UNTO THE RIGHT HONOURABLE THE LORDS OF COUNCIL AND SESSION

COS-P1183-25

SUBMISSION

by

THE EQUALITY AND HUMAN RIGHTS COMMISSION 4th Floor, 140 West George Street, Glasgow, G2 2JJ

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

PETITIONER

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

Intervention

1. The intervener is the Equality and Human Rights Commission (the "EHRC"). It is established under section 1 of the Equality Act 2006 ("2006 Act"). The EHRC is the non-departmental public body in Great Britain with responsibility for promoting and enforcing equality and non-discrimination laws in Scotland, England and Wales.

2. The EHRC's functions are provided for in part 1 of the 2006 Act. In terms of section 3 of the 2006 Act, the EHRC has a general duty, in the exercise of those functions to support the development of a society in which *inter alia* people's ability to achieve their potential is not limited by prejudice or discrimination, there is respect for the dignity and worth of each individual, each individual has

an equal opportunity to participate in society, and there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

3. The EHRC's functions include promotion of equality and diversity (section 8); monitoring the effectiveness of equality enactments (section 11); the issuing of a code of practice designed to ensure or facilitate compliance with the Equality Act 2010 ("2010 Act"), or an enactment made under that Act, or otherwise to promote equality of opportunity (section 14); and inquiry, investigation, and enforcement in relation to breaches of the 2010 Act (sections 16, 20 and 21).

Application for judicial review

4. The Petitioner contends that standing the decisions of the Second Division in *For Women Scotland v. Lord Advocate* 2022 S.C. 150 ("*FWS 1*") and *For Women Scotland v. Lord Advocate* 2025 S.C. (U.K.S.C.) 1 ("*FWS 2*") the first Respondent's Prisons Guidance published in February 2024 (the "Prisons Guidance") contains misstatements of the law, and presents a misleading picture of the legal position under the Equality Act 2010 ("2010 Act"). The Petitioner contends that the 2010 Act imposes an obligation upon the first Respondent 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, and that 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. They identify rule 126 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011

("2011 Rules") which states that female prisoners must not share the same accommodation as male prisoners, and that the respective accommodation for male and female prisoners must as far as reasonably practicable be in separate parts of the prison. They argue that in the 2011 Rules the terms "male" and "female" have their biological meaning, consistent with FWS 2. They contend that as a consequence, the Prisons Guidance gives operational directions which run directly contrary to rule 126. They contend that the Prisons Guidance induces prison staff to act unlawfully in terms of section 29 of the 2010 Act. They contend that the guidance gives rise to a devolution issue in that it contravenes the equal opportunities reservation in paragraph L2 of Schedule 5 of the Scotland Act 1998.

5. The Respondents contend that the Prisons Guidance provides for allocation of prisoners based on individual multidisciplinary assessments. They argue 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. Articles 3, 8 and 14 ECHR are said to be engaged in the making of these decisions, and a blanket approach would be unlawful in terms of section 6(1) of the Human Rights Act 1998 ("HRA") and section 57(2) of the Scotland Act 1998 ("SA"). The Respondents also argue that unlawful sex discrimination does not occur from the mere fact that a trans prisoner is held in a prison for those of the opposite biological sex, and that a trans prisoner can have a convention right to be held in a prison for those of the opposite biological sex. It is said that it is therefore not appropriate to review the guidance on a hypothetical basis. In relation to the potential for harassment, it is argued that

this cannot sensibly be considered in a judicial review because it requires specific evidence directed to the claim. That also applies to sex discrimination. They also argue that to automatically hold persons in the prison of their biological sex only because they are transgender would be a breach of article 8 and 14 ECHR.

Single sex services and spaces

6. In *FWS 2* the UKSC held that the words sex, man, and woman in the 2010 Act were references to biological sex (paragraph [265]). Part 7 of schedule 3 of the 2010 Act mean biological sex, biological woman, and biological man. Section 29 of the 2010 Act contains prohibitions on discrimination, victimisation and harassment in the provision of services (etc). Exceptions from those prohibitions under section 29 of the 2010 Act are made in part 7 of schedule 3, in relation to the provision of separate, single and concessionary services. In *FWS 2* the UKSC determined that the proper functioning of these provisions requires a biological interpretation of sex (paragraphs [210] to [228]; [265]). The EHRC's understanding of the consequence of this is that if single sex spaces or services are provided to individuals of both sexes, they cannot be described as single-sex; such a facility/service is, in substance, a mixed-sex facility, and recourse to the exceptions can no longer be relied upon. The question turns on the cohort to whom the service/facility is provided: if that cohort is mixed-sex, the facility/service is provided on a mixed-sex basis. Distinction should also be drawn between service users and those involved in providing the service. For example, the presence of male guards in women's prisons does not change the single-sex nature of the facility, since guards are not service users or those in

relation to whom the public function of imprisonment is exercised—the "women" in "women's prisons" refers to female prisoners.

7. There is further authority for this approach: in *R (Coll) v Secretary of State for Justice* [2017] 1 WLR 2093 at [34] Baroness Hale (giving the unanimous judgment of the Supreme Court) held that "*paragraph 26 proceeds on the assumption that, without it, the provision of single sex services would be unlawful discrimination*" even where both sexes are provided with equal facilities on a separate basis. The exclusion of men from the women's and women from the men's facilities are two separate instances of direct sex discrimination (see also *HM Chief Inspector of Education, Children's Services and Skills v Al-Hijrah School* [2018] 1 WLR 1471 at [45]-[51]). It is not a defence to say that some men have been admitted: what matters is the reason why those excluded are excluded (*viz*, because of sex). The comparator test here is whether a similarly situated woman (i.e., without the PC of gender reassignment) would be admitted: if yes, then a man in the same situation is being excluded for reasons of sex—direct sex discrimination. This is also the approach of UKSC in *Coll* at [30].

The Respondents' argument on relevancy

8. The primary argument for the Respondents is that the Petition is irrelevant because the existence of an underlying claim for sex discrimination or harassment cannot be assumed (Note of Argument at §4). EHRC's position is that this is incorrect. A policy or decision may be viewed as unlawful on the basis that it will give rise to unlawful discrimination or harassment under the

2010 Act, without reference to the particular circumstances of an underlying claim. It might fairly be said that a female prison is a quintessential example of a single-sex provision which would unarguably meet the requirements of, for example, para 27 of Schedule 3 to the 2010 Act. In line with the decision in *FWS 2,* if there is a policy of allowing some male prisoners in such a prison then it is no longer providing a single-sex provision. Furthermore, if there is no underlying claim for sex discrimination or harassment, then the schedule 3 exceptions serve no purpose: their fundamental legislative function is to render lawful the exclusion of men from facility/service X or women from facility/service Y, proceeding (as UKSC noted in *Coll* at [34]) on the presumption that such exclusion would otherwise be unlawful sex discrimination. This is confirmed by the statutory language: unless the exceptions' conditions are met, exclusion on grounds of sex is unlawful. It is also not a defence to a claim of direct sex discrimination that some men would not be discriminated against: *Coll* at [30] affirms this focus on the reason for exclusion and the comparator test described above.

9. Reference is made to *FWS 2* at [211] and [225], where one finds the following (emphasis added):

> "[211] Part 3 of the EA 2010 regulates the provision of services and public functions... Schedule 3 contains exemptions from this general prohibition. As we shall explain, some of these permit what would otherwise constitute gender reassignment discrimination but make no similar provision for persons issued with a full GRC. **Other provisions**

permit carve-outs from what would otherwise constitute sex discrimination under the EA 2010. In enacting these exemptions, the intention must have been to allow for the exclusion of those with the protected characteristic of gender reassignment, regardless of the possession of a GRC, in order to maintain the provision of single or separate services for women and men as distinct groups in appropriate circumstances. **These provisions are directed at maintaining the availability of separate or single spaces or services for women (or men) as a group**, for example, changing rooms, homeless hostels, segregated swimming areas (that might be essential for religious reasons or desirable for the protection of a woman's safety, or the autonomy or privacy and dignity of the two sexes) or medical or counselling services provided only to women (or men), for example, cervical cancer screening for women or prostate cancer screening for men, or counselling for women only as victims of rape or domestic violence…

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

10. It is respectfully submitted that it is difficult to read that passage as distinguishable from the present context: homeless hostels or swimming areas are not more obviously requiring of single-sex provision than are prisons.

Provision of services or exercise of public function

11. The parties appear to be agreed that allocation of prisoners by the Respondents is the exercise of a public function as opposed to the provision of a service: see Note of Argument for the Petitioners at §2.9, and that for the Respondents at §41. The prohibition on discriminatory treatment in the provision of services to the public is contained in section 29(1) of the 2010 Act with further prohibitions in sections 29(2) to 29(5), while the prohibition on discrimination, harassment or victimisation in the exercise of a public function that is not the provision of a service to the public or a section of the public is contained in section 29(6). Conduct which is prohibited in terms of section 29(6) of the 2010 Act is subject to an exception in schedule 22 paragraph 1 of the 2010 Act, where the relevant conduct is something that the person must do pursuant to a requirement of an enactment. The Respondents contend that acting in a convention-compliant manner is a requirement of section 6(1) HRA and section 57(2) of the SA and therefore the exception in schedule 22 paragraph 1 applies.

12. Section 31(4) of the 2010 Act provides that for the purposes of *inter alia* section 29, a public function is a function of a public nature for the purposes of the HRA. It is stated in the explanatory notes to the 2010 Act that public functions not involving the provision of a service include the core functions of the prison service and the probation service.

13. EHRC's view is that both ss.29(1) and 29(6) may be engaged. Prisoners will be provided with "services" whilst incarcerated (such as accommodation, toileting and washing arrangements) and such services provided in the exercise of a

public function are covered by s.29(1): see s.31(3). The allocation of prisoners to a particular estate is, on the other hand, covered by s.29(6). That is consistent with the views expressed in *FDJ* [2021] 1 W.L.R. 5265 at [67].

14. On that basis, the Respondents' first subsidiary argument does not necessarily provide the answer: Sched 22 to the 2010 Act only applies to s.29(6), and not to s.29(1), so that if both are engaged then Sched 22 does not assist.

15. If it is correct to focus on public functions only, then two statutory provisions are in play: the clear direction in rule 126 of the 2011 Prison Rules, and the general requirements of the HRA 1998. The Respondents appear to accept that the general requirement of Rule 126(1) could only be departed from under reference to the "reasonably practicable" carve out in Rule 126(2) if placement of a trans prisoner in a particular prison would involve a breach of their human rights. On that basis, this is perhaps a sterile argument: if s.29(6) applies then Sched 22 means that Rule 126 requires biological sexes to be segregated unless that would involve a breach of Convention rights; and if s.29(1)-(5) are in play then Sched 22 has no application and *FWS 2* means that single-sex spaces should remain single-sex unless that would, again, involve a breach of Convention rights.

Interaction Between Equality Act 2010 and Human Rights

16. EHRC recognises that, at least in Scotland, the impact of the 1998 Act is primarily a matter for SHRC rather than EHRC. It thus restricts itself to brief

observations on the interplay between the 1998 and 2010 Acts in the present context..

17. If the Court were to take the view that we are only here concerned with the exercise of a public function, rather than the provision of a service (the Respondents' first subsidiary argument), or if the Court were to take the view that a particular reading of the 2010 Act was necessary to comply with the Convention (the second subsidiary argument) the Respondents' argument would be of substance if it were correct that they could only act compatibly with the human rights of a transwoman by having a policy that each transwoman will be assessed to decide whether to place them within the women's prison estate (i.e., if there were no other course of action that would result in compliance with the Convention). EHRC makes the following observations:

    a. It is crucial to bear in mind at all times that it is not only the human rights of trans prisoners that are at issue, but also the human rights of women prisoners. There is inevitably a need to balance those rights if they come into conflict.

    b. How a prisoner is dealt with in the prison estate may, in extreme cases, result in a breach of article 3 ECHR (e.g. as was conceded by the Scottish Ministers in the slopping-out case of *Docherty v. Scottish Ministers* 2012 S.C. 150, First Division at [4]). For conduct to constitute a breach of article 3, it must reach a minimum level of severity, which usually means actual bodily injury or intense physical or mental suffering

(*Ali v. Serco Ltd* 2020 S.C. 182, Second Division at [48]). The mere fact of not being housed in one's preferred estate will not, without more, constitute inhuman or degrading treatment which crosses this threshold.

c. While it has been held that a lack of legal recognition of gender identity may breach article 8, where recognition is available, article 8 has not been held by the European Court of Human Rights to require prison housing (or indeed any other service) to be provided in line with gender identity *per se*. The correct test, following *AB v Secretary of State for Justice* [2021] UKSC 28 and *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, is whether the Court can be "fully confident" that, if this case were before the ECtHR, the Court in Strasbourg would hold that the article 8 positive obligation requires the UK to prohibit biological-sex-based rules (such as Rule 126) in prisoner allocation. Absent such full confidence, the Court ought not disapply domestic law. Given the wide margin of appreciation, the test is rarely satisfied, and it is highly unlikely in this context that Strasbourg would find such that an obligation existed.

d. In *R(FDJ) v. Justice Secretary* [2021] 1 WLR 5265 the Divisional Court accepted that competing interests had to be considered and competing rights had to be balanced (paragraph 73), but did not find that placing a post-surgery transwoman in a male prison would automatically breach article 8, provided that the risks to the individual are appropriately assessed and mitigated.

e. In *FDJ* the Divisional Court stated that it is not possible to argue that the prisons authority should have excluded all transgender women from women's prisons. The case pre-dates *FWS 2* and it must now be read in light of that decision. It is, perhaps, unlikely that *FDJ* can survive the combination of *AB, Elan Cane* and *FWS 2.* UKSC has been clear that it is not for domestic courts to conduct this kind of balancing test unless it is fully confident that there is a positive obligation arising under Art 8 to house transwomen in the female estate. Only once it is concluded that this obligation arises within the scope of Art 8 can a court then proceed to consider the lawfulness of the interference with that obligation. Given the limitations to Art8 (*per* Art8(2)), the fact that other rights (in particular those of the biological women within a women's prison) are at stake, and the margin of appreciation available, the necessary "full confidence" is likely to be missing.

f. Placing a transwoman in a male prison would not result in prohibited discrimination on the grounds of sex for the purposes of article 14. Nor would it be discrimination on the grounds of gender reassignment: absent the status of gender reassignment, the individual concerned will be treated in like manner to other biological males.

18. The Respondents argue, by reference to the HRA 1998, that the EA 2010 and the 2011 Rules must be read down, or alternatively that there should be a declaration of incompatibility.

19. The difficulty with this argument is that the mere possibility that an Act of Parliament might be applied in a way that contravenes the Human Rights Act 1998 (HRA) does not, by itself, permit a court to strain the statutory wording or make a declaration of incompatibility. The court must be satisfied that the provision itself is incompatible with a Convention right, and a declaration of incompatibility is a measure of last resort, only available when it is impossible to interpret or apply the legislation in a way that is compliant with the Convention rights.

20. The test in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 requires interpretation to be consistent with the core legislative purpose. In *FWS 2*, the UKSC found the central legislative purpose ("grain") of the 2010 Act was predicated on biological sex, making a section 3 HRA interpretation which diverts therefrom incompatible with that core. A declaration of incompatibility under section 4 HRA would be appropriate (in line with *AB* and *Elan-Cane*) only if the Court is fully confident that Strasbourg would find the absence of such an interpretation a breach of the Convention.

21. This can be seen from the decision of the House of Lords in *Bellinger v Bellinger*. There, Lord Hope said:

> "67.. We cannot proceed to the making of a declaration of incompatibility under section 4(2) of the Human Rights Act 1998 without examining the question which section 3(1) of the Act treats as the logically prior question, which is whether the legislation can be read and given effect in a way which is compatible with the Convention rights. As Lord Steyn

put it in R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45 , 68D—E, para 44, a declaration of incompatibility is a measure of last resort. But the word "must" which section 3(1) uses is qualified by the phrase "so far as it is possible to do so". As I said in *R v Lambert* [2002] 2 AC 545 , 585B—D, para 79, the obligation, powerful though it is, is not to be performed without regard to its limitations. The obligation applies to the interpretation of legislation, which is the judges' function. It does not give them power to legislate..."

22. Accordingly, the first question is whether the statutory regime is capable of being read and given effect in a way which is compatible with the Convention rights. Only if it is genuinely impossible to achieve compatibility through interpretation should a declaration of incompatibility be considered, and not merely because of a hypothetical possibility of incompatible application.

23. Equally, the HRA is not to be used to subvert the clear meaning of legislation. Thus in *R. (Morris) v Westminster City Council* [2004] EWHC 2191 (Admin) at [38], Keith J said: —

"If I were to read section 185(4) in such a way as made it compatible with Art. 14, I would be falling into the trap of amending section 185(4), not interpreting it. To use the words of Lord Rodger of Earlsferry in *Ghaidan* at para 110, I would be changing 'a provision from one which Parliament says that x is to happen into one saying that x is not to happen'."

24. Accordingly, a declaration is only appropriate where incompatibility is inherent and cannot be removed, not merely where it might arise in particular given circumstances.

25. Applying this to the precise context of trans prisoners, an HRA approach would only justify reading down or a declaration if it is impossible to read and apply the 2010 Act consistently with the human rights of trans prisoners. It is not clear to EHRC from what has been said by the Respondents as to whether it is being argued that trans prisoners simply cannot be accommodated within the estate appropriate to their biological sex. Given the possibility of bespoke arrangements to account for the protected characteristic of gender reassignment, it is thought unlikely that prisons simply cannot operate without allowing trans prisoners to be held in the prison appropriate to their chosen gender as opposed to their biological sex.

26. EHRC is keen to stress the point made at para 2 above: one of its functions is to support the development of a society in which *inter alia* people's ability to achieve their potential is not limited by prejudice or discrimination, there is respect for the dignity and worth of each individual, each individual has an equal opportunity to participate in society, and there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights. This involves being fair to all persons in society, whether trans or not. It is incumbent on the Respondents, in managing the prison estate in Scotland, to ensure that the rights of <u>all</u> are properly observed. That includes, crucially, the rights of women prisoners to safety, privacy and

dignity. If that requires the making of bespoke arrangements for trans prisoners then that is what it requires to happen. Unless the Respondents are able to demonstrate that it is simply impossible for any arrangements to observe the rights of trans prisoners without a situation in which – contrary to what was said in *FWS 2* – they are placed in the estate for the opposite sex to their biological sex, the human rights arguments are beside the point.

27. In *FWS 2* the UKSC had extensive submissions from both the Respondent and interveners on the interaction between the 1998 Act and Convention and the 2010 Act on the issues, but did not consider the statutory framework in the 2010 Act to give rise to any breach of Convention rights of trans persons in the context of single sex services or spaces. That being so, it is difficult to see how there could be any basis for a declaration of incompatibility in this case.

EHRC Codes of Practice

28. The EHRC is empowered to issue codes of practice in connection with any matter addressed by the 2010 Act by section 14(1) of the 2006 Act. Under section 14(2) any such code of practice shall contain provision designed to ensure or facilitate compliance with the 2010 Act or an enactment made under that Act. The EHRC is required to publish proposals and consult before issuing a code (section 14(6)). A draft code is submitted to the Secretary of State who may approve or not approve the draft (section 14(7)). Where a draft is approved, the Secretary of State lays a copy before Parliament. Where a draft is laid before Parliament, and neither House passes a resolution disapproving the draft within 40 days, the EHRC is entitled to issue the code in for form of

the draft. The code comes into force in accordance with provision made by the Secretary of State by order (section 14(8)). This process is also available for revision of a code (section 15(1)).

29. The effect of a code of practice is provided for in section 15(4) of the 2006 Act:

> (4) A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code–
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> (a) shall be admissible in evidence in criminal or civil proceedings, and
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> (b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.

30. Accordingly, a code of practice is not law. It does not bind a court and cannot require a court to reach a particular conclusion. However, a code of practice is an important reference point for courts, and for all those who need to comply with the 2010 Act (see *R(National Council for Civil Liberties) v. Equality and Human Rights Commission* [2025] EWHC 1504 (Admin), Swift J at [4]).

31. The relevant code of practice in the present case is, or would be, the EHRC's Code of practice for services, public functions and associations (the "Code"). Revision of the Code of practice was the subject of a consultation which concluded on 3 January 2025. Following the decision of the UKSC in *FWS 2,* the EHRC considered that the draft Code required to be revised in certain respects. Another consultation was opened and has concluded. A draft Code was submitted to the Secretary of State for approval on 4 September 2025. As

at the date hereof, it has not been laid before Parliament and consequently a revised code of practice has not been issued by the EHRC.

32. Standing the decision of the UKSC in *FWS 2* the EHRC considers that the previous version of the Code (issued in 2011) is based on an understanding of the meaning of "sex" in the 2010 Act which has now been determined authoritatively to be incorrect. They have invited the Secretary of State to make an order to withdraw that version of the Code, under section 15(3) of the 2006 Act. Pending such an order that version of the Code remains extant and, in terms of section 15(4)(b) of the 2006 Act, requires to be taken into account in cases where it appears to the court to be relevant. In the circumstances, however, though technically still in force, the EHRC does not found on the 2011 version of the Code in the present matter. In a letter to the Secretary of State of 15 October 2025 the EHRC requested that the 2011 version of the Code be revoked as soon as possible, as well as seeking progress in the procedure concerning the revised Code.

Conclusion

33. The EHRC as regulator of the 2010 Act and an intervener in these proceedings endeavours to assist the Court in these proceedings. They do so in recognition that the matter at hand involves competing considerations. It is of the first importance that a solution is found in which all prisoners within the Scottish prison estate have their rights respected. EHRC respectfully contends that the solution here lies in practical provisions within that estate, as opposed to in legal argument. The 2010 Act as explained in *FWS 2* is capable of being observed

within the confines of the 1998 Act, as long as necessary provision is made on the ground. There is no basis for a declaration of incompatibility, which would introduce most unwelcome uncertainty. EHRC is grateful for the opportunity to intervene in these proceedings and would offer any further assistance that the Court may require.

Roddy Dunlop, KC
David Anderson, Advocate
16 January 2026