KEEP PRISONS SINGLE SEX XX

May 8, 2022

RE: Senate Bill 6677--A: "An Act to amend the correction law, in relation to enacting the 'gender identity respect, dignity and safety act'"

Dear Members of the New York State Senate Committee on Crime Victims, Crime and Correction,

As an organization dedicated to ensuring single sex incarceration facilities, we appreciate the opportunity to share specific concerns about New York Senate Bill 6677--A.

The Bill places housing decisions in the hands of incarcerated individuals and would permit virtually any incarcerated male to opt into women's prison and jail

> The Bill bases prison and jail housing on self-declared unverifiable "gender identity" rather than the immutable objective category of "sex"

Senate Bill 6677--A provides that incarcerated individuals "shall be presumptively placed in a correctional facility with persons of the gender that most closely aligns with such person's self-attested gender identity unless the person opts out of such placement."

Among those eligible are individuals:

- with "a gender identity that differs from their assigned sex at birth" or
- who have "a diagnosis of gender dysphoria" or
- who "self-identif[y] as transgender or gender nonconforming, nonbinary or intersex."

(Senate Bill 6677--A, Section 3.)

These self-declared or self-reported identities cannot be externally validated and the law expressly forbids any attempts to do so. ("The department is prohibited from requiring documentation to confirm a person's gender identity...")

Those with a "gender identity" different than their sex or who have been diagnosed with "gender dysphoria" remain in their sex category as male or female. This Bill requires such individuals to be housed based solely on their self-assertions of internal identity rather than the objective, verifiable category of their sex.

The Bill forbids housing on the basis of biology and requires no external steps confirming "gender identity"

The realities of biological sex are required to be ignored under this law. The Bill forbids taking into account whether the incarcerated person has a penis, is taking hormone pills, or has undergone any medicalization or treatment related to "gender identity." Housing placement cannot be denied for "any discriminatory reason" including legally protected mental disorders which may include sexual paraphilias.

The Bill explicitly prohibits denying placement in cross-sex prison or jail housing on the basis of:

- "the past or current sex characteristics, including chromosomes, genitals, gonads or other internal or external reproductive anatomy, secondary sex characteristics or hormone function of the person whose housing placement is at issue"
- "the sexual orientation of the person whose housing placement is at issue"

Further, placement "shall not be conditioned upon the incarcerated individual's history of, consent to, intention to seek, or refusal to undergo any treatment or intervention regarding their sex characteristics or gender identity." Examples of this include "surgical interventions to change their sex characteristics such as genital surgeries and sterilizations."

Overcoming the presumption of housing placement based on "gender identity"

The only basis on which the presumption is overcome is if the chief prison or jail official identifies in writing that **"there is clear and convincing evidence that such person presents a current danger of committing gender-based violence against others."** Due to this high level of proof, the requirement of immediate danger and vagueness of the threat at issue, this is an almost insurmountable standard.

"clear and convincing evidence"

"Clear and convincing" is a higher standard than "preponderance of the evidence," which generally means "more likely than not." "Clear and convincing," in contrast, is a "high degree of probability." (This can be found in New York Pattern Jury Instruction 1:64 General Instruction – Burden of Proof – Clear and Convincing Evidence.") To deny housing an incarcerated male in a women's correctional facility, the chief incarceration facility official would need to present evidence meeting this extremely high burden.

"current danger"

The word "current" makes plain that there is no category of crime which automatically excludes a male from being presumed to be transferable to the women's prison or jail. The law does not automatically exclude males who have been incarcerated for sex crimes against women, or who are registered sex offenders, or have prior criminal acts of abusing women. Somehow the chief incarceration facility official must be able to articulate and provide evidence that the danger is

"current," and it appears not to be sufficient to rely on a pattern or history of crimes targeting women or crimes of violence. Such an assertion of "current danger" becomes all the more challenging with the next problem with the law.

"gender-based violence"

The Bill does not explain what this term means; it does not define "gender." (Even the recent amendment to New York State's human rights law does not define "gender." The closest the term comes to being defined is "The term 'gender identity or expression' means a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender." This definition could not possibly be more circular ("gender identity…means a person's…gender-related identity"). Further, it relies on sex stereotypes ("appearance, behavior, expression").)

The Bill (and other New York State law) do not appear to use "sex" and "gender" interchangeably. (Meaning, using "gender" as a more *polite* version of "sex" so as to avoid a synonym for "sexual intercourse.") Rather, "gender" appears to be a distinct concept.

Not knowing what "gender" is referring to, whether something is "gender-based" is also unclear. Does it mean violence which is explicitly not sex-based, but gender-based? Does it require that a victim have a "gender identity" different than their sex? If someone assaults women qua women is this "gender" or "sex" based? Does it depend on whether those women "identify" as women?

None of these questions are resolved by the Bill. In the absence of clarity, but recognizing that "sex" and "gender" appear to be distinct concepts, the best reading of the Bill suggests that it is not referring to sex-based violence against women, but, rather some form of violence against individuals based on how they, or others, define their "gender," which may or may not be the same as their sex. Confused? So are we. So will be the public officials tasked with making these determinations. So will be the courts adjudicating challenges to these determinations.

The Bill incentivizes incarcerated males to request cross-sex housing

In addition to the prospect of being placed in women's prison or jail facilities for the low social cost of declaring oneself "gender non-conforming" or "nonbinary," if a request is denied, Bill 6677--A provides that individuals denied their requests may initiate court or administrative proceedings for "injunctive relief and damages, including reasonable attorney fees" under New York State law.

Such terms invite cross-sex housing demands with the prospect of (a) being awarded placement in a women's incarceration facility; (b) a monetary reward; (c) attorney fees paid by the state. With potential litigation looming and the high burden and unclear requirements (as described in the prior section), any chief incarceration facility officer would find it challenging to meet the standard to block the presumption of housing according to an incarcerated individual's self-declared "gender identity."

The Bill puts incarcerated women's safety, privacy and constitutional rights at risk

In addition to prohibiting consideration of anatomy (such as having a penis), medicalization (such as not being on female hormones), sexual orientation (being sexually attracted to women), having mental disorders (such as sexual paraphilias), the Bill also explicitly prohibits denying placement in cross-sex prison housing on the basis of:

- "the complaints of other incarcerated individual's [sic] who do not wish to be housed with a non-cisgender … person due to that person's gender identity or sex characteristics" or
- "a factor present among other people in the presumptive housing unit or facility"

Under the first bullet above, concerns of incarcerated women who do not wish to be housed with a male inmate because he has a male body are to be ignored when housing the male inmate in accordance with his self-declared gender identity. Passing of this Bill renders New York State vulnerable to litigation on a federal First Amendment basis (in addition to Eighth and Fourteenth Amendment grounds). There are incarcerated women in New York with sincerely held religious beliefs concerning sharing intimate spaces with unrelated males. These women have a First Amendment right not to be placed into an environment in which their unclothed bodies or uncovered hair will be exposed to males to whom they are not related. Placement of males in those spaces is a refusal to accommodate those women's constitutionally guaranteed right to free exercise of religion. Such litigation is underway in California in response to its law which similarly provides that males may opt into women's prisons based on "gender identity."[1]

Even non-religious women have a legal right not to be exposed to male genitalia or to have their bodies exposed to males, such as when using showers, toilets or changing clothing.

It is unclear what was intended by the second bullet above, but it invites this data point: A 2016 report cited that 86% of women in jail had experienced pre-incarceration sexual violence.[2] This Bill not only fails to consider the potential impact on an already traumatized and vulnerable group of women, but – shockingly – forbids consideration of this "factor" when presumptively placing males in with this sexually traumatized population.

As noted above, the Bill provides that the inmate's housing preference cannot be denied based on anatomy. It also provides that sexual orientation cannot be a basis for denial. This means a man with fully intact male genitalia and a sexual attraction to women cannot be denied housing in a women's prison on those bases. No crimes, not even crimes of sexual violence, automatically render a man ineligible for being housed in a women's prison. That there are "trans" identifying males who would fall into any one, or several, of these categories would not be unusual: 85% of males identifying as "trans" retain male genitalia (i.e., have not had genital surgery),[3] a

[1] Chandler v CDCR Complaint (squarespace.com)
[2] overlooked-women-and-jails-fact-sheet.pdf (vera.org)
[3] www.ncbi.nlm.nih.gov/pmc/articles/pmc6626314/

substantial majority have a sexual attraction to women,[4] and rates of sexual offending are significantly higher than the general prison population.[5]

In other states with law or policy similar to this Bill, men who have committed violent crimes targeting women -- such killing of multiple female prostitutes[6] and torture and sodomy of a woman in front of her mother[7] -- are housed in women's prisons.

By processing this Bill for passage, you would be endorsing that such men – no matter how petrifying to the women who would have to share toilets, showers or sleeping quarters with them – should be housed in women's prisons and jails in New York.

Incarcerated women have a right to await trial, to serve their sentences and conduct their rehabilitation without being forced to cohabitate with men, however they identify.

What has happened where incarcerated males have been permitted to opt into women's prisons?

Assembly Bill 7001, the corresponding Bill, includes the following in its "Justification: "Similar measures have passed in California and have been implemented as a result of litigation around the country…" Bill Search and Legislative Information | New York State Assembly (nyassembly.gov)

This is true. However, the experience of municipalities and other states serves, not to endorse such laws, but to provide evidence for why such laws and policies are devasting to incarcerated women.

Just last month (April 2022), a male inmate who had been housed in the women's facility on Riker's Island was sentenced after pleading guilty to raping a female inmate in jail.[8]

Also last month, two female inmates in New Jersey were reported to be pregnant after 27 male inmates who identify as transgender were transferred to the women's prison.[9]

In 2021 after California began moving dozens of male inmates to women's prison consistent with its new law, there were reports of pregnancy and condoms being made available.[10] (See also the case cited in footnote 1 above.)

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[4] transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf

[5] In the federal Bureau of Prisons, 48.47% of males who identify as "trans" have committed "sex offenses" (usa.kpssinfo.org/transgender-inmate-report-from-bop-12-04-2021-2/) compared to approximately 11.6% (as of 12 Feb. 2022) of the general inmate population (www.bop.gov/about/statistics/statistics_inmate_offenses.jsp). In California, one third of the incarcerated males seeking to transfer to women's prison are registered sex offenders. (DATA FROM CALIFORNIA SHOWS THAT 1/3 OF THE MEN SEEKING TO TRANSFER TO WOMEN'S PRISON ARE REGISTERED SEX OFFENDERS | Keep Prisons Single Sex USA (kpssinfo.org))

[6] Transgender woman convicted for slayings of 3 women who worked as prostitutes - CBS News

[7] People v. Masbruch - 13 Cal.4th 1001 S047206 - Mon, 08/26/1996 | California Supreme Court Resources (stanford.edu)

[8] BXDA Letter Head (nyc.gov)

[9] Edna Mahan women's prisoners pregnant after sex with transgender inmate (nypost.com)

[10] Prison inmate pregnant after state lets biological men into women's prison (lawenforcementtoday.com)

Washington state's policy of transferring male inmates to women's prison has also resulted in reports of a convicted sex offender grooming and raping a developmentally disabled female inmate.[11]

In 2020, a male inmate transferred to the women's prison in Illinois based on transgender status was accused of sexual assault.[12]

These examples are shared not to claim that all males asserting "gender identity" as something other than male or who are diagnosed with gender dysphoria are sexual predators. (Although, as cited in footnote 5, such males do sexually offend at higher rates than other males.) Rather, that laws which place the power to elect to be housed in a women's prison in the hands of incarcerated males will inevitably be used by predatory men to gain access to women. The New York State legislature has a duty not to pass a law which invites such abuses.

Housing placement decisions should be based on the objective, stable category of "sex" not the mutable, unverifiable, self-selecting category of "gender identity"

Aside from being changeable and unprovable, the categories on which the Bill would permit males to opt into women's incarceration facilities ("gender nonconforming," "nonbinary," etc.) are also entirely accessible by mere self-declaration. As described above, that there are no objective requirements for those who wish to declare themselves out of the category of "male" and no requirements for pre-incarceration identification or for treatment or medicalization means the Bill is ripe for abuse by those who discover a new "gender identity" while incarcerated.

However, even for those males who could demonstrate pre-incarceration and continuing medicalization or diagnoses, there would still remain an objection to housing those males in women's facilities. A sincere belief in "gender identity" does not transform one's sex; those individuals are and will always be male. This is true even for those males who took pre-incarceration steps to present themselves in a stereotypically "feminine" manner or who have had genital surgery or who take cross-sex hormones. Those men remain male and should be housed and made safe in the men's facilities.

For purposes of creating a meaningful category in the law, there is no distinction between the group who is sincere in their belief and those who are not. (And the Bill prohibits even attempting to make these distinctions. There is no mechanism to deny cross-sex housing placement based on lack of sincerity of self-identification.) For the women who would have these men housed with them, there is no difference in the adverse effects. The presence of any incarcerated males in a women's prison or jail is harmful to women.

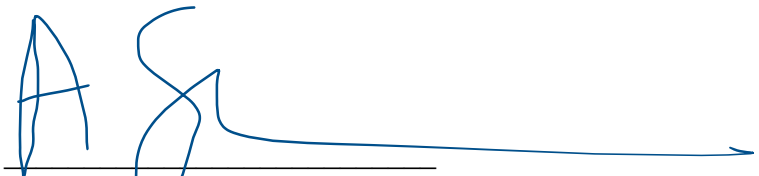
Conclusion

Despite claims to the contrary, it is not a human rights violation for male inmates (however they self-identify) to be denied access to showering with and sharing toilets and sleeping quarters with

[11] Male Rapist of 12-Year-Old Girl Groomed Vulnerable Woman While in Women's Prison - Women Are Human
[12] Transgender inmate accused of rape | News | Illinois Times

an already traumatized population of incarcerated women. The state owes a duty of care to all persons in its custody. It is the responsibility of the State to protect all vulnerable incarcerated men who are housed in men's facilities. It is not the responsibility of incarcerated women to be shields for men against violence from other men. Consistent with New York's obligation to protect the rights of incarcerated women in its custody, we ask that you reject SB 6677--A.

Thank you for the opportunity to present this submission to you.
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