UNTO THE RIGHT HONOURABLE THE LORDS OF COUNCIL AND SESSION

FORM OF JUDICIAL REVIEW
(incorporating adjustments to Summons to 24 September 2025
and further adjustments to 12 December 2025)

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 (i) SPS Policy for the Management of Transgender People in Custody Operational Guidance

HUMBLY SHEWETH:

Parties, procedure, jurisdiction and warrant to intimate

1. The petitioner is For Women Scotland. It is a company incorporated under the Companies Acts. It is registered in Scotland under Company Number SC669393. Its registered office is at 5 South Charlotte Street, Edinburgh, Scotland, EH2 4AN.

2. The first respondents are the Scottish Ministers, domiciled at Victoria Quay, Edinburgh, EH6 6QQ. The Prisons Guidance was published by the Scottish Prison Service ("**SPS**"), who are an Executive Agency of the Scottish Ministers and have no legal personality separate from the first respondents. The first respondents are domiciled in Scotland. The first and second respondents' averments in answer are not known and not admitted. *Quoad ultra* denied.

3. The second and third respondents are the relevant authorities in terms of Chapter 25A of the Rules of the Court of Session, in the case of proceedings raising a devolution issue within the meaning of Schedule 6 to the Scotland Act 1998 ("SA **1998**"). They are accordingly called for such interest as they may have. The first and second respondents' averments in answer are believed to be true. *Quoad ultra* denied.

4. There are no proceedings pending before any other court or courts involving the present cause of action and between the parties hereto. There is no agreement prorogating jurisdiction over the subject matter of the present cause to any other court. This court accordingly has jurisdiction to determine this petition. The first and second respondents' averments in answer are denied.

5. The date on which the grounds giving rise to the petition was formally the date on which the guidance was first issued. In a decision dated 18 February 2022 in *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4, 2022 SC 150 ("*FWS 1*"), the Second Division of the Inner House - comprising the Lord Justice Clerk (Lady Dorrian), Lord Malcolm and Lord Pentland - held a natal man who, without any further legal formality, simply declared themselves to be a woman did <u>not</u> result in any change into a "woman", at least for the purposes of the EA 2010. So the claim/slogan that, regardless of whether they had a gender recognition certificate "transwomen are women" was authoritatively stated clearly and unequivocally by a court always to have been wrong from at least that date. In a decision handed down on 16 April 2025 in in *For Women Scotland Ltd v. Scottish Ministers (No.2)* [2025] UKSC 16, 2025 SC (UKSC) 1, [2025] ICR 899 the UKSC confirmed that the Second Division in *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4, 2022 SC 150 had analysed the EA 2010 provisions correctly, but that the Second Division had, in *For Women Scotland Ltd. v. Scottish Ministers (No. 2)* [2023] CSIH 37, 2024 SC 117, got things wrong in holding that its analysis of how the EA 2010 provisions on "sex" worked was modified by Section 9 of the Gender Recognition Act 2004 to mean that people who obtained a "gender recognition certificate" under the 2004 Act thereby changed their "sex" under the Equality Act 2010 ("**2010 Act**"). Instead the UK Supreme Court confirmed that it made no difference to this analysis of "sex" in the 2010 Act that the individuals claiming the protected characteristic of "gender reassignment" held a gender recognition certificate under the Gender Recognition Act 2004. Notwithstanding the decision of the Second Division of 18 February 2022 and of the UK Supreme Court of 16

April 2025 the first respondents have maintained and adhered to the guidance documents and (wrongly) continue to insist that they accurately state the law as it stands. In the foregoing circumstances the petitioner seeks: (i) declarator that the Prisons Guidance is unlawful in terms of the Equality Act 2010 *et separatim* the Scotland Act 1998; (ii) reduction of the Prisons Guidance; and, (iiii) suspension of the Prisons Guidance *ad interim.* The petitioner craves the court to pronounce such further orders (including an order for expenses) as may seem to the court to be just and reasonable in all the circumstances of the case. With reference to the first and second respondents' averments in answer, admitted that the court has ordered that the action proceed as judicial review. Admitted that in terms of RCS 58.15, the Court is taken to have been satisfied that it should proceed in that way i.e. as an application to the supervisory jurisdiction. Admitted that no point is taken by the first and second respondents in respect of the proceedings as they were first raised. Believed to be true that the first and second respondents proceed on the basis that no issue is considered by the Court to arise in terms of section 27A of the Court of Session Act. *Quoad ultra* denied except insofar as coinciding herewith.

6. The petitioner has sent a copy of the summons to the Children and Young People's Commissioner for Scotland by letter dated 19 September 2025, in order that the she may satisfy herself on that point. With reference to the first and second respondents' averments in answer, admitted that those respondents no longer raise any question about the potential involvement of the Children and Young People's Commissioner in Scotland in these proceedings given the informal intimation to her. *Quoad ultra* denied except insofar as coinciding herewith.

Standing

7. The petitioner is the incorporated form of the previously unincorporated democratic grassroots feminist voluntary association, For Women Scotland, which is a group made up of ordinary women from all over Scotland who came together in June 2018 with the aim of giving ordinary women in Scotland a stronger political voice and to campaign and press for the strengthening of women's rights and children's rights in Scotland. The objects of the petitioner are to: (1) campaign on equality and human rights issues impacting on women and children in Scotland, (2) work closely with central, devolved and local governments across the UK and with each of the main political parties in the UK to

promote the interests and rights of women in Scotland, (3) participate in cultural and education activities and seek to raise awareness of cultural, health, social and socio-economic issues specifically associated with ordinary women in Scotland and, (4) seek, among other things, to promote the welfare of ordinary women in Scotland in terms of their visibility and recognition and access to health and social services, as well as their greater participation in civil society in Scotland.

8. The petitioner's standing to raise court actions concerning these issues has repeatedly been accepted and recognised: in the Outer House (in *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSOH 31, 2021 SLT 639 and in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61); in the Inner House (*For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150 and *For Women Scotland v. Scottish Ministers (No. 2)* [2023] CSIH 37, 2024 SC 117); and in the UK Supreme Court (in its judgment of 16 April 2025 in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899). There is no difference in the test of standing between ordinary actions and petitions for judicial reviews where a public law remedy is sought: *Keatings v Advocate General for Scotland* [2021] CSIH 25, 2021 SC 329, paragraph 53. The first and second respondents' averments in answer are denied.

9. The petitioner is a responsible independent public interest organisation. It plays a crucial role in civil society in Scotland in its campaigning for the recognition and protection and the strengthening of the rights of women and children in Scotland. The present petition concerns: the Prisons Guidance, which induces illegality to the detriment of women. The present action seeks orders of declarator and related orders in relation to the Prisons Guidance.

10. The petitioner has sufficient interest in the context of the present case to give it standing to raise the present petition: cf *AXA General Insurance Co v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 per Lord Reed at paragraph 170. To hold otherwise might impede or disable the Court from performing its constitutional function of "the preservation of the rule of law, which extends beyond the protection of individuals' legal rights": *Wightman v. Secretary of State for Exiting the European Union* [2018] CSIH 62, 2019 SC 111 per Lord President (Carloway) at para 24. But the rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to

challenge it: *Walton v Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67 per Lord Reed at para 94.

Devolution context

11. Any provision of an Act of the Scottish Parliament is outside the legislative competence of the Scottish Parliament if it relates to reserved matters: SA 1998, section 29(2)(b). The first respondents' devolved competence is circumscribed by reference to the legislative competence of the Scottish Parliament: SA 1998, section 54. It is outside devolved competence for the first respondents to exercise a function (or exercise it in any way) so far as a provision of an Act of the Scottish Parliament conferring the function (or conferring it so as to be exercisable in that way) would be outside the legislative competence of the Parliament: SA 1998, section 54(3).

12. Paragraph L2 of Schedule 5 to the SA 1998 specifies as among the matters which are reserved to the United Kingdom Parliament "Equal opportunities". This is further 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.". What is allowed to fall within the devolved competence of the Scottish Ministers is "the encouragement (*other than by prohibition or regulation*) of equal opportunities", and in particular "the encouragement of the observance of the equal opportunity requirements" which is to say "the requirements of the law for the time being relating to equal opportunities".

13. The requirements of the law for the time being relating to equal opportunities are almost entirely now contained in the 2010 Act. The 2010 Act reformed and harmonised the pre-existing equality law which then applied in Scotland, England and Wales, and restated the greater part of the enactments relating to discrimination and harassment related to protected characteristics of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. The first and second respondents' averments in answer are denied. The Human Rights Act ("**HRA 1998**") and section 57(2) of the SA 1998 are referred to for their terms. Explained and averred that the 2010 Act is compatible with the Convention Rights, within the meaning of the HRA 1998 and SA 1998. "Equal opportunities" is a reserved matter,

save within the very limited scope of the exceptions to the reservation in the SA 1998. The 2010 Act is the manifestation of how equal opportunities law is applied in England, Wales and Scotland: *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150, paragraph 28. Neither the HRA nor section 57(2) of the SA 1998 themselves form part of the law relating to equal opportunities. Where there is overlap between the protections afforded under the 2010 Act and those under HRA 1998, the 2010 Act is to be regarded by the courts as constituting the authoritative expression of what Parliament in the exercise of its sovereign authority has determined are matters which fall within the United Kingdom's margin of appreciation.

14. The "Prisons Guidance" issued by the Scottish Ministers will be lawful only if and insofar as they may be said properly to be in exercise of the Scottish Ministers' power to encourage, other than by prohibition or regulation, the observance of the requirements of the law for the time being relating to equal opportunities. If and insofar as the "Prisons Guidance" - or any part thereof - misstates the requirements of the law for the time being relating to equal opportunities, then it will be null, void and of no effect since it has been produced outside the powers of the Scottish Ministers: cf *Docherty v. Scottish Ministers* [2011] CSIH 58, 2012 SC 150 at para 21-22. They may therefore be best compared to blank sheets of paper: *Miller v Prime Minister/Cherry v Advocate General for Scotland* [2019] UKSC 41, 2020 SC (UKSC) 1 at para 69. The first and second respondents' averments in answer are denied.

15. In the interests of legal certainty it is necessary that, insofar as incompatible with the requirements of the 2010 Act, the Prisons Guidance is formally reduced (whether in whole or in part) by the court (*R (Majera) v. Home Secretary* [2021] UKSC 46, 2022 AC 461). That is particularly so standing the Scottish Ministers' refusal to withdraw, and/or their unjustifiable delay in withdrawing, the Prisons Guidance specifically in the light of the judgment of 18 February 2022 of the Second Division in *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150, an analysis confirmed (and extended to cover those holding gender recognition certificates under the Gender Recognition Act 2004) in the judgment of 16 April 2025 of the UK Supreme Court in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899. With reference to the first and second respondents' averments in answer, admitted that FWS1 was a legislative competence challenge brought against the Gender Representation on Public

Boards (Scotland) Act 2018. Admitted that the guidance at issue in that case was amended. Admitted that the UK Supreme Court judgment is authoritative and binding and final on each of the respondents as to the proper interpretation of the meaning of the terms "man", "woman" and "sex" as used in the 2010 Act. Paragraphs 248 - 263 of the judgment of the UK Supreme Court in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899 are referred to for their terms, under explanation that nothing in the said paragraphs - nor anything else in the UKSC judgment - offers any justification for the legal errors which are contained within the the Prisons Guidance and which are highlighted in the present petition. Admitted that the Schools Guidance dated August 2021 has been withdrawn. Admitted that is has been superseded by guidance published by the first respondents on 29 September 2025. The guidance of that date is referred to for its terms beyond which no admission is made. Admitted that the petitioner's solicitors were informed of the issuing of the revised guidance that same day, under explanation that they were only notified after the revised guidance was published online. Without prejudice to the petitioner's position anent the lawfulness of the guidance of 29 September 2025, no orders are sought in relation to that document in this petition. Believed to be true that the first respondents publicly announced that a working group is undertaking work to review every area of the Scottish Government that is or may be affected by that judgment of the UK Supreme Court, but the relevance of that to the matters raised in the present petition is denied. Believed to be true that that work was ongoing at the commencement of these proceedings. Believed to be true that it included the Schools Guidance that was the subject of these proceedings dated August 2021, a copy of which is 6/1 of Process. Believed to be true that the guidance of 29 September 2025 was made available on that date by way of a letter emailed to all education authorities (via their Directors of Education) and managers of independent and grant-aided schools, which was copied to all local authority Chief Executives. The first and second respondents are called upon to explain why no working group was ever set up by either of them to undertake work to review <u>*any*</u> area of the Scottish Government that was affected by the judgment of the Second Division in *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150. Their failure to answer this call will be founded upon. *Quoad ultra* denied except insofar as coinciding herewith. Explained and averred that the Prisons Guidance has never been restricted to deal only with those who had obtained a gender recognition certificate under and in terms of the Gender Recognition Act 2004, which

was the issue which the UK Supreme Court in fact ruled upon in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899. Yet the Prisons Guidance was not framed to reflect the law as correctly set out in the judgment of 18 February 2022 of the Second Division in *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150. Instead, the Prisons Guidance has been published and continued publicly to be adhered to and maintained in force by the Scottish Ministers unamended to date. The Prisons Guidance therefore continues to induce illegality, including by the first respondents (and SPS) on their own averments continuing "to exercise the discretion provided in section 10 of the Prisons (Scotland) Act 1989 in accordance with the Prisons Guidance". This illegality/unlawful action (based on their and others' reliance upon the Prisons Guidance) has been known to the Lord Advocate and the Scottish Minsters since, at the very latest, 18 February 2022, when the judgment of the Second Division in *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150 was handed down. This judgment made it clear that, as a matter of law, the definition of "woman" or "girl" in the 2010 Act did <u>not</u> extend to men with the protected characteristic of gender reassignment who chose to self-identify as women; and vice-versa. Neither the Lord Advocate nor the Scottish Ministers made any attempt to appeal against this first judgment of the Second Division to the UK Supreme Court. No application for permission to appeal to the UK Supreme Court against this first judgment of the Second Division was ever marked by or on behalf of the Scottish Ministers or the Lord Advocate. This first decision of the Second Division has therefore for more than three and a half years prior to the raising of this petition been authoritative and binding and final on the first and second respondent on questions relating to the interpretation and application of the 2010 Act. The subsequent judgment of the UK Supreme Court in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899 (which was taken on appeal by the petitioner against the later second decision of the Second Division in *For Women Scotland Ltd. v. Scottish Ministers (No. 2)* [2023] CSIH 37, 2024 SC 117) was predicated on the fact that the analysis of the Second Division in *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150 on this point was correct and sound as a matter of law. The written and oral submissions of all parties and interveners before the UK Supreme Court (including those presented by and on behalf of the Lord Advocate and the Scottish Ministers) certainly proceeded on this basis. The only issue for decision before the UK Supreme Court was whether or not the definition of "woman" or "girl" in

the 2010 Act *did* extend to born/natal men who had obtained a gender recognition certificate under and in terms of the Gender Recognition Act 2004. The Scottish Ministers and the Lord Advocate at no point sought to re-argue or to re-open before the UK Supreme Court their claim in the earlier litigation culminating in the first judgment of the Second Division, that the definition of "woman" or "girl" in the 2010 Act extended to men *without* a gender recognition certificate but with the protected characteristic of gender reassignment who chose to self-identify as women. In any event, for the reasons set out by the UK Supreme Court, a "biological sex" interpretation of the terms "man" and "woman" in the 2010 Act does *not* disadvantage or remove any of the protections which are actually provided under the 2010 Act in respect of people, of either sex, who also claim the protected characteristic of gender reassignment.

The Prisons Guidance

16. The Prisons Guidance is produced herewith. It was published by the SPS in February 2024. Its stated purpose is to (at page 6): *"ensure the rights and needs of transgender people are protected while also ensuring a safe and inclusive environment for everyone in the care of SPS and those who work [t]here."* The Equality and Human Rights Impact Assessment ("**EHRIA**") published alongside the Prisons Guidance indicates that the Prisons Guidance *"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 the Human Rights Act 1998 and that [its] practice is in line with a human rights-based approach and [its] broader approaches to the management and social rehabilitation of all individuals in custody".* The Prisons Guidance provides (page 6): "*the operational direction for 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*".

17. The Prisons Guidance contains specific misstatements of the law. *Separatim,* the combined effect of: (i) the contents hereinafter condescended upon, and, (ii) the absence of an explanation of lawful single-sex provision being based entirely upon the immutable facts of biology as regards determining and permanently fixing an individual's sex has the effect that, read as a whole, the Prisons Guidance presents a misleading picture of the true legal

position under the 2010 Act. That is so even though the EHRIA records that the purpose of the Prisons Guidance is, among other things, to ensure compliance with the 2010 Act. The Prisons Guidance induces illegality by SPS staff who follow it. It is accordingly unlawful. Insofar as the Prisons Guidance makes provision which is inconsistent with the requirements of the 2010 Act, it is separately unlawful, in contravening section 54(3) of the SA 1998. With reference to the first and second respondents' averments in answer, admitted that the first respondents are directly responsible for the confinement of prisoners. Admitted that in terms of the Prisons (Scotland) Act 1989 ("**1989 Act**"), section 10(1), a prisoner may be lawfully confined in any prison, under explanation that the first respondents' power so to confine must be exercised consistently with its obligations under: (i) the HRA 1998, (ii) the2010 Act, (iii) the policy and objects of the 1989 Act, (iv) fundamental rights, (v) the principle of legality; and in light of the 2011 Rules. Admitted that the first respondents have no power to act incompatibly with Convention rights: SA 1998, section 57(2). Believed to be true that a small number of prisoners, of either sex, may claim the protected characteristic of "gender reassignment". Believed to be true that individual prisoners claiming the protected characteristic of gender reassignment may have a variety of personal circumstances. Believed to be true that individual prisoners claiming the protected characteristic of gender reassignment may, or may not, have had gender reassignment surgery. Believed to be true that individual prisoners claiming the protected characteristic of gender reassignment may, or may not, have been issued with a gender recognition certificate. Believed to be true that individual prisoners claiming the protected characteristic of gender reassignment may, or may not, have lived for extended periods in their claimed acquired gender. Believed to be true that individual prisoners claiming the protected characteristic of gender reassignment may, or may not, claim to have been "accepted" in the gender with which they would self-identify. The terms of: (i) section 10(2) of the Prisons (Scotland) Act 1989; (ii) the Prisons Guidance; (iii) Articles 2, 3, 8 and 14 ECHR; (iv) section 57(2) and Schedule 6 of the 2010 Act; (v) section 6(1) of the HRA 1998 are each referred to for their terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that what may be said of *all* prisoners claiming the protected characteristic of gender reassignment is that – regardless of such matters as: whether they have, or have not had gender reassignment surgery; whether they have, or have not, been issued with a gender recognition certificate; whether they have, or have not, lived for extended periods in the gender with which they

would self-identify; whether they do, or do not, claim to have been "accepted" in the gender with which they would self-identify – they have *not*, and *cannot*, change their "sex" as that term is defined in the 2010 Act. It is for the first respondent to secure the protection of the Convention rights of *all* those in its custody, whether or not those in custody claim the protected characteristic of gender reassignment. Further explained and averred that the Convention rights of *women* (as defined in the 2010 Act) under Article 2 ECHR, Article 3 ECHR, Article 8 ECHR and Article 14 ECHR are also engaged in decisions of the first respondents concerning the custody of prisoners within the Scottish prison estate. In making arrangements to secure the protection of the rights of *all* those otherwise lawfully detained in their custody within the Scottish prison estate, the first respondents must act in a manner which is compatible with their obligations under the 2010 Act. In particular the first respondents must at all times exercise their custodial powers in a manner which respects *women* prisoners' rights not to be subject to direct or indirect sex discrimination or sex-related harassment. Women prisoners are different from male prisoners. There are no circumstances in which Article 2 ECHR and/or Article 3 ECHR and/or Article 8 ECHR when read separately or together with Article 14 ECHR mandate that a man must be accommodated with women in an otherwise women only single-sex space. Further while (per Section 57(2) of the SA 1998) a member of the Scottish Government has no power to do any act, so far as the act is incompatible with any of the Convention rights, Section 54(3) of the SA 1998 puts it beyond the respondents' devolved competence to exercise any the function conferred on them in any way that relates to "equal opportunities" as that term has been defined as a "reserved matter" in paragraph L2 of Schedule 5 to the SA 1998. The SA 1998 must be construed as a whole. Section 57(2) of that Act cannot provide *vires* for the first respondents to do something prohibited by section 54(3) of the same Act. Nothing in the SA 1998 (or in any other statute) invests the first or second respondents with any powers/provides the *vires* to allow the first or second respondents to take positive measures to avoid or to remedy what the respondents might deem to be a Convention incompatible situation. The first and second respondents' obligations to act compatibly with the Convention rights are no answer to the ongoing induction of illegality perpetuated by the Prisons Guidance, including given the terms of the Rules hereinafter condescended upon. With reference to the first and second respondents' points in defence of the Prisons Guidance:

(1) Not known and not admitted that the balancing of competing rights is a complex process. Not known and not admitted that the Prisons Guidance is directed to achieving a lawful balance. Each of (i) *R (Dowsett) v Secretary of State for Justice* [2013] EWHC 687; (ii) section 29 of the 2010 Act; (iii) *R (FDJ) v Secretary of State for Justice* [2021] EWCH 1746 (Admin); (iv) *R (E) v Governing Body of JFS* [2010] 2 AC 278; (v) *Goodwin v United Kingdom* (2002) 35 EHRR 18; and (vi) *I v United Kingdom* (2003) 36 EHRR 53 are referred to for their terms beyond which no admission is made. *Quoad ultra* denied except insofar as coinciding herewith. Explained and averred that the 2010 Act operates at both individual and group-level: *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899, para 130. Paragraph 26 of Schedule 3 to the 2010 Act proceeds on the assumption that, without it, the provision of single sex services would be unlawful discrimination: *R (Coll) v Secretary of State for Justice* [2017] UKSC 40 [2017] 1 WLR 2093, para 34, per Baroness Hale, with whom the other Justices agreed. Women in prison are particularly vulnerable and have particular needs: *Coll,* paragraph 37 and 38. In order to lawfully operate a restricted or segregated service for which eligibility is determined in whole or in part by reference to sex, a service provider must rely on an exception to the general prohibition against direct sex discrimination in the provision of services, pursuant to section 29 of the 2010 Act. Permitting access of males to female prison settings, or vice versa, would undermine the justification for the paragraph 26(1) exception altogether: *For Women Scotland Ltd. v. Scottish* Ministers [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899, paragraph 213. Reference is made to Statements 44 and 49. *Separatim,* in *R(B) v Secretary of State for Justice* [2009] HRLR 35, the "essence of the claim: was the interference with the claimant's ability to progress to receive 'gender reassignment surgery' during claimant's continued detention in a male prison: paragraph 7 and 50. The case is not authority for the proposition that a prisoner of one sex may have a Convention right to be held in a prison for the opposite sex for reasons related to the prisoner's trans-identity. It also contains numerous errors in law. Neither *Goodwin v United Kingdom* (2002) 35 EHRR nor *I v United Kingdom* (2003) 36 EHRR 53 involved the Strasbourg Court determining any right of any prisoner, nor passing comment, on the rights of prisoners. *Separatim,* neither *Buray* [2025] 1 WLR 2599, nor *JR123* [2025] AC 1256 relate to the review of lawfulness of guidance. The authoritative approach to

assessing the lawfulness of guidance and policy documents is set out in *R (A) v. Home Secretary* [2021] UKSC 37 [2021] 1 WLR 3931.

(2) Each of (i) *Goodwin v United Kingdom* (2002) 35 EHRR 18; (ii) *I v United Kingdom* (2003) 36 EHRR 53; and (iii) *Grant v United Kingdom* (2007) 44 EHRR 1 and (iv) *SV v Italy* (55216/08) are referred to for their terms beyond which no admission is made. *Quoad ultra* denied except insofar as coinciding herewith. Explained and averred that in *Grant,* the Strasbourg Court concluded that the applicant's victim status came to an end when the Gender Recognition Act 2004 came into force, thereby providing the applicant with the means on a domestic level to obtain the legal recognition previously denied. Article 8 does not necessarily require an individual proportionality assessment in all cases: *R (Z) v Hackney LBC* [2020] UKSC 40; [2020] 1 W.L.R. 4327, paragraph 85; *LF v United Kingdom* (2022) 75 EHRR SE5. States can, consistently with the Convention, adopt "general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases": *Animal Defenders International v United Kingdom* (48876/08); affirmed most recently in an Article 8 context in *JR123* [2025] AC 1256. There are good and sufficient reasons for adopting measures of general application in relation to the accommodation of prisoners. While domestic authorities have a narrow margin of appreciation as to the issue of whether to maintain a framework for 'gender recognition' (*Goodwin)* or to impose any requirement for surgery as a condition of such recognition (*AP, Garçon and Nicot v France* (79885/12, 52471/13 and 52596/13), they have a broader margin of appreciation as to how to strike the balance between the competing rights inherent in the maintenance of a gender recognition framework. The concept of margin of appreciation is of particular significance in relation to positive obligations: *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 [2023] AC 559, per Lord Reed at paragraph 55. It is important to exercise caution before positive obligations are imposed. It is not the function of the domestic courts to undertake a development of the Convention of a substantial nature. While it is open to domestic courts to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law, on the basis of the principles established in that law, they should not go further than they can be confident that the Strasbourg Court would go: *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2021] 3 WLR 494, per Lord Reed

paragraph 57. There is no basis in the Strasbourg case law to conclude that domestic authorities have a positive obligation under Article 8 to allow prisoners of one sex to access prisons reserved for the opposite sex. There is no basis to conclude that Article 8 requires the first respondents to maintain guidance to that effect. This court ought not to develop the Article 8 jurisprudence of the Strasbourg Court to that effect. On the contrary, a policy which allows for men claiming the protected characteristic of gender reassignment to be placed within the women's prison estate engages, and in its implementation breaches, the Convention rights (under Articles 8 and 14 and potentially also Article 3 ECHR) of the incarcerated women among whom these men are placed.

(3) Admitted that a transwoman (i.e. a man claiming the protected characteristic of gender reassignment) is different from a non-transgender man (i.e. a man without the protected characteristic of gender reassignment). Admitted that a transman (i.e. a woman claiming the protected characteristic of gender reassignment) is different from a non-transgender woman (i.e. a woman without the protected characteristic of gender reassignment). Each of (i) Article 14; (ii) *Thlimmenos v Greece* (2000) 31 EHRR 15; and (iii) *Taddeucci & McCall v Italy* (Application no. 51362/09, 30 June 2016) are referred to for their terms beyond which no admission is made. *Quoad ultra* denied except insofar as coinciding herewith. The correct approach to assessing *Thlimmenos* Article 14 discrimination claims was authoritatively summarised by Lord Reed in *R (Jwanczuk) v Secretary of State for Work and Pensions* [2025] UKSC 42. Applying that approach, the relevant question is whether there is an objective and reasonable justification for not making an exception for persons claiming the protected characteristic of gender reassignment may from the ordinary rules in relation to sex-segregated prison accommodation. Reference is made to the foregoing averments anent the effect of *Goodwin* and the margin of appreciation in this area and the acceptability of bright line rules. Reference is also made to *Khamtokhu v Russia* (2017) 65 EHRR 6. Men and women are different in many respects. Women in prison different from men in prison in respect of their circumstances, backgrounds, offending and experiences while incarcerated. Women in prison are particularly vulnerable. There is no basis in the Strasbourg case law to conclude that domestic authorities have a positive obligation to treat men claiming the protected characteristic of gender

reassignment as women by allowing them to reside in prisons designated for women. There is no basis to conclude that Article 14 requires the first respondents to maintain guidance to that effect. On the contrary, the combination of the Article 14 ECHR express status of "sex" with the Article 14 ECHR implied status of "being imprisoned" require that, in order to take account of their particular vulnerabilities as an imprisoned women, prison accommodation which is to be provided to such women as a group requires to be separated from, and free of, incarcerated men, regardless of whether or not those men claim the protected characteristic of gender reassignment, because any such claim does not lessen the vulnerabilities before and compared to men which imprisoned women have as a group. *Esto,* prisoner of one sex who claims the protected characteristic of gender reassignment does require to be treated differently from a non-trans-identifying prisoner of that same sex for the purposes of their accommodation (which is denied), the first respondents are, in any event, empowered to do so under the 1989 Act without acting unlawfully under the SA 1998 or 2010 Act. For example, it would be open to the first respondents to house all prisoners of one sex who claim the protected characteristic of gender reassignment together, separate from non-trans-identifying members of that sex. What the first respondents may <u>not</u> do is place members of one sex with members of the other sex, in an otherwise sex-segregated prison, for the reasons herein condescended.

(4) Admitted under explanation that, for the reasons hereinbefore averred, the Convention does not require (and therefore neither the SA 1998 nor HRA 1998 require) the maintenance of the Prisons Guidance in its current terms. *Quoad ultra* denied except insofar as coinciding herewith. Explained and averred that no enactment (as that term is used in Schedule 22 to the 2010 Act) requires the first respondents to place members of one sex with members of the other sex, in an otherwise sex-segregated prison.

(5) Section 29(6) of the 2010 Act is referred to for its terms beyond which no admission is made. *Quoad ultra* denied.

(6) Each of: (i) section 26(4) of the 2010 Act and (ii) *Pemberton v Inwood* [2018] ICR 1291 are referred to for their terms beyond which no admission is made. *Quoad ultra* denied except insofar as coinciding herewith. Explained and averred that for the

reasons hereinbefore averred, the Convention does not require (and therefore neither the SA 1998 nor HRA 1998 require) the maintenance of the Prisons Guidance in its current terms. The claimant in *Pemberton*, a Church of England Priest, was in an entirely non-analogous situation as compared with women in prison. The Court's analysis of whether it was reasonable for certain conduct to have the effects in section 26(1)(b) of the 2010 Act requires to be read in that context. Reference is made in particular to the reasoning of Underhill LJ at paragraph 89: the claimant belonged to an institution with known, and lawful, rules in relation to same-sex marriage. The Court concluded it implied no violation of dignity, and was not cause for reasonable offence, that those rules were applied to the Priest. *Pemberton* is not authority for the proposition that conduct which is not otherwise prohibited by the 2010 Act (including because a defence is available to that conduct under the Act) cannot amount to harassment.

(7) Denied.

Prisons Guidance: Separate Sex Provision

18. Separate prison accommodation for men and women may be said to be justified under the 2010 Act on any of the following bases:

(1) The provision of joint prison accommodation unsegregated on the basis of sex would be less effective, and the limited provision of prison accommodation segregated on the basis of sex is a proportionate means of achieving a legitimate aim, among which would be the recognition of the vulnerability and the protection of the dignity of incarcerated women: subparagraph 26(1) of Schedule 3 EA 2010.

(2) And in any event the extent to which the provision of prison accommodation is required by one sex makes it not reasonably practicable to provide the prison accommodation otherwise than as a separate service provided differently for each sex: subparagraph 26(2) of Schedule 3 EA 2010.

(3) Prison accommodation is anyway provided at a place which constitutes an "establishment for persons requiring special care, supervision or attention": see subparagraph 27(5) of Schedule 3 EA 2010.

(4) The circumstances of enforced incarceration are such that a person of one sex might reasonably object to the presence of a person of the opposite sex in the same prison accommodation: see subparagraph 27(6) of Schedule 3 EA 2010.

(5) In making provision for prison accommodation which is segregated on the basis of sex the SPS will have a defence to any claim that this constitutes unlawful discrimination so far as relating to gender reassignment discrimination, if and only if the provisions of prison accommodation segregated on the basis of sex is a proportionate means of achieving a legitimate aim: see paragraph 28 of Schedule 3 EA 2010. That defence would be applicable in respect of a trans-identifying woman (i.e. a man claiming the protected characteristic of gender reassignment) who was being excluded from the men's prison estate. However, it would not be applicable to a trans-identifying woman (i.e. a man claiming the protected characteristic of gender reassignment) who was being excluded from the *women's* estate. The relevant comparator in the latter case would a biological male who did not claim the protected characteristic of gender reassignment.

(6) Finally SPS may conclude that because of the nature of the sanitary facilities serving the prison accommodation which they have available then all or part of those facilities should be used only by persons of the same sex. This would not contravene the EA 2010 so far as relating either to sex discrimination or gender reassignment discrimination, if and insofar as it can be said that the accommodation is managed in a way which is as fair as possible to both men and women. In relation to gender reassignment, account must also be taken of whether and how far the provision of sex segregated residential prison accommodation is a proportionate means of achieving a legitimate aim: paragraph 3 of Schedule 23 EA 2010. The UKSC confirmed in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SC (UKSC) 1 (at § 224) that the legitimate aims which paragraph 3 of Schedule 23 EA 2010 plainly intends to provide for are "considerations of privacy and decency between the sexes both in the

availability of communal sleeping accommodation and in the use of sanitary facilities". Because of the nature of the sanitary facilities serving the communal prison accommodation, the creation of separate prison estates for women and men allows the available prison accommodation to be managed in a way which is as fair as possible to both men and women and achieves those legitimate aims.

Read as a whole, the 2010 Act imposes an obligation upon the first respondents to exercise their discretion to make separate or single sex provision where such provision is necessary in order to ensure the privacy and secure the dignity of men and women. The situation of incarcerated women in the prison estate requires the creation of separate male and female estates for reasons of privacy and dignity between the sexes. Such a construction of the 2010 Act is consistent with the United Nations' Standard Minimum Rules for the Treatment of Prisoners and other international instruments. With reference to the first and second respondents' averments in answer:

(1) Admitted that section 29(6) of and paragraph 1 of Schedule 22 to the 2010 Act apply. Admitted that the 2011 Rules are an enactment for the purposes of Schedule 22, paragraph 1. Admitted that Rule 126 of the 2011 Rules authorises the operation of prisons which are segregated on the basis of sex. *Quoad ultra* denied. Explained and averred that, insofar as any aspect of the 2011 Rules relates to equal opportunities, the 2011 Rules are only lawful only if and insofar as they may be said properly to be in exercise of the Scottish Ministers' power to encourage, other than by prohibition or regulation, the observance of the requirements of the law for the time being relating to equal opportunities. To the extent that the 2011 Rules trespassed otherwise into the Equal Opportunities Reservation, they would themselves be outside legislative competence: SA 1998, section 54(2). The first respondents could not permissibly make use of their own legislative powers to create an alternative regime governing single sex provision, because to do so would involve them legislating in the area of equal opportunities. The 2011 Rules require to be read as narrowly as is required for them to be within competence: SA 1998, section 101(2). The relevant application of section 191 of, and Schedule 22 to, the 2010 Act based upon the provisions of the 2011 Rules needs to be read in that context.

(2) Denied. Explained and averred that the proper approach to construction is that legislation should be read and given effect in a particular case according to its ordinary meaning, unless the person who is affected by it can show that this would be incompatible with their Convention right; only then does section 3 of the HRA 1998 come into play: *R (Z) v Hackney LBC* [2020] UKSC 40; [2020] 1 W.L.R. 4327, paragraph 114. The effect of section 3 of the HRA 1998 is confined to cases where there otherwise be breach of international law: *R (Elan-Cane) v. Home Secretary* [2021] UKSC 56 [2023] AC 559 per Lord Reed at paragraph 90. To go further would represent a substantial expansion of the constitutional powers of the judiciary, at the expense of Parliament. For the reasons hereinbefore averred, there is no basis in the Strasbourg case law to conclude that domestic authorities have a positive obligation to allow prisoners of one sex to access prisons reserved for the opposite sex. There is accordingly no room for recourse to section 3 of the HRA 1998..

(3) Denied. For the reasons hereinbefore averred, rule 126 can be construed in an entirely Convention compatible manner. It requires to be applied and given effect to.

(4) Schedule 6 to the SA 1998 is referred to for its terms. *Quoad ultra* denied except insofar as coinciding herewith. For the reasons hereinbefore averred, there is no basis in the Strasbourg case law to conclude that domestic authorities have a positive obligation to allow prisoners of one sex who claim the protected characteristic of gender reassignment to be accommodated within prisons designated for the opposite sex.

(5) Admitted that whether this case falls to be determined by reference to the specific duty in section 29(6) or the more general (service related) duties in section 29(1)-(5), when enacting the 2010 Act, Parliament did not intend to act incompatibly with Convention rights under explanation that Parliament did not act so incompatibly. *Quoad ultra* denied. Reference is made to the foregoing averments anent section 3 of the HRA 1998. For the reasons set out therein, there is no room for recourse to section 3 of the HRA 1998. The first and second respondents' averments anent the possibility that paragraphs 26 to 28 of the Schedule 3 to the 2010 Act might operate other than on the basis of biological sex are plainly, and manifestly, contrary to the authoritative determination of the meaning of those provisions as set out in the

judgment of 16 April 2025 of the UK Supreme Court in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899, paragraphs 211 – 221.

(6) Denied. Reference is made to the foregoing averments anent the lack of any incompatibility with the Convention. Explained and averred that 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 paragraph 19. On no tenable view do paragraphs 26 – 28 of Schedule 3 to the 2010 Act meet that high threshold.

The Prisons and Young Offenders Institutions (Scotland) Rules 2011

19. Consistently with the above, in terms of the rule 126 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 ("**the 2011 Rules**"): (i) female prisoners must not share the same accommodation as male prisoners and (ii) the respective accommodation for male and female prisoners must, as far as reasonably practicable, be in separate parts of the prison. The terms "male" and "female" have their normal ordinary language biological meaning, consistent with *FWS-UKSC.* Lest there be any doubt on that point, rule 128 makes provision for "*Accommodation of female prisoners' babies*". Subject to paragraphs (2), (3) and (4) of that rule, the Governor of any prison "*may permit a female prisoner to have her baby with her in prison*". There can be no rational doubt that a woman who self-identified as a man would continue to benefit from the protections of rule 128. Similarly, there can be no rational doubt that a man who self-identified as a woman would <u>*not*</u> benefit from those protections in order to have a baby with him in prison. The intended, and statutorily prescribed, separate sex provision in the 2011 Rules is therefore clear and unqualified. Notwithstanding that clear provision, the Guidance gives operational directions which run directly contrary to rule 126. The first and second respondents' averments in answer are denied.

Prisons Guidance: Initial accommodation decisions

20. Paragraph 3.2 of the Prisons Guidance provides:

"At the point of admission into SPS custody the location of a transgender individual should be considered on an individualised basis as far as possible. However, there may be limited

information about a transgender individual when they first arrive in SPS custody meaning that initial placement may be different to where they are located longer term. See the flowchart below for instructions on how to make decisions on initial placement for transgender men and women"

21. There follows a flowchart which provides for: (i) a (biological) man who self-identifies as female to be admitted to the women's prison estate if he is assessed as posing "*no apparent or obvious risk*" and (ii) a (biological) woman who self-identifies as male to be admitted to the men's prison estate if there are no concerns around her "health, safety or wellbeing" (page 9). Pages 10 – 11 give further indications of circumstances in which persons may be placed in the prison estate other than in accordance with their actual sex.

22. It is a specific misstatement of law for the Prisons Guidance to direct that persons of one sex might be accommodated in the same part of a prison as members of the other sex on the basis of their 'gender identity'. Such conduct would be unlawful in terms of the 2011 Rules which provide that the respective accommodation for male and female prisoners must, as far as reasonably practicable, be in separate parts of the prison. The first and second respondents' averments in answer are denied.

23. This also amounts to a specific misstatement of law vis-à-vis the 2010 Act. In providing an operational direction to staff to place some male prisoners in the women's prison estate, and vice versa, the Prisons Guidance induces staff members who follow it to act unlawfully. In order to lawfully operate a restricted or segregated service for which eligibility is determined in whole or in part by reference to sex, a service provider must rely on an exception to the general prohibition against direct sex discrimination in the provision of services, pursuant to section 29 of the 2010 Act. Permitting access of males to female prison settings, or vice versa, would undermine the justification for the paragraph 26(1) exception altogether: *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899, paragraph 213. In such circumstances, the exception would not apply and the underlying sex discrimination would be contrary to section 29 of the 2010 Act. The first and second respondents' averments in answer are denied.

24. *Separatim,* the Scottish Parliament could <u>not</u> confer, by primary legislation, a function on the first respondents which was to be exercised to: (i) maintain separate prison estates for men and women yet make provision to permit (ii) male prisoners to be accommodated

in the prison estate designated for women as if they were women. To the extent it purported to do so, it would be making alternative provision to paragraph 26(1) of Schedule 3 to the 2010 Act. That would contravene the Equal Opportunities Reservation in paragraph L2. The Prisons Guidance is accordingly unlawful in making such alternative provision in relation to accommodation within prisons on the basis of 'gender identity'. This gives rise to a devolution issue within the meaning of paragraph 1(c) to Schedule 6 of the SA 1998, being a question as to whether the purported exercise of a function by a member of the first respondents is, or would be, within devolved competence. The first and second respondents' averments in answer are denied.

Prisons Guidance: Accommodation after initial admission period

25. The Prisons Guidance provides as follows, in relation to accommodation after initial admission (page 23, emphasis added):

> *"In order to ensure the needs and rights of transgender people are met and protected while also ensuring a safe and inclusive environment for everyone in the care of SPS and staff, SPS has developed a case conference model to manage transgender people in custody on an individualised basis which adopts a multidisciplinary assessment of risk and need.*
>
> *The TCC process has been designed to allow staff and transgender individuals the opportunity to discuss their placement, accommodation and other aspects of their management while in SPS custody.*
>
> *A Case Conference for Initial Assessment (CCIA) form (Annex 3) should be completed for all transgender prisoners entering custody. It has been designed explicitly for the purpose of considering transgender individuals' placement in a prison which aligns with their affirmed gender. The option for a transgender person to be accommodated in an estate which aligns with their affirmed gender should be discussed with the individual upon admission to custody and they should be informed of the process involved."*

26. Paragraphs 5.1 – 5.4 provide detailed information on the TCC process, and records thereof. All of these pages are premised on the understanding set out above, that a prisoner might lawfully be accommodated in the (sex-based) prison estate which is not that of the prisoner's sex. Paragraph 5.5 makes provision, *inter alia,* for the possibility, that a man who has a history of violence against women or girls, or who is demonstrating such

behaviour in the present, might nonetheless be accommodated in the women's prison estate as if he were a woman. Such instances are described as "exceptions to the presumption". Paragraph 5.6 makes provision for circumstances (for example, new indicators of violence against women and girls) which may impact upon the ability of a prisoner to continue be accommodated in the (sex-based) prison estate which is not that of the prisoner's actual sex.

27. For the reasons condescended upon above in relation to initial accommodation decisions, these paragraphs are misstatements of law, both in terms of the 2011 Rules and the 2010 Act. In providing an operational direction to staff to place some male prisoners in the female prison estate, and vice versa, the Prisons Guidance induces staff members who follow it to act unlawfully. For reason of making provision in relation to accommodation within prisons on the basis of 'gender identity', the Guidance also raises a devolution issue within the meaning of paragraph 1(c) to Schedule 6 of the SA 1998. The first and second respondents' averments in answer are denied.

Prisons Guidance: Access to activities

28. Paragraph 5.7 of the Prisons Guidance relates to access for a prisoner to activities and programmes in the estate of their 'affirmed gender'. Insofar as relevant, it provides:

> *"If a TCC considers it a possibility for an individual housed in the estate which aligns with their sex assigned at birth to participate in activities in the estate which aligns with their affirmed gender, the case should be referred to RMT for them to consider the risk. As with access to all activities and programmes, decisions for individuals to attend are only made following a careful assessment of risk and need. Assessment should also consider the impact of a person's attendance on others already in that programme or activity."*

29. This paragraph is a specific misstatement of law. In providing for a process under which staff are empowered to allow a male prisoner, who has been judged too great a risk to be accommodated with women prisoners, nonetheless to partake and participate in women only activities as if he were a woman, the Prisons Guidance induces staff members who follow it to act unlawfully. Permitting access of male prisoners to prison activities designated as for women prisoners only would undermine the justification for the paragraph 26(1) exception altogether: *FWS-UKSC*, paragraph 213. The exception in relation to those activities would not apply and the discrimination would be contrary to

section 29 of the 2010 Act. Reference is made to Article 13 – 16 above. The first and second respondents' averments in answer are denied.

30. *Separatim,* the Scottish Parliament could not confer a function on the first respondents purporting to allow them to: (i) maintain separate prison estates for men and women and yet but (ii) permit a biological male prisoner to access, as if he were a woman, activities which were designated as being only for women prisoners . To the extent it purported to do so, it would be making alternative provision to paragraph 26(1) of Schedule 3 to the 2010 Act. That would contravene the Equal Opportunities Reservation set out in paragraph L2 of Schedule 5 to the SA 1998. The Prisons Guidance is accordingly unlawful in making such alternative provision. This gives rise to a devolution issue within the meaning of paragraph 1(c) to Schedule 6 of the SA 1998, being a question as to whether the purported exercise of a function by a member of the first respondents is, or would be, within devolved competence. The first and second respondents' averments in answer are denied.

Prohibition against harassment under the 2010 Act

31. Finally in the case of prisons the prohibition in Section 26 of the 2010 Act against, among other things, conduct relating to a protected characteristic which has the purpose *or effect* of (i) violating another's dignity, *or* (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for that other has then to be read together with Section 29 (3) EA 2010. Section 29(3) makes it unlawful for a service-provider such as SPS, in relation to the provision of a service, such as accommodating individual prisoners within the prison estate, to *harass* a prisoner (as either a person requiring the service, or (b) a person to whom the SPS provides the prison accommodation service). And equally by way of catch-all fall back Section 29(6) EA 2010 makes it unlawful for any *person "in the exercise of a public function that is not the provision of a service to the public or a section of the public [to], do anything that constitutes harassment".* These provisions in the 2010 Act against harassment create a positive obligation on the SPS not to follow (or to desist from) any course of conduct which can be said to be related to the prisoners' actual sex and which can be perceived by those prisoners as having the effect either of violating their dignity *or* of creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Women prisoners (to be) housed in the women designated prison estate have the right to object to, as "unwanted conduct", SPS placing a man claiming the

protected characteristic of gender reassignment within women-only designated prison accommodation if and insofar as the women prisoners' perception that their being given no choice but to be incarcerated in the same accommodation as a man (albeit one claiming the protected characteristic of gender reassignment) has the effect either of violating these women's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for these women. The dignity and safety concerns of women prisoners are not to be subordinated to concerns that male prisoners with the protected characteristic of gender reassignment might have about being housed in the male prison estate. Women prisoners are not to be permitted to be used as "human shields" or buffers against feared male violence towards other men, and women's prisons are not to be used as presumed safe spaces against feared male violence towards other men. If and insofar as necessary to preserve the safety and or dignity of male prisoners claiming the protected characteristic of gender reassignment within the Scottish prison estate, then distinct and separate provision for such individual may be made within the context of the men's prisons. With reference to the first and second respondents' averments in answer:

(1) *R (E) v Governing Body of JFS* [2010] 2 AC 278 is referred to for its terms beyond which no admission is made. *Quoad ultra* denied except insofar as coinciding herewith. Explained and averred as follows: in relation to the averments about treating individuals as individuals, reference is made to Statement 18 above. Neither Article 8 nor Article 14 of the Convention require an individual proportionality assessment in every case. The ground of challenge is not hypothetical in circumstances in which the first respondents admit that they continue to exercise the discretion provided in section 10 of the Prisons (Scotland) Act 1989 in accordance with the Prisons Guidance (Answer 15).

(2) Denied. Reference is made to the averments at Statement 17 anent the requirements of the Convention.

(3) Section 26 of the 2010 Act is referred to for its terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that, for the reasons hereinbefore averred, compliance with the Convention does not require that domestic authorities accommodate trans-identifying prisoners of one sex in prisons designated for the opposite sex. The Convention does not require the first respondents to maintain

guidance to that effect. On the (lack of) relevance of *Pemberton v Inwood* [2018] ICR 1291 reference is made to Statement 17

(4) Denied.

32. All that the Prisons Guidance currently says of its duties to avoid harassment is this: *"deliberate misgendering or use of the wrong terms was disrespectful and harmful; it may also constitute harassment. To ensure the dignity of all of those in SPS care, and to promote the wellbeing of all people in custody, it is useful to understand these terms, and it is important to ask people in custody the terminology they prefer to describe their own identity."* The failure of the Prisons Guidance even to advert to the duty on SPS to avoid creating a situation having the effect either of violating the dignity of *or* of creating an intimidating, hostile, degrading, humiliating or offensive environment for those women incarcerated in the prison estate has meant that the Prisons Guidance again misleads on this point by omission. It fails properly and accurately to encourage the observance of the requirements of the law for the time being relating to equal opportunities. Again this gives rise to a devolution issue within the meaning of paragraph 1(c) to Schedule 6 of the SA 1998, being a question as to whether the purported exercise of a function by a member of the first respondents is, or would be, within devolved competence. The first and second respondents' averments in answer are denied.

Remedies

33. The first respondents have refused – and/or unjustifiably delayed - to withdraw, amend or update the Prisons Guidance to comply with the law as set out in the judgment of 18 February 2022 of the Second Division in *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150, an analysis confirmed (and extended to cover those holding gender recognition certificates under the Gender Recognition Act 2004) in the judgment of 16 April 2025 of the UK Supreme Court in *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899. The petitioner is entitled to the declarators sought. The first and second respondents' averments in answer are denied.

34. The Prisons Guidance should be reduced. Guidance, produced by the executive, which induces illegality is an affront to the rule of law. It undermines the rule of law in a direct and unjustified way: *R (A) v. Home Secretary* [2021] UKSC 37 [2021] 1 WLR 3931. The first and second respondents' averments in answer are denied.

35. The Prisons Guidance has significant practical and ongoing effects. It provides operational direction to the employees of the SPS who are tasked with the care and custody of prisoners. Women in prison are often extremely vulnerable. They have often suffered violence at the hands of men. The petitioner has a strong *prima facie* case. Given the potential impact of the Prisons Guidance remaining in operation pending the determination of this petition, the balance of convenience favours the petitioner. The Prisons Guidance should be suspended *ad interim.* With reference to first and second respondents' averments in answer, admitted that, as hereinbefore condescended upon women in prison are often vulnerable. Admitted that, as hereinbefore condescended upon, they may have suffered violence at the hands of men. *Quoad ultra* denied. The 2010 Act operates at both individual and group-level: *For Women Scotland Ltd. v. Scottish Ministers* [2025] UKSC 16, 2025 SLT 443 [2025] ICR 899, para 130. In providing for single-sex or sex-segregated prisons, the first respondents require to rely upon an exception in the 2010 Act, since segregation of the sexes is, *prima facie*, unlawful discrimination on grounds of sex. Treating individuals as individuals does not permit the placing of men claiming the protected characteristic of gender reassignment in women's prisons. It is no answer to the ongoing induction of illegality perpetuated by the Prisons Guidance.

PERMISSION TO PROCEED

36. The petitioner satisfies section 27B(2) (requirement for permission) of the Court of Session Act 1988, for the reasons hereinbefore averred, and per the decision of the Court of 5 November 2025. With reference to the first and second respondents' in answer, admitted that permission to proceed has been granted under explanation that the first and second respondents did not contest permission.

TRANSFERS TO THE UPPER TRIBUNAL

37. The petition is not subject to a mandatory or discretionary transfer to the Upper Tribunal

PLEAS-IN-LAW

1. The Prisons Guidance being unlawful in terms of the Equality Act 2010 *et separatim* the Scotland Act 1998, decree of declarator should be pronounced.

2. The Prisons Guidance being unlawful in terms of the Equality Act 2010 *et separatim* the Scotland Act 1998, decree of reduction should be pronounced.

3. The petitioner having a strong *prima facie* case, and the balance of convenience favouring its grant, interim suspension should be granted.

IN RESPECT WHEREOF

SCHEDULE FOR SERVICE

PART 1: RESPONDENT(S)

1. THE SCOTTISH MINISTERS, Victoria Quay, Edinburgh, EH6 6QQ.

2. THE RIGHT HONOURABLE DOROTHY BAIN KC, His Majesty's Lord Advocate, Lord Advocate's Chambers, 25 Chambers Street, Edinburgh, EH1 1LA.

3. BARONESS SMITH OF CLUNY KC, Advocate General for Scotland, Office of the Solicitor to the Advocate General for Scotland, Victoria Quay, Edinburgh, EH6 6QQ.

PART 2: INTERESTED PERSON(S)

1. THE EQUALITY AND HUMAN RIGHTS COMMISSION, having a place of business at 2nd Floor, 151 West George Street, Glasgow, G2 2JJ.

SCHEDULE OF DOCUMENTS

1. Scottish Government Guidance on Supporting Transgender Pupils In Schools: Guidance for Scottish Schools (August 2021).

2. SPS Policy for the Management of Transgender People in Custody: Operational Guidance (February 2024).