

Criminal Justice Committee

**2nd Meeting, 2024 (Session 6), Thursday 11
January 2024**

Management of transgender prisoners

Note by the clerk

Introduction

1. In late 2023, the Scottish Prison Service (SPS) published its [Policy for the Management of Transgender People in Custody](#) alongside a suite of associated documents. A copy of the Executive Summary of the new policy is set put in **Annex A**.
2. As a consequence of the provisions in the newly published policy, two negative Scottish Statutory Instruments (SSIs) have been laid in the Scottish Parliament and referred to the Committee:
 - [The Gender Recognition \(Disclosure of Information\) \(Scotland\) Order 2023](#)
 - [The Prisons and Young Offenders Institutions \(Scotland\) Amendment Rules 2023](#)
3. The detail about these SSIs is set out in **Paper 2**. The deadline for the lead Committee to report on both of these instruments is 22 January 2024.
4. The Committee is meeting today to consider the detail of the SSIs and whether they should come into force, as well as to review the newly published policy referred to above.

Participants/written evidence

5. In doing so, the Committee will hear from:
 - Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs; and,
 - Teresa Medhurst, Chief Executive, Scottish Prison Service.
6. Due to the timetable available to the Committee before these negative instruments are due to come into force, additional written evidence was requested from various relevant parties. Copies of the submissions received are set out in **Annex B**

Format

7. Members of the Committee and witnesses will be attending the meeting in person for this evidence session.
8. Members will be able to ask the Cabinet Secretary and the Chief Executive of the SPS questions about the SSIs and wider policy. **When this is complete, members will consider two motions to annul (S6M-11816 and S6M-11817) that have been lodged for the SSIs mentioned in paragraph 2 above.**
9. Paper 2 contains more detail of the procedure followed for approving negative SSIs.

**Clerks to the Committee
January 2024**

Executive summary of the policy for the management of transgender prisoners

What the policy is:

- The policy is how SPS will admit transgender people to Scotland's prisons and ensure that they are placed and managed in a way which seeks to prevent transgender women with a history of Violence Against Women and Girls (VAWG), who present a risk of harm to those in the women's estate, from accessing that estate.
- The policy is rights-based and ensures the health, safety, and wellbeing of all people in prison.
- The policy articulates SPS's commitment to manage transgender people in accordance with its obligations as a prison service, as a public body, and as an Executive Agency of the Scottish Government.

What the policy does:

- The policy sets out the arrangements for how transgender people will be admitted to Scotland's prisons, how they will be placed, and how they will be managed.
- It puts policy and practice in place to prevent transgender women with a history of VAWG who present a risk of harm to those in the women's estate from accessing that estate.
- The policy articulates very strongly how SPS will consider and manage risks, protect rights, and meet the needs of people in prison.
- The policy 'individualises' the management of transgender people as far as is operationally practicable – through enabling SPS to admit people to prison based on the evidence and information available to SPS at that point in time – and then through an ongoing multidisciplinary case conference, the first of which will be held, insofar as practicable, within 72 hours of arrival in custody.
- This approach enables SPS to adequately consider and manage the risk that someone may present to others, or to themselves, including VAWG risk, in a way that the other, 'blanket' approaches do not (blanket approaches relate to management based on someone's sex, someone's gender identity, or on someone's status as a transgender person).
- The policy protects the rights of transgender people in custody whilst also promoting the care, safety, and wellbeing of everyone across Scotland's prison estate, for example, by introducing the 72-hour timescale for initial case conferences. This may reduce the amount of time that someone may be required to spend in Separation and Reintegration Units (SRUs).

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- It puts case management at the heart of the longer-term management of transgender people.
- The accompanying SSI will make it clear on the face of the Prison Rules that Governors have discretion to allow a transgender person to be searched by an officer of their birth sex if it is necessary and proportionate to do so.

Why the policy is needed:

A bespoke policy is needed for the management of transgender people because transgender people are the only group of people in custody where:

- A decision must be made about what gender of estate they are to be placed in.
- A decision must be made about what gender of prison officer should search them.

In addition, transgender people have specific support needs that other people do not, for example, access to equipment. It is also important to recognise that the transgender prison population is very small (0.3 per cent of the overall prison population)

Written submissions received

The following organisations were emailed by the clerks on 13 December 2023 to request written evidence. A reminder was sent on 3 January 2024:

EHRC	Murray Blackburn Mackenzie
Equality Network *	POA Scotland
Engender	Rape Crisis Scotland
Families Outside	Scottish Prison Governors Association
For Women Scotland	Scottish Human Rights Commission
HMIPS	Scottish Trans Alliance
Howard League Scotland	Scottish Women's Aid **
Keep Prisons Single Sex	Victim Support Scotland

* indicated that their views are the same as the Scottish Trans Alliance so they would not be making a separate submission

** indicated they did not wish to send a written submission

Copies of any submissions received in response are set out below. The Committee also received one unsolicited submission, which is also set out below.

Families Outside

We the Committee would [] consider two comments from us here at Families Outside.

First, we are concerned about the addition under Rule 8A which states that:

“(8A) Where a visitor is searched by an officer under section 41(2A) of the Act, the Governor may require that an officer of a different gender to the visitor must conduct the search where the Governor considers that it is necessary to do so for the purpose of protecting the health, welfare or safety of any person or the security or good order of the prison.”

Housing someone with a history of violence against women in a prison for women is one issue, but we are not clear about any grounds in which an officer searching a visitor of a different gender would be necessary unless they could prove there was a genuine risk (and if so, how would they prove this). We can foresee a risk of this being abused to control or intimidate visitors.

The second point is that, under Equal Rights legislation, we should be managing the behaviour rather than the gender. The phrasing of the legislation and any related policies need to be very careful that the management and decisions are made based on behaviour and risk rather than on the person's gender (trans or otherwise).

Thank you for your consideration on these issues and especially for your patience in the receipt of our response.

For Women Scotland

In order not to duplicate other submissions we are concentrating our evidence on the impact of our two recent judicial review decisions by the Court of Session Inner House on the SPS policy. The main points of these judgments are as follows:

- [For Women Scotland v The Scottish Ministers \[2022\] CSIH 4](#) (FWS1)

Incorporating transsexuals living as women into the definition of woman conflates and confuses the two separate and distinct protected characteristics of sex and gender reassignment and is not permitted. Transsexuals are those with the protected characteristic of gender reassignment and include those with and without Gender Recognition Certificates (GRCs).

An exception which allows steps to be taken relating to the inclusion of women as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a “female of any age”. Provisions in favour of women, in this context, **by definition [in the Equality Act] exclude those who are biologically male.**

- [For Women Scotland v The Scottish Ministers \[2023\] CSIH 37](#) (FWS2)

A person with a GRC in their acquired gender has the protected characteristic of gender reassignment. Separately, they also possess the protected characteristic of sex according to the terms of their GRC and have a presumptive right to access the single-sex services of their acquired gender.

On the other hand, individuals without a GRC, whether they have the protected characteristic of gender reassignment or not, retain the sex in which they were born and have no presumptive right to access services provided for members of the opposite sex.

A [biologically male] person with a GRC in the female gender comes within the definition of “woman” for the purposes of the Equality Act

These decisions are somewhat contradictory but the most recent ruling did **not** overturn the earlier one. Both stand with equal legal weighting.

SPS state in their [Policy Summary](#) that a policy is needed for the management of transgender people because “a decision must be made about what gender [sex] of estate they are to be placed in”. This confirms SPS is making use of the separate and single sex provisions in the Equality Act 2010 and is demonstrated by the provision of separate prisons solely for women in Stirling, Dundee and Glasgow. Where prisons such as Edinburgh, Greenock and Grampian hold both male and female inmates they are housed in separate wings.

The SPS [EHRIA document](#) states it is using the exception at Paragraph 3 of Schedule 23 in the Equality Act to provide communal accommodation which is restricted to one sex only for reasons of privacy, but has failed to apply it according to the terms of either of the Inner House judgments. FWS1 says there should be no biological males in the female accommodation. FWS2 says all males without a GRC in the female gender remain of the sex in which they were born and, as such, are excluded from the

female accommodation under the sex exception (not the gender reassignment exception). Females who hold a GRC in the male gender are also excluded from the female accommodation. **Only** those males with a GRC in the female gender have a presumed right of inclusion. However, we would suggest there are justifiable grounds to exclude on the basis of maintaining privacy in a facility where the majority of sleeping accommodation is shared and/or there are communal toilets and showers, particularly when we know the vast majority of males who identify as trans [still have a penis](#).

According to the information reported on [STV News](#) in December 2023, SPS has instead chosen to include 7 males who claim trans status (who do not hold a GRC in the female gender) in the female estate while 12 others remain in the male estate. Similarly, one female who claims trans status, but does not hold a GRC in the male gender, is housed in the male estate while 3 others remain in the female estate.

This is a completely inconsistent mishmash of rules and leaves the SPS at significant risk of direct discrimination claims from any prisoner without a GRC who is denied access to the opposite sex estate, as well as indirect discrimination or harassment claims from those prisoners denied the single-sex facility that SPS claim to provide under Schedule 23. There is an even higher risk of litigation should an inmate with a GRC be denied accommodation according to their acquired gender.

The **only** grounds on which to exclude under Schedule 23 are on a person's sex or gender reassignment and it is difficult to see how the additional introduction of an alternative ground relating to a subjective risk assessment will be a legally defensible reason to either include or exclude.

The [DPIA document](#) states that "Information regarding an individual's gender identity is only collected for the purpose of informing management decisions including where to place a transgender individual and how they will be searched." This is the wrong information to collect. If a prisoner claims a gender identity (which has varying meanings and covers any number of identities such as non-binary, demigender, etc) it gives no indication of whether they hold the protected characteristic of gender reassignment as defined in [Section 7](#) of the Equality Act or if they have obtained a GRC, both of which are necessary for decision making on where to house the prisoner.

In addition, the SPS relies on the outdated Equality Act [Code of Practice](#) in the DPIA to claim transsexual people should not be routinely asked to produce their GRC as this would compromise their right to privacy. They also say that according to [guidance](#) from the Equality and Human Rights Commission: "In most circumstances it would be inappropriate to ask a person to prove their legal sex by producing a birth certificate or Gender Recognition Certificate, and in some circumstances this could be unlawful."

However, the EHRC issued a [statement](#) clarifying that "a trans person is protected from sex discrimination on the basis of their legal sex. This means that a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions, and a trans woman with a GRC would be treated as female. The sex discrimination exceptions in the Equality Act therefore apply differently to a trans person with a GRC or without a GRC." The SPS have quoted this clarification in their [EHRIA document](#) so it is unclear why the policy

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does not reflect this updated guidance or recognise the need to collect information on GRC status to inform decision making.

The SPS recognise the need to hold confidential information securely but it should be clarified that extra privacy rights for trans people apply **only** to those who hold a GRC (or have submitted an application for one), as per [Section 22](#) of the Gender Recognition Act.

The EHRC has acknowledged that the Code of Practice which was published in 2011 is out of date, confusing, and out of line with the Equality Act and recent case law. In April 2022 the EHRC committed to [reviewing](#) the Code of Practice and certainly this is now required in light of the Inner House judgments.

It is our view that the SPS policy is in clear breach of the law and fails to uphold the dignity, privacy and safety of female prisoners. It should not be introduced until significant revisions have been made.

HMIPS

In response to your invitation of 13th December 2023 I now submit feedback on the provisions of the SSI detailed below as well as the wider SPS Policy.

- [Prisons and Young Offenders Institutions \(Scotland\) Amendment Rules 2023](#)

This SSI provides for changes to a number of the Prisons and Young Offenders (Scotland) Rules 2011 in regard to searching, commensurate with the planned implementation of the updated SPS policy on the management of transgender prisoners.

With regard to **rule 92** pertaining to the searching of prisoners, it provides for the Governor to require that officers of a different gender to the person being searched conduct this. It also requires the presence of a further officer of the same gender as the person conducting the search.

I submit that, whilst I agree that this provision is necessary to enable a person-centred approach, it is my view that opportunities have been missed. Firstly, to better uphold a fundamental human rights principle that people in custody are treated with respect due to the inherent dignity and value as human beings¹. This could be enhanced by the inclusion of a requirement to minimise strip searching, (searches of the person/body searches) by stipulating that these should not take place on a routine basis (such as following visits or transfer) and should only be prompted by intelligence or suspicion. In addition, wherever possible, searches of the person should be replaced by technology which would contribute to a more trauma- informed approach and bring the additional benefit of freeing staff time.

Further, I would like to propose that when body searches do occur, the event is recorded along with rationale in the same way that the use of force is recorded. This would create a basis for governance and scrutiny.

In October this year I wrote to SPS Chief Executive about these matters specifically with regard to women in custody but made wider reference to the general population.

With regard to **rules 93 and 94** pertaining to searches in relation to compulsory testing for controlled drugs and alcohol the SSI allows for the observation of the urine sample provision by an officer of a different gender to the person being searched. It does not stipulate that a second officer is present. My view is that in such sensitive circumstances the near presence of a second officer would be appropriate in the same way that this is stipulated in **rule 92**.

With regard to the wider SPS Policy for the [management of transgender prisoners](#) I submit the following feedback.

A pivotal element of the updated arrangements is a case conference approach which first commences 72 hrs after transition status becomes known and is repeated to create and monitor management plans. Throughout the document there is an absence of reference to the specific partners expected to participate in the case conference process. It would be beneficial for this to be clearly set out and to be sufficiently multi-

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disciplinary to achieve effective information sharing, planning, throughcare and risk management.

In section 3, it is stipulated that the policy does not apply to those who are gender diverse, stating that such individuals will be managed in accordance with their sex at birth. This blanket approach seems at odds with the individualised and person-centred theme of the policy.

The policy focusses on considering evidence to make decisions and sets out, in an annexe, a range of offending behaviour that negates the possibility of placing a transgender woman in the female estate. In my view this is proportionate to the aim of safeguarding those living in women's prisons.

The bottom line is that where there are no identifiable risks and subject to case conference, the policy allows for the location of people who are transitioning to reside in a prison occupied by those of the opposite sex to their birth gender. This was the case in the previous policy and is the part that generates discussion. It is my view that more time may be needed to fully consider this.

Howard League Scotland

Thank you for the opportunity to submit views.

We consulted our members on the management of transgender prisoners and submitted views during the SPS consultation process. Our members' views mirrored the divergent views of our Executive Committee and reflected wider public discourse, with support for two opposing views. A [summary](#) can be found on our website which the Criminal Justice Committee may find useful.

(from their website)

Transgender Prisoners

We have discussed the issue of 'Transgender prisoners and women's prisons', and consulted our membership. We asked our members which of the following two views aligned most closely with theirs:

View (A): Given the imperative need to protect the rights and security of female prisoners, transgender women should never be accommodated in women's prisons. If they cannot be safely accommodated in men's prisons, they should be accommodated in special units.

View (B): Given the importance of gender identity in a person's life, transgender women have a legitimate claim to be accommodated in women's prisons (and transgender men a legitimate claim to be accommodated in men's prisons). However, this should be subject to a safety assessment in each case, and such accommodations should not be made if they would pose a significant risk to prisoners' safety and security.

Responses mirrored the divergent views of HLS's Executive Committee, and reflected wider public discourse. Whilst some respondents were "deeply conflicted", others expressed very strongly held, completely opposing, views.

For those people who most closely aligned with View A

.... many of the responses concerned the vulnerability of female prisoners and the need for them to be protected from further harm. The psychological impact and the triggering of trauma responses was highlighted both hypothetically and in first-hand accounts.

The "case by case basis" on which decisions of where to house someone were being taken was described as ineffective because it could still allow recognisably male people into women's accommodation; and because it relies on the identification of individual risk, which is often unknown to the authorities, due to the under-reporting of sexual offences.

It was reported that "trans-identifying male prisoners [had] committed sexual or violent offences at rates much higher than the typical male prison population";

and that it was a known strategy for some men to claim to be transgender to effect a move to the women's estate in order to target vulnerable females. Some respondents were unequivocal in their belief that "people cannot change sex" and thus that what they described as "mixed-sex imprisonment" was "immoral".

For those people who most closely aligned with View B

.... many of the responses acknowledged the issue of risks to females in the women's estate and emphasised the importance of corresponding risk assessment. Some therefore suggested that evidence of a transitioning journey begun prior to sentencing should be required.

Mention of risk was often associated with a call for decision-making to be made on a case by case basis.

The complexity of the debate was illustrated by the point that the Equality Act 2010 was used as incontrovertible evidence in support of both View A and View B by some of our members.

A clear procedure to address the concerns of all those who may consider themselves to be at risk – and for all such risks to be addressed urgently – should be provided. In other words, there must be clear and equivalent procedures to address both the perceived risks to transgender men in the male establishment, and the perceived risks from transgender women to others in the female establishment, in any future policy.

Any new policy should not prioritise the views or experiences of transgender people over others, and given their potential vulnerabilities, the views of female prisoners should play a much greater part in the production and implementation of the policy than has previously. It is thus important that any involvement in this process by organisations representing transgender people are not 'foregrounded' or given greater voice over others, and that appropriate weight is given to all those involved and affected.

Any generalised assumptions of underlying risk must have a clear and transparent evidential basis to justify any 'default' policy position that transgender men may be safely allocated to the male establishment and transgender women may be safely allocated to the female establishment. Safety in this context must include both transgender and non-transgender prisoners who may be accommodated together.

The role of individualised risk assessment must also be made clear and a great deal more detail is required in terms of the identification, monitoring and management of safety concerns and potential risks to all prisoners.

Keep Prisons Single Sex

Keep Prisons Single Sex (KPSS) is an independent campaign group founded in 2020. Initially focused on the sex-based rights of women in prison, our work now includes risk assessment and safeguarding as well as service provision and data collection throughout the criminal justice system across the United Kingdom.

Having reviewed the 2023 Scottish Prison Service Policy for the Management of Transgender People, albeit that the publicly available documents leave important questions unanswered, including those regarding the operation of the policy and the use of terminology around gender and gender identity, we conclude that the policy is insufficient for the safety of female offenders.¹

The SPS policy stands in marked contrast to the revised Ministry of Justice policy, which came into effect at the end of March 2023:

<https://assets.publishing.service.gov.uk/media/642d40997de82b001231364f/transgender-pf.pdf>

Notwithstanding that SPS states that due consideration was given to policies in other jurisdictions and that the Ministry of Justice was consulted, we believe that SPS must provide thorough and detailed justification for the decision to implement a policy with a radically different starting point and priorities, which contains fewer criteria to limit the male prisoners that may be allocated to the general population of the female estate, which conceptualises risk in a significantly different way and set against a background which appears to indicate that SPS is unaware of international convention.

We find this departure surprising. The MoJ has the greatest experience throughout the UK and Channel Islands in managing this cohort of prisoners² and of devising the relevant policy in line with both local and global emerging evidence, international convention and legal opinion as reflected through case law. Here, we note that notwithstanding the judgement in the judicial review *R (FDJ) v Secretary of State for Justice* where the previous 2019 MoJ policy providing for the allocation of prisoners who identify as transgender was judged to be lawful, the MoJ still chose to take a different path for the 2023 policy, taking the necessary legal advice to ensure that the resultant, more restrictive, policy would also be lawful, with the expectation that decisions made in accordance with the 2023 policy could be defended in a court of law. At the time of its release in 2023, the MoJ policy was globally the most recent policy for the care and management of prisoners who identify as transgender. In our opinion, it set a global precedent as a minimum standard for safety and the management of risk in the female estate in consideration of the management of prisoners who identify as transgender.

¹ Here we note that the scope of the protected characteristic 'gender reassignment' in the 1 Equality Act 2010 is contested.

² In 2023, the MoJ reported that there were 269 prisoners who identified as transgender and a 2 further 11 who had been issued with a GRC. Of those 269, 225 were of the male sex as registered at birth and 44 were of the female sex as registered at birth.

https://assets.publishing.service.gov.uk/media/65675a9d312f400013e5d5f3/HMPPS_Offender_Equalities_2022-23_Report.pdf

We stress that it was open to SPS to reproduce in their policy the lawful provisions made by the MoJ. The active choice was made not to do so and instead to produce a policy which does not prioritise the legitimate and lawful needs of female prisoners to be housed in safety.

The starting position of the MoJ is the safety of women in prison: this principle is at the heart of the policy and the allocation criteria, which are grounded in a commitment to understanding the basis of risk and its established relationship to sex registered at birth, reflect this. The aim of the MoJ, when considering the allocation of male prisoners who identify as transgender, is to achieve a situation in the female estate where there is a high degree of confidence that only a low level of risk to female offenders is present. In respect of this cohort of male prisoners, allocation decisions to the female estate are made in consideration of what is in the best interests of women in prison regarding their safety: where the allocation of a male prisoner who identifies as transgender to the female estate is not in the best interests of the women held there in regard to their safety - where there is no longer a high degree of confidence in a low level of risk - that prisoner cannot be held alongside women.

By contrast, the SPS policy has at its heart the principle of maximising opportunities for prisoners who identify as transgender to be allocated to the estate that corresponds to their expressed or acquired gender. This drives the policy, with part of the rationale for the allocation criteria SPS sets better enabling prisoners who identify as transgender to live alongside those who correspond to their expressed or acquired gender post release.

Here we can see that decisions to allocate to the female estate are made in consideration of what is in the best interests of the prisoner of the male sex who identifies as transgender: the opportunities for that prisoner to be allocated to the estate corresponding to their expressed or acquired gender must be maximised, including in consideration of their best interests post release. Nowhere are such wide reaching and expansive considerations shown to female offenders. The best interests of the prisoner who identifies as transgender can only be overridden where the risk posed to female offenders is “unacceptable”. This is a very different way of conceptualising and demarcating risk compared to the MoJ: “acceptable” risk is arguably set at a higher threshold, albeit imprecisely and poorly defined (how is this to be operationalised for the purposes of risk assessment?), in comparison to “high degree of confidence in a low level of risk”.

The overriding commitment to maximising these opportunities for prisoners who identify as transgender means that even those whom SPS assess as presenting a degree of risk that is “unacceptable” meaning that accommodation within the female estate has been ruled out, may still be permitted “day passes” to the female estate in order to access activities and to mix with the women. This blatantly and unashamedly sees female prisoners as providing a service of “validation” or as objects to be studied and emulated in order that these male prisoners might have the chance to “practice” being women prior to release. We find this remarkable and frankly cynical. This is indeed the *reductio ad absurdum* of this policy: unconsenting women are tasked with the role of affirming these prisoners’ identities and assisting in their socialisation as women, regardless of the personal cost to them, in service of what is deemed to be these prisoners’ best interests.

The criteria the MoJ have set reflect a clear view of risk based on known offending history, in consideration of the established importance of sex registered at birth to patterns of offending.³ These criteria also reflect international convention, specifically, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measure for Women Offenders (the Bangkok Rules)⁴ which address the necessity of recognising the sex-based needs of women in prison and their specific vulnerabilities.⁵ Throughout the Bangkok Rules, close attention is paid to the specific needs of women that exist by virtue of being of the female sex and the minimum standards expected of prison regimes in relation to these. These include needs relating to pregnancy, the postpartum stage, breastfeeding, mothers with babies and infants, menstruation, gynaecological health and breast cancer screening. Subcategories of women whose specific needs are discussed include juvenile female offenders, minority/indigenous women and foreign nationals.

The Rules also assist states in understanding their responsibilities in preserving the dignity of women in prison including in relation to strip searching and the need for privacy when dressing, bathing and toileting. The Rules clearly use language referring to needs stemming from female biology. It would have been open to the Rules to also provide for the specific needs of prisoners whose sex registered at birth is male and who have expressed or acquired a female gender (e.g. access to hormone treatment or surgery, permitting the prisoner to wear the uniform for females) and/or to including the members of this group as a separate category of woman. Yet the Rules do neither. Thus we conclude that the Rules provide for women as a group defined in terms of sex registered at birth that excludes those whose sex registered at birth is male and who have expressed or acquired a female gender, whether or not they have also been issued with a GRC. Further, the Rules could have excluded from the group “women” those whose sex registered at birth is female and who have expressed or acquired a male gender, whether or not they have also been issued with a GRC. Yet the Rules do not this either.

To summarise, the MoJ criteria are:

1. No male prisoner who identifies as transgender convicted of any violent or sexual offence including against men and boys may be housed in the general population of the female estate.
2. Separately, and regardless of conviction, no male prisoner who identifies as transgender with intact male genitalia may be housed in general population of female estate.
3. GRC status is not relevant to allocation decisions: there is no longer a presumption that male prisoners who identify as transgender with a GRC will be allocated to the female estate meaning that these prisoners who have been issued with a GRC

³ e.g. Longitudinal research by Dhjene et al (2011) shows male-to-female transitioners retain the same risk of male-pattern criminality both in relation to crime generally, and to violent crime. Recent data from the MoJ reveal that over 40% of male prisoners who identify as transgender have been convicted of a sexual offence: this is in excess of their rate for men in prison (around 18%) and women (around 2%). Note these data have not been disaggregated according to the sex of the victim and include sexual offences against men and boys.

⁴ https://www.unodc.org/documents/justice-and-prison-reform/4_Bangkok_Rules_ENG_22032015.pdf

⁵ This is notwithstanding that some of the rules are also applicable to men held in prison.

signifying that they have obtained legal recognition of an acquired female gender can be, and are, allocated to the male estate.

4. Exceptions will only be considered where the body of evidence results in a high degree of confidence in a low level of risk to women. Prisoners that pass this test must then be signed off firstly by the Director of HMPPS and subsequently by the Secretary of State for Justice. Both Director of HMPPS and Secretary of State for Justice have the power to block any proposed allocation to the general population of the female estate: this is not merely a tick box exercise. We consider that this provides a much-needed check and important element of accountability.

We note that, unlike the SPS, the MoJ has never allocated a female prisoner who identifies as transgender to the male estate. We understand that this will simply not be considered, again regardless of GRC status. Instead all female prisoners who identify as transgender are managed in the female estate. The reason for this, which is to ensure the safety and security of these prisoners, is in our view self evident, absolute and no process of risk assessment can ever be appropriate or adequate to permit a decision to allocate to the male estate. We remain concerned that SPS continues to allow prisoners of the female sex to be housed in the male estate.

SPS sets different criteria:

1. No male prisoner who identifies as transgender convicted of any violent or sexual offence against women or girls may ordinarily be housed in the general population of the female estate.
2. Exceptions may be considered where an individualised assessment results in compelling evidence that the prisoner in question does not present an unacceptable risk of harm to women in prison.
3. Separately, male prisoners who identify as transgender who it is necessary to house in the male estate may be permitted to access work parties, activities, or programmes in the female estate in order that their gender identity is supported.

Here we note that the Bangkok Rules have not been included in the list of international human rights standards and instruments in the EHRIA, and we question why this is. We also question why the United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)⁶ and the Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence (the Istanbul Convention)⁷ have also been excluded: the UK is party to and has international obligations under each of these conventions. CEDAW defines woman on the basis of sex and the Istanbul Convention recognises that women and girls suffer disproportionately from domestic and gender-based violence on the basis of their sex. Clearly sex registered at birth matters when it comes to the UK's international legal commitments to the protection of women and girls and this includes the circumstances of their incarceration. We note that SOGI (sexual orientation and gender identity) rights and protections are a separate category and do not automatically replace or 'trump' sex-based rights and protections.

⁶ [Microsoft Word - Document1 \(ohchr.org\)](#)

⁷ <https://rm.coe.int/168008482e>

Instead, the EHRIA emphasises the Yogyakarta Principles. We find this both unusual and are concerned that the Yogyakarta Principles have been positioned by SPS as on a comparable footing with international human rights law. The Yogyakarta Principles have the status of opinion as agreed by a self-selected group of representatives from various NGOs and UN treaty monitoring committee members. The Principles are not binding in international law, they have been neither negotiated nor agreed by member states of the UN. They have not been incorporated into UK law. We are concerned that reliance on the Principles has been legitimised and without regard to the impact on law and the potential conflicts with ECHR convention rights. We consider the emphasis SPS has placed on the Principles, particularly in light of the lack of consideration given to international convention, to be unjustified

Whereas the MoJ policy does not apply to prisoners who identify as gender diverse, gender fluid, non-binary, or any other similar variant, inasmuch as these prisoners will be managed and allocated according to their sex registered at birth, SPS has stated that a specific policy for the management of prisoners asserting this range of identities is planned. We agree with the stance taken by the MoJ and see no legitimate need to treat these prisoners in any way other than in accordance with their sex registered at birth. We urgently request that the terms of reference for this proposed policy be made available including the anticipated timeline and provision for internal and external stakeholder consultation. Please take this submission as a request to be included as an external stakeholder.

Murray Blackburn MacKenzie

- The revised SPS policy has an erratic and opaque history. The SPS first stated it intended to review its policy in [late 2018](#), in comments made to the press, although no visible progress was made on this. In 2020 the then Cabinet Secretary for Justice [stated](#) the review was already underway, but this was not taken to completion.
- The review underpinning the revised policy ran from 2021 and 2023; however, in early 2023 the SPS introduced more restrictive [interim guidelines](#), in response to the placement of double-rapist Graham/Bryson in the female estate and backlash to this.
- The SPS has consulted more widely on the revised policy, compared to its 2014 policy, but arrived at the same position, based on gender self-identification principles. Prisoners seeking to be accommodated and/or searched based on their gender identity are expected to 'demonstrate' their identity, but this is not essential ([p.36](#)).
- More comprehensive operational guidance is provided for in a separate document, but this is not publicly available, putting the detail of the policy beyond scrutiny.
- The default policy excludes men with a known history of violence against women from the female estate; but provides for transfer if 'there is compelling evidence that they do not present an unacceptable risk of harm' ([Annex 1](#)). 'Unacceptable risk' is not defined.
- For men not housed in the female estate, access may be provided via work parties, activities, and programmes to allowing mixing 'with others of their gender identity' ([p.15](#)). We think this risks, at minimum, psychological harm and/or self-exclusion for some female prisoners.
- The revised policy requires internal authorisation to move a man with a history of violence against women in the female estate. This relaxes the recent interim guidelines, which required Ministerial approval, and removes political accountability.

Equality and Human Rights Impact Assessment

- This note looks at the underpinning [Equality and Human Rights Impact Assessment](#) (EHRIA), which we believe is below the acceptable standard for an organisation of SPS's size and responsibilities. The assessment ignores or downplays relevant evidence and gives unequal weighting to the vulnerabilities of trans and female prisoners.
- Limited methodological information is available on the 'scoping and evidence gathering' exercise underpinning the policy review. No information is presented on the written survey issued to prisoners, beyond the number of participants and participation rate. Fewer than half of female prisoners completed the survey (40%). It is unclear how the SPS dealt with low literacy rates among the prison population.
- The SPS also conducted interviews with eleven 'non-transgender men and women,' nine transgender prisoners, and 13 staff members. The interview schedules are not available, the breakdown of interviewees by sex is not given, and no detail is provided on the recruitment process, or how interviews were conducted.

- The SPS published a public engagement exercise on its website, which ran for one month before the review closing date and attracted three responses ([p.8](#)). No explanation is given as to why this exercise was undertaken so late in the review process.
- As part of the policy authorisation process, the SPS engaged with ‘experts in combatting violence against women’ ([p.8](#)), including Police Scotland, academia, and two third-sector organisations. Aside from Police Scotland, which [promotes self-identification](#) principles, no detail is provided on the other experts.

Incomplete and unbalanced review of international obligations and wider research

- The Yogyakarta Principles, which promote self-declaration, are cited at length, which the SPS asserts ‘reflects existing international human rights law and best practice’ ([p.10-11](#)). These principles are highly contested, do not consider women’s rights, and do not create legal obligations. They are the creation of a self-appointed group of activists.
- The EHRIA partially quotes [Nelson Mandela Rule 11](#) (pertaining to prisoner categories), omitting the reference to the sex category ([p.10](#)). When read in its entirety, the revised policy does not meet the standard on single-sex separation.
- The UN Rules for the Treatment of Women Prisoners and Non-Custodial Measure for Women Offenders ([Bangkok Rules](#)) are not referenced. Guidance on the Bangkok rules published by [Penal Reform International](#) (2021) explains how safety is key to women’s needs in prisons, and dependent on separation from men.
- Neither [CEDAW](#) nor the [Istanbul Convention](#) are referenced. The latter requires parties to take measures to prohibit discrimination against women and provide specialist support services to female victims of sexual and domestic violence. Its relevance is underscored by Scottish research which found 70% of female prisoners reported childhood sexual or physical abuse, and 85% reported adult sexual or physical abuse ([MacMillan et al. 2022](#)).
- The EHRIA states ‘Learning was also gathered from published policies and research on policies from other jurisdictions’ ([p.8](#)) but does not list the countries or policies.
- The review of ‘SPS Research, Strategy and Policy’ ([p.11](#)) does not include the seminal Commission on Women Offenders report ‘[Angiolini report](#)’, the SPS (2019) [New model of custody for women](#), [Strategy for women in custody 2021-25](#), or any other literature on the needs of female prisoners. Given the most controversial policy strand relates to placing men in the women’s estate, these are extraordinary omissions.

Inadequate presentation of consultation results

- The full results from the prisoner survey are not shown, and the results that are shown are poorly presented. For example, the finding that two-thirds of female prisoners saw the safety of ‘other people in custody’ as important is downplayed as ‘not as important to them as other [unstated] factors’ ([p.14](#)).
- A structured overview of the interview data is not available. Most views cited are broadly attributed to ‘stakeholders,’ ‘staff’ and other categories, without supporting detail.

- The revised policy is described as ‘backed by the evidence gathered from people and groups interviewed for this review as well as comparative research and assessment of international human rights standards’ ([p.12](#)). This ignores critical evidence provided to the review and international rights standards on the rights of women.
- Written submissions (HM Inspector of Prisons Scotland, Scottish Human Rights Commission and Families Outside) are not published. In June 2023 the SHRC Chief Executive told us the Commission was looking to withdraw its submission to the review (see further [here](#)).

Minimising women’s concerns

- The EHRIA covers a range of concerns relating to women in custody, including those raised by female offenders and prison officers, however these are largely minimised.
- Women are relegated to a subset of their own sex-class and described as ‘non-transgender women’ ([p.12](#)). The fact that transwomen are male is framed as ‘a perception’ ([p.20](#)).
- The EHRIA uncritically presents stakeholder comments that draw a false equivalence between violent men and violent women, and frame concerns about the former as ‘stigmatising’ ([p.21](#)).
- The EHRIA states ‘Staff... pointed out that violence in prison is not solely motivated by gender, or a person’s status as a transgender person, and therefore blanket approaches for placement of transgender people in custody would not fully eliminate risks of violence’ ([p.14](#)). This is misdirection, removing focus from the risk of violence from male prisoners in the female estate.
- The EHRIA states ‘VAWG experts also stated that no approach, blanket or otherwise, could prevent predatory men from seeking to manipulate the system’ ([p.14](#)). This is either untrue (a blanket ban cannot be exploited), or, if an allusion to men other than male prisoners with trans identities, it is whataboutery.
- The EHRIA states discussions with prisoners found ‘incidents of violence were often preceded by disagreement or tensions which were not typically motivated by gender or transgender status’ ([p.14](#)). This is a non-sequitur. Concern around the placement of men in the women’s estate relates to sex-based risks of violence, not motivation related to ‘gender’.
- A separate SPS [Executive Statement](#) ([p.6](#)) asserts a blanket sex-based approach ‘does not enable SPS to adequately consider and manage risk that people may present to themselves or to others, including VAWG’, is counter to ‘obligations placed on the SPS’, and ‘fail to acknowledge gender identity’. This ignores the routine housing of trans-identified men in the male estate.
- The EHRIA states generalisations about the transgender prisoner population are difficult, given the small numbers ([p.37](#)). The relevant risk factor is sex, not gender identity. Canadian Corrections Service prison population data shows gender identity does not override sex ([Phoenix, 2023](#)). Longitudinal research by [Dhejne et al. 2011](#) also shows the risk of violent offending among men, including sexual offending, does not change after sex reassignment.
- The EHRIA refers to commentary made in the [FDJ judgement](#) on the high proportion of trans-identified sex offenders in prisons in England and Wales; but *only presents the view of the Defendant* ([p.37](#)). This argued there was no reliable statistical case to show trans-identified male prisoners posed a

disproportionate risk of harm to female prisoners ([para. 65](#)). The Judge, however, accepted that placing trans-identified men in the female estate carried a higher risk of sexual result, but rejected the more precise risk estimate made by the Claimant ([para. 75](#)).

- The EHRIA uncritically quotes correspondence from the former UN Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity, stating that his mandate had not received any information on the abuse of self-identification laws or policies ([p.18](#)). This ignores that he strongly advocates for replacing sex with gender identity in law and policy, has overlooked available evidence on the adverse effects of self-identification, and ignored reasons why evidence is hard to obtain.
- The EHRIA downplays risks associated with the placement of men in the female estate, describing these as 'perceived' and a 'perspective' ([p.38](#)).

Searching

- The revised policy provides some limited protections for prison staff (see further [here](#)). Whereas the 2014 policy provided for searching based on 'gender', with the aim of affirming a person's self-declared identity, the revised policy also allows searching based on sex, at the discretion of the prison governor.
- The revised policy does not allow female officers to automatically 'opt-out' of searching men, and vice-versa (due to the likelihood that most would). An opt-out route may be available via HR; it is unclear if officers will be required to disclose personal details to access this.

Compelled speech

- The [revised policy](#) states 'gender identity and corresponding name and pronouns will be respected irrespective of where they are accommodated' ([p.2](#)). The EHRIA notes some external stakeholders raised issues around 'thought policing' ([p.18](#)) and states the 'challenge will be for SPS and its staff to create an environment and space where open and respectful discussions can happen' (*Ibid.*).
- In practice, the revised policy compels the use of preferred names and pronouns. To this aim, 'misgendering' is treated as a potential breach of ECHR Article 3 ([p.41](#)).
- The revised policy bases this on the Forstater ruling; but this did not express a view on how reasonable, or in what circumstances it might be reasonable, for employers to compel others to use preferred pronouns/names. This conflict of rights remains to be tested in the courts.
- Compelling staff to refer to men convicted of rape (Adam Graham/Isla Bryson) and child abduction and sexually assaulting a child (Andrew Miller) as women is a serious incursion into freedom of expression that raises issues around power and control. That both the former and current First Ministers refused to refer to Bryson/Graham as a woman is indicative of the difficulties here. We note that the current First Minister also [stated](#) Bryson was 'not a genuine trans woman' and 'trying to play the system'.

Loss of transparency

- In late 2021 the SPS began to publish limited data on the number of trans-identified prisoners and location (male or female estate) (see further [here](#)). Data for [January to March 2023](#) shows men with trans identities accounted for around 2.6% of the female estate. Whilst small, the impact of this likely to be asymmetrical, and felt by all women in an affected prison.
- Under the revised policy the SPS will continue to publish data on the number of transgender prisoners; but no longer specify whether they are housed in the male or female estate, citing guidance published by the Chief Statistician. This is unconvincing, given the SPS publishes [prison population data](#) with low values, and raises accountability concerns in a controversial policy area.

Interpretation of the Equality Act 2010

- The recent ruling in *For Women Scotland Limited v The Scottish Ministers* [2023] CSIH 37 confirmed that under the Equality Act 2010 the SPS is fully entitled to treat men with the protected characteristic of gender reassignment, who do not hold a GRC, as male. This provides the basis for a policy founded on a strong assumption against moving men without GRCs into the female estate.
- The SPS appear to interpret the Equality Act 2010 as broadly permitting male access to the female estate, based on the protected characteristic of gender reassignment, with exceptions permitted on a case-by-case basis, where proportionate.
- The EHRIA states that in relation to single-sex spaces, the gender reassignment provisions in Schedule 3 para. 28 allow the SPS to 'provide programmes and services within the women's estate for women who are not transgender, *only* if the presence of a transgender woman would prevent the achievement of the aims of the programme or service' ([p.39](#), emphasis added). This reverses the framing of the legal test, which is a positive one that allows single-sex provision if it is 'a proportionate means to legitimate aim'.

Privacy protections for GRC holders

- The EHRIA emphasises the need to ensure information about Gender Recognition Certificates (GRC) is kept confidential but recognises it may need to be disclosed for some purposes. This appears to underscore the relevance of GRCs to prison management. At the same time, the EHRIA states, 'it is inappropriate, and can be discriminatory, to ask individuals if they have a GRC to prove their legal sex' ([p.18](#)).
- We note that [secondary legislation](#) is currently lodged before the Scottish Parliament (SSI 2023/364), which seeks to exempt SPS staff from penalties for disclosing a person's GRC status in some circumstances. We could not find a reference to this in the EHRIA.

Unbalanced rights assessment

- Despite impacting on two vulnerable groups, the rights assessment focuses almost exclusively on the rights of transgender prisoners. The analysis of various ECHR Articles is not mirrored for female prisoners.
- The EHRIA does not assess international rights standards on the distinctive rights and position of women. As noted by Methven O'Brien (2023), the starting point for these [standards](#), as well as the [Prisons and Young Offenders Institutions \(Scotland\) Rules 2011 \(Part 13\)](#), is that prisoners should be accommodated on a single-sex basis.
- The EHRIA states poor mental health rates are higher among the transgender population, compared to the general population, and the revised policy 'promotes the right to health' (p.29). It does not discuss the prevalence of trauma and poor mental health in the female prison population, and how this might be exacerbated by placing men in the female estate.
- The EHRIA states privacy is provided for showering and dressing (p.41). We understand that shower cubicles in the female area at HMP Greenock are not fully enclosed.

Failure to acknowledge recent policy change in England and Wales

- The EHRIA states the SPS met with Ministry of Justice (MoJ) officials; but does not discuss the revised MoJ [policy criteria](#) introduced in early 2023, which provides far stronger protections for women, whilst avoiding a blanket ban. Under this, men are excluded from the female estate, based on either retaining their male genitalia and/or a history violent offending against women. Any exceptions to this require Ministerial approval, therefore providing political accountability.

Failure to acknowledge current policy and practice

- The strong weight attached to the need for gender affirmation, via contact with female prisoners, is undermined by the routine accommodation of trans-identified men in the male estate. Between [January and March 2023](#) the SPS housed 12 men with trans identities in the male estate, compared to 7 in the female estate.
- Other vulnerable men are also housed in the male estate, some of whom will be held separately (protected groups). It is difficult to understand why the SPS believes responsibility for affirming the non-falsifiable identities of some men should fall on women prisoners.

Misplaced confidence in risk assessment

- The EHRIA states that 'controls and criteria in place will seek to mitigate the risk of predatory transgender women from being placed in the women's estate and SPS is confident in the robustness of its arrangements' (p.35). No consideration is given here for factors other than physical safety, including psychological risks and trauma.
- The risk assessment places a strong emphasis on recorded offending histories; but does not discuss that most violence against women goes unreported.

- The EHRIA states the SPS believes the previous policy ‘functioned generally well’ ([p.22](#)). It is not acknowledged that the SPS was required to put interim guidelines in place, following the placement of a double-rapist in the women’s estate.
- The EHRIA states further, ‘SPS does not have evidence from its own population in custody that transgender women pose a risk to non-transgender women, or indeed to other transgender women in custody’ ([p.37](#)).
- Cases contrary to this include Daniel/Sophie Eastwood, convicted of murder, and held in Scotland’s female estate. [Press reports](#) state that whilst housed in the male estate, Eastwood [terrorised a female officer](#), who left her job as a result. Also, [Richard McCabe/Melissa Young](#), convicted of murder and held at Cornton Vale, where he [bit a female prison officer](#).

Conclusion

The revised SPS policy on transgender prisoners, despite its focus, involves two vulnerable groups: transgender prisoners and women. Yet despite a lengthy review process, it appears that, for the most part, the SPS has only considered the needs of the former in depth.

We think it is likely that the SPS began its review with a retained commitment to self-identification principles. Instead of asking why any men should be allowed to access the female estate, it has focused on developing a policy that ensured at least some men would be allowed access. To reach this position, it has ignored or downplayed relevant evidence relating to the vulnerability and trauma of women prisoners, male offending risks, and human rights standards. The SPS maintains it cannot uphold a blanket ban on placing men in the female estate but provides no convincing explanation. It maintains a blanket ban is incompatible with its requirement to recognise gender identity; but ignores that trans-identified men are routinely housed in the male estate. It appears to not recognise its [own record](#) of placing violent men in the female estate, including those convicted of murder, torture, voyeurism, and sexual assault.

The EHRIA concluded that the SPS had not identified any potential for unlawful discrimination, adverse impacts, or breaches of human rights articles. It could only realistically reach this conclusion by placing less weight on the rights and needs of women. That the SPS claim its revised policy, which allows for violent men to be housed with women, ‘advances equality and human rights as well as fosters good relations’ ([p.43](#)) suggests an organisation that does not understand the conflict of rights underpinning its own policy.

This is not an isolated case. The same failures are evident in the [equality assessments](#) underpinning the two Scottish Government consultations on gender recognition reform. Like the Scottish Government, the SPS fails to understand that concerns about self-identification relate to sex, not gender identity, and that the population-level risks presented by men with trans identities are just the same as other men.

The SPS has taken five years to develop and finalise a policy that disapplies safeguards, designed to protect women, for a small group of men, based on nothing more than a declared and non-falsifiable identity claim.

We would advise MSPs to insist that the current interim policy, devised after the Graham/Bryson case, stays in place indefinitely, until such time as SPS is able to produce a replacement which gives proper weight to the rights of vulnerable women in prison, as the revised MoJ policy does. Any work begun in preparation for bringing the new policy into force next month should be stopped.

Scottish Trans Alliance

NB. The Equality Network indicated that the views in the following submission are the same as theirs and so they would not be sending a separate submission.

1. Updated SPS Policy on the Management of Transgender People in Custody

We were invited to provide a written response to the Scottish Prison Service in March 2022 when they were in the process of updating their policy on managing trans people in custody. We have included our response in full at Annexe A of this letter, in order for the committee to understand our complete view on the most appropriate way for SPS to operate a policy on the management of trans people in custody.

Overall, we think the updated policy strikes the right balance in ensuring that the equality and human rights of all people in custody are upheld. It does this by seeking to respect trans people's lived gender identities, while considering the safety and dignity of all people in custody, and aiming to promote people in custody's wellbeing. We think that using comprehensive individualised risk assessments is the only appropriate way of taking decisions about which estate trans people in custody are housed on.

However, one area of concern we have where the policy may not achieve its aims is in relation to non-binary people in custody. The policy states that:

"This policy does not apply to people who are gender diverse (for example, people who are non-binary or gender fluid), who will be managed in accordance with their sex at birth."

This will result in some non-binary people being held in either the male or female estate when this is clearly inappropriate to their particular personal circumstances. We are concerned that SPS have not properly understood the range of ways in which non-binary people may transition. Operating a blanket policy about where they will be housed will have the same potential negative consequences on the safety, dignity and wellbeing of non-binary people, that operating a blanket policy to hold all trans men and trans women on the estate corresponding to their sex registered at birth would have on them.

For example, a non-binary person may have socially transitioned, changed their name and gender expression, or undergone gender affirming medical interventions which mean that they are mostly or wholly perceived by others as either male or female, or as gender non-conforming and/or androgynous. Insisting on housing them in accordance with their sex at birth could place them at significant risk of abuse, harassment and violence.

We think that that this is a significant and serious gap in the current policy, and that as well as potentially leading to non-binary people facing abuse, harassment and violence, could also potentially lead to breaches of their human rights.

2. The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2023

Overall, we feel neutrally about the changes that would be made to the Prisons and Young Offenders Institutions (Scotland) Rules 2011 by this SSI. However, we think it will

be extremely important that prisons monitor changes to their practice as a result of this amendment to the law, and review whether changes have resulted in any negative impact on people in custody and people visiting and working in prisons.

As we understand it, the SSI would amend the rules on searching prisoners, conducting compulsory drug and alcohol testing, searching visitors, searching of specified persons, and searching of officers and employees, so that searches and tests may be conducted by an officer of a different gender to the person being searched or tested. This would be allowed only if the Governor considers it to be necessary for the purpose of protecting the health, welfare or safety of any person, or the security or good order of the prison. We imagine that there could be a variety of situations, all of which would be described by the reasons prescribed in the SSI, that might mean that the most appropriate course of action would be to require an officer of a different gender to conduct a search or test of a person.

However, it will be important to ensure that the amendment to the rules does not result in people in custody, or people visiting and/or working in prisons, being routinely tested or searched by officers of a different gender. The initial intention of Parliament when passing the rules in 2011 was clearly that in all instances searches and tests should be conducted by an officer of the same gender as the person being searched or tested. The proposed amendments seem to us to be aimed at providing for some exceptional circumstances in which this approach can be disapplied. It is important that this exceptionality is then reflected in the practical application of the law within prison estates.

It would be wholly inappropriate, for example, for this SSI to result in all trans people in custody being searched or tested by officers of a different gender to them as a blanket policy, or, for example, for visitors to prisons to be routinely searched by officers of a different gender to them due to workforce issues.

We would suggest that the Governor should record all instances where they have taken the decision to require an officer of a different gender to conduct a search or test, and the reason for doing so. This should include both which of the reasons within the law is being relied on to take the decision, as well as a short description of the circumstances and rationale. This record should be kept under regular review, to ensure that:

- a) No groups of people in custody or people visiting and working in prisons, who share a protected characteristic, are experiencing discriminatory application of the exception to the general principle that people are searched or tested by an officer of the same gender. This is particularly important given that the Governor is required by Section 6 of The Prisons and Young Offenders Institutions (Scotland) Rules 2011 to “seek to eliminate within the prison discrimination on the grounds of” all protected characteristics in the Equality Act 2010, and “other status”. Whilst this submission is focused on trans people in custody, and thus those with the protected characteristic of gender reassignment, it would of course be extremely important to ensure that there was no discriminatory application of the rules for any groups.
- b) Where the reason within the law that is recorded for the Governor to require an officer of a different gender to conduct a search or test is ‘good order of the prison’, Governors should consider whether there are wider issues that need to be addressed, to reduce the need to rely on the exception to the general rule. We

think that ‘good order of the prison’ is the reason which has the highest risk of being relied upon in circumstances where this is not the most appropriate course of action, because the circumstances could and should be addressed in other ways. For example, if a Governor was routinely recording this as a reason for a search or test being conducted by an officer of a different gender, and the additional observation included remarks about availability of staff, then urgent action should be taken to rectify staffing levels rather than continuing to rely on the exceptions.

3. Gender Recognition (Disclosure of Information) (Scotland) Order 2023

This SSI makes changes to the operation of the Gender Recognition Act 2004, around the exceptions to the offence of disclosing ‘protected information’ that is obtained in an ‘official capacity’. We think that these changes seem reasonable and proportionate, and will ensure that relevant criminal justice agencies can share such ‘protected information’ where it is necessary for offender management.

Annexe A: Our response to the SPS Gender Identity and Gender Reassignment Policy review

1st March 2022

Policy intent

1 What do you think the main objectives of the policy should be? What are the outcomes that you think the policy should set out to achieve?

The policy should seek to respect trans people’s lived gender identities and to uphold the human rights and equality of all people in custody. It should set out to achieve safety and dignity for all people in custody, and to promote their wellbeing. It should support trans people in custody to express the gender with which they identify and to access NHS gender identity services. It should ensure that accommodation decisions take into account the trans person’s preferences and their lived gender identity, together with comprehensive individualised risk assessment that considers their safety and needs and the safety and needs of others. It should be clear, and allow staff to have confidence in the process and in the decisions they are taking.

2 When we consider the existing policy, we could say that the SPS considers a persons lived gender identity in concert with risks and the security and safety of both the transgender person, and others that they will be living alongside.

- **What other policy options should SPS consider?**
- **What are the key considerations that should SPS should take into account when considering these policy options?**

A policy which “considers a person’s lived gender identity in concert with risks and the security and safety of both the transgender person and others that they will be living alongside” is a policy that is addressing all the legitimate considerations. There are no other policy options that better respect equality, diversity, human rights and safety. In

particular, the management of trans people in custody cannot lawfully be reduced down to purely their genitals or their birth certificate - the wider circumstances of a person's lived gender identity, risks and vulnerabilities need to be considered and individualised decisions made.

The only way of ensuring that trans people in custody have their human rights lawfully upheld is to operate a policy that considers lived gender identity alongside risks and security and safety of trans people and others that they will be living alongside when making decisions about their accommodation and treatment. The best way of ensuring safety for all is to centre risk assessment within individualised decision-making.

Although SPS may want to make specific changes to the operation of the policy, such as what factors should be accounted for when determining risk, and how the case conference decision-making process functions, the principles of the current policy – that it “considers a person's lived gender identity in concert with risks and the security and safety of both the transgender person and others that they will be living alongside” – is the correct approach.

3 Thinking about this policy as a whole, how should SPS assess whether it is being delivered successfully? What do you think the indicators for success should look like?

- **How do we successfully deliver this policy in practice? Are there barriers to delivering this policy that could stop it being successful?**

To help assess whether the policy is being delivered successfully, SPS should keep records of:

- the number of trans women, trans men and non-binary trans people known to have been in SPS custody during each year and which estate each was accommodated in;
- all decisions made using the policy, including risk assessments carried out;
- any complaints raised by trans people in custody, other people in custody, or by staff, about any decision made using this policy;
- any incidents of physical or sexual harassment or assault reported within the prison estate where the victim or the accused is a trans person;
- any incidents of self-harm or psychological crisis experienced by trans people in custody.

After 3 years of policy operation, the above data should be analysed and combined with research interviews of trans people in custody, others in custody, staff and equality organisations about their experiences and views of the policy's operation in order to determine how successfully the policy is functioning.

Barriers that could stop the policy from being successful could include:

- lack of staff training on how to use the policy;
- inconsistent record-keeping of risk assessments and justifications for decisions;
- prejudice and discrimination towards trans people leading to biased decisions.

4. Are there any particular groups or individuals that you believe SPS should include within the review process?

Trans people in custody, other people in custody who are living alongside trans people, SPS staff, LGBT equality organisations and women's equality organisations.

Assessing risk

5. What are the potential risks that transgender and cisgender populations could face when being cared for in a custodial environment?

The risks that transgender people in custody face include:

- transphobic discrimination by staff or by other people in custody;
- physical and sexual harassment, assault or exploitation by staff or by other people in custody;
- psychological harm from verbal abuse mocking their gender identities or deliberately misgendering them by staff or by other people in custody;
- psychological harm from restrictions on their association with other people in custody who share their lived gender identity;
- psychological harm from denial of access to reasonable items that enable their expression of their gender identity, such as hair pieces, prosthetics, binders, make-up, etc.;
- physical and psychological harm from denial of, or interruption of, access to gender identity healthcare such as hormone therapy, post-op dilation equipment, etc.

It is important to note that there have been recorded cases of severe self-harm and suicide among trans people in custody as a result of psychological harm from repeated misgendering, restrictions on association and denial of access to items and healthcare to support expression of their gender identity.

The risks that cisgender people in custody could face from a trans person include:

- physical and sexual harassment, assault or exploitation by a trans person;
- psychological harm if forced to share a cell or communal shower with a trans person whom they perceive as a different sex from themselves, particularly if this would trigger previous traumatic experiences. (All other areas of all SPS estates are non-intimate and have a mixture of male and female staff and visitors present so there is no reason why a trans person simply also being present would cause psychological harm to a cisgender person if not sharing a cell or communal shower.)

6. Are the potential risks any different for:

a. transgender male to female

b. transgender female to male

- How could these risks be mitigated against?

The risks depend more on the individual circumstances of each trans person, rather than simply whether they are a trans woman or a trans man. It is important not to make assumptions based on sexist stereotyping when considering risks for trans people. The risk of being sexually assaulted or exploited by men is not necessarily higher for an individual trans man than for an individual trans woman. How masculine or feminine a trans person currently appears, and whether or not they have had any surgeries, can impact on their level of risk of being sexually assaulted or exploited but those are just

two of many factors and are not directly aligned to whether they are a trans man or a trans woman. Similarly, there are cisgender women and trans men who have physically and sexually assaulted women and there are trans women who are no risk to women. The number of trans people in custody is very small, less than 30 people in SPS custody at any time, so it is possible to carefully assess each trans person's risks individually. Individual risk assessments for each trans person is more accurate and reliable than using general assumptions of the relative risks of cisgender men or cisgender women.

7. Are there any other specific groups or individuals working or living in Scottish Prisons, who you think will be directly or indirectly affected as a result of decisions on how transgender people are held in custody?

- **If yes, in what way will groups or individuals be affected? How do you believe any significant impact can be mitigated against?**

SPS staff are highly skilled professionals working in teams and frequently dealing with various stressful and challenging situations for which they require to be

psychologically robust. They regularly conduct searches on people with a wide range of physical circumstances, including distressing medical conditions and hygiene problems. Therefore, searching transgender people in accordance with their gender identity does not pose SPS staff a general risk of psychological harm. If a risk assessment indicated that a particular trans person in custody posed a specific risk to staff safety, then this can be addressed using the same range of management options as for other people in custody who pose a risk to staff safety. Furthermore, the current policy also allows for staff to raise at any point any safety concerns about searching procedures for a trans person. Therefore, where necessary due to a trans person's individual evidenced risk, searching can be adjusted to protect staff safety. Similarly, general management of trans people in custody utilises the same SPS staff team work approach as for other people in custody and, where there is risk of violence towards staff, can implement the same range of safety measures and restrictions as used for other people in custody.

8. What key risk factors do you think should be considered upon reception of a transgender person into custody? Are there different issues to be considered for transgender male to female and transgender female to male?

The key risks factors to consider broadly fall into two categories: factors that may mean a trans person is at risk from others and factors that may mean a trans person is a risk to others. There are no distinct risk factors to consider separately for trans women or trans men: the overarching principles of what is important for determining risk is the same.

Potential factors that impact on trans person being vulnerable and at risk from others, include:

- History of being attacked, bullied or victimised;
- Evidence of coercion, manipulation, or threats towards the individual
- Individual's perceptions of their vulnerability in a particular location, or from a particular person or group of other people in custody;
- Mental health, history of self-harm and risk of suicide;
- Drug addictions and medication use;

- Physical health and anatomy;
- Learning disabilities or autism;
- Age.

Potential factors that impact on trans person being a risk towards others, include:

- Offending history, including index offence, past convictions and intelligence of potential criminal activity, particularly any sexual offences.
- Past behaviour in custody, the community, and in the care of the police or other services;
- Evidence of threats, bullying, coercion or manipulation towards others;
- Sexual behaviours and relationships within custodial/residential settings.

9. What key risk factors do you think should be considered upon an individual making the decision to transition while in custody? Are there different issues to be considered for transgender male to female and transgender female to male?

The same risk factors should be considered for all types of trans people. When an individual has not been transitioning prior to entering custody and instead is starting to transition while in custody, it is particularly important to support their exploration and increasing expression of their gender identity at an individualised pace which may be quite gradual. If they are currently sharing a cell, it is important to assess whether this remains safe. The individual's perception of their vulnerability from other people in custody can have a large impact on how they begin their transition so it is important to listen to and address any concerns. The same range of risk factors as discussed in question 8 will be relevant. Regular case conferences and detailed ongoing risk assessment are important to support the person's transition with appropriately paced adjustments to their items in use, name, pronouns, searching and accommodation. They should be supported to access NHS gender identity services if they wish to do so, but their social transition is not dependent upon accessing medical transition options.

10. How could SPS most effectively assess risk?

- **In your opinion what should the risk assessment process look like?**
- **what are the key factors?**
- **who do you feel should be involved in this process?**

It is likely to be the case that more often than not, it is the trans person in custody who is likely to face significant risks to their security and safety, rather than the trans person in custody posing a significant risk to others.

Whilst being trans should not be considered a risk factor in and of itself, SPS should always conduct risk assessments as part of taking decisions about how a trans person in custody is treated or where they are housed, in a way that is identifiably evidenced.

We believe the current risk assessment process detailed in the existing SPS policy is generally an appropriate and effective process. This involves the unit manager leading the collection of relevant evidence to inform the risk assessment and then arranging a case conference bringing together relevant staff and the trans person for detailed discussion. Potentially, a formal mechanism for additional review at SPS senior

management level of particularly complex decisions in high risk cases could be a useful new addition.

Housing Transgender people in custody

11. In responding to the questions below please consider if there may be different issues in housing transgender male to female and transgender female to male:

The factors that should be considered by SPS in making decisions about housing trans people in custody are the same, regardless of whether the trans person is a trans woman or a trans man.

- **What do you think is the most appropriate way to house transgender people in custody?**

Trans people in custody should be housed in the estate that aligns with their lived gender identity, unless there is evidenced significant safety risk, posed either to the trans person themselves or to others they will be housed alongside, to housing them in that estate. It is essential that this risk is assessed on an individual basis and not be the subject of blanket decisions. Trans people, like all people in custody are individuals and each of them pose a different set of risk in different settings.

Privacy and dignity can be upheld for all by never forcing a cisgender person to share a cell with a trans person whom they perceive as a different sex from themselves and by ensuring that showering facilities used are fully enclosed individual cubicles so that people do not need to see each other undressed. It is important to consider the specific unit that a person in custody is housed in within an estate, as some SPS units provide significantly greater privacy, for example in the showering facilities, than others.

Trans people are very diverse in risk levels and needs and are very small in number so it would not be acceptable to try to create a transgender specific custody unit to keep them all together isolated from cisgender prisoners. Such an arrangement would have a disproportionate and unjustified negative impact on the educational, occupational, and rehabilitation opportunities, safety and wellbeing of trans people who are low risk towards others. The long acknowledged inequality of opportunities for women in custody compared to men in custody that results from the smaller size of the womens' estate would be far worse for a tiny transgender unit. If there is a trans person in custody who is a high risk sexual offender, then that trans high risk sexual offender should be housed with cisgender high risk sexual offenders and not with low risk trans people who would be vulnerable to abuse by them.

- **What factors do you think should be considered in reaching a decision on this matter?**

The key factors should be the trans person's lived gender identity and their actual, evidenced individual safety risks, especially risk relating to whether or not they might be victim to or perpetrators of sexual assault.

Concerns about possible psychological discomfort for cisgender people about simply sharing spaces with trans people should be taken into account in regard to cell

occupancy and use of showering facilities, but not allocation to an estate. After all, there are many situations where a cisgender person in custody may feel psychological discomfort or even acute distress about the presence of another particular cisgender person in custody but, in the absence of actual threatening or abusive behaviour, SPS would manage the situation simply by preventing them entering each other's cells and not by removing either from the unit. Providing that a cisgender person is not forced to share a cell with, or to shower with, a trans person who they perceive to be a different sex from them, all other areas of the unit are non-intimate and will have a mixture of male and female staff and visitors present so the presence of a trans person is not objectively harmful or unreasonable.

- **Why do you think it is important to consider these factors?**

It is important to respect the trans person's lived gender identity because it can be direct or indirect gender reassignment discrimination under the Equality Act 2010 to treat only as their birth sex a trans person who has transitioned to live permanently in their gender identity. It is important to carefully assess and address safety risks for all people in custody because the SPS has a duty of care to all in its custody.

- **Why do you believe that is the most appropriate way to house this population?**

It is the fairest, safest way of dealing with the complex and diverse situations of trans people and balancing the wellbeing of all people in custody.

- **With said preferred option in mind, how do you think this would impact on the health, safety and security and wellbeing of transgender people involved?**

It would benefit the health, safety and security and wellbeing of trans people who pose a low risk to other people in custody because it would enable them to continue to be accommodated in accordance with their gender identity without harm to other people in custody.

It would not benefit the wellbeing of trans people who are determined to be too high risk to others to be approved to be housed in accordance with their gender identity. However, their evidenced individual safety risk would be legitimate justification for the negative impact on them.

- **With said preferred option in mind, how do you think this would impact on the health, safety and security and wellbeing of the cisgender population involved?**

It would benefit the health, safety and security and wellbeing of cisgender people because it would prevent any high risk sexual offender who also happened to be trans from being moved to an estate where they posed a greater risk to cisgender people. It would also benefit the wellbeing of cisgender people who would be distressed by sharing a cell or showering in front of a trans person whom they perceive as a different sex from themselves, because it would not ever force them to do so.

It would not benefit the wellbeing of cisgender people who object to a trans person simply being present fully clothed in supervised communal dining, recreation, educational and occupational areas of the estate where cisgender male and female staff and visitors can also be present. However, it is not objectively harmful or unreasonable for a trans person to be present in such areas so it would not be proportionate to exclude the trans person.

Provision of Healthcare

12. With said preferred housing option in mind, do you think there would be any implications in relation to the provision of healthcare for transgender people in custody?

No.

13. With said preferred housing option in mind, do you think there would be any implications in relation to the provision of healthcare for cisgender people in custody?

No.

Preparation for liberation

14. With said preferred housing option in mind, how do you think this would impact on the preparation for reintegration of transgender people back into their communities?

It would be beneficial because it would be easier for a trans person who has been accommodated in custody successfully in their lived gender identity to then reintegrate back into the community in that lived gender identity.

15. With said preferred housing option in mind, how do you think this would impact on the preparation for reintegration of cisgender people back into their communities?

It would be neutral because it mirrors how they will encounter trans people generally using facilities and accommodation such as toilets, hostels and hospital wards in the community.

Staff Training

16. With said preferred housing option in mind how can the SPS prepare staff for housing transgender people in this way?

It would be the same general situation as has been operated by SPS for a decade in regard to accommodation of trans people, so it should not require significant preparation. Additional training on how to conduct and record the risk assessment process and how to write up the detailed justifications for the case conference decisions would be beneficial to ensure all the case conference decisions are robustly evidenced.

Equalities and Human Rights

17. What are the impacts and implications on equalities and human rights for transgender people of your preferred option?

Continuing to take the same broad approach as that taken in the current SPS policy will uphold the human rights of all people in custody. Trans people should be able to be held in the estate that aligns with their lived gender identity, unless there is a credibly assessed reason that to do so would place either them or others at significant risk of harassment or assault.

18. What are the impacts and implications on equalities and human rights for cisgender populations said preferred option?

It would uphold equalities and human rights for cisgender people because it would still provide adequate privacy in regards to cell sharing and showering and would help protect their safety from harassment or assault by a trans person.

19. What quantitative and/or qualitative evidence have you considered when proposing your preferred option?

We developed our position on the most appropriate approach to housing trans people in custody through many years of work with SPS, trans people in custody themselves, and through the knowledge of staff who have extensive previous working experience in prison settings. We have previously attended case conferences for trans people in custody at those individuals' requests, and have a deep understanding of the real life working of the policy, and the situation within the Scottish prison estate for trans people in custody.

We are also experts in trans equality and human rights, having been funded since 2007 by the Scottish Government as a specific trans equality project, with a key function of our organisation being to provide best practice guidance and advice to public bodies and service providers on these issues.

20. What case law relating to equality and human rights have you considered when proposing your preferred option? (please provide references)

In particular, we have considered the decision in England & Wales in *R (FDJ) v Secretary of State for Justice* [2021] EWHC 1746 (Admin): <https://www.bailii.org/ew/cases/EWHC/Admin/2021/1746.html> in which a cisgender woman challenged the lawfulness of the policy that manages the treatment of trans people in custody in England. Although not identical to the current SPS policy, it takes the same approach: one that considers the trans person's lived gender identity, alongside the risks and the security and safety of both the transgender person, and others that they will be living alongside. The Judge's found in that case that the policy that operates in England is lawful, and that it would very likely be unlawful to operate a policy in which all trans women are held on the male estate.

21. Do you think your preferred option would contribute to eliminating discrimination, harassment and victimisation? If yes, in what way?

Yes, it will help prevent discrimination against trans people because it does not perpetuate the myth that all trans people are sexual predators, and it does not falsely treat all trans people as inherently unsafe to be in accommodation that reflects their lived gender identity. It recognises the diversity of trans people in custody and individually risk assesses them in a fair and balanced way to uphold everyone's safety. Other approaches, such as placing trans people according to their genitals or their birth certificate, would without justification leave vulnerable trans people at risk of harassment, without dignity or safety, in accommodation that fails to respect their lived gender identity.

22. Do you think your preferred option would advance equality of opportunity between those who share a protected characteristic and those who do not? If yes, in what way?

Yes, since it will enable trans people and cisgender people to have similar experiences in custody and reduce the degree to which having the protected characteristic of gender reassignment causes people to experience additional harm and inequalities within custody.

23. Do you think your preferred option will foster good relations between those who share a protected characteristic and those who do not? If yes, in what way?

Yes, reassuring people that safety risks will be carefully assessed when making accommodation decisions will help foster good relations because it will help allay the major public concern that predatory sexual offenders would be entitled to be automatically placed in the women's estate.

24. Will your preferred option breach or uphold human rights? If so, how?

Continuing to take the same broad approach as that taken in the current SPS policy will uphold the human rights of all people in custody. Trans people should be able to be held in the estate that aligns with their lived gender identity, unless there is a credibly assessed reason that to do so would place either them or others at significant risk.

A policy that sought to insist that all trans people must be held on the estate of their sex recorded at birth would breach trans people's human rights.

A policy that did not adequately assess risk to ensure that no one is placed inappropriately in an estate where they may threaten the safety or security of others, or have their own safety or security threatened, would also breach the human rights of all people in custody.

The suggested approach is the only option that will allow the human rights of all to be upheld.

25. Do you foresee negative impacts? What are they? How would you propose to mitigate them?

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As described in previous answers, ensuring adequate shower facility privacy and non-sharing of cells would mitigate the main potential negative psychological impact that some cisgender people in custody might otherwise risk experiencing.

For any high risk trans person in custody who was unable to be accommodated in line with their lived gender identity, there would be potential negative psychological impact. This could be mitigated by ensuring that their name and pronouns are respected by staff and they still receive access to NHS gender identity services and to any reasonable items that they need in order to express their gender identity. They should be allowed to have their risk levels reassessed over time in order to take account of any changes in their circumstances.

Jo Phoenix, Deputy Head of School, Professor of Criminology, School of Law, University of Reading

1. Introduction

1.1 I am Professor of Criminology at the University of Reading and a Trustee for the Centre for Crime and Justice Studies. I study criminal justice policy reform concerning sex, gender and sexualities. I am known for researching the unintended, often deleterious effects of criminal justice and social welfare policy reforms whose purpose has been to correct the harms done to marginalised groups by previous policy failures to recognise their vulnerabilities or the realities of their lives. I have a large body of work looking at child sexual exploitation as well as prostitution policy reform and now several years of experience of analysing and researching transgender prisoner placement in both the UK and Canada.

1.2 I have reviewed the publicly available documents accompanying the 2023 Scottish Prison Service Policy For The Management Of Transgender People, in relation to the evidence base pertaining to the profile of transgender prisoners, the evidence base about the profile of female prisoners, international treaties setting out the needs and standards females offending and the obligations of signatories.

1.3 I conclude that as far as can be ascertained the Scottish Prison Service Policy For The Management Of Transgender People is not evidence based, does not take account of key international treaties and does not adequately provide for the safety of female prisoners.

1.4 I note that the Scottish prison service policy is starkly different to that adopted by the Ministry of Justice for England and Wales in March 2023.

2 Evidence

2.1 As far as I can tell the revised policy is based on no research evidence at all. The evidence that was gathered is what in academia we would call attitudinal surveys - that is the opinion of various stakeholders involved in the placement of transgender people in prison. This is extremely worrying given the fact that this is a highly politicised policy area.

2.2 At a minimum I would have expected to see reference to the emerging evidence base about the extent to which gender identity does or does not override sex based patterns of offending and the extremely robust evidence base outlining female offenders' *different* (to male offenders) needs, risks and welfare issues. There is evidence that gender identity does not override sex where transgender prisoners are concerned. Correction Services Canada has conducted the first (and only) comprehensive review of transgender and gender diverse prisoners and careful reading of that data demonstrates that, at the population level, transgender prisoners' histories reflect those of their sex. (please see me review here <https://macdonaldlaurier.ca/gender-diverse-prisoners-and-sex-based-patterns-of-offending/>). If this is the case, there is no evidenced base reason for cross-sex prison placement.

2.2 The new policy takes a case by case basis and states that if a transgender woman meets the violence against girls and women criteria they will be placed in a male a state-

unless it is deemed that they are not a sufficient risk to the female estate. To my knowledge there are no risk assessment tools that can conclusively establish this.

2.3 The underpinning assumption is that the only risk faced by female prisoners as a result of the placement of transgender people in the female estate is that of physical violence. This is a wholly inadequate conceptualisation of risk given the robust evidence base about the profile and characteristics of females in the female prisoner estate. The international evidence is conclusive. Females in prison have significant histories of mental health problems, male violence and victimisation another associated issues that are a result of the trauma they experience at the hands of men. The robustness of this evidence base is reflected in international treaties such as The United Nations Rules For The Treatment Of Women Prisoners And Non Custodial Measures For Women Offenders [the Bangkok rules].

2.4 The evidence about the female prisoners conclusively females have significantly different rehabilitation needs and that their well-being is best served by what has euphemistically been called “gender responsive programmes”. Gender responsive programmes do not refer to gender identity, they refer to this specific ways that being a female [an all the cultural assumptions that are associated with that closed bracket structure and shape both female offending and women's rehabilitative needs.

2.5 There is emerging evidence, if anecdotal, that the presence of male bodies within the female prisons can have a re traumatising effect on female prisoners with long histories of violent victimisation at the hands of men.

2.6 It is concerning that given what we know about female prisoners there appears to have been no consideration by SPS of this research evidence in the present prison policy, nor a justification for excluding from consideration that research.

2.7 It is further concerning that the Scottish Prison Service has chosen, in light of the robust evidence base that exists about the (different to male prisoners) rehabilitative needs and welfare needs of females in prison to conceptualise risk in such an extremely narrow fashion [a literal risk of violence to female prisoners].

3 International Treaties

3.1 The Scottish Prison Service appears to have based its entire policy on the Yogyakarta Principles and not on extant evidence or international treaties and conventions – namely Bangkok Rules or the Istanbul Convention. The Bangkok Rules establish the minimum standards for women’s incarceration based on evidence about *female* offending. Yogyakarta Principles were not established via evidence and research but rather on abstract discussions of law and human rights.

3.2 There appears to be no discussion of the criteria by which SPS discounted adherence to these international agreements in favour of the Yogyakarta Principles.

4 SAFETY

4.1 Notwithstanding what I consider to be a wholly inadequate conceptualisation of risk the underpins this policy, the notion that a male prisoner who is also transgender can be transferred into the female prison estate if the executive is satisfied that such individual

does not present a “unacceptable risk of harm” is extremely worrying And shows the extent to which the policy is based on a notion of “acceptable risk of harm”. As noted earlier to my knowledge there are no risk assessment tools which evaluate the risks posed to female offenders by transgender individuals regardless of their offending history.

4.2 Further the presumption of the policy is that a male prisoner who is also transgender and does not have a history of violence against women presents no risk of harm to female prisoners. This presumption is drawn on the basis of the idea that such an individual's well-being is best secured in the female prison estate. There is no evidence to suggest that the placement of male individuals who are also transgendered is best served in such a fashion or worst served in the male estate. The most that can be said is that the placement of such transgender individuals in the female estate serves the only purpose a validating and recognising their gender identity.

4.3 Whereas heavy emphasis is placed on the wellbeing of transgender prisoners (correctly) there is no evidence that placement in the male estate is necessarily antithetical. In a review of evidence, published by McDonald Laurier Institute, I concluded that the claims of risk and vulnerability faced by transgender biologically male prisoners did not underpin a policy of cross-sex prison placements. You can find that report [here](#).

4.4 There is no consideration of the impact on female prisoners – or at least no evidence that anything more than an attitudinal survey has been conducted.

4.5 There is no evidence that SPS has considered the organisational challenges faced for female prison staff of managing mixed sex prisons in the context of male bodied individuals who are also trans being placed in close living quarters alongside female, much less a consider given to women’s human rights regarding privacy and dignity.

Apologies for the brevity of this submission. I am very happy to supply full references or further information if the committee would find it helpful.

NB. Professor Phoenix also provided a [comprehensive research document](#) reviewing the relative risks and vulnerabilities of transgender prisoners and female prisoners. This is available from the clerks on request.

ⁱ [The United Nations Standard Minimum Rules for the Treatment of Prisoners](#)