



OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Thursday 11 January 2024

Session 6



The Scottish Parliament
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot or by contacting Public Information on 0131 348 5000

Thursday 11 January 2024

CONTENTS

	Col.
MANAGEMENT OF TRANSGENDER PRISONERS	1
SUBORDINATE LEGISLATION.....	25
Gender Recognition (Disclosure of Information) (Scotland) Order 2023 (SSI 2023/364)	25
Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2023 (SSI 2023/366)	25
Firefighters' Pension Scheme (Scotland) Amendment Regulations 2023 (SSI 2023/369)	26

CRIMINAL JUSTICE COMMITTEE

2nd Meeting 2024, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

Katy Clark (West Scotland) (Lab)

*Sharon Dowey (South Scotland) (Con)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

*Pauline McNeill (Glasgow) (Lab)

*John Swinney (Perthshire North) (SNP)

*attended

COMMITTEE SUBSTITUTES

Neil Bibby (West Scotland) (Lab)

Donald Cameron (Highlands and Islands) (Con)

Jackie Dunbar (Aberdeen Donside) (SNP)

THE FOLLOWING ALSO PARTICIPATED:

Neil Bibby (West Scotland) (Lab) (Committee Substitute)

Maggie Chapman (North East Scotland) (Green)

Angela Constance (Cabinet Secretary for Justice and Home Affairs)

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)

Jamie MacQueen (Scottish Government)

Teresa Medhurst (Scottish Prison Service)

Ash Regan (Edinburgh Eastern) (Alba)

Tess White (North East Scotland) (Con)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Thursday 11 January 2024

[The Convener opened the meeting at 13:03]

Management of Transgender Prisoners

The Convener (Audrey Nicoll): Good morning and welcome to the second meeting in 2024 of the Criminal Justice Committee.

We have received apologies from Katy Clark, in whose place we are joined by Neil Bibby MSP. We are also joined by Maggie Chapman MSP, Ash Regan MSP, Tess White MSP and Rachael Hamilton MSP. Before we move on, I ask MSP colleagues who are joining us for the first time to declare any interests.

Maggie Chapman (North East Scotland) (Green): I declare that, formerly, I worked for a rape crisis centre.

Tess White (North East Scotland) (Con): I have no interests to declare.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): I have no interests to declare, but I thank you for asking, convener.

Ash Regan (Edinburgh Eastern) (Alba): I have no relevant interests to declare.

Neil Bibby (West Scotland) (Lab): I have no relevant interests to declare.

The Convener: Our first item of business is consideration of the Scottish Prison Service's newly updated policy on the management of transgender prisoners in Scotland and of the two associated Scottish statutory instruments, which are on our agenda today. I refer members to papers 1 and 2.

We are joined by the Cabinet Secretary for Justice and Home Affairs; Teresa Medhurst, who is the chief executive of the Scottish Prison Service; and Scottish Government officials David Doris, who is the prisons policy team leader, and Jamie MacQueen, who is a solicitor in the Scottish Government's legal directorate. I welcome our witnesses.

Before we start, I want to make it clear that we are considering the updated policy on transgender prisoners because I recognise the public interest in the matter and because several committee members indicated that they wished to do so. The committee does not have a formal role, as such, in approving the new policy; that is not what we are

doing today. The purpose of the meeting is to hear more about the content of and rationale for the new policy. The policy changes have triggered the laying of the two SSIs that are on our agenda today, so the committee's formal role involves taking a view on whether to recommend to the Parliament that the SSIs come into force or that they be annulled.

I invite Ms Medhurst to make a short opening statement on the new policy and the SSIs, and then I will ask the cabinet secretary whether she would like to add anything.

Teresa Medhurst (Scottish Prison Service): Good afternoon, convener and committee members. Thank you for the opportunity to outline the content of the "SPS Policy for the Management of Transgender People in Custody", which was published on 5 December last year.

As members will know, safeguarding the health, rights and wellbeing of all people in our establishments, some of whom are the most marginalised and vulnerable in society, is a key priority for the Scottish Prison Service and is at the heart of the new policy. I understand that there have been various submissions to the committee regarding the policy, and I recognise that the detail of the policy is of interest not only to the Parliament but to the wider general public.

The SPS has a proven track record of managing and supporting complex and vulnerable people, and we continue to do that daily, on a 24/7 rolling basis, with care, compassion and pride. Our commitment to providing person-centred care extends not only to those with clear and obvious additional needs but to our entire population. As custodians, we manage identified risks that are bespoke to an individual, and such risks are not exclusive to transgender people in custody. We are able to do that only with the support of our staff, who continue to demonstrate long-standing expertise in the management and care of an increasingly complex prison population, which is key to our success.

During the consultation period, one of our stakeholders commented that recognition of one's gender is essential to human rights and individual wellbeing. That recognition in wider society should also apply to prisoners, as with all other rights. It is therefore essential that our policies reflect and recognise the impact of wider societal changes. However, I completely understand the need to provide public assurance on how we implement, monitor and review our policies.

Our corporate policy review on transgender people in custody has been one of the most comprehensive and evidence-based reviews in recent times. It was developed following extensive engagement involving more than 200 women and

men in custody, including transgender individuals, as well as experts in tackling violence against women and a broad range of community organisations and service providers.

The policy, by its very design, is applied on an individualised basis. It outlines how transgender people will be first admitted into custody, where they will be accommodated during their sentence and how they will be managed. The personalised approach will ensure that any transgender woman with a history of violence against women and girls and who presents a risk to women and girls will not be placed in the women's estate. Although I am clear that that approach supports the welfare of everyone in our care, I am also clear that it provides our staff with the ability to utilise their operational expertise in developing the relationships that are critical to support those who we are entrusted to care for.

To support our staff, a transition period has been included in the planning to cater for the necessary training that will assist the operational implementation and application of the policy. Implementation will therefore commence from 26 February this year. In addition, at that time, we will publish our operational policy guidance, our gender diversity guidance and an evidence review document, which will all underpin the policy that was published last year.

Members will be aware that, since February last year, there has been an unprecedented level of interest in the way in which Scotland's prisons manage transgender people. I am acutely aware of the impact—in some cases, the detrimental impact—that that has had on the health, safety and wellbeing of people whom we care for. I therefore welcome this opportunity to set out the policy in more detail and to increase understanding of this important issue in prisons.

The Convener: Thank you very much, Ms Medhurst. Cabinet secretary, would you like to add anything?

The Cabinet Secretary for Justice and Home Affairs (Angela Constance): Yes. Good afternoon to everybody who is present at the committee and in the public gallery.

The Scottish Prison Service has considerable experience in the management of people in its custody, as well as a duty of care for those people, and its policy upholds its responsibilities to deliver safe, secure and suitable services for all. Although the management of everyone in custody is an operational matter for the SPS, I welcome the updated policy on transgender people, which has been developed following extensive engagement and careful consideration. The policy makes it clear that a transgender woman who has a history of violence against women and girls and who

presents a risk of harm will be admitted to and accommodated in the men's estate and will not have access to the women's estate.

I will speak briefly about each of the SSIs. The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2023 will change the prison rules to make it clearer that prison governors have discretion to allow a transgender person to be searched by an officer of their birth sex if it is necessary and proportionate to do so. That will ensure that the health, safety and welfare of the transgender individual and staff are considered in searching decisions. That is necessary to ensure that both the current SPS policy and operations on searching and the updated policy are clearly allowed for in the prison rules and that they are easily understood by those affected.

The discretion will be exercised only for the purpose of protecting the health, welfare or safety of any person or the security or good order of the prison. For example, if there is a risk to the safety of an officer in searching a transgender individual in line with their affirmed gender, the transgender individual will be searched by an officer of the same birth sex as the individual. Amendments are also proposed to make it clear that governors have the discretion to allow a transgender person to be observed by an officer of their birth sex while providing a sample for drug or alcohol testing, if it is necessary and proportionate to do so.

The Gender Recognition (Disclosure of Information) (Scotland) Order 2023 proposes to put beyond doubt that it is not an offence for staff who are involved in offender management to disclose protected information that is acquired legitimately in their official capacity and when required for the purposes of offender management. It is vital that SPS staff, justice social work services, the Parole Board for Scotland and others who are involved in the management, supervision and rehabilitation of people who are charged with or convicted of offences can, when necessary, disclose protected information, whether a gender recognition certificate has been applied for or granted, without risk of committing an offence under section 22(1) of the Gender Recognition Act 2004.

The SSIs, if passed, will come into effect on 26 February 2024, which aligns with SPS plans for implementation of the updated policy.

13:15

The Convener: Thank you, cabinet secretary.

We will move to questions, and I will begin with a question for Ms Medhurst. The new policy says that transfers from the male estate to the female one will not occur if a prisoner presents

“an unacceptable risk of harm to those in the women’s prison.”

Will you give a bit more detail on the risk assessment and risk management process in this space? Can you reassure us that the Scottish Prison Service will have access to all the relevant information that it needs from the courts, police, social work and other agencies to inform such a complex risk assessment and management process?

Teresa Medhurst: That is a really good question and one that I welcome. The risk assessment processes that we will apply are those that apply to complex cases, because this will apply to complex cases rather than any kind of standard case. It would be in exceptional circumstances that someone would be considered in this respect and, under those exceptional circumstances, rigour would be applied.

The case conference process would involve the multidisciplinary risk management team. We would have a range of professional expertise at that table, including forensic psychology, criminal justice social work and health input. There would be a range of expertise, as well as our operational expertise. The case conference would be chaired by either the deputy governor or governor of the establishment concerned. The team would look at the full range of information in the individual’s case file, including their history—not just their history of offending—prior to coming into custody, and their behaviour and response while in custody. At that point, the team would identify whether there were any gaps in that information.

In relation to complex cases, sometimes, although not always, it is clear that there are gaps. Therefore, more in-depth psychological risk assessments can be commissioned, and they would be undertaken by senior forensic psychologists. Those would identify where the gaps are and what information we require to ensure that we can develop an appropriate and safe management plan for the individual. If we could not do so, the case would progress no further but, where all that information was tied down, it would move to an exceptional case review. The exceptional case review panel would be chaired by the deputy chief executive. Again, it would include internal SPS expertise and external expertise through the office of the Scottish Government’s chief social work adviser.

At each level, a range of professionals are involved who are very well experienced and have expertise in risk management. We have well-honed systems and processes that we apply not just to those who are transgender but across a range of other high-risk individuals where that is necessary.

The Convener: I know that it is a moving figure, but what is the current population of individuals who identify as transgender in the Scottish prison estate?

Teresa Medhurst: The most recently published data shows that there are 23 individuals.

The Convener: Thank you.

I will open up the meeting to questions from members. I ask for brief questions and fairly succinct responses, as we are tight for time.

Russell Findlay (West Scotland) (Con): Good afternoon. This is a question for Teresa Medhurst. Can you confirm that, under the new policy, if the rapist Isla Bryson, or any other male-bodied sex criminal, asked for a transfer to a women’s prison, it could happen?

Teresa Medhurst: I am sorry, but I am a bit confused by your question, Mr Findlay.

Russell Findlay: Under the new policy, if someone like Isla Bryson or—if you do not want to talk about individuals—any male-bodied sex criminal sought a transfer to the women’s estate, it could happen.

Teresa Medhurst: Somebody who has committed a crime of a sexual nature and who presents a risk to women will not be transferred to the women’s estate.

Russell Findlay: On the part about presenting a risk to women, if it is deemed that someone like Isla Bryson, or another male-bodied sex criminal, was deemed in an SPS assessment not to present a risk, they could go to the women’s estate.

Teresa Medhurst: I would struggle to understand in what circumstances somebody who has been convicted of a sex offence would be deemed not to be a risk to women.

Russell Findlay: Okay. So, under the new policy, a male-bodied criminal with a history of violence could move to the female estate.

Teresa Medhurst: A history of violence against—

Russell Findlay: Generally.

Teresa Medhurst: It would depend on the circumstances of the individual case, what the violence related to and what risks were identified. Anyone who has committed an act of serious violence goes through a very rigorous assessment process in relation to their management plan and their placement. That applies regardless of whether or not they are a transgender individual.

Russell Findlay: I understand the new procedure, but I think that the short answer in both scenarios is yes—in theory, they could move to the women’s estate.

Teresa Medhurst: That is highly unlikely, Mr Findlay.

Russell Findlay: Okay. Thank you.

The next question is for the cabinet secretary. SPS documents that explain the new policy say that, if prison staff misgender an inmate, that could breach the inmate's human rights. Article 3 of the European convention on human rights, which relates to inhuman and degrading treatment, is cited. However, not so long ago, Humza Yousaf said that Isla Bryson was "at it". Nicola Sturgeon refused to say whether she thought Bryson was a man or a woman.

Why should Scottish National Party First Ministers be free to speak that very basic truth while SPS staff and female inmates are prohibited from doing so?

Angela Constance: Of course, everyone is free to speak as they wish. However, as you would expect me to say—you would, of course, expect this to be reflected in practice in the SPS—we endeavour, where appropriate and where circumstances necessitate, to respect people's identities.

I will explain my view on that. Given my exposure and visits to, and involvement with, prisons, I know that people wish to live and work in an environment in which people are respectful to one another. That helps to create a more secure and safer environment for everyone, as it helps relationships.

I will give one example from my contact with prisoners and ex-prisoners. They say that, when they are referred to by their name as opposed to by their number, that small measure—or measure that might seem small—is very helpful in securing and establishing relationships.

Russell Findlay: I do not think that anyone has a problem with respecting individuals' names and so on. This is about what is required of prisoners and staff being at odds with what prominent politicians have stated. Do you see that anomaly?

Angela Constance: I understand your question, Mr Findlay, but the reality is that everybody is free to speak as they wish to. I am not aware of significant consequences for any individual involved in the circumstances that you have described. I am merely stating that, generally speaking, it is better that people respond and react to one another in a manner that respects people's identities.

Russell Findlay: Teresa Medhurst, the new policies would require female prison officers to conduct intimate searches of male-bodied prisoners who identify as female. Can female staff decline to search male-bodied inmates, or would they be disciplined if they refused to do so?

Teresa Medhurst: Staff are not disciplined for any issues that they wish to raise in relation to searching. Over a number of years, we have had a process in place whereby members of staff are able to discuss their concerns with their manager, and we continue to search transgender individuals in relation to their affirmed gender without much difficulty. That will continue, and we will continue to work with our staff in the most constructive way possible. There is no intention to discipline anyone.

Russell Findlay: So they have an opt-out.

Teresa Medhurst: What I would say to you, Mr Findlay, is that our staff are very professional in relation to—

Russell Findlay: I do not doubt that.

Teresa Medhurst: —the work that they do and how they do it. If they have particular concerns, they are entitled to raise them. We will listen to them, and we will work with them to ensure that—

Russell Findlay: Do they have an opt-out?

Teresa Medhurst: It is an individual approach. What I am trying to say is that we have a responsibility and a duty of care, and where there have been individual concerns, we have always worked with our individual members of staff to listen to those concerns and work around that with them. What that results in is how we manage—

Russell Findlay: Okay. I will not labour the point. It sounds as though they do not have an opt-out, because—

The Convener: If I can just come in—

Russell Findlay: —I am not getting a clear answer.

The Convener: I want to move things on, because I want other members to have an opportunity to ask questions.

Russell Findlay: Absolutely.

The Convener: I will come back to you if we have time. John Swinney is next.

John Swinney (Perthshire North) (SNP): I would like to follow up on the point that Russell Findlay has been raising with Teresa Medhurst in relation to the discretion that is provided for governors to opt for a search to be undertaken by an officer of the individual's original gender. I wonder whether Teresa Medhurst could put on the record the approach that she envisages that a governor would take in fulfilling the statutory obligation in the instruments that the committee is considering this afternoon, particularly in the scenario that Mr Findlay put, where an officer has concerns about what they are being asked to do.

Teresa Medhurst: What we have with the new policy, which we did not have previously, is a searching and sampling form. That form carries out and conducts an assessment, as part of the case conference, with the transgender individual about their preference for searching, but it also takes account of any concerns around searching. That will all be recorded and a decision will be taken as to how the individual will be searched—whether it will be by staff of their affirmed gender or staff of their birth gender. On the basis of that decision—which, as I say, involves both the individual and that risk assessment process—searching will then be progressed. *[Interruption.]* If the decision is that it will be carried out by staff of their affirmed gender and a member of staff has—

John Swinney: Convener, it is difficult to hear the witness when there are conversations going on to my left. I want to concentrate on what Ms Medhurst has to say to us.

Teresa Medhurst: The governor has the discretion, where there is an identified risk, to determine whether the transgender individual should be searched by somebody of their affirmed gender or somebody of their birth gender, based on that assessment. That assessment takes account of and will involve the views and perspectives of the individual. On that basis, the searching procedure will be put in place.

Were a member of staff to raise concerns about that, that would be discussed with their line manager and some agreement would be reached as to how best to move forward in relation to their concerns and how those concerns had been raised. It is difficult to say what would happen based on not being sure about whether the concerns were from a religious perspective or another perspective.

John Swinney: Thank you for that. Would you accept that the instrument on the prison rules that the committee is looking at this afternoon places an obligation on the governor to ensure that, in their institution, there is an appropriate opportunity for a member of staff to raise their concerns and have them properly and fully addressed? Would you accept that that is required of the governor as a consequence of them being allocated the discretionary power in question?

13:30

Teresa Medhurst: Yes. The instrument makes explicit in the rules the decision-making power that a governor has. Governors have that power at the moment, and we have a way of recording its use that we did not have previously. That means that those decisions are recorded and can be reviewed, and it also allows us to look at consistency across the estate in relation to how

people are managed, because we can do sampling on the back of that.

However, that means that a governor will now conduct a process that is much more formal than it was previously. It goes a considerable way towards ensuring that we are protecting everyone's safety, because it does not take account of the perspective of only the staff member or the transgender individual but brings both those perspectives together.

John Swinney: Would you say that what is in front of the committee today is a strengthening of the obligation on governors to ensure that the perspectives and concerns of members of staff are addressed to a greater extent, with greater obligation, than was the case before?

Teresa Medhurst: Yes, because it is far more explicit and decisions will now be recorded as well.

John Swinney: I will move on to the ground that the convener started on, which is the risk assessment that is undertaken. Can you explain to the committee the degree of rigour, and the scope, of the risk assessment that is carried out in those circumstances and whether that rigour and scope are applied to any other scenarios in the Scottish Prison Service?

Teresa Medhurst: The rigour and scope that would be applied for exceptional circumstances, which is what we are talking about, would require a very in-depth analysis of the individual's life history. You would go through everything, including their early years and life experiences, how they were raised, any issues or matters that arose during that time, their relationships over the period of their early years and into adulthood, their response to schooling and any jobs that they might have had. The process takes in the whole context of how someone has lived and commenced, down the road, their offending behaviour, as well as, in this case, taking account of where that individual's transgender journey started and how that has developed over a number of years or in more recent times.

The process takes account of basically every element of the individual's life and goes into as much depth, and applies as much rigour, as possible, taking account of things such as social work and police reports and our own intelligence focus. Therefore, everything related to the individual in the run-up to and including their time in custody is taken into account.

John Swinney: Are there any limitations on the sources of information for that process that the Scottish Prison Service pursues to ensure that it has the broadest possible perspective on the history of an individual and the risk that they might pose to any other prisoner or member of staff in the Scottish Prison Service?

Teresa Medhurst: No. We would seek—

The Convener: I am sorry to interrupt. Please keep your response as brief as possible, as I will have to move on after Mr Swinney's final question.

Teresa Medhurst: We would seek out all information sources that are available to us. Where gaps are identified, we would apply more detailed analysis and in-depth scrutiny by our forensic psychology team.

Sharon Dowey (South Scotland) (Con): The new prison rules do not appear to include a definition of gender. Does that mean that for the purposes of prison searches, gender is defined by how a prisoner self-identifies?

Jamie MacQueen (Scottish Government): The policy, together with the rules, means that we are treating gender as the person's affirmed gender.

Sharon Dowey: So they self-identify?

Jamie MacQueen: Yes.

Sharon Dowey: Under the new policy, will any male-bodied prisoner who self-identifies as a woman be treated as a transgender prisoner, even if they change gender while they are in prison?

Teresa Medhurst: If somebody, while they are in custody, comes forward and indicates that they wish to identify as a transgender man or a transgender woman, we would take that approach seriously and deal with it appropriately.

Sharon Dowey: You said that there are 23 transgender individuals in the prison system just now. How many of them were transgender when they went into the prison system, and how many changed when they were in prison?

Teresa Medhurst: I am afraid that I do not have that information.

Sharon Dowey: The Ministry of Justice changed its policy last year. Why did you not follow the same policy as the Ministry of Justice?

Teresa Medhurst: We are aware of the changes that the Ministry of Justice made last year. It is not normal for the Scottish Prison Service to follow other jurisdictions. What we do, as we did in this case, is review the research and the evidence and look at other jurisdictions and take good practice from them, but we apply that to a Scottish context, because we are quite different from the MOJ. That is why we have not followed the process down south.

However, we have taken some practices from His Majesty's Prison and Probation Service, such as the searching and sampling arrangements that it has in place. We look at taking on practice from other areas, but we look at our context and

arrangements and apply the policy in the way that we think will best fit the Scottish Prison Service.

Sharon Dowey: The Ministry of Justice policy says that, regardless of conviction, any trans woman with intact male genitalia is ineligible for allocation to the general population of the female estate. Why did you decide not to follow that part of the policy?

Teresa Medhurst: That was because of the evidence that we have pulled together and the legal and regulatory obligations that we have as a prison service. We consider the individualised risk-based approach to be the most effective method of managing individuals and ensuring that we can apply due weight to rights, risks and vulnerabilities in order to ensure everyone's safety and wellbeing. That is why we have determined the individualised risk-based approach.

Sharon Dowey: The SPS has a trauma-informed approach to female offenders. The 2019 model of custody for women recognises that

"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". If you are putting male-bodied trans women into the female estate, how do you reconcile that with looking after the women who are already in prison?

Teresa Medhurst: Thank you for highlighting the "Strategy for Women in Custody: 2021-2025". As you know, the SPS takes a trauma-based approach to women. I am satisfied that our policy on women is fit for purpose. This policy is actually about transgender individuals in custody, and I am satisfied that our approach takes account of the rights, risks, wellbeing and safety of all.

Sharon Dowey: But some of the women in prison are probably the most vulnerable in society, so are you not discarding their—

Teresa Medhurst: When I was at committee last year, I said that women in custody are very kind to and understanding of transgender individuals in our care. That view is supported by the evidence base from our consultation with women in custody. Those women, and transgender individuals, asked that we ensure that our policy prevents people who are predatory from being given access to the women's estate. The policy will do that.

Sharon Dowey: So—

The Convener: I am sorry, but we must move on. I bring in Rona Mackay, to be followed by Pauline McNeill.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good afternoon. I listened to Teresa

Medhurst's response to my colleague John Swinney and to her remarks to Sharon Dowey. The policy seems to be much more specific—it focuses on there being a risk-based approach for everyone, not just for transgender prisoners, who currently make up 0.3 per cent of the prison population.

Does the policy apply throughout the prison estate? How much autonomy will governors have to bend the rules, if you like? Are they accountable to you if they do so?

Teresa Medhurst: The policy applies across the estate, and everyone is accountable to me, as I am the accountable officer.

Ultimately, we have concluded from our extensive consultation process and the rigour that we have applied to the new policy that we need to have in place better oversight arrangements. Therefore, we will sample decisions that are made over a year and monitor case reviews to ensure that we are satisfied that we have consistency across the estate. That is one of the issues that came through in the review.

Rona Mackay: Given the low number of transgender prisoners, that should be quite easy to do.

Teresa Medhurst: Absolutely.

Rona Mackay: Okay—thank you.

Pauline McNeill (Glasgow) (Lab): Good afternoon. I want to return to Russell Findlay's question to Teresa Medhurst. I found your answer helpful, Teresa, but I want to ensure that I understood correctly what you said to the committee.

The policy is that a transgender woman who has been convicted of an offence of violence against women or girls and poses a risk to females will not be admitted to the female estate. The confusion arises with the phrase "and poses a risk". I want to examine that.

I think that you told Russell Findlay that you could not envisage a situation in which the fact that someone has been convicted would not be seen as their posing a risk. Is that right?

Teresa Medhurst: Yes.

Pauline McNeill: It is clear, then, that any transgender woman who has committed an offence will not go to the female estate. That is what you have said.

Teresa Medhurst: I have said that somebody who is a transgender woman who has committed an offence or has a history of committing offences of violence against women or girls will not be considered for the female estate, or the women's estate, unless there are exceptional

circumstances, but those exceptional circumstances would have to be very exceptional.

Pauline McNeill: I am trying to tease out what those exceptional circumstances are. You did not say that to Russell Findlay. Does that mean that there would be no requirement for any transgender woman to go before a multidisciplinary panel if they have committed such an offence, given that, effectively, you have said that there is more or less a blanket ban on any transgender woman who has committed such an offence going to the female estate?

Teresa Medhurst: If it is considered that the individual should be in the male estate, an exceptional case would not be required. It would be only in circumstances in which there is potential vulnerability of the individual that an exceptional case might be considered. However, I struggle to envisage in what circumstances that would happen, particularly in relation to the kind of example that Mr Findlay referred to, which was about somebody who had been convicted of rape.

Pauline McNeill: In the interests of time, I would find it helpful if you would elaborate a bit further on what you have said are exceptional circumstances. Will you stick by that? The language is important. I understand that exceptional circumstances would be exceptional. I know that you cannot always guess what they might be, but I would be grateful if you would provide that information.

13:45

I have a further question. Most parliamentarians in the Scottish Parliament have taken part in debates about violence against women, and we are agreed that men are the problem—male violence is the problem. When a transgender woman has committed a serious violent offence against a man, would that not suggest that they pose a risk to women? I wonder why you did not include that category, if you like. Does that make sense?

Teresa Medhurst: A wide range of expertise can be drawn on, including criminal justice social work and forensic psychology. Mr Findlay referenced general violence. As an organisation, we would need to unpick that carefully; we would need to be very clear about and understand what the nature of the violence was, where it stemmed from and, therefore, what risks would be posed to women. That would need to be really clear and explicit before any decision was taken.

Pauline McNeill: Am I right in saying that the Prison Officers Association did not sign off on the policy?

Teresa Medhurst: It has remained neutral on it. That is correct.

Pauline McNeill: The association did not sign off on it. I have read the minute, which says that it did not sign off on the policy.

Teresa Medhurst: Yes.

Pauline McNeill: Further to John Swinney's important question on the SSI, I understand the discretion that prison governors will have. However, I want to make the situation real in my head. If a female prison officer does not wish to search a transgender woman prisoner, what is the route? Can she opt out of that? Does she tell her line manager? I understand that the discretion lies with the governor, but I would like to understand the bit in between.

Teresa Medhurst: What I said was that the individual and their line manager would have a discussion. I cannot say what would be the basis for such a refusal, and I have not come across a circumstance in which it has been necessary either to compel somebody or to discipline somebody. It is not something that has hampered the management in the searching of transgender women in custody so far, and I do not envisage that it will do so in the future.

Pauline McNeill: So, a female officer could go to her line manager and say, "I am not happy to search that person," and that would be okay.

Teresa Medhurst: There would then be a discussion and follow-up, depending on what the objections from the individual were. As I say, in more than 20 years of having transgender women in the prison estate, nobody has been disciplined, and I am not aware of any issue that has resulted in somebody not being searched.

Pauline McNeill: I have one further question for Teresa Medhurst and then one question for the cabinet secretary. Professor Jo Phoenix, of the University of Reading, wrote to the SPS as part of the consultation; I am not questioning why you did not speak to her, because we do not have time. Sharon Dowe has already laid the foundation for this, and I think that, in response, you accepted the nature of women's offending and that we have dealt with women offenders very well over the years—we are agreed on that.

What Professor Phoenix has said—and she is not the only person to say this—is that the policy is "not evidence based" and that it

"does not adequately provide for the safety of female prisoners",

who I think you accept are a vulnerable and marginalised group. Do you agree with that?

Teresa Medhurst: No, I do not. I am satisfied and confident with the policy, given that I have

responsibility for keeping people safe in custody. We have a world-leading women's strategy, and we are working towards being a trauma-informed organisation. The safeguards that we are putting in place and the changes that we are making in the policy make the range of factors that staff need to consider far more explicit, with violence against women and girls at the core of that. The element of unknown risk is considered at the point of admission, and the escalation routes and the involvement of the risk management team are far more explicit. As a result, there are far more protections in the policy for women than were evident in the previous policy.

Pauline McNeill: Just finally, cabinet secretary—

The Convener: Can I just ask whether you want to ask the cabinet secretary about that same issue, or is it a different question?

Pauline McNeill: No, it is about something else.

The Convener: Right.

Pauline McNeill: The Scottish Prison Service has said that it will no longer give any data on where transgender prisoners are. We can debate whether transgender prisoners can be identified and whether some high-profile cases will get into the press anyway, but given that our job is to scrutinise the policy, it seems a bit unfair that it is okay for such information to be in the *Daily Record*. I presume that the SPS would still have to answer a freedom of information request as to where transgender prisoners were. As the Cabinet Secretary for Justice and Home Affairs, are you not concerned that the committee cannot do its job if the SPS is no longer willing to give us data on where transgender prisoners are?

Before you answer, cabinet secretary, I will make one point. I fully recognise that a balance has to be struck in relation to the privacy and dignity of transgender people—I am not attacking that at all—but there have been many very difficult and publicly controversial cases, including the one involving Isla Bryson. How can we do our job if we do not know whether those people are in the female estate? Are you content that the press will just be able to report such things but we, as parliamentarians in a democracy, cannot know where a transgender prisoner is in the estate? That seems absolutely crazy to me. Are you comfortable with the SPS's decision?

Angela Constance: I stress to Ms McNeill that I would not narrate this as an SPS decision as such, and I would not narrate it as a position that anybody is comfortable with, necessarily. Sometimes, as Cabinet Secretary for Justice and Home Affairs, I feel the frustration of not being able to talk in a more free and frank manner. However, the reality is that, as justice secretary

and as a minister in the Government, I have to uphold the law and, if I get advice on information governance or data protection, I have to comply with that, as do public bodies.

I appreciate some of the frustrations around this issue. In many circumstances, it would be far easier, if it was desirable, appropriate or, indeed, legal, to discuss individuals—

Pauline McNeill: Can you say which law you are referring to?

Angela Constance: It is data protection. We have obligations under data protection and information governance.

Pauline McNeill: Why did that not apply before now, in that case? Until now, we got that information, but now we cannot.

Angela Constance: Until the statistical release—

Pauline McNeill: What has changed in that period? Has the law changed, or something?

Angela Constance: I am telling you about the advice that I have received since I have been in office, which has come via my officials and the Scottish Prison Service as an executive agency.

The Convener: I call Fulton MacGregor.

Fulton MacGregor (Coatbridge and Chryston) (SNP): My question is for Teresa Medhurst and relates to the briefing that Scottish Trans sent to committee members and, I am sure, other members. Scottish Trans is generally supportive of the policy, but it feels that, in one area, the policy will not achieve its aims, and that is in relation to non-binary people. The briefing says:

“This will result in some non-binary people being held in either the male or female estate when this is clearly inappropriate to their particular personal circumstances. We are concerned that SPS have not properly understood the range of ways in which non-binary people may transition.”

What are your views on what Scottish Trans has said? That is the only area that it has highlighted.

Teresa Medhurst: At the start of my opening statement, I made the point that the policy is purely for transgender individuals, but we recognise that we need to give staff guidance in relation to those who are gender diverse. Therefore, separate operational guidance will be published at the same time as the operational guidance for the policy.

The Convener: I will bring in Maggie Chapman and then Ash Regan and Rachael Hamilton.

Maggie Chapman: Good afternoon, and thank you for being here. I have a quick follow-up to Fulton MacGregor's question. Will there be an opportunity to scrutinise or have a look at the

guidance that you mentioned before it comes into operation, if that makes sense?

Teresa Medhurst: No. The intention is that we will publish and operationalise the guidance on the same day that we operationalise the policy.

Maggie Chapman: But, in doing so, you will take into account the issues that are expressed.

Teresa Medhurst: Absolutely.

Maggie Chapman: Okay—thank you.

I have a couple of other questions. The first, which is on data, is a follow-up to Rona Mackay's question. You indicated that you will take a snapshot sample to see how decisions have been made in order to ensure consistency. Given the numbers involved, would it not be better to take an overall look at all the data across the whole estate, to better understand not only the consistency of the policy's application but the impacts on trans prisoners and other prisoners, and to do so on a regular basis, instead of just taking a snapshot after a year?

Teresa Medhurst: We will do that not only after a year but on an on-going basis. I am sorry if I misrepresented that. That will happen over the course of each year. You make a very valid point about whether, as well as doing sampling during the course of the year, we should review all the samples at the end of the year. I will take that on board and discuss that with our team.

Maggie Chapman: Thank you for that. Things will change over the operation of the plan, as society changes, so it would be useful to have on-going monitoring and evaluation of the policy.

I also want to ask about the searching of prisoners and visitors. The policy refers to the searching of visitors. When do you envisage that that would be necessary? When might a visitor be searched by a member of prison staff of a different gender from that of the visitor?

Teresa Medhurst: A risk assessment would be undertaken. The situation is different for visitors, because we do not necessarily know them. If there were any concerns because of the way in which an individual was behaving or presented, that would be the factor that would trigger action such as an assessment being made by the staff, the manager and, ultimately, the governor. However, I suggest that that would happen very infrequently.

Maggie Chapman: Would instances of that happening be recorded?

Teresa Medhurst: Absolutely.

Maggie Chapman: My final question follows on from earlier questions. If a transgender prisoner is convicted of a crime that has absolutely nothing to do with violence of a sexual or other nature, what

is the process for deciding which estate they will be sent to?

Teresa Medhurst: Do you mean on admission?

Maggie Chapman: Yes.

Teresa Medhurst: Within the first 72 hours of someone coming into prison, a case conference will be convened, at which we will look at all the information that is available. If we have all the information, there is no known risk and the individual identifies as a transgender woman, they will be transferred to the female estate. If somebody came in and it was identified that there were risks or there was information that was unknown—if, in other words, we had an unknown risk—we would have to defer a decision until we had fuller information.

Very often, somebody will come in with a warrant that says “Assault”. We have no idea what that assault entails or whether it has been perpetrated on a male or a female. Therefore, the process will often take time. Although the case conference will take place within 72 hours, it might take much longer before we are able to align and pull together all the information that we require on which to base a decision on accommodation.

Maggie Chapman: Thank you—that was helpful.

Ash Regan: Good afternoon to the panel members. I would like to pick up on Ms Medhurst’s response to Sharon Dowey earlier, in which she made comments along the lines of women prisoners being kind and tolerant. I consider that to be irrelevant to the policy making with regard to women prisoners’ safety. Why does the policy prioritise the feelings of trans-identified males over the safety of women prisoners?

14:00

Teresa Medhurst: The policy does not do that, Ms Regan. I am sorry—

Ash Regan: It does do that.

Teresa Medhurst: I disagree. We spoke earlier about the SPS strategy for women in custody, which is based on trauma and trauma-informed practice. This policy is about how we introduce, manage and search transgender men and women who come into custody. As far as I am concerned, that is what the policy does.

Ash Regan: We will have to agree to disagree on that. I have in front of me a number of submissions from experts who have been watching the policy’s development over the past five years very carefully, and they would completely disagree with your position on that. They say that the policy does not protect the safety of women. I am not just referring to physical

safety—I am also referring to issues such as psychological harm. I am sure that Ms Medhurst will understand where I am going with that.

Teresa Medhurst: Yes, I absolutely understand that and I accept that entirely. However, as I said earlier, this is an operational policy for our staff to help and guide them in the management of transgender men and women who come into custody.

Ash Regan: I would like to move on to the policy underpinnings. It seems that the policy has been based on the Yogyakarta principles, which are merely opinion, I would say. They do not have status in international law and they do not have any legal standing. Would you not say that it seems to be a bit disturbing to base an important prisons policy about protecting people on those principles and not on things such as the Convention on the Elimination of All Forms of Discrimination against Women, the Istanbul convention or the Bangkok rules. I would say that it is a serious omission that those international obligations do not seem to be referenced or referred to in the policy. Why are the SPS and the Scottish Government ignoring their international obligations in this matter?

Teresa Medhurst: During the whole course of the evidence, research and consultation process we have looked at a wide range of rules and regulations, some of which—but not all—have been referenced in the document. It is good practice to look not just at legislation but, in addition to that, at things such as the Bangkok rules. We are aware of such things and we take cognisance of them. Even though they are not referenced in the documentation, I think that you will find that they are referenced in the strategy for women. We would always take cognisance not just of legislation and regulatory guidance, but of other appropriate references.

Ash Regan: It has taken five years to develop the revised policy. The revision was to correct a serious misjudgment, in that the previous policy did not consider the impact on women. That has been admitted. The Scottish Government and the SPS have taken five years to make the same mistake again—if we accept from the conversation that we have just had that they are not undertaking to consider fully the impact on women and their safety from psychological trauma and physical trauma, for example. Why, five years later, have we got to this position, where it seems that the Scottish Government is making the same mistake again?

Angela Constance: I am happy to take that question, convener, if Ms Regan is content with that.

It is vitally important to me, personally and politically, and as a Scottish Government minister, that we view the policy on managing the risks that some transgender prisoners present through the whole lens of the violence against women and girls policy, which is now mainstreamed. A ream of policies, past and present, have informed the underpinnings of the work that has been undertaken.

As a minister, I am always particularly interested in understanding lived experience. The committee might be interested to know that every female prisoner was surveyed on the policy. The survey had a high return rate—around 40 per cent—and there were a number of in-depth semi-structured interviews. What that work said to me was that women in custody were less concerned about living among transgender prisoners where it was safe to do so.

However, what really spoke to me was the fact that the women were more concerned about the Prison Service, as the executive agency, and the Government getting our risk assessment processes right and being alert to, and rigorous about, people who pose a risk. They did not want a blanket policy in that respect, either. I should point out that there is no blanket policy in the UK, by the way; the policy south of the border includes both a strong presumption in favour of the measures that it wants to achieve and measures for exceptional cases.

We must also bear in mind the learning from the report that was published last February, which sets out the challenge in terms of our needing to rebalance the focus on risk. I therefore think it imperative that the focus of the policy, which seeks to prevent people who will harm women from ever accessing the women's estate, be that we look case by case at everybody who comes through the door and ensure that they are thoroughly and appropriately risk assessed. That is at the heart of the policy, convener: it is about ensuring that people who are at risk of harming, or who want to harm, the women who are in our care are unable to do so.

I should also make a point about the expertise of the Scottish Prison Service in the matter. It was Teresa Medhurst who developed the women's strategy and the work on pursuing a trauma-informed approach in the women's estate. By the way, that approach applies to prison staff, too, so we should recognise the expertise that exists not only at officer level but at senior operational level in the Scottish Prison Service. After all, for over 20 years now the service has been caring for transgender prisoners and managing the risks, where they present themselves.

Ash Regan: So we would not have to rely—

The Convener: I am sorry, Ms Regan, but I am going to have to move on. I call Rachael Hamilton. I know that Pauline McNeill would then like to come in for what will have to be our final questions.

Rachael Hamilton: Thank you, convener.

On the risk assessment, the new transgender prisoner policy states that a

"Risk Management Team, and subsequently the Executive Panel"

decide whether a prisoner poses a risk to other female prisoners and is eligible for transfer to a women's prison. Are they the risk management team and executive panel that decided that Isla Bryson should be sent to a women's prison?

Angela Constance: The thing about the new policy that has just been published is that it retains and builds on the core protections that are in the interim policy. The purpose of the policy is to strengthen arrangements by ensuring that the risk management teams within the prison establishment—those multidisciplinary teams—are well supported. As a result of the policy, there is now a very clear and considered approach for exceptional cases.

I know that it is difficult for us all to hypothesise about such exceptional cases, but every policy—even the policy south of the border—has to acknowledge that we have to expect the unexpected and to plan and have a process for dealing with cases that fling up concerns and circumstances that have perhaps not emerged before, or where risk is very low but vulnerability is high. Any policy should have a very clear and rigorous process in respect of exceptional cases.

The policy that we now have includes a very strong presumption to prevent those who want to harm women, or have a history of harming women, from accessing the women's estate, so we have moved forward.

Rachael Hamilton: Okay. I ask Teresa Medhurst to answer the same question. Are the risk management team and executive panel the same people who placed Isla Bryson in the women's estate?

Teresa Medhurst: I cannot talk about individual cases. As the cabinet secretary said, we have strengthened the policy in relation not just to the escalation process, but to the admission process. The admission process is the most vulnerable area that we have, because at that point we have little or no information on individuals. That is why, as part of the policy, we have introduced the category "unknown risk". Very often, as I said earlier, somebody will come in with a warrant that notes a conviction for assault or attempted murder, but we will have no idea who was involved

or what the nature of that has been. That is why the admission process now has that category. With the majority of people whom we do not know, we are dealing with unknown risk. The very clear decision-making process that we have tied down means that, where we do not know the level of someone's risk, they will remain in the estate that is associated with their birth gender.

Rachael Hamilton: Okay. Can I—

The Convener: I am sorry, but I have to move things on.

Rachael Hamilton: Sorry, but I—

The Convener: We are really tight for time. I am sorry. Pauline McNeill will ask a final question.

Pauline McNeill: Cabinet secretary, I am honestly quite confused about what you said to me about the reason why the SPS has announced that it will no longer give us data on which estate transgender prisoners are in. Is it general data protection regulation that we are talking about? If so, has the legal advice changed? Can you give that advice to the committee? I would like to understand where this is coming from.

Angela Constance: That was based on advice on information governance and advice on data protection, but I am happy to check whether my colleague from the legal directorate has anything to add that would assist Ms McNeill.

Pauline McNeill: Okay. If we have the same GDPR law and it has not changed, why has the legal advice to ministers changed, all of a sudden?

Jamie MacQueen: It is just that we have reconsidered the position. We can follow that up in writing, if that would be helpful.

Pauline McNeill: Why did you reconsider the position?

Jamie MacQueen: We have reconsidered the data protection position in light of the whole policy review, ultimately, but we can—

Pauline McNeill: What was the motive?

Jamie MacQueen: Sorry?

Pauline McNeill: What was the motive for reconsidering something as important as data protection around what is a very controversial public policy area?

Jamie MacQueen: It is just that, as part of the general transgender policy review, we considered all aspects of the policy. Again, I am happy to follow that up in writing, if that would be helpful.

Pauline McNeill: It would be helpful. I am just trying to understand, for completeness. As parliamentarians, we are trying to do our jobs and scrutinise this very important area of public policy.

Whatever views we take on it, the change will deprive us of information that we used to have. It feels like a sword coming down, because yesterday we could get the information, but today we cannot. I would like to understand why.

The Convener: I suggest that we follow that up, as has been suggested. It is a valid question, but as time is against us, I suggest that we follow it up in writing.

I am sorry, but we do not have time for any more questions. We are under a strict timescale to end by 2.30 and we still have a formal process to go through. I thank members for their questions.

Subordinate Legislation

Gender Recognition (Disclosure of Information) (Scotland) Order 2023 (SSI 2023/364)

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2023 (SSI 2023/366)

14:14

The Convener: Our next agenda item is consideration of two negative Scottish statutory instruments that relate to the new transgender prisoner policy that we have just been discussing.

I refer members to papers 1 and 2. I remind all members who are present that only committee members can participate in this process. Motions to annul the instruments have been lodged in the name of Russell Findlay. I will invite the committee to dispose of the motions to annul.

I invite Russell Findlay to move motions S6M-11816 and S6M-11817 and to make any brief additional comments that he wishes to make.

Russell Findlay: I am sure that I speak for many MSPs and members of the public when I say that today's session was pretty frustrating and fell short of really meaningful scrutiny. That is no criticism of the convener or the clerks, given the time that we had available, but, ultimately, the SPS policy puts the rights of male prisoners who identify as women above the rights of voiceless and vulnerable female inmates. It allows for an acceptable risk of harm to women, and it is a retread of the previous flawed policy.

If I understand it correctly, SSI 2023/364 allows staff to disclose information about prisoners' trans status in the execution of their duty, which seems to be entirely proper.

On SSI 2023/366, although the default rule is that a trans-identifying male prisoner would be expected to be searched, or could be searched, by a female prison officer, the SSI allows for a prisoner of that definition to seek to be searched by someone of their birth sex. That is not in itself controversial. However, what is much more concerning in relation to the searching issue is that, despite repeated attempts, I was unable to elicit from the Scottish Prison Service today an answer as to whether prison officers in the female estate will have an opt-out when it comes to searching people who are male-bodied.

Obviously, we do not have a vote on the policy in its entirety: if we did, I would vote against it for all the reasons that we have touched on and many more that we have not had time to touch on.

However, I do not intend to move the motions to annul the two SSIs.

The Convener: That is fine. Can you confirm that you wish to withdraw your motions on both SSIs?

Russell Findlay: Yes.

The Convener: Thank you. Unless any member wishes to object or comment, that completes our deliberation of those SSIs.

Firefighters' Pension Scheme (Scotland) Amendment Regulations 2023 (SSI 2023/369)

The Convener: Agenda item 3 should only take a short moment, so I ask members to remain in their seats. I remind all members that this business is not part of our deliberations on transgender prisoners.

Are members content that the amendment regulations should come into force?

Members indicated agreement.

The Convener: Next week, we will return to the Victims, Witnesses, and Justice Reform (Scotland) Bill, with evidence from survivors of sexual crimes with experience of the criminal justice system, and from victims and survivors organisations. That concludes our meeting.

Meeting closed at 14:18.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: sp.info@parliament.scot



The Scottish Parliament
Pàrlamaid na h-Alba