

POLICY NOTE

THE GENDER RECOGNITION (DISCLOSURE OF INFORMATION) (SCOTLAND) ORDER 2023

SSI 2023/364

The above instrument was made in exercise of the powers conferred by section 22(5) and (6) of the Gender Recognition Act 2004. The instrument is subject to negative procedure.

Summary Box

Insert one or two sentences to explain what the purpose of the instrument is.

The purpose of the Gender Recognition (Disclosure of Information) (Scotland) Order 2023 is to put beyond doubt that it is not an offence for staff involved in offender management in Scotland to disclose protected information acquired legitimately in their official capacity where that is required for the purposes of offender management.

Policy Objectives

The purpose of this instrument is to ensure that staff from the Scottish Prison Service (SPS), 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, in relation to whether an individual has applied for or had granted a Gender Recognition Certificate, when necessary, in order 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 states that it is an offence to disclose protected information acquired in an official capacity. 'Protected information' is information about a person's application for a GRC or, if the application is granted, their gender history. Section 22(4) lists circumstances in which it is not an offence to disclose protected information. This includes disclosures made in accordance with provision made by an Order by the Scottish Ministers.

Therefore this instrument will add further circumstances in which it is not an offence to disclose protected information where disclosure is necessary for the purposes of offender management.

SPS staff, justice social work services, the Parole Board for Scotland and others involved in the management, supervision and rehabilitation of persons charged with or convicted of offences may on occasion need to disclose protected information in the course of their duties, even where it is not clear that any of the existing exceptions in section 22(4) apply.

Protected information may also be recorded as part of SPS' prisoner record. 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 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.

At present, however, there is some ambiguity around what the offence at section 22(1) of the Act covers and that presents a risk to staff in prisons and in the community who might need to disclose protected information about an individual in custody or being supervised in the community.

Prison service staff ordinarily try to obtain the agreement of the prisoner who is subject of the information (one of the existing exceptions) but there are occasions where individuals do not give this agreement and it is nonetheless necessary to disclose the information.

This Order will put beyond doubt that staff involved in offender management in Scotland will not commit an offence under section 22(1) of the Act if they disclose protected information where that is necessary for the purposes of offender management, including in prisons, in the community and to support the work of Parole Board for Scotland. This will ensure that relevant staff can confidently manage any risks posed towards, or by, individuals subject to offender management arrangements who have applied for or been granted a GRC, as well as any risk of self-harm. By limiting the use of disclosure under this instrument to specific purposes and stipulating that disclosure must be ‘necessary’, rather than merely expedient, the right of prisoners and those supervised in the community with GRCs will not be adversely affected.

The Gender Recognition (Disclosure of Information) (England and Wales) Order 2021 makes similar provision for staff involved in offender management in England and Wales.

The instrument will ensure that the Act continues to fulfil its policy aim of allowing the disclosure of protected information where appropriate by making the offence in section 22(1) of the Act compatible with proper operational practice in relation to offender management in prisons and in the community.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government’s policy to maintain alignment with the EU.

Consultation

There has been extensive consultation with stakeholders regarding the SPS review of its Gender Identity and Gender Reassignment Policy (2014) policy. SPS completed an informal consultation process with SPS Policy and Operational staff and TUS partners regarding this specific order. There has also been informal consultation with the Equality Network, Scottish Trans, Stonewall, the Parole Board for Scotland and Social Work Scotland.

Views expressed through the consultation support the Order being a proportionate clarification that puts beyond doubt that it is not an offence for staff involved in offender management in Scotland to disclose protected information acquired legitimately in their official capacity where that is required for the purposes of offender management.

The Equality Network noted reference in the equivalent order in England and Wales included disclosure of information for the purpose of the “development or assessment of policies”. It was considered this was too widely drawn, and care should be taken to ensure any equivalent provision is sufficiently tightly defined to make clear which bodies it related to. There is not an equivalent provision in the proposed order, though the purposes include “other purposes connected with or related to the management of any person”. This is contextualised to ensure it is clear that it is only extends to management purposes required because the person is in the criminal justice system. Any disclosure of protected information has to be necessary for the purpose and this would not include journalists writing about transgender prisoners, for example.

Impact Assessments

Equality (EQIA) and data protection (DPIA) impact assessments have been completed in relation to the SSI and are attached. There are no children's rights impact issues at this time. The impact assessments have informed the finalisation of the proposed order.

Financial Effects

The Cabinet Secretary for Justice and Home Affairs confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Justice Directorate

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