

Executive Summary of SPS Policy Review 2021 – 2023

“I think there are people that are in and out of jail that want to say they are transgender to get an easy sentence to be honest, or they’re at it, and these are the people that will make us look 'bad' ... all of that makes us look bad, we get tarred with the same brush, and it leads to us all being judged like them. Every policy that you have will be open to abuse. It’s about weighing up the good and bad, I would be concerned about that, because not only might there be a chance that someone might fool you, but that’s damaging for us as a group. Not only are you putting the community, the group of people that you are letting this person be part of at risk, you are risking our status too, because the public will think that we are all that person, we are all these people.” (Transgender person in custody)

“[The issue with the policy] is not an issue with trans people being housed in the estate they identify as. It’s because it feels like there is a low threshold for deciding who could be placed there. I think if a person has come out and lived that way for years and is clearly attempting to transition and progress in that journey then, yes, they should be allowed to be housed in the estate they feel comfortable with... but you can’t have people playing the system... if anyone can get hold of the criteria and manipulate it. People are clever, and you can’t have them manipulating the system or the paperwork or whatever to make it easier for them.” (Non-transgender woman in custody)

“We (SPS) need to leave ourselves space to say that a woman, who used to be male, who hasn’t had surgery, based on our knowledge... that we think it would perfectly safe for them to be located in a women’s hall. Equally, we need to have space to say that, based on our knowledge, they present a risk and should be in a man’s hall. We need space for both ...decisions to be made; we can’t force ourselves to make decisions based on things like surgery.... or whatever it might be.” (Senior operational member of staff)

“A policy that did not adequately assess risk to ensure that no one is placed inappropriately in an estate where they may threaten the safety or security of others, or have their own safety or security threatened, would also breach the human rights of all people in custody” (Stakeholder 2).

“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” (Stakeholder 7)

“So for me the whole, this whole area is about the balance and making sure that the rights of everyone who's affected, including other people in respective prisons, women and men, depending on the circumstances are considered and that that is built into policy.” (Stakeholder 9)

The SPS Policy Review (2021 – 2023)

The policy review concludes that SPS would not be able to adequately consider and manage risk, including Violence Against Women and Girls (VAWG) risk, if SPS was to adopt a blanket approach to the management of transgender people in prison, based on sex, gender identity, or someone's status as a transgender person and that SPS should individualise its management of transgender people as far as operationally practicable.

The policy review found that all prison populations who engaged in the review, including transgender people in prison themselves, recognised and supported the need for SPS to have robust processes in place to prevent predatory individuals gaining access to the women's estate. Indeed, the transgender people interviewed felt that predatory individuals claiming to be transgender in bad faith were a threat to their own wellbeing and a threat to the perception of transgender people more generally.

The *SPS Policy for the Management of Transgender People in Custody (2023)* published today, and the separate operational guidance for SPS staff, make a clear statement about how SPS will admit transgender people to Scotland's prisons and ensure that they are placed and managed in a way which seeks to prevent transgender women with a history of VAWG and present a risk from accessing the women's estate, is rights based and ensures the health, safety, and wellbeing of all people in prison.

The policy and guidance identified changes needed to searching practice to allow deviation from searching transgender people in line with their affirmed gender through defensible, transparent decision making.

Context

An effective, dedicated policy for the management of transgender people in Scotland's prisons is needed because transgender people are the only group of people in Scotland's prisons who require a decision to be made about what gender of estate they are placed in, and what gender of prison officer should search them. In 2014, SPS published its 'Gender Identity and Gender Reassignment' (GIGR) policy. SPS made a commitment to review the policy considering the concerns raised, acknowledged by SPS, around the Equalities Impact Assessment for the GIGR policy. The then Cabinet Secretary for Justice re-iterated the commitment to the policy review in 2019 and some evidence gathering work commenced. SPS's response to COVID19 led to the suspension of this work and the Policy Review commenced in full in 2021 by an internal team.

The stages of the policy review

The policy review was undertaken in 5 stages:

- Policy initiation – this initial stage looked at the methodology for the review, the people that SPS should invite to be part of the policy review and an initial horizon scan. The development of the EHRIA commenced at this early stage and was mainstreamed throughout the remainder of the review.
- Evidence and engage - this stage included an anonymised survey to all women in the prison estate and an equal number of men, interviews with people in prison who are transgender and who are not transgender, as well as engagement with stakeholders from a range of public bodies, academia, communities of interest and identity, including organisations who work with women in prison and people with expertise in preventing VAWG. Critically, the review engaged with prisons staff with experience in managing transgender people as well as prisons and justice expertise from other jurisdictions in the UK, and further afield, as well as trade union partners. A public consultation was also undertaken.

- Analyse and recommend – this stage included the development of key findings, the identification of the policy options emerging during the review for the management of transgender people and assessment of these against key criteria. This stage also included further updating of the Equalities and Human Rights and other Impact Assessments. This stage also included engagement with VAWG expertise, operational assurance and engagement with trade union partners.
- Authorise and publish – this stage included engagement with SPS Executive, SPS Advisory Board and, in accordance with our obligations as an Executive Agency, the Scottish Government. This stage also included communications arrangements for publication.
- Implement, monitor and review – this stage is critical and recognises that policy does not end at the point of publication. This includes an Implementation Plan based on an assessment of the policy against an Implementation Framework. This stage of the review identified proportionate monitoring and reporting arrangements, including public reporting arrangements consistent with SPS Data Protection obligations.

Evidence and analysis

A summary of key findings from the engagement stage of the policy review are as follows:

Evidence and analysis: engagement

Engagement with people in prison who are not transgender

- The interviews conducted suggest that both men and women had a “live and let live” attitude towards everyone in prison, including transgender people.
- There was hesitation, a fear of the unknown and a perception of risk amongst men and women – but this was not based on their experience of prison or living alongside transgender people, but more on what might happen if SPS get it wrong.
- The survey findings suggest that there is less of a fear of transgender people amongst women than has been characterised – the survey findings suggest that women are less concerned about the threat posed by “authentic” transgender people and more about the robustness of the processes SPS have in place for detecting predatory individuals.

Engagement with people in prison who are transgender

- The transgender people in prison largely supported an individualised approach but were keen to emphasise that an approach for one transgender person may not be the best for another.
- Some transgender people supported a status based rather than an individualised approach (commonly referred to as a transgender wing/hall) on the basis that it would create spaces more focused on support for transgender people with staff who had expertise in managing transgender people. However, in the main, transgender people saw the transgender wing/hall as a discriminatory way to separate one population from the mainstream population.
- Transgender people made it clear that the approach SPS adopts should include risk and safety and were vocal that SPS required robust processes to prevent predatory individuals gaining access to women’s estate.
- Transgender people felt that predatory individuals claiming to be transgender in bad faith were a threat to their own wellbeing and a threat to the perception of transgender people more generally.

Engagement with prisons staff with experience of working with transgender people

- Positive relationships with staff were seen to be key to both transgender people in custody, and other populations who may be affected by the policy, for example, women in custody.
- Staff said that SPS needed clear and concise processes and guidance in place.
- Staff said that they needed to retain some discretion but required a level of clarity around processes to ensure they were making defensible decisions. This discretion was especially important to manage transgender people in a way which minimises opportunities for re-traumatisation for women with traumatic past experiences.
- Staff did not support the idea of exclusive spaces for transgender people as it would minimise options for supporting them and for protecting transgender people and others.
- Staff acknowledged that transgender people can be subject to a high level of harassment and abuse and that efforts should be made to minimise that in the future.

Engagement with external stakeholders

- There was general convergence across the range of stakeholders that people's rights should be respected, risks should be managed, and needs and vulnerabilities should be responded to. The divergence came mainly in two areas: when stakeholders were invited to interpret those rights, and when stakeholders were invited to input on how these things should be achieved.
- The way that some stakeholders interpreted human rights were often in conflict and opinions were often polarised in how best to uphold these rights.
- The notion of incompatible rights was highlighted, especially in relation to the most suitable accommodation for this population.
- Irrespective of views of stakeholders, most felt that the purpose of the policy is to diffuse tensions and to strike a balance that is desirable and beneficial to all individuals impacted by the policy.

Engagement with prisons and justice expertise internationally

- There is a limited evidence base internationally.
- The jurisdictions we engaged with, in the main, sought to strike the right balance between upholding people's rights and managing risk and protection considerations.
- While there is no silver bullet internationally that would address all the concerns of all stakeholders, there are areas of good practice that the updated SPS policy and operational guidance draws on i.e. the searching and sampling arrangement form being introduced through the updated policy is based on searching agreements introduced in England and Wales, Canada, and New Zealand.

Evidence and analysis: policy review

The policy review:

- Identified key improvements to prisons policy and practice to ensure transgender people are managed in a way which seeks to prevent transgender women with a history of VAWG, who present a risk of harm to those in the women's estate, from accessing that estate, is rights based and ensures the health, safety, and wellbeing of all people in prison. These improvements are set out in more detail in subsequent paragraphs.
- Identified changes needed to searching practice introduced in the 2014 policy, through the introduction of searching and sampling arrangement forms, enabling overriding risks to the health, welfare, and safety of staff and the transgender person,

as well as the vulnerabilities and behaviours of the transgender person to be considered, and allow deviation from searching in line with affirmed gender, through defensible, transparent decision making.

- Identified and assessed the options available to SPS for the management of transgender people.

The evidence gathered enabled the policy review to identify four options for the management of transgender people in Scotland's prisons:

- A "sex-based" approach, which used an individual's sex assigned at birth as the main criteria upon which to make decisions about a person in custody's admission, management, or placement.
- A "gender-based" approach, which used an individual's lived gender as the main criteria upon which to make decisions about a person in custody's admission, management, or placement.
- A "status-based" approach, which used an individual's status as a transgender person as the main criteria upon which to make decisions about a person in custody's admission, management, or placement.
- A "case-based" individualised approach, which used a holistic body of evidence upon which to make decisions about a transgender person in custody's admission, management, or placement.

Evidence and analysis: policy assessment

The policy review assessed the four policy options and concluded that:

- SPS would not be able to adequately consider and manage risk, including VAWG risk, if SPS was to adopt a blanket approach to the management of transgender people in prison, based on sex, gender identity, or someone's status as a transgender person.
- SPS would not be operating in a way which was consistent with its statutory or regulatory obligations if SPS was to adopt a blanket approach to the management of transgender people in prison, based on sex, gender identity or someone's status as a transgender person.
- Prisons policy and practice for transgender people should be individualised, as far as is operationally practicable, at each stage of their admission, placement, and management, in line with wider prisons policy and practice and based on the time and information available.

The review identified four main reasons why SPS should adopt a case based, individualised approach:

- It enables SPS to adequately consider and manage risk that people may present to themselves or to others including VAWG risk.
- It protects the rights of transgender people in custody whilst also promoting the care, safety and wellbeing of everyone across Scotland's prison estate.
- The processes and categories introduced to mitigate the risks at the point of admission and to consider and manage risk are proportionate.
- It is an approach which is consistent with SPS obligations.

The review identified three main reasons why SPS should not adopt a blanket 'gender identity based' approach:

- A blanket 'gender identity-based approach does not enable SPS to adequately consider and manage risk that people may present to themselves or to others, including VAWG risk.
- A blanket gender identity-based approach would run counter to the obligations placed on SPS.
- A blanket gender identity-based approach could inadvertently 'out' people.

The review identified three main reasons why SPS should not adopt a blanket sex-based approach:

- A blanket sex-based approach does not enable SPS to adequately consider and manage risk that people may present to themselves or to others, including VAWG risk.
- A blanket sex-based approach would run counter to the obligations placed on SPS.
- A blanket sex-based approach fails to acknowledge gender identity.

The review identified three main reasons why SPS should not adopt a blanket status-based approach (sometimes referred to as transgender halls or wings):

- A blanket status-based approach does not enable SPS to adequately consider and manage risk that people may present to themselves or to others, including VAWG risk.
- A blanket status-based approach would run counter to the obligations placed on SPS, is discriminatory in that it would segregate a small group of people based on a single characteristic, which is disproportionate.
- A blanket status-based approach fails to acknowledge gender identity

Evidence and analysis: impact assessments

The EHRIA is clear that:

- The policy position adopted is the most focused on risk and safety that SPS can achieve without negatively impacting on the rights of staff or people in custody in Scotland.
- SPS can go no further on rights or on risk without introducing arrangements that would be inconsistent with our obligations as a prison service, as a public body, or as an Executive Agency of Scottish Government.
- The policy position seeks to maximise the safety and order of Scotland's prisons, and maximise the rights of people in Scotland's prisons, without negatively impacting on transgender people or others

The Data Protection Impact Assessment (DPIA) is clear that:

- There is a risk that transgender individuals in prison can be identified through SPS public reporting arrangements and that SPS must change public reporting arrangements for the transgender prison population

Evidence and analysis: key lessons learned

The lessons learned from the events of 2023 have informed the direction of the policy review, mainly around admission of transgender people to Scotland's prisons and the case reviews undertaken. The key lessons learned that the policy review has drawn upon are as follows:

- The need for consistency in standards across policy and practice through more prescriptive and robust guidance and recording of case conferences and decision making.
- More detailed processes for the admission and case conference processes for transgender people in custody.
- A recognition that processes must be flexible enough to mitigate the risks of SPS being time poor and information poor at the point of admission.
- The need for VAWG to be more clearly spelt out across processes and guidance.
- The need for SPS to continue to improve how we communicate with people in prison to keep them engaged and up to date with decisions affecting them.

SPS Policy Intent: SPS Policy for the Management of Transgender People in Custody (2023)

The health, safety, and wellbeing of all people who live and work in Scotland's prisons is paramount. As a prison service, SPS also requires a dedicated, bespoke strategy or policy for some populations. A bespoke policy is needed for the management of transgender people because transgender people are the only group of people in Scotland's prisons where:

- A decision must be made about what gender of estate, they are to be placed in, and
- A decision must be made about what gender of prison officer should search them.

In addition, transgender people have specific support needs that other people do not, for example, access to equipment. It is also important to recognise that the transgender prison population is 0.3 per cent of the overall prison population.

The policy review sets out an updated policy intent:

“SPS 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”.

The range of obligations referred to in the policy intent can be summarised as follows:

- SPS obligations as an Executive Agency of Scottish Government (SG) relate mainly to the obligations placed on SPS as set out in the Framework Agreement between SPS and SG, the expectation that SPS will deliver against national policy expectations, for example, to protect the public, prevent VAWG, meet public service reform expectations around person-centred and trauma-informed practice, rights-based and person-centred services.
- SPS obligations as a public body relate mainly to the range of statutory and regulatory obligations SPS must meet, for example, around equalities and human rights, good governance, and accountability arrangements.
- SPS obligations as a prison service relate mainly to the statutory and regulatory obligations SPS must meet, for example, Prison Rules, HMIPS Inspection Standards, a safe custodial environment, and its duty of care in relation to the health, safety, and wellbeing of staff and people in prison.

Changes in policy and practice

Taken together, the updated policy (and the operational guidance) make a clear statement about how SPS will admit transgender people to Scotland's prisons and ensure that they are placed and managed in a way which prevents transgender women with a history of VAWG

who present a risk of harm to those in the women's estate from accessing that estate, is rights based and ensures the health, safety, and wellbeing of all people in prison. Some of the key changes being introduced are as follows:

- The title and policy intent of the policy has been updated.
- The policy shifts to a policy position which is as focused on risk and safety that SPS can achieve without negatively impacting on the rights of staff or people in custody in Scotland.
- The policy introduces a new, detailed admission process that determines which estate a transgender person should be admitted to.
- The policy mainstreams prevention of VAWG across policy and practice.

The policy:

- Consolidates and extends existing good searching practice.
- Introduces further good practice for searching through searching and sampling arrangement forms and shifts to a more individualised approach to searching.
- Allows deviation from searching in line with affirmed gender.
- Introduces a multi-disciplinary assurance body for complex decisions involving transgender people with a history of VAWG.

Strategic alignment: the relationship with SPS Corporate Plan 2023 – 2028 (CP2328), other strategies and policies

This policy, taken together with delivery of other key commitments set out in the SPS Strategy for Women in Custody, and SPS Vision for Young People in Custody, will support delivery of SPS strategic priorities set out in CP2328. SPS places the delivery of this updated policy as an important commitment within CP2328, requiring a coordinated, cross Directorate approach across Scotland's prisons, in accordance with the principles set out in the CP2328:

- Equalities and human rights
- Person centred and trauma informed
- Evidence-based
- Collaboration and partnership
- Environmental sustainability

It is especially critical that the distinctive role and contribution of health services and justice services is recognised and facilitated in the way the policy is delivered, particularly through the case conference process.

As a public body, SPS must ensure our policies, our resourcing, and our statutory and regulatory framework is aligned, to enable this updated, evidence-based policy to be delivered, and therefore two statutory instruments are being laid.

Next steps: SPS' key commitments to implementation, monitoring, and evaluation

The effective implementation of policy is critical. SPS has developed an Implementation Plan based on an assessment of the policy against an Implementation Framework against three broad headings:

- Staff
- Services

- Monitoring and evaluation

The go live date for the policy will be just under 12 weeks from today, on **Monday 26 February 2023**. The separate operational guidance for staff will be available on the SPS website from that date onwards. This implementation period will afford SPS and our valued partners time to put arrangements in place. Oversight of implementation will be provided by an internal Implementation Working Group bringing together the different parts of SPS that contribute both collectively, and in some part individually, to implementation. There will be regular reporting on implementation and monitoring to SPS Executive through existing organisational performance arrangements and SPS will also publish an annual report through the Public Information Page (PiP).

Some further information on monitoring and evaluation

It is important that monitoring and evaluation is proportionate and is consistent with wider organisational performance arrangements. There are five main strands to the monitoring and evaluation arrangements for the updated policy:

- Ongoing quality assurance and monitoring of policy and guidance.
- Updated operational audit arrangements.
- The testing of self-evaluation/quality indicators for transgender people (as part of wider self-evaluation arrangements for other populations/prisons).
- Annual reporting through the PiP.
- Independent evaluation of policy within five years of publication.

The policy and operational guidance will require to keep pace with any legislative, regulatory, or wider evidence or learning that emerges in the intervening period between publication and future policy evaluation.

Public reporting

The Data Protection Impact Assessment (DPIA) highlights the risk that transgender individuals in prison may be identified through SPS public reporting arrangements. SPS will continue to publish the number of transgender people in prison on a quarterly basis however, in order to mitigate any risk of identification, SPS will not report on the gender of estate that people are placed in. The annual reporting arrangements being introduced may do so, provided the risk of identification of individuals can be mitigated. This arrangement will be kept under review.

Public feedback

SPS has consulted extensively on the development of the policy through the policy review process, including bespoke engagement with key stakeholders including VAWG expertise and other community organisations and groups, as well as a wider public consultation exercise. While SPS has no plans to formally consult on the updated policy, as with any area of prisons policy or practice, any relevant feedback received from stakeholders will be registered and considered as part of future policy evaluation.