

IN THE COURT OF SESSION
WRITTEN SUBMISSIONS
for
THE SCOTTISH HUMAN RIGHTS COMMISSION
INTERVENER

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

A. Introduction

1. The following submissions are made on behalf of the Intervener pursuant to the Court's interlocutor of 18 December 2025.
2. The Intervener is a statutory body. It is under a general duty to promote human rights and to encourage best practice in relation to human rights, including Convention rights (Scottish Commission for Human Rights Act 2006, s.2). The Intervener is accredited as an "A Status" National Human Rights Institution, in recognition of the fact that it is fully compliant with the United Nations Paris Principles. In making this written intervention, the Intervener aims to assist the Court by offering a detailed analysis of the Convention rights that the Intervener considers to be engaged by a decision to place a transgender prisoner in either the male or female estate. Principally, but not exclusively, the rights that are engaged are those of biological female prisoners and staff members, and those of transgender prisoners. In making this intervention, the

Intervener does not advocate in favour of either party's position or seek to give undue prominence to the rights of any one category of persons. Rather, the Intervener is eager to ensure that the human rights analysis that is relevant to the questions posed by the petition has been ventilated in as fulsome a manner as is appropriate in the context of these proceedings. In doing so, the Intervener considers it important to emphasise that the rights of all affected groups must be given appropriate consideration in any decision as to where to place a transgender prisoner within the prison estate. The rights of one group cannot be systematically prioritised over those of another. Most obviously in this context, when considering the placement of transgender prisoners, it is necessary to go beyond consideration of the rights of transgender prisoners themselves and to take account of the rights of other affected groups such as female prisoners and staff. As explained in more detail below, the Intervener does not consider the existing SPS policy and guidance to facilitate adequate consideration of all affected parties' Convention rights and may therefore, in some cases, give rise to an unlawful violation of the Convention rights of women prisoners, in particular.

3. The petition and answers raise a number of issues that require to be determined by this Court. One such issue is whether a 'without exception' policy that transgender prisoners must automatically and in all circumstances be accommodated in a prison corresponding to their biological sex could, in its implementation, amount to an unlawful interference with some prisoners' Convention rights. The Intervener considers that this more specific formulation of the issue is likely to be of greater utility than referring to the somewhat amorphous concept of a "*blanket policy*". The Intervener's submissions consider this issue. However, as addressed below, the Intervener wishes to note that it does not consider this question to be the only relevant matter in ensuring that a policy on the accommodation of transgender prisoners adequately protects Convention rights of all prisoners and staff. For the avoidance of doubt, the Intervener advances no submission on how the remaining issues presented by the petition and answers (i.e. those which do not require a human rights analysis) ought to be resolved by the Court, other than to note, as set out in the Intervener's August 2025 "*Statement in response to the Supreme Court judgment in For Women Scotland vs The Scottish Ministers*", that "*the Equality Act 2010 does not exist in isolation, and it must be applied in line with the requirements of the Human Rights Act 1998 and the international human rights framework*".

B. Relevance of Convention rights

4. The Court requires to grapple with whether a ‘without exception’ policy that all prisoners must automatically and in all circumstances be accommodated in a prison that accords with their biological sex would, in its implementation, produce unlawful results. It is respectfully submitted that the automatic placement of a transgender individual in a prison which accords with their biological sex is likely to engage that individual’s rights under Article 8, and in some circumstances, Articles 3, 2 and 14 of the Convention. Having regard to Strasbourg and domestic jurisprudence, it is open to this Court to conclude that in some specific cases (but not all, or even most, cases), a ‘without exception’ policy as defined above, in its implementation, may result in unlawful interference with an individual’s Convention rights.
5. A related question is whether the current Prisons Guidance is liable, by placing transwomen in the female estate, to result in an unlawful interference with the rights of one or more prisoners in the female estate. It is respectfully submitted that the Articles 8, 3, 2 and 14 rights of female prisoners are, in some cases, likely to be engaged by a decision to place a transgender prisoner (whether a transman or transwoman) in the female estate. While it is respectfully submitted that a ‘without exception’ policy as defined above is, in its implementation, likely to result in an unlawful interference with individuals’ Convention rights in some cases, the same criticism could be levied at a ‘without exception’ policy to automatically accommodate transgender prisoners in a prison that aligns with their gender identity.
6. Therefore, when considering where and how to accommodate a transgender prisoner, the application of a clear and consistent human rights assessment which sets out clear criteria to be applied in considering where and how a prisoner is to be accommodated, and which properly directs decision makers to consider the engaged rights of all prisoners and staff, is the most appropriate means of assessing and balancing potentially competing rights. For the avoidance of doubt, this is not the same as the current individualised risk assessment policy.

C. The Convention rights of female prisoners and staff

7. In order to frame the application of Convention rights in this context, it is appropriate to begin by considering the human rights rationale for sex-segregated prisons. It has long been recognised, domestically and internationally, that women prisoners have distinctive needs and vulnerabilities (see, for example, Rule 1 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (“**the Bangkok Rules**”)). That is in part as a result of the risks posed by gender-based violence, including sexual violence. Many female prisoners have experienced such violence prior to their incarceration (by way of example, see the Prison Reform Trust’s 2017 report on domestic abuse as a driver to women’s offending). In recognition of the particular risks faced by female prisoners by virtue of their sex, rule 11 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (“**the Nelson Mandela Rules**”) provides that: “*Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate*”. Rule 81 of the Nelson Mandela Rules provides, *inter alia*, that where a prison accommodates both men and women, the part of the prison set aside for women shall be under the authority of a female staff member and no male staff member shall enter the women’s part of the prison unless accompanied by a female staff member.
8. The United Kingdom is obliged in terms of its obligations under the Convention on the Elimination of All Forms of Discrimination against Women (“**CEDAW**”) (to which the Strasbourg Court regularly has regard) to “*take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men*” (see Article 4). Similarly, Article 6 of the Istanbul Convention (to which the United Kingdom is a signatory) provides that: “*Parties shall undertake to include a gender perspective in the implementation and evaluation of the impact of the provisions of this Convention and to promote and effectively implement policies of equality between women and men and the empowerment of women*”. Ensuring that the Convention rights of women are adequately safeguarded in the detention context is therefore essential not only to the production of

lawful decisions on a case-by-case basis, but also to the United Kingdom's compliance with its international law obligations.

9. Standing that sex-segregated prisons are provided in order to respect and accommodate the distinctive needs and vulnerabilities of female prisoners, one can readily see that the accommodation of a transgender prisoner of male biological sex within the female estate is likely, in many cases, to engage the Article 8 rights of female prisoners. In some circumstances, such a decision may also engage the rights of female prisoners under Articles 3, 2 and 14.

i. *Article 8*

10. Female prisoners' Article 8 rights could, in some circumstances, be impermissibly breached by their accommodation alongside a transgender prisoner. Having regard to, for example, a given transgender prisoner's offending history and any relevant vulnerabilities of the women with whom the transgender prisoner would be accommodated, a decision-maker could legitimately conclude in some cases that the placement of that prisoner in the female estate would give rise to a disproportionate and unjustified interference with the female prisoners' Article 8 rights because of, *inter alia*, the risk of physical and psychological harm to female prisoners posed by the specific prisoner in question.

11. However, it is respectfully submitted that any suggestion that the mere presence of any transwoman on the female estate automatically represents an unlawful interference with female prisoners' Convention rights (whether under Article 8 or Article 3) should be rejected. That proposition is unsupported by authority (and indeed was dismissed by Holroyde J in *R (on the application of FDJ) v Secretary of State for Justice* [2021] 1 W.L.R. 5265, as discussed further below). It is not unusual for Convention rights to conflict, or compete. The role of the decision-maker, subject to the supervision of the Court, is to have due regard to all engaged rights and to balance those rights to reach an appropriate decision.

12. It is also relevant to have regard to the Convention rights of (in particular) female prison staff. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (“CPT”) has recommended on various occasions that prisoners should only be searched by staff of the same sex and, in particular, where a prisoner is required to undress that should be done out of the sight of custodial staff of the opposite sex (the 10th General Report on the CPT’s activities, paragraph 23). While the CPT is predominantly concerned in this context with ensuring the rights of prisoners are respected, one can readily see that a requirement in some circumstances for a female prison officer to conduct an intimate search of a transgender prisoner would engage the staff member’s Article 8 rights. It is respectfully suggested that the Convention rights of female prison staff employed in the female estate, insofar as they are engaged by a given decision, must be taken into account and adequately safeguarded.

ii. *Article 3*

13. In considering the application of Article 3 in the context of prisoners, the Strasbourg Court has observed that: “[f]or detention specifically to fall under Article 3 of the Convention, the suffering and humiliation involved must go beyond the inevitable element of suffering and humiliation connected with deprivation of liberty itself. That said, the authorities must ensure that a person is detained in conditions compatible with respect for human dignity, that the manner and method of execution of a custodial sentence or other type of detention measure do not subject the person concerned to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, this person’s health and well-being are adequately secure” (*Neshkov and Others v Bulgaria* (nos. 36925/10, 21487/12 and 72983/12), decision dated 27 January 2015 at paragraph 228). The placement of a homosexual prisoner in solitary confinement, seemingly driven by a desire on the part of prison authorities to protect him from abuse by other prisoners, was deemed by the ECtHR to be a violation of his Article 3 rights (*X v Turkey* (no. 24626/09), decision dated 9 October 2012 at paragraph 42).

14. It is possible that the accommodation of transgender prisoners in the female estate could, in some circumstances, give rise to a breach of the Article 3 rights of female

prisoners. In finding that detention conditions crossed the threshold of Article 3, the Strasbourg Court has previously had regard (alongside other factors) to the fact that male and female prisoners were held together (see *Georgia v Russia* (II) (no. 38263/08), decision dated 21 January 2021). In the context of transgender prisoners, this could manifest in a number of ways. It is possible, depending on the precise circumstances, that the housing of female prisoners alongside a prisoner of the opposite biological sex could amount to a violation of female prisoners' Article 3 rights because of the unacceptable risk of physical and sexual violence, and the affront to dignity that certain female prisoners may experience in such circumstances. That could be a transwoman prisoner who has not had full gender reassignment surgery, or conceivably a transman prisoner who has had such surgery. It is respectfully submitted that this serves simply to underline that a clear and consistent assessment of the human rights of all relevant parties, rather than a 'without exception' policy, is the most effective means of ensuring that all affected persons' Convention rights are appropriately safeguarded.

iii. Article 2

15. Article 2 of the Convention protects the right to life. It encompasses a positive obligation on the state to take preventative measures to protect a person from lethal force from non-state actors (such as, in this context, other prisoners) (*Osman v the United Kingdom* (no.23452/94), decision dated 28 October 1998 at paragraph 115). The Strasbourg Court has recognised that Article 2 also requires the state, in some circumstances, to take measures to protect an individual from self-harm (*Renolde v France* (no.5608/05), decision dated 16 October 2008 at paragraph 81). The ECtHR has reiterated on a number of occasions, in the context of Article 2, that persons in custody are in a vulnerable position and the authorities are under a duty to protect them (see, e.g., *Keenan v the United Kingdom* (no. 27229/95), decision dated 3 April 2001 at paragraph 91).

16. A transgender woman who has a history of sexual and physical violence against women may pose a greater risk of violence to other female prisoners than others within the female estate such as to engage the Article 2 rights of women prisoners. Having regard to these possibilities, the Intervener concludes that a 'without exception' policy of

housing transgender prisoners in a prison that aligns with their biological sex could accordingly, in some cases, engage Article 2 (albeit the Intervener acknowledges that it is particularly difficult to assess the likely Article 2 implications of such a policy in the abstract, given that it is entirely possible for the state to comply with its obligations under Article 2 even if an individual is accommodated in a situation that results in an unlawful interference with their rights under Articles 3 and 8).

iv. *Article 14*

17. Article 14 of the Convention prohibits discrimination in the enjoyment of the rights and freedoms provided for by the Convention. Article 14 is engaged not only where there is “*a difference in treatment of persons in relevantly similar situations*” but also in some circumstances where there is “*a failure to attempt to correct inequality through different treatment*” (*Taddeucci and McCall v Italy* (no. 51362/09), decision dated 30 June 2016 at paragraph 81). It is foreseeable that the Article 14 rights of women prisoners could in some circumstances be engaged by a decision to place a transgender prisoner in the female estate. Those rights should be given appropriate consideration in the context of a complete human rights assessment.

D. Convention rights of transgender prisoners

i. *Article 8*

18. There is a clear and consistent line of authority from the European Court of Human Rights (“**ECtHR**”) which holds that transgender identity comes within the ambit of Article 8 of the Convention. The Strasbourg Court has, on a number of occasions, affirmed that the rights guaranteed by Article 8 of the Convention extend to “*gender identity, as a component of personal identity*” (see, e.g., *A.P., Garçon and Nicot v. France* (nos. 79885/12, 52471/13 and 52596/13, decision dated 6 April 2017) at paragraphs 92-94). This is not a novel development. The Strasbourg Court first found a violation of Article 8 in respect of the treatment of a transgender applicant more than 30 years ago, in the case of *B. v. France* (25 March 1992, Series A no. 232-C).

19. The Strasbourg Court has expressly recognised that Article 8, “*in the context of the application of that provision to transgender persons*”, “*includes a right to self-determination... of which the freedom to define one’s sexual identity is one of the most basic essentials*” (*A.P., Garçon and Nicot v. France* at paragraph 93). In particular, the ECtHR has identified that “*the right of transgender persons to personal development and to physical and moral security is guaranteed by Article 8*” (*A.P., Garçon and Nicot v. France* at paragraph 93). That is the case irrespective of whether a transgender person has undergone gender reassignment surgery: “*the right to respect for private life under Article 8 of the Convention applies fully to gender identity, as a component of personal identity. This holds true for all individuals*” (*A.P., Garçon and Nicot v. France* at paragraphs 94-95).

20. The ECtHR has not yet been asked to determine whether the imprisonment of a transgender individual in a prison corresponding to their biological sex amounts to an unlawful interference with that individual’s Convention rights. However, one would not require to depart from or radically develop the Strasbourg Court’s jurisprudence to conclude that the automatic placement of transgender prisoners in a prison estate of their biological sex could, in some circumstances and at least absent other protective measures, amount to an unlawful interference with an individual’s Convention rights. This could arise where, for example, they cannot express their gender identity without giving rise to an unacceptable risk to their safety from other prisoners, which cannot be mitigated other than by excluding that person from the remainder of the estate. This exclusion itself may engage the individual’s rights as set out at paragraph 12.

21. For the avoidance of doubt, the Intervener does not contend that there is a positive obligation on the first respondent to place all transgender prisoners in a prison which accords with their gender identity or even to operate a presumption to that effect, whether under Article 8 of the Convention or otherwise (as was the accepted position before the English High Court in *Prusianu v Romania* [2023] 1 W.L.R. 495 at paragraph 43, as discussed further below). There is no Strasbourg authority in support of such a proposition. However, the absence of a positive obligation to ensure the imprisonment of transgender individuals in accordance with their gender identity does not preclude

the possibility that failing to take such steps could, in some cases, amount to a breach of the state's negative obligation not to unlawfully interfere with an individual's Article 8 rights.

22. The Strasbourg Court has expressly recognised the particular vulnerability of a transgender prisoner undergoing a process of gender reassignment, and that this required enhanced protection (see *W.W. v Poland* (no. 31842/20) decision dated 11 July 2024 at paragraph 96). In doing so, the Court had regard to the Recommendation adopted by the Committee of Ministers on 31 March 2010 (CM/Rec(2010)5) on measures to combat discrimination on grounds of sexual orientation or gender identity. The Recommendation provides that:

“4. Member states should take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons, and in particular take protective measures against physical assault, rape and other forms of sexual abuse, whether committed by other inmates or staff; measures should be taken so as to adequately protect and respect the gender identity of transgender persons.”

(*W.W. v Poland* at paragraphs 38 and 96).

23. As noted above, insofar as the Intervener is aware, the Strasbourg Court has not yet been asked to determine whether the incarceration of a transgender prisoner in a prison which accords with his or her biological sex amounts to an unlawful interference with that individual's Convention rights. By the same token, the Intervener is not aware of any Strasbourg authority to the effect that the incarceration of a transgender prisoner in a prison which accords with his or her gender identity amounts to an unlawful interference with the Convention rights of female prisoners within the same estate (albeit such a claim similarly cannot, as discussed above, be excluded).

24. Having regard to the established principles applied by the Strasbourg Court when considering the application of Article 8 in the context of transgender identity, it is respectfully suggested that this Court ought not to conclude that a 'without exception' policy of automatically and in all circumstances imprisoning transgender individuals in

the prison of their biological sex could never amount to an unlawful interference with those individuals' Article 8 rights. As outlined above, the ECtHR has held that gender identity comes within the ambit of Article 8, and the right of transgender people "*to physical and moral security is guaranteed by Article 8*". The Strasbourg Court has also acknowledged that transgender prisoners are in a particularly vulnerable position. While the Court does not elaborate on what is meant by vulnerability, the Intervener considers that safety and the duration for which a prisoner is incarcerated are likely to be relevant. Having regard to these principles, one can readily conclude that a decision to place an individual in a prison which does not accord with their gender identity is likely to engage their Article 8 rights. It is equally possible to envisage circumstances where that decision (at least absent other possible mitigating steps being taken which would be appropriate to an individual case) would arguably amount to a breach of Article 8, having regard to the particular circumstances and offending history of the prisoner in question. In each case, a proportionality assessment will be required. That would be facilitated by the application of a policy that provides for a clear and consistent human rights assessment, having due regard to all engaged rights.

25. That the rights of transgender prisoners could be impermissibly breached by the application of a 'without exception' policy of incarceration in the estate aligned with prisoners' biological sex was acknowledged, *obiter*, by Holroyde LJ in *R (on the application of FDJ) v Secretary of State for Justice* [2021] 1 W.L.R. 5265. That case concerned a challenge to policies in England which required the initial placement of transgender prisoners in the women's estate. Holroyde LJ remarked:

"The difficulty which the Claimant faces, in my view, is that it is not possible to argue that the Defendant should have excluded from women's prisons all transgender women. To do so would be to ignore, impermissibly, the rights of transgender women to live in their chosen gender; and it is not the course which the Claimant herself says the Defendant should have taken" (at paragraph 83).

26. In *R (B) v Secretary of State for Justice* [2009] HRLR 35, Deputy High Court Judge David Elvin QC went further and found that a decision to detain a transwoman prisoner in a male prison constituted a breach of the claimant's Article 8 rights (see paragraph 57). In this regard, His Lordship noted that: *"When issues so close to the identity of a*

prisoner as here, so intimately concerned with her personal autonomy, the deployment of resources as a justification for the infringement of such rights must be clear and weighty in order to be proportionate” (at paragraph 77).

27. Similarly, in *Prusiana v Romania* [2023] 1 W.L.R. 495, the English High Court declined to extradite a transgender woman to Romania in connection with shoplifting charges on the basis that to do so would constitute an unjustified interference with her Article 8 rights. Fordham J determined that the fact that the claimant would be held in a male prison in Romania for a 21 day ‘quarantine’ period prior to being assessed constituted a “*protection gap*” (see paragraph 40). This “*protection gap*”, coupled with the disregard displayed by the Romanian authorities for the claimant’s gender identity in the context of the ‘assurances’ provided by them to the English Court, were “*crucial factors*” supporting the Court’s conclusion that extradition would amount to an unjustified breach of the claimant’s Article 8 rights (see paragraph 50).

28. Having regard to the foregoing authorities, it can be concluded that the automatic placement of all transmen in the female estate and all transwomen in the male estate, with no regard to their individual circumstances, could in some circumstances amount to an unlawful interference with an individual’s Article 8 rights. One does not require to depart from or radically develop the Strasbourg jurisprudence in order to reach that conclusion. Evidently, there are some circumstances in which a decision will interfere with a transgender prisoner’s Article 8 rights but that interference, having regard to the rights of others and the particular circumstances in which the prisoner will be accommodated, will be justified. The most appropriate means of ensuring that all rights are respected is by the application of a clear and consistent human rights assessment, rather than the application of a ‘without exception’ policy, to inform decisions about where and how a transgender prisoner will be accommodated.

ii. Article 3

29. Given the highly context-specific nature of Article 3, it is entirely feasible that the placement of a transgender prisoner in a prison that corresponds to his or her biological sex could generate sufficient distress and/or hardship on the part of that prisoner to meet

the threshold of degrading treatment, including as a result of e.g. the increased risk of violence faced, for example, by a transwoman from male prisoners within the male estate. Much would turn on the specific circumstances in which the transgender prisoner was to be accommodated. The distress and/or hardship arising from being accommodated in a prison estate that does not accord with the prisoner's gender identity would, of its very nature, be above and beyond the distress and/or hardship generated by imprisonment itself.

30. As outlined above, the Strasbourg Court has acknowledged that transgender prisoners are in a particularly vulnerable position. In the context of an appeal against sentence by a transgender woman convicted of theft and robbery, the English Court of Appeal recently noted that: "*we have no doubt that being a transwoman in a male prison (at least initially, and very probably throughout her sentence) will make the experience of imprisonment more arduous for the appellant*" (*R v Simmonds* [2023] EWCA Crim 1063 per Steyn LJ at paragraph 26).

31. As such, if the first respondent were required to adopt a 'without exception' policy, it is entirely feasible that such a policy could, in some cases, result in degrading treatment or punishment contrary to Article 3. For completeness, it is noted that "*where a measure falls short of Article 3 treatment*" it may nevertheless "*fall foul of Article 8 of the Convention*" (*Wainwright v the United Kingdom* (no. 12350/04), decision dated 26 September 2006 at paragraph 43).

iii. Article 2

32. As noted above, a transgender woman who is placed in the male prison estate may be at greater risk of violence from other prisoners than non-transgender male prisoners. Relatedly and regrettably, it is not difficult to identify examples of transgender prisoners who have died by suicide in Scottish prisons (see, for example, the recent Fatal Accident Inquiry into the death of Sarah Jane Riley [2025] FAI 42 which records that the deceased reported self-harm after being told she was to return to the male estate (at paragraph 19)). As such, the Article 2 rights of transgender prisoners may well be engaged by a decision on which prison estate they are to be accommodated in.

iv. Article 14

33. A ‘without exception’ policy that all prisoners are to be automatically housed in the estate which accords with their biological sex would be to treat prisoners of the same biological sex who are transgender and those who are not transgender in the same way notwithstanding the particular vulnerabilities of transgender prisoners. It is respectfully suggested that such an approach may well engage Article 14, in conjunction with Articles 2, 3 and/or 8 of the Convention.
34. It is therefore apparent that any given decision about to where to accommodate a transgender prisoner within the prison estate is likely to engage a number of potentially competing or conflicting Convention rights held by a number of parties. While an individualised assessment is facilitated by the existing policy and guidance (which provides for decision-makers to take account of a number of risk factors when deciding in which estate to accommodate transgender prisoners), it is respectfully suggested that all parties’ Convention rights would be most appropriately safeguarded by a clear and consistent human rights assessment which sets out clear criteria to be applied in considering when and how a prisoner is likely to be accommodated in an estate that does not accord with their biological sex and which signposts the decision-maker as to which rights are likely to be engaged and potentially interfered with as a result of a given decision. Such a policy should direct the decision-maker to have specific and appropriate regard to those rights. It is particularly important that the rights of detained persons are considered and protected in accordance with an accessible policy that produces predictable results, given the degree of state control over the lives of such persons. Noting that this is not a matter which is capable of determination in these proceedings, the Intervener observes that the current policy and guidance does not appear to it to meet that standard and accordingly may not be the most effective means of adequately safeguarding Convention rights. In particular, the Intervener notes that the present policy refers only to “*the rights and welfare of transgender people living in Scotland’s prisons*”, without expressly acknowledging that other rights-holders’ interests are likely to be engaged by decisions on the placement of transgender prisoners (see p.1), including in particular the Convention rights of female prisoners and staff.

E. Conclusion

35. In light of the foregoing, the Intervener respectfully submits that it is open to the Court to conclude that the implementation of a ‘without exception’ policy of automatically and in all circumstances accommodating transgender prisoners in prisons that correspond to their biological sex may result in an unlawful interference with some prisoners’ Convention rights. It is respectfully suggested that the most effective means of ensuring that the Convention rights of all prisoners are appropriately respected is by providing for a clear and consistent human rights assessment when deciding where to accommodate transgender prisoners. This conclusion does not amount to an endorsement of the SPS policy and guidance in its current form which, in the Intervener’s view, is capable of giving rise in its implementation to the unlawful interference with the Convention rights of women prisoners, in particular. As noted above, the policy could have been drafted in a manner that better provides for foreseeable outcomes for those whose rights may be engaged, and which more clearly provides for the need to identify, and take into account, all relevant parties whose rights may be engaged. A striking omission from the current policy is any express and detailed consideration of the Convention rights of female prisoners and staff. It is appreciated though that these aspects of the wording of the policy do not arise directly for determination by the Court in this challenge.

36. Should the Court determine that the respondents are legally required to operate same biological sex prisons (meaning that no transgender prisoner can be accommodated in line with their gender identity), the Intervener respectfully suggests that the respondents will require to develop alternative options which fully consider and protect transgender prisoners’ human rights as well as the rights of other prisoners, for example where a trans man were housed on the female estate. The Intervener does not provide any commentary on what such provision may be; however, would strongly resist any notion that a decision to house a transgender prisoner in line with their birth sex should ever amount to treatment in the same way as others of that sex who are not transgender, without accommodations and protections that reflect the transgender prisoner’s particular circumstances. The foregoing human rights framework as outlined must therefore be applied the development of any such provision to maintain compliance with the Human Rights Act.

37. The Intervener has sought to assist the Court with the foregoing written submissions, noting that it remains open to the Court to direct the Intervener to make oral submissions should that be considered useful.

IN RESPECT WHEREOF

Kenny McBrearty K.C.

Rachel Breen, Advocate

A handwritten signature in black ink that reads "Rachel Breen". The signature is fluid and cursive, with "Rachel" on the top line and "Breen" on the bottom line.

IN THE COURT OF SESSION

WRITTEN SUBMISSIONS

for

THE SCOTTISH HUMAN RIGHTS
COMMISSION

FIRST INTERVENER

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

P1183-25

16th January 2026

Scottish Human Rights Commission,
Bridgeside House, 99 McDonald Road,
Edinburgh EH7 4NS