

Submission to the UN Special Rapporteur for Torture
Current issues and good practices in prison management

in Canadian Women's Prisons

by Women's Rights Matter

Introduction

For the purpose of this report the term “gender non-conforming male” is used for clarity. The reader is welcome to substitute that term with “transwoman”, “trans woman”, “trans-identified male”, or any other term he or she wishes.

Canada, like many other Western countries, currently has an issue with gender identity rights clashing with the rights of women on the basis of sex. Most policies that have been enacted by federal and provincial jurisdictions have allowed for the right to self-identify and gender identity to trump women's rights, which has had negative implications for women (though the government and those advocating for gender identity deny there is any clash whatsoever). In the case of managing prisons, the Government of Canada has implemented policy CD100, which allows for male prisoners to self-identify into women's prisons.

The following human rights are at issue with respect to CD100:

1. Rule 11(a) of the Nelson Mandela Rules United Nations Standard Minimum Rules for the Treatment of Prisoners (“the Nelson Mandela Rules”).
2. Rule 12.2 of the Nelson Mandela Rules.
3. s. 8(a) of the UN Standard Minimum Rules for Prisoners.
4. General Recommendation 35 on gender-based violence against women.

Background

Canadian women's prisons used to be similar to men's prisons. Because of the high number of suicides among female prisoners, a study called the Creating Choices Report was conducted with a number of recommendations, which saw a complete change in how women's prisons looked and felt. Instead of being housed in cells with bars in minimum and medium security cells, women began to reside in units of cottages that resembled houses. The main difference between minimum and medium security units is there is no fence around minimum security units. Male prisons, on the other hand, have a higher level of security because they are deemed a higher risk. This was a direct result of the Commission coming to the conclusion that women have substantially different needs than men in order to be rehabilitated into society and require more care towards their mental health.

Bill C-16 (passed into law in June 2017) added gender identity and expression to the *Canadian Human Rights Act*, a variation that has become a part of all provincial and territorial human rights acts. The Government is required to complete a Gender Based Analysis (“GBA”) to determine how different groups, including women, would be affected by legal and policy changes. The Government redacted approximately 93% of this report, which is currently being contested. It is unknown what negative impacts the Government foresaw.

In response to the Bill, many departments made changes to policies that directly impacted women and girls. One such policy was made by the Correctional Service of Canada (“CSC”) in the official form of CD100 (many provinces and territories have similar policies in place, including Ontario, the Yukon, and British Columbia), following Interim Policy Bulletin 685. From the 1980s until 2017 Canada allowed for the federal transfer of gender non-conforming male prisoners into the women's estate provided the prisoner went through a psychological evaluation, had full sex reassignment surgery prior to being convicted, and had identified himself as trans before conviction. The policy change allowed the placement of offenders in federal correctional institutes based on their gender preference instead of

sex – no matter the genitalia they have. That means a male prisoner can ask to be transferred to the women's prison even if he has not had sexual reassignment surgery, hormone treatment, or psychological assessment. The only time that that accommodation would not take place is if there were "overriding health or safety concerns which cannot be resolved", with no explanation as to what that means. The documents with respect to the policy only look at the potential impact of the transferred prisoner. It does not take into account the impact on female prisoners or prison guards.

The CSC has made it difficult to find out about gender non-conforming prisoners in the system. The only information available is information that individuals have farmed from newspaper articles and some court cases. The only information that has come out from the Government was a study published in 2022 entitled "Examination of Gender Diverse Prisoners", which contains alarming information and figures. As such a lot of the information is anecdotal. That being said, the anecdotal evidence is growing and does show that concerns with respect to the transfer of gender non-conforming males into women's prisons are founded.

Female prison population vs. Male prison population

Fifty years of research has found that

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" (Pheonix, p. 33).

It is important to also note that males and females are different when it comes to the type of crimes committed. While

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. (Pheonix, p. 34)

Currently, 5% of the entire population of federal prisoners are women (approximately 6% in provincial prisons). There is an over-representation of Indigenous women imprisoned, at over 40% of female prisoners when they only represent under 4% of the total Canadian population.

"Examination of Gender Diverse Prisoners" CSC Report

CSC's "Examination of Gender Diverse Prisoners" Report ("CSC Report") goes over the study on how 'gender diverse' offenders are accommodated and provides a profile of the federal group of people that includes transgender, non-binary, gender fluid, intersex, two-spirited, and any other identities. Note that no offenders in the study were admitted before their gender diversity disclosure. The study does not explore how this affects the overall population in women's and men's prisons.

The breakdown of data for gender non-conforming males is as follows and can be found in the CSC Report's tables:

1. The average age was 42 (almost ten years higher than that of transmen).

2. 62% of the gender-diverse prison population (the rest were categorized as transmen and other).
3. 48% of all gender-diverse offenders were housed in women's prisons, with 33% of transwomen in women's prisons (versus 95% of transmen in women's prisons).
4. 51% were serving an indeterminate sentence.
5. 37.8% had previously served time for different offences
6. 91.7% were convicted of a violent offence, including:
7. 44.3% had a history of sexual offending (individuals previously and currently convicted of sexual offences).
 - A) 82% of gender-diverse prisoners with a history of sexual offences were transwomen.
 - B) 93.9% of sex offences were committed while the prisoner still identified as their biological sex.
 - C) 41.6% were serving time for a homicide-related offence.
 - D) 30% were serving a sex-related sentence.
 - E) 33% had multiple sex offences.
 - F) 54.5% of sexual offences were committed against females (24.2% were committed against both sexes, and 30.3% of the victims' sex was unidentified).
 - G) 90.6% had a high static factoring intake.
 - H) 65.6% had low reintegration potential.
8. 74.6% were assessed as having high static risk at intake.
9. 62.7% had low reintegration potential.
10. 39.3% were in maximum security and 52.5% in medium security facilities at admission.
11. 23% had requested transfers based on gender identity (note: no transmen had requested transfers).
12. 64.3% had been approved
13. 14.3% had their applications being reviewed
14. 21.4% had been denied
12. 59% of transwomen had institutional incidents with the two highest offences committed:
 - A) 27.9% committed assault.
 - B) 42.6% for behavioural problems.

Possible conclusions of the study:

1. Gender-diverse offenders commit more serious offences resulting in longer sentences.
2. A high amount of sexual offenders disclose gender identity after being convicted.
3. The majority of transwomen have low reintegration potential.
4. 66% of gender-diverse offenders had committed an institutional incident during the period of the study.
5. Gender non-conforming prisoners had the highest rate of transfers, particularly from men's to women's prisons.

Push for transferring gender non-conforming males into women's prisons

The following reasons are typically given for advocating for gender non-conforming males to be able to transfer into women's prisons (Pheonix, p. 27):

1. There is a high risk of committing suicide should the prisoner not be accommodated.
2. There is a higher risk of being sexually assaulted if left in male prisons.

The two arguments above are flawed on the following basis (Pheonix, p. 27):

1. The number of suicides committed by gender non-conforming male prisoners is approximately 2%, while that percentage is 1% for the male and female prison populations, respectively. There is no evidence that this population is at a higher risk of suicidality.
2. While the majority of sexual assaults in prisons take place in male prisons, a large portion reported in 2014-2019 were committed by transgender offenders. 12% of victims and 18% of instigators were identified as transgender.
3. The Office of the Correctional Investigator ("OCI") notes that prevention efforts are what mitigate the issue of sexual assaults in prisons. In other words, the prevalence and extent of prison sexual assault and violence is based on how a prison is run.

The reasons men may seek a transfer into women's prisons may be categorized as follows, according to April Kitzul, a retired probation officer, in her February 2023 essay response to the CSC 2022 Report:

1. The perception is that it would be "easier time" in women's prisons because there is less security, more freedom of movement, and nicer living quarters compared to men's prisons.
2. The reward of immediate access to sexual partners. It is a strong motivation for male inmates to "identify as women" when this is combined with the desire to con the system.
3. "Sex offenders may see transfer to women's prisons as giving them access to their victim pool, whether adult women or children. Some sexual offenders are predatory in nature and may deliberately seek a transfer for the precise purpose of victim access. Other sexual offenders are impulsive and/or opportunistic, and although they may not be consciously aware of their desire to access victims, they are making "seemingly unrelated decisions" that indeed put them in the path of victims" (Kitzul, p. 3).
4. "Sex offenders may seek to transfer from men's to women's prisons in order to escape the harassment and "muscling" that sex offenders inevitably receive from other men. For instance, the women's prison offers them a form of refuge, as sex offenders are the most despised inmates. is a powerful motivator for an inmate with sex offences to suddenly "identify as a woman." It should be noted that since the closing of segregation (due to a lawsuit), the inmate practice of "checking in" to segregation (for safety/refuge) has been cut off" (Kitzul, p. 3-4).

Known Transfers

There are a number of concerning transfers that we will outline below. There are reports of offenders with long and violent records being transferred into women's prisons. What is worse is some of these individuals, such as Samantha (formerly Steven) Mehlenbacher had committed a variety of offences against female cellmates. Mehlenbacher pled guilty to sexual harassment, while sexual assault was dropped in exchange for a four-month sentence in a halfway house. Mehlenbacher has been allowed to remain in women's prisons despite the offences. In 2020 the Parole Board noted that Mehlenbacher had "created a trail of victims, many of whom were terrorized" (Pheonix, p. 16). Mehlenbacher is just one example of the safety issues of allowing transfers. The most well-known tragedy is that of Karen White, formerly known as David Thompson, in the UK. White had a history of sexual offences, yet was remanded in a women's prison. Whilst in prison White committed four counts of sexual assault against female prisoners. White has since been transferred back to men's and is reportedly hoping to get

a Gender Recognition Certificate which would lead to White being transferred back to a women's prison.

How This Impacts Women

It must be noted that none of the publications by the Department of Justice, Correctional Service of Canada, or annual publishing by the OCI, takes into account how housing male prisoners with female prisoners impacts female prisoners. There is no consideration for the safety, security, and mental health of women. There is no evidence that a proper Gender Based Analysis has been conducted, or that female prisoners had been consulted prior to the implementation of CD100. It ignores the differences between male and female offending, and the difference of in needs and vulnerabilities that males and females have, as well as the difference in security risks. Another issue is the size difference between the average male and female and the physical strength. For instance, that strength matters when it comes to the damage from a male assaulting a female. Other considerations include: religious accommodations that women must be segregated by sex, women who have past trauma from males, and the dignity and privacy of women sharing sleeping quarters with male gender non-conforming prisoners.

One of the major concerns is that the growing number of gender non-conforming males being transferred into women's prisons will change the environment female prisoners have. Out of necessity, women's prisons would need to increase the static and dynamic features in women's prisons to manage the increased risk gender non-conforming male prisoners present. Doing so would undermine the Creating Choices Report as women's prisons would start to resemble men's prisons again. This issue also contravenes s. 8(a) of the UN Standard Minimum Rules for Prisoners.

Conclusion

There is no evidence that there is any benefit to CD100 for gender non-conforming male prisoners being allowed to self-identify in women's prisons. It must be acknowledged that doing so conflicts with women's rights on the basis of sex, and the consequences are detrimental to female prisoners. CD100 is not the answer to protecting gender non-conforming male prisoners and needs to be halted immediately. The government, along with CSC, must look at other options for prison management and risk mitigation to protect vulnerable prisoners.

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