

# Equality and Human Rights Impact Assessment (EHRIA)



To be completed by the person leading the EHRIA	
Title of Policy or Practice:	The SPS Policy for the Management of Transgender People in Scotland's Prisons
Date EHRIA Commenced:	2022
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Revision History			
Revision Date	Version	Summary of Changes	Authoriser

For official use only by the Equality and Diversity Team	
EHRIA Tracker Number:	
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**Remember!** When completing the Equality and Human Rights Impact Assessment policy/practice must be interpreted in the widest possible sense to include the full range of SPS policies, provisions, criteria, functions, procedures, practices, and activities for employment and service delivery.

## Stage 1: Background information

### What is the title of the new or revised policy/practice?

SPS Policy for the Management of Transgender People in Custody.

### What is it?

A new policy / practice

A revised policy / practice

### Acronyms and terms used in this document (for a full list of terms and their definitions see the new policy document)

CHS	Criminal History System - the Scottish Criminal Record Database
Gender Diverse	An individual that does not follow the gender norms commonly associated with the sex they were assigned at birth. This is an umbrella term for gender identities and gender expressions that differ from dominant social expectations. This term is used to categorise various gender identities (non-binary, gender fluid, etc.).
TCC	Transgender Case Conference
GRC	Gender Recognition Certificate
Non-transgender/Cis gender	A person whose gender identity matches their sex assigned at birth. In all of the documents related to this policy, it is a term which is used to mean a person who is not transgender and does not imply any innate gender identity. SPS make no assumptions about how a transgender, or a non-transgender, person might express their gender identity or present their gender.
PER	Person Escort Record
SCCPES	Scottish Court Custody and Prisoner Escort Services in Scotland
SCTS	Scottish Courts and Tribunal Service
Transgender	<p>A person with the protected characteristic of gender reassignment who is proposing to undergo, is undergoing, or has undergone, a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex.</p> <p>The term transgender is often abbreviated to “trans”. A “trans woman” is a person who was assigned male at birth but understands herself to be a woman and identifies as a woman. A “trans man” is a person who was assigned female at birth but understands himself to be a man and identifies as a man. The term transsexual is seen by many as an outdated term for</p>

	transgender/trans but is used in the Equality Act 2010 under the definition of gender reassignment.
Transitioning	The steps a transgender person takes to live in the gender with which they identify. Transitioning may encompass a variety of steps including medical and surgical intervention, presenting and dressing in the gender with which they identify, changing names and pronouns, and changing official documents. It is important to understand that not all transgender people may want, or are able, to go through medical or surgical transition. This process may also be called gender reassignment. Gender reassignment is a protected characteristic under the Equality Act 2010. A person has that protected characteristic if they are proposing to undergo, are undergoing, or have undergone a process for the purpose of reassigning their sex.
SRU	Separation and Reintegration Unit - a separate part of the prison used to remove an individual from general association with the intention of one (or more) of the following reasons: to maintain good order or discipline, to protect the interests of any prisoner, or to ensure the safety of other persons, i.e. keeping the individual safe, or to keep others safe from the individual.  For an individual to be located there they must be being managed under the application of a Rule 95 or Rule 41 of the Scottish Prison Rules.
VAWG	Violence against women and girls

**Are there any other SPS policies that will be altered by the proposed changes?**

If so, they will also need to be impact assessed separately.

Yes (Please provide details) –

The following strategies, policies and procedures will be impacted by or interact with the SPS Policy for the Management of Transgender People in Custody:

- Searching policy
- PRL standard 2.3.2 *Searching is carried out effectively and sensitively.*
- Women's Strategy
- Code of Conduct policy
- Escorting policy
- Think Twice
- Dignity at Work policy
- Talk2Me
- GMA on protection prisoners (in draft)
- Population strategy
- Cell Sharing Risk Assessment (covers location within an establishment)
- Prison survey

No

## Stage 2: Scoping and evidence gathering

Scoping	
<p>Why are you introducing the new policy/practice, or why are you revising an existing policy/practice?</p>	<p>SPS's Gender Identity and Gender Reassignment Policy was published in 2014, hence it is timely to conduct a review to assess its effectiveness and its impact on both transgender and gender diverse people in custody as well as other groups in prison who may be impacted.</p> <p>A range of concerns were raised with SPS and Scottish Ministers about how the previous policy had been developed, especially the lack of engagement across the women's estate in the EHRIA process. There were concerns from a range of interest groups about how the policy was being implemented and implications for the safety and wellbeing of people in custody.</p> <p>The purpose of the policy review was to develop an updated and evidence-based corporate policy position which would clearly articulate an updated intent and how this would be achieved, consistent with the obligations of SPS as a public body and as a prison service.</p>
<p>What is the intended outcome(s) and impact of the new policy/practice, or making the changes to an existing policy/practice?</p>	<p>The new policy's intent is: <i>We will admit, place, and manage transgender people in a way which is rights-based, consistent with the obligations of SPS as an Executive Agency of the Scottish Government, as a public body, and as a prison service which seeks to promote the health, safety, and wellbeing of all people who live in Scotland's prison system.</i></p> <p>The policy seeks to ensure that SPS is fulfilling its obligations under the Equality Act 2010, including the Public Service Equality Duty, as well as obligations under the Human Rights Act 1998 and that our practice is in line with a human rights-based approach and our broader approaches to the management and social rehabilitation of all individuals in custody.</p> <p>The policy seeks to ensure a comprehensive and consistent approach is taken across SPS towards the admission, placement, and management of transgender individuals in custody. This EHRIA considers the policy as well as the development of operational</p>

## Scoping

guidance documents for staff on managing transgender people in custody. The guidance will be tested and refined in the 12-week period, between the date of policy publication and the date of policy implementation. As an additional product of the review, SPS will also develop separate guidance for the management of gender diverse people in custody which will be subject to a separate EHRIA. Although the policy review looked at how the 2014 policy impacted on both transgender and gender diverse people in custody (the 2014 policy applied to both transgender individuals as well as other individuals who can broadly be categorised under the umbrella term gender diverse), this EHRIA assesses the impact of the Management of Transgender People in Custody policy and guidance only.

## Evidence gathering

### WHO did you consult with?

(Have you consulted/involved equality groups or other groups who will be affected by the new/revised policy/practice? The Trade Union Side should be always consulted in support of the SPS Partnership agreement. The PGA (Prison Governor's Association) should be consulted as well. It may also be useful to consult with staff via support networks (e.g. Prism, Race Support Network, Disability Support Network, and Women's Development Network) or with people in custody via focus groups.

SPS conducted a comprehensive evidence and engagement exercise as part of this review using a range of methodologies. The intention of the review was to put lived experience at the heart of the review, engaging and gathering evidence from a wide range of internal and external stakeholders, and from other jurisdictions, to develop an evidence-based and operationally suitable policy. This co-production also aimed to increase confidence in the policy review process and its outcomes.

Internal evidence gathering came from the following sources:

- Semi-structured interviews with nine transgender people in custody which focused on their experience in custody as transgender individuals, the impact that the 2014 policy had had on them in custody, and where they believed it could be improved. No interviews took place with anyone who identified as gender diverse as, at the time of the interviews, there was no one in SPS custody who was known to identify as gender diverse.
- Semi-structured interviews with 13 staff members ranging from Residential Officer to Governor all with experience of managing transgender people in custody to discuss their experiences, how they thought the policy was working and recommendations for its improvement.
- Surveys were distributed to all women and the same number of men in custody (240 to women and 240 to men) to better understand general attitudes towards transgender and gender diverse individuals and the policy's impact of managing

transgender and gender diverse individuals across the prison population. 238 (49.6%) surveys were returned completed. 143 from men ( 59.6% response rate), and 95 from women (39.6% response rate).

- Surveys were supplemented with interviews with 11 non-transgender men and women in custody to expand on the survey's findings, particularly the impact that the policy may have had on their own wellbeing and safety.
- Discussions took place with the trade union side on findings and recommendations of the policy review, especially regarding searching obligations of staff.
- Consultation with internal SPS Directorates and departments and teams including the internal operational quality assurance panel, Operations (including some Governors), Psychology, Chaplaincy, Health, Digital and Human Resources.

#### External evidence gathering:

- 37 external organisations and agencies were invited to participate in interviews, 18 interviews took place and three organisations provided written feedback. These organisations included academia, communities of interest and identity, service providers, and healthcare. Questions centred on the existing policy and their recommendations' impact on equalities and human rights duties. The organisations interviewed were:
  - Bent Bars
  - Community Justice Scotland
  - COSLA
  - Criminal Justice Voluntary Sector Forum – Shine, New Routes & Action for Children
  - Fair Play For Women
  - For Women Scotland
  - Howard League Scotland
  - Keep Prisons Single Sex
  - LGB Alliance
  - MurrayBlackburnMackenzie
  - National Gender Identity Clinical Network for Scotland
  - Rape Crisis Scotland
  - Risk Management Authority
  - Scottish Human Rights Commission
  - Scottish Trans
  - Social Work Scotland
  - Victim Support Scotland
  - Women in Prison
- Written submissions were received from the following organisations: His Majesty's Inspector of Prisons Scotland (HMIPS), the Scottish Human Rights Commission (SHRC) and Families Outside.
- Engagement with the Ministry of Justice in England and Wales, the Correctional Service Canada, and the Department of Corrections in New Zealand took place via email to learn about their policies and practices towards the management of

transgender and gender diverse people in prison to inform our own learning and practice. Learning was also gathered from published policies and research on policies from other jurisdictions.

- A public engagement exercise was published on SPS's website asking the following questions about the existing policy: What should, if possible, be retained from within the current policy? And what should be adapted, included, or discarded in an updated policy? The page was published one month before the closing date for submissions and three responses were received.
- At the authorisation stage of the policy review, further engagement was sought from experts in combatting violence against women. Experts came from Police Scotland, academia and two third sector organisations to enable constructive challenge of the content of the revised policy through a VAWG lens and inform the development of the EHRIA.

Relevant partners were also engaged with to verify and assure discrete aspects of the policy, including NHS Prison Care Network, SPS's throughcare partners, Police Scotland, the Scottish Courts and Tribunals Service (SCTS), and the Crown Office and Procurator Fiscal Service (COPFS).

**What quantitative and/or qualitative evidence, as well as case law relating to equality and human rights, have you considered when deciding to develop new or revise current policy/practice? How did it shape your policy/practice?**

A review of existing literature on the experiences of transgender and gender diverse people in prison, and on how prisons have approached accommodating and managing them, was conducted.

Case law was analysed to understand the application of relevant legislation including the Equality Act 2010 and precedents set which may impact on how the policy would be designed and implemented. The case law pertains to discrimination cases involving transgender people in prison, how sex and gender reassignment are understood in the Equality Act, and beliefs about gender and sex.

The policy review also considered the international human rights framework on the rights of transgender and gender diverse people in prison and the human rights concerns raised by prison policy.

The literature review, case law, and review of international practice helped shape the policy in several ways by providing a greater understanding of the transgender experience of prison which supported and corroborated what was said by transgender interviewees and external stakeholder groups; by identifying areas of good practice that could be adopted into the new policy such as the Searching Arrangement form, as well as affirming existing areas of good practice which should be maintained (e.g. case conference approach); and by enhancing understanding of the application of the Equality Act 2010 as it pertains to gender reassignment and sex discrimination.

**UK legislation**

Section 3(3) of the Prisons (Scotland) Act 1989

Prisons and Young Offenders Institutions (Scotland) Rules 2011

Equality Act 2010

Gender Recognition Act 2004

Human Rights Act 1998 in particular the following articles:

- Article 2: Right to life

- Article 3: Prohibition of torture and inhuman and degrading treatment and punishment
- Article 8: Right to respect for private and family life
- Article 14: Prevention of Discrimination

UK General Data Protection Regulation and the Data Protection Act 2018

### **Case law**

FDJ, R (On the Application Of) v Secretary of State for Justice (Rev 1) [2021] EWHC 1746 (Admin) (02 July 2021)

R (Green) v Secretary of State for Justice [2013] EWHC 3491 (Admin)

For Women Scotland Limited v (1) The Lord Advocate, (2) The Scottish Ministers (2022) CSIH 4

Fair Play for Women LTD v The Registrar General for Scotland and The Scottish Ministers [2022] CSIH 7

For Women Scotland Limited v The Scottish Ministers [2022] CSOH 90

For Women Scotland Limited v The Scottish Ministers [2023] CSIH 37

Forstater v CGD Europe & Others [2021] UKEAT 0105\_20\_1006 (10 June 2021)

### **International human rights standards and instruments (beyond that which are included in UK law)**

Nelson Mandela Rules

- Rule 7: No person shall be received in a prison without a valid commitment order. The following information shall be entered in the prisoner file management system upon admission of every prisoner: (a) Precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender;
- Rule 11: 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.

The Yogyakarta Principles

The Yogyakarta Principles address a range of human rights and their application to issues related to sexual orientation and gender identity. The Yogyakarta Principles is not an international human rights treaty but reflects existing international human rights law and best practice. Principle 9 is the applicable principle on the rights of people in detention:

States shall:

- Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;
- Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;
- Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;
- Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve



no greater restriction of their rights than is experienced by the general prison population;

- E. Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;
- F. Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;
- G. Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

Yogyakarta +10

Relating to the right to treatment with humanity while in detention

(Principle 9) states shall:

- H. Adopt and implement policies to combat violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as placement, body or other searches, items to express gender, access to and continuation of gender affirming treatment and medical care, and “protective” solitary confinement;
- I. Adopt and implement policies on placement and treatment of persons who are deprived of their liberty that reflect the needs and rights of persons of all sexual orientations, gender identities, gender expressions, and sex characteristics and ensure that persons are able to participate in decisions regarding the facilities in which they are placed;
- J. Provide for effective oversight of detention facilities, both with regard to public and private custodial care, with a view to ensuring the safety and security of all persons, and addressing the specific vulnerabilities associated with sexual orientation, gender identity, gender expression and sex characteristics.

International Covenant on Economic, Social and Cultural rights

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: ... (b) Safe and healthy working conditions

Article 12 (1)

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

### **SPS Research, Strategy and Policy**

SPS Gender Identity and Gender Reassignment Policy (2014)

Scottish Prison Service Delivery Plan 2022-23

Scottish Prison Service Framework document 2016

Scottish Prison Service Corporate Plan for 2023-28.

Talk to Me: prevention of suicide in prison strategy 2021

**Scottish Government strategy and reports**

Scottish Government Vision for Justice in Scotland 2022

A Fairer, Greener Scotland: Programme for Government 2021-22

A stronger and more resilient Scotland: the Programme for Government 2022-2023

Programme for Government 2023 – 2024

### **Policies from other prison services**

Correctional Service Canada *Commissioner's Directive 100: Gender Diverse Offenders (2022)*

Ministry of Justice / His Majesty's Prison and Probation Service *The Care and Management of Individuals who are Transgender (2023)*

New Zealand Department of Corrections *M.03.05 Transgender and intersex prisoner (2014)* and *1.10 Management of transgender prisoners (2018)*

### **Other sources**

The Civil Service Code

Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, Practices of exclusion, UN General Assembly Document A/76/152, 15 July 2021

Mandate of the Special Rapporteur on violence against women and girls, its causes and Consequences Ref.: OL GBR 14/2022 29 November 2022

Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity Ref.: OL GBR 15/2022 13 December 2022

Country reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

HM Inspectorate of Prisons for Scotland (2023) A Thematic Review of Segregation in Scottish Prisons

UNDP and UNODC (2020) Mapping of good practices for the management of transgender prisoners

### **WHAT did you learn from your evidence-gathering exercises?**

Through the evidence gathering, the policy review found the following themes and concerns emerge:

#### **Individualised, case-based approach**

The revised policy, like the previous 2014 policy, continues, as far as possible, to take an individualised, case-based approach to the admission, placement and management of transgender people where individuals who self-identify as a gender which does not align with their sex assigned at birth are supported and have their gender identity fully recognised. The multi-disciplinary case-based approach enables prison staff to consider multiple factors when making decisions about the admission, placement, and management of transgender people, including their safety and wellbeing, their often-complex support needs, as well as any risk they may pose to other individuals and groups

in prison, while still being a human rights approach. Transgender individuals will be admitted to a prison which aligns with their affirmed gender as long as, for transgender women, the individual has no known or unknown violence against women and girls (VAWG) markers and for transgender men, there are no known concerns around their health, safety, or wellbeing to placing them in the male estate which cannot be mitigated. A case-based individualised decision about their longer-term placement takes place at the first case conference to be held, insofar as practicable, within 72 hours of their admission.

The evidence collected in support of this policy review identified this as the best policy option for protecting the rights of transgender individuals in custody as well as being able to minimise negative impacts on other populations in custody, particularly on women who are not transgender (referred to from here on as non-transgender women). This approach is backed by the evidence gathered from people and groups interviewed for this review as well as comparative research and assessment of international human rights standards

Interviews with SPS staff highlighted the need for any approach to the admission, placement, and management of transgender people in custody to be person-centred and free from “blanket” rules or approaches that might prohibit an establishment’s available management options. Staff stated that decisions regarding the management of transgender people should be made on an individualised, case-based approach and that having a range of management options available was the best way to protect transgender people, staff, and other people in custody. Staff were confident that the current provisions within the policy for managing transgender people – principally using multi-disciplinary case conferences as the basis for decision-making – was the preferred approach. However, many felt the current guidance was lacking. Some staff wanted to be sure that there were oversight mechanisms in place to ensure that the right decision was being made, and that they had support when making these decisions to ensure that they were enhancing the safety, security, and rights of all people in custody.

Engagement with other criminal justice agencies in Scotland demonstrated that there is a very short period of time from leaving court to being admitted to custody for making decisions relating to an individual’s admission. The Scottish Court Custody and Prisoner Escort Services in Scotland (SCCPES) contract provider must conduct a dynamic risk assessment and complete a Person Escort Record (PER) based on information made available by the court and by the individual. However, information about an individual’s gender identity is not systematically or consistently collected or recorded at any point in the justice system. There is no requirement on any person to provide any justice partner with information on their gender identity. Furthermore, while someone’s gender identity or reassignment can be included in the PER between court and prison, individuals do not need to declare their gender identity and the gender identity information included requires verification. Admission to prison is the first point on someone’s journey through the justice system where someone’s gender identity is explored and systematically recorded, and prison is the first point in the justice system where someone’s gender identity informs how someone should be managed.

Regarding the individual’s offence information in the warrant, this only highlights the charge to which the warrant is related, alongside any potential aggravation (e.g. bail aggravation, domestic abuse aggravation under the Domestic Abuse (Scotland) Act 2018 etc). The warrant cannot provide any detail on the gender of the alleged victim or provide any other qualitative information about the offence. In the case of assault, for example, only assault is listed. Furthermore, the presence of an aggravation will not state conclusively that an offence relates to VAWG. While most domestic violence and sexual offending is perpetrated by non-transgender men against women, most of these offences can also be perpetrated by non-transgender women and by transgender individuals. Relevant criminal history information is shared with SPS by Police Scotland within the first 72 hours of admission of an individual into custody. It is not logistically possible for criminal history information to be shared between court and prison (the Scottish Criminal Records Office has 7 to 10 days to respond to requests) and it would not be appropriate

for the SCTS to request this information, particularly pre-conviction. SCTS does not have, or have any need to, access the Scottish Criminal Record Database (CHS). There is therefore no practical route for SCTS to share criminal history information along with warrant.

Transgender women can be especially vulnerable in prison to physical and sexual assault. There are reports from around the world of the abuse faced from other prisoners as well as from prison staff.<sup>1</sup> UN experts on combatting torture have pointed to the risks of violence against transgender women when they are automatically placed in men's prisons.

*“For transgender women and men, for example, it is often a situation of complete abandonment, resulting in some transgender women being placed in male-only prisons, where they are exposed to a high risk of rape, often with the complicity of prison personnel”, Sir Malcolm Evans, Chair of the UN Subcommittee on Prevention of Torture<sup>2</sup>*

Evidence from the Ministry of Justice in 2020 found that, in 2019 alone, there had been 11 sexual assaults on transgender women held in the men's estate.<sup>3</sup>

Some stakeholders were keen to emphasise that protecting women from violence must include protecting transgender women from violence too, and that SPS must be aware of the risk of violence faced by transgender women if they are placed in the men's estate.

Staff acknowledged that, while taking blanket approaches to how transgender people were placed in prisons would seek to minimise the possibility of people in custody fraudulently claiming to be transgender in order to victimise other people in custody, they pointed out that violence in prison is not solely motivated by gender, or a person's status as a transgender person, and therefore blanket approaches for placement of transgender people in custody would not fully eliminate risks of violence. VAWG experts also stated that no approach, blanket or otherwise, could prevent predatory men from seeking to manipulate the system and transgender and non-transgender people were clear that SPS should have robust processes in place to minimise the possibility of predatory men accessing the women's estate. Discussions with transgender and non-transgender people in custody found that incidents of violence were often preceded by disagreement or tensions which were not typically motivated by gender or transgender status, although some non-transgender women remained anxious about the proximity of a transgender individual's placement to them and what that might mean for them.

Transgender people interviewed for this review largely supported the individualised approach that the previous 2014 policy took in relation to their placement in custody. A number of transgender interviewees did not support the automatic placement of all transgender people in the estate which aligned with their gender identity. Some stated that if a transgender person was found to represent a risk to the people in a particular estate, then decisions that minimised that risk should be taken. Transgender people were vocal about the processes used by SPS to ensure that those who were being transgender “in bad faith” could be identified – i.e. individuals claiming a transgender status to gain access to perceived advantages. Transgender people made it clear that they were happy for an individualised approach to consider risk and safety, as those interviewed saw “illegitimate” transgender people as a threat to their reputation and wellbeing.

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<sup>1</sup> UNDP and UNODC (2020) Mapping of good practices for the management of transgender prisoners

<sup>2</sup> UN News ‘UN rights experts stress need for protection of LGBT people in places of detention’ 23 June 2016  
<https://news.un.org/en/story/2016/06/532932#:~:text=%E2%80%9CFOR%20transgender%20women%20and%20men,of%20the%20UN%20Subcommittee%20on>

<sup>3</sup> Question for Ministry of Justice Prisoners: Sexual Offences 11 May 2020 <https://questions-statements.parliament.uk/written-questions/detail/2020-05-11/45149>

In the survey distributed to non-transgender people in custody, when presented with a list of factors that SPS may consider before placing a transgender person in custody, the highest proportion of both men and women identified “the safety of the transgender person” as an important factor to be considered (66.4% of men, and 74.5% of women). Whereas non-transgender men considered the “safety of other people in custody” as being equally important as the safety of the transgender person (66.4% of men), the next most important factor for non-transgender women who responded to the survey was “how long the person has been living in the chosen gender” (70.2%). Although a large proportion of women surveyed (66%) saw the safety of other people in custody as an important factor in decision-making about transgender people in custody, this was not as important to them as other factors. Most external stakeholders believed an individualised approach to the management of transgender people in custody was the most sensible option. While many of those stakeholders differed regarding the admission and placement, they recognised that having an individualised approach to the accommodation of transgender people in custody appeared to be the most appropriate option in terms of addressing the concerns raised within the sex-based, gender-based and status-based options which were explored.

*‘The policy should seek to respect trans people’s lived gender identities and to uphold the human rights and equality of all people in custody. It should set out to achieve safety and dignity for all people in custody, and to promote their wellbeing. It should support trans people in custody to express the gender with which they identify and to access NHS gender identity services. It should ensure that accommodation decisions take into account the trans person’s preferences and their lived gender identity, together with comprehensive individualised risk assessment that considers their safety and needs and the safety and needs of others. It should be clear, and allow staff to have confidence in the process and in the decisions they are taking...A policy that sought to insist that all trans people must be held on the estate of their sex recorded at birth would breach trans people’s human rights. ...It is important to respect the trans person’s lived gender identity because it can be direct or indirect gender reassignment discrimination under the Equality Act 2010 to treat only as their birth sex a trans person who has transitioned to live permanently in their gender identity.’(SH2).*

*‘I am of no doubt that transgender people remain a highly vulnerable group who face continued discrimination and that recognition of one’s identified gender is essential to human rights and individual wellbeing. This recognition in wider society should, as with all other rights, also apply to prisons’ (SH7).*

*‘the main priority of the policy should be to ensure that the sort of health and wellbeing of the transgender population, specifically around mental health and protecting their privacy and their journey through their transition and making sure that we are taking account of the specific vulnerabilities that they have and in terms of discrimination and hate crime, physical and verbal abuse and just a lack of understanding around that population’(SH11).*

A small number of stakeholders felt that while they could understand the benefits of an individualised approach, they felt that the only condition by which a transgender woman should be deemed appropriate for accommodation within the women’s estate would be if a Gender Recognition Certificate (GRC) has been obtained and they had no history of violence or sexual abuse against women.

An individualised approach was also seen to offer flexibility to the management of transgender individuals in prison. While it may be necessary to accommodate transgender individuals in a prison which does not align with their affirmed gender, there may be other ways of supporting their gender identity, for example through access to work parties, activities, or even programmes with others of their gender identity. This approach would be in line with CPT’s recommendation on the accommodation and management of

transgender individuals: “If accommodated in a separate section, they should be offered activities and association time with the other prisoners of the gender with which they self-identify.”<sup>4</sup>

*Main points:*

- There is a need for placement approaches to consider multiple factors including how best to protect transgender people who may have, or face, particular vulnerabilities in prison or may pose a risk to others.
- Admission is a period where SPS staff are time and information poor but there is a need to make decisions quickly about where to admit a transgender individual that ensures their safety and the safety of others in custody.
- There is a need to recognise the vulnerabilities faced by transgender people - they face bullying and harassment because of their gender identity and a placement policy needs to be able to make decisions which protect transgender people from this.
- Blanket approaches may result in “outing” transgender individuals and do not entirely mitigate risk of violence against transgender people or others. For example, a policy which housed transgender people by their sex assigned at birth, or sex on birth certificate, may out transgender people without their consent or, vice versa, a policy that placed transgender people into custody solely based on their affirmed gender may force those to live in a location that they do not feel safe or comfortable in.
- Defensible, transparent and consistent decision making through an improved multi-disciplinary case conference process which considers multiple risk and need factors to inform placement decisions including the rights of the transgender individual, safety and security, wellbeing, and rights and safety of others in custody and staff and the consent of the individual would contribute to ensuring the rights of transgender people and others in custody are protected and demonstrate that measures taken to protect these rights are proportionate.

### **Data protection and management**

Stakeholders highlighted the importance of accurate recording of both sex and gender in SPS’s prisoner records database (PR2). There have been a number of calls for accurate data collection about the transgender population in prison, but also ensuring that this information should only be shared with those who need to know. Accurate data recording of sex and gender, that is available to officers and staff, would help reduce the risk of people being misgendered. Accurate and confidential data recording also ensures consideration for individuals’ privacy.

*I think having really clear rules about who needs to know what and why. Because I think there’s again an assumption that if someone discloses that they’re trans or think they might be that everybody needs to know. And I actually don’t think that’s the case. I think there’s lots of reasons why even a very few number of people need to know. And I think providing really clear guidance that specifies who needs to know and why because if someone discloses to somebody and they know that that then means that everyone is gonna know then they are just not gonna disclose where as if they know I can tell this one officer that I can trust who I think cares about me and is concerned about me and they can support me kind of quietly around this I think that then makes a difference, especially if they are not*

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<sup>4</sup> Report to the Italian Government on the periodic visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28 March to 8 April 2022 paragraph 161 <https://rm.coe.int/1680aaaa03>

*seeking to publicly transition because then you don't necessarily have to have a case conference in the same way, because they're not asking to dress in a particular way, or they're not asking to move prisons and they're not asking for particular things, but having a trusted person that knows that this is part of what they are going through and what they're experiencing. If they hear someone else being transphobic to another trans person, that is probably going to have an impact on them. (SH1)*

Accurate data recording also allows for monitoring discrimination against transgender individuals. Although numbers remain small at the time of publication, and thus trends may be difficult to discern, this recording is nonetheless important.

As stated above, SPS often has little information about those who are being admitted to its custody. In order to make informed and defensible decisions about searching and placement which seeks to protect their rights and safety and that of others, extensive information may need to be gathered on transgender individuals. It is imperative that any information gathered is only used for the purpose of making decisions about 1) which estate a transgender individual is to be located in, 2) which gender of officer will conduct searches, and 3) the individual's general management in custody where relevant. The use of the information should be based on objectively verifiable risks and not solely because the person is transgender.

There is a need to ensure information about GRC is kept confidential. SPS's previous GIGR policy stated that officers should not ask individuals if they have a GRC. 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."<sup>5</sup>

Where staff are aware that a prisoner has applied for or has a GRC, they should only disclose that information, or information about the individual's gender history, where it is necessary for certain limited purposes, such as prevention of crime or with certain criminal justice partners for the purposes of managing the individual in custody or on release from custody.

SPS had been publishing quarterly data on the transgender population since January 2022. However, this data included small numbers that could potentially render individuals identifiable. As the result of a review, in line with statutory obligations to uphold the right for those in our care to have their personal information protected, and as advised by guidance from the Chief Statistician, it was deemed necessary to protect the data of those in our care and mitigate the risk of identification of individuals. SPS should continue to publish the total number of transgender people in prison on a quarterly basis but should no longer report on the gender of estate that those people have been placed in, until such times as the risk of identification of individuals can be mitigated.

*Main points:*

- Accurate data recording and management ensures that those that need to know about a transgender individual's status can know that while maintaining the individual's privacy.
- Ensuring proportionality in data gathering when making decisions about the individual's management in custody, including placement and searching of transgender individuals, is imperative and this information must only be gathered

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<sup>5</sup> Equality and Human Rights Commission 'Protecting people from sex and gender reassignment discrimination' 4 April 2022 <https://www.equalityhumanrights.com/en/our-work/news/protecting-people-sex-and-gender-reassignment-discrimination>

for that purpose, based on risk, and only shared with those who need to know, and be involved in, these decisions.

- Accurate data recording is important for monitoring discrimination against people with protected characteristics, including transgender people.
- It is inappropriate, and can be discriminatory, to ask individuals if they have a GRC to prove their legal sex.
- Publication of data on the transgender population should not publish small numbers, and which estate these individuals are placed in, as that may risk identification of those individuals in custody, until such times as the risk of identification of individuals can be mitigated.

### **Staff knowledge and awareness**

Transgender people in custody generally had more positive experiences of feeling more secure and supported when staff promoted the use of appropriate and correct language and pronouns, and actively sought to combat discrimination and harassment. These feelings of security and safety engendered by staff's language enabled transgender people to integrate better into prison life. Transgender people understood that errors can occur in relation to the use of names, terms, or pronouns, as long as these did not become a regular occurrence, or obviously intentional or malicious. Positive relationships with staff were seen to be key to both transgender people in custody, and other populations, who may be affected by how they are managed in custody, for example, non-transgender women in custody.

Many external stakeholders agreed that there should be an effort made by SPS staff to address transphobic behaviours and attitudes. However, external stakeholders discussed the concept of "thought policing" people, highlighting that SPS needs to accept that there are different ideological beliefs, and somewhere within those beliefs there is a space where people can all be treated with respect and be able to live as they want without affecting other people and without other people affecting them. The challenge will be for SPS and its staff to create an environment and space where open and respectful discussions can happen.

It was felt that some transgender people are targeted, and have their authenticity questioned, if they are not seen to be committed to 'fully transitioning' through medical intervention. Stakeholders stated that this can have a significant negative impact on an individual's mental health. There was also a concern that the link that has been made between level of medical intervention, and perceived authenticity, could negatively influence case conference decisions. Stakeholders suggested transgender individuals should be supported to access hormone and medical treatment and care as soon as possible, if that is what they want to do, however, SPS should also seek to understand and learn about the reasons an individual may decide not to medically transition. Stakeholders emphasised this is not necessarily an indication of inauthenticity.

It was suggested that SPS should ensure staff receive comprehensive in-person training on gender identity and gender reassignment. It was felt that face-to-face training would be more effective, allowing for staff to ask questions in a safe space and discuss any concerns. It was suggested that this type of training should be made compulsory, particularly for those who are contributing to Transgender Case Conferences (TCCs).

In order to ensure SPS's approach is balanced and acknowledges the very real concerns of other people in custody, non-transgender women particularly, it was noted that training not specific to the transgender population would be important. Training that was directed at upskilling staff to respond to disclosures or concerns regarding sexual predatory behaviour was seen to be vital to reassure all individuals in custody that they would be listened to, and their concerns would be responded to appropriately.



Stakeholders felt it important that training be developed through a collaborative approach with a broad range of organisations with different perspectives. It was also seen to be important that staff had access to a list of trusted resources. It was also noted that transgender people themselves should be involved in designing the training to ensure that it was reflective of the reality of the situation.

*Main points:*

- Transgender individuals in custody felt more secure, safe and supported when they felt like staff were “on their side” and made efforts to use and promote the use of the correct names, terms, and pronouns.
- Staff training and awareness-raising involving community organisations, transgender people, and trusted resources would ensure staff obtain correct information which helps them understand the transgender experience.

### **Searching**

The previous policy required that transgender people be searched in line with their affirmed gender, with the intention of respecting the individual’s lived gender. However, interviews with transgender people in custody found that feeling comfortable during searching was not as straightforward as needing to be searched by an officer who shared their own gender identity, or indeed their sex assigned at birth. Although the previous policy included provisions for discussions to take place, it resulted in inconsistent approaches to searching across different establishments. Some transgender people in custody said that being able to discuss the search beforehand helped them feel more comfortable about it.

Some external stakeholders also expressed that individuals should have the right to request the gender of the officer by which they are searched, while some felt this should not necessarily be specific to the transgender population. Stakeholders were keen to demonstrate that often these situations are not black and white. It was felt that an element of flexibility would be beneficial to not only the transgender population but others as well.

Several jurisdictions included in this research (England and Wales, New Zealand, and Canada) have adopted voluntary searching agreements where a transgender individual, and in the case of Canada, a gender diverse individual, can request the gender of officer they wish to be searched by.

There were concerns raised by staff about their safety and comfort searching transgender individuals who may be anatomically different from themselves. The Prison Rules specify people in prison should be searched by staff of the same gender, meaning women should be searched by officers who are women. This is the expectation among staff and how searching is taught to officers at SPS College. Staff believed that training needed to be adapted to ensure staff are aware and know how to search anatomically different bodies.

A small number of stakeholders felt that staff should never be placed in the position where they are asked to search someone who is anatomically different to them. Examples were given in relation to the level of discomfort that could be felt from staff whose religious faith would be challenged, and staff who have experienced sexual abuse themselves, particularly women. These stakeholders expressed a concern at the level of trauma that staff could be exposed to as a result of being asked to search individuals in line with their gender identity as opposed to their birth gender. Staff highlighted that SPS should be sensitive to previous experiences of prison staff and should acknowledge that searching anatomically different bodied people could lead to discomfort or the triggering of trauma. Staff wanted to ensure that there were provisions in place to support staff in this position, and also guide staff in making decisions about searching to ensure that staff are protected in such instances. VAWG experts emphasised cautioning against any human resources process that would require officers to disclose past trauma as evidence to be excused from searching transgender individuals. However, others stated that having an opt-out for

officers would potentially open the door to too many officers taking this option and there being no officers available to conduct a search. Evidence from other jurisdictions showed that opt-in or systems which allowed officers to volunteer to conduct searches of transgender individuals in line with their affirmed gender were ineffective and would not be able to be operationalised.

There was a desire from some external stakeholders for SPS to install 'airport style' body scanners in each establishment to reduce the need for body searching as far as practicable. These have been successfully installed at some establishments already. More evidence is needed on the functioning and impact of the roll out of documenting searching decisions and the impact of the searching guidance on staff, including resourcing implications and the concerns of these changes on staff wellbeing and rights.

### **Main points**

- Interviews with transgender people in custody found that feeling comfortable during searching was not as straightforward as needing to be searched by an officer who shared their own gender identity, or indeed their sex assigned at birth
- International best practice suggests that transgender individuals should be given a choice regarding the gender of the officer conducting the search. Many jurisdictions make use of searching agreements where a transgender, or gender diverse, individual can voluntarily state the gender of officer they wish to be searched by. These make searching provisions more transparent, protecting both the individual being searched and the officer conducting the search.
- The rights and safety of staff in conducting searching needs to be considered in searching protocols, especially as there is a need to respect religious beliefs of staff conducting searching as well as those with trauma or experiences that might trigger trauma.
- There is a need to establish expectations about searching during foundational officer training at the college.

### **Additional support to transgender people in custody**

According to a 2018 study by Stonewall, 46 per cent of transgender people had thought about taking their own life in the last year, compared to 31 per cent of lesbian, gay and bisexual non-transgender people. Two thirds of transgender people had experienced depression in the last year, and 71 per cent of transgender people had experienced anxiety in the last year.

External stakeholders discussed the feelings of anxiety and fear that are often experienced when 'coming out'. It was generally felt that these feelings are heightened when in a custodial environment. Stakeholders pointed out that unlike in the community, people in custody cannot physically go wherever they want and do whatever they want, some stakeholders noted this feels like a very dangerous situation for many transgender people as they are having to 'come out' within a confined space where they have to see the same people day in, day out.

External stakeholders noted that some individuals might not want to necessarily 'come out' publicly while in prison. They may not wish to engage with the case conference process, dress in a different way, or move to an establishment that aligns with their gender identity. However, stakeholders emphasised that it is still vital that SPS is able to support these individuals in a discrete and respectful manner, emphasising how vital it could be to an individual struggling with their gender identity to have access to staff who were trained and trusted. Stakeholders explained SPS would need to consider ways of making people in custody aware of where and who they can obtain information and support from, in a manner that would not inadvertently 'out' them.

The 'softer' side of exploring gender identity was raised by external stakeholders as being of high importance during the stakeholder engagement – this relates to contact that is

made by individuals who are curious about their gender identity in the early stages, for example, going to clubs or bars specifically for the LGBTQ community, searching the internet for forums, blogs or information, following LGBTQ organisations via social media etc. These examples were noted to help someone in the early stages but which an individual in custody would not have access to.

Stakeholders discussed the importance of having access to information and mental health support irrespective of the nature or degree of transition. It was noted that support and information should be easily accessible and available to all individuals in custody.

Stakeholders suggested that there are organisations that individuals in custody can link up with, for example, organisations that can provide support through their letter writing scheme which links people up with a correspondent who can provide support and advice.

Connections with other individuals from the transgender community were noted to be significant in helping people understand and manage their transition. Particularly when they are in a custodial setting and can otherwise feel very alone in their journey.

*Main points:*

- Availability of support and information about transgender and wider LGBTQ issues in prison can support mental wellbeing, prevent social isolation and promote community reintegration.
- Soft contact with LGBTQ communities can be important for those individuals exploring their gender identity and is especially important for people in custody who lack the usual avenues for this in the community.

### **Non-transgender women in custody**

Some external stakeholders were particularly concerned about the vulnerability of non-transgender women in prison and the need for them to be protected from further harm. Housing transgender women alongside non-transgender women, in particular, was seen to result in harm. The psychological impact and the triggering of trauma responses was highlighted: “It is very clear that the presence of men [sic] in women’s prisons is disastrously stressful. These men need not carry out assaults— their mere presence is enough” [SH7]. Stakeholders said that SPS must be aware of the risk that housing transgender women alongside non-transgender women could present. Some highlighted that this is not simply a risk of physical harm including sexual and violent assault but also a risk to women’s feelings of comfort and safety. Some discussed their concern about women being housed alongside someone with the strength of a person who was assigned male at birth and who has gone through male puberty. There was also a general fear of predatory men claiming to be transgender women in order to have access to the female prison population. There were also concerns from external stakeholders about transgender women initiating coercive relationships, and the risk of pregnancy with non-transgender women. Some stakeholders also raised the point that predatory and violent behaviour towards non-transgender women in prison comes from other non-transgender women and that it is stigmatising to suggest that only transgender women are a threat.

The previous UN Independent Expert on Sexual Orientation and Gender Identity has also reported in his ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’:

*Para. 64 ...the mandate holder has previously voiced the view that “the claim that legal recognition of trans women per se threatens safe spaces ... appears to draw on stigma about predatory determinism” and has suggested a risk management approach that should include all objectively identified risks for safe spaces for all*

women (including lesbian, bisexual and trans women), which cannot promote, replicate or condone stigma or stereotypes.<sup>6</sup>

There were also concerns about religion and belief issues that may arise as a result of housing transgender people in an estate that aligns with their gender identity as opposed to their sex assigned at birth. Some stakeholders discussed that as the general prison population becomes more ethnically and religiously diverse there is a risk that individuals' core values and beliefs will be challenged.

There was concern raised in relation to the potential discomfort non-transgender women may feel living alongside transgender men, who may present in a very masculine way. Some stakeholders stated this could also be triggering for some non-transgender women in custody.

It was suggested by some stakeholders that if an individual in custody is so fearful for their own safety around anyone they perceive to be a man, then SPS have a duty to provide additional support as this would have implications on multiple areas of their life, such as living in halls where male staff are working, seeing a male healthcare professional, and would also impact on their reintegration into the community upon liberation. It was also noted that if women in custody had significant feelings of fear and anxiety around their safety, SPS may need to revise other policies in order to ensure that women were confident in the organisation's ability to protect them from harm and keep them safe. Some stakeholders emphasised that many women who have been victims of abuse and trauma may never reveal or share this with anyone and yet they may continue to be deeply impacted by it. They emphasised the need for trauma-informed approaches that were responsive and inclusive of women who were not willing or able to disclose.

There was a feeling from some stakeholders that, if a transgender woman is coming into female estate who has a history of violence against women, then they should be treated the same way as any other woman that is coming in with a history of violence against women.

*Main points:*

- Some stakeholders were fearful that the presence of transgender women in the women's estate would present a risk to physical and psychological harm because of past trauma and experiences of violence by non-transgender men and a perception that transgender women are men.
- By this logic, the same may apply to the presence of transgender men in the women's estate.
- There may be religious considerations to take when housing transgender individuals in the estate which aligns with their affirmed gender

**HOW will this shape your policy/practice?**

Analysis of the evidence showed that the previous policy functioned generally well and was in line with SPS's statutory obligations under the Equality Act 2010, the Scotland Act 1998, and Human Rights Act 1998. It worked to prevent discrimination, affirmed and supported transgender people to live in their affirmed gender, put the safety of all at the forefront of decisions, and took an individualised approach which is in line with good international practice. The evidence showed that where there is room for improvement, this is largely focused on providing guidance and processes for staff to ensure consistency and

<sup>6</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, Practices of exclusion, UN General Assembly Document A/76/152, 15 July 2021, paragraphs 63 & 64 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/192/14/PDF/N2119214.pdf?OpenElement>

transparency in the policy's implementation, especially regarding case conference processes and decisions for searching and admission and placement of transgender individuals. To improve on these areas the revised policy:

- Introduces a new, detailed admission process that determines which estate a transgender person should be admitted to.
- Introduces Searching and Sampling Arrangements which record the transgender individual's choice for the gender of officer they will be searched by and the gender of the officer who will oversee any sample given for drug and alcohol testing . Accommodating this decision will be based on evidence that there are no known risks to the health, welfare or safety of the individual or member of staff, or to the security or good order of the prison that cannot be mitigated. This document is to be signed by both the individual and a member of staff. An amendment is being made to the Prisons and Young Offenders Institutions (Scotland) Rules 2011 to ensure it they clearly reflect how this policy will operate in practice.
- Provides new guidance on recording data about transgender individuals in prison in SPS's prison record management system.
- Provides detailed guidance for staff on how to organise and manage Transgender Case Conferences (TCC) for transgender individuals. The new guidance will set parameters for the timing and regularity of the conference, expectations for staff attendance, roles, how to inform and ensure the individual is aware of the purpose of the conference, the individual's role, participation of external parties, as well as the topics that should be discussed (searching, access to property, access to additional support, purposeful activity, location decisions, accommodation and cell allocation, recording data on PR2 and any other additional issues the chair or individual would like to raise). The addition of a process for searching and/or location decisions ensures that sufficient data can be collected, and that this data collected is done on an as need basis.
- Gives guidance on the importance of using correct names and pronouns for transgender people in custody to ensure transgender people are respected and feel supported.
- Outlines VAWG criteria which if met, would mean a transgender woman is not eligible for admission to a women's prison. The policy outlines a risk assessment process whereby transgender women with VAWG can be considered for and potentially transferred to the women's estate where the risk presented may be sufficiently mitigated.
- Introduces an escalation route for making location decisions where there are complex factors of risk and vulnerability which means it falls outside the capacity of the TCC.
- Introduces an Executive Panel to which local RMTs are required to refer complex location decisions, involving VAWG, for assurance if they consider a transgender woman with a history of VAWG suitable for accommodation in the women's estate.

As part of the new policy's implementation, SPS will:

- Ensure proportionate and consistent operational and strategic implementation and oversight of the policy. This will include centralised support and oversight on decision making and case conferences through designating a national policy lead whose role will entail ensuring a consistent approach across the estate, provide staff with a level of confidence in decision-making, mitigate the risk of litigation and provide people in custody with an impartial SPS point of contact and support during case conference procedure if required.
- Lay an SSI for a change to Rules 92, 93, and 94 to specifically provide that SPS can deviate from the rule that searching and sampling should be conducted by an officer of the same gender as the prisoner.
- Provide dedicated support, expertise and resources for transgender people in custody, including exploring providing voice recorders to support with speech therapy, explore support for transgender people through internal peer support groups and through LGBT

community organisations including facilitating their participation in case conferences (where requested by the individual) and encouraging discussions about wellbeing during case conferences.

- Introduce training for staff on the new policy including awareness raising to sensitize staff on transgender and gender identity issues more broadly and more in-depth training for a smaller number of staff who work directly with transgender individuals on matters relating to the policy such as the admission process, the TCC process and complex location decisions involving VAWG etc.
- Introduce new expectations and guidance to staff conducting searching.
- Explore potential for body scanners in prisons which house transgender individuals to minimise the need for body searching.
- Introduce monitoring and oversight processes to ensure consistent implementation of the policy and assess its ongoing impact on all people in custody and staff.

The new policy has to be in line with SPS's duties under the Equality Act 2010, the Scotland Act 1998, and the Human Rights Act 1998. The individualised approach taken by this policy are in line with these statutory obligations because it:

- Allows transgender individuals to affirm their own identity by not forcing them to live or present in a certain way.
- Allows for defensible and transparent decision making around location decisions for transgender individuals.
- Respects individuals' needs and circumstances and allows individuals to input into decisions made about them.
- Allows for flexible access to programmes, activities and integration at other establishments to support potential transfer and integration of a transgender person to the estate which aligns with their affirmed gender.

The Equality Act 2010 allows for different treatment of individuals with the protected characteristic of gender reassignment if it is a proportionate means of achieving a legitimate outcome. SPS will seek to exclude transgender women from the women's estate if the risk they present to women is one which cannot be mitigated through proportionate means. It is the assumption that transgender women who meet certain VAWGs criteria will be excluded from the women's estate, although there is a process which allows deviation from this if compelling evidence exists that they do not present an unacceptable risk of harm.

There exists concern that the policy may be abused by specific individuals claiming to be transgender to access perceived advantages or to gain access to vulnerable people, specifically vulnerable transgender and non-transgender women, to commit violence and harm. Evidence from staff and stakeholders suggests that clear assessment criteria which prioritises VAWG markers will help to minimise the possibility of this.

By avoiding taking blanket approaches based solely on legal gender, gender identity, or transgender status, the new policy is able to factor in transgender individuals' human rights, their security and safety, their needs and wants, and the security and safety of others in prison. The new policy acknowledges that not all transgender people may want to be housed in the prison which aligns with their gender identity, it protects those who may not want to be out as transgender, and it allows for more flexible approaches to management and involvement in the prison regime.

The new policy is transparent about the factors which are considered in making decisions about the placement of transgender people which allows for defensible decision making and improved monitoring and oversight.

A set of quality indicators should be developed in order to monitor the impact of the policy on the human rights of transgender individuals, and others in prison, especially those with protected characteristics, and staff.

<p>Staff should ensure that discussions and decisions regarding the admission, placement and management of transgender people are properly documented and shared with relevant internal parties involved in the individual's TCC.</p>	
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<p>Staff training and sensitisation needs to be undertaken to ensure transgender individuals are treated with dignity that the policy is properly implemented, and that staff feel confident to make what can sometimes be complex decisions.</p>	
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### Stage 3: Identifying impact/outcomes

<b>The Public Sector Equality Duty</b>	
<p><b>Will the impact and outcomes of the new/revised policy/practice:</b></p> <p>(Consider for people in custody in terms of the equality risk assessment of the prisoner journey with us which includes admission, residential care, establishment regime, health and wellbeing, throughcare, people in custody management, visits etc.</p> <p>Consider for staff in terms of the equality risk assessment for the staff journey with us, which includes recruitment, retention, progression, promotion, training etc.)</p>	
<p><b>Contribute to eliminating discrimination, harassment and victimisation?</b></p> <p><b>E.g.</b></p> <ul style="list-style-type: none"> <li>• Raise awareness of our SPS vision and values for equality and diversity</li> <li>• Challenge appropriately any behaviours or procedures which do not value diversity and advance equality of opportunity</li> </ul>	<p><b>POSITIVE:</b></p> <p>It will contribute to eliminating discrimination, harassment, victimisation <input checked="" type="checkbox"/></p>
	<p><b>NO EFFECT:</b></p> <p>It will have no effect on discrimination, harassment and victimisation <input type="checkbox"/></p>
	<p><b>NEGATIVE:</b></p> <p>It will make discrimination, harassment and victimisation worse <input type="checkbox"/></p>
<p><b>Advance equality of opportunity between those who share a protected characteristic and those who do not?</b></p> <p><b>E.g.</b></p> <ul style="list-style-type: none"> <li>• Remove or minimise disadvantage</li> <li>• Meet the needs of groups with protected characteristics that are different from the needs of others to ensure their participation in public life.</li> </ul>	<p><b>POSITIVE:</b></p> <p>It will advance equality of opportunity <input checked="" type="checkbox"/></p>
	<p><b>NO EFFECT:</b></p> <p>It will have no effect on equality of opportunity <input type="checkbox"/></p>
	<p><b>NEGATIVE:</b></p> <p>It will reduce equality of opportunity <input type="checkbox"/></p>
<p><b>Foster good relations between those who share a protected characteristic and those who do not? E.g.</b></p> <ul style="list-style-type: none"> <li>• Tackle prejudice</li> <li>• Promote understanding</li> </ul>	<p><b>POSITIVE:</b></p> <p>It will foster good relations <input checked="" type="checkbox"/></p>
	<p><b>NO EFFECT:</b></p> <p>It will have no effect on good relations <input type="checkbox"/></p>
	<p><b>NEGATIVE:</b> <input type="checkbox"/></p> <p>It will cause good relations to deteriorate <input type="checkbox"/></p>



## Human rights

### Will the new/revised policy/practice breach the human rights articles?

Consider for people in custody in terms of the equality risk assessment of the prisoner journey with us which includes admission, residential care, establishment regime, health and wellbeing, through care, people in custody management, visits etc.

Consider for staff in terms of the equality risk assessment for the staff journey with us, which includes recruitment, retention, progression, promotion, training etc.

#### Consider:

#### European Convention on Human Rights

Article 2	Right to life
Article 3	Prohibition of torture
Article 4	Prohibition of slavery & forced labour
Article 5	Right to liberty & security
Article 6	Right to a fair trial
Article 7	No punishment without law
Article 8	Right to respect for private & family life
Article 9	Freedom of thought, conscience & religion
Article 10	Freedom of expression
Article 11	Freedom of assembly & association
Article 12	Right to marry
Article 14	Prohibition of discrimination
Protocol 1 Article 1	Protection of property
Protocol 1 Article 2	Right to education

#### International Covenant on Economic, Social and Cultural Rights. Rights to:

- Work in just and favourable conditions;
- Social protection;
- An adequate standard of living;
- The highest attainable standards of physical and mental health; and
- Education.

It will uphold human rights articles.

It will breach with human rights articles.

<b>When considering all your responses to Stage 3 if you selected <u>POSITIVE</u>:</b>	Please move on to <b>stage 4</b> where you will be asked to provide details of the equality group(s) affected, the impact and evidence you considered.
<b>When considering all your responses to Stage 3 if you selected <u>NEGATIVE</u>:</b>	Please move on to <b>Stage 4</b> where you will be asked to provide details of the equality group(s) affected and the impact and strategies to mitigate the impact to a reasonable level, or to remove the impact altogether.
<b>When considering all your responses to Stage 3 if you selected for ALL areas <u>NO EFFECT</u>:</b>	Please justify your conclusions here and move directly to <b>Stage 5</b> .

#### Stage 4: Analysis of impact/outcomes

You have indicated that this new/revised policy/practice will have an impact/outcome on one or more of the 3 main duties of the Public Sector Equality Duty and Human Rights articles for people in custody or staff. Use these sections below to indicate whether the impact is positive or negative, and justify your assessment using the data and evidence you have already gathered (via statistics, consultation, etc.)

### What are the positive impacts?

Does the new/revised policy or practice: Advance equality of opportunity? Remove discrimination? Remove harassment? Remove victimisation? Foster good relations? Encourage participation by disabled people? Uphold human rights articles?

Detail the positive impact here:

Because the policy takes an individualised approach which considers and balances a range of factors, including respecting the individual's own needs and wants, the policy and its implementation can better protect the individual's human rights and prevent discrimination.

The policy contributes to the protection of the **right to private and family life** in that it does not force or compel transgender individuals to live in a certain way in order to benefit from the provisions of the policy, or indeed for their affirmed gender to be recognised and supported. In addition, decisions about longer term placement and searching are not made without the input of the individual. **Discrimination** is prevented based on the grounds of gender reassignment or transgender status because the policy recognises and supports transgender people. The policy actively promotes respect for how an individual identifies and requires staff to use an individual's correct name and pronouns and allows for the provision of property and support from outside agencies, recognising that transition can be a very challenging and difficult decision for people to arrive and that peer support can be crucial.

Transgender people are not excluded from being housed in the prison estate that aligns with their affirmed gender by virtue of their transgender status but rather through an individualised assessment which considers risk and vulnerability. Only transgender women with a history of VAWG who present a risk of harm to women will not be placed in the women's estate. .

Evidence gathered shows that housing transgender individuals based on sex assigned at birth, gender identity, transgender status, or legal sex (e.g. birth certificate) does not protect the individual or others, particularly non-transgender women, from potential harm, because these approaches are unable to determine level of risk. The policy and the individualised approach also understand that risk and vulnerability can change over time depending on changing circumstances and this may lead to a person being moved from one estate to another and may be conducted through a gradual phased approach. Case conferences will take place regularly to review a person's circumstances and experiences of being transgender in prison and, where an individual is not already accommodated in the estate which aligns with their gender, will discuss the possibility of a move taking place. A policy such as this not only protects transgender people from discrimination, but also works to protect non-transgender women in custody by preventing individuals who may pose a risk (because of their offending histories or behaviour in custody) from being housed alongside them.

Transgender people are not prevented from participating in any activities or services provided by the prison because of their transgender identity.

This new policy supports the **prohibition of torture, inhuman and degrading treatment** in that the safety and security of transgender individuals is at the forefront of decisions about their admission, placement and management. In protecting transgender individuals at the point of admission, due to the new admission approach, SPS may have to make use of Rule 95(1) (see below under negative impacts for more details). The policy seeks to prevent stigmatisation of transgender people because it actively supports transgender people to live in their affirmed gender, and staff will work towards creating a supportive environment for the individual where bullying and harassment are not condoned.

Deliberate misgendering of transgender individuals may constitute harassment, degrading or ill-treatment but the policy emphasises the need for staff to use correct pronouns and terms, cognisant that mistakes are acceptable as long as staff can learn from them. The

safety of non-transgender people in custody, particularly non-transgender women, is considered and steps taken to ensure their rights are not violated through the TCC process (and Risk Management Team process) through placement decisions, which ensures that the safety of all are considered in making placement decisions, and mitigating steps, taken to ensure this, while also protecting the rights and safety of transgender people in prison.

The new policy recognises that transgender people as a group have higher rates of poor mental health than the general population as shown above in the data from Stonewall. The new policy promotes **the right to health**, including both physical and mental health, by affirming and supporting individuals' gender identity, including mental health as a standing agenda item in case conferences and supporting transgender individuals to access NHS services for gender affirming physical and mental healthcare including medication, surgery and counselling, should they wish.

The new policy, as well as other SPS policies that work in concert with this one, promotes **work in just and favourable conditions**, again through the prioritisation of safety for all those working and living in our prisons. While the policy does require that transgender individuals are searched by officers of the same gender (transgender women searched by officers who are women and transgender men searched by officers who are men) if that is in line with their Searching and Sampling Arrangement, there will be exemptions where an individual's searching preference can be overridden if there are risks to the health, safety, or welfare of the individual, or to staff, or to the security or good order of the prison which cannot be mitigated, while also ensuring transgender individuals are treated humanely and with dignity in this process.

As stated above, the policy supports the prevention of discrimination against transgender people (the protected characteristic of gender reassignment) under the provisions of the Equality Act 2010.

**Please select which group(s) will be affected by the positive impact, and provide details below each category:**

**Age** (e.g. older people or younger people):

The CRWIA conducted for the policy identified a need for processes and communications to be age appropriate, taking into account children's level of education and maturity. It also stated that a child-friendly short guide will be put together and issued to any transgender child coming into custody to inform them of the processes involved in their management, including how they will be supported to participate in their case conference. It will also include a summary of how their rights will be protected.

**Race** (e.g. people from black or any minority ethnic groups):

**Sex** (e.g. women or men):

**Disability** (e.g. people with visible or non-visible disabilities, physical impairments):

**Gender Reassignment** (e.g. changed/changing gender from that assigned at birth):

Some stakeholders stated that it would be discriminatory to make decisions in relation to the management of transgender people in custody based on their sex assigned at birth without acknowledging and respecting their gender reassignment (see above under evidence). Reference was made to the case of R (FDJ) v Secretary of State for Justice [2021] EWHC 1746 (Admin) in England:<sup>7</sup>

*'A cisgender woman challenged the lawfulness of the policy that manages the treatment of trans people in custody in England. Although not identical to the current SPS policy, it takes the same approach: one that considers the trans person's lived gender identity, alongside the risks and the security and safety of both the transgender person, and others that they will be living alongside. The judges found in that case that the policy that operates in England is lawful, and that it would very likely be unlawful to operate a policy in which all trans women are held in the male estate.'* (SH2)

The policy approach takes into account the individual's own opinions and wants regarding their own placement, aware that not all transgender people may want to or feel safe to be accommodated in the estate which aligns with their affirmed gender, and that not all transgender women may be eligible for placement in the women's estate. The case conference model gives individuals more of an input in placement and management decisions, increasing feelings of confidence and empowerment, minimising negative mental health impacts. The policy also promotes their integration by enabling transgender individuals to live, or in some circumstances and where practicable, to work and participate in activities, alongside those who share their gender identity.

The new policy aims to enhance equality of opportunity through ensuring that transgender people have the same access to programmes and activities as other people in prison and, where possible, that individuals can access programmes and activities which serve their affirmed gender. Work will be undertaken to raise awareness of transgender issues and the transgender experience among staff through training so that they can help promote a positive and supportive environment in prison where transgender people will not experience harassment and bullying. This training aims to foster good relations between those with the protected characteristic of gender reassignment and non-transgender staff through raising better awareness and understanding of transgender people and their experiences.

**Religion or Belief** (e.g. belonging to a particular religion/belief or no affiliation):

**Sexual orientation** (e.g. lesbian, gay, bisexual or heterosexual):

**Maternity and Pregnancy** (e.g. pregnant/on maternity leave/breastfeeding):

SPS is cognisant that transgender men individuals who were assigned female at birth may be able to become pregnant. SPS's maternity and pregnancy policies apply equally to these individuals.

<sup>7</sup> [FDJ, R \(On the Application Of\) v Secretary of State for Justice \(Rev 1\) \[2021\] EWHC 1746 \(Admin\) \(02 July 2021\) \(bailii.org\)](#).

**Marriage and civil partnership:**

**Socio-economic groups:**

**Human rights compliance** (e.g. civil, political, economic, social, and cultural rights):

As stated above, the revised policy will have a positive effect on enhancing the following human rights:

Prevention of discrimination

Right to respect for private and family life

Prohibition of torture and inhuman or degrading treatment

Right to health

Right to work in just and favourable conditions

**Inclusive Communications.** What consideration have you given to the communication

In formatting the document, good practice principles around engagement and inclusive communications have been adhered to.

All relevant communications relevant to transgender people in custody, case conferences, Searching and Sampling Arrangement forms, support services available and all changes to be implemented due to the new policy will be communicated in accessible formats to transgender individuals across SPS.

### What are the negative impacts?

Does the new/revised policy or practice: Create any barriers or issues for people from an equality group? Discriminate against any equality group? Have a negative impact on community relations internally and/or externally? Reduce any equality groups' access to a service or any other aspect of prison life? Reduce any equality group entry or progression as a member of staff, breach human rights articles?

**\*\*Any aspect of the policy/practice that has a negative impact must either be mitigated to a reasonable, objectively justifiable level, or abandoned altogether if this is not possible\*\***

### Detail the negative impacts here:

There is the potential for discrimination of a transgender person to emerge in admission, placement and searching decisions. However, under the Equality Act 2010 some discrimination on the basis of a protected characteristic can be justified if it is to achieve legitimate aims, including ensuring the health and safety of individuals. And under article 14 of the ECHR, a difference in treatment between two people's enjoyment of their rights under the ECHR, based on the status of one of those people as a transgender person, can be justified and lawful, if the difference in treatment necessary in pursuit of a legitimate aim and the difference in treatment is proportionate to the aim pursued. No interference with an individual's right under Article 3 of the ECHR (prohibition of torture, inhuman or degrading treatment) is justifiable or lawful.

The revised policy's approach to admission may result in more transgender women first being admitted to the men's estate, due to SPS having a lack of information about the individual's criminal history in situations where we cannot be certain of the risk they present, or risk they face from other. While the numbers of transgender men who have entered custody are too small to be able to make any generalisations as to where they may be admitted in this policy, the explicit emphasis on vulnerability in the revised policy may result in more transgender men being admitted to the female estate, compared to the 2014 policy. This approach to admission may appear to have an impact on SPS's ability to protect against breaches of the following articles from the ECHR: Article 2 on right to life; Article 3 on prohibition of torture, inhuman or degrading treatment; Article 8 right to private and family life; and Article 14 prevention of discrimination in relations to Articles 2, 3 and 8.

In relation to Article 2, there is a known increased risk in relation to death by suicide during the first three months in custody<sup>8</sup> and a known increased risk in relation to death by suicide for transgender individuals.<sup>9</sup> The revised policy for the management of transgender individuals acknowledges that the new admissions process will result in more transgender individuals being admitted to the prison which aligns with their sex assigned at birth and, because of this, they may suffer severe anxiety and suicidal ideation. As noted below, even a short time in a prison that does not align with an individual's gender identity is likely to have adverse impacts on both transgender men and women's mental wellbeing.

Article 2 requires SPS to safeguard the lives of those in its custody, including taking preventive operational measures. This positive obligation extends to safeguarding individuals from self-harm, which may result in suicide where SPS knows, or ought to know, of a real and immediate risk to the life of an identified individual. SPS must take measures within the scope of its powers which might be expected to avoid the risk.<sup>10</sup> SPS's suicide prevention strategy, Talk to Me, has been in place since 2016. It requires a risk assessment to be carried out by reception staff and healthcare teams for every individual at reception including for new admissions, transfers, returns from court, returns from external escort, video conference court appearances and tribunal hearings, after parole hearings, and following receipt of a parole decision. The reception risk assessment identifies any concerns and records if someone is deemed to be 'at risk' or 'no apparent risk'. If deemed to be 'at risk' the Talk to Me strategy is initiated when the rationale for any

regime alterations, change of location or restrictions on normal clothing or items in use etc. is recorded. The maximum contact interval must also be recorded.

A TCC should be organised and take place, insofar as reasonably practicable, within 72 hours of the admission of a transgender into custody or, insofar as reasonably practicable, within 72 hours of an individual declaring they wish to seek assistance to transition or live in a gender which is different to that which was assigned at birth. The TCC is intended to allow better informed, individualised placement and management decisions to be made in relation to the individual. The individual will be involved in the decision-making process and offered the opportunity to express their preferences in relation to things such as placement and searching. The TCC process will continue for the duration of the individual's time in custody and is designed to ensure that the person is treated with dignity and respect, while also allowing the risks presented to, and by, them to be continually assessed. Transgender people in custody should be provided the opportunity and supported to work towards being accommodated in an estate that aligns with their affirmed gender so that on release to the community they have had the opportunity to live with those who share their affirmed gender. The Talk to Me strategy will also be available throughout the person's time in custody and, as noted above, risk assessments for all individuals happen at key moments of an individual's time in custody. Individuals also have access to support from medical professionals and the Samaritans.

The revised approach to admission may result in SPS having to make use of Rule 95(1)<sup>11</sup> in order to keep these individuals safe in the first days of custody before a proper assessment of their risk and needs can take place. Despite the admission process only being for around 72 hours, and thus it is envisaged any use of Rule 95(1) or SRU would also only be for around 72 hours, there remain risks to the protection of rights for transgender people. Implications are minimised as far as possible through the individualised approach and other aspects of the policy such as the overall gender affirming and supportive approach to all transgender people in SPS custody. Blanket approaches, either sex or affirmed-gender based, would unlikely meet SPS's human rights obligations.

Transgender women placed in a male establishment may be especially vulnerable to physical and sexual assault. As stated above, there exists evidence from around the world pointing to abuse faced by transgender women from other prisoners as well as from prison staff when they are placed in the male estate and UN experts on combatting torture have also pointed out the risk of rape that transgender women face when placed in male prisons. As described above, the revised policy is likely to result in more transgender women being placed in the men's estate than occurred under the 2014 policy due to most transgender women admitted to custody falling under the unknown risk category. Those making placement decisions must be cognisant of the very real risks to safety faced by transgender women when they are placed in the men's estate and must take steps to prevent this which are human rights-based and promote the wellbeing of the individual.

Even a short time in a prison that does not align with an individual's gender identity is likely to have adverse impacts on both transgender men and women's mental wellbeing and increases the risk that a person's Article 8 right to private and family life might be

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<sup>8</sup> [Understanding the Mental Health Needs of Scotland's Prison Population \(www.gov.scot\)](http://www.gov.scot) p.7

<sup>9</sup> [lgbt\\_in\\_britain\\_health.pdf \(stonewall.org.uk\)](http://stonewall.org.uk) and [Cognitive Approaches to Combatting Suicidality | Gender Identity: Why are transgender and non-binary people more at risk of suicide? \(manchester.ac.uk\)](http://manchester.ac.uk)

<sup>10</sup> [KEENAN v. THE UNITED KINGDOM \(coe.int\)](http://coe.int)

<sup>11</sup> Rule 95 of the Scottish Prison Rules entails a prisoner being removed from association with other prisoners or prevent participation in activities can be utilised to maintain good order and discipline, protect the interests of any prisoner or to ensure the safety of other persons. It cannot be made for more than 72 hours at a time unless an extension has been authorised in writing by Scottish Ministers. An individual can be held on Rule 95 in the SRU or in a cell on a main hall.



breached. Transgender women and men may be “outed” (their identity as transgender individuals made known to others against their will) in this process. This “outing” may also place them at risk of harassment and violence by others in custody if their transgender status is made known by this initial admission policy. This can even be the case if someone is held on Rule 95 in a main hall and not in the SRU as individuals can be harassed by others outside their cell. The policy will seek to mitigate this through ensuring privacy and confidentiality of transgender individuals where possible at admission. The approach taken strikes an appropriate balance between the transgender individual’s rights and the protection of the rights of other women in the women’s estate.

The first days in custody can be a very anxious time for many people and especially for those for whom it is their first time due to it being an unknown environment, where individuals are separated from their families and friends and where there is uncertainty about what will happen to them. The instruction to hold individuals isolated for around 72 hours, until the risk assessment and case conference takes place may compound the feelings of anxiety experienced by individuals entering custody and may damage an individual’s mental health and wellbeing, as they are denied interaction with others. The policy specifies that case conferences to decide longer-term placement must take place, insofar as reasonably practicable, within 72 hours. Individual practice may result in non-compliance with the 72-hour window, due to a lack of information being made available to enable a decision which could result in individuals being kept separate for longer than 72 hours and could worsen the mental health of individuals and further put individuals at risk, however, this would mean staff operating outwith the guidance of the policy. HMIPS’s recent thematic report on use of segregation in Scottish prisons found that SRU is overused in Scottish prisons and steps need to be taken to reduce its use.<sup>12</sup> This policy must not lead to increased SRU usage, or use of Rule 95(1) within one’s own cell, as this would not be in line with international human rights standards or preventive monitoring bodies such as HMIPS and European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The policy emphasises use of the SRU only as a last resort and if used in line with the policy and Rule 95 guidelines, the policy will not breach article 3 or article 8.

On location decisions, the policy is unlikely to contravene article 3 in terms of torture and inhuman treatment, but it may be argued that it contravenes degrading treatment which is more concerned with humiliation, or showing a lack of respect for a person’s human dignity. SPS considers that the policy meets its article 3 obligations to all prisoners and staff. Purpose is relevant in the context of degrading treatment, but not determinative. There is a strong correlation between degrading treatment and respect for human dignity. SPS’s positive obligations relate to both the transgender individuals who the policy applies to and also other prisoners in its custody, including those in the female estate against whom the potential risk is presented. This is relevant when considering the relativity of the treatment to determine if it is severe enough to amount to inhuman or, perhaps more relevantly in this context, degrading treatment. The positive obligations in article 3 are also to be interpreted in a way which does not impose an excessive burden on SPS as it is an organisation making operational choices in terms of priorities and resources. It is not practicably possible for SPS to obtain information quickly enough to allow it to make individualised risk-based assessments for every transgender prisoner being admitted to custody. It also has to balance the risks to every prisoner’s article 3 rights from its decisions. As noted above, each individual will be supported, regardless of which estate they are admitted to. Transgender women may also be placed in the female estate once time has allowed a better informed consideration of the risk they may present.

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<sup>12</sup> HMIPS 2023 ‘A Thematic Review Of Segregation In Scottish Prisons’

SPS consider that the policy meets SPS's article 3 obligations in regard to searching. The reason for a decision not to search an individual in line with their affirmed gender is to protect the health, welfare, or safety (and therefore protecting the article 3 and 8 rights) of the individual themselves and prison staff. It also allows broader considerations of the good order and security of the prison to ensure the protection of the rights of all those in custody and who work in prisons. The policy goes as far as it can to ensure respect for an individual's dignity and their personal preferences, but it cannot ignore potential concerns which searching an individual prisoner might present. These decisions will be individualised risk-based decisions.

Although SPS considers that the policy is compliant with its ECHR obligations, we acknowledge that articles 2, 3, and 8 are engaged and therefore we have to consider the policy's potential impacts on individuals' rights under article 14 of the ECHR.

The revised approach to admission will aim to prevent the admission of transgender women to the women's estate, where they have known VAWG markers, or where SPS does not have enough information about their risk and criminal history to place them in the women's estate. However, it is important to note that although this step may contribute to reducing risks of violence to women in custody from transgender women who have VAWG markers, it does not eliminate any violence that may be experienced by a woman in custody. The controls and criteria in place will seek to mitigate the risk of predatory transgender women from being placed in the women's estate and SPS is confident in the robustness of its arrangements. Multiple factors, which SPS can only control to varying degrees, contribute to the safety and wellbeing of women in prison. This revised policy's approach to admission and to longer-term placement will allow SPS to better mitigate the risk posed by predatory men who may seek to abuse the policy to gain access to the women's estate to enact harm on women, and will be closely monitored throughout the policy's implementation. .

The decision to admit transgender individuals to the estate which aligns with their sex assigned at birth where there is an absence of evidence that would indicate their suitability for the estate which aligns with their affirmed gender may constitute discrimination but is deemed a proportionate response in order to protect the safety of the individual and of others.

The policy's overall design and its implementation are not envisaged to have a negative impact on the rights of others in custody and staff. The policy aims to affirm and support the gender identity of transgender individuals in custody, implementing mechanisms to ensure their safety and needs are provided for. For transgender individuals, the policy emphasises that the safety of others is considered in location decisions through the case conference for initial assessment process. Through the implementation of the policy, SPS will deliver awareness and sensitisation training for officers, as well as training for those officers working closely with transgender individuals, for example, those involved in TCCs, to ensure that transgender individuals are treated humanely and that their gender identity is understood and respected. Despite these features, SPS through this policy cannot eliminate the potential for misgendering, lack of recognition of transgender individuals' identity, needs and rights, bullying, harassment, and discrimination by staff or indeed by others in prison. However, SPS is confident that the oversight and monitoring processes put in place will provide effective oversight of the policy and mean that poor policy implementation, misconduct by staff, or practices which may constitute discrimination will be identified and corrected.

Please select which group(s) will be affected by the negative impact, and provide details of the negative impact and how you will mitigate against it below each category:

**Age** (e.g. older people or younger people):

The new policy includes the need for transgender individuals to produce evidence of their gender identity in the form of documentation, evidence that they live in that gender, medical evidence etc if they seek to be accommodated and/or searched in line with their affirmed gender. The basis of this guidance comes from the HMPPS policy in England and Wales "The Care and Management of Individuals who are Transgender" which lists evidence which may be provided by individuals to demonstrate their gender. SPS's new policy has adopted this practice to support transparent and defensible decision making in placement decisions. However, the new policy is also explicit that decisions should not be made based on an individual's ability to provide a wealth of evidence and there may be many reasons why an individual cannot provide this evidence and should not be penalised for this. The HMPPS policy is explicit in stating that young people and those who have lived abroad are two groups who may especially have difficulty in accumulating or providing such evidence. There are specific provisions in SPS's policy to account for the situation of young people who may not be able to produce evidence of their gender identity.

A separate CRWIA has been conducted assessing the impact of the policy on transgender children and non-transgender children in custody. TCCs for this group should be cognisant of the age of the child or young person and ensure communication is conducted in a way that is understandable for this age group.

**Race (e.g. people from black or any minority ethnic groups):**

As with young people, those who have lived abroad including foreign nationals (who have the protected characteristic of race because race encompasses nationality and citizenship) may also be unable to provide evidence of their gender identity, however the guidance for the management of transgender individuals emphasises to take this into consideration when making decisions regarding placement decisions. Indirect race discrimination can be permitted it is proportionate and for a legitimate aim, in this case for the purpose of making informed decisions about the placement of transgender people, however staff will be encouraged to rely on a range of evidence to avoid foreign nationals not being able to access the estate which aligns with their gender identity because of a lack of evidence due to their nationality.

The policy also protects against potential discrimination against foreign nationals who do not have a GRC and may be unable to obtain a GRC because the policy does not require transgender individuals to have a GRC to be placed in the prison which aligns with their affirmed gender.

The policy for transgender individuals is applicable regardless of race. There is no evidence of any other impacts of the policy or its implementation on persons with this protected characteristic, however it will be continually monitored henceforth, especially regarding the location decisions based on the availability of evidence provided by foreign nationals on their gender identity.

**Sex** (e.g. women or men):

Sex refers to one's legal sex recorded on their birth certificate Transgender men and women are protected from sex-based discrimination based on their legal sex, as stated in guidance from the Equality and Human Rights Commission:

*Under the Equality Act, people are protected from sex discrimination on the basis of their legal sex. This means that a trans woman who does not hold a Gender Recognition Certificate is legally male and is treated as a man for the purposes of the sex discrimination provisions, and a trans woman with a Gender Recognition Certificate is treated as a woman. The sex discrimination exceptions in the Equality Act therefore apply differently to trans people with and without Gender Recognition Certificates.<sup>13</sup>*

This was confirmed in the recent judgement in *For Women Scotland v the Scottish Ministers* where Lady Haldane stated,

*I conclude that in this context, which is the meaning of sex for the purposes of the [Equality Act 2010], “sex” is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the [Gender Recognition Act 2004] stating their acquired gender, and thus their sex.*

Lady Haldane’s judgement has recently been affirmed by the Inner House of the Court of Session in a reclaiming motion (appeal) by the Petitioner (For Women Scotland Limited). The Court stated,

*“A person with a GRC in their acquired gender possesses the protected characteristic of gender reassignment for the purposes of section 7 [of the Equality Act 2010]. Separately, for the purposes of section 11 they also possess the protected characteristic of sex according to the terms of their GRC...A person with a GRC in the female gender comes within the definition of “woman” for the purposes of section 11 of the [Equality Act 2010].”*

During the evidence gathering for the policy review, non-transgender women in custody, staff who are women, and women’s organisations raised concerns about the impact of the policy on women, including concerns that the policy would be open for abuse by predatory men, therefore risking women’s physical and psychological safety as well as concerns about access to services for women, women’s privacy as well as freedom of speech (covered below under religion and belief).

The small number of transgender individuals in custody in Scotland means that making generalisations about that population from the statistics available is difficult – and making claims about the whole population based on smaller sample sizes can result in claims that are misleading. SPS does not have evidence from its own population in custody that transgender women pose a risk to non-transgender women, or indeed to other transgender women in custody. Figures from HMPPS, presented in the case *R(FDJ) v Secretary of State for Justice*,<sup>14</sup> do point to a higher proportion of transgender people in custody in England and Wales being convicted from sexual offences (49.5% of the 163 transgender individuals recorded in the prison estate) – although this data came with similar caveats about reliability given the small sample population, the reliability of identifying transgender people based on self-declaration of gender identity, whether the crime happened before or after their transition or whether the individual was in custody for those offences or they were prior convictions, amongst other factors (para 65).

Furthermore, there were anxieties that had the Gender Recognition Reform (Scotland) Bill not been blocked by the UK government and had been enacted, it would result in fraudulent claims for a GRC by predatory men due to the proposed expedited and less bureaucratic process to obtain a certificate, which in turn may put non-transgender women in custody at risk, as it would result in more transgender women having to be housed in

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<sup>13</sup> Protecting people from sex and gender reassignment discrimination 04 April 2022  
<https://www.equalityhumanrights.com/en/our-work/news/protecting-people-sex-and-gender-reassignment-discrimination>

<sup>14</sup> *FDJ, R (On the Application Of) v Secretary of State for Justice (Rev 1) [2021] EWHC 1746 (Admin) (02 July 2021) (bailii.org)*.

the women's estate. The UN Special Rapporteur on Violence against Women and Girls, its Causes and Consequences in a letter to the Scottish Government on the Gender Recognition Reform (Scotland) Bill states that:

*It is important to note that insistence on safeguarding and risk management protocols does not arise from the belief that transgender people represent a safeguarding threat. It is instead based on empirical evidence that demonstrates that the majority of sex offenders are male, and that persistent sex offenders will go to great lengths to gain access to those they wish to abuse. One way they can do this is by abusing the process to access single-sex spaces or to take up roles which are normally reserved to women for safeguarding reasons.<sup>15</sup>*

However, the former UN Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity in a letter to the Scottish Government dated 13 December 2022 refuted this, stating:

*My mandate has not received any information of administrative or criminal judicial findings that the self-identification process has been used by predatory men for the purpose of perpetrating gender or sexual violence against women in gender segregated spaces in any of those countries or regions; and desk and online research to that effect has not yielded any results. Similarly, there are no reported cases that would support the submission that crimes perpetrated by trans women, trans men or non-binary persons are the result of an abuse of the system of legal recognition for the purpose of gaining undue access to a segregated space or any gender-related differential treatment.<sup>16</sup>*

Despite the difficulties faced around interpreting the data from HMPPS and the lack of evidence as stated by the Independent Expert this does not preclude consideration of the qualitative evidence collected as part of the policy review from the participants above, which acknowledges a perceived risk associated with the placement of transgender people in custody.

The policy review has responded to this perspective by providing a more transparent explanation and guidance on how to place transgender people in custody, and assess and manage risk, including the general assumption that transgender women with VAWG markers will not be admitted to or placed in the women's estate unless they do not present an unacceptable risk of harm. This added transparency aims to provide assurances which will reduce the anxiety associated with this perspective. Any decisions to place transgender women in the women's estate will consider any potential impact on non-transgender women, alongside other considerations.

Where there have been incidents of VAWG by transgender women, these are dealt with in line with existing policies to manage violence among people in custody and measures are taken to prevent future incidents of violence. Where there are concerns around a transgender person's suitability for the estate that aligns with their affirmed gender, these are to be raised at the individual's TCC where placement decisions are reviewed.

The UN Independent Experts on Sexual Orientation and Gender Identity has also reported in his 'Report of the Independent Expert on protection against violence and discrimination, based on sexual orientation and gender identity':

*Para. 64 ...the mandate holder has previously voiced the view that "the claim that legal recognition of trans women per se threatens safe spaces [...] appears to draw on stigma about predatory determinism" and has suggested **a risk management***

<sup>15</sup> Mandate of the Special Rapporteur on violence against women and girls, its causes and Consequences Ref.: OL GBR 14/2022 29 November 2022

<sup>16</sup> Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity Ref.: OL GBR 15/2022 13 December 2022

**approach** that should include all objectively identified risks for safe spaces for all women (including lesbian, bisexual and trans women), which cannot promote, replicate or condone stigma or stereotypes [emphasis added].<sup>17</sup>

SPS's previous policy, and this revised policy, consider risks presented by transgender people in making placement decisions, these risks include examination of the individual's index offence and criminal history where available (previous prison sentences or involvement in the criminal justice system), and intelligence on current and past behaviour in custody which may indicate VAWG markers, among other evidence. SPS is confident that its assessments for placing transgender people are comprehensive and able to filter out those who may seek to abuse the policy to access the women's estate to harm women.

The Equality Act 2010 provides for exceptions to the general provisions on non-discrimination and makes provision for organisations and service providers to provide single sex spaces and to exclude transgender people from these if these exceptions are proportionate and are used to pursue a legitimate aim.

Paragraph 3 of Schedule 23 sets out exceptions relating to communal accommodation where it is permitted to exclude a person from shared sleeping accommodation on the grounds of sex or gender reassignment. The new policy states that transgender individuals should be housed in single cells.

Paragraph 28 of schedule 3 the Equality Act 2010 sets out the exception which relates to transgender persons:

*(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.*

*(2) The matters are—*

*(a) the provision of separate services for persons of each sex;*

*(b) the provision of separate services differently for persons of each sex;*

*(c) the provision of a service only to persons of one sex.*

This provision would allow SPS to, for example, provide programmes and services within the women's estate for women who are not transgender, only if the presence of a transgender woman would prevent the achievement of the aims of the programme or service. Services must still be provided to transgender people though, as to prevent access to these services because of their protected characteristic of gender reassignment would be discriminatory.

The new policy will be monitored for its impact on non-transgender women and non-transgender men in custody, including through qualitative and quantitative data gathering. In addition, there will be oversight of the case conference process to ensure defensible and transparent decisions in the placement of transgender people.

**Disability** (e.g. people with visible or non-visible disabilities, physical impairments):

The policy is applicable to anyone in SPS custody who is transgender regardless of disability. The needs of transgender people with disabilities will be considered as part of the case conference process. It is not envisaged that the existence of a disability will

<sup>17</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, Practices of exclusion, UN General Assembly Document A/76/152, 15 July 2021, paragraphs 63 & 64 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/192/14/PDF/N2119214.pdf?OpenElement>

negatively impact placement decisions or prevent transgender individuals from being supported to live in their affirmed gender, be able to be placed in the estate which aligns with their affirmed gender or access activities with others of their affirmed gender. There was no evidence of any negative impacts of the policy or its implementation on persons with this protected characteristic however it will be continually monitored henceforth.

**Gender Reassignment** (e.g. changed/changing gender from that assigned at birth):

Some transgender people may not be housed in the estate that aligns with their gender, due to the outcome of an assessment which examines the risks presented by the individual as well as the vulnerabilities they may face from certain placement decisions. This may be especially the case for transgender women with VAWG markers. The new Case Conference for Initial Assessment (CCIA) form examines at index offence, offending history as well as behaviour in custody, among other factors, when making placement decisions. These decisions are not a violation of the Equality Act 2010, as they fit into the existing exceptions in that Act which allow discrimination if there are legitimate aims, one of which is health and safety of individuals. This exemption is kept proportionate and necessary, through the ongoing review of placement decisions, as well as being transparent about the basis for these decisions. There may be other means by which transgender people can access the estate which best aligns with their affirmed gender identity, for example, by participating in activities and programmes in that estate while remaining housed in the estate which aligns with their gender assigned at birth, where it is deemed safe to do so for the individual and for others.

There may also be perceptions that the provision of additional property to transgender people, which support them to live in the affirmed gender while not providing this to non-transgender individuals may be discriminatory. However, this additional property can be viewed in the same way as reasonable adjustments for those with other protected characteristics, in that they are items to support an individual live comfortably in their daily life. When staff were asked about provision of additional property, none saw any issue to them being restricted to anyone as long as there was no concern that the item would be a threat to security. The new policy proposes more consistency in canteen sheets to ensure everyone has access to the same items, although items such as binders and wigs will continue to be available only through the NHS for those with diagnosed gender dysphoria.

**Religion or Belief** (e.g. belonging to a particular religion/belief or no affiliation):

The policy has been designed to ensure that it does not result in discrimination against those with the protected characteristic of religion or belief, although SPS recognises that some religious bodies and those with religious beliefs and values may not agree with this policy.

Some stakeholders felt very strongly about protecting individuals' belief and religion, as well as the right to freedom of expression, and that non-transgender women in prison and staff should not be punished for referring to transgender women with he/him pronouns. Some stakeholders cited the case *Maya Forstater v CGD Europe and others* claiming that the judgement found that "being gender critical or not believing that transwomen are actually women, has the same rights in law as a religious belief." – (SH4) and that women could not be compelled to use a transgender woman's pronouns or to say that they were a woman. However, it should be noted that the judgement states:

*This appeal is about the much narrower issue of whether the Claimant's belief as to the immutability of sex is one that amounts to a philosophical belief under s.10, EqA. For the reasons we set out below, we have come to the conclusion that it does. That does not mean, however, that those with gender-critical beliefs can indiscriminately and gratuitously refer to trans persons in terms other than they would wish. Such*

*conduct could, depending on the circumstances, amount to harassment of, or discrimination against, a trans person.* (Paragraph 4 - Maya Forstater v CGD Europe and others).

It is SPS's view, in line with this judgement that deliberately referring to a transgender person not by their name or their pronouns could amount to harassment and even constitute degrading or ill-treatment under Article 3 of the ECHR. Any transphobic language or behaviour from people in custody, or among our staff, is dealt with according to SPS's anti-bullying policy Think Twice (for people in custody) which covers transphobia and SPS's Dignity at Work policy (for staff).

Other external stakeholders also raised concern over the impact of this policy on those from religious and faith groups, particularly for staff with a religious background and/or beliefs who may feel uncomfortable searching someone they perceive as the opposite gender and for people in custody who feel uncomfortable living alongside someone they perceive to be a different gender. Although the evidence gathering did not produce evidence to show that non-transgender women or men in custody with religious beliefs would be discriminated against as a result of this policy, the policy does safeguard their beliefs. The policy reinforces privacy for all people in custody, both transgender and non-transgender individuals: transgender individuals should be housed in single cells, and both groups are afforded privacy for showering and dressing.

The implementation of the policy will also emphasise the need for awareness raising among both staff and people in custody on transgender issues and combat misconceptions, fears, and prejudices that may be held by individuals in order to foster good relations between those with the protected characteristic of gender reassignment (transgender people) and those without, or with other, protected characteristics. There may be a need to target specific populations for whom issues around gender reassignment may be unfamiliar or unknown.

It was also raised by religious stakeholders the issue of religious services where the presence of a transgender person may contradict conventions of single sex services. There may be a need to provide separate services for transgender people in these cases.

Some staff also shared concerns regarding searching and feeling uncomfortable with searching transgender people who are anatomically different to them. There were questions about whether officers who are women would be compelled to search transgender women who had not had gender confirmation surgery and whether officers who are men would be compelled to search transgender men who had not had gender confirmation surgery. While the expectation will be for transgender women and transgender men to be searched in line with their gender identity, as long as there are no overriding concerns for their, or the officers', health and safety, for officers with the protected characteristic of religion or belief, or where an officer has experienced trauma, and may find searching transgender men or transgender women is not in line with their beliefs, or may risk retraumatisation, there will be a route through human resources and occupational health, if necessary, to deal with these concerns and put in a plan to respond to them.

Other impacts of the policy on the protected characteristic of religion and belief will be monitored on an ongoing basis.

**Sexual orientation** (e.g. lesbian, gay, bisexual or heterosexual):

The policy is applicable to anyone in SPS custody who is transgender regardless of sexual orientation. SPS understands that sexual orientation and gender identity are different concerns. There is no evidence of any negative impact of the policy or its implementation on persons with this protected characteristic, however, it will be continually monitored henceforth.



**Maternity and Pregnancy** (e.g. pregnant/on maternity leave/breastfeeding):

The policy is applicable to anyone in SPS custody who is transgender regardless of maternity or pregnancy. There is no evidence of any positive or negative impact of the policy or its implementation on persons with this protected characteristic, however, it will be continually monitored henceforth.

**Marriage and civil partnership:**

The policy is applicable to anyone in SPS custody who is transgender regardless of marriage or civil partnership. There is no evidence of any negative impact of the policy or its implementation on persons with this protected characteristic, however, it will be continually monitored henceforth.

**Socio-economic groups:**

Gender Recognition Certificates are inexpensive to obtain (£5 at time of writing), however, the process for obtaining one can be expensive, for example, if access to private medical care is needed, and lengthy and therefore may be prohibitive to those from lower income backgrounds. However, a GRC is not a requirement to a transgender person being recognised and affirmed in their gender identity or indeed from being moved to and living in the estate which better aligns with their gender identity, thus preventing discrimination on this basis from occurring.

Transgender individuals can be placed anywhere in the prison estate, but where feasible and practicable and taking into account all other factors, will be placed close to their home community and family, thus enabling short travel times for family and friends to visit and will keep travel costs down.

**Human rights compliance** (e.g. civil, political, economic, social, and cultural rights):

Any potential negative impacts of the policy are outlined above. The policy is designed to align with human rights obligations. Oversight of the policy implementation will identify any instances of discrimination, acts which may constitute violations of the above stated articles and ensure these are corrected.

## Stage 5: Identifying options and course of action

**Recommended course of action: select relevant outcome and check the box when prompted:**

**Outcome 1:** Proceed – no potential for unlawful discrimination or adverse impact or breach of human rights articles has been identified.

Policy/practice addresses the intended outcome and is positive in its language and terminology. It advances equality and human rights as well as fosters good relations.

**Outcome 2:** Proceed with adjustments to remove barriers identified for discrimination, advancement of equality of opportunity and fostering good relations or breach of human rights articles.

**Outcome 3:** Continue despite having identified some potential for adverse impact or missed opportunity to advance equality and human rights (justification to be clearly set out).

**Outcome 4:** Stop and rethink as actual or potential unlawful discrimination or breach of human rights articles has been identified.

### Summary of outcome decision and any other recommendations

Please provide summary here:

Consideration has been given to whether SPS's revised policy, SPS Policy for the Management of Transgender People in Custody, would positively or negatively impact the human rights of people in custody and staff and whether it would lead to discrimination or less favourable treatment of people with protected characteristics, hinder the advancement of equality of opportunity, or fail to foster good relations between those who share a protected characteristic and those who do not.

Through engagement with transgender people in custody., non-transgender people in custody, SPS staff, the TUS, and external stakeholders, SPS is aware of the human rights and equalities concerns which arise through this policy. The policy aims to prevent violations of the prevention of discrimination, right to life, prohibition on torture and right to private and family life by respecting and supporting transgender people's gender identity and through the individualised approach to admission, placement, and management. There will be circumstances in which protecting the safety of the individual and the safety of others takes precedence, in which case transgender people will not be housed in the estate which aligns with their gender identity. Wherever an individual is placed, their gender identity will be respected and supported.

Implementation of the policy must be proportionately monitored. Any decisions made regarding the placement of transgender people, who they are searched by and other areas which affect their lives and ability to live in their affirmed gender are to be comprehensively documented and shared through the case conference process. This transparent decision-

**Summary of outcome decision and any other recommendations**

Please provide summary here:

making intends to promote defensible decision-making and adherence to the policy and its human rights based approaches.

**Outline plans to action and review the impact of the new/revised policy/practice.**

- Note: any evidence that raises concern would trigger an early review rather than the scheduled date.
- Indicate if there is any data which needs to be collected as part of action to be taken and how often it will be analysed.
- Indicate how the person responsible will continue to involve relevant groups and communities in the implementation and monitoring of the new/changed policy/practice.

<b>What:</b>	Explore development of quality indicators to monitor the impact of the policy on transgender individuals in prison relating to prevention of discrimination. Quantitative and qualitative indicators should examine admission, placement and management of transgender people within the prison estate and any impact on others in custody and on staff.
<b>Why:</b>	To ensure that SPS is complying with its obligations under the Equality Act 2010 and Human Rights Act 1998.
<b>Who:</b>	Policy team
<b>When:</b>	Ongoing – quarterly for quantitative data
<b>Name of lead:</b>	Policy review team, Corporate Policy Lead
<b>Date:</b>	Year 1
<b>What:</b>	Dip testing of case conferencing decisions, information, recording.
<b>Why:</b>	To ensure consistent implementation of TCC provisions.
<b>Who:</b>	Corporate policy lead
<b>When:</b>	Continuous, at agreed regular intervals
<b>Name of lead:</b>	Corporate policy lead
<b>Date:</b>	Year 1