



Sue Brookes

Scottish Prison Service

By email

2 February 2022

Dear Ms Brookes,

Gender Identity and Gender Reassignment Policy Review

Thank you for your letter of 21 December with an invitation to take part in the SPS Gender Identity and Gender Reassignment (2014) policy review. We have taken time responding as our interest relates mainly to the conduct of the review itself. We thought it would be sensible to offer comments about that in writing as a first step.

Our interest and concerns in this area relate principally to the policy process, and the previous failure of the SPS to consider the interests of female prisoners and staff in developing the 2014 policy. We documented this in a 2019 paper for the peer-reviewed journal *Scottish Affairs* entitled 'Losing Sight of Women's Rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland?'¹ Our analysis showed that the SPS had failed to consider the potential detrimental impact of the policy on female prisoners and staff, and raised serious questions about the undue influence of single-interest lobby groups on decision-making. This was confirmed in a subsequent response to our paper by Cowan et al. which stated that the Director of the Scottish Trans Alliance 'was tasked with writing a first draft outline of what such a policy might look like'.² While the authors state that the 2014 policy was substantially revised from the initial draft, it remains a matter of concern that the SPS allowed an advocacy group to draft and thereby frame the policy in its formative stages.

We have also previously written about a lack of transparency in relation to the SPS review.³ For the most part, information has been piecemeal, made in response to

¹ [Losing sight of women's rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland](#) (Murray and Hunter Blackburn, *Scottish Affairs*, 2019).

² Cowan, S, Giles, HJ, Hewer, R, Kaufmann, B, Kenny, M, Morris, S & Nicoll Baines, K 2020, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie', *Scottish Affairs*. Early version, also known as pre-print, last accessed on University of Edinburgh site 1/2/22.

³ [Opaque and overdue: the Scottish Prison Service trans prisoner policy review](#) (MurrayBlackburnMackenzie)

media queries or parliamentary questions. At times, the details appear to be inconsistent. We first learned of SPS' intention to review the policy via an online media article in December 2018,⁴ although Annex A to your letter states that this commitment was made in 'late 2019'. In February 2020 the then Justice Secretary stated that 'internal consultation in respect of those in custody has already been undertaken with those in our care and staff' yet the current terms of reference state that engagement with both prisoners and staff only began in December 2021. The impact of the pandemic notwithstanding, we are not aware of any other formal review that has followed such an opaque and convoluted path.

Against this background, we think it is important to regain confidence in the SPS review process. To this aim, we have put forward a number of suggestions in relation to the terms of reference outlined in Annex A to your letter and how this might be improved (we were encouraged to see that the SPS intends to take an iterative approach in this respect). Our response also highlights areas where we think that it is important that the SPS provides clarity, as a matter of priority, to enable those taking part in the review to reach properly informed conclusions.

1. Publication of draft policy

The invitation letter states that once the engagement work is complete, it is 'our intention to undertake an analysis of feedback received and to then publish an updated SPS policy for the placement and management of transgender people in Scotland's prisons in Summer 2022'. We think the SPS should first publish a draft policy for feedback and comment, before finalising the updated policy. Moving instead straight to publication provides no opportunity for others to engage with SPS's own conclusions from its evidence gathering stage before the policy is finalised. In our view, confidence in the process requires such a stage.

2. Short-life working group

Annex A to your letter states that oversight will be provided by a short life working group, chaired by the Director of Strategy and Stakeholder Engagement. The SPS should state which organisations and/or positions are represented on the working group.

3. Shared evidence base

The invitation letter states that the first stage of the review comprised of a 'review of international approaches to placement and management of transgender people, based on international examples of practice and academic research, informed by current and forthcoming policy and legislation (March 2021 onwards)'. It would be helpful if the SPS could share its evidence base (i.e. a bibliography of published material) with those taking part in the review. This will allow participants to identify any evidence gaps and/or alert the SPS to any relevant papers that may have been missed.

⁴ [Scots prisons to consult on changes to transgender policy](#) (Ferret, 20 December 2018)

4. Expertise in the female prison population

The substantive questions asked in the review are largely outwith our field of expertise. However, to redress the imbalance in the original policy process, the SPS needs to engage with academics with expertise in female prisoners and their vulnerabilities. If not already approached, we would suggest contacting [REDACTED] and [REDACTED]. Both the 2007 Corston Review of Vulnerable Women in Prison⁵ and 2012 Commission on Women Offenders chaired by Dame Elish Angiolini⁶ are also directly relevant here.

In relation to female prisoners, we note that academic research undertaken by a former SPS employee revealed multiple concerns raised by female prisoners (albeit framed by the researcher in terms that supported the current SPS policy).⁷ The paper also notes that of the fifteen participants, only three “were almost entirely accepting of the transgender people they lived with”. Concern raised in the paper include:

- The placement of biological males in the female estate in principle
- The placement of biological males with full male genitalia in the female estate
- Confusion as to whether those with full male genitalia retained full sexual function
- Differences in size and strength between male and female prisoners, and female vulnerability
- Housing biological males with female victims of child abuse
- “The fear that transitioning from male to female might enable men who pose a threat to women to move to the female estate was discussed by a number of participants”
- Scepticism about prisoners’ motives for requesting placement in the female estate, including a desire to avoid the male estate, and opportunities for sexual access
- Inappropriate overly-sexualised conversation
- The appearance of trans prisoners, for example, a prisoner presenting with a full beard.
- Concerns raised by family members concerns about daughters/sisters being housed with male prisoners

⁵ [The Corston Report](#) (2007)

⁶ [Commission on Women Offenders \[Angiolini Report\]](#) (Scottish Government, 2012).

⁷ [‘She Was Just Like A Lassie’ Analysing The Views of Cis-Women In Custody About Their Experiences of Living With Transgender Women In The Scottish Prison Estate](#) (Maycock, 2021 British Journal of Criminology)

5. Risk assessment and potential for abuse

Any policy that allows male prisoners in the female estate has the potential for abuse. To fully explore these risks we suggest that the SPS seek to engage with academics and practitioners with experience of working with sexual offenders, such as [REDACTED]. We also refer you to written evidence by Dr Michael Biggs presented to the Women and Equalities Committee in 2020,⁸ and in particular, the following extract from his paper:

5.3 The British Psychological Society (2015) described ‘a number of cases where men convicted of sex crimes have falsely claimed to be transgender females’. Several motivations were specified: ‘demonstrating reduced risk and so gaining parole; ... explaining their sex offending aside from sexual gratification (e.g. wanting to “examine” young females); ... separating their sex offending self (male) from their future self (female); ... seeking better access to females and young children through presenting in an apparently female way’.

5.4 The British Association of Gender Specialists (2015)—presided over by Dr James Barrett, who also heads the Gender Identity Clinic—described ‘the ever-increasing tide of referrals of patients in prison serving long or indeterminate sentences for serious sexual offences’. Some prisoners were motivated to ‘pretend transsexual status’ for the same reasons laid out by the British Psychological Society. For one particular individual, there was ‘a plethora of prison intelligence information suggesting that the driving force was a desire to make subsequent sexual offending very much easier’

6. Terminology

We were surprised that the questions set out in the Annex make multiple references to ‘cisgender’ prisoners. This is a contested and ideological term that implies the existence of an innate gender identity. This is a belief that the SPS should not assume is universally subscribed to (see Forstater vs CGD Europe and Others⁹). Its usage in this context prejudices a critical assumption here and is unhelpful.

To avoid the risk of perceived bias and for clarity, the review and any subsequent publications should be framed in neutral terms (for example, by referring to male or female prisoners).

7. Interviews with prisoners

The invitation letter states the review will include engagement with ‘complemented by engagement with service users across the men’s estate and the women’s estate, transgender men and transgender women in prison as well as prisons staff who have experience of working with transgender people in Scotland’s prisons.’ Annex A to

⁸ [Women and Equalities Committee: Reform of the Gender Recognition Act. Evidence submitted by Dr Michael Biggs](#) November 2020

⁹ <https://www.gov.uk/employment-appeal-tribunal-decisions/maya-forstater-v-cgd-europe-and-others-ukeat-slash-0105-slash-20-slash-joj>

your letter then specifies that the SPS will engage with prison staff, undertake a survey of men and women living in custody across establishments in Scotland, and undertaken 'a series of interviews with transgender men and transgender women in prison'.

Engagement

The engagement plan is as follows:

- engagement with prisons staff who have experience of working with transgender people in Scotland's prisons, commencing December 2021
- a series of interviews with transgender men and transgender women in prison, commencing January 2022
- a survey of men and women living in custody across establishments in Scotland, commencing February 2022
- one to one discussions with stakeholders, between February and May 2022

Based on the information above, we think the methodology needs to be revised as a matter of urgency, to redress what is a marked imbalance in the approach being taken to the different prisoner groups. It appears that a more limited opportunity will be given to female prisoners share their views and experiences of the operation of the current policy, although they are directly impacted by policy-making in this area. They will only be involved through completing a survey. By contrast, transgender prisoners will be given the opportunity to express their views in an interview. It would be unreasonable if prisoners in both groups were not offered the same level of opportunity to contribute to the review.

This disparity is exacerbated further by the known low levels of literacy among the prison population. Between August 2015 and July 2017, 85% of prisoners in the Scottish estate were assessed as lacking functional literacy.¹⁰ This will need to be taken into account in the design of any survey and will also prevent some respondents from being able to fill it out unaided, and therefore in confidence. This will set limitations on the sort of data it will be possible to gather this way.

We strongly recommend that the SPS seek to engage with female prisoners on a one-to-one basis, to properly understand their views and experiences. To help elicit open responses, interviews should be led by experienced independent researchers of the same sex, without a prisoner officer present. (We are aware of previous research interviews with female prisoners undertaken by a male academic whilst working as an SPS employee.¹¹ Given the subject matter, namely the placement of males in the female estate, and the issues covered in the course of these interviews, including sexual abuse and male violence, we were surprised that permission was

¹⁰ [SPS Freedom of Information response](#) (16 July 2018)

¹¹ ['She Was Just Like A Lassie' Analysing The Views of Cis-Women In Custody About Their Experiences of Living With Transgender Women In The Scottish Prison Estate](#) (Maycock, 2021 British Journal of Criminology)

granted to a male SPS researcher to conduct these interviews on a one-to-one basis).

Appropriate assurances should be given to female prisoners participating in these sessions that their views on this topic will not be directly attributable to any individual in a way that makes them identifiable to the prison authorities.

On the planned survey, we note that no indication is given as to the survey format, for example, whether questions will be closed or open-ended. The choices made here will be significant.

8. Interviews with prison officers

The SPS needs to specify how it is engaging with prison officers (for example, interviews or focus groups), and again, put arrangements in place to ensure that staff can freely express their views on what is a controversial policy area, without incurring any personal or professional reputational risk.

We were concerned that an unpublished academic paper by a former SPS employee characterised the concerns of five female SPS officers about searching trans prisoners of the opposite sex as variously showing ‘aspects of prudence (sic), conservatism or bigotry and perhaps elements of transphobia as well as the acceptance of transgender people’.¹² The analysis also cast doubt on the officers’ professionalism: ‘there is a recurring biological reductionism of a particular type... pointing to the significance of male genitalia being problematic for cis-female staff to search. Professional behaviour which supports a biological definition of gender, rather than the self-identified lived gender is inconsistent with SPS policy and the professional standards required of officers’.¹³

We do not feel this was an appropriate way to use the material provided by the subjects of this research. It is critical that officers’ views are now established and reported on in an even-handed and non-judgemental way.

9. SPS position on Gender Recognition reform

Annex A to your letter states that the SPS will consider ‘forthcoming policy and legislation’ but provides no specific detail. Of immediate relevance here is the forthcoming Bill on gender recognition reform, which is expected to be introduced by the Scottish Government in the current Parliamentary term, and will allow a person to change their sex in laws on the basis of self-declaration.

Given that the SPS review process will coincide with the passage of the Bill, the SPS needs to clarify its understanding of the law in this area, and the likely implications of reform.

We note that the current Scottish Government position on how possession of a GRC affects prisoners’ rights is at variance with Ministry of Justice (MoJ) policy in England

¹² The paper documents one officer who states “I would say probably every female member of staff that I work with feels the same; uncomfortable with it. But just get on with it. I know there’s other ones that have went and specifically said, I’m not under any circumstances doing it.”

¹³ The paper was provided to us by the SPS as part of a Freedom of Information request.

and Wales. Whereas SPS policy treats holding a GRC as irrelevant, MoJ policy states that ‘transgender women prisoners with GRCs must be treated in the same way as biological women for all purposes’ unless there are exceptional circumstances. The MoJ position is based on case law (*R (on the application of AB) v Secretary of State for Justice and another* [2009] EWHC 2220 (Admin), [2009] All ER (D) 28 (Sep)) which ruled that the decision not to transfer a pre-operative transgender woman to a female prison constituted a breach of rights under Article 8 of the European Convention on Human Rights.¹⁴ A challenge to the lawfulness of the policy was rejected in July last year, in [*R \(on the Application of FDJ\) v. Secretary of State for Justice*](#).

The SPS needs to set out why the above case law is not regarded as relevant to its own policy making.

We would also like to draw attention to increasing evidence of problems within the Irish prison estate¹⁵ due to placement of male prisoners in the female estate and lack of judicial discretion. In 2019 the Chair of the Criminal Law Committee in the Law Society of Ireland, Robert Purcell stated¹⁶ that GRA reform had placed the State in an “impossible position” with regard to transgender prisoners.

10. **Data on the transgender prison population**

The SPS do not publish data on the transgender prison population and we were disappointed that the review invitation provided no relevant data as a reference for participants. We do not think it is possible to properly consider any policy impact without robust trend data on the number, sex and placement of transgender prisoners. The ad hoc snapshot data released by the SPS in response to Freedom of Information requests, media requests and parliamentary questions falls well short of this standard.

We note that the Ministry of Justice 2020/21 ‘Offender Equalities Annual Report’ provided data on the number of the known number of transgender prisoners with Gender Recognition Certificates. Capturing this data is of particular relevance to the forthcoming Bill on GRC reform, which may see an increase in the number of prisoners applying for GRCs.¹⁷

We ask that the SPS make data on transgender prisoners available to those taking part in the review process. Drawing on responses to past data requests as necessary, it should provide the best available picture of how this population has varied in size and nature over time. It should provide as much information as possible on the number, type and location of prisoners covered by the policy, and how the transfer system has worked (the proportion of prisoners of each sex seeking

¹⁴ See: [The placement of trans prisoners](#) (MurrayBlackburnMackenzie, 2020)

¹⁵ [Male born transgender sex-offender moved to female prison in Limerick despite not having surgery](#) (Mirror, 12 September 2019)

¹⁶ [Male-bodied transgender inmate housed with women](#) (Law Gazette of Ireland, 18 October 2019)

¹⁷ [Her Majesty’s Prison and Probation Service Offender Equalities Annual Report 2020/21](#) (Ministry of Justice)

transfers, how far requests were agreed, how often transfers have been reversed, and, if reversed, whether at the prisoner's or the SPS's initiative).

The SPS should commit to publishing an agreed set of data on this group on a routine basis, as part of the SPS time series Prison Population data, and the Scottish Government Scottish Prison Population Statistics series. That an MSP was badged transphobic in the Scottish Parliament for simply asking 'how many people whose biological sex is male are currently in women's prisons in Scotland'¹⁸ underscores the key role that the SPS has still to play in normalising discussion in this area.

We would be very happy to meet you and your colleagues to discuss any of this, if that would be helpful. Please let us know if so, and we will look for a suitable slot using the link   sent last week.

Yours sincerely,

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¹⁸ [Asking about male inmates in women's jails isn't transphobic](#) (Daisley, Spectator, January 2022)