

EXPLANATORY MEMORANDUM TO
THE GENDER RECOGNITION (DISCLOSURE OF INFORMATION) (ENGLAND
AND WALES) ORDER 2021

2021 No. 1020

1. Introduction

- 1.1 This explanatory memorandum has been prepared by The Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Gender Recognition Act 2004 ('the Act') enables people to change their legal gender by obtaining a Gender Recognition Certificate (GRC), which is in effect a replacement birth certificate. 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 gender before it became the acquired gender or information about their application for a GRC. Section 22(4) lists defences to the offence in section 22(1). The purpose of this instrument is to add a further exception to the offence in section 22(1) such that it is not an offence to disclose protected information acquired in an official capacity where that is required for the purposes of offender management.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required

6. Legislative Context

- 6.1 Section 1 of the Act enables people to change their legal gender by obtaining a GRC, which is in effect a replacement birth certificate entitling the holder to assume the legal protections of their acquired gender. Section 22 of the Act makes it an offence to disclose protected information acquired in an official capacity. 'Protected information' is defined in the Act as information about the previous gender of someone with a GRC, or their application for one; in other words, information revealing that they have changed or are in the process of changing their legal gender. Section 22(4) of the Act lists exceptions to this offence. For instance, the offence is not committed where disclosure is to prevent or investigate crime, or where the subject of the information agrees to the disclosure. Operational staff in Her Majesty's Prison and Probation Service (HMPPS) must sometimes 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. For instance, 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. In some instances, not disclosing protected information would be in breach of the duty of care that staff have towards prisoners. This SI will provide that the offence of disclosing protected information acquired in an official capacity is not committed where that disclosure is required for offender management purposes. The precise definition of those purposes is taken from sections 1 and 14 of the Offender Management Act 2007 and includes the supervision and rehabilitation of offenders.

7. Policy background

What is being done and why?

- 7.1 The policy aim of the Gender Recognition Act 2004 is to provide transgender people (referred to by the more archaic term ‘transsexual’ in the Act) with a means of changing their legal gender by obtaining a Gender Recognition Certificate, which is in effect a replacement birth certificate giving them the right to be treated like any person of their acquired gender. One of the legal protections that the Act offers is the creation of the offence, in section 22, of disclosing protected information acquired in an official capacity. The Act does, however, have a secondary policy aim of ensuring that the GRC process does not prevent information being shared where appropriate. Section 22(4) gives a list of exceptions to the section 22(1) offence. This instrument will ensure that the Act continues to fulfil its policy aim of allowing the disclosure of protected information where appropriate by making the section 22 offence compatible with proper operational practice in the prison context.
- 7.2 The risk under the law as it stands is that a member of prison staff might need to disclose protected information about a prisoner, where that disclosure is necessary to safeguard the prisoner or others, or to ensure the safe and effective operation of the prison, and none of the existing section 22(4) exceptions apply. HMPPS must sometimes disclose protected information to fulfil their duty of care towards prisoners, or to properly run the prison, but it is not clear that any of the existing s22(4) exceptions apply. In practice, such situations include where a prisoner is vulnerable and information about their gender history is relevant to safeguarding them (for instance, if they are self-harming or suicidal due to gender dysphoria or because of difficulties accessing gender reassignment treatment); where a prisoner with a GRC needs to be referred to a transgender case board, which provide expertise on supporting and managing transgender prisoners (including regarding allocation); and where information about a prisoner’s offending history needs to be shared for risk management purposes and amounts to the disclosure of protected information. HMPPS staff ordinarily try to obtain the agreement of the prisoner who is the subject of the information (one of the existing exceptions), but there are occasions where prisoners do not give this agreement and it is nonetheless necessary to disclose the information.
- 7.3 This instrument removes the risk of prison staff committing an offence under section 22 of the Act by disclosing protected information acquired in an official capacity where that is required for the purposes of offender management. This will ensure that HMPPS staff can confidently manage any risks posed towards, or by, prisoners with

GRCs, 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 with GRCs will not be adversely affected.

- 7.4 A legislative (rather than purely policy-based) solution is required to this problem because of the conflict between the offence under section 22 of the Act and the duties of prison staff. A policy-based solution could not remove the risk of staff committing the offence by disclosing information in instances where it is appropriate (and, indeed, necessary) that they do so.

8. 8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 This instrument does not amend any other instrument.

10. Consultation outcome

- 10.1 An informal consultation process was carried out. We consulted with a number of HMPPS staff at both operational and strategic levels, both in small meetings and focus groups. We also consulted (in group and individual meetings) the HMPPS Transgender Advisory Board and its members, which consists of several organisations that work with transgender prisoners and advise HMPPS on their policies concerning this group. We also consulted with the Government Equalities Office to ensure that this legislation is compatible with the government’s wider policy aims on equality and the Gender Recognition Act specifically.
- 10.2 During consultation, HMPPS welcomed this instrument as it will ensure they are able to manage prisoners safely and effectively. We analysed their requirements to make sure that this instrument is both necessary and sufficient to meet those operational requirements. We consulted with the HMPPS Transgender Advisory Board, which advises HMPPS on the safety and wellbeing of transgender people in custody or serving a sentence in the community. The members of the Board initially raised some concerns regarding the need to protect the legal rights of transgender prisoners but were reassured by the high threshold for disclosure that the defence provided by this instrument requires. We will continue to work with a range of stakeholders on the implementation of this instrument. A more detailed account of this consultation process will be issued alongside this instrument being laid before Parliament.
- 10.3 The power under which this order is made does not require consultation with the devolved administrations. The order covers Wales but will not affect any devolved competencies.

11. Guidance

- 11.1 As noted above, we are designing accompanying guidance to this instrument which will ensure that its implementation is effective (in particular, by advising staff on when the disclosure of protected information is likely to be required). This guidance will be incorporated into the HMPPS/Ministry of Justice policy framework ‘The Care and Management of Individuals who are Transgender’, the next iteration of which will be published in 2022. This guidance will not be essential to the operation of this

instrument but will provide support for operational staff to aid good practice and organisational learning.

12. Impact

- 12.1 There is no significant impact on business, charities or voluntary bodies.
- 12.2 There is no significant impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because no impact on business is foreseen.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 We are looking at ways to monitor the use of this instrument in order to allow HMPPS and the Ministry of Justice to ensure that disclosure using the defence it provides is necessary and proportionate. Any problems identified will be addressed with additional training and guidance for staff and, where necessary, disciplinary action.
- 14.2 The instrument does not include a statutory review clause.

15. Contact

- 15.1 Donald Marshall at the Ministry of Justice (email: Donald.Marshall@justice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Adam Bailey, Deputy Director for Prisoner Outcomes, Resettlement and Reoffending at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Alex Chalk at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.