IN THE COURT OF SESSION

NOTE OF ARGUMENT FOR THE SCOTTISH MINISTERS AS THE FIRST RESPONDENTS & THE LORD ADVOCATE AS THE SECOND RESPONDENT

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) Supporting Transgender Pupils In Schools Guidance for Scottish Schools and (ii) SPS Policy for the Management of Transgender People in Custody Operational Guidance

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Introduction

1. This is the note of argument for the first and second respondents (together the "Respondents") in the petition of For Women Scotland Limited for judicial review. The petition now challenges only the Prisons Guidance (6/2), published by the Scottish Prison Service ("SPS") in February 2024 and directed to SPS staff. The petitioner argues that that guidance document is unlawful in light of the requirements of the Equality Act 2010 ("2010 Act") and the decision of the Supreme Court in ***For Women Scotland Ltd v Scottish Ministers*** **2025 SC (UKSC) 1**.

2. The 'test' for the lawfulness of policy guidance was set out by the Supreme Court in ***R (A) v Secretary of State for the Home Department*** **[2021] 1 WLR 3931**. It is whether a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. It requires a comparison

between what the relevant law requires and what the policy statement says. If the policy directs them to act in a way which contradicts the law, it is unlawful: ***R (A)*** at §§38 and 41. Although there are a number of arguments advanced on both sides of this case, the ultimate question for the Court as posed by the petition is whether the guidance document positively authorises or approves unlawful conduct, under reference to the law as set out in the 2010 Act or the Scotland Act 1998 and falls to be declared unlawful, suspended or reduced. That is a question that requires to be answered on concrete facts. It is not appropriate to challenge a policy statement by reference to hypothetical cases: ***R(A)***, §40 – *a fortiori*, by reference to no case at all.

Summary

3. The position of the Respondents is advanced in terms of a primary and two subsidiary arguments that are alternatives to each other.

4. The primary argument is that the petition is irrelevant. It proceeds on a false comparison by making fundamental errors relating to the nature of the 2010 Act. It also adopts an erroneously narrow approach to devolved competence by wrongly assuming that only "equal opportunity requirements" are engaged and, insofar as equal opportunity requirements are engaged, that they are restricted to that Act and, for example, do not include the Human Rights Act 1998. As to the 2010 Act, the petition takes for granted what is termed "the underlying sex discrimination" that is assumed to be contrary to section 29 (Statement 23), and proceeds on the premise that the only justification for single sex spaces is strict compliance with the requirements of paragraph 26 or 27 of Schedule 3 to the 2010 Act. The existence of underlying sex discrimination (or for that matter harassment) cannot be assumed. A claim must be established. Schedule 3 is secondary. It provides a defence to any such claim. The error in the petition is to assume that, if the defence in Schedule 3 is unavailable, there will necessarily be unlawful sex discrimination or harassment. The 2010 Act

does not operate in that way. It requires claims to be made out. It does not mandate sex segregation. It does not contain any 'norm', positive or negative, express or implied, in that regard. It does not absolutely prohibit deviation from any norm. It provides a remedy for an individual who is able to establish a claim. Even if the petitioner is correct and the defence in Schedule 3 would be undermined by placing a transperson in a prison for those of the opposite biological sex, that only affects one potential defence and does not establish a ground of liability. No guidance document can sensibly be challenged as unlawful because it does not advance one specific defence; in this case because it does not conform to the 'requirements' of Schedule 3. No discrimination or harassment claim is advanced by the petitioner. The petition is fundamentally irrelevant.

5. Examination of the supposed underlying unlawfulness, and questions of competence, necessarily require consideration of the duty of the Respondents under section 57(2) of the Scotland Act 1998 to act compatibly with Convention rights. Convention rights are fundamental to the issues in this case. A blanket rule of the kind advanced by the petitioner that a transgender prisoner can only be placed in the prison according to their biological sex would violate the rights of some prisoners under at least Articles 8 and 14. There is also a contradiction in the petitioner's argument when the position of a transman is considered. *Prima facie*, on the petitioner's argument a transman must be held in a female prison, but the Supreme Court judgment contemplates that a transman of masculine appearance may have to be excluded from a female facility. Presumably the petitioner supports that analysis but it contradicts the petitioner's principal argument: biology is not the sole determining factor in such a case. To require that a transman be held only in a female prison on account the single factor of biological sex (i.e. omitting any consideration of risk) would violate that person's rights under Articles 8 and 14; and to exclude him from free association solely on account of his masculine appearance would be a further violation of that individual's Convention rights.

6. If it is necessary to engage with the secondary question, whether the defence to an otherwise substantiated case of sex discrimination or harassment has been undermined by the trans-inclusive policy, the Respondents advance two alternative arguments. The distinction between them is that the first assumes that it is the specific duty applicable to core public functions in section 29(6) of the 2010 Act that applies. The second assumes that the case relates to the provision of services to which the duties under section 29(1)-(5) apply. However, it is common ground between the parties (Statement and Answer 18(5)) that whichever alternative applies, when enacting the 2010 Act Parliament did not intend to act incompatibly with Convention rights.

7. The Respondent's first subsidiary argument is that the placement of prisoners pursuant to section 10 of the Prisons (Scotland) Act 1989 is a 'core' public function (not the provision of a service) to which section 29(6) of the 2010 Act applies. That function may lawfully be exercised, notwithstanding it gives rise to sex discrimination or harassment, where that is required by another statute: paragraph 1 of Schedule 22 to the 2010 Act. Sex segregation is permitted and required by rule 126(1) of the Prisons and Young Offenders (Scotland) Rules 2011/331 ("2011 Rules"), subject to the requirements of reasonable practicability in rule 126(2). The placement of transgender prisoners in a prison of the opposite biological sex may be required by section 6(1) of the Human Rights Act 1998 and separately section 57(2) of the Scotland Act 1998, where such placement is necessary to avoid a violation of the prisoner's Convention rights. The Guidance permits SPS staff to act in a way which is consistent with the law as just set out. The Guidance is not unlawful in terms of the 2010 Act because Schedule 22 authorises what is being done. In giving guidance to give effect in this way to the 2010 Act and the Human Rights Act 1998, the Scottish Ministers do not act outside devolved competence. The Prisons Guidance is accordingly not unlawful in terms of the Scotland Act 1998.

8. The Respondent's second subsidiary argument approaches matters from the perspective that the duties in section 29(1)-(5) apply and that sex segregation of prisons may depend on Schedule 3 to the 2010 Act (not Rule 126). The argument is in two parts:

(a) The petitioner fails to set up a relevant case as to why Schedule 3 to the 2010 Act is engaged. There is no specification of any sex discrimination claim, even in the abstract, which would trigger the requirement for justification in terms of Schedule 3.

(b) On the hypothesis (which is not accepted) that Schedule 3 is engaged and determines the lawfulness of the Prisons Guidance, then the Respondents' position is staged as follows. Paragraph 26 of Schedule 3 can be read as affording a defence to a claim of sex discrimination where the provision of services is "primarily" (rather than exclusively) for persons of the same sex, so as not to jeopardise the availability of the defence by the admission to those services of transgender persons of the opposite biological sex, where that is necessary to avoid a breach of their Convention rights. If that provision cannot be read in that way, a declaration of incompatibility in respect of paragraphs 26-28 of Schedule 3 should be made by the court in terms of section 4(2) of the Human Rights Act 1998.

9. For all of those reasons, the Prisons Guidance is not unlawful. The petition challenges it on the basis of an erroneous understanding of the law with which ***R (A)*** requires it to be compared. On a proper understanding of the law, the Prisons Guidance does not direct any person to act in a way which contradicts the law. On the contrary, it facilitates the law being given effect. The petition should accordingly be dismissed and the orders sought against the Prisons Guidance refused. If it is necessary to do so, the remedies set out at paragraph 9(b) above should be granted.

The factual background

10. The Prisons Guidance document (6/2 of Process – "**the Prisons Guidance"**) is an internal document. It follows on the policy statement "SPS Policy for the Management of Transgender People in Custody" in December 2023. It contains operational guidance for SPS staff in relation to the management of transgender men and women in custody. It is not limited to guidance on placement in a prison for the opposite sex. It contains wider guidance, irrespective of the prison in which the individual is held, to support transgender prisoners by reference to matters such as name and pronouns, provision of gender related personal property, access to activities and programmes and showering arrangements.

11. It is a matter of admission on Record (Statement and Answer 16), and therefore may be taken to be common ground between the parties, that the stated purpose of the Prisons Guidance (page 6) is to *"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"*. It is further a matter of admission and common ground that that purpose is supported by The Equality and Human Rights Impact Assessment (the EHRIA) that states 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 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"*.

12. The stated purpose accords with the fundamental role of prison management. The management of transgender prisoners is closely regulated to take into account the risks to them and the risks to other prisoners and staff based on multidisciplinary assessment and review. The management of transgender prisoners mirrors developments in the law including the judgment in ***Goodwin v United Kingdom*** (2002) 35 EHRR 18 and the 2010 Act. There have been instances of transgender

prisoners being held in prisons for those of the opposite biological sex since, at latest, 2006. Only a minority of transgender prisoners have been held in prisons of the opposite sex. The number of prisoners so detained has been low. The placement of those prisoners has not given rise to any significant operational issue in the prisons in which they have been detained. Given the obvious sensitivity of the matter, names and even anonymised details that could lead to the identification of the persons concerned are being withheld, but the types of prisoner so accommodated over time have included (1) a prisoner with a gender recognition certificate, (2) a prisoner who has lived in the acquired gender for decades and (3) a transman of masculine appearance. Prisoners are not allocated solely on the basis of those personal attributes. Allocation depends on an individualised assessment in accordance with the Prisons Guidance. The Prisons Guidance is informed by evidence, referred to in the EHRIA at page 32, that there is an increased risk of suicide during the first three months in custody and a known increased risk of suicide for transgender individuals. The Respondents have a well-founded concern that being required to adopt a policy that a transgender prisoner can never be held in a prison for the opposite biological sex could give rise to an unacceptable risk of harm. While this note of argument will concentrate on Articles 8 and 14 of the Convention, the increased risk of suicide engages Article 2 and the risk that a transgender prisoner will be abused also engages Article 3.

The statutory framework: Equality Act 2010

13. The 2010 Act is not the only "equal opportunities requirement" for the purposes of devolved competence but it is the main discrimination law statute in the United Kingdom. It is structured so as to set out the following: (i) certain "protected characteristics" (Chapter 1 of Part 2), including "sex" (s 11) and "gender reassignment" (s 7); (ii) the types of conduct which are prohibited in relation to the protected characteristics or some of them (Chapter 2 of Part 2), including direct discrimination (s 13) and harassment (s. 26); (iii) areas of regulated activity in which the prohibitions

are to have effect, in relation to some or all of the characteristics (Parts 3 to 7); that includes Part 3 relating to the provision of services and the exercise of public functions (s 29) and the sector specific exceptions in Schedule 3 that are given effect by s 31(10); (iv) the means of enforcement of a contravention of the prohibitions, by individuals (Part 9); (v) distinct provisions relating to the advancement of equality in the public sector (Part 11), including the public sector equality duty (s 149) and authorisation of positive action (ss 158 and 159); (vi) general exceptions to the prohibitions (Part 14), including section 191 giving effect to Schedule 22; (vii) interpretative provision (Part 16); and (viii) various subject-specific exceptions to the prohibitions, including Schedules 3 and 22.

14. There is no issue in this case about the discharge of the public sector equality duty or any other more general provision. This case engages the delictual parts of the 2010 Act. The general sector of activity involved is the provision of services and the exercise of public functions to which section 29 applies. The petitioner relies on the protected characteristic of sex (s 11) and the protected characteristic of gender reassignment (s 7) is also relevant. The types of prohibited conduct involved are direct discrimination (s 13) and harassment (s 26). The exceptions in Schedules 3 and 22 also require consideration. It is section 29 that is at the heart of these proceedings.

15. Section 29 is effectively in two parts: it concerns (a) the provision of services (by the private or public sector); and (b) the exercise of a public function that is not the provision of a service. The provision of services is covered by specific sub-sections in section 29 that will be mentioned below and those provisions have to be read with Schedule 3. The exercise of a public function that is not the provision of a service (referred to in this note as a **'core' public function**) is covered by section 29(6) which compendiously prohibits discrimination, harassment and victimisation. Section 29(6) has to be read with Schedule 22. The overlap between Schedules 3 and 22 is dealt with in paragraph 2(6) of Schedule 3, which provides that section 29 does not apply to anything done in connection with the imposition of a requirement or condition which comes within Schedule 22 (statutory provisions).

16. Section 29(1)-(2) provides that a person concerned with the provision of a service to the public or a section of the public (the "service-provider") must not discriminate against a person requiring the service by not providing it (which includes not providing it in the manner in which it is usually provided: s 31(7)); and, in providing it, must not discriminate against the person by subjecting them to various forms of detriment (e.g. differential terms). It does not matter whether the service is provided in return for payment: s 29(1). To establish a claim of direct discrimination in terms of section 29, an individual requires to establish less favourable treatment in terms of section 13(1), giving rise to detriment in terms of section 29(1)-(2). The need to prove less favourable treatment is integral to direct discrimination in any context.

17. Section 29(3) regulates harassment. It provides that a service-provider must not harass a person requiring the service or to whom it is provided. To establish a claim of harassment in terms of section 29(3), an individual requires to establish, in terms of section 26, *inter alia* a violation of that person's dignity or the creation for that individual of an intimidating, hostile, degrading, humiliating or offensive environment: s 26(1)(b)(i)-(ii). In deciding whether the conduct complained of amounts to harassment, account is taken of the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect (s 26(4)). The argument that a policy might give rise to a harassing environment is not one which can sensibly be made in a claim for judicial review against that policy and would require to be brought as a substantive claim under the enforcement provisions of the 2010 Act. That is because it requires specific evidence directed to the claim: ***R (C) v Secretary of State for Work and Pensions*** [2017] 1 WLR 4127, at §45, Baroness Hale of Richmond.

18. Section 29 of the 2010 Act is not a free-standing legal prohibition against sex discrimination or harassment. The policy which it represents in respect of direct discrimination, and by analogy harassment, is that individuals should be treated as individuals with actionable legal rights as such,

and not assumed to be like other members of a group: ***R (E) v Governing Body of JFS*** [2010] 2 AC 728 at §90, Lord Mance. The inappropriateness of raising an allegation of harassment in a judicial review identified in ***R (C)*** would apply with equal force to a generalised complaint of sex discrimination.

Primary argument: The petition is irrelevant because it proceeds on an unduly narrow understanding of devolved competence relative to equal opportunities and a misunderstanding of the 2010 Act

19. In any challenge involving the proposition that guidance does not accurately reflect the law there must be a comparison between what the relevant law requires and what the policy statement says ***R(A)*** (§41). The primary argument for the Respondents is that the petition is irrelevant because it proceeds on a fundamental misunderstanding of the nature of the 2010 Act and the role of that Act within the scheme of devolved competence. The petition proceeds on three misconceptions:

    (1) It is averred in Statement 13 that the requirements of the law relating to equal opportunities are "almost entirely" contained in the 2010 Act but, in fact, the petition proceeds on the basis that these requirements are exclusively found in that Act (they are not).

    (2) The assumption in Statement 12 is that the scope of devolved competence in Section L2 of Schedule 5 to the Scotland Act 1998 is defined by reference to the 2010 Act (it is not).

    (3) Statements 44 and 49 assume that the 2010 Act prescribes a norm for "justified" segregation of prisons on the ground of sex or "lawfully" segregated prisons (it does not).

20. The relevant part of devolved competence is defined by reference to "equal opportunities" and a proper understanding of that term is required to understand why points (1) and (2) are misconceived. The term is used in Section L2 of Schedule 5 to the Scotland Act 1998 that specifies one of the reserved matters, subject to certain exceptions. The term is defined in Section L2 and the definition does not reproduce the list of protected characteristics in section 4 of the 2010 Act. For

example, Section L2 lists "other personal attributes", not found in the 2010 Act. Similarly, the term "Equal opportunity requirements" in Section L2 is not defined relative to the 2010 Act. On the contrary, it is defined on a more expansive basis to apply to the requirements of the law for the time being related to equal opportunities.

21. The provisions of the European Convention on Human Rights as given effect by the Human Rights Act 1998 come within the scope of "Equal opportunity requirements". The 2010 Act is accordingly not the exclusive source of the requirements of the law relating to equal opportunities. In any event, promotion of equal opportunities is not the sole consideration. The Respondents must act compatibly with Convention rights by virtue of section 57(2) of the Scotland Act 1998. That includes not only Article 14 of the Convention but also Articles 2, 3 and 8.

22. The reservation of "equal opportunities" is subject to the four exceptions specified in L2. The first, second and fourth are relevant. Only the fourth (equal opportunities in relation to Scottish functions) mentions the 2010 Act in order to protect it (and subordinate legislation under it) from "modification", meaning protecting it from being in substance amended, superseded, disapplied or repealed: ***UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*** 2019 SC(UKSC) 13, at §51. Statement 14 in the petition acknowledges the first exception, relating to encouragement of observance of the equal opportunity requirements. The Prisons Guidance is an internal document and therefore is not an instance of Ministers seeking to impose any "prohibition or regulation". The second exception permits the Scottish Parliament and Scottish Ministers to go beyond issuing encouragement by the imposition of duties to have due regard to the need to meet the equal opportunity requirements; and the fourth allows further action that does not involve modification of the 2010 Act.

23. The inclusion of Convention rights compliance within the scope of "equal opportunity requirements" in L2 is necessary in the devolution scheme because it ties in directly with the requirement in section 57(2) of the Scotland Act 1998 that a member of the Scottish Government has no power to act incompatibly with Convention rights. Scottish Ministers, unlike other public authorities, cannot rely on section 6(2) of the Human Rights Act 1998: ***Somerville v Scottish Ministers*** 2007 SC (HL) 140, at §36, Lord Hope.

24. The need to act in a Convention rights compatible manner is critical to the discharge of duties and performance of functions by Scottish Ministers. Parliament not only assumed that Scottish Ministers would act compatibly with Convention rights, Parliament directed that they do so *inter alia* under section 57(2). Indeed, it is common ground between the parties (Statement and Answer 18(5)) that whether the relevant duties arise under section 29(1)-(5) or 29(6), when enacting the 2010 Act Parliament did not intend to act incompatibly with Convention rights. The short point is that there is no relevant case that the Scottish Ministers are not entitled to pursue the transgender prisoner policy in order to act compatibly with Convention rights.

25. The petition assumes, in terms of the third misconception, that there is a norm prescribed in the 2010 Act for lawful segregation by sex which entails following the precepts of paragraph 26 or 27 of Schedule 3 to the 2010 Act. Even assuming that Schedule 3 applies (which is not accepted), it does not amount to a prescription of any norm of lawfulness.

26. There is no general requirement in law that the sexes be segregated. On the contrary, the assumption is that they will be mixed. The 2010 Act does not operate so as to define the circumstances in which there can be lawful segregation. So far as relevant, it is statute that imposes civil liability for discrimination against an individual on specified grounds. It is section 29 that is relevant in this case because it sets out the conditions for civil liability in the provision of services or the exercise of a

public function. The individual alleging unlawful discrimination must not only show that one of the protected characteristics is engaged, but also that they have been less favourably treated (section 13(1)) and suffered detriment; or, for harassment, meet the requirements of section 26. The relevance of Schedule 3, and in particular paragraph 26, is that it gives a defence to a claim for breach of section 29 based on sex discrimination (and only discrimination) if certain conditions are met. The observation by the Supreme Court in §213 in ***For Women Scotland*** on which the petitioner relies relates to the feasibility of satisfying those conditions if the sexes are mixed, but that only affects the availability of the defence. A failure to comply with those conditions does not necessarily translate into a finding of unlawful discrimination because the claimant must still prove that the circumstances complained of constitute discrimination, which does not necessarily result from differences in treatment between men and women: ***R (Dowsett) v Secretary of State for Justice*** [2013] EWHC 687 (Admin).

27. The petition relies on direct discrimination and harassment. The petition does not allege that the placement of a man in a woman's prison is unlawful discrimination, but in any event it is not. The gravamen of the complaint is in Statement 23 and is a consequential or secondary argument following the logic in §213 of the Supreme Court judgment. The argument is that the inclusion of a man in a women's prison undermines the justification for segregated prisons under paragraph 26 of Schedule 3, because it makes it more difficult (if not impossible) to establish that "a joint service for persons of both sexes would be less effective" (§26(1)(a)), thereby creating an exposure to liability for "the underlying sex discrimination". However, the failure to satisfy the requirements of paragraph 26 only affects the availability of a defence. There is still the anterior question whether any complainer can substantiate a claim of discrimination. In ***R (Coll) v Secretary of State for Justice*** [2017] 1WLR 2093, at §34, Baroness Hale accepted a submission that paragraph 26 proceeds on an assumption that, without it, the provision of single sex services would be unlawful discrimination

but in that case Baroness Hale had already held that the claimant had substantiated direct discrimination (less favourable treatment and detriment): §§26-33. There is no warrant in the 2010 Act for an assumption that a failure to meet the requirements of Schedule 3 is sufficient for a finding of unlawful sex discrimination. The 2010 Act is not framed on the basis of inflexible rules of universal application. It imposes civil liability in fact specific circumstances, requiring individuals to be treated as such: ***R (E)*** at §90, Lord Mance; and see ***R(A),*** at §45, Baroness Hale. The same is true of harassment which is an inherently 'individualised' delict (see: section 26(4)(a)). The law should generally be consistent: see ***Pemberton v Isherwood*** [2018] ICR 1291. In considering harassment, consideration must be given not only to the complainer's perception but also to all the circumstances and whether it is reasonable for the conduct to have the effect complained of (s 26(4)). The fact that the conduct in question is necessary to act compatibly with the Convention rights of a third party would be material to that assessment.

28. The petition is irrelevant because it assumes what is termed "the underlying sex discrimination" contrary to section 29 without any averment relative to the circumstances of any particular individual to demonstrate that either sex discrimination or harassment is occurring.

29. In concentrating on biological sex, the petition fails to allow for the full scope of discrimination for the purposes of the 2010 Act and the Human Rights Act 1998. The petition proceeds on the premise that discrimination only occurs when there is a failure to treat similar people equally. However, the Article 14 jurisprudence recognises that discrimination may also occur by failing to treat different people differently: ***Thlimmenos v Greece*** (2000) 31 EHRR 15 and ***Taddeucci & McCall v Italy*** (51362/09) (30 June 2016). The 2010 Act recognises "gender reassignment" as a protected characteristic. Gender reassignment or, more broadly, gender identity also comes within the scope of "equal opportunities" in L2 in the Scotland Act as one of the "other personal attributes". A non-transman and a transman are different by reference to that characteristic or attribute. Similarly, a

non-transwoman and a transwoman are different on the same basis. To treat a transperson and a non-transperson in exactly the same way in all circumstances only because of their common biology is unlawful discrimination in Convention rights terms but is the basis on which the petition proceeds.

30. The Supreme Court considered those authorities in *R (Jwanczuk) v Secretary of State for Work & Pensions* [2025] 3 WLR 741. The Court affirms that Article 14 can impose a positive duty to introduce an exception to an otherwise general rule (§33). However, it is acknowledged that any legislature can enact a general rule which, if justified, can be lawful despite the fact that it causes hardship in some exceptional cases (§126, quoting from §162 of *R (SC);* and §146). Considering that possibility here, the questions are whether Parliament has enacted a general rule; and if it has, whether that rule is justified. Those questions do not arise here because section 29 does not prescribe a general rule. The existence of both sex discrimination and harassment are fact specific.

31. The essential basis for the finding of an Article 8 violation in ***Goodwin v United Kingdom*** (28957/95) (2002) 35 EHRR 18 and ***I v United Kingdom*** (25680/94) (2003) 36 EHRR 53 was that the inconsistences in UK law regarding the rights of transgender persons were no longer justifiable. Those inconsistences included, in ***I,*** the fact that a transgender person could be held in a prison of the opposite sex but could not marry as a person of the opposite sex. Prison practice is referred to in both cases, at §§47-48 of ***Goodwin*** and at §§30-31, 33, 44 and 48 of ***I***. It would be a plain breach of Article 8 to hold a prisoner in the position of Christine Goodwin in a male prison solely because "sex" in domestic law is now defined for certain purposes by reference to biology. The domestic cases of ***R (B) v Secretary of State for Justice*** [2009] HRLR 35 (see §54) and ***R (FDJ) v Secretary of State for Justice*** [2021] 1 WLR 5265 (see §§83 & 86-87) make clear the relevance of Articles 8 and 14 in the prison context.

32. ***Goodwin*** and ***I*** led to the enactment of the Gender Recognition Act but Article 8 is not restricted to recognition of a change in legal status. It covers day to day living short of a change in legal status: ***B v France*** (1993) 16 EHRR 1. It includes the right to change name in advance of full gender reassignment: ***S.V. v Italy*** (55216/08) (11 October 2018). In ***Sheffield & Horsham v United Kingdom*** (1999) 27 EHRR 163 the Court held that there was no breach of Article 8 because the applicants did not suffer any substantial practical detriment on a day-to-day basis (§§47 and 59). ***Goodwin***, which came after that case, has led to an advancement in the rights of transgender people but in this case the Scottish Ministers do not seek any further advance. They seek to respect the rights of transgender people in daily living by continuing the practice in the UK pre-dating ***Goodwin*** that, in an appropriate case, a transgender prisoner can be accommodated in a prison corresponding to their lived gender. Separate prisons for males and females is the international norm but, subject to individual assessment, the European Committee for the Prevention of Torture considers that as a matter of principle transgender prisoners should be accommodated in the prison section corresponding to the gender with which they identify. Reference is made to the CPT 2024 report on Transgender Persons in Prison, written with specific emphasis on ECHR Article 3. The Scottish Ministers, as a public authority, are required to read their statutory powers and duties in the light of Convention rights and, so far as possible, to give effect to those powers and duties in a way which is compatible with the Convention rights of the people concerned: ***Ghaidan v Godin-Mendoza*** [2004] 2 AC 557, at §106, Lord Rodger. The Prisons Guidance does that from the perspective that the rights in question include Articles 2, 3, 8 and 14 and "the people concerned" are transgender and non-transgender people alike.

33. The example of a transman looked at in this context exposes a contradiction in the petitioner's case. In the Supreme Court judgment (at §§220-221 and §§232-236) it is said that a transman can be excluded from single sex facilities for both sexes. Applied to prisons, that would mean that a

transman cannot be held in a man's prison because he is biologically a woman but may be excluded from a woman's prison if, for example, his masculine appearance would be something to which reasonable objection might be taken. The contradiction lies in the fact that that transman is not being treated on the basis of biological sex but the practical detriment is more serious. Such a transman would have to be held in an intermediate zone as not quite one gender or the other. ***Goodwin*** *(*§90*)* was unequivocal: that is no longer sustainable. Reference is also made to Baroness Hale of Richmond in ***R (C) v Secretary of State for Work and Pensions*** [2017] PTSR 1476, at §29, for a similar statement.

34. There is a further misconception in Statement 17 when the petitioner infers that Scottish Ministers maintain that Articles 8 and 14 "mandate that a man must be accommodated with women in an otherwise women only single-sex space". There is nothing mandatory in the Scottish Ministers' argument. It is that a transwoman may be accommodated in a woman's prison if that is necessary to respect her Convention rights; and a transman may be held in a man's prison if that is necessary to respect his Convention rights. Three clear examples have been given (two prisoners in the position of Christine Goodwin and a transman of masculine appearance) which show that the reach of "equal opportunities" extending to Convention rights is critical. The Scottish Ministers have no power to act incompatibly with Convention rights and cannot act contrary to the rights of any of those individuals.

35. In Statement 43 the petitioner correctly states that the duty of the Scottish Ministers is to act compatibly with the Convention rights of every prisoner. That requires a balance to be struck. The whole purpose of the Prison Guidance is to inform the conduct of that balancing exercise. The observation in ***R (FDJ)*** [2021] 1 WLR 5265 (§§86-87) is in point. The Guidance is directed to achieving the legitimate aim of ensuring the safety and welfare of **all** prisoners whilst enabling transgender prisoners to live in their chosen gender. The petition seeks to deny the second part of that aim and, in so doing, undermines the first.

36. The petition asks the Court to determine that there is no requirement to carry out a balancing exercise because there is an absolute rule that prisoners must be placed in prisons corresponding to their biological sex. There is no such rule. Quite apart from the fact that declaring such a rule does not tell us where a transman of masculine appearance may be detained, such a rule would place the Scottish Ministers in breach of section 57(2) of the Scotland Act 1998 because it would be incompatible with the Convention rights of some prisoners. To borrow the phrase used by the petitioner, there is nothing in the 2010 Act to "mandate" an act on the part of the Scottish Ministers that would be incompatible with the Convention rights of any prisoner. On the contrary, there is an unequivocal direction in section 57(2) of the Scotland Act 1998 that the Scottish Ministers must not act in that manner. The Prisons Guidance does not direct anyone to act in a way which is inconsistent with the law as just set out. On the contrary, it permits SPS staff to act in a way which is compatible with the law and within devolved competence.

First subsidiary argument: Section 29(6), Rule 126 and Convention rights

37. The first subsidiary argument is that, in the context of this case, the Scottish Ministers exercise a core public function and do so lawfully within the 2010 Act by virtue of Schedule 22. Section 29 applies to the provision of services and the exercise of public functions. The two overlap insofar as the exercise of public functions involves the provision of a service. Where the exercise of a public function does not involve the provision of a service it is regulated by a standalone provision, section 29(6). The meaning of 'services' is broad: it includes the provision of goods or facilities (s 31(2)) and the provision of a service in the exercise of a public function (s 31(3)). A public function is defined as "a function of a public nature for the purposes of the Human Rights Act 1998" (s 31(4)). The express reference to the Human Rights Act 1998 is significant and affirms that the 2010 Act was not intended to result in a public authority acting incompatibly with Convention rights.

38. There is a distinction between what may be called a 'core' public function (one that is not the provision of a service) and a public sector service provider. Section 29(6) applies to the former. There is specific reference to section 29(6) in Schedule 22 to the 2010 Act that creates certain exemptions from liability. In short, a person carrying out a core public function cannot be liable for sex discrimination (or harassment or victimisation) if what is done is pursuant to a "requirement of an enactment".

39. An "enactment" includes subordinate legislation (s 212(1)) and that includes the 2011 Rules. Rule 126 has been cited in the petition:

> "(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".

Rule 2(1) defines "accommodation" as "the cells or rooms used to accommodate prisoners for living and sleeping purposes". Plainly, rule 126(1) authorises segregation of prisoners. In discussing the extent of segregation that is authorised one could debate the meaning of "female" and "male" and "accommodation" but that is unnecessary because rule 126(2) allows a degree of mixing if full segregation is not "reasonably practicable". On any ordinary interpretation rule 126(2) would allow a transgender person to be detained in the same part of the prison as those of the lived gender if that is necessary to ensure Convention right compatibility because it is not "reasonably practicable" to separate them if the separation would be unlawful. If that is not accepted, to prevent Convention incompatibility the rule would require to be read down in terms of section 3 or disapplied: ***RR v Secretary of State for Work and Pensions*** [2019] 1 WLR 6430 at §27, Baroness Hale of Richmond.

40. That same conclusion can be reached by reference to other "enactments": section 6(1) of the Human Rights Act 1998 and section 57(2) of the Scotland Act 1998. There cannot be liability for sex

discrimination, harassment or victimisation if the Scottish Ministers in exercising their core public functions make an exception for a trans person pursuant to the requirements of either provision.

41. The question is whether section 29(6) applies. Does this petition concern a core public function or the provision of a service by the Scottish Ministers in the exercise of their public function? The court can proceed on the basis that section 29(6) and paragraph 1 of Schedule 22 apply because that is admitted by the petitioner in para (1) of the reply to the Respondents' averments in Statement 18. In any event, the 2010 Act Explanatory Notes give examples of core public functions including "core functions of the prison service and the probation service" (para 122). The Supreme Court decision in ***R (Coll) v Secretary of State for Justice*** related to "Approved premises" (formerly probation or bail hostels), and the decision of the court was that a service was being provided, at least by way of the provision (if not the commissioning) of approved premises. ***Gichura v Home Office*** [2008] ICR 1287 related to an immigration detention centre and the complaints are summarised in §10 and related to: (a) the reception procedures (searches and the time and conditions in which he was kept waiting); (b) access to toilet and bathroom facilities; (c) access to and egress from a room; (d) provision of suitable bedding; and (e) medical services. The Court of Appeal concluded that (b)–(e), but not (a), qualified as the provision of services on a broad, purposive interpretation: Buxton LJ at §25. That broad interpretation was applied at a time when the prohibition of discrimination did not apply to core public functions. A broad interpretation is no longer necessary given that section 29(6) applies to such functions.

42. While those authorities might lend some support to the conclusion section 29(6) does not apply because this case involves the provision of services, the relevant consideration is the nature of the task involved. Here the issue relates to the formulation of policy by Ministers informing the exercising of their discretion under section 10 of the Prisons (Scotland) Act 1989. The decisions relating to the composition of the prison estate and the policy to be adopted for the allocation of

prisoners across the estate are 'core' public functions. Consequent on those decisions individual prisoners may receive services of the kinds mentioned in ***Gichura*** but the policy formulation decisions are "in the exercise of a function that is not the provision of a service to the public or a section of the public" and, therefore, section 29(6) applies.

43. The petition is accordingly irrelevant because it is not necessary to justify the operation of prisons by reference to Schedule 3. The admission of a transperson to a prison for the opposite biological sex does not jeopardise the maintenance of what are otherwise separate prisons for women because the defence to a claim for discrimination or harassment by reference to sex is under Schedule 22 and, ultimately, section 57(2) of the Scotland Act 1998. It follows that the Prisons Guidance is not unlawful on the ***R (A)*** approach.

<u>Second subsidiary argument: Schedule 3 governs prisoner placement and requires a remedy under the Human Rights Act 1998</u>

44. The second subsidiary argument is relevant only if the court rejects the preceding arguments and finds that Schedule 3 governs the lawfulness of decisions and policy-making relative to the function of prisoner placement under the Prisons (Scotland) Act 1989. Schedule 3 to the 2010 Act sets out several exceptions authorising discrimination in the provision of services and public functions. In principle, Schedule 3 applies to the totality of functions, including core public functions under section 29(6), but paragraph 2(6) eliminates duplication: section 29 does not apply to anything done in connection with the imposition of a requirement or condition which comes within Schedule 22. That supports the conclusion which would in any event follow from the need to give legislative effect to paragraph 1 of Schedule 22: that, where Schedule 22 is engaged because there is another governing statute, then at least in relation to the protected characteristic of sex, the *lex specialis* for core public functions is Schedule 22, not Schedule 3.

45. Paragraph 26 of Schedule 3 permits separate and different separate services, disapplying the prohibition in section 29 in respect of sex discrimination where the limited provision is a proportionate means of achieving a legitimate aim. Paragraph 27 similarly permits single-sex services where certain conditions for the limited provision are met. The dividing line between separate and single-sex services is unclear, but the lack of clarity is not material.

46. Paragraph 28 of Schedule 3 is derivative of paragraphs 26 and 27. It disapplies the section 29 prohibition in relation to gender reassignment discrimination, subject to a proportionality requirement, by providing that a person does not contravene section 29 "only because of anything done in relation to a matter within subsection (2)", those matters being, read short, the provision of services permitted by paragraphs 26 and 27.

47. The petitioner relies on paragraph 26 and, most notably, on the observation by the Supreme Court in §213 of its judgment that it would be difficult (if not impossible) to establish the conditions necessary to justify separate services for each sex set in that paragraph if there is mixing. The Respondents adhere to the argument made above, that that has a bearing only on the availability of the defence constituted by paragraph 26 and does not of itself establish that a person excluded from the mixed service could claim unlawful sex discrimination.

48. An insistence that the requirement that "a joint service for persons of both sexes would be less effective" (para 26(1)(a) and (2)(a)) be met on an entirely exclusive basis is difficult to envisage in practice. The example usually cited is a mother taking her young son into a female only space – a changing room or a toilet. Does that common occurrence defeat the ability to maintain that space as a single-sex space? A pragmatic approach suggests not. As has been said, paragraph 26 does not supply the complete answer and this provides a good example of that. An essentially single-sex space can be maintained notwithstanding this limited exception because the allowance of that

exception does not give rise to sex discrimination. A father could not claim that his exclusion from the female space constituted sex discrimination. He is not less favourably treated because he can take his young daughter into a male only changing room or a toilet. However, there is an alternative explanation. The provision of an effective service to a mother with young children may require her to have the ability to take her children with her, irrespective of their sex. The effectiveness of a joint service must cater for the needs of the group as a generality that is being served and limited exceptions that are otherwise justifiable in pursuit of the aim that is generally being pursued (young children of the opposite sex being allowed in a single-sex facility maintained to protect the privacy and dignity of women) do not detract from the general proposition that a joint service would be less effective. The presence of a young boy does not challenge the dignity of a woman in a changing room in the way that the presence of an adult male would – and the same may be said of the presence of persons in the position of Christine Goodwin relative to a non-transgender adult male.

49. There is a staged approach to statutory interpretation (primary or secondary): ***S v L*** 2013 SC (UKSC) 20, at §§15-17, Lord Reed. The first stage is to determine the meaning by applying ordinary principles of statutory interpretation. As part of that exercise the Court can apply the presumption that legislation is not intended to place the UK in breach of international law, including the ECHR. If the stage 1 meaning is incompatible with Convention rights, then recourse can be had to section 3 of the Human Rights Act 1998 but that interpretative tool is not unlimited. Section 3 cannot go against the grain of the legislation: ***Ghaidan v Godin-Mendoza*** [2004] 2 AC 557. But if section 3 can be applied at stage 2 it may result in the same provision having different meanings in different cases: ***R (Z) v Hackney LBC*** [2020] 1 WLR 4327, at §114, Lord Sales. If the subject of the exercise is primary (Westminster) legislation and any incompatibility cannot be resolved by interpretation, then the only option (stage 3) is a declaration of incompatibility under section 4.

50. It could be argued that the requirement that "a joint service for persons of both sexes would be less effective" in paragraph 26(1)(a) and (2)(a) must be strictly construed because of the detailed explanation of the architecture of the 2010 Act given by the Supreme Court. That said, the definition of a public function for the purposes of section 29 is by reference to a function of a public nature for the purposes of the Human Rights Act 1998: section 31(4). It cannot have been the intention of Parliament when imposing a duty on a public body under section 29 of the 2010 Act (whether a public body exercising a core function or one providing a service) to require it to act incompatibly with Convention rights. This is a case calling for the application of the presumption referred to in ***S v L.*** That is achieved by construing the requirement in paragraph 26(2)(a) of Schedule 3 as being addressed to the effectiveness of a joint service for the generality of those being served and allowing necessary exceptions required for Convention rights compatibility. That could be achieved as part of an ordinary purposive interpretation but, if necessary, section 3 can be used. There is authority for a trans-inclusive interpretation being applied to the Sex Discrimination Act 1975 by the House of Lords in ***Chief Constable of the West Yorkshire Police v A (No 2)*** [2005] 1 AC 51, albeit the driver in that case was the need to comply with EU Law.

51. The context here is that the trans-inclusive Prisons Guidance is dictated by the need to act compatibly with Convention rights. Recognition of an exception of that limited scope would provide a solution without affecting the ability to maintain the single-sex facility more generally. For those reasons also the Prisons Guidance is not unlawful on the ***R (A)*** approach.

The two alternatives viewed together

52. Neither of these subsidiary arguments is the place to start. Even if they are both wrong the petition is irrelevant because both relate only to some of the lines of defence. The primary question is whether any individual has a relevant claim for sex discrimination or harassment consequent on the

placement of a transgender prisoner in a prison of the opposite sex. Irrespective of the merits of the two alternative arguments the Prisons Guidance is lawful because there is no relevant case alleging sex discrimination or harassment.

53. The significance of these two subsidiary arguments is that they further demonstrate that the Prison Guidance does not conflict with section 54(3) of the Scotland Act 1998 because a trans-inclusive policy is consistent with the 2010 Act. That is more directly the case for section 29(6) because of the express exception in Schedule 22. If Schedule 3 applies, the solution calls for sympathetic interpretation but it can be achieved. Either alternative avoids the conflict between sections 54(3) and 57(2) of the Scotland Act 1998 and removes the conundrum that the Respondents act unlawfully whatever they do or do not do: act unlawfully under section 54(3) if they allow an exception for a suitable trans prisoner whose Convention right would otherwise not be respected; or act unlawfully under section 57(2) if they fail to do so.

54. The rules set down by the Scotland Act 1998 were intended to create a system for the exercise of legislative power by the Scottish Parliament (and, by extension, executive functions by the Scottish Ministers) that is coherent, stable and workable: ***Imperial Tobacco v Lord Advocate*** 2013 SC (UKSC) 153, at §14, Lord Hope of Craighead. An approach that requires the Respondents to act unlawfully whatever they do or do not do is to be avoided where possible. It is both possible and necessary to avoid that result in this case.

GERRY MOYNIHAN KC

LESLEY IRVINE, ADVOCATE

15 December 2025