

Submission: a FAIR analysis submitted to the SPS Gender Identity and Gender Reassignment Policy Review

August 2022

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A 'FAIR' analysis of the accommodation of transgender prisoners

The Commission has highlighted the potential for a human rights based analysis to act as a helpful tool to support discussion of balancing rights. An example of a rights based approach is to undertake a FAIR analysis, which evaluated the facts, the human rights at stake, the standards connected to those rights, identifies who is responsible for implementing these, and keeps this under review.ⁱ

In light of the Scottish Prison Service's Gender Identity and Gender Reassignment Policy Review, we have considered the issue of accommodating transgender prisoners using a FAIR analysis. We have applied this analysis to the potential policies for accommodating transgender prisoners, with a focus on the accommodation of transgender women in women's prisons, where the focus of concern appears to lie. We have focused on the impact on cis-womenⁱⁱ prisoners although we appreciate that concerns have also been expressed by female prison staff in relation to searching and rubdown procedures. A similar analysis could be applied to that issue.

Facts: What are the lived experiences of the individuals involved and what are the important facts to understand?

The current policy of the Scottish Prison Serviceⁱⁱⁱ is that the accommodation provided must be the one that best suits the person in custody's needs and should reflect the gender in which the person in custody is currently living. Where a transgender person in custody is still living predominantly in the gender assigned at birth, then establishment allocation should usually be the gender assigned at birth. Where the person in custody is permanently living in their new social gender instead of the gender they were assigned at birth, then establishment allocation should usually be the new gender in which they are living. A process of initial risk assessment and risk assessment through regular case conferences follows from this initial policy position, to determine

whether placement is appropriate. The possession of a Gender Recognition Certificate is not a determining factor.

We are not in possession of detailed facts regarding the management of transgender prisoners in practice at this stage, which may not be straightforward and include a wide range of views. In addition, there is a lack of reliable data to assess the situation, especially in Scotland. We note also that SPS is carrying out a review of evidence as part of the policy review process. Instead, we suggest the facts that would be important to establish in order to underpin a robust human rights analysis.

- What evidence and factual information is available on the numbers of transgender prisoners in Scotland? At what stage of the gender reassignment process?
- What are the known impacts of the existing policy?
- What is the lived experience of transgender prisoners?
 - What is the general profile of risks to and from trans people in prison settings?
 - What evidence is there of incidents of violence both to and from trans prisoners?
 - What evidence is there of incidents of sexual assault both to and from trans prisoners?
 - Have these incidents taken place in the male or female estate?
 - Can data be broken down between those who have a GRC and those who do not?^{iv}
- What is the lived experience of cis-women prisoners?
 - What is the general profile of risks to and from cis-women in prison?
 - What evidence is there of incidents of violence towards cis-women in the female estate?
 - What evidence is there of incidents of violence between cis-women and trans prisoners – either to or from cis-women?

Analyse rights: Develop an analysis of the human rights at stake

We have made significant reference to the case of ***R. (on the application of FDJ) v Secretary of State for Justice***^v, which challenged the policy regarding accommodating transgender prisoners in England and Wales. While the policy has differences^{vi}, the human rights issues raised would equally apply to the Scottish context. *FDJ* therefore provides a key source of both information and analysis which has significant application to the Scottish policy.

- *What ECHR rights are relevant to consider?*

For transwomen prisoners:

- Article 3 ECHR, the prohibition of torture, inhuman and degrading treatment. Prison authorities have an obligation to protect all prisoners from a risk of assault, including sexual assault. Policies must be designed in such a way as to address any such risk. In individual cases, there is an obligation to protect individuals from ill-treatment where the authority knew or ought to have known of the risk.
- Article 8 ECHR, the right to private and family life: gender identity and personal development are a fundamental aspect of the right to respect for private life. The state has a positive obligation to facilitate the enjoyment of that right. The obligation applies regardless of the stage of exploration and/or transition that a person has reached with respect to their gender identity.
- Article 14 ECHR: transwomen prisoners must not be discriminated against in the exercise of their rights. They must not be treated differently or placed at a disadvantage as compared to relevantly similar groups, such as cisgender prisoners. Any differential treatment or disadvantage requires to be objectively justified.

For cis-women:

- Article 3 and/or 8 ECHR, the prohibition of torture, inhuman and degrading treatment. Prison authorities have an obligation to protect all prisoners from a risk of assault, including sexual assault. Policies must be designed in such a way as to address any such risk. In individual cases, there is an obligation to protect individuals from ill-treatment where the authority knew or ought to have known of the risk.
 - Article 14 ECHR, the prohibition of discrimination. Cis-women must not be discriminated against in the exercise of their ECHR rights. They must not be treated differently or placed at a disadvantage as compared to relevantly similar groups, such as cisgender men. Any differential treatment or disadvantage requires to be objectively justified.
- *How should competing rights be balanced?*

Before carrying out a balancing exercise, it will be necessary to consider whether the facts disclose any real and concrete risks to the rights identified above. Do the facts show that either transgender women or cis-women are at risk of ill-treatment in particular ways?

The Article 8 rights of transgender people require positive action from the State (including public authorities like SPS) to enable the enjoyment of those rights. The European Court of Human Rights (the ECtHR) has held that gender identity is a core component of an individual's personal development and is "one of the most intimate areas of a person's private life."^{vii}

Any interference with the Article 8 rights of transgender prisoners must be for a legitimate aim and be a necessary and proportionate means of achieving that aim i.e. only going as far as is necessary to achieve the aim.

The legitimate aims for interfering with Article 8 rights are:

- Protecting national security, public safety or the economic well-being of the country,

- Preventing disorder or crime,
- Protecting health or morals, or for the protection of the rights and freedoms of others.¹

Any purported risks to the rights of others would need to be real and concrete to justify interferences with the Article 8 rights of transgender people. The aim of protecting the Article 3/8 rights of cis-women prisoners would be a legitimate aim, however, do the facts establish that there is a real and concrete risk of ill-treatment caused by the accommodation of transwomen prisoners in the female estate?^{viii}

If any real and concrete risks to the rights of others (i.e. cis-women) are identified, it is then necessary to consider, firstly whether any restriction is necessary and also the most proportionate means of addressing those risks, which restricts the Article 8 rights of transgender prisoners only so far as necessary to achieve the aim of protecting those rights.

We must consider the options available to address the placement of transgender prisoners and assess them through this lens. We have identified the following possible options, considered in the case of *FDJ*. The same analysis could be applied to any additional options identified:

1. Excluding all transwomen prisoners from the female prison estate. This would mean accommodating transwomen prisoners in the male estate or in separate units: This is the most restrictive option and deprives transwomen of their Article 8 right to live in their chosen gender^{ix}. The facts should be considered to establish whether transwomen in male units may be placed at risk of inhuman or degrading

¹ European Convention on Human Rights, Article 8, https://www.echr.coe.int/Documents/Convention_ENG.pdf

treatment. If, as in *FDJ*, the facts establish that there is not sufficient data to demonstrate a real and concrete risk of assault by transwomen prisoners on cis-women prisoners, the necessity and proportionality of such a policy would be difficult to establish. This policy would also likely amount to discrimination.

2. Excluding transwomen without a GRC from the female estate: whether a person does or does not hold a GRC does not determine their level of risk, nor does it address the fears of cis-women prisoners as they were expressed in *FDJ*. In that case, a policy of this nature was still challenged on the basis of risk to women. It does, however, impinge on the right of transwomen to live in their gender identity. In order to be proportionate, the option chosen must have a rational connection with the aim i.e. will the restriction lead to a reduction in the problem? This option appears to lack such a rational connection.
3. Adopting a presumption that transgender women prisoners with convictions for violent and sexual offences against women should not be accommodated in the female estate. This would mean accommodating them in the male estate or in separate units: while this approach may meet the tests of legitimate aim (protecting cis-women prisoners), if risks to them could be concretely established from the facts, its necessity and proportionality are not clear. If a heightened risk were established, a general presumption is a blunter tool than individual risk assessment. It would also require to be supported by individual risk assessment in any case.
4. Case by case risk assessment (**the current policy**): a process of risk assessment requires all aspects of risk both to and from the individual to be considered and balanced. In *FDJ*, the Court found that “Properly applied, [careful, case by case assessment of the risks and of the ways in which the risks should be managed] has the result that non-transgender prisoners only have contact with transgender prisoners when it is safe for them to do so.” There may remain individual cases in which the policy is not properly

applied, which could be subject to challenge. Important factors in the policy included:

- A detailed list of considerations that required to be taken into account in the assessment.^x This includes offending history, past behaviour, physical strength, evidence of threats towards others.
- Decisions on risk assessments were made by expert multi-disciplinary panels. The Court was of the view that they can “be expected to be astute to detect any case of a male prisoner who, for sinister reasons, is merely pretending to wish to live in the female gender.”^{xi}

A case-by-case policy would also be capable of practical operation where small number of individuals (with or without a GRA) are subject to SPS policy.

The timing of the risk assessment also needs to be considered. The current policy requires initial risk assessment on placement by the Unit Manager, then a case conference within seven days and regularly thereafter. The policy must be operated in such a way that risks are picked up in this initial period rather than placement based on general policy assumptions.

5. Requiring that the process of risk assessment take into account the views of women prisoners and knowledge of their heightened vulnerability: while this is important to understand and may have relevance, it does not provide a real and concrete basis on which to restrict the individual transwoman’s rights. As the Court said in *FDJ* “I fully understand the concerns advanced on behalf of the Claimant. Many people may think it incongruous and inappropriate that a prisoner of masculine physique and with male genitalia should be accommodated in a female prison in any circumstances. More importantly for the Claimant’s case, I readily accept that a substantial proportion of women prisoners have been the victims of sexual assaults and/or domestic violence. I also readily accept the proposition...that

some, and perhaps many, women prisoners may suffer fear and acute anxiety if required to share prison accommodation and facilities with a transgender women who has male genitalia, and that their fear and anxiety may be increased if that transgender woman has been convicted of sexual or violent offences against women”^{xii} However “...the subjective concerns of women prisoners are not the only concerns which the Defendant had to consider in developing the policies: he also had to take into account the rights of transgender women in the prison system.”^{xiii}

- *What other international standards or principles (binding and non-binding) are engaged which are relevant for the analysis?*

The Yogyakarta Principles and Yogyakarta Plus 10^{xiv} outline a series of standards relating to the right to treatment with humanity while in detention (Principle 9). Any policy developed by SPS should take into account these standards with a view to international best practice in human rights:

Principle 9

“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.

States shall:

- a) Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;
- b) Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to

- hormonal or other therapy as well as to gender-reassignment treatments where desired;
- c) Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;
 - d) Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;
 - e) Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;
 - f) Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;
 - g) Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity”

Yogyakarta +10

- h) “Adopt and implement policies to combat violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as placement, body or other searches, items to express gender, access to and continuation of gender affirming treatment and medical care, and “protective” solitary confinement;
- i) Adopt and implement policies on placement and treatment of persons who are deprived of their liberty that reflect the needs and rights of persons of all sexual orientations, gender identities,

gender expressions, and sex characteristics and ensure that persons are able to participate in decisions regarding the facilities in which they are placed;

- j) Provide for effective oversight of detention facilities, both with regard to public and private custodial care, with a view to ensuring the safety and security of all persons, and addressing the specific vulnerabilities associated with sexual orientation, gender identity, gender expression and sex characteristics.”

UN Independent Expert on Sexual Orientation and Gender Identity

The Independent Expert has suggested “a risk management approach that should include all objectively identified risks for safe spaces [including prisons, changing rooms and bathrooms] for all women (including lesbian, bisexual and trans women) which cannot promote, replicate or condone stigma or stereotypes”^{xv}

Identify responsibilities: Identify what needs to be done and who is responsible for doing it

- Who are the “duty bearers” in relation to the above? The Scottish Prison Service is the primary duty bearer.
- What do they need to do to ensure all rights are upheld based on the facts and the human rights analysis?

The following non-exhaustive areas emerge from the above analysis:

- A need for reliable data on the experiences of transwomen prisoners, including any data on the prevalence of assaults on or by transwomen prisoners housed in both the male and female estate;
- A need to ensure robust criteria for risk assessment, taking into account all relevant factors;
- Ensuring that risk assessment is carried out as early in the process as possible, and continuously

Review actions: Make recommendations for action and later recall and evaluate what has happened as a result

We note that SPS are currently undertaking a process of review of the existing policy. The following steps could be taken into account in considering keeping the policy under review in the future

- Is there a commitment to review the operation of the system in relation to the above, based on the facts and the human rights analysis?

The analysis suggests that it would be worthwhile to review the experiences of those affected at periodic intervals and respond to emerging evidence.

- Is there appropriate accountability and redress in the system for when rights are not being met?

There must be robust systems to allow any individual instances of risk/assault to be reported and remedied. Staff and prisoners must be equipped with knowledge and awareness of those systems.

ⁱ [The FAIR approach - SHRC - Equality & Human Rights Impact Assessment \(scottishhumanrights.com\)](#)

ⁱⁱ We use this term to distinguish between people whose gender identity and biological sex at birth align and transgender women for the purposes of clarity where their relative circumstances have to be considered.

ⁱⁱⁱ Available at [Gender Identity and Gender Reassignment Policy \(sps.gov.uk\)](#)

^{iv} While SPS's current policy does not make a distinction based on whether the individual holds a GRC or not, this information may be relevant to analysis and assessment of the policy both now and in the future

^v [2021] EWHC 1746 (Admin)

^{vi} The policy in England and Wales requires the initial allocation of all individuals who are transgender to the part of the estate which matches their legally recognised gender. Additional structured risk assessments are required before a person is allocated or transferred to part of the estate which does not match their sex assigned at birth, including where a person has gained legal recognition of the gender with which they identify. Individuals without a Gender Recognition Certificate can apply to be moved to the estate of the gender with which they identify.

^{vii} *Van Kuck v Germany*, June 2003, Application No 35968/97, para 56

^{viii} The claim that transwomen present a greater risk of sexual assault than cis-women is highly contested. The Court in *FDJ* approached the following conclusion after assessing the evidence and arguments:

"I accept that the statistical evidence shows that the proportion of transgender prisoners who have been convicted of one or more sexual offences is substantially greater than the corresponding

proportions of non-transgender men and women prisoners. I do not accept that the statistical evidence permits the conclusion, for which the Claimant contends, that a transgender prisoner is 5 or 6 times more likely than a non-transgender prisoner to commit a sexual assault on a non-transgender prisoner: that seems to me a misuse of the statistics, which in any event are so low in number, and so lacking in detail, that they are an unsafe basis for general conclusions.”

^{ix} *FDJ* at para 83 “it is not possible to argue that the Defendant should have excluded from women’s prisons all transgender women. To do so would be to ignore, impermissibly, the rights of transgender women to live in their chosen gender;”

^x “Decisions must be informed by all available evidence and intelligence in order to achieve an outcome that balances risks and promotes the safety of all individuals in custody as set out below.

Potential risks to the individual from others, or personal vulnerabilities of the individual, related to (* indicates critical factors):

- mental health and personality disorder;
- history of self-harm;
- anatomy, including risk of sexual or violent assault;
- testimony from an individual about a sense of vulnerability, eg in a male environment, in a particular prison, or from a particular prisoner or group of other prisoners;
- risk of suicide;
- Medication including the absence of medication and the impact of known side effects;
- history of being attacked, bullied or victimised;
- intelligence including evidence of coercion, manipulation or threats towards the individual;
- Family circumstances/relationships;
- Age;
- Physical health; learning disabilities or difficulties.

Potential risks presented by the individual to others in custody ... related to (* indicates critical factors):

- offending history, including index offence, past convictions and intelligence of potential criminal activity – eg credible accusations;
- anatomy, including considerations of physical strength and genitalia;
- sexual behaviours and relationships within custodial/residential settings;
- use of medication relating to gender reassignment; and use of medication generally;
- Past behaviour in custody, the community, in the care of the police, or in the care of prisoner escort services;
- intelligence reports;
- evidence of threats towards others;
- mental health and personality disorder;
- Learning disabilities or difficulties;
- Substance misuse.

Views/characteristics of the individual (* indicates critical factors):

- birth, legal and presented gender;
- strength of confirmation of presented gender, including medical treatments and full evidence of gender identity (such as birth certificate or a GRC);
- view on establishment allocation, prison management and lifestyle.”

^{xi} *FDJ* at para 80

^{xii} *FDJ* at para 76

^{xiii} *FDJ* at para 78

^{xiv} The Yogyakarta Principles are two sets of principles developed by international human rights experts. The first set of principles, published in 2006, articulates already existing rights in the context

of sexual orientation and gender identity, similar to the way in which the groups rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) articulate universal human rights in the context of race discrimination, women's rights, children's rights and disabled people's rights respectively.

The second set of principles, developed in 2017, known as 'Yogyakarta Plus 10' set out 'Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles.' These additional principles include civil, political, economic, social and cultural rights not articulated, or not fully articulated in the first set of principles.

The Yogyakarta Principles are not an international human rights treaty which States sign and ratify. They are however, increasingly referred to as representing international best practice since they align with the human rights framework developed at international and regional level, offering protections in the same way as the group rights treaties. For example, they have been used in a number of contexts, featuring in recommendations from states to each other in Universal Periodic Review processes, being adopted by Special Rapporteurs, influencing UN guidance notes on asylum claims related to LGBTQI discrimination, being referenced by the CoE Commissioner for Human Rights, being referenced in a dissenting opinion by ECtHR judges, being referenced by the European Court of Justice (ECJ) Advocate General in a case at the ECJ to determine whether gay and lesbian people form a particular protected group for the purposes of asylum, and being cited by the Inter-American Court on Human Rights, which has issued an advisory opinion to Costa Rica around gender recognition on the basis of the Principles.

^{xv} Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, Practices of exclusion, UN General Assembly Document A/76/152, 15 July 2021, at paras 63 & 64.