

## Cisnormativity, criminalisation, vulnerability: Transgender people in prisons

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The Tasmanian Institute of Law Enforcement Studies (TILES) publishes regular Briefing Papers on topics related to the Institute's research program. Our 12th Briefing Paper is prepared by Dr Jess Rodgers, Dr Nicole Asquith and Dr Angela Dwyer<sup>1</sup> and addresses one of TILES' key theme areas: vulnerability in policing. In line with the Institute's aim of exploring innovative policy and practice approaches in this field, this paper critically analyses policies and practices that aim to address and reduce the vulnerability of transgender prisoners. This is a timely publication in light of the public attention given to transgender prisoners as, in the United States, President Obama commuted the sentence of Chelsea Manning on 18th January 2017. This paper provides an important perspective on some of the issues facing transgender prisoners and suggests an approach to prevent the replication of their vulnerability in the criminal justice system. - Associate Professor Roberta Julian, Co-editor, Director of TILES

### Abstract

International research identifies transgender people as a particularly vulnerable group in the prison system, with their most basic needs often being denied to them (Grant et al. 2011, 158). Transgender prisoners experience higher rates of sexual assault and rape (Broadus 2008-9; Jenness et al. 2007). Yet, there is little empirical Australian research (Simpson et al., 2013). Drawing on a conceptual framework of cisnormativity, this article examines existing research about these policies, procedures, and practices regarding the treatment of transgender people in prisons and argues that carceral settings both pathologise and criminalise transgender inmates through incarceration practices that aim to address and reduce their vulnerability. We additionally demonstrate this argument through analysis of policies regarding the treatment of transgender prisoners. By examining how cisnormativity affects transgender prisoners, this briefing paper seeks to move beyond strategies that respond to vulnerability and towards approaches that prevent its replication.

Key words: transgender, imprisonment, prison, criminalisation, vulnerability, pathologisation, cisnormativity.

### Introduction

Most, if not all, prisoners are vulnerable during imprisonment because incarceration constrains their liberty and autonomy, and system decisions impact their basic human rights. However, some prisoners face additional punishments and compounded vulnerability as part of the process of imprisonment. We are all vulnerable to other people's evaluation and their endowment (or denial) of social recognition, but as Gilson (2014) suggests, our vulnerabilities can be exacerbated in some situational contexts such as our engagement with criminal justice systems, and particularly the processes of incarceration. Just as gay men's and lesbians' emotional affinities are criminalised behind bars (Irvine, 2010), transgender prisoners are made more vulnerable by imprisonment processes. United States (US) research has mapped the violence, abuse, and marginalisation faced by imprisoned transgender people as a product of policies, practices, and legal contexts of their imprisonment (See, for example, Arkles, 2008-9; Lee, 2008; Rosenblum, 2000; Sylvia Rivera Law Project (SLRP), 2007; Stanley and Smith, 2011). In this briefing paper, we analyse the vulnerability of transgender prisoners in Australia to provide a case study of how the conceptualisation of vulnerability can be transformed from an individual attribute to a set of vulnerabilising social and institutional practices.

TILES

Briefing Paper

US research reports that transgender prisoners disproportionately experience sexual coercion and assault (Broadus, 2008-9; Grant et al., 2011; Jenness et al., 2007) and are regularly exposed to administrative segregation, humiliation, violence, and denial of medical services (Scott, 2012-13; Sumner and Jenness, 2013). These issues, in addition to the power dynamics inherent in criminal justice systems, amount to further criminalisation of transgender people. We argue that prison processes developed in the name of risk management, informed by cisnormativity and pathologisation, are responsible for creating the conditions that construct transgender prisoners as vulnerable. We will show how these structures pathologise transgender prisoners while simultaneously requiring them to be pathologised to access their rights, which exponentiates transgender prisoners' vulnerability. Some innovations in prison practices can appear to reduce the vulnerability of transgender prisoners and enhance protection, yet on closer examination, these often paternalistic strategies can exacerbate the harms caused by imprisonment.

While there is insufficient space to conduct a thorough theoretical analysis of the policy reviewed here, we propose the framework of cisnormativity as a lens through which to view policy regarding trans people in prisons. This lens is outlined, and our argument is further situated with a review of key historical context - the pathologisation of transgender people. Second, to better understand the scope of the issues involved, we overview how and why transgender people are imprisoned. Partly due to the critical mass of transgender people in US prisons, existing research has focussed on the experiences of US transgender prisoners. This research is culturally specific and may not be representative of transgender prisoners' experiences elsewhere.

#### Transgender

Transgender is an umbrella term that refers to someone whose sex and/or gender does not correspond with the sex they were designated at birth and the gender that is expected to follow from that designation.<sup>i)</sup> This can include people who are transgender, transsexual, non-binary genders (such as genderqueer, genderfluid, bigender, agender)<sup>ii)</sup>, and non-Western formulations of non-cisgenders, such as Two-Spirit and *sistergirl*.<sup>iii)</sup> The terms "transgender" and "trans" are used in this paper to refer to various transgender selves, as these are the terms developed by the community to more adequately capture the experiences of those living outside cisgender norms (Rosenblum, 2000). Some transgender people may use the term "transsexual" to denote themselves as partaking in a medical transition process that aligns their bodies with their sex and gender (such as hormonal and surgical changes); however, Rosenblum (2000) and others suggest it is an outdated medicalised term.

i) The use of the terms such as "gender identity" or "identifies as" are avoided in this paper as these are traditionally deployed to exceptionalise the gender of trans people. Often such language is

represented as a dichotomy between the natural gender of "real" men and women and the constructed gender of trans people. As such, in this paper, the terms, "gender" and "sex" are applied equally to all people.

ii) Often, the term, "transgender" does not map all conceptualisations of sex and gender variance. The "umbrella" of transgender is debated within the community in relation to whether cross-dressers, transvestites, and drag kings and queens fall under the transgender umbrella (see, for example, Anon, 2014; and discussion of community debate by Davidson, 2007).

iii) The term "*sistergirl*" typically refers to Australian Aboriginal and Torres Strait Islander persons designated male at birth but who are or live as women. In traditional communities the word "*sistergirl*" can also include sisters or gay men.

While acknowledging the diversity in jurisdictional approaches for managing transgender prisoners, we comparatively analyse Australian policies and the limited evidence of practices to illustrate the institutional contexts of vulnerability. Australian research on the experiences of transgender prisoners is scarce, mostly dated, and limited in its policy analysis. For example, Blight (2000), Samiec (2009), and Mann (2006) have conducted policy analysis in this area, and Kane (2012) analyses the anti-discrimination case of a denial of hormones to a transgender woman in a men's prison in Queensland. Blight's (2000) review of definitions and sex-marker change requirements contextualises his discussion of transgender prison policy and procedures across Australia during the 1990s and 2000s. Mann (2006) reviews Australian prison policies, drawn primarily from Blight (2000), in her comparative analysis of American, Australian, and Canadian prison policies for transgender people. She argues that out of the three countries, Australia has the best policies, but only closely analyses New South Wales (NSW). Samiec (2009) and Kane (2012) examine updated Queensland policies (Queensland Correctional Services 2008), and argue the policy amendments are inadequate (Samiec 2009) and discriminatory (Kane 2012). Concerns include the housing of prisoners by genital status (Kane 2012: 65; Samiec 2009: 35) and the risk of violence and sexual assault (Samiec 2009: 44).

Limited qualitative research from 1984 and 2013 demonstrates similar conditions in Australia for transgender people across time. Sanderson's (1984) interview with a transgender woman who had spent nearly two decades in and out of NSW prisons found experiences of assault, protective segregation, (attempted, in this case) sexual assault, and housing in men's prisons. Simpson et al.'s (2013) seven in-depth interviews with transgender prisoners in NSW found similarly. These findings align with issues raised from US research (see, for example, Grant et al., 2011; Jenness, 2007; SRLP, 2007) and reinforce areas of key consideration for policy analysis. Our analysis adds to this

existing work in its consideration of the policy development to emerge since the amendment to the Sex Discrimination Act in 2013 that extended these provisions to transgender people. The new policies - New South Wales (2002, 2013, 2015), Australian Capital Territory (ACT) (2014), Queensland (2008), Western Australia (2014), and Victoria (2015, 2016) - are interpreted through the lens of cisnormativity and pathologisation.

A desktop search was undertaken in May and July 2014 for policies regarding the imprisonment of transgender people in Australia. Policies regarding prisoner placement and management were located on each Australian state's and territory's correctional department webpage, or corresponding departmental website (e.g., Corrections Victoria; Victoria State Government, Justice and Regulation). These policies were searched for mentions of "transgender", "transsexual", "sex", "gender". Additional web searches were undertaken for policies that may not be available on these websites, using terms such as "transgender prisoners Australia", "transgender prisoners [state name]". Policies that specifically mentioned transgender or transsexual prisoners were selected for analysis. This included the review of issues such as housing, hormone access, and naming. Publicly available policies regarding transgender prisoners were located from ACT, NSW, and Queensland prison services. Given the fast-changing policy environment, an additional search was undertaken in December 2015 and November 2016, which elicited updated ACT and NSW policy, and new Victorian and Western Australian policy. Due to problems with sampling publicly available documents, we have adopted Blight's (2000) analysis as a benchmark, from which to consider the more recent policy developments.

In their presentation to the American Society of Criminology Conference, Sumner and Sexton (2014) suggested that Australian trans prisoners are treated with more respect for their human rights than their US peers. Our analysis, however, highlights that the issues of housing, cellmates and bathrooms, hormones and other medical issues, and name and pronoun use remain problematic to the situational experience of systematic vulnerabilisation.

### **Transgender, cisnormativity, pathologisation and vulnerability**

Despite over 25 years of scholarship on the social construction of gender - most notably for this analysis, Butler's (1990) pioneering provocation in *Gender Trouble* - the language of sex and gender continues to be informed by naturalising discourses that assume the bio-psychological alignment of sex, gender, and sexuality. Everyone is designated a sex at birth based on the single attribute of visible genitals. Hormones, chromosomes, and internal reproductive organs are not taken into

consideration unless the first attribute, external genitalia, is unclear. These additional biological markers do not always align with the sex applied to visible genitalia. Gender is expected to follow in a "straight line" (Wittig 1992) from the medical designation of sex, such that a penis identifies a person as male, which is then adhered to masculinity. Conversely, a vagina identifies a person as female and, therefore, represents the feminine.

#### **Cisgender**

Cisgender denotes people whose sex and gender align with that they were designated at birth. Cisnormativity refers to the ideological framework that assumes the correspondence between the designated sex at birth and the legitimate, "normal" or "correct" gender aligned with that designation (Harwood and Vick 2012; Rodgers 2013). As such, cisnormativity constructs other sexes or genders as illegitimate, abnormal, and requiring identification. It is a set of norms and values that privilege the straight line between designated sex at birth and the corresponding gender, gender roles, and gender presentation. Behaviour or feelings which could destabilise this basic assumption of designated sex and gender linearity are pathologised and, in some cultures, criminalised. Diversions from cisnormativity are violently policed for both cis and trans people (Harwood and Vick 2012; Rodgers 2013). Violence attached to regulating normative gender performativities is best understood as that which "constitutes and regulates bodies according to normative notions of sex, gender and sexuality" (Lloyd, 2013: 819). It is not surprising, then, that digression from cisgender (that is, being transgender) raises significant problems in the captive-audience environments of police custody and imprisonment.

The pathologisation of transgender people as innately psychologically unstable is grounded in a biomedical discourse that is framed by a cisnormative valuation of gender. In this framework, bodies that fail to conform to cisnorms are mediated and discursively constructed by medicine and psychiatry (Harwood, 2013). Biomedical interventions are not definitive of being transgender, and some trans people choose not to seek access to surgeries or hormones. This makes their gender no less legitimate, though it is often a process used to define trans people's rights and is often mandatory for those seeking to be legally viewed as different from their designated sex and at birth.

Stryker states that "access to medical services for transgender people has depended on constructing transgender phenomena as symptoms of a mental illness or physical malady, partly because 'sickness' is the condition that typically legitimises medical intervention" (2008: 37). Although recent updates to the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 2013) has seen the term "gender dysphoria" replacing the older "gender identity disorder" (and "transsexualism" as the earliest term) (Cohen-Kettenis and Pfäfflin, 2010; Parry, 2013), these medicalised frameworks still remain intact, with transgender people often requiring psychiatric assessment, diagnosis, and clearance before

commencing hormones or accessing surgeries, as designated by the *Standards of Care* (World Professional Association for Transgender Health, 2012). These psychological assessments are themselves problematic as they classify the appropriate presentation of transgender, which may include the requirement to live as the preferred gender 12 months prior to hormone or surgery approval.<sup>ii</sup> Further, psychiatrists, psychologists, and doctors may have outdated ideas on gender informing their ideas of what constitutes a “legitimate” transgender person (Rosenblum, 2000). This, in turn, means some transgender performativities are seen as more legitimate than others, particularly those based on arbitrary and stereotypical gender performativities and presentations, such as the adoption of hyper-feminine/masculine characteristics.

This pathologisation then informs the processes surrounding legal status, leading to the requirement of medical interventions to change sex markers on identification documents at state and federal level. Such medical interventions and legal changes may come with physical, financial, religious, cultural, or familial barriers. Without changes to identification documents, those unable or unwilling to undertake required medical procedures are forever marked legally as their designated sex at birth, which can be highly problematic and unjust. As these laws are grounded in the pathologisation of transgender people, we suggest they exist as an exemplar of the cisnormative violence adhered to seemingly neutral government practices. In effect, trans people’s gender legitimacy is only recognised through cisnormative systems and processes, and without this formal recognition, transgender identities remain illegitimate in the eyes of the law.

Prison practices and policies informed by cisnormative frameworks of sex and gender construct transgender people as “high-risk” (US Department of Justice, 2012) and handle them with a series of approaches, while well-meaning and aimed at reducing the impact of vulnerability, which fail to consider the significant ways in which vulnerability is institutionalised, and to a great extent endemic to criminal justice processes (Asquith et al., 2016; Bartkowiak-Théron et al., 2017). We argue that just by being trans - a subjectivity othered by cisnormative society - trans people experience significant vulnerability, and their efforts to ameliorate this vulnerability can be grounds for further punishment. Further, as discussed below, many trans prisoners are additionally marginalised, which compounds their vulnerability when interacting with criminal justice systems and when imprisoned; this is then again compounded, as we will show, in efforts to protect them in prison.

## **Criminalisation**

As has been illustrated in numerous studies since the early work of the New Deviancy theorists, who is labelled as a criminal is subject to a range of social, cultural, and

political decisions. What is a crime, and who can be evaluated against a criminal code, is also shaped by a range of intersecting subjectivities (such as race, class, gender, sexuality, ability). At the front end of the criminal justice system, police practices, allocation of police resources, and prioritisation of particular crimes creates an uneven landscape of who is surveilled, and thus, who is criminalised. The initial “deviance” of being trans has been (and in some cases, continues to be) criminalised, including the recent push in the US to criminalise transgender people’s use of public toilets (Redden, 2016; Jenkins, 2016), and ongoing issues with legal documentation and perceived fraudulent behaviour (Wang, 2016; Rook, 2016). This criminalisation is compounded when some trans people engage with the informal economy and survival crimes (such as petit larceny, panhandling, and drug use). Once drawn into the criminal justice system, transgender prisoners must then negotiate a range of social relationships that draw them into a criminalised trajectory, examples of which are demonstrated throughout our analysis.

## **The reasons for, and extent of, transgender people’s imprisonment**

Transgender people face extreme forms of social exclusion, abuse, harassment, and discrimination (Lenning and Buist, 2012). The pathologised nature of trans subjectivity pushes trans people to the margins of society where they are more likely to become involved in crime - often for survival - or have their mere presence criminalised (in the case of the criminalisation of homelessness). This places them at greater risk of criminalisation and imprisonment due to homelessness, drug and alcohol use, sex work participation, and mental health issues (Couch et al., 2007; Hillier et al., 2010; Perkins et al., 1994; Spade, 2011). High rates of employment discrimination in many occupations mean trans women may undertake sex work or drug dealing (Scott, 2013). US research demonstrates that transgender people are at higher risk of arrest because they are twice as likely as the general population to be homeless (Grant et al., 2011). Consequently, homeless transgender people are incarcerated for minor offences, such as loitering or sleeping outside (SRLP, 2007), and are 2.5 times more likely to be incarcerated than transgender people who are not homeless (Grant et al., 2011). Other crimes resulting in incarceration include distribution of black-market hormones (SRLP, 2007), which is a direct result of the pathologisation of trans people through bio-medical processes (Lev, 2005; Stryker, 2000). These criminalisation processes are deepened by not being able to pay for legal representation (SRLP 2007), leading to incarceration and longer prison sentences.

Determining how many transgender people are imprisoned is challenging. Most existing knowledge about transgender offenders and inmates comes from research

in the US (see, for example, Broadus 2008-9; Grant et al. 2011; Jenness et al. 2007; SRLP, 2007) and UK (see, for example, Irish Prison Reform Trust, 2016; Lambie, 2012; Read and McRae, 2016). The experiences of transgender offenders are often exceptionalised as case studies or excluded entirely from mainstream criminological studies due to small sample sizes. Additionally, just as transgender people outside of prison may not disclose their gender, transgender prisoners may not disclose their gender in prison (Jenness, 2010; Robinson, 2011) and they may only be identified through intake processes if their gender clashes with sex markers on their identity documents or by prison officers in risk assessment for protective housing (Scott, 2013).

US research suggests LGBTQ populations are particularly at risk of imprisonment (Belknap et al., 2013; Curtin, 2002),<sup>iii</sup> but definitions used in research, and thus results reported, vary considerably. In relation to youth detention populations across six US jurisdictions, Irvine (2010) found six per cent of participants were transgender or gender non-conforming.<sup>iv</sup> Estimates from Canada suggest transgender prison populations of less than one per cent (Mann 2006: 110). Calculations from numbers provided by US prisons (Brown and McDuffie 2009: 281) suggest transgender prisoners consist of .03 percent of the entire US inmate prison population. However, Brown and McDuffie (2009: 282) also state that transgender inmates are grossly overrepresented in California alone. In Australia, Butler et al. (2010) encountered two trans women (0.2%) in Queensland men's prisons and a comparative NSW study by Richters et al. (2008) found three transgender respondents (0.3%) in men's prisons and two in women's prisons (1.0%) in their representative samples of all inmates surveyed. Data on inmate reception to NSW court cells and correctional facilities between July 2009 and December 2010 found 16 (0.01%) transgender inmates (Corrective Services NSW, 2013a). A 2015 study of the health of Australian prisoners found transgender prisoners made up 0.6 percent of a sample of 1011 prison entrants and 0.2 percent of a sample of 437 discharges (Australian Institute of Health and Welfare, 2016).<sup>v</sup> Based on US estimates of 0.3 percent of the population being transgender (Gates 2011), these figures illustrate the gross lack of data on this issue, with these figures representing both over - and under - representation of transgender people in prisons. The variance between these studies - from six percent and 0.01 percent - highlight the issues with self-disclosure in an institutional context and definitions used to capture these populations in research (Sexton, Jenness and Sumner 2010). It is clear that transgender people are at significant risk of criminalisation, but these processes paradoxically worsen when transgender people are incarcerated. Once criminalised, and depending on the jurisdictional policies or the success of their engagement with medical and legal processes, they may be further

punished by the way cisnormativity plays out in prison settings or by the "safety" measures implemented to lower their risk of harm.

## The vulnerabilities of transgender people's imprisonment

Sexual assault (including rape) disproportionately affects transgender people in prison, with both staff and other prisoners perpetrating this violence (Grant et al., 2011; Shah, 2010). Additionally, staff sometimes assist inmates to harm other transgender inmates (Arkles, 2008-9; Scott, 2013; Shah, 2010). While Grant et al. (2011) identified that 15 per cent of the transgender prison or jail population had experienced sexual assault, Jenness et al. (2007) found that 59 per cent of transgender prisoners had experienced sexual assault. It could be argued that sexual assault in prison is a common experience - with comparative rates reported by the general inmate population of 4.4 per cent (Jenness et al., 2007). Other than Jenness et al. (2007), there are no studies that measure a comparative rate between transgender and non-transgender prisoners. Comparisons across studies are also difficult to discern because of different measures used in studies, such as differences in language around rape, sexual assault and coercion (Wolff, Shi and Bachman, 2008). Other US studies of general prison populations find experiences of sexual assault ranging from less than 1 per cent (Nacci and Kane, 1983) to 10 per cent (Beck and Johnson, 2012) to 22 per cent (Struckman-Johnson et al., 1996) of prisoners, but these cohorts could include unidentified transgender prisoner within their totals. In Australia, we know little of these experiences. Simpson et al's (2013) analysis of seven in-depth interviews with trans women and sistergirl prisoners and ex-prisoners identified daily experiences of sexual coercion and psychological distress. The experiences of Catherine Moore (Renshaw, 1997), who suicided while in protective custody in a men's prison after being sexually assaulted, and Mary, who was raped daily in a Queensland men's prison (Lambert, 2016), mirror these findings. Importantly, this increases the risk of sexually transmitted diseases for transgender prisoners in men's prisons (Scott, 2013; SRLP, 2007).

While processes and disciplinary actions are in place for complaints against perpetrators of violence (both prisoners and staff), often no action is taken against those who perpetrate violence against transgender prisoners (Jenness, 2010), or prisoners avoid making complaints in fear of being regarded as a "snitch", being further victimised, and losing privileges (Robinson, 2011). Additionally, these processes can be lengthy and ineffective, which discourages reporting (SRLP, 2007), and victims are often told to "toughen up" by staff (Jenness, 2010).

The segregation of prisons by sex is a key tool for safety and control (Sumner and Jenness, 2013: 230-231). A common argument for the housing of transgender prisoners due to genital status is the safety of other prisoners (Blight, 2000: 3; Rosenblum, 2000; Stevens v Williams, 2008; Sumner and Jenness, 2013: 244). For example, a woman with a penis in a women's prison is seen at risk of engaging in sexual intercourse with, or raping, other women prisoners. However, these arguments fail to consider the gender of transgender prisoners, make assumptions about transgender people as sexual predators, and do not consider the well-documented (as demonstrated above) incidence of sexual violence experienced by transgender prisoners. The occurrence of sexual violence against transgender prisoners is just one of many issues that demonstrates the importance of close consideration of prison housing arrangements.

Transgender prisoners also negotiate administrative and health-related issues unique to their experience of imprisonment. In both Australia and the US, prisoner healthcare has generally been regarded as inadequate (Levy, 2005; Richters et al., 2008; Sumner and Jenness, 2013) and this is compounded for marginalised prisoners. In the US, transgender people receiving hormone treatments may be denied hormones in prison or receive irregular access (Grant et al., 2011; Scott, 2013), something that profoundly impacts their mental health (SRLP, 2007; Sumner and Jenness, 2013). Further negative health effects include hair regrowth, painful changes in breast tissue (in the case of those on oestrogen), fatigue, cramps, and vomiting (Tarzwell, 2006 -7). Commencement of hormones or surgery whilst imprisoned has been largely rejected by prison services. However, in a recent US case, a judge ruled that the California Corrections Department must provide genital surgery to an inmate. This, and other cases, illustrates the capricious nature of these decisions, which are determined on a case-by-case basis, with surgery decisions shifting in some situations (Thompson, 2015). Depending on how these cases are decided and appealed,<sup>vi</sup> these processes could be experienced as punishment by transgender prisoners because of psychological trauma attached to refusing people the right to transition (McNeil et al., 2012).

Other factors also compound the poor mental health of transgender prisoners and its management (SRLP, 2007). The "systemic misgendering" (Jenness, 2010: 519) of US transgender prisoners - including being misnamed and ridiculed by staff and prisoners - increases depression and anxiety (Broadus, 2008-9; Grant et al., 2011; Scott, 2013; Sumner and Jenness, 2013). In Australia, the GLBTI Health and Wellbeing Ministerial Advisory Committee (2014) found transgender prisoners have a greater risk of suicide, and higher rates of depression, anxiety, drug use, and cancer.

Processes for managing transgender prisoners can impact negatively on support, welfare, and rehabilitation programs provided during imprisonment (Dolovich, 2011; SRLP, 2007). Appropriate supports may not exist as the lack of acknowledgement of LGBTQ people in prisons means rehabilitation, education, and support programs exclude their needs (Belknap et al., 2013; Dennis, 2013). Specialised counsellors are rarely available (Curtin, 2002) and access to relevant publications is absent for transgender prisoners (Arkles, 2008-9). This is unsurprising given that transgender people outside of prison experience difficulties finding such support (Grant et al., 2011; McNeil et al., 2012; Riggs et al., 2014).

These experiences demonstrate how the duty of prison-afforded care to transgender inmates is questionable at best. Analysis of Australian prison policies provides additional evidence of the pathologisation and criminalisation of transgender prisoners.

## **Policies that criminalise and pathologise Australian trans prisoners**

Prison policies related to housing transgender prisoners, medical issues such as hormone provision, and name and pronoun use highlight questionable approaches adopted by Australian corrective services institutions. The following analysis of Australian policy documents shows how care for transgender prisoners is deprioritised in favour of processes of containment and risk aversion.

### *Housing*

Policy documents related to housing transgender prisoners are not publicly available for some Australian jurisdictions (Tasmania, South Australia, and the Northern Territory). Whilst Blight (2000) was able access some documents in his analysis of policies, in our more recent analysis, some jurisdictions either had no policies on the housing of transgender prisoners, or these were no longer publicly available. In the Northern Territory, South Australia (Blight, 2000), and Queensland (Queensland Corrective Services, 2008), transgender prisoners are housed based on their surgery or partial surgery status. In South Australia, this decision can be reviewed within two weeks of being housed (Blight, 2000), while in Queensland, a number of other factors are considered for those who have not completed surgery. These include the offender's housing preference, hormone status, concerns expressed by staff and the offender in relation to safety, the offender's "lived" gender, the opinion of the offender's treating doctor, and any partial medical procedures or surgeries (Queensland Corrective Services, 2008). In contrast, transgender inmates in NSW can apply to be housed in a correctional centre of their gender unless it is determined the inmate should be assigned based on their designated sex at birth (Corrective Services NSW, 2013b).

However, transgender inmates who have updated birth certificates or similar documentation are housed in the prison that aligns with their documentation (Corrective Services NSW, 2015). Those without documentation are initially remanded for assessment to determine appropriate placement (Corrective Services NSW, 2015). In the ACT, all transgender people are placed in accommodation appropriate to their gender unless there are overriding safety concerns (ACT Corrective Services, 2014), such as type of crime, custodial history, and perceived risk to their safety. Victorian procedures state that initial placement for transgender prisoners is determined by the gender on the prisoner's warrant, but this placement is to be urgently reviewed by the Sentencing Management Panel (Corrections Victoria, 2016). This panel considers factors such as the prisoner's safety, medical history and wishes when determining long-term placement. Like Victoria, initial Western Australian placement is based on the gender on the prisoner's warrant (Department of Corrective Services, 2014). On being identified as transgender or identifying themselves as transgender, a placement decision is to be made according to the "initial and ongoing assessment and sentence management provisions" (Department of Corrective Services, 2012: 3; Department of Corrective Services, 2014). More detailed provisions, including the specific nature of assessment in regards to transgender prisoners, are not stated in Western Australian policy.

Separate showering facilities for transgender prisoners is a key way of managing the safety of this population, but also represents a form of segregation of transgender prisoners from the general prison population. These accommodations are specified in some Australian locations. Transgender prisoners in Queensland, for instance, are given access to shower and toilet facilities that "provide for the privacy and dignity of the offender" (Queensland Corrective Services, 2008), whereas in the ACT they are specifically placed in single cell accommodation, or with other prisoners who are transgender or intersex (ACT Corrective Services, 2014).<sup>vii</sup> These prisoners are also given access to bathroom facilities that "are private enough to ensure the dignity and self-respect of detainees" (ACT Parliamentary Counsel's Office, 2016), but this provision applies to all detainees. NSW policy updates do not stipulate bathroom facilities (Corrective Services NSW, 2015) which were previously specified (Corrective Services NSW, 2013b). In Western Australia, once identified, transgender prisoners are placed in a single cell with separate bathroom facilities (Department of Corrective Services, 2014). How transgender prisoners experience segregation for housing and hygiene purposes has not been considered in the Australian context. They may experience these accommodations as exclusion rather than enhanced safety.

### *Hormones and Related Medical Issues*

There is no doubt transgender prisoners experience gatekeeping around hormone therapies and medical assistance as further punishment by prison officials (Arkles, 2008-9; SRLP, 2007; Kane, 2012). These "special considerations" are subject to neo-liberal economics and public concern about prisoners being afforded special privileges (von Dresner et al., 2013), and although some policies specify access to hormone therapy, this may not happen. For example, in Australia, Blight (2000) found most states provided hormone therapies if transgender prisoners had commenced treatment prior to incarceration, and both the Queensland Corrective Services (2008) and NSW Corrective Services (2013b) have explicitly mandated this in their more recent policy documents. However, the decision to grant access to hormones is often dependent on evaluation by prison medical services, and whether or not inmates themselves could fund this treatment. In South Australia, hormone therapy may be initiated at the discretion of prison medical officers (Blight, 2000), and the General Manager of Custodial Operations and prison doctors determine access to hormones or surgery (whether starting or continuing) for transgender prisoners in the ACT (ACT Corrective Services, 2014; Corrections Management Act, 2007: 13). Much like US practice, adherence to policy is often at prison staff discretion, and may be contested before the court. For example, in *Sinden v State of Queensland* (2012), despite clearance by a doctor and a psychiatrist in 2006, Queensland Correctional Services would not allow a prisoner to take the hormone therapy prescribed. In arbitration, withholding medical treatment to Sinden was ruled not to be discrimination by the Queensland Civil and Administrative Tribunal in 2012.

### *Name and Pronoun Use*

Prison policies vary markedly regarding preferred names and pronoun markers. These considerations differ across jurisdictions, prisoners, and correctional staff (Grant et al., 2011; Scott, 2013; Sumner and Jenness, 2013; SRLP, 2007). Some Australian jurisdictions differ significantly from the US on names and pronouns. In South Australia, for example, Blight (2000) found that policies emphasise addressing transgender inmates in gender neutral terms or by their chosen pronouns, whilst more recently, the ACT and NSW have mandated that all transgender prisoners should have their gender and name documented when processed by correctional institutions (Corrective Services ACT, 2014; Corrective Services NSW, 2015). Victorian policy requires a name on the prisoner's warrant to be recorded on intake, but preferred name, gender, and pronouns are to be used when addressing and referring to the prisoner (Corrective Services Victoria, 2015). In contrast, Queensland policies align with the US prison practice of calling transgender

prisoners by the name on their birth certificate or the name on a warrant (Queensland Corrective Services, 2008), irrespective of their gender.

### *The Effect of Cisnormativity and Pathologisation*

Although it appears an insignificant issue, the misnaming and misgendering of transgender people can produce psychological trauma (McLemore, 2014), and may be experienced as a form of punishment, particularly if we consider how these experiences happen in conjunction with other prison practices. In the worst case, transgender people can be housed in prisons matching their designated sex at birth with no regard given to cell mates and bathroom privacy, or they may be housed in segregation for their own safety and denied access to hormones. Additionally, in being called by a name they no longer use,<sup>viii</sup> transgender prisoners are stripped of their gender and embodiment, with all the attendant risks and harms to their health. Taken together, these practices are discriminatory and seek to contain transgender prisoners, as well as invoking pathologising practices that further punish and, in some instances, further criminalise transgender prisoners.

In the largely consistent cisnormative adoption of the biomedical model for determining gender, seemingly supportive prison policies can have the effect of making transgender prisoners more vulnerable and further pathologised. Without a cisnormative ordering of sex and gender, access to hormones and surgeries would not require the authorisation of medical and psychological staff; albeit, medical support may be required to manage the biological consequences of hormone therapy. As such, it is the cisnormative structures that simultaneously frame transgender people as pathologised and yet requires them to be pathologised to access medical services necessary to bring their bodies in line with their genders. It is these pathologising structures that bind vulnerable transgender prisoners to their vulnerabilities as both transgender and as a prisoner. Transgender prisoners are constructed both as risky at and at-risk in the cisnormative ordering of prisons.

Our review features examples of the application of pathologisation and cisnormativity throughout prison policy. Decades of feminist scholarship has sought to disconnect gender from biological functioning (i.e., gender roles from their assumed alignment to physical sexual organs); yet, gender continues to be medicalised for both cis women and trans people. For example, access to hormones in NSW and Queensland based on whether a prisoner has commenced hormone therapy prior to incarceration (Queensland Corrective Services, 2008; NSW Corrective Services, 2013b) is informed by the initial pathologisation required for approval to start hormone therapy. Another example of the role of cisnormativity in

prisoner administration is the Victorian procedure that requires the provision of medical advice if there is difficulty determining a prisoner's sex (Corrections Victoria, 2015: 10); which also concurrently obscures the distinction between gender and sex. This demonstrates the cisnormative practice of medicalising bodies that fail to fit binary norms, which is not only an issue for transgender prisoners but also intersex prisoners, whose visible bodies may not align with a binary norm. The value given to state-recognised gender in the form of birth certificates (NSW Corrective Services, 2016) further pathologises transness. NSW makes this explicit in their delineation between those transgender prisoners who are "recognised" and those who are "self-identified" (NSW Corrective Services, 2016). As previously discussed, the processes for legal recognition of gender are dependent on medical recognition. Prison policies and practices embed the cisnormative pathologisation of transgender people in decision-making about housing, bathrooms, cellmates, medical services, and name and pronoun use, which further vulnerabilises an already marginalised cohort; these policies doubly punish, and thus criminalise, trans people's otherness.

### **Australian and International Research Gaps**

This policy analysis has illustrated the ways in which contemporary prison policies and practice are embedded in cisnormative pathologisation and the concomitant criminalisation of transgender prisoners. While the Australian policy reviewed may be more considerate of the human rights of trans people than in the US (Sumner and Sexton, 2014), given the gaps in available documents in some Australian jurisdictions, an overall comparison is difficult to make. One significant Australian research gap is the experience of trans prisoners with segregation. Prison staff in US jurisdictions commonly use isolation cells to protect transgender offenders from sexual and physical assault (Arkles, 2008-9; Emmer, Low and Marshall, 2011; Scott, 2011; SRLP, 2007; Sumner and Jenness, 2013). Solitary confinement, administrative segregation, and protective custody may be just as harmful as having vulnerable prisoners placed in general population housing (Arkles, 2008-9; Scott, 2011; SRLP 2007). These segregated spaces may place prisoners at a higher risk of physical and sexual abuse from more violent prisoners who are also segregated (Scott, 2011) or enable corrective services personnel to more easily target trans prisoners for physical, sexual, or verbal abuse (SRLP, 2007). Transgender prisoners are also further punished when denied access to educational, rehabilitative, and vocational programs while in protective segregation (Arkles, 2008-9), which thus perpetuates their vulnerability through a process that is purported to protect them. By using punishment as a strategy for managing the safety of transgender prisoners, corrective services

institutions are complicit in the exacerbation of disadvantage.

The experiences of trans men in either men's or women's prisons (SRLP, 2007), and the experiences of transgender women in women's prisons, are also significant gaps in Australian and international research. The behaviour of prison staff and authorities, including their application of mandated policies, should be considered along with policy development regarding non-binary transgender and gender non-conforming people, and how prison staff are trained around these issues. Finally, questions remain about the suitability of rehabilitative services for transgender people in prisons, including the materials available to transgender prisoners in services such as prison libraries. Critically, trans people's experiences must be centred in research aiming to understanding trans imprisonment in Australia. This is particularly crucial given only a small amount of Australian empirical research has been undertaken on the lived experiences of trans imprisonment (see Simpson et al., 2013).

## Conclusion

Much like hooks's *Feminist Theory: From Margin to Center* (1984), critical trans politics provides us with a departure point for the relationship between trans people's vulnerability in prison and the universalised vulnerability of engagement with the criminal justice system. Both hooks (1984) and critical trans politics (see, for example, Spade, 2011; Harwood, 2013) start from the perspective of the most vulnerable and materialise as "trickle-up" social justice. Such an approach results in changes for all, rather than for those best positioned to benefit from initial social reforms. Policy approaches centred on appropriate methods of protecting trans prisoners will have the extended benefit of positive change for other prisoners. This is particularly vital in criminal justice systems which fail to recognise, record, and therefore understand the multifarious factors contributing to the criminalisation of lesbian, gay, bisexual, transgender, intersex, and queer people. The factors that support their desistance from crime are largely unknown; yet, emerging research on what is termed a "queer criminal career" (Asquith, Dwyer and Simpson, 2016) clearly points to social and institutional practices that perpetuate the ongoing criminalisation and incarceration of LGBTQ people.

Transgender offenders constitute a relatively small sub-population of prisoners, but barriers encountered by these prisoners before, during, and after imprisonment offer a stark example of the circuitous relationship between vulnerability, cisnormativity, pathologisation, and criminalisation. The gaps in the research are vast not only

in terms of trans people's lived experiences of criminality and punishment, but also their desistance from crime, re-integration following imprisonment, and the double punishment and further pathologisation dispensed by criminal justice systems through seemingly protective prison processes. We need to urgently reconsider transgender people's criminality and explore how their criminalisation is a product of their vulnerability as transgender people, which is informed by cisnormativity and pathologisation. This must give primacy to the voices and experiences of transgender (ex-) prisoners using feminist ethnographic (Naples, 2003; Skeggs, 2001) approaches and partnerships with transgender researchers, and transgender and prisoner community organisations.<sup>ix</sup> As this paper suggests, unless the voices of transgender prisoners are heard, and the complex intersecting forms of vulnerability, pathologisation and criminalisation are understood, prison systems will continue to violently shape the lives of trans people.

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<sup>ii</sup> This requirement for hormone approval was removed from the latest version of the Standards of Care, but psychiatrist practices are not always up to date with recommended approaches to transgender care.

<sup>iii</sup> The acronym, LGBTQ denotes lesbian, gay, bisexual, transgender and queer. Queer can include a variety of non-normative sexualities or genders, such as pansexual and asexual, or people may identify just as "queer". The "Q" in this acronym is also used by people questioning their sexuality or gender.

<sup>iv</sup> Irvine used gender non-conforming to refer to transgender youth or youth whose gender expression diverges from the norms expected for their gender, but still see themselves as cisgender.

<sup>v</sup> Dischargee data was not provided for New South Wales.

<sup>vi</sup> See Thompson 2015 for discussion of *Norsworthy v Beard* where genital surgery was approved and subsequently appealed.

<sup>vii</sup> Another group of people who face challenges with norms around sex and gender are intersex people. Intersex is a term used to describe bodies that do not map precisely to either of the two standard sexes as defined by Western culture. The challenges faced by intersex and transgender people are different, but sometimes overlapping. Intersex people can be transgender.

<sup>viii</sup> It is important to note not all transgender people change their name.

<sup>ix</sup> While transgender researchers and organisations may not have knowledge, experience and connections regarding prisons, they would be, at least, a starting place regarding appropriate terminology, theoretical frameworks, conceptual knowledge and etiquette regarding working with and researching transgender people. Similarly, while prisoner support organisations may have little experience regarding transgender prisoners, they would have useful knowledge and experience regarding working with and researching prisoners.

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