

A REALIST APPROACH TO SUPPORT GENDER MINORITY PEOPLE IN SECURE SERVICES

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**AIM: TO PROVIDE PRACTICE-BASED ASSESSMENT OF
EXTANT EVIDENCE ON MEETING TRAUMA NEEDS OF
GM PEOPLE IN SECURE ENVIRONMENTS**

- Key definitions
- Harm assessments
- Legal framework: GM Jurisprudence; 'gender fraud', GM imprisonment
- Key reports and literature
- Recommendations

KEY TERMS

- Transgender and cisgender: Cisgender describes someone who identifies with the sex they were assigned at birth, transgender is used when someone does not identify with that sex
- SGM: Sexual and Gender minority people
- GM: Gender minority people
- Heteronormativity: the social assumption that everyone's sex, gender and sexuality are causally linked and heterosexuality is the only logical outcome (e.g. Rich 1980, Rubin 1993)

KEY TERMS II

- Cisnormativity: The assumption that everyone identifies with the sex they were assigned at birth and a binary definition of gender (male/female) (e.g. Walls & Costello 2010)
- Transphobia: The assumption that trans people are inferior to cis people, compare to homophobia, islamophobia, etc.



FROM RISK TO HARM ASSESSMENTS I: EVIDENCE-BASED REALISM

- Risk assessments → the risk of harm to self or others
- A shift from risk to crime *to* the harms of crime
- Harm assessments focus on possible harms associated with an activity and their impact on both the individual and wider community
- Two models:
- (1) Hillyard and Tombs (2007): the impact of harm at different levels (e.g., individual, community, societal)
- (2) Greenfield and Paoli (2013): evaluated and standardised the severity of each harm

Source:
<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/theimpactofcrimeonvictimsandsociety/march2022>

FROM RISK TO HARM ASSESSMENTS II

- Harm assessments are evidence-based, requiring evaluation at every step of the process
- Harm assessments consider the following:
 - Individual level
 - Community level
 - Institutional level
 - Societal level



The screenshot shows the Office for National Statistics website. The header includes the logo and navigation links for 'Release calendar', 'Methodology', 'Media', 'About', and 'Blog'. A search bar is present with the text 'Search for a keyword(s) or time series ID'. Below the search bar, there is a purple banner for 'census 2021 Data and analysis from Census 2021'. The main content area shows a breadcrumb trail: 'Home > People, population and community > Crime and justice > The impact of crime on victims and society'. The title of the article is 'The impact of crime on victims and society: March 2022'. The text below the title states: 'This article summarises the crime harm framework that has been used to categorise existing related data in the new crime harm interactive database. It also includes information on how to use the recently updated Crime Severity Score data tool.'

FROM RISK TO HARM ASSESSMENTS III

- Different types of harm:
 - Physical
 - Emotional or psychological
 - Financial or economic
 - Community safety
 - Privacy



The screenshot shows the Office for National Statistics website. At the top, there is a navigation menu with links for Home, Business, industry and trade, Economy, Employment and labour market, People, population and community (which is highlighted), and Taking part in a survey?. To the right of the menu are links for Release calendar, Methodology, Media, About, and Blog. Below the menu is a search bar with the placeholder text 'Search for a keyword(s) or time series ID' and a magnifying glass icon. Below the search bar is a purple banner with the text 'census2021 Data and analysis from Census 2021'. Below the banner is a breadcrumb trail: Home > People, population and community > Crime and justice > The impact of crime on victims and society. The main content area features the title 'The impact of crime on victims and society: March 2022' and a paragraph of text: 'This article summarises the crime harm framework that has been used to categorise existing related data in the new crime harm interactive database. It also includes information on how to use the recently updated Crime Severity Score data tool.'

WHY FOCUS ON GM PEOPLE & LAW?



- 5000 people in UK applied to change their passport before the GRA 2004 was introduced = small population
- Legal cases involving trans people forced law to explicitly define sex/gender
- Sandland (1995): law is forced into “revealing the contingency of its claim to truth”, i.e. law tries to argue sex/gender are fixed & unchangeable but the existence of GM people highlights the fallacy of the argument

GRC

Financial year	Number of applications	Number of decisions made
2020 to 2021	466	456
2019 to 2020	443	403
2018 to 2019	379	363
2017 to 2018	369	405
2016 to 2017	365	350
2015 to 2016	375	373
2014 to 2015	342	284
2013 to 2014	311	371
2012 to 2013	301	277
2011 to 2012	320	311
2010 to 2011	305	318
2009 to 2010	289	276
2008 to 2009	275	274
2007 to 2008	294	449
2006 to 2007	693	590
2005 to 2006	1,059	1,271

Source: <https://www.gov.uk/government/publications/gender-recognition-certificate-applications-and-outcomes/gender-recognition-certificate-applications-and-outcomes>

THE CASE LAW: 1970-2004

- *Corbett v Corbett* [1971] P 83:
 - Sex is fixed at birth and entirely biological
 - Gender is irrelevant for marriage, marriage should remain a heterosexual union
 - April Ashley was described as a “female impersonator” by the judge
- *J v S-T (formerly J) (transsexual ancillary relief)* [1998] Fam 103:
 - Acknowledges a shift from sex to gender in the MCA
 - Marriage should be a heterosexual union
 - J “pretended” to be male and deceived his spouse

THE CASE LAW: 1970-2004

- *Bellinger v Bellinger* [2003] 2 AC 467 :
 - Recognises sex and gender as distinct categories
 - But: recognising gender reassignment would blur the line between male and female
 - Surgery can only provide an “imitation”
- *Goodwin v. U.K.* (2002) 35 E.H.R.R. 18.
 - UK’s failure to provide legal recognition for trans people was a violation of Articles 8 and 12 ECHR



GENDER RECOGNITION ACT 2004

- Introduced as a response to Goodwin v UK
- Following case law it focuses on gender not sex (Cowan 2005)
- Allows change of gender if these conditions are met:
 - 18 or over
 - Diagnosed with gender dysphoria (requires 2 medical reports)
 - Lived in the “new” gender for 2 years
 - Swears to remain in that gender for life
- Gender Reassignment Surgery and hormone treatment are not required but many commentators assume that it is necessary to show at least intention to have surgery (Sharpe 2007)
- Married trans people had to divorce s.4(2) GRA 2004

“GENDER FRAUD” CASES

- *R v McNally (Justine)* [2013] EWCA Crim 1051: “deception as to gender vitiates consent”
- Justine McNally and Gayle Newland were convicted on the basis that they had deceived their partners about their gender identity
 - => sexual activity was not consensual.

TRANS & GM IMPRISONMENT

- UN Rapporteur on torture has identified trans women in prison as being at particular risk of violence and harm
- Location of prison can hugely affect prisoners' chances of accessing gender identity clinics
- Protections for trans people are unevenly implemented
- At least 5 deaths of trans people in prison in recent years

TRANS PEOPLE IN PRISON

- *XT v MOJ* segregation of trans women in prison supposedly for their own protection. She was allocated to a male prison and held in segregation for 14 months up to 23h a day. She received an apology from MOJ and confidential settlement.
- *VXG v Avon and Somerset* case of a trans woman who was strip searched by male officers and female officers after a suicide attempt caused her to be arrested - police admitted unlawful behaviour

TRANS PEOPLE IN PRISON

- *R FDJ v Secretary of State for Justice* challenged the lawfulness of the Defendant's policy relating to the allocation to a women's prison of trans women who have been convicted of sexual or violent offences against women. The claim was dismissed.



**Written questions, answers
and statements**

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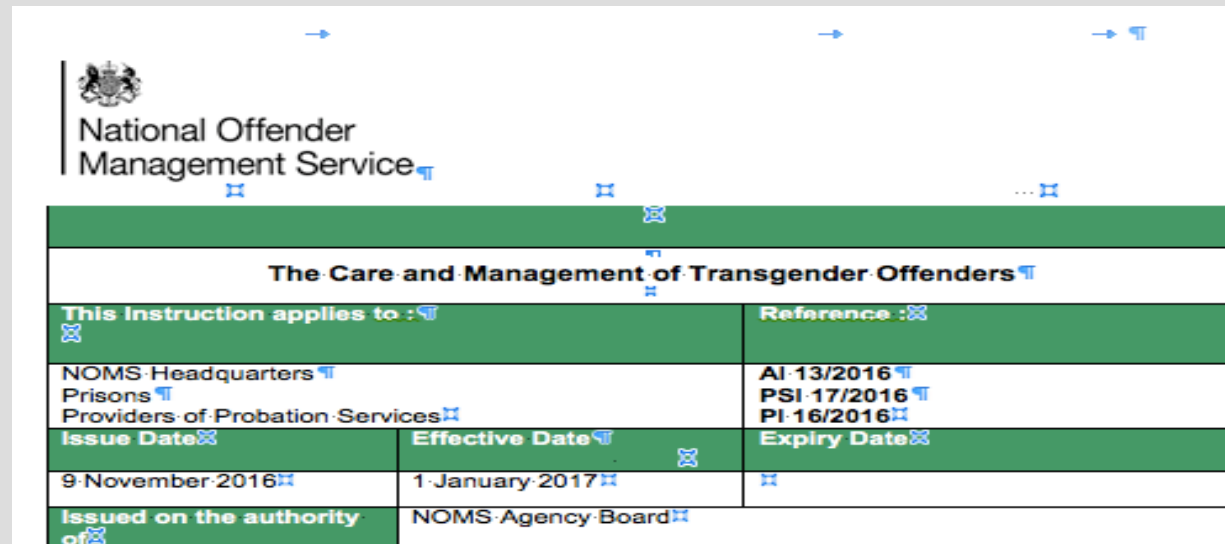
Prisoners: Transgender People

Question for Ministry of Justice

▼ [Show full question](#)

PRISON POLICY I

- PSI 17/2016 came into force on 1st January 2017 and makes at least some provision for trans women to be moved into prisons that match their gender identity
- Trans people are generally not involved in decision making or informed about what and how decisions are being made about them in a prison setting



The screenshot shows a document header for the National Offender Management Service. The main title is 'The Care and Management of Transgender Offenders'. Below this, there is a table with the following content:

This instruction applies to :		Reference :
NOMS Headquarters Prisons Providers of Probation Services		AI 13/2016 PSI 17/2016 PI 16/2016
Issue Date	Effective Date	Expiry Date
9 November 2016	1 January 2017	
Issued on the authority of	NOMS Agency Board	

PRISON POLICY II

- PSI updated in 23-24 (MoJ 2024) presumes trans women with any sexual or violent offence conviction or current charge and/or birth genitalia to not be moved into prisons that match their gender identity
- GRCs
- Biology
- Annex D sets out violent offences category broadly
- Annex D leaves open the possibility of trans women regardless of current genitalia to be moved into prisons designed for men

1.5 This policy framework builds on the previous instruction (PSI 17/2016) in the following key respects:

- Adding the presumption that transgender women (including those with GRCs) with birth genitalia and/or any sexual or violent offence conviction (see Annex D) or current charge should not be held in the general women's estate, with exemptions recommended by a Complex Case Board (CCB) being referred to the HMPPS Director General Operations for consideration and the Secretary of State for Justice

PRACTICAL STEPS

For clinicians:

- Don't make assumptions
- Don't expect linear narratives of gender history
- Offer legal & medical advice
- Move away from 'deception'
- Join evidence-based initiatives: *Developing National Guidance for the use of Structured Professional Judgement with gender diverse populations in prison, forensic and probation settings. A Delphi Study*

For policy-makers:

- Interagency and inter-sector collaborations to expand evidence base
- Recognition of biological reality including medical interventions
 - Consider individual risk factors and simultaneously harm factors
 - Acknowledge biological reality including impact of medical interventions