



# Justice Committee briefing on the Scottish Prison Service ‘Gender Identity and Gender Reassignment Policy for those in our Custody’

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## Introduction

This briefing set out concerns about the operation of the Scottish Prison Service (SPS) Gender Identity and Gender Reassignment Policy. We believe that SPS policy as currently formulated, together with the Prisons and Young Offenders Institutions (Scotland) Rules 2011, negatively impacts on female prisoners and officers, in respect of their physical and psychological safety, dignity and privacy.

## 1. Characteristics of the female prison population

- 1.1. The SPS is [currently holding](#) around 286 women and 7,174 men in custody. The SPS accommodate male trans-identified prisoners in both estates. We understand five trans-identified males are held in the female estate (2% of the female population) and six in the men’s estate (0.08% of the male population).
- 1.2. Female prisoners have distinctive needs and vulnerabilities. In 2012 the [Commission on Women Offenders report](#) (‘the Angiolini report’) documented very high rates of mental health problems among Scotland’s female prison population (80% of those housed at Cornton Vale) and ‘higher lifetime incidences of trauma, including severe and repeated physical and sexual victimisation’.
- 1.3. [Research](#) by McMillan et al. (2022) demonstrated the complex needs and high levels of victimisation among those housed in the Scottish women’s estate.<sup>1</sup> Based on a sample of 109 participants (around a quarter of the female estate):
  - 70% reported childhood sexual or physical abuse.
  - 85% reported adult sexual or physical abuse.
  - 83% reported problematic alcohol or drug use.
  - 92% reported mental health difficulties, most commonly anxiety and depression.
  - 78% reported a significant head injury (SHI) and 65% reported repeat head injuries.
  - Of those with SHI and/or repeat head injuries, domestic violence was the most common cause, reported by 63 individuals.

## 2. SPS Gender Identity and Gender Reassignment Policy

- 2.1. The [SPS Gender Identity and Gender Reassignment Policy for those in our Custody](#) allows prisoners to be accommodated on the basis of self-declared gender identity, subject to a case by case assessment. Female prison officers are expected to search male trans-identified prisoners, including those with male genitalia, and vice-versa.
- 2.2. The policy was developed over a seven-year period in close collaboration with the Scottish Trans Alliance. The SPS wholly failed to consider the needs of female prisoners and officers. It did not consult with any groups representing women’s interests, nor consider documentary evidence on women’s imprisonment or the

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<sup>1</sup> Based on interviews with 104 female prisoners and five trans-identified males. Unfortunately, the researchers do not disaggregate these two populations, which means that the findings need to be read more cautiously.

experiences of female offenders. Notably, it did not cite the Angiolini report, published just two years prior.<sup>2</sup>

- 2.3. The Equality Impact Assessment (EQIA) concluded that women, in this context, female prisoners and prison officers, would not be affected. A copy of the EQIA and accompanying commentary can be accessed [here](#).
- 2.4. In December 2018 the SPS [told the press](#) that it intended to review the policy. An SPS spokesperson said: 'One of the groups we will be particularly keen to consult is the female prison population, who have not been specifically consulted about this before'. The review was due for completion last summer. The Scottish Government recently stated that the review is '[nearing completion](#)'.
- 2.5. The SPS does not intend to publish a revised draft for scrutiny before it is adopted. It [told us](#), 'We plan to publish the final policy alongside supporting documents, including the range of evidence that has informed the review. We will not be seeking further input externally or internally from stakeholders once the policy is final and published'.
- 2.6. We urge the Committee to ask that the SPS reconsider its position and submit its conclusions to public scrutiny before publishing a final version of any revised policy.

### **3. Prisons and Young Offenders Institutions (Scotland) Rules**

- 3.1. The Prisons and Young Offenders Institutions (Scotland) Rules ('the Rules') set out statutory rules for managing Scotland's prisons. Note that these are Scottish Statutory Instruments, subject to the negative procedure, which limits parliamentary scrutiny.
- 3.2. We draw the Committee's attention to far-reaching changes made to the Rules in 2011, ahead of the current SPS policy taking effect. It is open to question whether these legislative changes were made to facilitate the 2014 policy.

#### **Classification of prisoners**

- 3.3. Classification refers to the placement or allocation of prisoners, based on risks and needs. The 2006 Rules ([rule 13](#)) classified prisoners by 'sex', along with age, offence, period of sentence and previous record. The 2011 Rules ([rule 14](#)) replaced the classification of prisoners by sex with 'gender' and added a broad ranging reference to 'any other matter which the Governor considers appropriate'.

#### **Male and female accommodation**

- 3.4. The 2006 Rules ([rule 133](#)) stated, 'Female prisoners shall be accommodated in rooms or cells which are entirely separate from rooms or cells used for the accommodation of male prisoners'. This approach was continued in 2011: [rule 126](#) states, 'Female prisoners must not share the same accommodation as male prisoners' and accommodation 'must, as far as reasonably practicable, be in separate parts of the prison'.
- 3.5. We are unclear how this is squared with the classification of prisoners by 'gender' in the same instrument. It is also undermined by the SPS Gender Identity policy, which provides for accommodation based on gender identity.

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<sup>2</sup> For further information on the policy development process and proposed review see: [The SPS review on trans prisoners: a chance to get policy-making in Scottish prisons back on track](#)

For a detailed account of the policy development process, see: [Losing sight of women's rights: The unregulated introduction of gender self-identification as a case study of policy capture in Scotland](#)

## Searches of individuals

- 3.6. The 2006 Rules stated that prisoner searches must be carried out by prison officers 'of the same sex' ([rule 106](#)). In 2011, the reference to sex was replaced with 'gender' ([rule 92](#)). A similar change was made in respect of other search types. Table 1 provides links to the respective rules in 2006 and 2011.

Table 1. Replacement of sex with gender in the Prisons and Young Offenders Institutions (Scotland) Rules

	2006 Rules: Prison officers must be the 'same sex'	2011 Rules: Prison officers must be the 'same gender'
Prisoners	Rule <a href="#">106</a>	Rule <a href="#">92</a>
Visitors	Rule <a href="#">102</a>	Rule <a href="#">106</a>
Contracted services & health providers	Rule <a href="#">104</a>	Rule <a href="#">108</a>
Prison officers/employees	Rule <a href="#">151</a>	Rule <a href="#">142</a>

- 3.7. The 2011 Rules are accompanied by an [Executive note](#) on the key changes from 2006. Whilst each of the above rules are listed, the replacement of sex with gender is only made explicit in relation to searches of prison officers and employees (rules 151/142).
- 3.8. The Scottish Parliament Subordinate Legislation Committee considered the 2011 rules on [4 October 2011](#). It did not discuss any of the above changes.

## 4. Risk assessment on the placement of transgender prisoners

- 4.1. We understand that in 2016, following a complaint from a prisoner, the SPS introduced a risk assessment template, aimed at providing a consistent record of decision-making. The template and a directive explaining its introduction is [here](#).
- 4.2. The template is inadequate as a tool for decision-making. It employs subjective terminology ('social gender', 'gender identity' etc.) and is heavily weighted towards mitigating risks to transgender prisoners. It does not refer to women or sex as a protected characteristic. For a critical overview of the template, see [here](#).
- 4.3. The [interim measures](#) introduced by the Scottish Government state male offenders with a history of violence (including sexual violence) against women will, by default, be placed in the male estate (subject to exceptions). This departs from current SPS policy, which states that male offenders who poses a sexual risk should not, by default, be excluded from the female estate (see [Section 6.4. Accommodation](#)).

## 5. Female offenders and trauma-informed care principles

- 5.1. SPS Gender Identity policy represents a significant departure from its commitment to trauma-informed care principles in respect of female prisoners. This approach came about principally as a result of the Angiolini report, which acted as a '[catalyst for change](#)' both in relation to the physical prison estate and the type of care provided.
- 5.2. The SPS [New Model of Custody for Women](#) (2019) detailed how a trauma-informed approach would underpin operational practice. Under the 'Core Values & Principles of Trauma Informed Care' it noted that 'women who have suffered some type of physical or emotional trauma are often hyper-aware of possible danger' and that 'survivors of trauma may find it difficult to trust others' (p.7).
- 5.3. The [SPS Strategy for Women in Custody 2021-25](#) aims to establish 'an environment in which women feel safe and can have space to heal' (p.9). Under the heading 'What will the strategy look like in practice', it states, 'There is a climate of dignity and respect and

privacy is protected. The services and facilities provided promote physical, emotional and psychological health and wellbeing' (p.11).

- 5.4. At the same time, the SPS has continued to place male offenders in the female prison estate. This tension between trauma informed care principles and the placement of males in the female estate is discussed further [here](#).
- 5.5. The SPS recently started to publish statistics on the placement of trans prisoners; prior to this, media reports provided the only public source of information. The following non-exhaustive list shows some of the offences committed by male prisoners held at some stage in the female estate. These include murder, torture, and sexual assault.
  - a) Murder (Alan Baker/Alex Stewart): Held in the female unit at Greenock prison ([here](#)).
  - b) Murder (Daniel/Sophie Eastwood): Held in women-only units at HMP Edinburgh and HMP YOI Polmont, and at HMP YOI Cornton Vale ([here](#)). Whilst still housed in the male estate, Eastwood terrorised a female officer, who left her job as a result ([here](#)).
  - c) Murder and torture (Peter Laing/Paris Green): Held at Cornton Vale women's prison and HMP Edinburgh women's section ([here](#) and [here](#)).
  - d) Murder, assaulting (biting) a female officer (Richard McCabe/Melissa Young): Held in remand at Cornton Vale ([here](#)).
  - e) Assault, robbery, racially aggravated harassment, dishonesty and threatening police officers. (Stuart Kelly/Katelyn Findlay). Held at Cornton Vale (see [here](#), [here](#))
  - f) Voyeurism and sexual assault (Katie Dowlatoski). Held at Cornton Vale ([here](#))
  - g) Assault, robbery and threatening police (Joseph/Nicola Wilson). Held at Cornton Vale ([here](#), [here](#) and [here](#))
  - h) Threatening and abusive behaviour (Alan/Alannah Morgan). Appeared in court as both male and female. Held on remand at Cornton Vale ([here](#)).

#### **The impact on female offenders**

- 5.6. The placement of any male offender in the female estate, irrespective of their gender identity or offending history, is fundamentally at odds with a trauma-informed approach to dealing with women offenders. It undermines women offenders' sense of physical and psychological safety, as well as their dignity and privacy. It fails to take seriously the fact that female offenders are often repeat victims of male sexual and physical violence, or that some women may be re-traumatised by male bodies or voices.,
- 5.7. In a [BBC interview](#) in February 2020, the former governor of Scotland's women's prison Rhona Hotchkiss stated that in her experience, it is "*always an issue to have trans women in with female prisoners*" and that the presence of a male bodied person among vulnerable women caused them distress and consternation.
- 5.8. Academic [research](#) undertaken by a former SPS employee revealed multiple concerns raised by female prisoners. These included:
  - The placement of biological males with full male genitalia in the female estate.
  - Confusion as to whether these males 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.
  - Fear that males who pose a threat to women may move to the female estate.
  - 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, presenting with a full beard.
- Family members concerns about daughters/sisters being housed with male prisoners.

5.9. In a recent media interview, a former prisoner spoke about her experiences of being accommodated alongside two male offenders, convicted of murder and domestic violence respectively. She stated:

“My whole time in prison on constant high alert, my nerves were frazzled with fear. These incredibly violent men were walking around the communal shower area naked and sometimes clearly aroused. Myself and other women were in cubicles with only a curtain to protect us. I was shaking with fear. In the end I went to the prison clinic and had a coil fitted because I believed I could be raped at any time. I didn’t want one, I felt forced to do it. ([Daily Record](#), 29 January 2023)

#### Impact on prison officers

5.10. The SPS Gender Identity policy also impacts on female prison officers, particularly in relation to searching requirements. The policy states:

People in custody should be **rubdown and body searched in accordance with the social gender in which they are living**, rather than according to their physical body... The genital appearance of a transgender person in custody **must not** be used to determine which gender of Prison Officer should search them. ([SPS 2014: 6.5](#) emphasis in original)

5.11. As noted above, the 2011 Prison Rules also require that prisoners are searched by an officer of the same ‘gender’. Unpublished research ([available](#) via a Freedom of Information request) based on interviews with prison officers shows the clear discomfort felt by some female officers, when required to search male prisoners:

“I know that some staff are uncomfortable, female staff are uncomfortable searching a transgender prisoner who was previously a male.”

“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.”

“No. I wouldn’t, personally. Unless I was ordered to do so. And if I’m ordered to do so, I’ll do that. I’ll then put a paper in [submit a formal grievance] at the end of it saying that was...it took me totally out my comfort zone. And I felt vulnerable in that type of situation.”

The following comment by a line manager, suggests some female officers feel unable or unwilling to express their discomfort to senior staff:

“Luckily so far nobody has refused with me, but I have had staff sort of, I hear them in the background saying oh that’s not right, I’m not going to do this, I’m not going to do that. But I’ve been fortunate so far that they’ve all carried out the jobs I’ve asked them to carry out.”

Similarly, male officers felt uncomfortable about searching female prisoners.

It was to be male staff to search him. Which, all the male staff said...refused point blank. Uh-huh. Every single one said...uh-huh...no. Absolutely not.

5.12. A recent [press article](#) (4 February 2023) stated that female prison officers were ordered to carry out intimate searches on an exceptionally violent trans-identified male prisoner, housed in the male estate. A Scottish Prison Officers Association spokesman stated he was concerned that female staff felt pressurised to carry out intimate searches.

## 6. Legal standards

- 6.1. HM Inspectorate of Prisons for Scotland (HMIPS) set out '[Standards for Inspecting and Monitoring Prisons in Scotland](#)', which are referenced against relevant legal standards, guidance and research. International standards cited include the European Convention on Human Rights (ECHR) and several soft law instruments. The latter include the UN Standard Minimum Rules for the Treatment of Prisoners ([Mandela Rules](#)) and UN Rules for the Treatment of Women Prisoners and Non-Custodial Measure for Women Offenders ([Bangkok Rules](#)), which supplement the Mandela Rules.
- 6.2. SPS Gender Identity policy engages with ECHR Article 3 (prohibition on torture or to inhuman or degrading treatment or punishment). The policy is also likely to engage Article 8, on the right to private life, and Article 14, on the right not to be discriminated against in the enjoyment of ECHR rights and freedoms.
- 6.3. We draw the Committee's attention to the Scottish Human Rights Commission [submission](#) to the SPS review (August 2022). We are surprised that Scotland's statutory human rights body treats Article 3 as a right that can be balanced. Aside from ECHR, the only other international instrument relied on by the SHRC is the Yogyakarta Principles. These are highly contested and based on the principle that in all contexts, consideration for gender should outweigh sex. The relevant legal standards referenced by HMIMPS are not cited or discussed.
- 6.4. The classification of prisoners based on gender and the placement of males in the female estate appears contrary to the [Mandela Rules](#). Rule 11 states:

'The different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment; thus:

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate'
- 6.5. Mandela Rule 52 states intrusive searches must be carried out by staff of the same sex. [Bangkok Rule 19](#) states, 'effective measures shall be taken to ensure that women prisoners' dignity and respect are protected during personal searches, which shall only be carried out by women staff'.
- 6.6. Mandela Rule 81 states 'women prisoners shall be attended and supervised only by women staff members'. We anticipate that the placement of male offenders in the female estate will often require the presence of additional male staff.
- 6.7. While our focus here is on women, we understand SPS policy may adversely affect male trans-identified prisoners held in restricted conditions in the female estate (for example, in locked cells without association, or on occasion, in segregation). It is unlikely such restrictions would apply in the male estate, which continues to house some male trans-identified prisoners, who have either never requested a transfer or been refused after risk assessment.
- 6.8. We would ask the Committee to seek clarification from the SPS and Scottish Government on how the revised SPS policy is taking relevant legal standards into account, including ECHR, and more broadly, how it will resolve the fundamental tension between its commitment to trauma informed care for female offenders, and the placement of any male offender, irrespective of gender identity or offending history, in the female estate.