

Criminal Justice Committee

2nd Meeting, 2024 (Session 6), Thursday, 11 January 2024

Subordinate legislation - Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider the following negative instruments:
 - [The Gender Recognition \(Disclosure of Information\) \(Scotland\) Order 2023 \(SSI 2023/364\)](#) [see page 4];
 - [The Prisons and Young Offenders Institutions \(Scotland\) Amendment Rules 2023 \(SSI 2023/366\)](#) [see page 7].
2. The purpose of the Gender Recognition (Disclosure of Information) (Scotland) Order 2023 (SSI 2023/364) is, according to the documentation received, 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.
3. The purpose of the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2023 (SSI 2023/366) is to support the implementation of the SPS Policy for 'The Management of Transgender People in custody'.
4. If the Committee agrees to report to the Parliament on the instruments, it is required to do so by **22 January 2024**.

Delegated Powers and Law Reform Committee Consideration

5. The Delegated Powers and Law Reform Committee considered both of the instruments at its meeting on 19 December 2023.
6. The DPLR Committee agreed that it did not need to draw either of the instruments to the attention of the Parliament on any grounds within its remit.
7. However, in its [report](#), the DPLR Committee draws its [correspondence with the Scottish Government](#) on the Gender Recognition (Disclosure of Information) (Scotland) Order 2023 (SSI 2023/364) to the attention of the Committee as it

provides further information on how the instrument delivers the policy intention, and on factors that are relevant to the Scottish Government's consideration of the compliance of the instrument with Convention rights.

8. The DPLR Committee's report also draws its [correspondence with the Scottish Government](#) on the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2023 to the attention of the Committee as this, and the [revised Policy Note](#) which resulted from the correspondence, clarifies the policy intention behind the rule changes made by the instrument.

Procedure for negative instruments

9. Negative instruments are instruments that are "subject to annulment" by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
10. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
11. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
12. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
13. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book). Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
14. Each negative instrument appears on the Criminal Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.

15. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

16. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee>

Action

17. **The Committee is invited to consider the instruments.**

**Clerks to the Committee
January 2024**

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.

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
December 2023

Policy Note

The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2023

SSI 2023/366

1. The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2023 (“the Amendment Rules”) are made in the exercise of the powers conferred by section 39 of the Prisons (Scotland) Act 1989. These Rules amend the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (“the Prison Rules”) and are subject to negative procedure.

The purpose of this instrument is to support the implementation of the SPS Policy for ‘The Management of Transgender People in custody’.

Policy Objective

2. The Prison Rules set out provisions relating to the regulation and management of Prisons and Young Offenders Institutions and various matters concerning those who are required to be detained in these institutions (such as their classification, treatment, discipline, employment and control).
3. The Amendment Rules will make changes to Rule 92 (Searching of Prisoners). This Rule currently requires prisoners to be searched by an Officer who is the same gender as them. While this may be overridden by a Governor where there are concerns about the searching Officer’s safety or, in the case of a transgender prisoner, that they would prefer to be searched in accordance with their birth sex, the Rules do not currently expressly provide for that. The Amendment Rules will make clear on the face of the Rule 92 that Governors have a discretion to allow a transgender person to be searched by an Officer of their birth sex if it is necessary and proportionate to do so. While the Amendment Rules will provide a discretion in relation to all prisoners, their purpose is to apply only to transgender prisoners. This will be underpinned by the Scottish Prison Service’s policies on searching, including under the policy for the Management of Transgender People in Custody. Prisoners who are not transgender will continue to be searched only by officers of the same gender as them.
4. Rule 93 (compulsory testing for controlled drugs) and Rule 94 (compulsory testing for alcohol), will also be amended to make clear on the face of the Prison Rules that Governors may allow a transgender person to be observed by an Officer of their birth sex whilst providing a sample for drug or alcohol if it is necessary and proportionate to do so. Again, while the Amendment Rules will provide a discretion in relation to all

prisoners, their purpose is to apply only to transgender prisoners. This will be underpinned by the Scottish Prison Service's policies on sample taking, including under the Policy for 'The Management of Transgender People in custody'. Prisoners who are not transgender will not provide samples in the sight of a person who is not the same gender as them.

5. The Amendment Rules will also make consequential changes to: Rule 106 (searching of visitors); Rule 108 (searching of specified persons) and Rule 142 (searching of officers and employees), to ensure that a consistent approach to searching is taken throughout the Prison Rules.

Consultation

6. There has been an extensive consultation with internal and external stakeholders in regard to the SPS Policy for 'The Management of Transgender People in custody'. A full list of the organisations and groups consulted can be found in the Equalities Human Rights Impact Assessment. There was also a public engagement exercise published on SPS' website which sought views on the existing policy.

Impact Assessment

7. An Equality and Human Rights Impact Assessment has been completed for the SPS Policy for 'The Management of Transgender People in custody' which these Rule Amendments will support the implementation of. The assessment identified no potential for unlawful discrimination or adverse impact or breach of Human Rights articles.

8. A Child Rights and Wellbeing Impact Assessment (CRWIA) has also been completed, it identified issues and risks with two articles in the UNCRC (Article 16 Right to privacy and Article 19 - Protection from violence, abuse and neglect) and the actions SPS can take to mitigate against any potential negative impact.

EU Alignment Consideration

9. This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU. Financial Effect

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