

Delegated Powers and Law Reform Committee

35th Meeting, 2023 (Session 6), Tuesday, 19 December 2023

Instrument Responses

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

On 8 December 2023, the Committee asked the Scottish Government:

1. The policy intention of the instrument, as set out in the Policy Note and accompanying documents, is to ensure that it is not an offence for staff involved in offender management to disclose protected information acquired legitimately in their official capacity for the purposes of offender management. The accompanying documents set out some of the considerations that will have informed the analysis of compatibility with Convention rights and data protection rights. Additional information is requested on the following points.
 - (a) The accompanying documents indicate that the people who will be entitled lawfully to disclose information as a result of this Order will be staff from the Scottish Prison Service; justice social work services; Parole Board for Scotland; and others involved in the management, supervision and rehabilitation of those charged with or convicted of offences (paragraph 2 of the Policy Note). However the instrument does not limit it to the staff of specified bodies. By virtue of section 22(3) of the Act, it could permit disclosure by people who obtain the information as (for example) a prospective employer or in the conduct of business, or through their work for a voluntary organisation. Could an explanation be provided of why the instrument does not limit the provision to the staff of the bodies indicated in the accompanying documents? Was consideration given to more precisely and narrowly identifying in the Order the people who will be entitled to disclose information, and what factors were taking into account in that regard?
 - (b) The instrument permits disclosure for “any other purpose connected with or related to the management of any person because they are, or have been, (i) officially accused of committing an offence, (ii) the accused in criminal proceedings, or (iii) found guilty in criminal proceedings”. Is it sufficiently clear what is meant by “management” in this provision, and is this sufficiently narrow?
 - (c) The Policy Note says that the Order only extends to management purposes required because the person “is in the criminal justice system”, however it also applies to those who were, but are no longer, in the criminal justice system (article 2(c)). For example, it could apply to a person who many years previously was either charged with committing an offence but was never prosecuted, or was tried and acquitted, if the disclosure is considered

necessary in relation to the management of that person because they were once charge. Given the questions above, the assessment of whether it is necessary to disclose protected information could be made by a staff member of any body, including an employer or voluntary organisation (by virtue of section 22(3)(a) of the parent Act). Further, the staff member would be assessing whether it was necessary for the “management” (given its ordinary meaning) of the person. Was consideration given to narrowing the application of article 2(c) to information about persons who are still within the criminal justice system, and what factors were taken into account in this regard?

- 2) Please confirm whether any corrective action is proposed, and if so, what action and when.

On 12 December 2023, the Scottish Government responded:

Question 1.a)

The Order is not limited to the staff of the bodies indicated in the accompanying documents as it takes an approach based on describing a necessary purpose. Under article 2(2)(a) disclosure is permitted for what are effectively justice social work service purposes and for the purposes of managing an individual under section 10 of the Management of Offenders etc. (Scotland) Act 2005 (MAPPA arrangements). The disclosure is not limited to just the staff of a local authority providing the justice social work service as it is intended to allow disclosure to or by that local authority when necessary for the provision of its justice social work service to, or in respect of, an individual. It is also not limited to staff of the bodies involved in MAPPA arrangements for the same reason. Where a disclosure was not to meet those purposes it would not be lawful.

This also applies to those purposes listed in article 2(2)(b). It may be necessary for other organisations from those listed, whose staff are subject to section 22 of the Gender Recognition Act 2004, to disclose information to the relevant bodies for the purposes of allowing the listed bodies to effectively meet their statutory functions in relation to offenders and those accused of committing offences.

Article 2(2)(c) provides the purposes include “any other purpose connected with or related to the management of any person”. However 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 (as narrated in heads (i) – (iii)). This point is reiterated in the Policy Note, which describes the effect of the instrument and explains that any disclosure of protected information has to be necessary for the purpose.

Additional commentary is also provided in the DPIA, which provides context on the type of situations where disclosure is potentially necessary. The DPIA states:

“All exceptions to the section 22(1) offence are only for circumstances where disclosing this protected information is necessary and proportionate. Although the Order makes provision to allow for disclosure at different points in the justice system including supervision of an individual on bail or release on license or their

management in custody, the disclosure has to be necessary for a particular purpose. The purpose of disclosure is most likely to be to reduce risk of harm to the individual or others. This may relate to decisions around support packages which may include accommodation or access to particular services. For example, if it is necessary for information of existence/application of a GRC to be shared for the purposes of allocation of appropriate accommodation either in custody or on release from custody to allow full consideration of the interests of both the person concerned and others in the accommodation setting.

Protected information may be recorded as part of SPS's 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. Allowing disclosure will also help to ensure an individual with the GRC can access appropriate support and programmes in the community on release from prison or following a non-custodial disposal of their case at court."

We consider that the approach taken is appropriate and correct. The offence in section 22(1) of the Gender Recognition Act 2004 is limited only to those who receive protected information in their official capacity. As noted in your question this includes an employer or prospective employer of the person to whom the information relates. However, the exemption provided in the Order requires that the disclosure is necessary for one of the purposes listed in article 2 of the Order. We do not envisage that employers or prospective employers of the individual to whom the information relates will meet the necessity test or purposes listed in article 2 of the Order.

We therefore consider that the language of the Order when read with section 22(3) of the Gender Recognition Act 2004 will make it clear who the exemptions provided by the Order to the offence in section 22(1) of that Act applies. While we could have listed specific persons connected to particular statutory functions it was considered that such a list would be unwieldy and prone to requiring frequent updating. The delivery of offender management services is carried out by a number of public bodies and some private and voluntary organisations providing specialist services and support. It was thought that the best approach was therefore to tie necessary disclosure to the delivery of functions and services connected to offender management purposes rather than to attempt to exhaustively list the bodies and organisations who currently provide such services.

It should be noted that the exemptions in this Order are simply exemptions from the offence in section 22(1) of the Gender Recognition Act 2004. Those disclosing protected information will still have to act in accordance with the UK GDPR and the Data Protection Act 2018 when doing so.

Question 1.b)

Yes. We believe that the article 2(2)(c) as a whole is clear that management relates to their management because of the individual's engaged in the criminal justice system. This is achieved by providing that the purpose of the disclosure must be connected with or related to the person's management *because* they are or have been engaged in the criminal justice system. Further the context of the Order as a

whole is very clearly the management of those accused of committing offences and convicted offenders both in custody and the community which should provide further guidance to those interpreting its effect.

Question 1.c)

As with the response to question 1.b), we consider that article 2(2)(c) is clear that the management of the person must be tied to the fact that they are or have been engaged in the criminal justice system. It provides that the purpose of the disclosure must be connected with or related to the person's management *because* they are or have been engaged in the criminal justice system. We consider the provision is sufficiently narrow to meet the policy intent. We also consider that the Policy Note is consistent with the Order.

Question 2.

No corrective action is proposed.

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

On 7 December 2023, the Committee asked the Scottish Government:

1. The Policy Note states that the purpose of the instrument is to support the implementation of the SPS policy for "The Management of Transgender People in Custody". This is described as an operational policy to enable prison staff to consider multiple factors when making decisions about the management of transgender people in custody. However, this instrument extends beyond the rules governing the searching and testing of transgender prisoners to the rules governing the searching of visitors, specified persons and officers and employees which is not covered in the SPS policy or mentioned in the Policy Note accompanying the instrument. Could an explanation be provided for this difference between the policy intention as stated in the Policy Note and the wider policy delivered by the instrument?
2. The instrument applies to all prisoners as it does not specify transgender prisoners in particular. For example, by referring to "a different gender to the prisoner," it is feasible under the rule changes made by this instrument that a female prisoner could be searched by male officers "where the Governor considers that it is necessary to do so for the purpose of protecting the health, welfare or safety of any person, or the security or good order of the prison." Does the instrument go beyond the stated policy intention by applying this discretion not just to transgender prisoners?
3. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 13 December 2023, the Scottish Government responded (adopting the question numbering as a), b) and c) rather than 1, 2, and 3):

Question a)

1. The primary purpose of the instrument is to support the new transgender prisoner policy while maintaining the approach taken overall in the Prison Rules, that transgender prisoners are not subject to particular bespoke provision. While the effect of the instrument will be highly unlikely to extend beyond transgender prisoners (this point being expanded upon in our answer to question (b)) it was considered that a consistent approach to searching should be taken throughout the Prison Rules and so consequential amendments were made to rules 106, 108 and 142. We acknowledge this could have been specifically addressed in the Policy Note, and have addressed this through an updated Policy Note. However, we did consider that as paragraph 3 of the Policy Note lists those Rules, (including a parenthetical description of what they cover) a reader of it will be aware that those changes are being made. The explanation provided in paragraph 3 of the need for the Rule changes applies equally to each provision amended.
2. We consider the policy intent is sufficiently clear from the Policy Note, but have updated the Policy Note to provide further clarity.

Question b)

1. All searches (or observing the taking of samples as the case may be) must be carried out by an officer of the same gender unless the exception applies. The exception may only apply to achieve a listed purpose, may only be used where it is necessary to do so, and only where it is a proportionate course of action in order to achieve the listed purpose. We acknowledge that the discretion afforded to prison governors via this exception applies to all prisoners, not just transgender prisoners, however the tests set out within the amended Prison Rules as interpreted in light of the European Convention on Human Rights (the Convention) means the discretion will be extremely unlikely to be used with regard to a female prisoner who is not transgender. We consider the language used in the amending Rules to be appropriate. We therefore do not propose corrective action.
2. SPS policies on searching regulate day to day activities by prison governors under the Prison Rules. They give prison governors guidance as to how to exercise discretion in relation to transgender prisoners. They do not afford such discretion with regard to prisoners who are not transgender, accordingly female prisoners who are not transgender will only be searched by female officers.
3. The policy prohibition on searching (or observing the taking of samples by) female prisoners who are not transgender by an officer of a different gender is long standing and will remain as it is.

4. The amendments made to the Prison Rules only allow prison governors a discretion. That is necessary in order that searching is in every case in accordance with the law. The exercise of that discretion would have to be lawful (i.e. in accordance with the relevant Prison Rules and the Convention) and is underpinned by SPS policies. We think the searching of a female prisoner who is not transgender by a male officer is unlikely to be compliant with the Convention except in the most extreme of cases. The legal tests set out on the face of the Rules that the prison governor must be satisfied of, in order to exercise their discretion, would also be extremely unlikely to be met in order to allow a female prisoner who is not transgender to be searched by a male officer.
5. We think a search of a transgender female prisoner in such a way is lawful, as such a prisoner is more likely to have attributes that could justify that search being carried out by a male as being necessary and proportionate when combined with a risk assessment of the prisoner. It will be clear to prison governors applying the searching rules in the Prison Rules and those to whom they will apply that the discretion is in practice only exercisable in relation to transgender prisoners. The discretion will be capable of being exercised lawfully with the language used in this SSI.
6. The discretion is required in relation to transgender prisoners as they are the only prisoners on whom a decision is required on whether they are searched by a male or female officer. SPS policy and the amendments this SSI seeks to make to the Prison Rules reflect the duties on SPS to conduct searches in a manner which protects the health, safety and welfare of all prisoners and SPS staff as well as the security and good order of the prison. This requires some discretion to be afforded to prison governors and the amendments in this SSI reflect that that should be clear in the Prison Rules.

Question c)

1. As noted above, corrective action is proposed in relation to question a) (a replacement policy note) but not in relation to question b).