

27 November 2023

Dear Dr Edwards,

### **Call for input current issues and good practice in prison management**

We are an Edinburgh-based independent policy analysis collective, with a background in policy-making, research (including criminology) and communications.

We are writing to set out our strong concerns about the operation of the Scottish Prison Service (SPS) policy on the placement of transgender prisoners and searching arrangements ('Gender Identity and Gender Reassignment Policy for those in our Custody'). We are particularly concerned that SPS policy as currently formulated, together with the Prisons and Young Offenders Institutions (Scotland) Rules, negatively impacts on female prisoners and officers, in respect of their physical and psychological safety, dignity and privacy.

In relation to international instruments, of immediate relevance here is Article 3, specifically in respect of inhuman or degrading treatment or punishment. The policy also engages Article 8, on the right to private life, and Article 14, on the right not to be discriminated against in the enjoyment of ECHR rights and freedoms.

The UK also has international obligations under the United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and the Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence (the Istanbul Convention). The former defines women on the basis of sex, and that latter recognises that women and girls suffer disproportionately from domestic and gender-based violence, on the basis of sex. Both underscore due diligence obligations to prevent violations of rights.

Other relevant international instruments include the United Nations Standard Minimum Rules for the Treatment of Prisoners (the [Nelson Mandela Rules](#)) which make provisions on the basis of sex, for example in relation to accommodation (rule 11). The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measure for Women Offenders (the [Bangkok Rules](#)) also set out standards providing for the specific characteristics and needs of women offenders and prisoners. [Guidance](#) published by Penal Reform International on the implementation of the Bangkok rules explains further:

The Bangkok Rules recognise that safety is perhaps the most important need that women in prison have, without which the concept of "social reintegration" remains an abstract concept. The safety requirements of

women in prison are also covered elsewhere in the Bangkok Rules, such as screening procedure and classification system (Rules 40-41), women's separation from men in prison (re-emphasising Rule 11(a) of the Nelson Mandela Rules), and the supervision of women in prison by female staff (Rule 81 of the Nelson Mandela Rules), who should be specially trained to respond appropriately to the specific needs of women in prison (Rules 29 and 33 of the Bangkok Rules) and supplementary provisions relating to the protection of women in prison from gender-based violence (Rule 33 of the Bangkok Rules)

While our focus here is on women, we understand that SPS policy may also adversely affect some trans-identified males, who may be held in restricted conditions in the female estate (for example, in locked cells without association, or on occasion, in segregation). It is unlikely such restrictions would apply in the male estate, which continues to house some transwomen.

The remainder of this letter sets out our concerns in more detail. We provide information on: the Scottish female prison population; policy and legislation in relation to the placement of transgender prisoners; how the policy position was arrived at; the SPS position on trauma-informed care for female offenders; and the implications of its Gender Identity and Gender Reassignment Policy for female prisoners and staff.

## **1. Characteristics of the female prison population**

At the time of writing, the SPS is holding around 300 women in custody (around 24% are untried and 8% awaiting sentence). Most offenders are held at HMP YOI Cornton Vale, which is Scotland's sole women-only prison, with other offenders held in female wings at locations across the Scottish prison estate. The SPS recently stated that five transwomen are held in the female estate, and we assume they are included in the 284 count. Around six transwomen remain housed in the men's estate.

There is an extensive literature documenting the distinctive needs and vulnerabilities of the female prison population. In 2012 the [Commission on Women Offenders report](#) ('the Angiolini report') documented high rates of mental health problems among Scotland's female prison population (around 80% of those housed at Cornton Vale) and 'higher lifetime incidences of trauma, including severe and repeated physical and sexual victimisation'.

[Recent research](#) by McMillan et al. (2022) found exceptionally high levels of victimisation in the Scottish women's estate, based on interviews with 104 female prisoners and five transwomen. Unfortunately, the researchers do not disaggregate these two populations, which means that the findings need to be read more cautiously. Relevant findings include the following:

- 85 of the 109 participants (78%) reported a significant head injury (SHI). Of this group, 34 (40%) had an associated disability;
- Of the 85 participants with a SHI, 71 (84%) reported repeat head injuries;

- Among the 71 participants with SHI and repeat head injury, domestic violence was the most common cause, as reported by 63 individuals (89%).

Across all participants (N=109):

- 70% reported childhood sexual or physical abuse
- 85% reported adult sexual or physical abuse
- 83% reported problematic alcohol or drug use;
- 92% reported mental health difficulties, with anxiety and depression the most commonly reported.

## 2. Scottish Prison Service transgender policy

In 2014 the SPS issued its [Gender Identity and Gender Reassignment Policy for those in our Custody](#). The policy allows prisoners to be accommodated on the basis of self-declared gender identity, subject to an assessment in each case before any move. In respect of searches, it states, ‘rubdown and body searches should be conducted in accordance with the gender in which the person in custody is currently living, rather than their physical characteristics’. In other words, a female prison officer would be expected to search a male trans-identified prisoner, including those with intact male genitalia.

## 3. SPS policy development

Our research has demonstrated a clear bias in the policy-making process and a failure to consider the interests of women. The policy was developed over a seven-year period in close collaboration with the Scottish Trans Alliance (STA), a Scottish Government funded organisation and project of LGBT lobby group the Equality Network that advocates for trans rights. The SPS did not consult with any groups representing women’s interests, nor consider any documentary evidence on women’s imprisonment or the experiences of female offenders. Notably it did not reference the Angiolini report, published just two years prior.

Despite extensive evidence documenting the vulnerabilities of female prisoners, the Equality Impact Assessment concluded that women, in this context, female prisoners and prison officers, would not be affected. A short analysis of the EQIA can be accessed [here](#).

In late 2018 the SPS stated that it intended to review the policy. An SPS spokesperson said: ‘One of the groups we will be particularly keen to consult is the female prison population, who have not been specifically consulted about this before’. This short [article](#) provides further information on the policy development process and proposed review. For a more detailed account of the policy development process, see this [article](#).

### Recent policy developments

In early 2023, the SPS placed a man (‘Isla Bryson’) convicted of two rapes in segregation in the female estate (see further [here](#)), sparking a major political controversy. In response, the Scottish Government introduced [interim measures](#),

which state that male offenders with a history of violence (including sexual violence) against women would not be placed in the female estate. This is a departure from existing policy, which states:

‘A male-to-female person in custody living permanently as a woman without genital surgery should be allocated to a female establishment. She should not be automatically regarded as posing a high sexual offence risk to other people in custody and should not be subject to any automatic restrictions of her association with other people in custody. However, if there is clear evidence that she, as an individual, may pose a sexual offence risk, then this should be dealt with as for any other person in custody posing a risk. Only where a risk assessment determines it is justified, should she be subject to increased staff supervision or restrictions of her association with other people in custody.’

In January 2023 the Scottish Government Justice Secretary said the review, as originally announced in late 2018, was ‘[nearing completion](#)’. This means that the policy has now been ‘under review’ for longer than it has been in place prior to review. At the time of writing, the review remains ongoing, with no clear end in sight.

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

The Prisons and Young Offenders Institutions (Scotland) Rules set out the statutory rules for managing Scotland’s prisons. The Rules are devolved and legislated for as Scottish Statutory Instruments, subject to the negative procedure. This means that parliamentary scrutiny is limited.

We draw attention to far-reaching changes made to the rules in 2011, ahead of the current SPS policy taking effect. We assume, but cannot be sure, that these legislative changes were made to facilitate the policy.

The [preceding version of the rules](#) (2006) stated that searches (other than an examination of the prisoner’s person and clothing, without removal of the clothing) must be carried out by a person of the same sex. A similar rule applied to visitor searches, with only oral searches of the mouth permitted by an officer of the opposite sex. The 2006 rules also classified prisoners by sex (along with characteristics such as age, period of sentence etc.). In relation to accommodation, the 2006 rules state, ‘Female prisoners shall be accommodated in rooms or cells which are entirely separate from rooms or cells used for the accommodation of male prisoners’.

The updated 2011 Rules removed all references to sex (bar a single mention of sex as a protected characteristic), replacing these with ‘gender’ This included the classification of prisoners, which now cite ‘gender’ (note this is counter to Rule 11 of the [Nelson Mandela Rules](#), which specifies ‘sex’)<sup>1</sup> and provisions relating to

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<sup>1</sup> Rule 11 states: ‘The different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their sex, age, criminal record, the legal reason for their detention and

searching. The 2011 provision on accommodation still refers to male and female prisoners, which appears to be inconsistent with the classification of prisoners by 'gender' in the same instrument.

The 2011 Instrument is accompanied by a lengthy [executive note](#) which provides a summary of the key changes from 2006. The sweeping replacement of sex with gender is only referenced once, in relation to searches of officers and employees (rule 151).

The Scottish Parliament Subordinate Legislation Committee considered the 2011 rules on [4 October 2011](#). It did not discuss any of the above changes.

## **5. Risk assessment on the placement of transgender prisoners**

We understand that in 2016, following a complaint from a prisoner, the SPS introduced a risk assessment template, with the aim of providing a consistent record of decision-making. The template, and information on its introduction can be accessed [here](#).

As a tool for decision-making the template is poor. It employs subjective terminology ('social gender', 'gender identity' etc.) and is heavily weighted towards mitigating risks to transgender prisoners. It does not refer to women or sex as a protected characteristic. This short [article](#) analyses the template in more detail.

## **6. Female offenders and trauma-informed care principles**

We believe that current SPS policy represents a significant departure from the trauma-informed care principles that the service is otherwise committed to. This approach came about principally as a result of the Angiolini report, which acted as a '[catalyst for change](#)' in respect of women offenders, both in relation to the physical prison estate, and the type of care provided.

The SPS [New Model of Custody for Women](#) (2019) detailed how a trauma-informed approach would underpin operational practice. It noted 'women who have suffered some type of physical or emotional trauma are often hyper-aware of possible danger' and that 'survivors of trauma may find it difficult to trust others'. The [SPS Strategy for Women in Custody 2021-25](#) stated all aspects of the care should 'take account of their likely experience of trauma and adversities'.

At the same time, the SPS continued to place male offenders in the female prison estate. The SPS has only recently started to publish statistics on the placement of transgender prisoners; prior to this, media reports provided the only public source of information. The following list shows some of the index offences committed by male prisoners placed in the female estate, as based on media reporting. These include murder, torture, and sexual assault.

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the necessities of their treatment; thus:

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate;

- Murder (Alan Baker/Alex Stewart): Held in the female unit at Greenock prison (see [here](#)).
- Murder (Daniel/Sophie Eastwood): Held in women-only units at HMP Edinburgh and HMP YOI Polmont, and at HMP YOI Cornton Vale (see [here](#)). Whilst still housed in the male estate, Eastwood terrorised a female officer, who left her job as a result (see [here](#)).
- Murder and torture (Peter Laing/Paris Green): Held at Cornton Vale women's prison and HMP Edinburgh women's section (see [here](#)).
- Murder, assaulting (biting) a female officer (Richard McCabe/Melissa Young): Held in remand at Cornton Vale (see [here](#)).
- Assault, robbery, racially aggravated harassment, dishonesty and threatening police officers. (Stuart Kelly/Katelyn Findlay). Held at Cornton Vale (see [here](#), [here](#))
- Behaving in a threatening or abusive manner (Callum/Stacey Maclean). Held at Cornton Vale. Threatened to rape female prisoners.
- Voyeurism and sexual assault (Katie Dowlatoski). Held at Cornton Vale (see [here](#))
- Assault, robbery and threatening police (Joseph/Nicola Wilson). Held at Cornton Vale (see [here](#), [here](#) and [here](#))
- Threatening and abusive behaviour (Alan/Alannah Morgan). Appeared in court as both male and female. Held on remand at Cornton Vale (see [here](#)).

A list of case studies compiled by Keep Prisons Single Sex ([here](#)) provides further additional information. As noted above, both the Bangkok and Nelson Mandela rules state that female staff should be predominantly applied in female prisons. We anticipate that the placement of male offenders in the female estate will, in most cases, also require the presence of additional male staff. This [article](#) looks further at the tension between trauma informed care principles and the placement of males in the female estate.

## 7. The impact of SPS transgender policy on female offenders

We suggest that the placement of any male offender in the female estate, irrespective of their gender identity or offending history, remains fundamentally at odds with a trauma-informed approach to dealing with women offenders. Placing male offenders in the female estate fails to take seriously the fact that female offenders are often repeat victims of male sexual and physical violence, or that some women may be re-traumatised by male bodies or voices. As detailed next, it undermines women offenders' sense of safety, as well as their dignity and privacy.

In a [BBC interview](#) in February 2020, the former governor of Scotland's women's prison Rhona Hotchkiss stated that in her experience, it is "*always an issue to have trans women in with female prisoners*" and that the presence of a male bodied person among vulnerable women caused them distress and consternation. We recommend that you seek a meeting with Ms Hotchkiss.

Academic [research](#) undertaken by a former Scottish Prison Service (SPS) employee revealed multiple concerns raised by female prisoners (although these are broadly painted by the researcher as outdated attitudes). Concerns include:

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

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

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

## 8. Impact on prison officers

We believe that the SPS Gender Identity and Gender Reassignment Policy also impacts negatively on female prison officers, most directly in relation to searching requirements, and in particular body searches. The policy states:

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

Rule 92(2) (a- g) of the 2011 Prison Rules set out a range of search types. The following types are relevant here:

- (a) a search of the prisoner's person including the prisoner's clothing prior to removal of the clothing under sub-paragraph (c);
- (b) a search of the prisoner's clothing after removal of the clothing under sub-paragraph (c);
- (c) the removal of the prisoner's clothing;
- (d) a visual examination of the external parts of the prisoner's body after the removal of the prisoner's clothing;<sup>3</sup>) Where a search is conducted under paragraph (2)—

The rules state that in the case of a search under paragraph (2)(a), the officer must be of the same gender as the prisoner, and that in the case of a search under paragraph (2)(c) or (d), the officer must be of the same gender as the prisoner and at least one other officer of the same gender must be present during the search;

A range of evidence indicates that female officers find these requirements degrading. Unpublished research (available [here](#) via Freedom of Information) based on interviews with prison officers documented the clear discomfort felt by some female prison officers, when required to carry out intimate searches (again, this is painted as evidence of dated attitudes and/or bigotry).

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

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

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

The following comment, by a line manager, indicates that some female officers do not feel able to express their discomfort at being required to search men:

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

Similarly, male officers felt uncomfortable about the requirement to search transmen (biological females).



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

This recent [press article](#) (4 February 2023) reports that female officers were ordered to carry out intimate searches on an exceptionally violent male prisoner, with a trans identity, housed in the male estate. The officers said that their human rights ‘went out the window’. In the article, a Scottish Prisoner Officers Association spokesman stated he was concerned that female staff felt pressurised to carry out intimate searches on the prisoner.

## 9. Conclusion

As noted above, the SPS is currently conducting a review of its Gender Identity and Gender Reassignment Policy. We have previously expressed our concern to the SPS that it does not intend to publish a revised draft for scrutiny before it is adopted. In response, the SPS [told us](#), ‘We plan to publish the final policy alongside supporting documents, including the range of evidence that has informed the review. We will not be seeking further input externally or internally from stakeholders once the policy is final and published’.

We also draw your attention to the [submission](#) from Scotland’s statutory human rights body, the Scottish Human Rights Commission, to the SPS review. We are surprised that this treats Article 3 as a right that can be balanced. The submission also draws on the contested Yogyakarta Principles, which rest on the principle that considerations for self-declared gender identity outweigh those based on sex, in all contexts.

We would urge you to seek clarification from the SPS and the Scottish Government on how the revised policy is taking Article 3 and other relevant international instruments on imprisonment into account. We also urge you to encourage the SPS to reconsider its position on publication and submit its conclusions to public scrutiny before publishing any revised policy.

Kind regards,

Dr Kath Murray  
Dr Lucy Hunter Blackburn  
Lisa Mackenzie