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1. PURPOSE

- 1.1 The purpose of this Policy & Guidance document is to:
- outline the procedures to be followed in the event of a transgender person being brought into custody,
 - provide accurate and current information for all police staff in relation to transgender people in custody, and
 - to ensure fair treatment of all people who enter the custody suites irrespective of gender identity or expression.

2. POLICY

- 2.1 The Association of Chief Police Officers in Scotland (ACPOS) recognise diversity within society and that people have the right to undergo gender transition and live their lives as a transgender person. ACPOS also recognise that people have the right to live with dignity and that there will be no exception to this when a transgender person is in police custody and subject to police procedures. ACPOS also recognise that there is no dignity in full strip searches and that procedures should be adopted that will enable staff and people in police custody to interact in as dignified manner as possible in the circumstances.
- 2.2 The key message of this policy is that people will be treated according to the gender in which they present.

3. DEFINITIONS

- 3.1 **Gender Identity** is a person's internal sense of where they exist in relation to being a man or a woman.
- 3.2 **Gender Expression** is a person's external gender-related clothing and behaviour (including their interests and mannerisms).
- 3.3 **Transsexual People** are people who consistently self-identify as the opposite gender from the gender they were labelled at birth based on their physical body. Depending on the range of options and information available to them during their life, transsexual people may try to cope in a variety of ways. Many will manage (some while still children, most as young adults and some much later in life) to find a way to transition (undergo gender reassignment) to live fully in the gender that they self-identify as. Whether people receive medical or surgical interventions can depend on health issues, personal choice, social circumstances and other factors.
- 3.4 **Gender Dysphoria** (which is also known as **Transsexualism**) is a recognised medical condition for which gender reassignment treatment is available on the National Health Service in Scotland. Gender Dysphoria is distress, unhappiness and discomfort experienced by someone about their physical body not fully matching their gender identity (that is, their internal sense of where they exist in relation to being a man or a woman). Transsexual people usually experience intense gender dysphoria which is significantly reduced by transitioning to live as their self-identified gender and by taking hormones and perhaps getting surgery to make their physical bodies match their gender identity and gender expression better. Other types

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of transgender people may also experience various degrees of gender dysphoria, especially when unable to fully express their gender identity.

- 3.5 A **Female-to-Male [FTM] Transsexual Man [Trans Man]** is someone who was labelled Female at birth but has a Male gender identity and therefore is currently seeking to transition, or has already transitioned, to live permanently as a Man.
- 3.6 A **Male-to-Female [MTF] Transsexual Woman [Trans Woman]** is someone who was labelled Male at birth but has a Female gender identity and therefore is currently seeking to transition, or has already transitioned, to live permanently as a Woman.
- 3.7 **Transition** or **Gender Reassignment** refers to the medically supervised process that a transsexual person goes through to present themselves permanently in their new acquired gender.
- 3.8 **Cross-dressing People** (sometimes called **Transvestite People** although this is becoming an out-dated term) are people who dress, either occasionally or more regularly, in clothes associated with the opposite gender, as defined by socially accepted norms. Cross-dressing people are generally happy with their birth gender and do not want to permanently alter the physical characteristics of their bodies or change their legal gender. They may dress as the opposite gender for emotional satisfaction, erotic pleasure, or just because they feel more comfortable doing so.
- 3.9 **Androgyne People** (sometimes called **Third-gender People**, **Bi-gender People** and **Polygender People**) are people who find they do not feel comfortable thinking of themselves as simply either men or women. Instead they feel that their gender identity is more complicated to describe. Some may identify their gender as being some form of combination between a man and a woman, or as being neither. Like transsexual people, they can experience gender dysphoria (sometimes as intensely as transsexual people do) and may sometimes at least partially transition socially and may take hormones or occasionally undergo some surgery.
- 3.10 **Acquired Gender** is the term used in the Gender Recognition Act 2004 to mean the gender role that a person has transitioned to live their life in and which matches their self-perceived gender identity. Therefore, the acquired gender of a Male-to-Female Trans Woman is Female. The acquired gender of a Female-to-Male Trans Man is Male.
- 3.11 **Prisoner** refers to any person who has been arrested or detained under a statutory provision and is in Police custody.

4. GUIDANCE

4.1 Introduction

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- 4.1.1 A transgender person may be heterosexual, lesbian, gay or bisexual. Their sexual orientation is determined in relation to their gender identity rather than their physical body. For example, a male-to-female transsexual woman living as a woman (regardless of whether or not she has undergone any surgery) may identify as a straight woman if attracted to men, as a lesbian woman if attracted to women or as a bisexual woman if attracted to men and women.
- 4.1.2 Distress is likely to be caused to transgender people if mistakes are made about the type of transgender identity they have. In particular, a transsexual person undergoing gender reassignment is likely to be upset if incorrectly referred to as a cross-dressing or transvestite person.
- 4.1.3 Some transgender people may look androgynous or have obvious physical characteristics which mean that their transgender status might be noticeable to others. However, most of the time it is not possible to determine that someone is a transgender person from their appearance while clothed.
- 4.1.4 Inappropriate questions about a transgender person's physical body, gender history or transition (gender reassignment) process will insult the person and may impact negatively on their willingness to co-operate. Only questions that are essential for the investigation of a crime should be asked and these should be phrased as politely as possible.

4.2 Transition or Gender Reassignment

- 4.2.1 The process of diagnosis and treatment can take anything from a matter of months to a period of years. The initial diagnosis is usually followed by hormone therapy, and during this process the individual will start to live and work full-time in their acquired gender and at this point their name and other records will be changed.
- 4.2.2 For any NHS-funded reconstructive surgery in Scotland, transsexual people are currently required to first undertake at least a year of living fully in their acquired gender. A person may live full-time in their new name and gender and achieve full legal recognition and rights in their acquired gender without ever undergoing any surgical intervention.
- 4.2.3 Surgical intervention is not a requirement for gender reassignment or transition and some people may not undergo surgery due to age, health or other factors including high complication rates in some of the surgical procedures.

4.3 Privacy rights provided by a Gender Recognition Certificate:

- 4.3.1 The **Gender Recognition Act 2004** created a process to enable transsexual people to get their UK birth certificates and legal gender changed. The transsexual person can apply to the Government's Gender Recognition Panel for a Gender Recognition Certificate. If they are successful in their application, the law will recognise them as having all the rights and responsibilities appropriate to a person of their acquired gender.
- 4.3.2 The Gender Recognition Act 2004 defines any information relating to a transsexual person's gender recognition application as 'protected information'. It is a criminal offence, punishable with a fine up to £5000, for anyone acquiring this protected information in an 'official capacity' to disclose it to a third party without the transsexual person's consent. There are only a

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very few exceptions, for example if the information is specifically required by the third party for the prevention or investigation of a crime.

- 4.3.3 The information is deemed to have been acquired in an 'official capacity' if it was acquired by someone in connection with their function:
- as a member of the civil service, a police constable or the holder of any other public office or in connection with the functions of a local or public authority or of a voluntary organisation, or
 - as an employer, or prospective employer, of the person to whom the information relates or as a person employed by such an employer or prospective employer, or
 - in the course of, or otherwise in connection with, the conduct of business or the supply of professional services.
- 4.3.3 It is not an offence to disclose protected information relating to a person if—
- (a) the information does not enable that person to be identified,
 - (b) that person has agreed to the disclosure of the information,
 - (c) the information is protected information by virtue of subsection (2)(b) and the person by whom the disclosure is made does not know or believe that a full gender recognition certificate has been issued,
 - (d) the disclosure is in accordance with an order of a court or tribunal,
 - (e) the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal,
 - (f) the disclosure is for the purpose of preventing or investigating crime,
 - (g) the disclosure is made to the Registrar General for England and Wales, the Registrar General for Scotland or the Registrar General for Northern Ireland,
 - (h) the disclosure is made for the purposes of the social security system or a pension scheme,
 - (i) the disclosure is in accordance with provision made by an order under subsection (5), or
 - (j) the disclosure is in accordance with any provision of, or made by virtue of, an enactment other than this section.

4.4 Disclosure

- 4.4.1 When a prisoner discloses their transgender identity to a member of staff, the prisoner should be informed that there is a need to disclose this information for the prevention or investigation of crime against that person when in custody and assured that such disclosure is only when relevant. The prisoner should be told to whom the information will be disclosed and the reason for the disclosure. It is best practice to obtain their consent in the first place.
- 4.4.2 Thereafter, the member of staff must inform the officer in charge of the Custody Suite so that the information can be recorded appropriately. For Data Protection purposes, this must not be on a sheet which is easily accessible when in place outside the cell.
- 4.4.3 It may also be necessary to share this information with other custody care related organisations and other police staff. Such disclosure is made in terms of the exception listed at (f) for the purposes of preventing or investigating crime. Disclosure must only be in cases where the sharing of such

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information for the prevention of crime against the prisoner and is relevant, legal, proportionate, and fair.

- 4.4.4 The Act is framed in such a way that it seems to create an absolute offence. That means that an intention to commit an offence does not have to be proved by the prosecutor (unlike, for example, an intention to steal). The act sets out various specific defences to the offence section as listed at paragraph 4.3.3. Thus, all that the prosecutor requires to do is prove that the accused "disclosed" protected information and it would then be for the accused to make out one of the specific defences if they can, on a balance of probability.
- 4.4.5 However the question of what type of behaviour on the part of the accused would amount to "disclosure" remains. The offence would certainly apply to someone as defined in Section 22 (3) who deliberately hands over protected information. It may apply also to someone who negligently "allows it to be seen". From this it would appear that staff must follow Force procedures without fail so as not to negligently disclose protected information.

4.5 Searching transgender people

- 4.5.1 Searching and strip searching can be undignified and difficult both for the prisoner and the officers concerned. It is therefore important to minimise any negative impact where possible. There is potential for distress and embarrassment during any search. Sensible application of the following guidance should minimise the risk and protect all involved:
- 4.5.2 If a search has begun without any knowledge that the prisoner is transgender and it only comes to light in the middle of the search then the searching officers should continue the search in the usual professional manner, unless the prisoner requests a different gender of searching officers to take over the search.
- 4.5.3 A person who is undergoing gender reassignment will have changed their name either by deed poll or affidavit. They may also have other documentation, driving licence, bank cards, Gender Recognition Certificate etc., which should confirm that person's gender identity.
- 4.5.4 However, if a prisoner is thought or known to be transgender prior to a search being carried out, then they should be searched according to the gender they present and live their lives as. This can be ascertained by asking them and/or checking documentation.
- 4.5.5 A female-to-male trans man who still has breasts and a vagina may identify strongly as a man but may request to be searched by a female officer. In such a case, the trans man should still be referred to using male pronouns and treated as a man in all other ways except in terms of the gender of officer who searches him.
- 4.5.6 If a prisoner is unwilling to provide this information, the officer must determine the predominant gender in which the person lives their life. This is likely to be indicated by their name, title or gender on their main identity documentation such as their driver's licence, bank cards, Gender Recognition Certificate, etc. If they appear to live predominantly as a woman, they should be treated as such.

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4.5.7 Once the prisoner's gender has been established, normal search procedures will apply and the prisoner will be searched by officers of that gender.

4.5.8 Once it has been established which gender a prisoner is to be treated as during the search, the officers conducting the search should be informed by Custody Suite staff of the prisoner's transgender identity. The prisoner should be informed of the reason for the disclosure. This is the best way to ensure that the dignity of both the officers and the person is maintained as it reduces the risk of the officer being surprised if the person has some physical characteristics not usually associated with that gender.

4.6 Multi-Occupancy of Cells

4.6.1 Where a prisoner has identified their transgender identity, they must not be placed in a cell or detention room with another prisoner.

4.6.2 In an attempt to prevent a prisoner being inadvertently outed or placed in a situation of potentially being at higher risk, all prisoners who are to be placed in multi-occupancy cells should be informed that this course of action is being considered should be asked "Do you wish to disclose anything which would impact on your care in a shared cell?" The prisoner may wish to disclose their transgender identity at that point.

4.6.3 Where the Transgender prisoner has been arrested with other accused, staff must not assume that any co-accused would be aware of the prisoner's transgender identity.

4.7 Care Issues

4.7.1 Staff briefing following shifts can disclose the transgender identity of a prisoner as outlined in Disclosure section. Specific care issues should be recorded and passed on to relevant staff as outlined in Force procedures.