

SUBMISSION TO THE CRIMINAL JUSTICE COMMITTEE ON THE SPS POLICY ON THE MANAGEMENT OF TRANSGENDER PRISONERS

FOR WOMEN SCOTLAND, 04 JANUARY 2024

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 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.