance masculine et féminine et sur la reconnaissance des écarts entre les besoins, les vulnérabilités et la sécurité des femmes et des hommes.

La pauvreté, l'origine ethnique et l'expérience de victimisation sont les principaux moteurs de la criminalité féminine. La délinquance de nombreuses femmes aboutissant dans le système de justice pénale s'inscrit dans un contexte de salaires bas et de grande pauvreté (par rapport aux hommes), ainsi que de taux disproportionnellement élevés relativement à la victimisation avec violence et extrêmement disproportionnés relativement aux agressions sexuelles. La décision d'intégrer des hommes anatomiques se désignant comme femmes dans une population de détenues crée une nouvelle « couche » de vulnérabilité pour un groupe déjà vulnérable.

Comme on le conclut dans ce document, il n'existe pas d'élément probant à l'appui d'une politique permettant aux transgenres de désigner la prison de leur choix pour purger leur peine. Les détenues qui subissent un nouveau traumatisme en raison de leurs contacts avec des personnes au corps masculin – en particulier au sein des programmes de réinsertion où on débat parfois du traitement de la violence masculine – ne peuvent pas simplement les éviter en adhérant à un autre groupe. Assurer le bien-être et la sécurité de toutes les personnes incarcérées est l'une des principales tâches du SCC et l'une des principales responsabilités de l'effectif du système carcéral. On se demande donc comment les risques connus et potentiels liés à l'incarcération des hommes se désignant comme femmes dans des prisons pour femmes peuvent être acceptables.

Il ne fait guère de doute que les droits des femmes à des prisons séparées, à la sécurité, au bien-être, à la vie privée et à la dignité entrent en conflit avec les droits des transgenres. Exiger d'une population déjà marginalisée qu'elle supporte le poids du risque, de nouveaux traumatismes et une perte de dignité et d'intimité afin de valider l'identité ressentie et subjectivement vécue d'un nombre relativement petit de personnes pourrait engendrer un mauvais équilibre entre des droits concurrents, d'autant plus que rien ne prouve que de tels risques soient justifiés. [MLI](#)

Introduction

In 21st century Canada, there are new social norms concerning the acceptability and recognition of gender identity, gender expression, and gender diversity. The *Canadian Human Rights Act* extends protections against discrimination based on gender identity and expression. What does an organization like Correctional Service Canada (CSC) do when faced with these new norms?

Prior to 2017, CSC placed offenders in facilities according to their anatomical sex. Exceptions were made for post-operative transgender women (i.e., anatomical males who had undergone sex reassignment treatment) who could be placed in a women's prison. Yet, in 2017 when Bill C-16¹ came into force, CSC adopted an interim policy in which gender diverse offenders were given the choice to state where they would like to be incarcerated – in women's prisons or in men's prisons, in accordance with their gender identity and expression of their sex. This interim policy eventually formed the basis of *Commissioner's Directive 100: Gender Diverse Offenders* (CD100), which itself was implemented in 2022 (CSC 2022a).

CD100 states that: newly sentenced gender diverse offenders, or those returning to the federal prisons, are allowed to declare their preference for serving their sentence in either the men's or women's prisons; that a case conference will be immediately held in which the risks and needs of an offender are assessed; and that their choice will be respected unless there are "overriding health and safety concerns that cannot be resolved" (CD100, paras 33 and 36). It also states that during the case conference the potential impact on the offender population and others at the receiving institution will be assessed as will the impact on the gender diverse offender of both remaining in the current site or being transferred to the receiving site as well as any challenges that might be posed regarding physical infrastructure or security. CD100 introduced other

measures as well, including outlining new staff responsibilities and new systems for record keeping (such as having a gender identity and expression “flag” and only changing an offender’s sex marker (i.e., their biological sex as observed at birth) once that individual has undergone sex-affirming surgery to their genitals). In short, CD100 added only slight amendments to the interim policy

Policy Bulletin 685 states that the CD100 was:

developed by the Gender Considerations Secretariat in collaboration with the Strategic Policy Division and in consultation with internal and external stakeholders. Consultations included formal and ongoing engagement with external stakeholders and experts with specific areas of expertise in gender identity, human rights, criminology and health care, as well members of the 2SLGBTQI+ community. (CSC 2022)

At present it is unclear whether female offenders were consulted in the development of this policy, or what consideration was given to the tensions that might occur with housing potentially violent male prisoners who identify as women alongside vulnerable women.² It is also unclear what consideration was given to the robust body of research that details how women offenders have different needs to men or the principles underpinning correctional work with women in Canada. Allowing gender expression to take precedence over sex is consistent with the federal government’s more general approach of supporting gender diversity where the gender of the individual to be recorded by Statistics Canada and by federal agencies is the expected default variable and where “sex at birth” is retained only as needed and where such information can be justified.

The lack of consideration for either the effect on women prisoners or the evidence is a problem. Two stories published in *La Presse* in the summer of 2022 highlight this. In June, *La Presse* covered the story of Jody Matthew Burke who asked a sentencing court: (i) to classify him not as a dangerous offender (a legal classification that means that Burke can be incarcerated indefinitely) but as a long-term offender because he identifies as a woman and (ii) that upon sentencing he be transferred to a hospital where he can undergo his transition (Péloquin 2022a). On one level, the story is not extraordinary: a convicted offender tries to get a reduced classification and receive a less harsh sentence; a transgender individual asks CSC to respect their gender identity.

What makes the story about Jody Matthew Burke truly noteworthy is that Jody (now “Amber”) has a string of violent and sexual offences against women that dates back nearly two decades and include sexual assaults with weapons. Jody/Amber was most recently convicted for raping his wife at knifepoint, strangling her until she lost consciousness, and breaking several of her ribs. Further, at the time of the sentencing hearing, Jody/Amber, who was a former mixed martial arts fighter, was incarcerated in a man’s prison, was taking testosterone, and claimed to have only just discovered that they were transgender. Jody/Amber also stated their wish to delay cross-sex hormone treatment until removed from the men’s prison and placed in a hospital. In this context, it is not surprising that there were questions raised about whether Jody Matthew Burke was or was not genuinely transgender, or was merely trying to find their way into a women’s prison or trying to negotiate a less harsh sentence in a less harsh environment.

The second story *La Presse* covered (Péloquin 2022b) outlined what had happened after CSC accommodated, sometime around 2017, Steven Mehlenbacher’s request to transfer to a women’s prison on the basis that Steven identified as a woman. Once transferred, “Samantha” committed a variety of offences against female inmates which Samantha’s victims had reported and made known to the appropriate authorities. By 2020, the Parole Board noted that “Samantha” had “created a trail of victims, many of whom were terrorized” (Péloquin 2022b). CSC’s approach was consistent with its policies and, arguably, consistent with equalities law.

On the face of it, it seems hardly credible that CSC would place anatomical males in women’s prisons even when such prisoners have histories that demonstrate that they are a risk to women and despite decades of empirical research about the vulnerability of women in prison. Then, when the worst-case scenario happens and one such individual does go on to victimize women in prison, the individual is not removed or returned to a men’s prison

Even given these known examples, it appears as though the 2022 Commissioner’s Directive was a unilateral decision to prioritize gender identity and expression over sex in the organization of prisons and, with that, to unilaterally redefine women’s prisons as places that incarcerate by gender identity and not sex. This is a significant policy change to have occurred in the absence of much expert, political, and public consultation, or a robust evidence base, and flies in the face of what is already known about sex, offending, and vulnerability.

As this report will demonstrate, there is some evidence that suggests that being placed in a prison that does not align with one's gender identity might increase risk or harm to the offender, but whether that evidence is applicable to Canada is questionable. There is very significant evidence about the vulnerabilities of women in women's prisons that speaks directly to why we have, and arguably ought to maintain, sex-segregated prisons. There is no scholarly evidence about the impact on transgender offenders of giving them a choice of where they are accommodated or of accommodating transgender women who are anatomically male in women's prisons, but we do have a mounting number of specific instances (in Canada and England) where women have been directly harmed as a result of such policies.

This report concerns itself with evidence, and based on the scholarly evidence it argues that:

1. Biological sexual differences *do* matter in certain contexts, situations, and institutions.
2. Prisons *are* one of those institutions because :
 - a) women prisoners are more vulnerable than the average population of women;
 - b) there is no Canadian evidence to ascertain whether, as a population, transgender women are more or less violent than the general population of women prisoners or the general population of men prisoners;
 - c) evidence from other jurisdictions indicates that transgender women prisoners have disproportionately high rates of sexual offending in their histories; and
 - d) the (on average) greater physique and musculature of anatomical males due to testosterone has material effects on some women prisoners, particularly those who have been victimized by men previously.
3. The way to mitigate the potential risks posed to women and ensure their well-being and safety is to place prisoners in facilities according to their biological sex, not their gender identity.
4. Gender identity and sex *must* be treated as different things in prisons – and arguably failure to do so leaves the question of the specific needs of transgender prisoners unaddressed.

5. The way to address the problems and challenges faced by transgender women and transgender men (including those who do *and* who do not seek hormonal, medical, or surgical sex reassignment treatments) is to gather data on their likely criminal behaviour, their offending histories and their rehabilitative needs, and from that craft a series of policies and programs to suit them, rather than to assume that prison regimes based on sex apply to individuals on the basis of gender identity.

Sex matters in social research

What follows is an evidence-based provocation that proceeds from a number of key assumptions, including:

- Humans are sexually dimorphic.
- Women (anatomical females) and men (anatomical males) form two different sex classes (i.e., they can be viewed as distinct categories for social, political, and economic analysis, discussion, policy-making, and so on).
- Biological sexual differences have material social effects (i.e., the effects are objective and measurable and exist regardless of how individuals feel or identify).
- There are average physical differences in size and strength between men and women and, in some certain circumstances, these biological and physiological differences *do* matter in that these differences have material and social effects. So, for instance, the greater (on average) physical strength of men does matter if a man is assaulting a woman – even if not all men are always stronger than all women. The possession of a penis does matter when it comes to the crime of rape – even if women can also be raped or violently penetrated by objects other than penises. That these things matter has social effects in the way men and women make sense of and navigate, for instance, geographical space such as night-time cityscapes.
- The complex social behaviours we associate with notions of femininity and masculinity (i.e., gender), and with normative expectations about how particular types of bodies *ought to* behave, do not have their basis in biology but are historically and socially constructed

and specific – hence we have different norms about how women and men behave over time and across countries.

So far, so ordinary. Very little in the above statements ever caused much controversy, except perhaps for a short time by those opposed to “second wave” feminist policy reforms. Indeed, research and evidence on social matters over several decades proceeded on the basis that there are times and contexts where it is vitally important to study men and women as different social categories. The Appendix includes a further discussion of these and additional assumptions.

The rest of this report focuses on a number of arguments: against the implementation of self-identification in the federal prison system in Canada; about the consequences for women offenders of being accommodated alongside anatomical males who identify as women; and finally, the capacity of CSC to keep women safe.

What is the evidence or argument for a policy of self-identification in prisons?

There are two basic arguments for implementing a policy of self-identification in which offenders are placed in prisons according to their gender identity or expression rather than their anatomical sex. The first – not offered by CSC but used within the wider political discourse⁴ – is that “trans rights are human rights” and, this being so, organizations and others must prioritize an individual’s stated gender identity over their anatomical sex. The implication is that not doing so would be an infringement of their human rights. The second assertion is that being placed in the wrong prison puts transgender individuals at risk of grave harm and is, as some transgender advocacy groups and individuals claim, “torture.”

This section looks at the evidence for these claims and demonstrates that neither stand up to scrutiny.

Trans rights, human rights, and prisons

“Trans rights are human rights” is a specious slogan for justifying any policy reform, much less prison reform. Human rights, by their very nature, often conflict with each other. In this case, the rights of transgender people to be placed in a prison according to their gender identity when the CSC has organized prisons according to sex inevitably puts women’s right to single sex provision into conflict with transgender rights. There is no legal basis for claiming that one protected group’s rights always trump another group’s rights. Legal rights do not exist *a priori*. Legal and human rights are a matter of applying legal maxims to everyday practices and policies. No legal ruling (via case law or statute) has the capacity to cover all eventualities and thus we have traditions for testing the limits of rights in the courts and through judicial reviews for conflicting rights. To claim that such conflicts do not exist (or ought not to exist) is to deny the realities of case law.

Take, for instance, the well-established conflict between the right to religious expression and lesbian and gay rights. Lesbian and gay activists claimed for decades that the right to religious expression, where that religion advocates for discrimination against people on the basis of sexual orientation, conflicted with their rights. This was tested in a case that went all the way to the Supreme Court of Canada in 2018 (SCC 2018). Trinity Western University (TWU), a private faith-based university, applied to the Law Society of British Columbia and the Law Society of Ontario to have their law program approved and accredited. Such approval was denied because TWU asked students to sign a covenant that prohibited heterosexual or homosexual sexual intimacy except within marriage. TWU challenged the decision of the two law societies and eventually the case was heard by the Supreme Court. It ruled that in this case the rights of lesbians and gays did in fact take precedence over the right of a faith-based group *to impose their religion on others*:

[That for the Law Societies’ decisions] ...to be considered reasonable, the decisions had to strike a proportionate balance between the religious rights of the TWU community and the Law Societies’ objectives to protect the public interest. For the majority [of the Supreme Court justices], the “public interest” included promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and

preventing harm to LGBTQ law students. Neither Law Society was stopping someone from following his or her own religious beliefs (including following the covenant if s/he wanted to). They only prevented TWU from enforcing beliefs on other members of the law school community. Because of this, the majority said the decisions did not seriously limit anyone's religious freedoms. As the benefits of protecting the public interest were important, and the limitation on religious rights was minor, the majority said that both decisions reflected a proportionate balance, and were therefore reasonable. (Supreme Court of Canada 2018)

The case makes one simple but relevant illustrative point: asserting that one group has human rights is no guarantor that an action or policy that places two (or more) rights in conflict with each other is unlawful unless it is tested in court. Put succinctly, the justification of changing prison policy because “trans rights are human rights” makes no more legal sense than excluding male people who identify as women on the basis that “women's rights are human rights.” All people have human rights by virtue of being human.

“*There is no legal basis for claiming that one protected group's rights always trump another group's rights.*”

Yet, even when transgender rights have been tested in law in relation to prison, there still remains no legal case for CSC's current approach of giving transgender offenders a choice of where to be incarcerated. In 2019, a case heard by a federal court tested the limits of the *Canadian Human Rights Act* in relation to transgender prisoners. In *Boulachanis v. Canada*, Justice Sebastian Grammond overruled the CSC's decision to deny a transgender prisoner transfer from a men's prison to a women's prison. He stated that the CSC's decision was “prima facie discrimination based on gender identity or expression”

(Rudolph 2021, 117). But, importantly, in this case, the Justice ruled narrowly (meaning the ruling applied only to the specific case of Ms. Boulachanis) and *did not require CSC to make any policy changes*.

Whatever the case, the *Canadian Human Rights Act* contains clauses describing circumstances where it is legitimate to treat groups of people in discriminatory ways when accompanied or informed by a *bona fide* justification. Hence, if an individual's sex is a legitimate occupational requirement relevant to the creation of special plan, program, or arrangement, it remains lawful to discriminate. Legislation here is intended to “prevent disadvantages that are likely to [be suffered]... or to eliminate or reduce disadvantages that are suffered by any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination” (*Canadian Human Rights Act* 1985, section 16, para 1).

In light of the *Boulachanis* ruling and the potential for invoking *bona fide* justification for excluding anatomical males from women's prisons, CSC's choice to adopt self-identification seems a simple case of prioritizing the wants and needs of anatomical males who identify as women over the rights, needs, and safety of women.

Evidence about transgender prisoner vulnerability

In a town hall meeting with Prime Minister Justin Trudeau (2017), an advocate for transgender rights claimed that it is torture to place an anatomical male who identifies as a woman in a men's prison – because they are either placed in solitary confinement or subject to sexual violence. Leaving aside the sensational nature of the claim, an argument does exist that it is important for the prison service to prioritize gender identity over sex when placing prisoners. Failure to do so, it is claimed, means that transgender individuals suffer harms from being placed in the “wrong prison.” Therefore, it is important to test this evidence.

What does the evidence say?

International research does exist that demonstrates that being housed in “the wrong prison” can harm transgender prisoners in the following ways: the mental health impact of not having one's gender identity validated (see Szuminski 2020); harassment and bullying of anatomical males who identify as women in men's prisons from other prisoners and staff (Brown and Jenness 2020,

Jenness 2021); the lack of recognition of these abuses by prison management (Brown and Jenness 2020, Jenness 2021); higher risks of suicide of transgender women in men's prisons; the mismanagement of the medical and social needs of transgender women in men's prisons (Jenness 2021); and secondary forms of victimization such as protective or administrative solitary confinement in the case of the United States (Edney 2004).

How strong is the evidence?

Evidence about any social phenomenon can be assessed according to whether it offers a valid insight (i.e., portrays something authentic about the specific issue) or offers a reliable argument (i.e., uses a methodology that can be replicated to test whether the findings are repeatable). Evidence about the deleterious effect of any criminal justice policy usually boils down to a combination of producing objective (even if proxy) measures that attempt to “quantify” the harm or risk alongside producing valid results that address the individual experience.

For instance, the majority of women in prison in England and Wales have relatively short sentences. There is an argument that imprisoning women has disproportionately harmful effects (versus imprisoning men) even though the majority are imprisoned for short sentences (i.e., have committed less serious crimes). The objective measures used to quantify these harms include: the number of women who lose their housing, children, jobs, and so on because they have been incarcerated for less than three months. Combined with this will be testimonials about the capacity to access prison rehabilitation programs (usually none) whilst serving short sentences and the effects of incarceration as individual prisoners see them. So, when assessing the strength of the evidence base, it is important to understand not just methodology but context as well.

The evidence about the vulnerability of Canadian transgender prisoners is not robust for one main reason: the evidence does not come from Canada. The overwhelming majority of the evidence has come from the United States and, too often, is applied without question to other social, political, ideological, and cultural contexts – including the UK and Canada. This is a problem because the history and practices of incarceration in the United States are (literally) exceptional amongst democratic countries:

- The United States incarcerates at a significantly higher rate than Canada or the UK (World Population Review 2022). In 2021, the

US incarcerated approximately 664 people per 100,000 as compared to 129 per 100,000 in the UK and 104 per 100,000 in Canada (Prison Policy Initiative 2021). Different rates of imprisonment between countries tend not to reflect different rates of crime but rather different cultures of punishment. The observation has long since been made that the US is a much more punitive country, with prison regimes that are much harsher and sentences that are much longer than in Canada or the United Kingdom. These different cultures of punishment and regimes will inevitably shape offenders' experiences, transgender or otherwise. Put simply, there is no reason to assume that the horrendous experiences of incarceration that many American transgender individuals have are replicated in Canada or the United Kingdom. Prison governance in the three countries is fundamentally different. In the United States, prisons are sometimes private enterprises run for profit and the penal regimes in them are woefully poor in comparison to the UK and Canada. Indeed, there is a large body of academic penological literature addressing what is known as "American penal exceptionalism" (Garland 2020). The conditions in US prisons are notably different than in prisons in Europe and Canada; for instance, several US states still operate the death penalty, and the history of US prisons is shaped, at least in part, by a history of racial division, slavery, and segregation (Gilmore 2000). This means that any evidence about transgender prisoner experience from the US is likely to speak to an authentically exceptional experience which, by itself, is not likely to be valid in the context of Canadian prison research.

- The social and cultural politics around sexuality in the United States are different than in Canada and the United Kingdom. For instance, homosexual sex was decriminalized in the United Kingdom and Canada in 1967 and 1969, respectively, but was not made legal in the United States until 2003. These politics will shape prison culture, especially in relation to homophobia and transphobia. Using research produced from United States about the experiences of gender non-conforming, transgender, lesbian, gay, or bisexual people in prison is highly unlikely to be valid for Canada because the context is so different.

In fact, the American context is so different that academics regularly note that empirical research produced in the US about prisons cannot be generalized to other democratic countries (Jones and Newburn 2021). The question then is: what, if any, of the evidence from the United States about the transgender prisoner experience is generalizable and what is not? I would argue not enough for Canada or other countries to justify a self-identification approach to offender placement in prison. Yet, campaigning and advocacy groups regularly express grave concerns about the experience of imprisonment for transgender offenders based almost exclusively on the US evidence, so it is worth examining some of the claims in greater detail.

Suicide

The argument about the harm of prison misplacement is often made in relation to increased risk of death by suicide by transgender prisoners as a result of being placed in the wrong prison (Faye 2021). There is no evidence about this in Canada. However, the UK does provide some evidence, and it challenges the idea that transgender prisoners are at an increased risk. Between 2013 and 2020, there have been six deaths by suicide of transgender women in English and Welsh men's prisons (Inquest 2020). During the same period, 782 men and 31 women who were not transgender committed suicide in English and Welsh prisons (Inquest 2020). Six deaths are equivalent to approximately 2 percent of the known transgender prison population. Meanwhile, 782 men and 31 women are equivalent to approximately 1 percent of the male and female prison population. Given that the numbers are so small, it is impossible to draw any robust statistical conclusions – that 2 percent is double 1 percent does not easily translate into an assessment of whether transgender prisoners are more or less at risk of suicide than those who do not identify as transgender.³

Whatever the reason, too many lives are lost to suicide in prison. Yet how these numbers should affect policies, including that of trans prisoner placement, is far from clear. Exactly what transgender women (and others) are at risk of suicide *from* in the prison environment is unclear. Are these gender-identity-based risks or risks within the greater system? Indeed, in the UK, the three official reports into the suicides of three transgender prisoners concluded that the suicides were likely not related to either the transgender status of the individuals or the prison not handling their transgender status well. Further, the

same research report that the Ministry of Justice for England and Wales used to argue for the higher risks of suicide faced by transgender prisoners contained other evidence, albeit largely produced from the United States and so needs to be treated with caution (CIE 2017). Notably, relative to the general population and to lesbian, gay, and bisexual populations, disproportionately high rates of poor physical health and mental health as well as higher than expected social risks (of abuse, etc.) and lower than hoped for access to appropriate health care are found among trans prisoners (CIE 2017).

I make no comment on the causative dynamics, but simply note that there is, at least potentially, a chicken-and-egg problem here. Transgender prisoners' *prior* health (including mental health) issues may well have an impact on their (mental) health once they are incarcerated. Perhaps more importantly, there is no evidence from Canada, the US, or the UK to suggest that anatomical males who identify as women are *less* at risk of suicide or mental health if they are placed in women's prisons. Put another way, for a policy of gender self-identification to be a *solution* to the problem of suicide by trans-identifying prisoners, it would have to be established that self-identifying into women's prisons lowers the suicide rate and it is on precisely this point that we have little or no evidence. More data is needed for Canada. Without it, evidence-informed let alone evidence-based policies are not possible in design, implementation, or evaluation.

Sexual violence

Evidence from the United States indicates that transgender prisoners, specifically anatomical males who identify as women, have significantly higher risks of sexual violence than other populations in prison. In a review of the research literature from the US, Jenness (2021) opines that the prevalence of sexual assaults against transgender women specifically whilst in prison is significantly higher than for other prisoners. So while 4 percent of the male prison population in California report sexual assault, 59 percent of transgender prisoners in the same male prisons reported being sexually assaulted – some 13 times more.

These are appalling statistics by any measure. The question that must be raised, however, is whether the same or similar patterns occur outside of US prisons. To date, there is no evidence that this is the case in Canadian prisons. Indeed, evidence from the Office of the Correctional Investigator's (OCI) in-

spection reports indicates that other minority groups may well be at significantly higher risks than transgender prisoners. In 2019-2020, the OCI reported on a national study into sexual coercion and violence in Canada's federal prisons. The report starts by noting:

As the U.S. National Prison Rape Commission has recognized, prison-based sexual violence is not an intractable problem. The American experience attests that sexual violence behind bars is largely the result of correctional maladministration, deficient policies, negligence and unsafe practices. Prison rape becomes endemic however, when correctional officials fail to take the problem seriously, when they do not institute proper detection, enforcement and preventive measures. (OCI 2020, 23)

In other words, according to the OCI, the prevalence and extent of prison sexual violence is a function of *how* prisons are run and, as noted above, Canadian prisons are run in quite distinct ways from American prisons.

The OCI report goes on to note that when the report was written there existed no studies of prison sexual violence in Canada, that Canada did not have a system of mandatory reporting, and there was no overall strategy to deal with it.⁵ To fill in the blanks, the OCI collated and analysed incident reports and investigations from the CSC and interviewed CSC staff and federal inmates. The OCI found that between April 2014 and April 2019 a total of 67 incident reports were made of sexual assaults of federal inmates across 22 different institutions involving 73 victims and 66 “instigators.” The majority (66 percent) took place in male prisons; 33 percent took place in female prisons. The OCI stated that a large proportion of *both* victims and assailants were 2SLGBTQQIA+ (30 percent of assailants identified as such as did 15 percent of victims). The OCI further claimed that “While it was less frequently reported, at least 12% and 18.2% of the victim and perpetrator samples respectively identified as transgender individuals” (OCI 2020, 36).

On the basis of this, the OCI opined that:

This clearly demonstrates a need for prevention efforts to protect specific groups of incarcerated individuals who are known to be vulnerable to SCV [sexual coercion and violence]. As with other factors, it is possible

that the proportion of 2SLGBTQIA+ individuals involved in cases of SCV is even higher than what we observed from the BoI reports, as gender identity/expression information was not systematically reported. (OCI 2020, 36)

Without doubt, the statistics provided by OCI are underestimates given the well-known under reporting of sexual violence. However, what this (admittedly poor) evidence demonstrates is that there is a different group who are by the OCI's own evidence proportionately at *greater* risk of sexual violence than transgender prisoners. The OCI stated that 60.6 percent of victims had serious mental health issues and that 25 percent had serious cognitive impairments or delays. On the basis of their own data, the need for prevention efforts to protect specific groups would be better targeted at individuals with serious mental health issues and cognitive impairments. Commissioner's Directive 574 on sexual coercion and violence does make provision for CSC to flag individuals with sexually violent histories as not appropriate for double bunking and outlines a new system of recording and reporting sexual assaults, but it appears that there is nothing within the new directive to address how CSC might *prevent* sexual violence to women in women's prisons from anatomical males that self-identify as women.

Vulnerability

One of the assumptions that sits underneath arguments for the placement of prisoners according to gender identity is that transgender prisoners are a uniquely vulnerable population because of the reasons mentioned above. The evidence for these claims comes mostly from the US and is, arguably, not applicable to other countries, including Canada. But, even in the absence of evidence to the contrary, the claim that transgender prisoners (especially anatomical males who identify as women) are a uniquely (or the most) vulnerable prison population is social science nonsense. It may be a good rhetorical device to underscore the challenges, problems, discriminations, harassment, and bullying that many gender non-conforming and transgender people face, but it is not helpful in evidence-based policy-making.

It is difficult to conceive of a methodology that would provide evidence capable of speaking to the relative status of different vulnerable groups within

prison (or generally). One could create a (non-exhaustive) list of objective or proxy measures of vulnerability (for instance, diagnosed mental health problems, cognitive impairment, youth, advanced age, physical disability, economic insecurity as measured through precarious employment or unemployment, homelessness, and so on). Yet even such a list misses one of the key dimensions of vulnerability. Vulnerability is *relative* to the social context and *relational* to other specific groups and individuals. A cognitively impaired young wheelchair user may be extremely vulnerable in a prison but not in a school designed for and run by disabled young people with cognitive impairments. Hence, listing demographic characteristics (disabled, migrant, working class, lesbian) misses the main drivers of vulnerability.

“*Vulnerability is relative to the social context and relational to other specific groups and individuals.*”

The issue of comparative vulnerability gets more complex when a group is claiming vulnerability based on a subjective social characteristic rather than an objective one and when the complications of intersectionality are introduced. So, for instance, is a black, gay male prisoner more or less vulnerable than a black heterosexual female prisoner? The answer to that question lies in the social context rather than the social category to which an individual belongs.

The inclusion of “identity” categories like lesbian, gay, or transgender creates even more complexity. Does a person have to be *out* in order to be vulnerable as a transgender individual or lesbian, gay, or bisexual prisoner? If so, for how long? What if no one in the prison knows that the individual is transgender, lesbian, gay, or bisexual? Are they still vulnerable? There is no methodology presently developed that can meaningfully grasp or measure the comparative relative or relational vulnerability (or indeed privilege) of identity categories. None.

Finally, and much more specific to the prison context, even if it is the case that transgender prisoners do represent a population within prisons that are at

a heightened vulnerability (to assault, of mental health problems, etc., as indicated in research from the United States) compared to the “average” prisoner, it is not the case that they are *uniquely* vulnerable. Other prisoner populations are also vulnerable, including sexual offenders, informants, former serving police and prison officers, minority groups, gay prisoners, younger prisoners, and those with drug debts (Cornish 2022 and private communication with Rhona Hotchkiss 2022⁶).

Recognition of the increased and heightened vulnerability of some prisoners relative to others led to the creation of the Vulnerable Prisoners Unit in England and Wales. In a detailed examination of the treatment of vulnerable prisoners in Edinburgh and Durham prisons, Cornish (2022) made the case that an individual’s journey into and pathway through prison is often shaped by the level or intensity of their vulnerability – regardless of the specific conditions of their vulnerability (i.e., being a member of a demographic seen as being vulnerable). Moreover, he also noted that the notion of “vulnerable” is, itself, a fluid category influenced by a range of factors including, for transgender prisoners, the relative newness of the social changes and media attention (see Cornish 2022).

Clearly, transgender prisoners do face a set of circumstances that are unique to their status as transgender and anatomical males who identify as women do face risks in men’s prisons. The question must be asked, though, why anatomical males who identify as women (and not other vulnerable prisoners) are alone in being given a choice about where they are incarcerated. At least in the UK there are other ways of addressing the vulnerability of prisoners, including the creation of vulnerable prisoners units (VPU).

Missing evidence

In the ideal world, we would have evidence that unpacks the pros and cons of sex segregation and placement by gender identity from the perspectives of trans prisoners, incarcerated men and women, and staff (as well as loved ones to be comprehensive). However, there is no such evidence in Canada or anywhere else. As the above outlines, the evidence supporting the current policy of allowing anyone who identifies as a woman to *choose* the prison in which to serve out their sentence is exceptionally thin and there are very significant gaps. There are no other categories of offenders at risk in men’s prisons that are given a choice. At

present, we know from a study on prison staff trainees that they expressed concern, noting the complications of the introduction of self-identification in the federal prison system (Ricciardelli, Gacek and Phoenix 2020). We do not know:

- what security problems are created when anatomical males who identify as women are included in women's prisons;
- whether anatomical females who identify as men pose a threat to women in the women's prisons;
- the "risk," however defined, from an organizational point of view of creating mixed sex prisons; for instance, what effect will such a policy eventually have on the security regimes in women's prisons, on the rehabilitation programs, and on the provision of health care or contraception (will taking contraception become mandatory for females in order to avoid prison pregnancies?). Will women be forced to double bunk with any male who identifies as woman as long as that male does not have a sexual assault marker (as per the new sexual coercion and violence prevention policy)? And what about maintaining the dignity and privacy of mothers who are breastfeeding babies – how will the prison deal with that? How will the prison deal with women of faith whose religious beliefs require sex segregation?
- whether transgender prisoners are any more or less at risk of sexual violence than other vulnerable groups because of their sexuality, say for instance young gay men;
- whether gender identity overrides sex in patterns of offending and risks posed to other inmates or staff;⁷
- how efficacious other ways of accommodating gender identity and gender expression might be, such as the creation of specialized units or the development of and inclusion of transgender prisoners into Canadian VPUs;
- what the impact of accommodating anatomical males who identify as women in women's prisons has on staff;
- what the impact of accommodating transgender women in women's prisons has on women of faith whose religions require single sex space provision for bathing, washing, and so on;
- what the impact of transgender prison staff has on prisoners, including in relation to searching anatomical female and male offenders;

- how women in women’s prisons *interpret* the (potential or actual) risks posed by anatomical males who identify as women and anatomical females who identify as men; and
- how CSC assesses health and safety in terms of any exclusions it may impose on transgender women being in women’s prisons (Rudolph 2021).

Against this almost complete lack of relevant data, there is other evidence that supports sex-segregated incarceration and emerging evidence (albeit with the usual caveats about generalizations) indicating that the policy change originally introduced in Canada in 2017 and formally adopted in 2022 does *actively* place women at risk, *actively* undermine their rights, and *actively* disadvantage minority women disproportionately.

Sex-segregated prisons

Historically, sex segregation of prisons was rooted in Victorian concerns for protecting women and girls from both the (then) degrading conditions of prisons and the humiliations they experienced first-hand from men who were imprisoned alongside them (Kunzel 2022). Whilst the impetus behind 19th century prison reform and sex segregation was also bound up with historically specific notions of reforming “fallen women,” the fact remains that sex segregation was also intended to stop sexual violence and the prospects or chances of prison pregnancies.

As originally conceived in the 1823 *Gaol Act* of England and Wales, sex segregation extended to prison staff as well (Arbour 1996; Britton 1995; Britton 2003; Freedman 1981). Elizabeth Fry, the architect of the *Gaol Act*, wished for a complete separation with women prison/correctional officers helping women prisoners to be rehabilitated (Fry and Cresswell 1856). Indeed, reforms in Canada after the closure of the Prison for Women in Kingston, Ontario, ensured women officers were the primary staff in women’s institutions – a trend still in evidence on many women’s units in prisons today (Arbour 1996).

Whilst sex segregation may be an historical legacy, its continued practice is grounded in evidence about the differences between male and female offending, and in recognition that women prisoners have different needs and vulnerabilities to men and that the security risks they pose are different to those of men. To appreciate this evidence, it is important to understand that most women's offending is related to women's overall position in societies structured by sex-based inequalities.

Women and crime

Fifty years of research into women's criminality confirms that women's offending is related to sex-based social inequalities (i.e., those forms of social inequalities that women often share as a sex-class and are related to the social experience of being a woman in a social structure that accords men relative advantages in comparison to women) and that the antecedents for such offending bear the same markers that are used to measure sex-based inequalities (Fitz-Gibbon and Walklate 2018). For many women who end up in the criminal justice system, their offending takes place against a backdrop of poor pay and higher poverty (relative to men), disproportionately high rates of violent victimization that are twice as high among women compared to men, and hugely disproportionately higher rates of sexual assault – a rate five times higher among women than men (Cotter 2021).

Overall, evidence shows that time and again, and across different countries and jurisdictions, the same pattern emerges: Poverty, ethnicity, and victimization are the main drivers of women's criminality. Although poverty and ethnicity also shape men's offending, victimization does not feature so prominently. As noted above, vulnerability is related to context. The decision to include anatomical males who identify as women in a population of female prisoners – who are already known to have experienced significantly higher rates of victimization at the hands of men – creates a new layer of vulnerability for an already vulnerable group. The rest of this section describes the evidence.

Women and crime: The evidence

Official criminal statistics are the end products of complex social processes of decision-making starting with the creation of a law whose violation constitutes a "crime." From there, police recording decisions, an individual's reporting decisions, a prosecutor's categorizing decisions, adjudicators adjudicating guilt

or innocence, and so, on all shape what goes into the official criminal statistics. Within academic criminology there is a general recognition that official criminal statistics do not reflect the truth about crime. They reflect the decision-making processes of many involved in the administration of criminal justice. Notwithstanding this fact, the patterns of sexual differentiation within criminal justice statistics (across time and across countries) remain remarkably stable.

Based purely on a head count of arrests and convictions and since criminal statistics were first collected (in the mid-1850s), males make up around 80 percent of those arrested, prosecuted, and convicted of crime. This figure varies between 70 percent and 85 percent according to what is being calculated and at what stage the counting takes place. So, for instance, in the last analysis of sex differences in police reported crime conducted on behalf of Statistics Canada, females accused of crime as reported by police made up approximately 25 percent of all those accused (Savage 2019).



*Violent crime is the category
of offence that men are
accused of most.*

Although there are no exclusively male or female categories of police reported crime, there is a distinct pattern of offending by sex. Women are accused of 23 percent of all violent crime, but even then there are distinct sex-based differences. For instance, 2.8 percent of those accused of sexual offences are women, meaning that men make up 97.2 percent of all those accused of sexual offences of any type. For property crime, women comprise just over 29 percent of all those who are accused. But, like crimes of violence, this figure conceals further sex-based differences. The majority of women accused of property crime are accused of shoplifting – 37 percent of women’s property crime is shoplifting and they make up 43 percent of all those accused of such crime. The statistics also demonstrate a further difference between male and female offenders that is significant to the issue of prison placement.

Excluding “Administration of Justice” offences (i.e., offences where an offender fails to comply with a criminal justice order), violent crime is the category of offence that men are accused of most. By comparison, property crimes are

the category of offences that women are accused of most. From those findings comes the criminological truism that when women enter the criminal justice system, they do so mainly for property offences that often occur against a backdrop of economic marginalization and social welfare problems, but that when men enter the criminal justice system, they do so for *both* property offences *and* violent crimes. Indeed, in 2017, Statistics Canada recorded that 198,850 men were accused of violent crime (compared to 58,115 women) and 196,679 men were accused of property crime (compared to 81,852 women) (Savage 2019).

Women and prison: The evidence and empirical realities

Five decades of criminological research in Canada, the United States, Europe, Australia, and New Zealand confirm the distinctiveness of the female prison population (see, for example, Cerezo 2017; MacDonald 2013; McClellan, Farabee, and Crouch 1997; Sheehan, McIvor, and Trotter 2013; Sorbello, Eccleston, Ward, and Jones 2002). The female prison population is only a fraction of the male prison population worldwide.

In Canada, between 2019 and 2020 there were approximately 14,000 people incarcerated in the federal prison system and 24,000 in the provincial and territorial prison system (World Prison Brief 2022). Women make up on average around 6 percent of the overall Canadian prison population (World Prison Brief 2022; see also Statista 2022). Women are convicted for less serious, less violent, and more petty property offences than men, and rarely for sexual offences (Phoenix forthcoming 2023). Generally speaking, women who come to the attention of the criminal justice system tend to do so for survival crimes, petty property offences, and as a result of the physical or psychological trauma, victimization, and mental health issues that arise from, at least in part, male violence (Chesney-Lind and Pasko 2012, Fitz-Gibbon and Walklate 2018, Carlen 1988, Phoenix forthcoming 2023).

Notably, these demographics and trends have remained stable since criminal statistics were first collected in the mid-1800s and across different western democracies. For instance, in the United Kingdom, around 50 percent of women in prison have survived emotional, physical, or sexual childhood abuse – the numbers in Canada are similar – and give rise to the paradox that for some women, prison serves as a space of temporary refuge from male violence and exploitation (Bucurius, Haggerty, and Dunford 2020). Almost 66 percent

of women in prison in the United Kingdom have experienced domestic violence (Women in Prison 2022), 70 percent have mental health needs (Women in Prison 2022), nearly 80 percent of women incarcerated in Scotland have had significant traumatic brain injuries at the hands of their intimate partners (McMillan et al. 2021), and, compared with the general population of women, women in prison have significantly higher incidences of mental health, drug, and alcohol problems (McMillan et al. 2021). Research suggests that nearly 80 percent of women in the Canadian federal prison system meet the criteria for a mental health disorder (Correctional Service Canada 2017) compared to around 40 percent of incarcerated men (Beaudette and Stewart 2016).

Evidence-based women's prison policies

Taken together, these patterns raise a profound question for prisons as organizations: how are they to address the needs of women offenders, which are different from men? Yet because there are so few women in prison, criminal justice policies, prison policies, community punishment schemes, security and safety regimes within prisons, programs for rehabilitation, risk assessments, and so on, were all developed based on the notional male offender (Langan and Pelissier 2001; Messina, Burdon, Hagopian, and Prendergast 2006; White 2012). The evidence about the vulnerability and different needs of female prisoners is so robust that by the late 20th and early 21st century, different jurisdictions started to develop specific regimes and policies for female prisoners.

In Canada, a special task force was convened in 1989 to look at the inequitable treatment of women prisoners that arose from subjecting them to regimes and programs developed for men, with its findings published in April 1990 (Correctional Service of Canada and Canadian Association of Elizabeth Fry Societies 1990). The task force recommended a holistic woman-centred approach for women in conflict with the law, which led to an overhaul of the federal prison system for women in Canada and the eventual roll out of CSC's "Gender Responsive Corrections" (Barrett, Allenby, and Taylor 2012; Hannah-Moffat 1995; Hannah-Moffat and Shaw 2001). "Gender responsive corrections" means correctional policies that recognize the different needs and backgrounds of women offenders compared to men. In 2007, in England and Wales, the Corston Report (see Annison and Brayford 2015; Corston 2007) came up with similar findings to the Canadian task force (Correctional Service

of Canada and Canadian Association of Elizabeth Fry Societies 1990), recommending a radical overhaul of the treatment of women in the criminal justice system and the introduction of a holistic woman-centred approach to respond to three specific vulnerabilities that women offenders experienced.

These vulnerabilities, thought to result in women's criminalization and incarceration, are (i) women's domestic circumstances (e.g., vulnerabilities tied to domestic violence, child care, single parenthood), (ii) women's personal circumstances that make them more vulnerable relative to men (e.g., mental health, low self-esteem, substance misuse, eating disorders), and (iii) women's socio-economic status relative to men (e.g., poverty, isolation, and unemployment). Corston wrote:

Women have been marginalised within a system largely designed by men for men for far too long and there is a need for a "champion" to ensure that their needs are properly recognised and met... I have also concluded that there needs to be a re-design of women's custody introduced in parallel with other gender specific workable disposals and sanctions. (Corston 2007, 1)

She went further to state that:

I have seen little evidence that much preparatory work is in hand in respect of the imminent statutory duty or of any real understanding that treating men and women the same results in inequality of outcome. Equality does not mean treating everyone the same. The new gender equality duty [sic] means that men and women should be treated with equivalent respect, according to need... This will result in some different services and policies for men and women. There are fundamental differences between male and female offenders and those at risk of offending that indicate a different and distinct approach is needed for women. (Corston 2007, 3)

Canada and England and Wales are not alone. By 2010, international recognition of the unique needs of women prisoners resulted in 193 countries adopting the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("the Bangkok Rules" – see

Barberet and Jackson 2017). These state that providing for the distinct needs of women is necessary and that doing so “shall not be considered discriminatory.”

The majority of the rules address the necessity of recognizing women’s sex-based needs; for instance, the rules cover the minimum standard expected of prison regimes when dealing with the children of women who are incarcerated, with hygiene needs particular to menstruation and breastfeeding (e.g., the provision of sanitary products and water for washing), and regarding women’s particular reproductive health care needs. The rules also help countries understand their responsibilities in preserving the dignity of women, particularly regarding strip or invasive body searches, and the particularly high risk of rape, sexual assault, and humiliation that women can experience – including being watched when dressing, showering, or in the bathroom. The preservation of dignity becomes even more important for women who may come from cultural or religious backgrounds that require intimate spaces to be for women only.



*Incarcerated women
have different needs than
incarcerated men.*

CSC argues that there are higher “need” levels for incarcerated women relative to men. In a detailed analysis of assessed need in relation to community outcomes for both men and women, women’s higher needs in all assessed domains directly affected their community outcomes following their release (CSC 2019). Relevant here, these experiences underscore one of the main rationales for sex-segregated prisons: incarcerated women have different needs than incarcerated men and those needs are related to the effects of living in socially unequal societies (Belknap 1996; Fedock, Fries, and Kubiak, 2013; Morash, Haarr, and Rucker 1994).⁸ In this circumstance, it is almost impossible not to conclude that CSC is undermining its own policies when it unilaterally decided to make women’s prisons mixed sex by permitting anatomical males who identify as women to choose to be accommodated in them.

The next section will show that there is now mounting evidence of the risk to women prisoners’ safety, security, and well-being posed by placing male people who identify as women in female prisons.

Evidence, risk, and women's physical and emotional safety

Campaigning organizations, individuals, academics, and journalists have argued that the inclusion into women's prisons of anatomical males who identify as women and who have not had sex reassignment surgery is hugely problematic and much more so than for those who are post-operative. In England and Wales, there have been several instances where males who identify as women have been transferred into women's prisons, have committed acts of sexual violence against women offenders or have acted in highly inappropriate ways, and who make the female prisoners feel afraid.

The most well-known is that of David Thompson (Karen White) – an individual convicted of several rapes and of stabbing an elderly woman. In passing sentence, the judge remarked that David Thompson (Karen White) was a manipulative sexual predator (Keep Prisons Single Sex 2022a). Despite an established history of sexual and violent offending, David Thompson (Karen White) was held on remand in the women's prison HMP New Hall. At that location, David Thompson (Karen White) committed four acts of sexual assault. The Prison Service recognized their part in what had happened and apologized for the mistakes they made. This prisoner is now placed in a men's prison and it is reported that they are hoping to obtain a Gender Recognition Certificate so that the prison service will place them in a female prison (Keep Prisons Single Sex 2022a).

There are other less extreme instances that highlight some of the issues involved. Martin Ponting (who also goes by Jessica Winfield) was convicted of raping two girls in 1995, transitioned without surgical intervention in 2007 and by 2017 was incarcerated in HMP Bronzefield (the largest women's prison in Europe). At this prison, Martin/Jessica sexually assaulted a female prisoner. Other female prisoners reported that Martin/Jessica did not take the hormone therapy they were meant to, regularly displayed erections, and intimidated female prisoners (KPSS 2022a).

In May 2022, a 43-year-old male who identified as a woman was found having consensual sex with a much younger female prisoner who officers considered vulnerable after having supplied her with alcohol. At the time of writing, Sussex Police confirmed that a man who had been convicted of 30 historic

offences of indecent assault or indecency with a child against seven victims but who later identified as a woman and who does not possess a Gender Recognition Certificate is serving an 18-year prison sentence in HMP Bronzefield (Sales 2022).

As noted in the introduction, in October 2022, *La Presse* reported on the case of Samantha (formerly Steven) Mehlenbacher, a Canadian federal prisoner with successive convictions for assault, possession of weapons, and disguise with criminal intent, who in 2018 after 10 years of incarceration began to identify as a woman and was transferred by authorities to the Grand Valley Institution for Women in Kitchener, Ontario (Péloquin 2022b). At Grand Valley, fellow inmates accused Samantha of lying about their gender identity in order to have sex with women, and one lodged an official complaint. Following an investigation, Mehlenbacher was charged with sexual assault and criminal harassment. Pursuant to an agreement with the Crown, Mehlenbacher ultimately pled guilty to one count of harassment; the count of sexual assault was dropped in exchange for a four-month sentence which she partially served in a halfway house in downtown Montreal.

These are “the worst-case scenarios.” There are other less dramatic but nevertheless deleterious effects on women offenders of accommodating anatomical males who identify as women alongside them. There is a growing evidence base that takes the form of testimonials, but to date there has been no large-scale attempt to understand the effect of placing anatomical males who identify as women in women’s prisons from the perspective of the women, or the prison officers.⁹ A former governor of a female prison (Rhona Hotchkiss) attests to the retraumatizing effect of placing transgender prisoners in female prisons. In a personal communication with this author, and in written evidence in a judicial review, Hotchkiss states that the mere presence of male offenders amongst a population that has disproportionately suffered male violence causes retraumatization, particularly if these individuals are also present in any prison programs designed for the women to address the male violence they have experienced. There is, necessarily, a loss of privacy and dignity as women prisoners are forced to share often quite intimate spaces, such as showers, with anatomical males who identify as women.

For women of faith this can have enormous and long-lasting personal consequences. Professor of Sikh Studies Jagbir Jhutti-Johal, in a personal communication with the author, writes that because the number of Sikh prisoners (of

either sex) is exceptionally low (around 1 percent of the total prison population), their needs are often forgotten. Sikh female prisoners share with Muslim and Hindu female prisoners an added burden as women of faith. Jhutti-Johal notes:

[In] all three communities the cultural prioritisation of family and community honour (*izzat*) and shame (*sharam*) regulates the conduct of members of the community. These notions are essential in maintaining familial *izzat* and the low numbers of Sikhs in prison is most likely due to the strong cultural expectation to uphold family honour by getting a good education, job and getting married. It is important to note that the responsibility of preserving family honour is borne by women mainly, and they are told to act well and not to bring shame to the family or community. Their behaviour is monitored and any form of interfaith relationship or pre-marital sex, consumption of alcohol or criminal activity brings *bezhti* (shame) to the family and community, and the women are referred to as being shameless (*besharam*).

Power of *izzat* and *sharam* in South Asian communities means criminal activity and sentencing will not be disclosed easily by a family due to the fear of ostracization or otherization by the community. Thus, to avoid their own loss of belonging a family, if a son or daughter is jailed, will not talk about the situation, but instead will try and cover it up by saying ‘so and so has gone to India or US for work’ for example.

... To deviate from the norm has a lot of consequences, but it is important to note that the consequences do vary according to whether one is a woman or man, and these consequences are dependent on social and cultural norms, such as son-preference. (Jhutti-Johal, *personal communication*, 28 July 2022)

Sikh women in prison are often seen as “model prisoners.” They become very religious in order to help mitigate the very processes of exclusion ex-

plained above. The decision to include transgender women in female prisons can jeopardize any chances that prisoners who are women of faith have to be reintegrated within their communities – with all the devastating consequences that then follow. Simply, many women of faith must adhere to cultural and religious prescriptions that include the necessity to maintain single sex provision for intimate spaces. Hence:

if it becomes public knowledge that she has shared prison space with transwomen... [t]o the community it will not matter that the transwoman identifies as a woman, instead for the community, especially the older generation all they will focus on is that the Sikh female was in a mixed jail, and this can be used to cast further negative aspersions about her character and behaviour to strengthen her ostracization from the community which the community would feel will be beneficial to maintaining the community's honour. (Jhutti-Johal, *personal communication*, 28 July 2022).

Increased risk of sexual and physical violence, retraumatization, lack of consideration for women of faith – these are the potential risks and consequences that women prisoners must shoulder when governments decide to prioritize gender identity over sex in choosing the facility into which to place prisoners.

Indeed, even Canada's Office for the Correctional Investigator (OCI) recognized some of these problems in its *Annual Report 2018-2019*. In March 2018, the OCI stated that there were just over 50 such individuals with nearly 66 percent residing in the men's prisons. The OCI noted that the integration of anatomical males who identify as women in the women's prisons "created operational challenges" (OCI 2019, 115) and that some women offenders had expressed concerns for their safety. The OCI did not rule out "manipulation." While the OCI never explicitly stated what this meant, it is reasonable to assume that they were referring to the fact that some men may claim transgender status in order to (i) serve their time in a facility with a less severe regime and (ii) some predatory men may manipulate the system in order to further prey on women. The OCI further noted that the CSC "uses a series of risk assessment tools based on numerous variables, from sexual victimization to escape risk" (OCI 2019, 116). Finally, it noted that other jurisdictions face similar

problems and cited, at length, the case-by-case risk assessment procedures that England and Wales follows.¹⁰ It is therefore worth looking in detail at what happens in those jurisdictions.

Case-by-case risk assessment approach and a specialist unit inside the female prison system

In the United Kingdom, “gender reassignment” is a protected characteristic within the 2010 *Equality Act*. “Gender reassignment” in the UK is a more narrowly defined characteristic than Canada’s “gender identity and gender expression” in that it protects individuals who are in the process of, intending to, or have transitioned from one gender identity to another. England and Wales have not introduced self-identification into prisons. Individuals wishing to legally change their sex marker on their birth certificate must obtain a gender recognition certification (GRC). To obtain one, an individual must have a diagnosis of gender dysphoria, have lived in their acquired gender for two or more years, and apply to a medical board for certification. Once an individual has a GRC, they are then for most but not all purposes treated as a member of the opposite sex.

Presently, the Ministry of Justice states that the placement decisions for transgender prisoners without a gender recognition certificate¹¹ take a “balanced approach... where the safety and well-being of the individual who is transgender is balanced by an informed assessment of any risks that the individual presents to other people (particularly in custody or residential settings such as in women’s prisons)” (England and Wales Ministry of Justice 2019, 11). The ministry takes a case-by-case approach to the transfer of transgender prisoners from men’s prisons to women’s prisons and vice versa (ibid.). Anatomical males who identify as women and have a GRC are either temporarily placed in a specialist unit in Downview Prison (when they are deemed to be of sufficient risk to women offenders) or are on general release (integrated within the wider prison population). Unlike Canada, the Ministry of Justice for England and Wales collects data on the number of known transgender prisoners (with and without GRCs) in the prison system and publishes the number of transgender prisoners without GRCs every year in *Her Majesty’s Prison and Probation Service Offender Equalities Annual Report*. Table 1 gives the latest figures.

In response to a Parliamentary Question asked by Tim Loughton, the UK’s Ministry of Justice claimed that as of March 2022, there were 146 transgender

TABLE 1: PROTECTED CHARACTERISTICS AND SELF-IDENTIFIED GENDER IDENTITY OF THE TRANSGENDER PRISONER POPULATION IN ENGLAND AND WALES, MARCH/APRIL 2016 TO MARCH 31, 2022.

	Mar/Apr 2016	Mar/Apr 2017	Mar/Apr 2018	Mar/Apr 2019	Mar 31, 2020	Mar 31, 2021	Mar 31, 2022
All reported transgender prisoners with a GRC	–	–	–	–	–	10	11
All reported transgender prisoners without a GRC	69(r)	124(r)	139	162(r)	–	197	230
Legal gender							
Female	13(r)	23	–	–	–	–	–
Male	56(r)	98(r)	–	–	–	–	–
Legal gender female	–	–	23	32	–	39	43
Legal gender male	–	–	111	128(r)	–	158	187
Not recorded / not known	–	~	~	~	–	–	–
Self-identified gender identity							
Female	–	–	114	129(r)	–	146	168
Male	–	–	19	20	–	39	42
Non-binary	–	–	–	–	–	–	13
Not recorded / not stated	–	–	6	13	–	~	7
Other gender identity							
Gender fluid	–	–	27	15	–	7	–
Intersex	–	–	~	7	–	10	–
Non-binary	–	–	~	6	–	7	–
Cross-dresser	–	–	0	8	–	12	–
Male	–	–	–	–	–	20	–
Female	–	–	–	–	–	46	–
Transgender	–	–	–	–	–	19	–
Prefer not to say	–	–	48	51	–	37	–
Other	–	–	–	–	–	–	–
Not recorded / not stated	–	–	50	76	–	39	–
Establishments							
Total number of establishments housing transgender prisoners	33	47	44	62	–	69	79
# of establishments housing 1 transgender prisoner	19	23	15	29	–	27	33
# of establishments housing 2-4 transgender prisoners	11(r)	16	18	22	–	30	29
# of establishments housing 5 or more transgender prisoners	3(r)	8	11	11	–	12	17
Women's establishments							
Number of transgender prisoners identifying as male or female in women's estates						40	49
Transgender women (legal gender male, self-identifies as female)	–	–	–	–	–	~	6
Transgender men (legal gender female, self-identifies as male)	–	–	–	–	–	37	~
Other (one non-binary, identifying in a different way or not stated/not known)	–	–	–	–	–	~	~
Men's establishments							
Number of transgender prisoners identifying as male or female in women's estates	–	–	–	–	–	157	181
Transgender women (legal gender male, self-identifies as female)	–	–	–	–	–	145	162
Transgender men (legal gender female, self-identifies as male)	–	–	–	–	–	0	~
Other (one non-binary, identifying in a different way or not stated/not known)	–	–	–	–	–	12	~

Source: England and Wales, Ministry of Justice (2022).

women in all the prisons in England and Wales. In relation to current offences only (i.e., those offences that led to the current period of incarceration), 87 transgender women had a conviction of at least one sexual offence and that fewer than five were in the women's prisons (see United Kingdom, Parliament 2022).

Ninety-eight percent of convicted sexual offenders in the UK are male and this has remained relatively stable since criminal statistics were first collected. In Canada in 2017, 3.12 percent of sexual assaults reported to the police were those accusing a female of committing the offence, in comparison to 96.88 percent in which a man was accused (Savage 2019). More recently, Statistics Canada reports that 96.25 percent of those found guilty of sexual assault and other sexual offences are male and 3.75 percent are female. These figures need to be treated with some caution, however, because cases were allocated a sex according to the name of the accused and no sex was recorded from the cases in Manitoba (Statistics Canada 2022). The same or similar is true in New Zealand, Australia, the US, and across Europe. In England and Wales, as revealed in parliamentary questions, nearly 60 percent of prisoners who were known transgender women were incarcerated for sexual violence as compared to only 1.8 percent of the general female prisoner population and 18 percent of the general male prison population.

This pattern of disproportionately high rates of sexual offending among transgender women has remained stable for five years, even though the number of transgender prisoners has more than doubled. This is an important point.¹² CSC does not routinely collect or publish data on the number of transgender prisoners, much less the number currently housed in women's prisons or the proportion of such offenders with flags for histories of sexual offending. We can make no comment about whether the same or different patterns seen in the UK are also in evidence in Canada.

Even transgender activist and academic Alex Sharpe concedes that self-identification for prison placement policies poses problems. Sharpe (2018) argues that it is necessary to adopt a case-by-case approach (and not self-identification), as this mitigates against (i) dangerous transgender sexual offenders (with or without a GRC) being placed in the female prison system and (ii) sexual predators abusing the system to claim transgender status to further their sexual predation.

This was tested when FDJ, a woman prisoner who was sexually assaulted by a male who identifies as a woman and who possessed a GRC (i.e., was there-

by legally a woman), took the Secretary of State (England and Wales) before a judicial review. FDJ's grounds of claim argued that because the Ministry of Justice policy does not take into account of the effect of placing anatomical males who identify as women on the women there incarcerated (namely, the increased risk presented to the women) the policy had the effect of indirect sex discrimination. The judges ultimately concluded that that policy was lawful, but they conceded that:

the unconditional introduction of a transgender woman into the general population of a women's prison carries a statistically greater risk of sexual assault upon non-transgender prisoners than would be the case if a non-transgender woman were introduced. However, the policies require a careful, case by case assessment of the risks and of the ways in which the risks should be managed. Properly applied, that assessment has the result that non-transgender prisoners only have contact with transgender prisoners when it is safe for them to do so. (England and Wales High Court (Administrative Court) Decisions 2021, para 75)

In addition, they noted their willingness to:

accept [that] the psychological impact on non-transgender women prisoners held in prisons with transgender women is likely, in many instances, to be significant: see paragraphs 76 - 77 above. I am prepared to accept the effect on non-transgender men in the corresponding scenario is likely to be less significant. (England and Wales High Court (Administrative Court) Decisions 2021, para 100)

The problem with risk assessments

In England and Wales, the risk assessment tools being used to balance safety and security and potential risks posed by the individual wanting to transfer from the male to the female prison system are, arguably, not fit for purpose. The Sexual Reoffending Predictor (OSP) assessment tool was developed for male sexual offenders. The risks of sexual offending are sex differentiated. Yet this tool

developed for males is not used when assessing the risk of sexual reoffending for males who identify as women. There is no comparable tool for female offenders if only because males make up more than 98 percent of all convicted sexual offenders.

Thus, any system that relies on risk assessment tools that have been developed for offences that are highly patterned by sex, like sex offending, may simply not be fit for purpose for males who identify as women and vice versa. To date there are no transgender specific risk assessment tools, much less transgender specific risk of sexual reoffending tools. Further, there are no tools capable of assessing the risks *to* women prisoners brought about *by* the presence of males who identify as women. So for instance, there are no tools developed or used that can assess the risk to women's mental health of having to be accommodated alongside a trans identifying anatomical male who has been convicted of serious crimes of male violence – such as rape of women or children, murder or child sex offenders. Nor are there any evaluations of consequences of turning female only prison rehabilitative programs that are “trauma informed” and address male violence into mixed sex programs on the women in prison for whom such programs have been designed.

The issue here is simple: presently constituted risk calculations are likely to underestimate the risk of male offenders who identify as women *to* women prisoners and underestimate the impact *of* such offenders' presence on women prisoners. This may help explain why there are anecdotal stories of grave concern. Some female prisoners, officers, and other staff in women's prisons in England and Wales claim that there are one or two highly problematic males who identify as women prisoners in women's prisons who illicitly stop taking their hormone treatment while in prison, masturbate in view of females, show their erect penis to female prisoners, and are “terrorizing” women in the unit in which they are accommodated.¹³ At the risk of repetition, there has been no sustained study about the effects of including transgender women in the female prison system in the UK or Canada and so all we are left with are anonymous and anecdotal stories that are provided through written correspondence with organizations such as Keep Prisons Single Sex.

The question then arises: in a context where credible assessment is not possible, and yet where there is credible and robust evidence about the potential harm to women prisoners, whose needs and rights matter more and why? It is crucial to distinguish between the obligation of prisons to recognize

an individual's gender identity and expression (for instance by respecting an individual's pronoun choice or supporting their sartorial style) and a policy that privileges the desires and choices of males who identify as women *over* the safety, well-being, and security of women in prison.

Conclusion

This report has shown that there is no substantial evidence to support a prison placement policy that permits transgender prisoners to choose in which prison they will serve their time. It has also shown that any case-by-case risk assessment is beset by problems, one of which is the knock-on consequences for women in prison. It is reasonable to assume that not all transgender women have a criminal history that makes them a clear and easily understood risk to women prisoners (i.e., not all transgender women prisoners are incarcerated for sexual violence). It is also reasonable to assume that not all women prisoners in Canada will experience the presence of transgender women in the ways described above. These are assumptions though because, in Canada's case, there are no studies, no data, and no evidence to support (or refute) these assumptions. This seems a glaring omission in the prison policy-making process.

According to the OCI (2020), only 50 prisoners in the federal system identified as transgender, and 66 percent of them chose to stay in a male prison. If Canada follows the same trajectory as the UK where the numbers of “out” transgender prisoners more than doubled in a five-year period, this number is likely to increase significantly in the next few years. Three observations flow from this analysis.

First, it is reasonable to argue that because the head count is so low in comparison to the total federal prison population in Canada (approximately 15,000) the placement of transgender women in female prisons does not matter. However, if the UK experience demonstrates anything, it shows that a single prisoner can introduce unacceptable levels of risk into a vulnerable population. Prisons are not like anywhere else. Those women prisoners who are retraumatized by the presence of male-bodied individuals – especially in

rehabilitation programs that may well be discussing male violence – cannot simply leave and find another group to attend. Those who share intimate spaces cannot leave to make themselves more secure when confronted with a sexual predator, as the victims of Karen White (David Thompson) discovered. These are not inconsequential matters because ensuring the well-being, safety, and security of prisoners is one of the primary tasks of CSC and one of the main responsibilities of all those employed in the prison system. Yet in Canada at the present time, someone like Karen White would be entitled to state their preference for where they would like to serve their sentence, and as long as the safety and security concerns that any assessment might highlight (like a flag to indicate a history of sexual offences which would make Karen White inappropriate for double bunking), Karen would, likely, be accommodated in one of the country’s women’s prisons.



*A single prisoner can
introduce unacceptable levels of
risk into a vulnerable population.*

Second, given that the size of the (known) transgender prisoner population is so small, it seems even more extraordinary that so little data and evidence about it has been collected, analyzed, and collated. This, again, is a major omission to the policy-making process and does an active disservice to the transgender prisoner population. It is not possible, for instance, to know whether and to what extent prison rehabilitation programs based on data collected about sex are capable of addressing the unique and specific needs of transgender prisoners. It is not possible to know how and to what extent a person’s gender identity does (or does not) shape their offending and resettlement. It further begs the question of whether the provision of a specialist unit might not better serve transgender prisoners’ needs.

Third, consistent with patterns in the UK and US, the majority of transgender prisoners are males who identify as women. The public discussion is about the introduction of such people into women’s prisons and the risks and

vulnerabilities of such individuals being in male prisons. To the extent that we have little to no evidence to assess the claims made in public discussions, we have even less about females who identify as men. Yet we know that they do not tend to be placed in male prisons. In England and Wales, there have been no such known transfers. The reasons are perhaps obvious: it would introduce an unacceptable level of risk for the individual, could only be mitigated by administrative solitary confinement, and would place huge organizational burdens on the prison in question.



*Does gender identity
override the effect of biological
sex in patterns of crime?*

The question must then be raised about why the potential of risks of such a situation is thought to be unacceptable and yet the known and potential risks of placing males who identify as women in women's prisons *is* acceptable. It is extraordinary that there exists no data to help informed, evidence-based policy-making in this field because, in the absence of evidence, the basis of policy-making becomes little more than preconceived prejudices and opinions and political ideologies. Sadly, all too often the absence of evidence is used in political and public discussions as evidence of the absence of risk. This is, arguably, a dangerous (for women) conflation and a serious flaw in policy-making.

One final note about evidence. There is little dispute about the relationship between biological sex and crime. Offending is highly patterned by sex, as we have seen above. Perhaps the single most important question that needs to be addressed is not where to place transgender prisoners. The real question is whether sex differences in offending, in criminal histories, and in patterns of victimization are the same (or different) between transgender women and women, and transgender men and men. In other words, does gender identity override the effect of biological sex in patterns of crime? To our knowledge, no such study has yet been undertaken and yet it is the one study that is capable of speaking to the issues, for prison placement policy is only one of the many

issues facing the administration of criminal justice where the new social norms about gender identity are concerned. At the risk of over-simplification there is simply no evidence from anywhere that where criminal justice is concerned, transgender women *are* women and (at least in relation to statistics produced by the Ministry of Justice in England and Wales) some evidence to indicate otherwise.

As has been suggested in this report, the driver for the change in Canadian prison placement policy was neither evidence nor legal necessity. It was politics. Unless and until there is more robust evidence to contrary, the implication of this report is that Canadian law and policy-makers need to consider whether prisons are (or ought to be) seen places where the *bona fide* exemption clause in the *Canadian Human Rights Act* applies. There is little doubt that the rights of women offenders to single sex provision in prisons, to safety and well-being, and to privacy and dignity *are* in tension with transgender rights in prisons. And the risks do not fall proportionally. Nearly 50 percent of the female prison population in Canada are Indigenous women (a shocking and worrying statistic) (OCI 2022). To ask an already marginalized demographic to bear the burden of risk, the possibility of retraumatization, and the loss of dignity and privacy in order to validate the sense of identity and subjectivity of a relatively small number of individuals and to be exposed to the potential risks created by male sexual predators (regardless of how they identify) is, perhaps, the wrong balance of competing rights, especially given that there is so little evidence that such risks are worth bearing. [MLI](#)

Addendum: They said it would never happen

The discussion about balancing the rights of women to dignity and privacy, to single sex spaces especially in prisons, has been a live political debate for many years in the UK. The nature of the debate has often been polarized. Academics and activists have been harassed, cancelled, silenced and accused of being transphobic– including by senior politicians, such as Nicola Sturgeon, First Minister for Scotland – for daring to mention the fact that there are potential loopholes in prison policies that will allow male sexual predators who also happen to self-identify or self-describe as transgender to be located in women’s prisons.

I, myself, was unlawfully cancelled and blacklisted by the Department of Sociology at the University in Essex in December 2019 because staff deemed that the seminar I was due to give on transgender rights and women’s prisons was transphobic. I was later hounded out of a job at The Open University for my insistence that, as academics, we must ask questions about how, where, when and why sex might matter more than gender expression in the organization of public services.

The case that was made was relatively simple. To suggest that a transwoman might be a sexual predator was trading on very old, discriminatory stereotypes that justify deleterious treatment of trans individuals. Further, that no sexual predator would pose as a transwoman just to get into a female prison. In other words, they argued, “it would never happen.” Then, in 2018 when it emerged that Karen White, a transgender woman who after being moved to a female prison went on to sexually assault two prisoners, having previously raped two other women, the blame was quickly laid on inappropriate risk assessments. In other words, Karen White as an exception – not one that proved the rule but rather one that underscored the need for a case-by-case approach with a “robust risk assessment” to ensure that such a tragedy could never happen again.

Late in 2022, the Scottish Parliament debated and eventually passed a bill reforming the *Gender Recognition Act* such to bring in what is now commonly referred to as “self-identification.” In the run up to the vote, academics and activists continued to make the case that there very serious safeguarding issues, even with the case-by-case approach, such arguments were dismissed as bigotry. Again, we heard “it would never happen.”

Yet, not even four weeks after the passing of the bill, in the final days of January 2023, it did happen. Not once, but twice within a week. On January 24, Isla Bryon – a male who has sought no hormone treatment, who does not possess a gender recognition certificate, is a legal male and who was convicted of a double rape – was sent to Cornton Vale, a female prison in Scotland. The reason: the individual identified as a woman. Then, four days later, the story broke that another male offender who was serving a sentence in a male prison, Tiffany Scott, requested to be transferred into a female prison. This individual had stalked a 13-year-old girl before transitioning.

The Minister of Justice for England and Wales seized the political high ground and announced a new policy that would be implemented in weeks: no transgender woman – including those who have changed legal sex – with a history of sexual violence or violent offences against women would be placed in women’s prisons unless there are highly exceptional circumstances. The presumption would be that all such individuals will serve their sentence in men’s prisons.

The Scottish government was almost immediately engulfed in controversy. Suddenly, interventions from the Scottish Prison Service were made and it was confirmed that the double rapist would be located in a male prison and Tiffany Scott would not be moved to a female prison. Then, ministers intervened and did what media pundits declared as a “screeching u-turn” by announcing a review of the Scottish Prison Service’s policy on self-identification considering the two cases. At the risk of repetition, only four weeks previously, the Scottish government passed a bill that would ensure that self-identification was implemented throughout Scotland, including in the prison service.

At the time of writing this addendum (early February 2023), the politics surrounding the balancing of the safety and rights of women in prison and the rights of individuals to express their gender identity is in flux. The UN Special Rapporteur for Violence Against Women and Girls and the UN Special Rapporteur for Torture have both been asking questions about how it was even possible that a double rapist who came out as transgender after committing rape and whilst waiting sentence was, even for a moment, considered an appropriate individual to be in a woman’s prison.

A further note: Scottish and England government officials are placing trust and faith in “robust risk assessment” to support the case-by-case approach they favour. Yet risk assessments rely on large databases from which it is possi-

ble to, correctly, identify risk, need and protective factors. Risk assessments rely on validated tools that can measure the risks, needs and protective factors of any particular individual. But there are no such tools that exist for transgender individuals. The risk assessment tools, at least in the UK, which are used to establish an individual's risk of future sexual offences, have been developed with data about male sexual offending and cannot be reliably used with transgender individuals. There is no large database about transgender offenders that can highlight the risks they pose, their needs and so on, much less a database that indicates what might be efficacious programs of intervention. Risk assessment then, in practice, means little more than asking a professional to use their discretion and their professional judgment.

It must always be remembered that the risk that is being assessed and managed is an artifice of government policies that prioritize gender identity over sex and that have, in effect, created mix sexed prisons blind to the poor state of the evidence base supporting such a move and blind to the total absence of evidence that would support any risk or need assessments of, specifically, transgender and gender non-conforming individuals. In this context, the implementation of a policy that permits such individuals to make a choice seems, as this report hopes to show, misguided at best and the wrong balancing of rights.

The lesson to be drawn from the “case-by-case” risk assessed approach of the UK: it can and does happen. [MLI](#)

About the author



Jo Phoenix is a Professor of Criminology at the University of Reading, where she researches sex, gender, sexualities and justice, youth justice and punishment, the production of criminological knowledge and research ethics. She has studied and written about a wide variety of subjects including managerialism and ethics in the production of criminological knowledge, prostitution, prostitution policy reform, child sexual exploitation, youth penalty and youth justice practice and policy. Her most recent research concerns academic freedom, politics ethics and research and sex, gender, gender identity and criminal justice policy.

Jo started her career as an access teacher at a local college in Bristol where she studied for her undergraduate and masters. Whilst doing her PhD (at Keele University), she supplemented her ESRC grant by tutoring for The Open University. Her first job was at Middlesex University. From there she took up full time academic posts at the University of Bath, Durham University, Leicester University and The Open University. Along the way she has held several senior leadership roles including Head of Department and Dean. Jo has a professional commitment to mentoring and enriching the research environment and to that end she started various research centres and networks, including the Centre for Sex, Gender, and Sexualities (Durham University) and The Open University Gender Critical Research Network. [MLI](#)

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Endnotes

- 1 This was the amendment to the *Canadian Human Rights Act* and *Criminal Code* that made it unlawful to discriminate based on gender identity or expression.
- 2 Throughout this report, distinctions are drawn between men and women (defined in relation to common language and commonly held ideas about sexual differentiation and biology) and transgender individuals. Where clarity is needed – say for instance when talking about someone who is anatomically male but identifies as a woman – the term “anatomically” is used. Alternatively, the words commonly used to denote biological sexual difference will be used – such as female and male.
- 3 Two caveats: the known transgender prisoner population in England and Wales does not represent the total number of transgender prisoners and the known transgender prisoner population was retrospectively inferred from 2013 to 2016 using 2016 numbers.
- 4 It is important to distinguish between the arguments that organizations tasked with responsibilities might make and wider political, academic and popular arguments. Most statutory organizations, like CSC, are likely to argue that giving transwomen access to what was once female-only space is about ensuring that such individuals are treated with the respect and dignity that is deserving of an individual with a legally protected characteristic.
- 5 At the time of writing, Commissioner’s Directive 574 came into effect. This Directive creates a new system for managing sexual coercion and violence in prisons as well as better reporting and record keeping systems (see Correctional Service Canada 2022c).
- 6 Rhona Hotchkiss is a former governor of a female prison. She and the author communicated privately on this topic on 26 July 2022.
- 7 At present there has been only one study that is relevant to this question. Dhejne et al. (2011) conducted a long-term follow-up of transexual per-

sons (that is individuals who had undergone sex reassignment surgery) in Sweden. Their study indicates that, at least for those individuals observed as male at birth, their risk of criminal offending did not decrease, suggesting that their “crime proneness” more closely resembled their sex than their gender identity. This is a very important study because the group studied were males who had sought sex reassignment surgery. Yet even under those conditions their crime proneness more closely resembled their sex at birth.

- 8 Of note, our purpose here is not to lay the foundation for a comparison of the needs of women and males who identify as women. It is solely to establish the rationale and case for maintaining sex-segregated prisons. An analysis of the comparative needs of women *vis-à-vis* transwomen or men *vis-à-vis* transmen in relation to prison, probation, or criminal justice has not yet been done, to our knowledge, in any jurisdiction.
- 9 There is an exception. Maycock (2021) studied the views that women prisoners in the only female prison in Scotland held about accommodating transgender prisoners alongside them. Of relevance to this report, the women distinguished between different categories of transgender prisoners. Some, they claimed, were men manipulating the system, others posed threats, and others still – those who had hormonal and medical treatment – needed to be in the female prison system. The study, whilst illuminating, was extremely small scale (n=15).
- 10 The United Kingdom is made up of different jurisdictions with England and Wales forming one, Scotland forming another and Northern Ireland forming a third jurisdiction. The rules, process and laws surrounding prison placement policy, and indeed even the process of acquiring a gender recognition certificate, are different in the different jurisdictions. The case-by-case approach discussed herein is that which has been adopted by the Ministry of Justice for England and Wales.
- 11 Where individuals possess such a certificate it is presumed that they will serve their time in the facility that matches their legal sex.
- 12 Clare Dimyon, an activist, has been making Freedom of Information requests of the Ministry of Justice since 2016. All requests and Ministry of Justice provided data are accessible at <https://www.sexsegregatedprisons.info/home/factsheets/fois-tg-sexual-offenders>.
- 13 Female prisoners across England and Wales have written to Keep Prison Single Sex and so some of the anecdotal stories come via that organization (KPSS 2022b). Other stories have been told anonymously and directly to the author of this report.

Appendix

The related ideas that humans are sexually dimorphic, that women and men form two different sex classes, that biological sexual differences have objective material social effects and that the complex social behaviours we associate with notions of femininity and masculinity (i.e., ‘gender’) are socially and politically constructed are key ideas in what has become known as a “gender critical feminist perspective.” This perspective also recognizes that the social relations between men (as a class) and women (as a class) are unequal, not based in biology but happen because we live in social structures that provide one group (males) with political, economic, and social advantages over another (females). We call these patriarchal social structures.

Notably, there is nothing controversial about feminist evidence on the social world. Take, for instance, Criado-Perez’s (2019) compelling exposition of the “data gap” on women. She outlines the various ways that failure to think about human biological sexual differences have a profound impact on women’s experiences of the world – from the lack of medical data about how cardiac issues manifest differently in women to the design of safety features (like seat belts) in cars that assume a male physique (with a larger frame and no breasts) and thereby leave women at increased risk of harm relative to men should an accident happen. There are many more examples, but the most significant forms of inequality that women experience include: income inequalities; unequal access to appropriate female health care; inequalities in educational opportunities and attainment; inequalities in the burdens of housework, childcare, and care of the elderly; and, of relevance to this report, unequal access to justice or protections by the law.

A *gender critical* perspective adds the following two assumptions:

- Biological sex is immutable, which means that humans cannot change sex, even if they can change their legal sex marker (the denotation of sex on foundational documents like passports) or their secondary sex characteristics through hormone and surgical treatment. This means that there is the assumption that men cannot become women even when they identify as women: transwomen are not women in any *biological* sense of the word.
- The idea that there exists a unique, authentic “gender identity” in each of us, known only to ourselves and which may (or not) be at

variance with our biological sex should be treated skeptically. Put another way, someone who writes from a gender-critical perspective might argue that people do not have a gender identity and the very notion that one forms part of every person's overall identity is highly problematic.

It is these latter tenets that often see gender critical feminist (GCF) activists and scholars in conflict with transgender rights activists and scholars. GCF activists and scholars are accused of transphobia, of “erasing” transgender people, of committing violence when they fail to recognize the existence of a gender identity. Leaving aside the hyperbolic nature of these accusations, the pertinent question for justice and organizational administration is whether biological sex *ought to be prioritized* over the gender identity, and if so, why and where. [MLI](#)

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