

Jan Savage  
Executive Director  
Scottish Human Rights Commission  
*By email*

14 August 2023

Dear Jan,

**REVIEW OF SCOTTISH PRISON SERVICE POLICY ON SEX AND GENDER  
REASSIGNMENT: HUMAN RIGHTS ISSUES**

Dr Murray and Dr Hunter Blackburn were pleased to meet with you and the Commissioners on 21 June 2023, and welcomed the opportunity to discuss the [SHRC submission](#) (August 2022) to the Scottish Prison Service consultation on its Gender Identity and Gender Reassignment policy. We promised to write following the meeting.

As we set out at the meeting, it is our view that the SHRC's August 2022 submission to the SPS consultation was flawed. We stressed that impacts on women were not considered when the policy was developed (see further this [paper](#) published in Scottish Affairs) and set out our concern that the August 2022 submission similarly suffers from inadequate attention to the rights of women in prison.

We were pleased to hear that the Commission is looking to withdraw its submission and would be grateful if you could let us know what stage this is at, and when the revised submission will be available. For reference, please find below a summary of our key points, and links to further relevant sources.

**Article 3**

The SHRC submission implies that Article 3 (prohibition of torture, inhuman and degrading treatment) can be balanced against other considerations. As we discussed, Article 3 ECHR is absolute and cannot be approached in this way. We highlighted that the framing of the document inexplicably phrased obligations under the ECHR differently for the two different groups of prisoners, in a way that had the unfortunate effect of implying those of one group (women) are more subject to balancing than those of the other. We welcomed your clarification at the meeting that it was not your intention to convey that meaning and would urge you to make that clear to the SPS.

Under Article 3, degrading treatment includes that which 'humiliates or debases the individual' and arouses feelings of fear. We also welcomed that you did not discount that the presence of male prisoners, for some women, could cause such feelings.

We discussed how Article 3 issues may arise in relation to female prison officers and the requirement to search male prisoners. We also explained that the SPS did not consult female officers when developing its 2014 policy. The attached briefing provides examples of the clear discomfort experienced by some female officers at searching male prisoners.

## **Articles 8 and 10**

As we pointed out in the meeting, the impact of placing male prisoners with the characteristic of gender reassignment in the female estate has an asymmetrical effect in terms of Article 8 privacy rights, insofar as the placement of one male will impact on most or all female prisoners.

Related to this, the August 2022 submission does not consider the right of female prisoners to be accurately advised about the sex of a person with whom they are confined, or whether prisoners who name a person's sex accurately will automatically face any penalty. We recommend this recent [analysis](#) on Article 8 privacy issues, in the context of gender recognition reform, and some of the difficulties created by the stringent privacy provisions the Gender Recognition Act 2004.

## **Prisoner vulnerability and the FDJ case**

The August 2022 submission minimises impacts in terms of female vulnerability. Drawing on R. (on the application of FDJ) v Secretary of State for Justice, the SHRC state:

'Requiring that the process of risk assessment take into account the views of women prisoners and knowledge of their heightened vulnerability: while this is important to understand and may have relevance, it does not provide a real and concrete basis on which to restrict the individual transwoman's rights'. As the Court said in FDJ

"I fully understand the concerns advanced on behalf of the Claimant. Many people may think it incongruous and inappropriate that a prisoner of masculine physique and with male genitalia should be accommodated in a female prison in any circumstances. More importantly for the Claimant's case, I readily accept that a substantial proportion of women prisoners have been the victims of sexual assaults and/or domestic violence. I also readily accept the proposition...that some, and perhaps many, women prisoners may suffer fear and acute anxiety if required to share prison accommodation and facilities with a transgender women who has male genitalia, and that their fear and anxiety may be increased if that transgender woman has been convicted of sexual or violent offences against women". However "...the subjective concerns of women prisoners are not the only concerns which the Defendant had to consider in developing the policies: he also had to take into account the rights of transgender women in the prison system." (SHRC, 2022: 5).

As explained in the meeting, we do not think that FDJ can be relied on, in the way the August 2022 submission does, for the purposes of a human rights assessment. It is a ruling of a lower court which was not taken to appeal. The case looked narrowly at whether the policy then applying was lawful in failing to distinguish between sex offenders and other prisoners. The complainant did not ask the court to rule on the overall desirability or human rights implications of confining women with any male prisoners with the characteristic of gender reassignment. The judgment did not offer any view on whether the policy then applying was required to meet human rights requirements in relation to gender reassignment. That policy has of course since been radically changed, to rule out most males with the characteristic of gender reassignment from being housed with women, anticipating that this will happen only in exceptional cases.

The implied hierarchy in the description of women prisoners' 'fear and acute anxiety' as 'subjective concerns', contrasted with the 'rights' of males covered by gender reassignment, we believe should, of itself, have alerted the Commission to the limitations of the judgment as a human rights analysis. The asymmetric impact discussed above, in terms of the numbers of people affected, is also relevant here. Note also that recent policy measures

introduced by the Ministry of Justice are much more restrictive, and have effectively superseded the ruling in FDJ (see attached briefing).

As this [blog](#) by the Legal Feminist lawyers network discusses at more length, there are therefore good reasons to question how adequately and thoroughly human rights issues were explored during the case.

### **International instruments**

The August submission cites the Yogyakarta Principles (YP), stating ‘Any policy developed by SPS should take into account these standards with a view to international best practice in human rights’.

The YP are highly contested and do not consider women’s rights. The rules are the creation of a self-appointed group of activists and are premised on the principle that in all contexts, consideration for gender should outweigh sex. They do not create any obligations on the Scottish Government. In 2022 one of the co-signatories, Professor Robert Wintemute stated that women’s rights were not considered at the meeting where the principles were written, and the authors did not consider that fully intact males would seek to access female-only spaces. See further [here](#).

The submission did not refer to other international instruments, developed through established intergovernmental machinery processes, 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. This is surprising, given their direct relevance to the SPS consultation. The Mandela rules are also routinely relied on by bodies such as HM Inspectorate of Prisons. We note that current SPS policy does not meet these standards in a range of areas. For example, on accommodation Mandela 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’

Mandela Rule 52 states intrusive searches must be carried out by staff of the same sex, and 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’.

On a related point, the August 2022 submission refers to the UN Special Rapporteur on Sexual Orientation and Gender Identity. If this office holder is being cited, then for balance the UN Special Rapporteur on Violence Against Women and Girls also should be.

### **Increasing numbers of male staff in the female estate**

We anticipate that the placement of male offenders in the female estate will result in requiring more male prisoner officers being allocated to the women’s estate, given this group typically has a more violent pattern of offending behaviour than women. We note that Mandela Rule 81 states ‘women prisoners shall be attended and supervised only by women staff members’. Regardless whether this position can be achieved, the rule calls into question any policy which of itself is likely to increase the need to place male staff in women’s prisons.

### **Segregation and restricted conditions**

For their own safety or that of others, prisoners with the characteristic of gender reassignment may be held in more restricted conditions in the opposite-sex estate than if they were held in same-sex accommodation (for example, in locked cells without association, or on occasion, in segregation). We note the HM Inspectorate of Prisons has recently published a [highly critical report](#) on the use of segregation by the SPS. We have been concerned that political and public discussion of these cases has treated segregation in the women's estate as an ordinary and acceptable outcome of policy for male prisoners with the characteristic of gender reassignment.

As we noted at the meeting, the SPS continues to house in men's prisons some male prisoners with the characteristic of gender reassignment, who have either never requested a transfer or been refused after risk assessment. At one stage, three of the six male prisoners with the characteristic of gender reassignment held in the male estate had not requested a transfer (see [here](#)). This is an important observation because it strongly suggests the needs of male prisoners with the characteristic of gender reassignment have to be capable of being safely met in the male estate, and are currently are being, without relying on transfer to the female estate, to the detriment of vulnerable female prisoners. The splitting of this group between men's and women's prisons appears likely, if anything, to increase the isolation of those individuals still held in the male estate. This [blog](#) provides further background and data on this key point, which has been largely overlooked in the debate here.

### **Use of female accommodation to de-escalate male violence**

During the meeting, one of the Commissioners gave the example of a male prisoner who was described as driven to violence by his "trauma around gender", suggesting that not being in a male environment had acted as a 'de-escalator'. The Commissioner argued that the prisoner's violent behaviour was due to 'being in the wrong place'. In our view it is wholly inappropriate to use the women's estate for the management of violent male behaviour, no matter the cause.

### **Wider relevance of Articles 3, 8 and 10**

We also urged the Commission to explore the potential impact on women's rights under Article 3 of including some males in some other settings designated as being for women only, for example, in secure psychiatric care and single-sex hospital wards, and similarly Articles 8 and 10. We would draw to your attention two NHS Boards (NHS Ayrshire and Arran, NHS Greater Glasgow and Clyde), discussed further [here](#). Both set out a case study on how to deal with a female patient who has expressed concerns about the placement of a male patient with the characteristic of gender reassignment on a nominally single-sex ward. The respective policies advise, 'it would be appropriate to re-iterate that the ward is indeed female only and that there are no men present', effectively instructing women to disbelieve their own senses. NHS Ayrshire and Arran: 'ultimately it may be the complainant who is required to be removed' and describe such behaviour as equivalent to racism or homophobia. We would urge the Commission to take an interest in the human rights implications of such policies for women, in particular.

## **Terminology**

The August 2022 submission refers to 'cis-women'. This is a term that only functions by reference to a belief system which many women find offensive in assigning to them an 'identification' with stereotypical expectations placed on women. Public bodies should not be seeking to impose that view or assume it is universally shared.

We also draw your attention to [research](#) that we have recently published, which shows that public understanding of the terms 'trans woman' and 'transgender woman' is limited. Using representative public polling, we found that both terms were correctly understood by fewer than two-thirds of those asked. Based on these results, it is reasonable to anticipate that the term 'cis-women' is also likely to suffer at least equal levels of confusion.

## **Asymmetrical access to justice**

The Commission will be aware that the conflict of rights around sex and gender identity is an active area of law. In Scotland, Just Right Scotland, which is part Scottish Government funded, is focusing on 'trans justice' cases (see [page 5](#)). For example, Just Rights represented Scottish Trans pro bono, in pursuing a legal intervention in the Outer House of the Court of Session (Scottish Trans is almost wholly Scottish Government funded). We are not aware of any similar arrangements apropos support for women, which creates a profoundly asymmetrical effect in terms of access to justice, including as concerns litigation on human rights matters.

## **Role of SHRC**

We recognise that the Commission provides guidance on a human rights framework, rather than detailed policy advice. We understand however, that the Commission is obliged to ensure that organisations are fulfilling their legal obligations. That is, although the Commission does not make policy, it does have a role in judging the impact of policy and policy processes. With that in mind, we also urge the Commission to take an active interest in the consultation process, and whether the methodology used to collect the views of women prisoners is likely to elicit honest responses (see further our correspondence with SPS). This [article](#) provides more detail on the consultation, which is now long overdue, even accounting for the pandemic. Our correspondence with the SPS on the consultation paper and the SPS response can be accessed [here](#) and [here](#).

As discussed at the meeting, we attached a short briefing, which sets out evidence on the impacts of the SPS policy on female officers and staff. We also strongly encourage the Commissioners to meet former prisoner governor Rhona Hotchkiss (we are providing her contact details separately). We also plan to say, in the next week or so, that we have met you, and to put a copy of this letter and briefing note into the public domain at that point.

Copies go also to the Commissioners, Jim Farish, Shelley Gray and Claire Methven O'Brien.

Yours sincerely,

Dr Lucy Hunter Blackburn

Dr Kath Murray

Lisa Mackenzie