

EQUALITY IMPACT ASSESSMENT RECORD

Title of policy/ practice/ strategy/ legislation etc.	Scottish statutory instrument (SSI) - The Gender Recognition (Disclosure of Information) (Scotland) Order 2023	
Minister	Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs	
Lead official	David Doris, Prisons Policy Team, Community Justice	
Officials involved in the EQIA	name	team
	David Doris Louise Ward	Prisons Policy Team Prisons Policy Team (with input from policy colleagues and JSW adviser)
Directorate: Division: Team	Justice Directorate, Community Justice Division, Prisons Policy Team	
Is this new policy or revision to an existing policy?	This Order is designed to clarify the legal restrictions on staff working in the justice system on disclosing “protected information” (i.e. information concerning a person’s application for a gender recognition certificate (GRC), or, if they have obtained a GRC, their gender history).	

Screening

Policy Aim

The purpose of this instrument is to ensure that staff from the Scottish Prison Service, justice social work services, the Parole Board for Scotland and others involved in the management, supervision and rehabilitation of those charged with or convicted of offences, can disclose protected information when necessary. This is to allow them to carry out their duties without risk of committing an offence.

The Gender Recognition Act 2004(the Act) enables people to change their legal sex by obtaining a Gender Recognition Certificate (GRC). Section 22(1) of the Act provides that it is an offence to disclose protected information (information about a person's application for a GRC or, if the application is granted, their gender history).

Section 22(4) of the Act lists circumstances in which it is not an offence to disclose protected information but does not explicitly cover the full range of offender management purposes for which it might be necessary to disclose such information. To remove the risk of staff working in offender management committing an offence this Order will make it explicit that they can disclose protected information when necessary for certain purposes.

This instrument contributes to the National Outcome of ensuring we respect, protect and fulfil human rights and live free from discrimination.

Who will it affect?

This instrument will have a small impact on two main sections of the community;

- those working on the management of offenders where the individuals being managed have either applied for or been granted a Gender Recognition Certificate
- and the individuals themselves.

For those working in the management of offenders this instrument will alleviate concerns identified by SPS that staff may commit an

offence under section 22(1) of the Act by disclosing information relating to an application/granting of a GRC. This will ensure that relevant staff can confidently manage the individuals in their care, including any risks posed towards, or by individuals, as well as addressing any risk of self-harm.

It might be necessary to disclose protected information to safeguard a prisoner with a GRC, to safeguard other prisoners in the same prison as them; to make practical arrangements to properly care for or transport the prisoner; or to make collective decisions about a prisoner with a GRC. Disclosure may also help to ensure an individual with the GRC can be identified for appropriate support and programmes in the community on release from prison or following a non-custodial disposal of their case at court.

In some instances, not disclosing such protected information may be a breach of the duty of care that staff involved in offender management have towards prisoners or those being supervised in the community.

For those individuals who have either applied for or been granted a GRC and are subject to offender management arrangements, this instrument will put beyond doubt that staff involved in their management are able to disclose such protected information, ensuring they have relevant and necessary information about a person's circumstances to make appropriate practical arrangements can be put in place for their supervision and/or care. This potentially has a positive and direct impact by safeguarding the person concerned and enabling them to access appropriate support and programmes, both in the community or within custodial settings. Additionally, by clarifying that disclosure under this instrument will only be lawful where done for specific purposes and when necessary for those purposes, rather than merely expedient, the right of prisoners and those supervised in the community will not be adversely affected.

What might prevent the desired outcomes being achieved?

Risks are assessed in the DPIA.

Stage 1: Framing

Results of framing exercise

SPS currently publishes information on the number of transgender individuals in custody. In the period to end March 2023, there were 23 transgender individuals in prison. Publications (sps.gov.uk)

These statistics demonstrate that the transgender population represents around 0.3% of the total prison population. Although it is not known exact numbers of this cohort who have/have applied for a GRC, SPS have indicated that only a small proportion of transgender individuals in custody over a period of time have had a GRC. Based on information from National Records of Scotland there are around 25-30 people per year born or adopted in Scotland who obtain a [GRC Financial Memorandum \(parliament.scot\)](#). There is no available data regarding the numbers of transgender offenders are being managed within the community.

Exceptions to offences under section 22(1) should only be considered where necessary and proportionate, especially given the interaction with right to privacy. Although the numbers of transgender individuals subject to offender management arrangements are low, and the number of individuals either applying for or who have been granted a GRC is lower still, it is important that relevant staff are not at risk of disclosing protected information unlawfully, where disclosure is necessary for a legitimate purpose. This Order is designed to ensure that risk is removed.

Extent/Level of EQIA required

This proposed instrument will support the implementation of the Scottish Prison Service's Review of its Gender Identity and Gender Reassignment Policy (2014) policy. The Scottish Prison Service have completed an EHRIA in relation to the introduction of this revised policy, which is being published.

However, it is also appropriate to assess the equality impact specifically in relation to the proposed order.

While the order has primarily been developed in collaboration with SPS and relevant policy teams in the Scottish Government, including gender recognition and public protection, there has also been some engagement with SPS staff representatives, Social Work Scotland, LGBTI organisations, and the Parole Board for Scotland.

Stage 2: Data and evidence gathering, involvement and consultation

Include here the results of your evidence gathering (including framing exercise), including qualitative and quantitative data and the source of that information, whether national statistics, surveys or consultations with relevant equality groups.

Characteristic ¹	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
AGE	N/A		
DISABILITY	N/A		
SEX	N/A		
PREGNANCY AND MATERNITY	N/A		
GENDER REASSIGNMENT	The number of trans individuals in prison custody was 23 in Qtr 4 22/23. No current data on how many of the transgender prisoners or offenders in the	SPS figures covering Jan to March 2023	There is no data available on how many trans individuals have been released into the community and/or are currently being

¹ Refer to Definitions of Protected Characteristics document for information on the characteristics

	community have applied for or been granted a GRC.		managed by justice professionals.
SEXUAL ORIENTATION	N/A		
RACE	N/A		
RELIGION OR BELIEF	N/A		
MARRIAGE AND CIVIL PARTNERSHIP (the Scottish Government does not require assessment against this protected characteristic unless the policy or practice relates to work, for example HR policies and practices - refer to Definitions of Protected Characteristics document for details)	N/A		

Stage 3: Assessing the impacts and identifying opportunities to promote equality

Having considered the data and evidence you have gathered, this section requires you to consider the potential impacts – negative and positive – that your policy might have on each of the protected characteristics. It is important to remember the duty is also a positive one – that we must explore whether the policy offers the opportunity to promote equality and/or foster good relations.

Do you think that the policy impacts on people because of their age? No evidence of any impact

Age	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination, harassment and victimisation				
Advancing equality of opportunity				
Promoting good relations among and between different age groups				

Do you think that the policy impacts disabled people? No evidence of any impact

Disability	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination, harassment and victimisation				

Advancing equality of opportunity				
Promoting good relations among and between disabled and non-disabled people				

Do you think that the policy impacts on men and women in different ways? No evidence of any impact

Sex	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination				
Advancing equality of opportunity				
Promoting good relations between men and women				

Do you think that the policy impacts on women because of pregnancy and maternity? No evidence of any impact

Pregnancy and Maternity	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination				
Advancing equality of opportunity				
Promoting good relations				

Do you think your policy impacts on people proposing to undergo, undergoing, or who have undergone a process for the purpose of reassigning their sex? (NB: the Equality Act 2010 uses the term ‘transsexual people’ but ‘trans people’ is more commonly used) YES

Gender reassignment	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination	x			By clarifying through express provision in the Order the circumstances in which it is not an offence to disclose protected information, relevant staff can confidently share relevant and necessary information to ensure that transgender individuals receive appropriate supervision and/or support.
Advancing equality of opportunity	x			As above
Promoting good relations			x	The proposed instrument puts beyond doubt that protected information can be disclosed when

					necessary for offender management purposes. It is not expected to change current practice and so will not have an impact on relations between staff and transgender individuals with GRCs.
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Do you think that the policy impacts on people because of their sexual orientation? No evidence of any impact

Sexual orientation	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination				
Advancing equality of opportunity				
Promoting good relations				

Do you think the policy impacts on people on the grounds of their race? No evidence of any impact

Race	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination				
Advancing equality of opportunity				
Promoting good race relations				

Do you think the policy impacts on people because of their religion or belief? No evidence of any impact

Religion or belief	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination				
Advancing equality of opportunity				
Promoting good relations				

Do you think the policy impacts on people because of their marriage or civil partnership? No evidence of any impact

Marriage and Civil Partnership²	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination				

² In respect of this protected characteristic, a body subject to the Public Sector Equality Duty (which includes Scottish Government) only needs to comply with the first need of the duty (to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010) and only in relation to work. This is because the parts of the Act covering services and public functions, premises, education etc. do not apply to that protected characteristic. Equality impact assessment within the Scottish Government does not require assessment against the protected characteristic of Marriage and Civil Partnership unless the policy or practice relates to work, for example HR policies and practices.

Stage 4: Decision making and monitoring

Identifying and establishing any required mitigating action

Have positive or negative impacts been identified for any of the equality groups?	<u>Transgender prisoners/offenders/accused – who have/seek a GRC</u> Positive impact: <ul style="list-style-type: none">• This instrument will ensure protected information is shared when necessary by clarifying that it is lawful to do so. This will help ensure that those individuals whose protected information is disclosed can be safeguarded (in prison or the community) and enabled to access appropriate supports and programmes. No negative impacts identified meantime
Is the policy directly or indirectly discriminatory under the Equality Act 2010 ³ ?	No
If the policy is indirectly discriminatory, how is it justified under the relevant legislation?	
If not justified, what mitigating action will be undertaken?	

³ See EQIA – Setting the Scene for further information on the legislation.

Describing how Equality Impact analysis has shaped the policy making process

No changes or modifications required to the instrument following preparation of this impact assessment.

Officials will liaise with the Scottish Prison Service to ensure that appropriate notification is made with their staff to highlight the introduction of this instrument and the clarification it provides. We have engaged with stakeholders.

This instrument will not have any direct financial implications on prisons or criminal justice partners.

This instrument will contribute to better outcomes for transgender prisoners/offenders/accused who have/are applying for a GRC as protected information will be shared when necessary. It will provide staff with the confidence to share protected information where necessary for one of the purposes in the instrument. This will help ensure that where a transgender individual with, or applying for a GRC's protected information is relevant to safeguarding them (for instance if they are self-harming or suicidal or because of difficulties accessing gender reassignment treatment) it can be shared if necessary.

Additionally there are potential better outcomes for the general public and wider communities by providing certainty to relevant justice partners that it can share protected information when it is necessary to do so when planning risk management of a transgender offender with a GRC.

Monitoring and Review

The operation of the order will be primarily monitored by the respective Data Controllers. If any concerns emerge around operation, including from individuals, consideration would be given to these.

Stage 5 - Authorisation of EQIA

Please confirm that:

- ◆ This Equality Impact Assessment has informed the development of this policy:

Yes No

- ◆ Opportunities to promote equality in respect of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation have been considered, i.e.:

- Eliminating unlawful discrimination, harassment, victimisation;
- Removing or minimising any barriers and/or disadvantages;
- Taking steps which assist with promoting equality and meeting people's different needs;
- Encouraging participation (e.g. in public life)
- Fostering good relations, tackling prejudice and promoting understanding.

Yes No

- ◆ If the Marriage and Civil Partnership protected characteristic applies to this policy, the Equality Impact Assessment has also assessed against the duty to eliminate unlawful discrimination, harassment and victimisation in respect of this protected characteristic:

Yes No Not applicable

Declaration

I am satisfied with the equality impact assessment that has been undertaken for the Gender Recognition (Disclosure of Information)(Scotland) order 2023 and give my authorisation for the results of this assessment to be published on the Scottish Government's website.

Name: Quentin Fisher

Position: Interim Deputy Director Justice

Authorisation date: 17 November 2023