UNTO THE RIGHT HONOURABLE THE LORDS OF COUNCIL AND SESSION

NOTE OF ARGUMENT FOR THE PETITIONER

in the petition of

FOR WOMEN SCOTLAND, a company incorporated under the Companies Acts, and having its registered office at 5 South Charlotte Street, Edinburgh, Scotland, EH2 4AN

PETITIONER

for Judicial Review of the Scottish Prison Service Policy for the Management of Transgender People in Custody Operational Guidance

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1. INTRODUCTION

1.1 The position of the petitioner is entirely straightforward. It is based on the following simple basic propositions, all of which are readily established and immediately verifiable:

(i) The Scottish Ministers are statutorily obliged to provide women-only prison accommodation, separate and distinct from that provided for male prisoners. [1]

(ii) To fulfil this statutory duty, the Scottish Ministers must ensure that *no* male prisoners - whether or not claiming the Section 7(1) of the Equality Act 2010 ("EA 2010") defined protected characteristic ("PC") of "gender reassignment" [2] and/or holding a gender recognition certificate under the Gender Recognition Act 2004 ("GRA 2004") - are accommodated within the women's prison estate. [3] As the UK Supreme Court has unequivocally stated:

> "[A] person is either a woman or a man. Persons who share that protected characteristic for the purposes of the group-based rights and protections are persons of the same sex and provisions that refer to protection for women *necessarily* exclude men." [4]

(iii) The Scottish Prison Service's ("SPS") current 2024 policy on the housing of transgender prisoners is unlawful, because it is predicated on the basic error in law that at least *some* male prisoners (among those who claim the PC of gender reassignment) might lawfully (consistently with the EA 2010) be assigned to serve their sentences within the women's prison estate. [5]

1.2 The respondents' defence tries to distract from these propositions. It seeks to avoid addressing the clear wrongful application of, in particular, paragraph 28 in Part 7 of

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[1] See Rules 11(a) and 81 of the United Nations' *Standard Minimum Rules for the Treatment of Prisoners* ("the Nelson Mandela Rules") and Rule 126 of the of the Prison and Young Offender Institutions (Scotland) Rules 2011 ("the 2011 Prison Rules")

[2] For the purposes of Section 7(1) EA 2010"changing *physiological* attributes of sex" might be sought to be achieved by surgery and/or hormone treatment. Changing "other [non-physiological]attributes" is a reference to addressing psychological attributes "of what must necessarily be biological sex" (*FWS* [2025] UKSC 16 at §200) might include, in the case of trans-identifying males, undergoing appropriate psycho-social counselling and therapy to at least make an effort to "unlearn" such characteristic male behaviours as: male readiness to resort to aggression; male assertions of dominance over women; males' sense and expression of entitlement in relation to women; and males' threat and employment of physical and mental violence against women and girls.

[3] See *FWS* [2025] UKSC 16 at §§ 211-218 and at §§ 222-225 setting out the proper interpretation of the provisions in the EA 2010 for separate sex services, for single sex services and for sex-segregated communal residential accommodation.

[4] *FWS* [2025] UKSC 16 at §171

[5] See *FWS* [2025] UKSC 16 at §§ 219-221 concerning the provision for lawful gender reassignment discrimination in the provision of separate sex services, single sex services paragraphs 28 in Part 7 of Schedule 3, and paragraph 3 of Schedule 23, EA 2010

Schedule 3 EA 2010.[6] The respondents start from the other end of the telescope in a presumably deliberate attempt to confuse matters. The respondent's "defence" is based on all of the following propositions, which are all themselves based in clear errors of law:

(a) The Scottish Ministers have an ECHR based duty to treat incarcerated men in their custody claiming the PC of gender reassignment *as if* they were women (whereas, in fact, their only duty under the EA 2010 is not to victimize, harass, or discriminate against these men because of their claiming the PC of gender reassignment).

(b) This ECHR based duty means that, unless it would in an individual case be Convention disproportionate to do so, the Scottish Ministers ***must*** accommodate male prisoners claiming the PC of gender reassignment within the women's prison estate which the Scottish Ministers have *chosen* (but are ***not*** obliged) to provide mainly (but not exclusively) for women.

(c) The Scottish Ministers are therefore obliged to conduct a case-by-case consideration of each prisoner claiming the PC of gender reassignment to inform the determination of the Convention proportionality of their prison accommodation allocation decisions.

(d) The Scottish Ministers require to produce a policy (the "Policy for the Management of Transgender People in Custody: Operational Guidance, hereinafter, "the Prisons Guidance") to guide this decision-making. The Prisons Guidance operates on a *presumption* (but not an absolute bar) against accommodating within the women's prison estate, men who claim the PC of gender reassignment who have a history of violence against women/girls, and/or where there is information available of behaviour indicative of violence against women/girls. [7]

(e) The ECHR-based duty to treat men claiming the PC of gender reassignment *as if* they were women overrides all and any statutory provisions such that
   (i) contrary provisions of secondary legislation (such as rule 126 of the 2011 Rules) have to be rewritten or wholly disapplied as Convention incompatible; and,
   (ii) contrary provisions of primary legislation (such as paragraphs 26 to 28 of Schedule 3 EA 2010 and/or paragraph 3 of Schedule 23 EA 2010) have to be

[6] SPS Equality and Human Rights Impact Assessment (EHRIA) for the SPS Policy for the Management of Transgender People in Custody which bears to have been signed off in December 2023 notes as follows: see, in particular, pages 24, 39 and the legally erroneous explanation anent paragraph 28 of Schedule 3 EA 2010.

[7] The Prisons Guidance records (at page 34) that SPS "retains the ability to consider exceptions to the presumption … that no transgender woman with a history, or demonstrating behaviour of Violence against women and girls ("VAWG")… should be considered for placement in the women's estate."

re-written to conform with the ECHR requirement, pursuant to s3 Human Rights Act 1998 ("HRA 1998"); or,

(iii) if re-writing of the primary legislation under the HRA 1998 is not possible, these provisions of primary legislation must be formally pronounced and declared by this court, under Section 4 HRA 1998 to be Convention incompatible.

1.3 The proposed making of a declaration of incompatibility would open up a fast track for Parliament to amend the offending provisions, thereby rescuing the Scottish Ministers from, on their account, the impossible dilemma of having, under the Scotland Act 1998 ("SA 1998") no power to act in a Convention incompatible manner and yet being obliged under the EA 2010 (as interpreted by the UK Supreme Court in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SC (UKSC) 1) to act Convention incompatibly towards "transsexual persons" (to use the terminology mandated by Section 7(2) EA 2010)".

1.4 The bold premise of the Scottish Ministers' position is that, in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SC (UKSC) 1 – a case in which the Scottish Ministers took the opportunity to make legal submissions on the Convention rights and common law rights of "transgender people" – the UK Supreme Court didn't properly understand the law and/or misapplied it. In any event, the petitioner submits that there is no basis in law for the Scottish Ministers' position. Instead, it is clear that the Prisons Guidance is unlawful, and therefore falls to be reduced by the court.

2. THE LEGAL BASES FOR SEPARATE PRISON ACCOMMODATION FOR MEN AND WOMEN WITHIN THE SCOTTISH PRISON ESTATE

Section 10 of the Prisons (Scotland) Act 1989 and its fetters

2.1 Section 10 of the Prisons (Scotland) Act 1989 provides:

> **"10.— Place of confinement of prisoners.**
> (1) A prisoner may be lawfully confined in any prison.
> (2) Prisoners shall be committed to such prisons as the Secretary of State may from time to time direct, and may be moved by the Secretary of State from any prison to any other prison."

2.2 But no executive discretion is unfettered.[8] Any statutory power has to be exercised in a manner which is consistent with the policy and objects of the empowering statute. [9] International law materials are relevant in considering those policy and objects, because there is a "strong presumption" in favour of interpreting statute "in a way which does not place the United Kingdom in breach of its international obligations" [10] and "so as to be in conformity with international law."[11] Any exercise of these Section 10 powers under the 1989 Act must also be consistent with fundamental rights. The Human Rights Act 1998 is not an exhaustive statement of the fundamental rights protected in law. And the constitutional "principle of legality" spoken to by Lord Hoffmann in *ex parte Simms* [12] applies equally to these common law fundamental rights lying beyond the four corners of the ECHR. [13]

2.3 Finally, compliance with the rule of law (as is required of the Scottish Ministers [14]) means that the section 10 powers must be exercised always and only conform to the relevant prison regulations. In this case these are the Prison and Young Offender Institutions (Scotland) Rules 2011 which relevantly provide as follows (in Rule 126):

> **"PART 13 – FEMALE PRISONERS**
> **126.— Separation of male and female prisoners**
> (1) Female prisoners ***must*** not share the same accommodation as male prisoners.
>
> (2) The respective accommodation for male and female prisoners must, as far as reasonably practicable, be in separate parts of the prison."

2.4 The 2011 Rules require to be read as narrowly as is required for them to be within devolved competence: SA 1998, section 101(2). The Scottish Ministers could not permissibly have made rules which allowed for the presence of males claiming the PC of gender reassignment to be accommodated in female prisons. Such rules would trespass upon the reservation of Equal Opportunities and accordingly be *ultra vires*: SA 1998, section 54(2).

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[8] See *R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd* [1988] AC 858 per Lord Bridge of Harwich at pp 872A-873A. See too *Cherry v. Advocate General for Scotland/Miller v. Prime Minister* [2019] UKSC 41, 2020] SC (UKSC) 1 at §§ 42, 44

[9] See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 per Lord Reid at 1030 and, more recently, *R (Palestine Solidarity Campaign) v. Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16 [2020] ICR 1013

[10] *Assange v Swedish Prosecution Authority* [2012] 2 AC 471 per Lord Dyson § 122. See also Lord Brown at § 98 and Lord Kerr at § 112.

[11] See *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116 per Lord Denning at 141

[12] *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 per Lord Hoffmann at 132

[13] *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 per Lord Steyn at §27.

[14] *AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 per Lord Reed at §§ 152-153

2.5 Importantly, the regulatory regime applicable in Scotland differs from that which applies in England and Wales where there is no statutory requirement that male and female prisoners be accommodated in different establishments, as was noted by Holroyde LJ in *R (FDJ) v Justice Secretary* [2021] EWHC 1746 (Admin) [2021] 1 WLR 5265 at § 9. The differences in the regulatory regime overall (including the fact that the lawfulness of prison allocation policy in Scotland is circumscribed by the devolved competence of Scottish Ministers) and the fact that the applicable policy in England and Wales differs significantly from the SPS policy at issue means that past English decisions in this area are of little, if any, relevance and, at best, of limited assistance to the present case. And contrary to the respondents' claim in Answer 44(2) there is certainly no requirement for rule 126 to be re-written to mirror the asserted "corresponding rule in England: Rule 12(1) of the Prison Rules 1999/728". This would indeed go against the grain of the 2011 Rules by turning a clear and unequivocal statutory *obligation* into a discretionary *power*. There is simply no precedent for so "reading-down" a "must" to mean "may".

The Equality Act 2010 (EA 2010)

2.6 The separate accommodation of male and female prisoners in distinct prison estate mandated under rule 126 of the 2011 Rules is, in any event, wholly consistent with the overall policy and purposes of the Equality Act 2010 ("EA 2010") and, in particular, conforms to the requirements of paragraphs 26 and 27 in Part 7 of Schedule 3 EA 2010. These provisions were originally drafted by Parliament to comply with EU law which then applied to the UK as a Member State. As the UK Supreme Court has repeatedly made clear, neither Convention nor EU proportionality requires, within the context of equal treatment, individual case assessments. Proportionality can instead lawfully be determined on the basis of the creation and application of proportionate (which is to say duly justified) group-based bright line policies thereby creating legal certainty through a readily workable rule.[15]

2.7 As the UK Supreme Court (Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lady Rose, Lady Simler noted in its unanimous judgment in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SC (UKSC) 1 (at §211), the relevant provisions of paragraphs 26 – 28 in Part 7 of Schedule 3 EA 2010:

> "permit carve-outs from what would otherwise constitute sex discrimination under the EA 2010. In enacting these exemptions, the intention must have been to allow for the *exclusion of those with the protected characteristic of gender reassignment*, regardless of the possession of a GRC, *in order to maintain the provision of single or separate services for women and men as distinct groups in appropriate*

[15] See e.g. *R (Z) v Hackney London Borough Council* [2020] UKSC 40 [2020] PTSR 1830 per Lord Sales at §§ 85-86 and the case law cited. See too *R (Jwanczuk) v Secretary of State for Work and Pensions* [2025] UKSC 42 [2025] 3 WLR 741 at §§ 146-147.

circumstances. These provisions are directed at maintaining the availability of separate or single spaces or services for women (or men) *as a group*"

and (at § 225)

"On any view, the plain intention of these provisions is to allow for the provision of separate or single-sex services for women which exclude *all* (biological) men (or vice versa). Applying a biological meaning of sex achieves that purpose"

2.8 Paragraphs 26 and 27 of Schedule 3 EA 2010 proceed on the basis that the provision of separate, or single, sex services otherwise than in conformity with the requirements of these paragraphs would constitute unlawful sex discrimination: *R (Coll) v Secretary of State for Justice* [2017] UKSC 40 [2017] 1 WLR 2093 per Baroness Hale giving the judgment of the unanimous Court (at § 34). And at § 37, Baroness Hale noted that: (i) "the needs of women offenders are recognised to be different from the needs of male offenders" and (ii) (at § 38) "expecting women offenders, with their many vulnerabilities, to share premises with male offenders who by definition present a high or very high risk of harm is not likely to be an effective way of helping them with the transition to an independent and law-abiding life in the outside world."

When does it become *mandatory* on the Scottish Ministers to make the single sex/separate sex provisions allowed for under the EA 2010

2.9 The allocation of prison accommodation to lawfully detained prisoners constitutes the exercise of a public function that is *not* the provision of a service to the public. Section 29(6) EA 2010 stipulates that "a person must not, in the exercise of a public function that is not the provision of a service to the public, do anything that constitutes discrimination, harassment or victimisation".

2.10 However, rule 126 of the 2011 Prison Rules constitutes a "requirement of an enactment" as defined in Section 212(1) EA 2010. Paragraph 1 of Schedule 22 EA 2010 therefore applies. Anything which must be done pursuant to rule 126(1) or 126(2) *cannot* constitute an unlawful act of discrimination, harassment or victimisation because of sex. The corollary is this: insofar as the first respondents purport to make accommodation decisions which involve female prisoners sharing the same accommodation as male prisoners with the PC of gender reassignment, this will, in principle, open the first respondents up to legal challenges based on breaches of, in particular section 29(6)EA 2010. Such actions may be brought by or on behalf of women inmates (or women staff) with reference to any or all of:

- the prohibition against direct and indirect sex discrimination as set out in sections 13 and 19 EA 2010;

- the prohibition against all and any unwanted conduct related to their sex, which has the purpose or effect of violating their dignity as women and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them as women contrary to section 26 EA 2010;
- the prohibition, contained in section 27 EA 2010, against subjecting women to a detriment because, among other things, of their making an allegation (whether or not express) that the respondent, or another person, has contravened the EA 2010.

2.11 The EA 2010 provisions on separate services for the sexes and on single-sex services clearly allow for the provision and maintenance by the Scottish Ministers of separate male and female prison estates in Scotland is, in any event, positively required by rule 126.

2.12 The EA 2010 also imposes positive duties upon the Scottish Ministers not to allow incarcerated women prisoners to be placed in a situation which these women may, reasonably and foreseeably, consider to violate their dignity as women and/or to create an intimidating, hostile, degrading, humiliating or offensive environment for them as women. The inability of women prisoners to object to decisions of the SPS to choose to place within the women-only designated prison estate biological males who claim the wholly unverifiable/unfalsifiable PC of gender reassignment compounds the humiliating lack of agency which these women have within the avowedly women-only estate in prison. In giving these women no choice but to be incarcerated in the same accommodation as biological males, SPS has caused - wholly unnecessarily and eminently avoidably - what many incarcerated women will undoubtedly experience as violation of their remaining dignity as women in prison, and as creating for them - as imprisoned women - an intimidating, hostile, degrading, humiliating and/or offensive environment.

2.13 Just as the provision of the single sex service (in this case the provision of a separate women's prison estate) may be established on the basis of its *reasonableness* under and in terms of paragraph 27(6) in Part 7 of Schedule 3 EA 2010, so would it be *reasonable* under Section 26(4) EA 2010 for women incarcerated in a women's-only prison: (i) to object to the accommodating of men in it and (ii) to experience men's presence as a violation of their dignity as women and/or as creating for them as women an intimidating, hostile, degrading, humiliating or offensive environment.

2.14 Separately, the Scottish Ministers are under a duty to make separate provision for the sexes in this context. In *RM v Scottish Ministers* [2012] UKSC 58, 2013 SC (UKSC) 139 at §§ 46-47, the Supreme Court observed:

> "46. The fundamental flaw in the Scottish Ministers' argument is to assume that a failure to exercise a discretionary power can only be unlawful — or, to put the matter

differently, to assume that an obligation to exercise a discretionary power can only arise— where the exercise of the power is necessary to make effective a legal right… As Lord Reid explained in *Padfield* (p 1033), *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 is itself authority for going behind the words which confer a statutory power to the general scope and objects of the Act in order to find what was intended. In the words of Lord Cairns LC in *Julius v Lord Bishop of Oxford* (pp 222, 223):

> '[T]here may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty'.

47. The importance of *Padfield* was its reassertion that, *even where a statute confers a discretionary power, a failure to exercise the power will be unlawful if it is contrary to Parliament's intention*. ...."

2.15 When interpreting and applying the EA 2010 as a whole the statute must "read in the historical context of the situation which led to its enactment". [16] That context is - as regards its provisions concerning same sex and opposite services and accommodation - "the historic omnipresence of patriarchy which will otherwise undermine even the noblest of legislative endeavours". [17] What this points to in the present case - is that when enacting the provisions of paragraphs 26 and 27 in Part 7 of Schedule 3 EA 2010 and paragraph 3 of Schedule 23 EA 2010, Parliament intended that the power to make separate sex/single-sex provision be exercised (i.e. that it become a duty) where such provision was necessary in order to ensure the privacy and secure the dignity of men and women. The situation of incarcerated women detained in prison is precisely one which requires the creation of separate sex estates for reasons of respect for privacy and maintenance of dignity between the sexes. The Scottish Ministers are accordingly acting unlawfully, contrary to the EA 2010, and the plain terms of rule 126 by determining, in terms of the Prisons Guidance, that men (who may or may not have a history of, or behavioural propensity toward, violence against women) should be accommodated in the women's estate. This reading of the EA 2010 becomes all the more compelling when regard is had to the following international materials concerning the detention of women in prison.

Relevant international materials

2.16 The mandated separation of women prisoners from men prisoners is in line with long settled practice in international humanitarian law, as much as domestic law. For example

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[16] *FWS* [2025] UKSC 16 at § 10 approving and relying upon *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 [2003] 2 AC 687 per Lord Bingham of Cornhill at para 8:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

[17] *Rahube v. Rahube* [2018] ZACC 42 [2019] 1 LRC 541 at § 74.

the Geneva Conventions Act 1957 gives effect to such provision.[18] In its Mainstreaming and Equality Outcomes – Progress Report (2021-2023), SPS itself claims to have regard to and comply with the standards required by a whole host of international human rights materials, including the Nelson Mandela Rules and the Bangkok Rules.

2.17 In 2015 the United Nations adopted "Standard Minimum Rules for the Treatment of Prisoners" known as "the Nelson Mandela Rules". These relevantly provide as follows:

> *Rule 7*
> ...The following information shall be entered in the prisoner file management system upon admission of every prisoner:
> *(a)* Precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender;
> ...
> *Rule 11*
> *Separation of categories*
> The different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their *sex*, age, criminal record, the legal reason for their detention and the necessities of their treatment; thus:
> *(a)* Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate."
> ...
> *Rule 52*
> ...Intrusive searches shall be conducted in private and by trained staff of the same *sex* as the prisoner. [19]
> ...
> *Rule 81*
> 1. In a prison for both men and women, the part of the prison set aside for women shall be under the authority of a responsible woman staff member who shall have the custody of the keys of all that part of the prison.
>
> 2. No male staff member shall enter the part of the prison set aside for women unless accompanied by a woman staff member.
>
> 3. Women prisoners shall be attended and supervised only by women staff members. This does not, however, preclude male staff members, particularly doctors and teachers, from carrying out their professional duties in prisons or parts of prisons set aside for women."

2.18 The Mandela Rules (in terms of Rule 7((a)) take account of the possibility of people claiming the PC of gender reassignment ("his or her self-perceived gender") but, in dealing with the situation of *women* being imprisoned, refer not to any individuals' "self-perceived gender" but to their "sex" as women and imposes restriction on "male staff members"

[18] Articles 25, 28, 97 and 108 of the Geneva Convention relative to the Treatment of Prisoners of War; Articles 76, 85 and 124 of the Geneva Convention for the Protection of Civilian Persons in Time of War; Article 75(5) of the First Additional Protocol to the Geneva Conventions of 12 August 1949; and, Article 5(2)(a) of the Second Protocol to the Geneva Conventions of 12 August 1949.
[19] See for example *Valasinas v. Lithuania* (2001) 12 BHRC 266 in which the Strasbourg Court held that forcing a male prisoner to be strip searched in front of a female prison officer was a relevant factor in finding a breach of the Article 3 ECHR prohibition against inhuman and degrading treatment.

entering "the part of the prison set aside for women unless accompanied by a woman staff member". So, the relevant international instruments in the area of the housing of prisoners make a clear distinction between the prisoners *claiming* a particular "gender identity" and prisoners who are in *fact* "male" or "female". It is their sex (and not their claimed or self-perceived "gender identity") which determines where they are to be placed.

2.19 The central imperative for the separation of women prisoners from men prisoners is recognised in paragraph 9 of the Preliminary Observations on the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). This notes as follows (emphasis added):

> "9... The resolution is an acknowledgement of the fact that violence against women has *specific implications for women's contact with the criminal justice system*, as well as their right to *be free of victimization while imprisoned*. Physical and psychological safety is critical to ensuring human rights and improving outcomes for women offenders, of which the present rules take account."

2.20 The Council of Europe Convention on preventing and combating violence against women and domestic violence ("the Istanbul Convention") recognises in its preamble: (i) that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women; (ii) the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men; (iii) that women and girls are exposed to a higher risk of gender-based violence than men; and, (iv) that domestic violence affects women disproportionately. If and insofar as a rationale and justification needs to be found for the rule that women prisoners are to be accommodated separately from male prisoners, it may be found in the sex-specific brute-fact of male violence against women, which is behind much of women's contact with the criminal justice system, and the recognition that women have a legitimate expectation of being protected, while in custody, against the threat, possibility of fear of further male violence.

3 EQUALITY AND TRANS-IDENTIFYING PERSONS IN PRISON

3.1 In *The Corston Report: a Review of Women with Particular Vulnerabilities in the Criminal Justice System* (Home Office, 2007) its author Baroness Jean Corston noted:

> "Equality does *not* mean treating everyone the same. The new gender [public sector] equality duty means that men and women should be treated with equivalent respect, according to need. Equality must embrace not just fairness but also inclusivity. This will result in different services and policies for men and women."

3.2 Just how many men are accommodated by the SPS in the women prison estate is no longer made public. In its Data Protection Impact Assessment, SPS said:

> "SPS has also committed to publishing data about the transgender population in custody on a quarterly basis on the SPS website. SPS will publish data on the total number of transgender individuals in custody and present these numbers as a percentage of the total prison population *but will no longer publish a breakdown of what estate they are housed in (female or male estate).*"

3.3 The Scottish Ministers' transgender prisoners policy was initially issued in 2014, then reviewed and reissued in 2023 and, following the "Isla Bryson" affair, further reviewed and reissued in February 2024. Each iteration has reflected the Scottish Government's erroneous claim that "transwomen are women". Yet this claim was definitively stated to be wrong in law by the Second Division in 2022.[20] And as the UK Supreme Court confirmed in 2025, the words "sex", "woman" and "man" in sections 11 and 212(1) EA 2010 mean (and were always intended to mean) biological sex, biological woman and biological man. The Supreme Court also held that subsection 9(1) of the Gender Recognition Act 2004 ("GRA 2004") did *not* afford a biological male with a gender recognition certificate ("GRC") the protections afforded to a woman under the EA 2010. [21]

3.4 In Answer 43, the respondents rely on the decision in *R (FDJ) v Justice Secretary* [2021] EWHC 1746 (Admin) [2021] 1 WLR 5265 to claim that detriment to women prisoners "cannot be assumed to be occurring from the *mere fact* that a [male] trans [-identifying] prisoner is being held in a prison for those of the opposite biological sex". But that is *not* what that decision says. In fact Holroyde LJ found that: (i) the proportion of "transgender prisoners" who have been convicted of sexual offences is substantially greater than the corresponding proportions of "non-transgender men and women prisoners" (§ 75); (ii) a substantial proportion of women prisoners have been the victims of sexual assaults and/or domestic violence (§ 76); (iii) some, and perhaps many, women prisoners may suffer fear and acute anxiety if required to share prison accommodation and facilities with a male claiming the PC of gender reassignment, particularly if the male had been convicted of sexual or violent offences against women (§ 76); and, (iv) Article 3, 8 and 14 ECHR were engaged (§ 77).[22]

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[20] See *For Women Scotland Ltd v Lord Advocate (No. 1)* [2022] CSIH 4, 2022 SC 150 ("*FWS 1*")) where the Second Division of the Inner House (the Lord Justice Clerk Lady Dorrian), Lord Malcolm and Lord Pentland) (§40).
[21] *FWS* [2025] UKSC 16 at § 264
[22] See also Swift J concurring in *R (FDJ) v. Justice Secretary* [2021] EWHC 1746 (Admin) [2021] 1 WLR 5265 at § 100.

3.5 The SPS Equality and Human Rights Impact Assessment (EHRIA) for the SPS Policy for the Management of Transgender People in Custody (which bears to have been signed off in December 2023) notes as follows (at page 37):

> "During the evidence gathering for the policy review, non-transgender women in custody, staff who are women, and women's organisations raised concerns about the impact of the policy on women, including concerns that the policy would be open for abuse by predatory men, therefore risking women's physical and psychological safety as well as concerns about access to services for women, women's privacy as well as freedom of speech (covered below under religion and belief).
>
> The small number of transgender individuals in custody in Scotland means that making generalisations about that population from the statistics available is difficult – and making claims about the whole population based on smaller sample sizes can result in claims that are misleading.
>
> SPS does not have evidence from its own population in custody that transgender women pose a risk to non-transgender women, or indeed to other transgender women in custody. Figures from HMPPS, presented in the case *R(FDJ) v Secretary of State for Justice*, do point to a higher proportion of transgender people in custody in England and Wales being convicted from sexual offences (49.5% of the 163 transgender individuals recorded in the prison estate) – although this data came with similar caveats about reliability given the small sample population, the reliability of identifying transgender people based on self-declaration of gender identity, whether the crime happened before or after their transition or whether the individual was in custody for those offences or they were prior convictions, amongst other factors."

3.6 The EHRIA assessment of the 2024 transgender prisoner accommodation policy is fundamentally flawed. Because of the Scottish Ministers' apparent failure to collate the relevant statistics (from information clearly available to them) there is said to be an absence of reliable evidence to substantiate women's clearly expressed concerns about accommodating male prisoners in the women's estate. [23] This absence of evidence created by the Scottish Ministers is then falsely presented by them as evidence of women's expressed fears being unsubstantiated, and therefore unfounded.

4 DOES THE ECHR MAKE A DIFFERENCE TO THE DUTIES OF THE SCOTTISH MINISTERS UNDER THE EA 2010 ?

4.1 In Answer 43 the respondents claim that "failing to place the prisoner in the estate corresponding with their gender identity .... may engage the prisoner's rights under Articles 2, 3, 8 and 14 ECHR". They cite no Strasbourg authority in support of this claim. Such Strasbourg authority as there is, is against them.

4.2 *WW v. Poland* (2025) 80 EHRR 9 involved a male-to-female transgender prisoner who complained about difficulties in accessing hormone therapy while in prison. The

[23] See SPS Equality and Human Rights Impact Assessment (EHRIA) for the SPS Policy for the Management of Transgender People in Custody (December 2023) (at pages 14, 18, 21).

Strasbourg Court noted that the applicant had served several terms of imprisonment in male prisons. It also noted that at the time the application was lodged, the applicant, having been born male, was still recognised under Polish law as being "male"; but that on 2 March 2023 (while still imprisoned) a domestic judgment was pronounced granting the applicant's request for legal gender recognition as "female". The Strasbourg Court did *not* consider it legally significant that a male-to-female transgender prisoner served their whole sentence within the male prison estate. Nothing in either the main judgment or the dissent suggests that anyone on or pleading before the court considered that the fact that a male prisoner with gender dysphoria (and who ultimately obtained legal recognition of am 'acquired gender' as "female") was at all *times* as a prisoner housed within the male prison estate was in any way Convention incompatible.

4.3 It is <u>*not*</u> open to courts in the UK to go further than the Strasbourg Court has in applying their interpretation of the requirements of the ECHR to new factual situations not specifically covered by Strasbourg jurisprudence. The following propositions can be taken from the opinion of Lord Reed, with whom the rest of the Court agreed, in *R (AB) v. Justice Secretary* [2021] UKSC 28 [2022] AC 487 (at §§ 54, 57, 59):

(1) It is not domestic courts' function to undertake a development of the Convention to undertake a development of the Convention law of a substantial nature: § 54.

(2) The intended aim of the HRA 1998 is to enable rights and remedies available in Strasbourg also to be asserted and enforced by domestic courts. That aim is put "particularly at risk" of being undermined if domestic courts take the protection of Convention rights further than they can be "fully confident that the European court would go": § 57.

(3) In situations which have not yet come before the Strasbourg Court, domestic courts should aim to anticipate, where possible, how the Strasbourg Court might be expected to decide the case, on the basis of the principles already firmly established in its case law, even if some *incremental* development may be involved: § 59.

4.4 In the present case it appears that the Prisons Guidance may have been influenced by the terms of the 2023 33rd General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The substantive section of this report addresses the treatment of transgender persons in prisons. In short, the CPT promotes an approach whereby, in principle, "transgender persons should be accommodated in the prison section corresponding to the gender with which they identify", subject to individualised risk assessment. However:

(1) The CPT is neither a legislative nor adjudicative body and the legal authority of its recommendations has been described as "slight". [24]

(2) There is no Strasbourg case law to the effect that the ECHR *requires* the housing of transgender prisoners according to the gender with which they identify.

(3) There is clearly no European consensus supporting the CPT approach.

(4) No reference is made in the CPT report to the international law standards referred to above, nor has any account been taken by the CPT of possible adverse impacts on (and objections by) women prisoners to the housing of male prisoners claiming the PC of gender reassignment alongside them in the women's estate.

(5) The Strasbourg Grand Chamber acknowledged in *Mursic v. Croatia* (2016) 65 EHRR 1 (a passage later quoted with approval by Lord Reed in *R (AB) v. Justice Secretary* [2021] UKSC 28 [2022] AC 487 at §§ 61, 66) that:

   a) Unlike the Strasbourg Court, the function of the CPT is to develop general standards aiming at future prevention of ill-treatment (§ 112).

   b) CPT activity by its very nature, aims at a degree of protection that is greater than that upheld by the Strasbourg Court when deciding cases concerning conditions of detention (§ 113).

4.5 The only authority which the respondents cite in support of their claim that "a trans prisoner can have a Convention right to be held in a prison for those of the opposite biological sex" is *R (B) v Secretary of State for Justice* [2009] HRLR 35. But that decision is no authority for the proposition claimed. It is instead a legally indefensible decision taken by a Deputy High Court Judge finding that it was irrational/Wednesbury unreasonable for the prison authorities *not* to transfer into the women's prison estate a man with physically intact male genitalia but claiming the PC of gender reassignment. This man was serving a life sentence in the male prison estate in HMP Manchester in respect of his convictions: first for manslaughter for killing his (then) same sex male partner; and secondly for his attempted rape of a woman. The legal errors in this decision are legion. It perhaps suffices to note at this stage, that the Deputy High Court Judge wrongly proceeded on the assumption that section 9(1) GRA 2004 applied in the circumstances of the case such that the claimant was to be treated by the prison authorities for all purposes as female. The court ruled that, as a man with a GRC showing his acquired gender to be female, the claimant's treatment was to be compared to a "biological female with the same risk profile as the claimant [who] would be dealt with appropriately in a female prison". The decision

[24] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26 [2007] 1 AC 270 per Lord Bingham at § 23

(much like that of the Employment Tribunal in *Peggie v. NHS Fife* [25]) is perhaps most charitable described as a "hot mess". For the respondents to rely upon it (or the *Peggie* ET decision) in support of their argument shows the weakness (for all the reasons set out above) of their Convention rights case in defence of the lawfulness of the Prisons Guidance.

Thlimmenos discrimination and Article 14 ECHR

4.6 The respondents in their Answer 43(3) claim that

> "it would be a breach of Article 14 ECHR automatically to treat a transwoman in exactly the same way as a non-transgender man (and vice versa) *only because they share the same biological sex.* To automatically hold such persons in segregation in the prison of their biological sex only because they are transgender would be to place them in an intermediate zone of neither one sex nor the other".

4.7 However, no decisions of the Strasbourg Court support an argument that male prisoners claiming the PC of gender reassignment acquire a right to be accommodated within the women's prison estate. And UK law is now clear that: (i) men making claims of gender reassignment do *not* cease to be men; and (ii) neither the PC, nor a GRC in the "female gender" [26], require there to be any physical changes effected in, on or to his male body. [27]

4.8 And again, such Strasbourg case law as there is on *Thlimmenos* discrimination (which, consistently with the common law, [28] deals with the situation in which people in different situations are improperly treated alike [29]) and the treatment of offenders, supports the petitioner's position that men and women prisoners are to be segregated by their sex, and that women offenders and women prisoners have a Convention right to be treated *differently* from male offenders and male prisoners. Thus in *Khamtokhu v. Russia* (2017) 65 EHRR 6 in upholding the Convention compatibility of Russian policy which exempted women from receiving life sentences that men who were convicted of the same or similar offences as women could be subject to, the Grand Chamber (by a 16 to 1 majority) held that this differential group treatment as between men and women offenders was justified by the public interest in protecting women against gender-based violence, abuse and sexual

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[25] Case no: 4104864/2024 *Peggie v. NHS Fife* (Employment Tribunal, 8 December 2025)

[26] *AB v. Gender Recognition Panel* [2024] EWHC 1456 (Fam) [2025] 1 WLR 227 at §61 and *W v Gender Recognition Panel* [2025] EWHC 2685 (Fam) per Hayden J at §§ 72, 75, 93.

[27] See *FWS* [2025] UKSC 16 at §26.

[28] See observations of Lord Reed in *R (SC) v Work and Pensions Secretary* [2021] UKSC 26 [2022] AC 223 at § 146.

[29] See *R (Jwanczuk) v Secretary of State for Work and Pensions* [2025] UKSC 42 [2025] 3 WLR 741 at §§ 30-33 for a recent authoritative account by the UK Supreme Court of *Thlimmenos* discrimination.

harassment in the prison environment, and the need for protection of pregnancy and motherhood.

4.9 Some of the relevant factual differences and the specific vulnerabilities of women in prison (compared to men) are highlighted in the *Equal Treatment Bench Book* - July 2024 (May 2025 update) produced by the Judicial College for the bench in England and Wales, which collates and records the following:

> "106. Women's offending is commonly linked to underlying mental health needs, drug and alcohol problems, coercive relationships, financial difficulties and debt:
> - Seventy-six per cent of women in prison report having mental health issues(compared with 51% of men).
> - Forty-six per cent of female prisoners have reported having attempted suicide at some point in their life, compared with 21% of male prisoners and 6% in the general population.
> - Fifty-three per cent of female prisoners, compared to 27% of male prisoners, report having experienced emotional, physical or sexual abuse as a child.
> - It is estimated that nearly 60% of women who offend have experienced domestic abuse.
> - Approximately 48% of women in prison have committed an offence in order to support someone else's drug habit – more than double the 22% of men who reported the same.
> - Twenty-five per cent of women report having a drug or alcohol problem on entry to prison (compared with 13% of men).
> - Thirty-one per cent of female prisoners have spent time in local authority care.
>
> **The impact of imprisonment on women**
> 107. Custody can exacerbate mental ill health, heighten vulnerability and increase the risk of self-harm and suicide… Although women make up approximately 4% of the prison population, they accounted for 22% of all self-harm incidents in 2020.
>
> 108. In 2021, the number of individuals who self-harmed per 1,000 prisoners was 350 for females and 135 for males. Compared to males, a higher proportion of females reported: self-declared mental health problems, physical disability, having drug and alcohol problems, money worries and housing worries. …[T]he number of incidents in the female estate is smaller than in the male estate, the rate of self-harm per 1,000 prisoners is much higher. In the 12 months to December 2022, there were 39,124 incidents in the male estate compared with 16,140 in the female estate. However, the rate of self-harm was almost ten times higher in the female estate, with 5,035 incidents per 1,000 female prisoners and 507 incidents per 1,000 male prisoners.
>
> 109. The impact of imprisonment on women, *more than half of whom have themselves been victims of serious crime*, is especially damaging and their outcomes are often worse than men's."

4.10 The *Equal Treatment Bench Book Scotland* (October 2025) notes (at page 147) that "the criminal justice system has adapted to the fact that most persons entering it are male. It is likely that women have dissimilar needs from men and distinct challenges".

4.11 Thus, the combination of the Article 14 ECHR status of "sex" and other status of "being imprisoned" require that prison accommodation provided to women as a group be separated from, and free of, incarcerated men, regardless of whether or not those men claim the PC of gender reassignment, because any such claim does not lessen the vulnerabilities before, and compared to, men which imprisoned women have as a group. There is an obvious objective and reasonable justification for not making an exception for men who claim the PC of gender reassignment from the ordinary rules in relation to single sex prison accommodation by treating them as women and therefore accommodating them in the women's estate. A policy which allows for such men to be placed within the women's prison estate is not "necessary for compatibility with the Convention rights of a transgender person in a prison". It may therefore be said that such a policy engages (and, in its implementation, breaches) the Convention rights (under Articles 3, 8 and/or 14 ECHR) of the incarcerated women among whom these men are placed. That the ECHR requires, in certain circumstances, services or other functions to be provided on a single or separate sex group basis is precisely why Parliament made such detailed and specific provision in this area in the EA 2010, rather than leave public authorities (including the courts) to carry out a balance on a case-by-case basis of individual's supposedly competing Convention rights/protected characteristic in any particular situation.

4.12 Certainly any court action which might be taken by a male prisoner (whether or not claiming the PC of gender reassignment) alleging that his exclusion from the women's prison estate constituted unlawful sex discrimination would fail. The separation of the sexes as regards the provision of prison accommodation to the incarcerated falls within the exceptions to the prohibition against sex discrimination set out in paragraphs 26 and 27 in Part 7 of Schedule 3 EA 2010 and paragraph 3 of Schedule 23 EA 2010 (even putting aside the mandatory provision of rule 126 of the 2011 Rules). And any action by the same male prisoner alleging unlawful *gender reassignment* discrimination would also fail. The paragraph 28 proportionality defence in Part 7 of Schedule 3 EA 2010 would <u>*not*</u> be applicable in his case. It would only come into play in the case of a woman claiming the PC of gender reassignment (i.e. a trans-identifying woman) who was being excluded from the women's prison estate where she would otherwise expect to be accommodated on the basis of her sex.[30] Rather, the same male would be bound to fail because non-trans identifying men (who do not claim the PC of gender reassignment) would equally be excluded from being accommodated within the women's estate: *Haynes v Thomson* [2025] EWCC 50.

[30] *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SC (UKSC) 1 at §§ 219-221.

5 THE SCOTLAND ACT 1998 ("SA 1998"), THE HUMAN RIGHTS ACT 1998 ("HRA 1998") AND THE EQUALITY ACT 2010 ("EA 2010")

5.1 There is, in any event, a major problem for the Scottish Ministers in advancing the defence they do. The Scottish Ministers had and have no power to make the Prisons Guidance. It is therefore *ultra vires* and accordingly to be treated as a nullity: *Cherry v. Advocate General for Scotland* [2019] UKSC 41.[31]

5.2 Paragraph L2 of Schedule 5 of the SA 1998 lists "Equal opportunities" as a reserved matter, defined as "the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions." The Scottish Ministers' powers are limited under the exception listed in paragraph L2 to the *encouragement* (but *not* the prohibition or regulation) of equal opportunities and, in particular, to the encouragement of observance of the "requirements of the law for the time being relating to equal opportunities"; i.e. the requirements of the Equality Act 2010 being, in the words of the Second Division in *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150 at § 28 the "manifestation of how equal opportunities law is applied in Great Britain".

5.3 The Prisons Guidance is a policy: (i) which *avowedly* relates to the prevention, elimination or regulation of discrimination between persons on grounds of the PC of gender reassignment (and so falls within the equal opportunities reservation) but (ii) which is incompatible and irreconcilable with the observance of the "requirements of the law for the time being relating to equal opportunities" (i.e. the EA 2010). The Scottish Ministers' promulgation and maintenance of the Prisons Guidance is therefore *ultra vires* in terms of Section 54(3) SA 1998.

No valid HRA 1998 basis for the impugned 2024 policy

5.4 Faced with that difficulty, the Scottish Ministers put forward new legal arguments under the HRA 1998. They argue that a failure to promulgate and act on the Prisons Guidance concerning prisoners claiming the PC of gender reassignment would result in a contravention of those prisoners' rights under Article 8 ECHR because they would

[31] *Cherry v. Advocate General for Scotland/Miller v. Prime Minister* [2019] UKSC 41, 2020 SC (UKSC) 1 at paras 69-70.

unjustifiably be prevented, or at least impeded, from living in their 'chosen/affirmed' gender by not being accommodated in the prison estate set aside for persons of the opposite sex. On this argument, such failure would open up the Scottish Ministers to court actions by, for example, male prisoners claiming the PC of gender reassignment. The anticipated argument from these men would be that, if they were *not* accommodated in the *women's* prison estate, this would unjustifiably prevent (or at least impede) them from living in their 'chosen/affirmed' gender. They therefore have a *positive* Convention right to be accommodated in the women's prison estate. Since this would be a *positive* Convention right, their remedies would not be limited to a declaration of past or continued breach and/or just satisfaction damages. Instead, the court could be asked (and, perhaps, on the Scottish Ministers' analysis, obliged, as a public authority under section 6 HRA) to make an order *ad factum praestandum* requiring these male prisoners' reassignment to the women's prison estate.[32]

5.5 But there is of course an immediate logical flaw in this invented argument of the Scottish Ministers. It is perfectly possible for the Scottish Minsters to make arrangements for male prisoners claiming the PC of gender reassignment to live in their 'chosen/affirmed gender' without transferring them into the women's estate (and vice versa). For example, a particular part of the prison estate could – wholly consistently with the 2011 Rules and the EA 2010 - be set aside for the accommodation of only those trans-identifying prisoners who wish to live in their 'chosen/affirmed' gender, without impinging on the women's estate, and remaining separate from the men's estate. That provision of "transgender exclusive accommodation" is a possible option[33] has, been accepted by SPS, who have noted that "transgender people encounter specific challenges and have specific vulnerabilities and needs, distinct from other populations." [34]

5.6 In sum, *esto* (which is denied) male prisoners claiming the PC of gender reassignment have a right to live in their 'chosen/affirmed' gender while lawfully incarcerated, respect for this right does not give rise to any <u>power</u> for the respondents to purport to allocate them to the women's prison estate. Scottish Minsters are not statutorily required – in breach of rule 126 - to arrange for the accommodation of trans-identifying prisoners in the prison estate which has been set aside for persons of their opposite sex. In the absence of such a statutory

[32] *Davidson v. Scottish Ministers* [2005] UKHL 74, 2006 SC (HL) 41.

[33] See e.g. *Croft v Royal Mail Group* [2003] EWCA Civ 1045 [2003] ICR 1425 where the lawfulness of a policy of an employer that an individual with the PC of gender re-assignment should have access to a toilet designated for disabled persons was upheld at all stages of the litigation.

[34] See SPS Policy Review of the Gender Identity and Gender Reassignment (GIGR) (2014) Policy: Evidence Paper at pages 36, 37.

requirement, the Scottish Ministers cannot pray in aid paragraph 1 of Schedule 22 EA 2010[35] as a means of circumventing their duties under Section 29(6) EA 2010.

5.7 In any event nothing in the HRA 1998 or any other statute empowers the Scottish Ministers - gives them the *vires* - to act beyond the limitations on their power imposed by Section 54(3) and paragraph L2 of Schedule 5 EA 2010.

6 A DECLARATION OF INCOMPATIBILITY OF THE EA 2010 AND/OR THE SA 1998 ?

6.1 In final desperation it seems - or maybe in a canny political move to draw in the UK Government to this case and try to publicly implicate them in their arguments - the Scottish Ministers suggest that this Court should make a declaration of incompatibility in respect of those provisions of the EA 2010 (as interpreted by the UK Supreme Court) which would prevent the Scottish Ministers from maintaining the Prisons Guidance.

6.2 The first difficulty with the idea that a prisoner accommodation policy which is clearly lawful under the EA 2010, could nonetheless be found to be unlawful under the HRA 1998 is that Parliament did <u>not</u> intend to allow a "two-bites of the cherry" approach. There is undoubtedly an overlap between the PCs listed in section 4 EA 2010, and the characteristics which the Strasbourg Court has found to fall within the ambit of Article 14 ECHR, as well as Article 9 ECHR, Article 12 ECHR and Article 2 of Protocol 1 ECHR.

6.3 When passing the EA 2010, Parliament was well aware of this overlap between the two statutes in terms of the characteristics protected under them. Parliament carefully crafted (particularly in various Schedules to the EA 2010) detailed provision to ensure competing rights were statutorily balanced, thereby ensuring that the EA 2010 and the HRA 1998 operated in harmony. [36] Parliament intended to produce a Convention compatible overall system of equality law, which ensured the outcomes produced by application of the EA 2010 were Convention compatible.[37] Parliament succeeded in that endeavour.

6.4 Where there is overlap between the protections afforded under the EA 2010 and protections afforded under HRA 1998, the EA 2010 is to be regarded as constituting Parliament's authoritative expression in respect of matters which, to use the terminology

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[35] See e.g. *Hampson v Department of Education and Science* [1990] ICR 511, UKHL per Lord Lowry, at p 518C-D and the discussion in *Ahmed v. Amnesty International* [2009] ICR 1450, EAT at §§ 44-45.

[36] See for example *Preddy v Bull* [2013] UKSC 73; [2013] 1 WLR 3741.

[37] See for example *R (Cornerstone Ltd) v Ofsted* [2021] EWCA Civ 1390 [2022] PTSR 595 per Peter Jackson LJ at § 152.

of the Strasbourg Court, [38] fall within the margin of appreciation available to the United Kingdom. [39] It is not constitutionally open to the courts to conclude that the application of the HRA 1998 requires a different result from that which Parliament intended be reached in any particular case by the proper application of the norms and provisions set out in the EA 2010. [40]

6.5 Thus in in *R (Elan-Cane) v Home Secretary* [2021] UKSC 56 Lord Reed *denied* that it was

> "open to domestic courts to modify unambiguous legislation under section 3(1) so as to bring about a result which departs from Parliament's intention in enacting that legislation, where they consider that Parliament's approach fails to comply with Convention rights, even though the European court would itself accept that Parliament's assessment was legitimate. That would constitute a significant encroachment on the principle of Parliamentary sovereignty: a principle which, it has long been recognised, the Human Rights Act is careful to protect (see, for example, *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 367, and *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, § 120).
> ...
> [P]ermitting judges to override the intention of Parliament on the basis of their individual assessments of the requirements of the Convention rights, notwithstanding Parliament's compliance with the requirements imposed by the Convention under international law ... would represent a substantial expansion of the constitutional powers of the judiciary, at the expense of Parliament." [41]

6.6 The PC of "sex" and the PC of "gender reassignment" are not in any event comparable conditions. "Sex" is universal. And it is, and is only, binary. Everyone is either male or female, man or woman. In making this classification of an individual's sex the law relies on objective standards found in biology. These biological facts are immutable and permanent. The law's classification of an individual's sex based on them is similarly immutable and permanent. [42]

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[38] See for example the non-admissibility decision by the European Court of Human Rights in *LF v. United Kingdom* (2022) 75 EHRR SE5 at §§ 38-40.

[39] *R (Elan-Cane) v Home Secretary* [2021] UKSC 56 [2023] AC 559 per Lord Reed at § 85:

> "When the European court finds that the contracting states should be permitted a margin of appreciation, it does not cede the function of interpreting the Convention to the contracting states, or enable their domestic courts to divide that function between their domestic institutions. Contracting states can of course create rights going beyond those protected by the Convention, but that power exists independently of the Convention and the Human Rights Act, is not dependent on the margin of appreciation doctrine, and is exercisable in accordance with long-established constitutional principles, under which law-making is generally the function of the legislature."

[40] *R (Interim Executive Board of Al-Hijrah School) v HM Chief Inspector of Education, Children's Services and Skills* [2017] EWCA Civ 1426; [2018] 1 WLR 1471.

[41] *R (Elan-Cane) v Home Secretary* [2021] UKSC 56 per Lord Reed at § 90.

[42] *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SC (UKSC) 1, § 171, 173 and 179.

6.7 By contrast, the PC of "gender reassignment" is *not* universal. Instead, the claim that they have the PC of "gender reassignment" is made from time to time by *some* individuals. Neither is the claim immutable or permanent. The basis for making such a claim is wholly subjective. It may be claimed regardless of whether the individual has obtained a gender recognition certificate under the GRA 2004 (which has, as one pre-requisite, their prior diagnosis with the medical condition of gender dysphoria or gender incongruence [43]). It is neither objectively verifiable; nor, as a consequence, objectively falsifiable. [44]

6.8 And although there may not be any automatic or fixed hierarchy among the various PCs and/or Convention rights [45] in situations where these conflict, precedence has to be given among them. [46] Context is everything. [47] Incarcerated women are a particularly vulnerable group defined by their "sex". Imprisonment magnifies their vulnerabilities and compromises their dignity as women. Men in prison – regardless of whether or not they

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[43] cf *Re JR111's Application for Judicial Review* [2021] NIQB 48 per Scoffield J at para 157.

[44] See *R (Elan-Cane) v Home Secretary* [2021] UKSC 56 [2022] 2 WLR 133 per Lord Reed at § 3:
> "The term 'gender' is used in this context to describe an individual's feelings or choice of sexual identity, in distinction to the concept of 'sex', associated with the idea of biological differences which are generally binary and immutable."

[45] *R (Cornerstone Ltd) v Ofsted* [2021] EWCA Civ 1390 [2022] PTSR 595 per Peter Jackson LJ at § 125, 128, 129:
> 125. .. While there is no *automatic* hierarchy under the HRA 1998 as between qualified Convention rights, the ECtHR has repeatedly emphasised the need for "particularly weighty" reasons to justify differential treatment on the ground of sexual orientation or other "suspect" grounds of discrimination. These encompass birth out of wedlock, sex, sexual orientation, race and ethnic origin, and nationality; it is as yet unclear whether the ECtHR considers religion to be included in this category. ... 128. .. [T]he present case must be decided within the framework of our equalities and human rights legislation, which does *not* give the same prominence to the rights of religious organisations. ... 129. .. *Enhanced* protection on the ground of sexual orientation exists to counteract *historic injustice* towards homosexuals, the causes of which include religious beliefs."

[46] *R. (on the application of Johns) v Derby City Council* [2011] EWHC 375 (Admin); [2011] H.R.L.R. 20 per Munby LJ at para 93:
> "While as between the protected rights concerning religion and sexual orientation there is no hierarchy of rights, *there may, as this case shows, be a tension between equality provisions concerning religious discrimination and those concerning sexual orientation*. Where this is so, Standard 7 of the National Minimum Standards for Fostering and the Statutory Guidance indicate that it must be taken into account and in this limited sense *the equality provisions concerning sexual orientation should take precedence*."

[47] See e.g. *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47 [2005] 1 AC 593 per Lord Steyn at para 17:
> "Neither Article [8 nor Article 10 ECHR] has *as such* precedence over the other. Secondly, where the values under the two ECHR Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

would claim the protected characteristic of gender reassignment – represent and clear and present danger to women. [48]

6.9 Further, as the UK Supreme Court repeated in *FWS* [2025] UKSC 16 at §§ 175 and 195) **"**The concept of sex is of foundational importance in the EA 2010." It is for this reason, among others, that the UK Supreme Court held in *FWS* [2025] UKSC 16 that Section 9(3) of the Gender Recognition Act 2004 was to be understood indicates Parliament's intention to the effect that claims of gender reassignment (even when supported by GRCs) must not yield to the realities of sex-based protections, where these sex-based protections for women would otherwise be rendered unworkable in practice. That is the choice which the UK Supreme Court has held that Parliament has made as regards the relative balance to be afforded to these different PCs in the event of their inevitable conflict, within the context of the incarceration of men and women. It is a choice which Parliament was entitled to make having regard to the margin of appreciation afforded to the United Kingdom in this context. That margin of appreciation is of particular importance where, as here, positive obligations are asserted to be owed by domestic authorities, in respect of which caution requires to be exercised before they are imposed.[49] Parliament's careful and measured choice cannot lawfully or constitutionally be gainsaid by courts (or the respondents) by purporting to elevate claims of trans-identifying men in prison to parity with or superiority over the requirements of the protection of incarcerated women's safety and dignity in prison.

6.10 For at least these reasons, claims as to the Convention incompatibility of otherwise EA 2010 mandated results can only be brought before the Strasbourg Court.[50] It would be for Parliament – and not for the domestic courts – to determine whether [51] and, if so, how to remedy any identified incompatibility with the requirements of the ECHR. But it is clear that the Strasbourg Court pays great respect and deference to the judgments of the UK Supreme Court and will not (readily, if ever) seek to impugn either its reasoning or its

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[48] A Swedish study statistical study from 2011 indicated that (1) trans identifying males were between 18 to 20 times more likely to commit violent crimes than women; and (2) gender reassignment of men did not result in any change in the propensity of men generally to commit violent offences. See Cecilia Dhejne and others "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden" (2011) 6 PLoS ONE https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885

[49] *R (Elan-Cane) v Home Secretary* [2021] UKSC 56 per Lord Reed at § 90.

[50] See for example *Islington London Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] PTSR 982 and *Eweida v United Kingdom* (Application Nos 48420/10, 59842/10, 51671/10, 36516/10) (2013) 57 EHRR 8, ECtHR.

[51] See *Hirst v. United Kingdom* (2006) 42 EHRR 41 on prisoners' voting rights.

conclusions as Convention incompatible. [52] For example in *LF v. United Kingdom* (2022) 75 EHRR SE5 (the follow on application from the decision in *R (Z) v Hackney London Borough Council* [2020] UKSC 40 [2020] PTSR 1830), the Strasbourg Court endorsed and affirmed the Convention compatibility of the Supreme Court's analysis, particularly as regards proportionality and the role of the courts when faced with a provision which represented "a deliberate choice by Parliament which constituted a fundamental feature of the legislation" (see, in particular, § 49).

6.11 In sum, this court should reject the Scottish Ministers' claim that the decision of in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SC (UKSC) 1 means that the single-sex/separate sex provisions contained in, in particular paragraphs 26, 27 and 28 in Part 7 of Schedule 3 and paragraph 3 of Schedule 23 to the EA 2010 are to be subject to a Section 4 HRA 1998 declaration of Convention incompatibility.

6.12 Presumably (but not as yet stated) the Scottish Minsters might also seek a declaration of incompatibility in respect of the limitation on their vires imposed under the SA 1998 which stops the Scottish Minsters from maintaining this policy in place. However, ensuring the Convention compatibility of the action of public bodies does not entail an obligation on national authorities to re-write their constitution. So, any such claim, should it be made, should also be rejected outright as wholly unstateable.

6.13 Finally, a declaration of incompatibility ought only to be granted if a rule is found to gives rise to an unjustified interference with Convention rights in all or almost all cases in which it applies: *re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 [2023] AC 505 per Lord Reed at § 19. None of the provisions identified by the Scottish Ministers come anywhere near to meeting that threshold. It would be clearly inappropriate to grant a declaration of incompatibility in these proceedings.

7. THE GUIDANCE

7.1 The Prisons Guidance is the "operational direction for [SPS] staff when managing and making decisions about someone who has transitioned, or is in the process of transitioning, to a gender which is different from that associated with their sex assigned at birth".[53] It says that it seeks to "ensure that SPS is fulfilling its obligations under the Equality Act 2010, including the Public Service Equality Duty, as well as obligations under

[52] See *Lee v. Ashers Baking Co. Ltd.* [2018] UKSC 49 [2020] AC 413 per Baroness Hale at para 56 and the Strasbourg non-admissibility decision on the follow on to this decision in *Lee v. United Kingdom* [2022] ECtHR 18806/19 (6 January 2022) [2022] IRLR 371, ECtHR
[53] SPS Transgender Prisoners Guidance, page 6.

the Human Rights Act 1998 and that our practice is in line with a human rights-based approach and our broader approaches to the management and social rehabilitation of all individuals in custody".[54]

7.2 However, for the reasons set out in this Note, and in the petition, the Prisons Guidance is unlawful. SPS staff who follow the "operational direction" given to them (i.e. the Prisons Guidance) will contravene the law. The Prisons Guidance positively authorises or approves unlawful conduct. It undermines the rule of law in a direct and unjustified way. It requires to be reduced.

8. CONCLUSION

8.1 Despite the respondents' best efforts to confuse matters with ever more Byzantine arguments and baseless assertions, this is in fact a very simple and straightforward case which admits only of one answer.

8.2 The Scottish Ministers are obliged by rule 126 of the 2011 Rules to provide women-only accommodation in a women-only prison estate. The decision of the UK Supreme Court in *FWS* [2025] UKSC 16 makes it clear that such a women-only service can only be provided by excluding all male prisoners from it, regardless of whether these men do, or do not, claim the PC of gender reassignment and regardless of whether these men do, or do not, hold a GRC. The 2024 policy of the Scottish Ministers regarding the accommodation of transgender prisoners within the prison estate, the Prisons Guidance, is incompatible and irreconcilable with the Scottish Ministers' obligation to provide women-only accommodation within a prison estate. It induces illegality amongst those to whom it is addressed. The Prisons Guidance therefore falls to be reduced by this court.

Aidan O'Neill KC **Tony Convery, Advocate**

[54] SPS Equality and Human Rights Impact Assessment (EHRIA) for the SPS Policy for the Management of Transgender People in Custody which bears to have been signed off in December 2023, at page 5

UNTO THE RIGHT HONOURABLE THE LORDS OF COUNCIL AND SESSION

NOTE OF ARGUMENT FOR THE PETITIONER

in the petition of

FOR WOMEN SCOTLAND, a company incorporated under the Companies Acts, and having its registered office at 5 South Charlotte Street, Edinburgh, Scotland, EH2 4AN

PETITIONER

for Judicial Review of the Scottish Prison Service Policy for the Management of Transgender People in Custody Operational Guidance

SM/FOR550/4

2025

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