

FOI 202300340304- INFORMATION RELEASED- ANNEX

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1. Briefing relating to Transgender Prisoner dated 25 Jan 2023

BACKGROUND NOTE AND LINES TO TAKE- Transgender Prisoner [redacted]

Please note that this briefing includes personal information that should not be publicly disclosed or circulated further.

Background

1. Multiple media reports about [redacted], a transgender woman convicted of two counts of rape, who has been remanded at Women's Prison (HMP & YOI Cornton Vale) prior to sentencing. As the case is still before the court, any public comment has to be limited. The Cabinet Secretary for Justice was interviewed by the BBC this morning this morning. The readout of this is provided below.

2. Her placement is in keeping with administrative arrangements SPS has with the courts and with SPS's established policy on the management of transgender prisoners.

3. BBC has reported that [redacted] is initially being sent to the women's prison at HMP Cornton Vale, and it is likely she will be segregated from other prisoners. [redacted] in order to protect private information of those in custody we do not to comment on individual cases and therefore cannot confirm this.

4. Decisions about the placement of prisoners is an operational matter for SPS. They have confirmed that an initial risk assessment has been carried out, but there will be a further assessment when further information is available and a case conference held. This will include consideration of [redacted] trans-gender status.

5. [redacted]

Transgender Prisoner Management

6. Decisions by the SPS as to the most appropriate location to accommodate transgender people are made on an individualised basis, informed by a multi-disciplinary assessment of both risk and need.

7. SPS conducts a risk assessment in respect of every individual admitted into custody and considers all relevant factors before arriving at a view on the most appropriate location for their accommodation within the prison estate.

8. Such decisions seek to protect both the wellbeing and rights of the individual as well as the welfare and rights of others around them, including staff, in order to achieve an outcome that balances risks and promotes the safety of all.

9. Where there are any concerns about any risks posed by an individual, either to themselves or others, the SPS retain the ability to keep them separate from the mainstream population until an agreed management plan is in place

10. To inform decisions, a multi-disciplinary case conferencing approach is adopted, to which a range of case specific partner agencies can be invited based on the specific circumstances of the individual being discussed.

11. The case conference should review the individual circumstances of the person in custody to determine the suitability of the person in custody's accommodation across the three aspects of establishment placement, unit placement and cell-sharing suitability.

The gender reassignment case conferences should examine all the circumstances of the particular case, including the person in custody's viewpoint and wishes, take into account the expert opinion of any NHS Gender Identity Clinic medical specialist treating the person in custody, and conduct full risk assessments in order to make decisions about how to ensure the safety, dignity and privacy of the person in custody (and others where relevant), in terms of accommodation and searching, and especially as the person in custody progresses through changing the social gender in which they live.

Lines to Take

- We do not comment on individual cases, that this is an operational matter for SPS who have a clear track record in deploying robust risk assessment for those in our care.
- Decisions by the SPS as to the most appropriate location to accommodate transgender people are made on an individualised basis, informed by a multi-disciplinary assessment of both risk and need which brings together expertise and evidence to support decision making
- Before a decision is reached as to whether a transgender person should be allocated or transferred to part of the estate which aligns with their social gender (including those cases where a person has gained legal recognition of the gender with which they identify), an additional structured case management process (Gender Identity and Gender Reassignment Case Conference) is carried out. This is in addition to the standard assessments of risk and need SPS carry out for all individuals in custody
- The case conference process puts defensible and evidence based decision making at its centre, with decisions based on the individual circumstances of the person in custody to determine the suitability of their accommodation including: most suitable prison, most suitable area within that prison and suitability or otherwise for cell-sharing. Such decisions seek to protect both the wellbeing and rights of the individual as well as the welfare and rights of others around them, including staff, in order to achieve an outcome that balances risks and promotes the safety of all

- If there is clear evidence that an individual poses a sexual offence risk or there is a high level of concern about sexual assault, then the individual will be kept out of association until the concerns have been appropriately managed. These circumstances will be dealt with in the same way as for any other person in custody posing such a risk or who is in fear of harm

Readout Cabinet Secretary for Justice and Veterans BBC interview 25 January

Readout of KB interview on trans prisoner Isla Bryson

“I am very confident that the Scottish Prison Service is managing the risks, sometimes extreme risks, posed by those in custody - both to themselves and others around them. Risk assessments are done over a period of time, and decisions are made from this

Decisions on where to place prisoners have nothing to do with the GRR Bill that went through Parliament. The Prison service takes the facts as they see them, take the risks that are presented and mitigate against them.

As things currently stand SPS don't know if people have a gender recognition certificate or not. There are medical assessments done, health assessments, psychological assessments - these are what are taken into account. Gender recognition certificates are not a cornerstone of the assessments carried out by SPS.

SPS knows better than anyone else, the background of prisoners, the trauma they have suffered and the possibilities of exacerbating this. They take these issues into account when deciding where to allocate prisoners.

Part of the justice system across the board is managing risks and I am confident that we do the proper risks assessments to minimise risks for everyone

Have to understand the general public concern about this, not least the ways facts are presented by the media, and that SG have a duty to respond to this. Hope they will accept that we do take these things very seriously and have a strong- track record of keeping people safe.”

Contact Name: [redacted]

Community Justice

2. Briefing for First Ministers Questions dated 26 Jan 2023

[REDACTED]

Information already publicly available at [Official Report - Parliamentary Business : Scottish Parliament](#)

As of 31 December 2022, SPS had 15 trans people in its custody, including 12 trans women and 3 trans men.

That means that trans men accounted for 0.04% of the total prison population, and trans women accounted for 0.16%.

Of the 12 trans women, six are in male, six in female estate. Of the three trans men, one is in the women's estate, and two in the male.

They were all living in single cells at that point.

[REDACTED AS OUT OF SCOPE]

3. Briefing for Urgent Question relating to Transgender Prisoners dated 25 Jan 2023

BACKGROUND

Transgender people in Scotland's prisons

It is important that the information on offending histories of transgender prisoners are considered against the offending histories of the wider prison population. Most people in Scotland's prison system have a history of violent or sexual offending, albeit the number of women with a history of sexual offending is very low compared to men.

When considering transgender data, the FDJ, R. V Secretary of State for Justice, heard in The High Court of Justice, before Lord Justice Holroyde and Mr Justice Swift on the 2nd July 2021, is instructive.

The Ministry of Justice policy which allows prisoners in England and Wales to be housed according to their gender identity, 'irrespective of whether they have taken any legal or medical steps to acquire that gender' was ruled to be lawful. The claimant in this case specifically challenged the policy in relation to the allocation to a women's prison of transgender women who have been convicted of a sexual or violent offence against women. In the judgement, Lord Holroyde:

- *accepted that statistical evidence showed the proportion of trans prisoners convicted of sexual offences was "substantially higher" than for non-transgender men and women prisoners*
- ***stated that claims about the risk of sexual assault were a "misuse of the statistics, which... are so low in number, and so lacking in detail, that they are an unsafe basis for general conclusions" This 'unsafe basis' should be considered when analysing the data gathered for the transgender population in Scottish Prisons (which is much smaller than England and Wales)***
- *confirmed he "fully understood" the concerns of the claimant that women prisoners "may suffer fear and acute anxiety" if housed with a transgender woman who has male genitalia, he also noted that the rights of transgender women prisoners must also be considered*
- *concluded that upon proper application of the MOJ policy, whereby a careful case by case assessment is carried out, considering the risks and how best to manage those risks, the result will be that 'non transgender prisoners only have contact with transgender prisoners when it is safe for them to do so.'*

This case acknowledges the margin of discretion in balancing the competing rights and managing the risks. The policy itself is ruled to be lawful however the judgement does make it clear that individual decisions still open to challenge.

SPS Gender Identity and Gender Reassignment Policy (2014)

Under the current SPS Gender Identity and Gender Reassignment Policy, the SPS is very clear that the health and wellbeing of those who live in Scottish prisons is SPS' priority. For all individuals received into the custody of SPS, there is a reception system which assesses each person's immediate social, mental and physical health needs, including identification of those whose gender identity differs from their gender at birth. Standard risk assessments and management procedures are carried out for all people in custody and a prisoner's allocation within each establishment takes cognisance of the needs and risks of both the individual and others in SPS care.

The SPS introduced its Gender Identity and Gender Reassignment Policy in 2014. The current policy makes clear that the social gender in which the person in custody is living should be fully respected regardless of whether or not the person in custody provides any evidence of having a Gender Recognition Certificate (GRC). The policy states:

“A female-to-male person in custody living permanently as a man without genital surgery should be allocated to a male establishment. However, if he requests to be allocated to a female establishment due to high level of concern about sexual assault risk in a male establishment, then he should be kept out of association until an urgent case conference responds in detail to his request.

A male-to-female person in custody living permanently as a woman without genital surgery should be allocated to a female establishment. She should not be automatically regarded as posing a high sexual offence risk to other people in custody and should not be subject to any automatic restrictions of her association with other people in custody. However, if there is clear evidence that she, as an individual, may pose a sexual offence risk, then this should be dealt with as for any other person in custody posing a risk. Only where a risk assessment determines it is justified, should she be subject to increased staff supervision or restrictions of her association with other people in custody.”

The current policy sets out a clear set of procedures by which the safety and security of transgender prisoners should be managed. It states that upon taking over responsibility for a person in custody's safety and welfare, a review of all information available relating to a person's gender reassignment must be conducted in addition to a risk assessment, paying particular attention to appropriate accommodation. The Unit Manager must continue to make interim decisions about the management of accommodation and searching for up to seven days until the initial gender reassignment case conference takes place.

The gender reassignment case conference examines all the circumstances of the particular case, including the person in custody's viewpoint and wishes, takes into account the expert opinion of any NHS Gender Identity Clinic medical specialist treating the person in custody, and a full risk assessment is conducted in order to make decisions about how to ensure the safety, dignity and privacy of the transgender person in custody and others, in terms of accommodation and searching.

To summarise, under the current Gender Identity and Gender Reassignment (2014) policy, each decision taken in relation to the appropriate accommodation of a transgender person in custody is made on an individual basis informed by a multidisciplinary assessment of

both risk and needs. If there is clear evidence that an individual poses a sexual offence risk or there is a high level of concern about sexual assault, then the individual should be kept out of association until the concerns have been appropriately managed.

It should be noted that the current policy emphasises, should an individual have a GRC:

“it is a criminal offence to share information about their gender history without their permission. However, there is an exception which allows information to be shared without permission where necessary to aid the prevention or investigation of crime. Where the purpose of the information sharing is for risk assessment then the sharing of anonymised information can be carried out to enable risk assessment in situations where there is no prevention of crime rationale.”

These circumstances will be dealt with in the same way as for any other person in custody posing a risk or ‘in fear of harm.

[SPSGenderIdentityandGenderReassignmentPolicy20142562_1392 \(2\).pdf](#)

Transgender Prison Population in Scotland at [Publications \(sps.gov.uk\)](#)

As of 30/11/21 there are 15 transgender people in SPS Custody. They are accommodated across the Scottish prison estate.

- Eleven transgender women
- Four transgender men.

[redacted] Section 35(1)(b) and (c) – Prosecution of offenders and the administration of justice

[redacted] Section 38(1)(b) – Personal information]

Impact of the development of the new women’s custodial estate on management of trans prisoners

The new Strategy for Women in Custody which will underpin the operational management of the new women’s estate will comply fully with the refreshed SPS policy position for the placement and management of transgender prisoners, due for publication in Summer 2022.’

‘SPS will then keep the refreshed policy under review, taking account of any wider legislative or regulatory changes that may impact on the placement and management of transgender people in Scotland’s prisons.

4. Question and Answer for Urgent Question relating to Transgender Prisoners dated 25 Jan 2023

URGENT QUESTION –Q&A

[redacted] section 30(b) free and frank advice.

The Gender Recognition Reform (Scotland) Bill does not change the SPS approach to trans prisoners, which is not dependent on possession of a GRC.

Possession of a Gender Recognition Certificate will continue to have minimal impact on how SPS manage transgender people in their care. Decisions on placement and management are not based solely on a Gender Recognition Certificate but on multiple factors and through individualised assessment.

SPS will retain the ability to place an individual in an estate which does not necessarily correspond to the gender on their Gender Recognition Certificate where they determine that to do so could put the individual or others at risk.

The GRR Bill is of course not currently in force, so not relevant to any current case.

The current GRC process does not prevent applications from offenders or have any scope to refuse applications on the basis of risk. The Scottish Parliament agreed changes to the Bill that introduced new safeguards around offenders, which go further than what is currently in place. That has been blocked by the UK Government's Section 35 intervention.

[redacted] section 30(b) free and frank advice.

Decisions on the placement of prisoners are taken by the SPS based on protecting both the wellbeing and rights of the individual and those around them, including staff, using comprehensive individualised risk assessments. As set out, SPS are progressing the review of their Gender Identity and Gender Reassignment Policy and are due to finalise the outcomes in the coming months. We will consider carefully the outcome of that review.

[redacted] section 30(b) free and frank advice.

[redacted] section 30(b) free and frank advice.

A: We do not comment on individual cases, that this is an operational matter for SPS who have a clear track record in deploying robust risk assessment for those in our care.

Decisions by the SPS as to the most appropriate location to accommodate transgender people are made on an individualised basis, informed by a multi-disciplinary assessment of both risk and need which brings together expertise and evidence to support decision making

Before a decision is reached as to whether a transgender person should be allocated or transferred to part of the estate which aligns with their social gender (including those cases where a person has gained legal recognition of the gender with which they

identify), an additional structured case management process (Gender Identity and Gender Reassignment Case Conference) is carried out. This is in addition to the standard assessments of risk and need SPS carry out for all individuals in custody

The case conference process puts defensible and evidence based decision making at its centre, with decisions based on the individual circumstances of the person in custody to determine the suitability of their accommodation including: most suitable prison, most suitable area within that prison and suitability or otherwise for cell-sharing. Such decisions seek to protect both the wellbeing and rights of the individual as well as the welfare and rights of others around them, including staff, in order to achieve an outcome that balances risks and promotes the safety of all

If there is clear evidence that an individual poses a sexual offence risk or there is a high level of concern about sexual assault, then the individual will be kept out of association until the concerns have been appropriately managed. These circumstances will be dealt with in the same way as for any other person in custody posing such a risk or who is in fear of harm

[redacted] section 30(b) free and frank advice.

Decisions by the SPS as to the most appropriate location to accommodate transgender people are made on an individualised basis, informed by a multi-disciplinary assessment of both risk and need which brings together expertise and evidence to support decision making.

If there is clear evidence that an individual poses a sexual offence risk or there is a high level of concern about sexual assault, then the individual will be kept out of association until the concerns have been appropriately managed. These circumstances will be dealt with in the same way as for any other person in custody posing such a risk or who is in fear of harm.

[redacted] section 30(b) free and frank advice.

Individuals must be permitted to present and express themselves in the gender with which they identify. However, respecting an individual's gender identity and expression, does not mean that SPS is compelled to place them in any particular location.

SPS conducts a risk assessment in respect of every individual admitted into custody and considers all relevant factors before arriving at a view on the most appropriate location for their accommodation within the prison estate.

[redacted] section 30(b) free and frank advice.

The Gender Recognition Reform (Scotland) Bill does not change the SPS approach to trans prisoners, which is not dependent on possession of a GRC.

Possession of a Gender Recognition Certificate will continue to have minimal impact on how SPS manage transgender people in their care. Decisions on placement and management are not based solely on a Gender Recognition Certificate but on multiple factors and through individualised assessment.

SPS will retain the ability to place an individual in an estate which does not necessarily correspond to the gender on their Gender Recognition Certificate where they determine that to do so could put the individual or others at risk.

The GRR Bill is of course not currently in force, so not relevant to any current case.

The current GRC process does not prevent applications from offenders or have any scope to refuse applications on the basis of risk. The Scottish Parliament agreed changes to the Bill that introduced new safeguards around offenders, which go further than what is currently in place. That has been blocked by the UK Government's Section 35 intervention.

[redacted] section 30(b) free and frank advice.

As was explained very clearly in correspondence to Mr Findlay, that would have been at high risk of breaching ECHR and therefore outwith the competence of this Parliament.

Readout Cabinet Secretary for Justice and Veterans BBC interview 25 January

Readout of KB interview on trans prisoner

"I am very confident that the Scottish Prison Service is managing the risks, sometimes extreme risks, posed by those in custody - both to themselves and others around them. Risk assessments are done over a period of time, and decisions are made from this

Decisions on where to place prisoners have nothing to do with the GRR Bill that went through Parliament. The Prison service takes the facts as they see them, take the risks that are presented and mitigate against them.

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SPS knows better than anyone else, the background of prisoners, the trauma they have suffered and the possibilities of exacerbating this. They take these issues into account when deciding where to allocate prisoners.

Part of the justice system across the board is managing risks and I am confident that we do the proper risks assessments to minimise risks for everyone

Have to understand the general public concern about this, not least the ways facts are presented by the media, and that SG have a duty to respond to this. Hope they will accept that we do take these things very seriously and have a strong- track record of keeping people safe."

Readout Joanna Cherry's interview 25 January

Presenter

Just while we have you with us, Joanna Cherry, we know that the SNP is planning to use a special procedure today to try and reverse the UK Government's position on

Scotland's gender recognition legislation. I know you have issues with that legislation. Does the move in Parliament today have your support?

Joanna Cherry

Well, I mean, everyone knows about my issues with the legislation and they're very much based on my concern for universal human rights. I'm completely in favour of trans rights but I think the bill which allows self-identification will have unintended, I hope unintended, consequences for the rights of women and girls and for LGB rights. I frankly don't think that when the bill went through Scottish Parliament, it had as thorough an analysis from a human rights perspective as it should have done. And indeed, I don't think there was proper scrutiny of the concerns of the Equality and Human Rights Commission, and others, that the bill might impact on the Equality Act. But I'm a supporter of Scottish self-determination and I believe that problems made in Scotland should be sorted out in Scotland and I'd like to see the United Kingdom Government stop meddling with the Scottish Parliament and get on with running the UK effectively, which let's face it, it isn't doing at the moment.

Presenter

The First Minister has accused the Conservatives of starting a culture war over this. Would you agree?

Joanna Cherry

I'm not sure that I would use the language of cultural war. I think that language is sometimes used to silence the legitimate concerns of feminists like myself and lesbians like myself about the unintended consequences of self-identification. I'm completely in favour of equal rights for trans people but the First Minister herself has said that this bill creates no new rights for trans people and it doesn't. What it does is it creates a right for anyone, any man to self-identify as a woman with minimal safeguards and it doesn't really take very much imagination, you can just open this morning's newspapers and get a pretty good idea of what the unintended consequences of that might be and they're not good for women and girls.

Additional background- Care and management of transgender prisoners in England and Wales

Extract from Ministry of Justice/ HMPPS (England and Wales) policy on Care and Management of Individuals who are Transgender:

- All individuals in our care must be supported to express the gender with which they identify.
- Their preference does not oblige us to allocate them to a men's or women's prison or approved premises accordingly; it is one of many factors that may influence such decisions.
 - However, all individuals who are transgender must be initially allocated to part of the estate which matches their legally recognised gender (or best-known evidence where legal gender is not known).
- The only exceptions are when allocation decisions are approved by a Prison Group Director or the Community Interventions Deputy Director 10

via a Complex Case Board, or YCS Head of Casework or Band 8 Senior Case Manager.

- A balanced approach must be adopted when making allocation, care and management decisions relating to transgender individuals, balancing the risks and well-being of the individual with the risks or impact on well-being that the person may present to others, particularly in custodial and residential settings.
- Additional structured risk assessments and resources are required before a person is allocated or transferred to part of the estate which does not match their sex assigned at birth, including where a person has gained legal recognition of the gender with which they identify.

5. Briefing for First Ministers Questions dated 26 Jan 2023

[REDACTED under Section 30(b) – Free and frank provision of advice or exchange of views]

Information published at [Official Report - Parliamentary Business : Scottish Parliament](#)

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