KEEP PRISONS SINGLE SEX XX

January 10, 2025

RE: Senate Bill 1049: "An Act to amend the correction law, in relation to enacting the 'gender identity respect, dignity and safety act'"

Dear Bill Sponsors and 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 highlight concerns about New York Senate Bill 1049 introduced on January 8, 2025.

The Bill places housing decisions in the hands of incarcerated individuals, permitting virtually any incarcerated male to be presumptively housed with women or girls

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

Senate Bill 1049 provides that incarcerated individuals "shall be **presumptively** placed in a correctional facility or other institution 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." (Emphasis added.)

Among those eligible to take advantage of this presumptive placement in cross-sex housing 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, gender nonconforming, nonbinary, or intersex."

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

Those with an opposite sex "gender identity" (a male who identifies as female or vice versa) and those diagnosed with "gender dysphoria" remain in their sex category as male or female as nobody can change their sex. This Bill would not only require that those individuals be presumptively housed with the opposite sex unless the inmate opts out, but it also entitles those who self-identify as "gender nonconforming" or "nonbinary" to be housed based solely on their self-assertions of internal identity rather than the objective, verifiable category of their sex. As

these terms are not defined and no claim to such an identity can be challenged under the Bill, anyone – absolutely anyone – can assert coverage under these labels.

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

The realities of biological sex (including "past or current … chromosomes, genitals, gonads … or hormone function") are required to be ignored under this law. The Bill forbids considering whether the incarcerated person has a penis, is taking hormone pills, or has undergone any medicalization or treatment related to "gender identity."

There is no requirement for an inmate to articulate or demonstrate that their "gender identity" existed prior to incarceration. Inmates may "request placement in a housing unit with persons of the gender that most closely aligns with their self-attested gender identity **at any time**." (Emphasis added.) Post conviction, post incarceration any male may claim a "gender identity" requiring a correctional facility to place the male inmate in a woman's unit.

Contrary to what much of the public imagines the law would permit: This Bill provides that, unless they opt out, fully genitally-intact, sexually-functioning incarcerated males are presumed eligible to be housed in women's prison if they assert – at any time – a gender identity other than "male."

The Bill extends beyond correctional housing

This Bill applies not just to correctional facilities but also to "other institution[s]" into which incarcerated individuals are being placed. This could include placement in forensic mental health facilities, which may be secure facilities, non-secure psychiatric centers and community-based care. This means, based on "gender identity," unless they opt out, incarcerated mentally ill males will be presumptively housed with incarcerated mentally ill women or girls.

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

The only basis on which the presumption is overcome is if "there is clear and convincing evidence that such person presents a current danger of committing gender-based violence against others." (Emphasis added.) 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.

This is particularly true given that "the department shall have two days to make a determination" that there is such clear and convincing evidence. A written decision is required to be provided to the affected person within two days of the decision being made. It is further required that the written decision include a "description of all evidence supporting the department's decision and an explanation of why the evidence supports" such a determination **and** that "all supporting documentation [be attached] to the written decision." This means that within two days: an entire risk assessment must be conducted (one would hope, at an absolute minimum, this would include reviewing criminal history, reviewing psychological records, reviewing prior incarceration records, conducting interviews, etc.) and making a determination based on that risk assessment.

Within two days from that: compiling a report to support the determination, redacting supporting documentation as necessary, preparing a description of all the evidence, writing an explanation of why the evidence supports the determination and providing this packet to the incarcerated person. This is unreasonable on its face. Even if a department could meet the vague and near impossible standard below, it almost certainly cannot meet these procedural requirements within the required time constraints.

"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."

Also, the Bill provides that "unsubstantiated allegations are not clear and convincing evidence justifying a denial of presumptive placement or a transfer out of presumptive placement." This means that should such an inmate be involved in one, or even multiple, encounters which are "X said"/"Y said" without other witnesses or other corroboration and, thus, which are unable to be definitively substantiated, these cannot be relied upon as evidence to deny or transfer someone out of their cross-sex housing placement. Additionally, with the two-day decision requirement, allegations under investigation would remain "unsubstantiated" at the time and, thus, not able to be taken into consideration.

"current danger"

The word "current" makes plain that there is no category of crime which automatically renders a male ineligible from being housed in a women's incarceration facility. The law does not articulate an exclusion for males who have been incarcerated for sex crimes against women or girls, or who are registered sex offenders, or who have committed prior criminal acts of abusing women. Under the Bill it is not sufficient to rely on a pattern or history of crimes targeting women or crimes of violence. (If it were, these would be identified in the Bill rather than left entirely to the incarceration facility to determine and support.) Such an assertion of "current danger" becomes all the more challenging to prove with the next problem with the law: what sort of violence are we talking about?

"gender-based"

The "current danger" required to be demonstrated is of "gender-based violence." The Bill does not explain what "gender-based" means; it does not define "gender."

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 is specifically 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 violence? 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, apparently, 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.

"violence"

Under this Bill it is only the "current danger" of "gender-based **violence**" which is grounds for denial or transfer out of presumptive cross-sex housing placement. But physical "violence" is not the only reason for sex-segregated spaces and Eighth Amendment violations do not require physical pain or harm. Punishment which *degrades human dignity* can be violative of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238 (1972). Having men's bodies exposed to women and forcing women to shower, urinate, defecate, and sleep near males – however they identify – is a degradation of their dignity. This is particularly true given the extremely high percentage of incarcerated women who have experienced pre-incarceration sexual violence. (See footnote 2.) Experiencing sexual harassment, or even the fear of sexual harassment, for merely engaging in routine hygiene matters is a degradation of human dignity.

The Bill ignores the impact of sexual harassment by male transferees into women's incarceration facilities. Because it is arguably not "violence," this Bill would require that a male inmate who engages in ongoing sexual harassment towards women (sexual advances, verbal comments or gestures of a sexual nature, suggestive or derogatory comments about body or clothing or obscene language or gestures, etc., all of which is reportable conduct under the Prison Rape Elimination Act regulations, 28 CFR §115.6) be permitted transfer to or to remain in a women's facility if the male inmate claims a non-male "gender identity."

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 1049 provides that individuals denied their requests may initiate proceedings for "injunctive relief and damages, including reasonable attorney fees" under New York State law.

These terms invite declarations of "gender identity" differing from one's sex 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) and unreasonable time frames, any chief incarceration facility officer would find it challenging to meet the standard to block the "gender identity"-based presumption of cross-sex housing.

The Bill prevents data collection to track the impact of housing males in women's incarceration facilities

The Bill provides that anyone "who self-identifies as transgender, gender nonconforming, nonbinary or intersex shall … have the right to maintain the confidentiality of records or portions of records related to their incarceration that would reveal their sex characteristics or their transgender, gender nonconforming, nonbinary, or intersex status, or that would otherwise reveal that their gender identity differs from their assigned sex at birth, ..."

Incarcerated individuals absolutely have a right to privacy of diagnoses and medical conditions (such as gender dysphoria and disorders of sexual development). However, this Bill would function to prohibit the disclosure of the sex of males transferred to women's prison. Those attempting to track or study the impact of cross-sex housing would be unable to obtain data to do so. Those attempting to report on criminal incidents within an incarceration facility may be unable to do so accurately with the sex of those involved not being disclosable.

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 cross-sex hormones), sexual orientation (being sexually attracted to women), having legally protected mental disorders (which may include sexual paraphilias), the Bill also explicitly prohibits denying cross-sex prison housing placement based on: "the complaints of other incarcerated individuals who do not wish to be housed with a non-cisgender person due to that person's gender identity, or sex characteristics".

In other words, the concerns of incarcerated women who do not wish to be housed with men ("due to [their] sex characteristics") are required to be ignored.

Failing to consider concerns of incarcerated women renders New York State vulnerable to constitutional violation claims. For example, there are incarcerated women in New York with sincerely held religious beliefs which prohibit sharing intimate spaces with unrelated men. These women have a First Amendment right not to be forced into an environment in which their unclothed bodies or uncovered hair will be exposed to unrelated males, however those males identify. California's law which provides for prison housing based on "gender identity" is being challenged on this basis, among others.[1]

Non-religious women also have a constitutional right under the Eighth Amendment not to be exposed to male genitalia or to have their bodies exposed to males, such as when using showers, toilets or changing clothing. Such objections by female inmates are all the more understandable in light of data that 86% of women in jail have experienced pre-incarceration sexual violence.[2] This Bill not only fails to consider the potential impact on housing males with an already

[1] https://static1.squarespace.com/static/5f232ea74d8342386a7ebc52/t/669bdcca2c96eb4538e77fe0/1721490645800/20240719_Doc_84_Amended_Complaint.pdf; See also: West v. Radtke, No. 20-1570 (7th Cir. 2022) :: Justia (upheld religious-based claim of male inmate who objected to being searched by female correctional officer who identifies as a man)

[2] overlooked-women-and-jails-fact-sheet.pdf (vera.org)

traumatized and vulnerable group of women, but – shockingly – forbids consideration of objections made on this basis when housing males with this sexually traumatized population.

As noted above, the Bill provides that presumptive cross-sex housing placement cannot be denied based on anatomy, sexual orientation, or sexual functioning. 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 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 jurisdictions with law or policy similar to this Bill (including New York City), men who have committed violent crimes directed at women -- such as targeting female prostitutes for murder[6] and torture and sodomy of a woman in front of her mother[7] and serially killing girlfriends[8] -- are housed in women's correctional facilities. Any law with this predictable outcome of housing such men with women should be unhesitatingly voted down.

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?

Other states and municipalities have passed similar laws or have similar policies. However, the experience of those jurisdictions serves, not to endorse such laws, but to provide evidence for why such laws and policies are devasting to incarcerated women. Some recent examples:

[3] www.ncbi.nlm.nih.gov/pmc/articles/pmc6626314/
[4] transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf
[5] In the federal Bureau of Prisons, 47.94% of males who identify as "trans" have committed "sex offenses" (Transgender Inmate Report 2024 Excerpts PDF | Keep Prisons Single Sex USA) compared to approximately 12.9% of the general inmate population. ((2) Keep Prisons Single Sex USA on X: "Incarceration for sex offenses: Trans-identifying males: 47.94% General BOP prison pop: 12.9% Trans-identifying females: 7.19% Trans-identifying males are almost FOUR TIMES as likely to be incarcerated for a sex offense as the gen'l prison pop (all men and women). 2/5 https://t.co/LN9Ni95oYd" / X. (See also: 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] She Killed Two Women. At 83, She Is Charged With Dismembering a Third. - The New York Times (nytimes.com)

In 2024, charges were filed against a male inmate in California for multiple rapes while he was housed in a woman's prison.[9]

In 2023, a male inmate was accused of raping a female inmate in their shared jail cell in Ohio.[10]

In 2023, the women's prison in Washington State found that reports of a male inmate having physically and sexually assaulted female inmates were substantiated.[11]

In 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.[12]

Also in 2022, two female inmates in New Jersey were impregnated after two dozen or so male inmates were transferred to the women's prison.[13]

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.[14] (See also the case cited in footnote 1 above.)

Washington State's policy of transferring male inmates to women's prison has resulted in reports of a convicted sex offender grooming and raping a developmentally disabled female inmate.[15]

In 2020, a male inmate transferred to the women's prison in Illinois was accused of sexual assault.[16]

Laws which place the power to choose 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 ("transgender," "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.

---

[9] Pronoun use at center of rape case involving former Chowchilla Central California Women's Facility prisoner Tremaine Carroll - ABC7 Chicago

[10] Trans-Identified Male Accused In Jailhouse Rape of Female Cellmate - Reduxx

[11] EXCLUSIVE: Trans-Identified Male Inmate Launches Human Rights Lawsuit Against Washington Women's Prison After Being Accused Of Sexually And Physically Assaulting Female Inmates - Reduxx

[12] BXDA Letter Head (nyc.gov)

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

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

[15] Male Rapist of 12-Year-Old Girl Groomed Vulnerable Woman While in Women's Prison - Women Are Human

[16] Transgender inmate accused of rape | News | Illinois Times

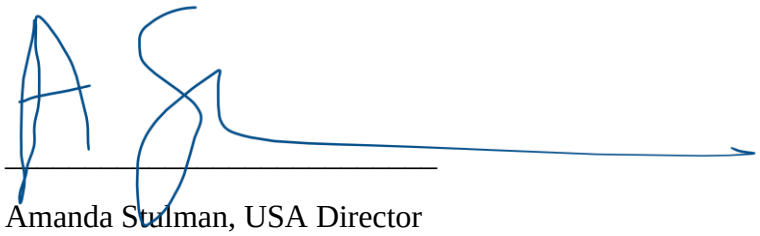
However, even for those males who could demonstrate pre-incarceration and continuing identification and medicalization, there would still remain an objection to housing those males in women's facilities. A sincere belief in "gender identity" does not transform one's sex; those individuals are and will 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 "gender identity" 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 be housed with these men, there is no difference in the adverse effects. The presence of any incarcerated males in a women's correctional facility 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 an already traumatized population of incarcerated women. Consistent with New York's obligation to protect the rights of incarcerated women in its custody, we ask that you reject Senate Bill 1049.

Thank you for the opportunity to present this written submission to you and we would welcome an opportunity to provide in-person testimony.



Amanda Stulman, USA Director
Keep Prisons Single Sex
Email: amanda@kpssinfo.org
Website: USA.kpssinfo.org