

Prisons – accommodation – equality – sex – gender reassignment – human rights

For Women Scotland v Scottish Ministers [2026] CSOH 59

Court of Session (Outer House)

Introduction

Since the decision of the Supreme Court in *For Women Scotland v Scottish Ministers* ([2025] UKSC 16) that the term ‘sex’ in the 2010 Equality Act was biological and did not include transsexuals, various agencies and employers have had to amend their equality and inclusion policies to ensure that that distinction is preserved where possible, without discriminating against trans persons (also a protected group under the 2010 Act). The decision has had a particular impact on the provision of mixed sex toilets, but the current case is concerned with the different issue of the prison environment.

The background and facts

A campaign group sought judicial review of guidance on the management of transgender prisoners issued by the Scottish Prison Service, an executive agency of the Scottish Ministers, on the basis that it allowed, in some circumstances, for the accommodation of some biological men within the women’s prison estate.

Rule 126 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 required separate accommodation for male and female prisoners, but the effect of the guidance was that in the absence of a marker for risk of violence against women and girls, a trans woman prisoner should be considered for admission into the women’s prison estate. There was, then, a presumption that the presence of a marker meant a trans woman prisoner would not be admitted into the women’s estate, although exceptions remained possible. Section 29 of the Equality Act prohibited discrimination in the provision of services, although Schedule 3 permitted the provision of separate services for persons of each sex. Section 29(6) prohibited discrimination in the exercise of a public function, but by virtue of Schedule 22 an act undertaken in the exercise of a public function would not contravene s.29(6) so far as relating to the protected characteristic of sex if it was done ‘pursuant to a “requirement of an enactment”’.

The petitioner argued that the allocation of prison accommodation was a public function in terms of s.29(6), and that the provision of women-only prison accommodation was intended for the protection of women prisoners as a group. Thus, accommodating women prisoners in women-only prisons was lawful because Regulation 126 constituted a ‘requirement of an enactment’ for the purposes of Sch.22 para.1. Further, in light of the Supreme Court’s judgment that the words “sex”, ‘woman’ and ‘man’ in the Act meant biological sex, biological woman and biological man, the applicable provisions of the 2010 Act could only be read as referring to biological women, with the result that trans women could not be accommodated in women’s prisons in *any* circumstances. In response, it was argued, firstly, that the petition was irrelevant because no specific claim of discrimination or harassment had been advanced, and secondly, that it might be necessary to place transgender prisoners in a prison of the opposite biological sex in order to avoid a violation of such prisoners’ rights in terms of the rights contained in the European Convention on Human Rights 1950, in particular under Article 2 (the right to life) in the context of suicide risk.

The decision of the Outer House

The Court of Session found that the Scottish Prison Service’s operational guidance on the management of transgender prisoners was, following the Supreme Court’s decision, unlawful, as the guidance misstated the law in so far as it permitted trans prisoners to be accommodated in prisons for the opposite biological sex. In the Court’s view the 2011 Rules, read with the 2010

Act, required separate prison accommodation for male and female prisoners according to biological sex, and that respect for trans prisoners' rights under Article 8 of the Convention (guaranteeing respect for private life) did not extend to a right to be accommodated in a prison for the opposite biological sex. Further, there was no positive obligation, in general terms, based on Articles 2, or 3 (freedom from inhuman and degrading treatment) to accommodate a trans prisoner in a prison for the opposite biological sex.

In granting the petition, the Court first looked at whether there was a requirement for a particular claim. It held that the structure of the 2010 Act and the fact that it allowed for individuals to bring claims did not provide a complete answer to the petition. Service-providers and those who exercised public functions had to ensure that they carried out those responsibilities lawfully, and if they adopted a policy which, when implemented in individual cases, would result in a breach of their statutory obligations, that policy could be challenged as being unlawful.

Turning to the legal basis for sex segregation in prisons, the court noted that Rule 126 mandated sex segregation in prisons in order to protect the safety of women and to secure the privacy and dignity of both women and men. Further, in deciding to which prison a prisoner was to be committed, the Scottish Ministers exercised a power under s.10(2) of the Prison (Scotland) Act 1989, which was a governmental function which could be discharged only by the Scottish Ministers, exercising the coercive powers of the state. Accordingly, deciding prison allocation was the exercise of a public function, subject to s.29(6) and Sch.22 of the 2010 Act.

In the Court's view, s. 29 constituted a general prohibition on discrimination, and applied to the Scottish Ministers in their exercise of their public function in determining prison allocation. Pursuant to Sch.22 para.1, there would be no contravention of s.29(6) if the Scottish Ministers' act of allocating prisoners to establishments according to sex was done pursuant to a 'requirement of an enactment'. Rule 126 of the 2011 Rules constituted such a requirement. Accordingly, if, to any extent, an allocation decision entailed sex discrimination, sex segregation in prisons could be justified and there would be no breach of s.29(6). Such a justification did not require a case-by-case analysis, and it was not necessary to refer to specific evidence relating to an individual claim. As the petitioner challenged the guidance on the basis that it mis-stated the law, in order to do that in relation to sex discrimination, it was not necessary to put before the court the circumstances of any individual case.

The Court then considered the claim based on Convention rights, as given further effect to by the Human Rights Act 1998. In the Court's view, respect for trans women prisoners under Article 8 did not extend to an obligation to provide accommodation with women. Sex segregation was in accordance with the law and, under Article 8(2) was necessary for the protection of health and morals and for the protection of the rights and freedoms of others, specifically women prisoners. The Court noted that the margin of appreciation in regulating prisoner allocation was wide, and that the statutory scheme imposed a bright-line rule, and sex segregation in prisons did not admit of exceptions on the basis of Article 8. Further, in terms of Articles 2 and 3, there was no positive obligation, in general terms, to accommodate a trans prisoner in a prison for the opposite biological sex, and that the existence of a suicide risk did not necessitate an option, *as a matter of policy*, to accommodate trans women prisoners within the women's prison estate. However, it was conceivable that, in an extreme case involving a threat to life and a potential breach of Article 2, a trans prisoner might be able to argue that the Scottish Ministers ought to disapply Rule 126; although in the instant proceedings, it was impossible to say whether that could be done, and whether any such argument would succeed. Thus, to operate a policy premised on the *possibility* that the Scottish Ministers might disapply the applicable subordinate legislation would undermine the clarity of the existing scheme, and a statement in a policy, in advance and in the abstract, and in the absence of an established Convention right, to the effect that a public authority might disregard the statutory requirements, would also mis-state the law.

The Court concluded, therefore, that sex segregation in prisons in Scotland was lawful, and that the statutory scheme required separate prison accommodation for men and women. That,

following the Supreme Court decision, meant sex segregation in prisons according to biological sex, and thus, in so far as the guidance allowed the Service to accommodate trans prisoners in prisons for the opposite biological sex, that was in conflict with the requirement that prison accommodation be provided separately for men and women.

Commentary

Since the Supreme Court's ruling, above, various public bodies and agencies needed to redraft many of their previous policies, where the desire to include and protect trans persons clashed with the wishes and privacy and dignity rights of those seeking to retain their binary status rights. As with the original *For Women Scotland* case, litigation has tended to centre around issues such as the provision of toilet and ancillary facilities, and the question whether permitting transsexual (females) to use such facilities interfered with the equality and human rights of binary females. The present case before the Outer House deals with an equally controversial and important area and the question of whether, and how, prison services can accommodate trans prisoners into male and female prisons without breaching the respective rights and claims of both binary and trans prisoners.

The Supreme Court, in defining sex for the purpose of equality legislation, offered a warning that the legislation offered protection on grounds of sex *and* sexual identity. Thus, Lord Hodge was careful to point out that the parties bringing the claim should not see the judgment as an outright victory in terms of the ongoing debate in this area. The decision, therefore, was based on the statutory interpretation of words used in the 2010 Act, not a statement that one view on sex and sexuality is preferable to another. Accordingly, any enforcement of the rights of binary (fe)males under the law has to be conscious of any potential discrimination against the rights of others – in these cases, the rights of trans persons.

The legality of prescribing toilet facilities on the basis of binary sex was accepted by the England and Wales High Court in *R (Good Law Project) v EHRC* ([2026] [2026] EWHC 279 (Admin)), in finding that the interim guidance issued by the Equality and Human Rights Commission concerning single-sex toilet and changing facilities in workplaces and public services was lawful and compliant with the Commission's statutory duties. The High Court also held that any consequent interference with an individual's right to private life under Article 8 of the European Convention on Human Rights was capable of being justified for the protection of the rights and freedoms of others. Also, the guidance recognised that the application of the Act's provisions on single-sex facilities would require a factual evaluation and an assessment of whether the facilities provided were a proportionate means of achieving a legitimate aim. Specifically, the Court held that the Commission had stated that the consequence of single-sex lavatory provision should not be that no provision was made for transsexual people. It had, therefore, encouraged the provision of unisex or single-person-use facilities. Those matters directed everyone to consider the consequences for gender reassignment discrimination of providing single-sex lavatories and to consider the dignity of transsexuals.

The outcome of disputes in this area, thus, depend on their facts, and some tribunal decisions turn on how the policy was introduced and implemented by the employer or agency. Thus, in *Hutchinson v County Durham and Darlington NHS Foundation Trust* ([2026] 1 WLUK 238), a tribunal partly upheld nurses' claims of harassment and indirect sex discrimination after they were required to share a female changing room with a transgender colleague and after their concerns were dismissed. On the question of harassment, the tribunal held that the Trust had subjected the claimants to harassment related to sex and gender reassignment by permitting a trans person to use the female changing room and requiring the claimants to share that changing room without providing suitable alternative facilities, and by not taking seriously and declining to address the claimants' concerns regarding the use of the female changing room by a biological male, transgender woman colleague.

As the implementation of mixed facilities is not necessarily unlawful or discriminatory against those of a binary sex, it is important that the courts and tribunals lay down some guidance as to how employers or other agencies can provide facilities that reflect the rights of both groups. In *Peggie v Fife Health Board* ([2025] 12 WLUK 249), some such guidance was provided on this issue by the tribunal when it found that a health board's grant of permission to a trans woman junior doctor to use the female staff changing room was unlawful under the Equality Act 2010. In the tribunal's view, such permission, although not unlawful *per se*, was not the least intrusive measure and should have been revoked until a long-term solution was implemented. Importantly, the tribunal found that the original grant of permission was not inherently unlawful under the 2010 Act, as the protected characteristic of gender reassignment was of equal status to sex, as were the claimant's and the trans person's respective beliefs. Thus, it was potentially but not necessarily, lawful under the 2010 Act to permit a trans woman to use a female only space in the context of work.

The result, therefore, was that the claimant could argue the claims of direct and indirect discrimination and of harassment if a trans woman was granted permission to use the female changing room, and a trans woman could argue indirect discrimination and harassment if excluded from that changing room. The tribunal then suggested ways in which the conflict could have been resolved without insisting that the claimant share those facilities, such as a temporary solution to provide spaces for both sexes and mixed sex facilities, which would not have impacted so disproportionately on the rights of the claimant.

Returning to the present decision on the allocation of male and female prisoners, the Outer House employed the formal tools of statutory interpretation to decide the ambit of the prison service's duties under the prison legislation. Thus, although the prison service sought to include trans prisoners within male and female prisons (in some circumstances), the Court held that that was not possible under the current statutory duties imposed on the prison service. Any change to that clear bright rule, therefore had to come through a change to the existing legislation. The situation is different therefore than to the one with same sex toilets, where the accommodation of transpersons can be lawful, provided the rights of binary sex and transgender individuals are respected.

In this case, the Court refused to provide a remedy for breach of trans gender Convention rights in abstract, in other words without a specific allegation of rights' violation by specific claimant who was a victim of the policy. That ruling contrasts with the decision to allow the claimants' allegation of illegality to proceed, without a specific victim. Of course, the test for standing is different in human rights claims (being a victim), than in cases of judicial review (sufficient interest, and the public law character of judicial review proceedings allow for a broader test of standing. Instead, the Court in this case recognised that in the future such a prisoner may be able to bring a case using the Human Rights Act 1998, to claim that incarceration in a (male) prison was a breach of the right to life (under Article 2), amounted to inhuman and degrading treatment (under Article 3), or infringed the right to private life (under Article 8). In such a case, the authorities would have to justify to the court why, as a matter of interpretation and principle, why a transperson needed to be exposed to a risk to life, bodily integrity and private life in the prison environment. The outcome of such cases will turn on the facts and the protection offered to trans prisoners within the prison, but it would be difficult to justify those risks solely on the basis that a trans prisoner is, by law, a (fe)male, and must be imprisoned in a male or female prison accordingly.

Nevertheless, the Court was adamant that nothing in Article 8 imposed a positive obligation on the state to house transsexuals in a particular prison to reflect their gender identity. That aspect of the ruling was based on the interpretation of both domestic law and precedent as well as understanding of a limited jurisprudence of the European Court in this area.

The respondents sought to draw on this jurisprudence to claim that the Article 8 rights of trans prisoners are far from trivial, and should be respected, but, in the Court's view, did not argue that

that entailed a positive right for any individual trans prisoner to be accommodated in a prison of the opposite biological sex. Thus, although the Article 8 rights of trans prisoners may be engaged when they are admitted to custody, it did not follow that there is a right to be accommodated in a particular prison.

The Court noted that there were means of protecting trans prisoners' rights which do not involve accommodation in a prison for the opposite biological sex, such as the various forms of special provision set out in the Prisons Guidance with respect to arrangements allowing a trans prisoner to live in their affirmed gender and for the authorities to respect trans prisoners' Article 8 right to a private life. Although a trans prisoner may consider that these measures are insufficient to allow for life as fully a man or as fully a woman, but there is no case to support an argument that Article 8 entails a right for a trans woman to live in the same place as and in the company of women. In the Court's view, it is precisely because of the impact of mixed sex accommodation provision on the privacy and dignity of the would-be fellow prisoners that the restriction in rule 126 exists. Thus, even if Article 8 rights are engaged, the interference is justified under Article 8(2), as sex segregation is necessary for the protection of health or morals, or for the protection of the rights or freedoms of other prisoners.

Although Convention rights of prisoners are important and should, so far as possible, be respected, in the custodial setting, accommodating the wish of a trans woman prisoner to live as a woman by a transfer to the female estate entails association with an identifiable group of other prisoners, that is to say women prisoners. At liberty, a trans woman may consider that she can best express her female identity by sharing accommodation with women, and that may be achieved on the basis of consent, but a person, whether male or female, cannot be compelled to share the living space needed for essential daily activities such as eating and washing, with another person. A trans prisoner cannot live in his or her transgender identity in the abstract and accommodating a trans woman prisoner in the women's estate necessarily involves association with women, and their circumstances are such that they cannot opt out.

The Court recognised that the Convention rights of trans prisoners have come before the courts previously. For example, in *WW v Poland* ((2025) 80 EHRR 9), a trans woman prisoner complained that she did not have access to hormone treatment. The Strasbourg Court found that the authorities failed to strike a fair balance between the competing interests at stake, resulting in a violation of Article 8., noting that the applicant's particular vulnerability as an imprisoned transgender person undergoing a gender reassignment procedure, which required enhanced protection from the authorities. However, the Court of Session noted that there was no argument in that case of a right to be accommodated in a women's prison.

Further, although the decision in *R (FDJ) v Secretary of State for Justice* [2021] EWHC 1746 (Admin) accepted that it was not possible to argue that the Secretary of State should have excluded from women's prisons *all* trans women, as that unlawfully ignored the rights of transgender women to live in their chosen gender, that case cannot be reconciled with the protection recognised by the Supreme Court in 2025, which is afforded to separate sex spaces, in respect of which sex is biological sex.

Hence, in the Court's view, sex segregation in prisons is in accordance with law and necessary for the protection of health and morals, and to protect the rights and freedoms of others, specifically women prisoners. Further, Article 8 does not create a positive obligation requiring accommodation in the women's estate. The Court also rejected the respondents' argument that a flexible policy was required to accommodate the rights of trans prisoners. Although the Court recognised that for at least some trans women prisoners the consequences may be, or may be perceived to be, harsh, and perhaps especially for trans women well-accustomed to living as such for a long period prior to custody, the law recognises the necessity for clear rules which are not subject to a case-by-case analysis in their application, as suggested by the respondents. The imposition of a bright line rule may have adverse consequences for individuals but there is a strong line of authority which makes clear that a state can adopt general measures which apply

to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases (*Animal Defenders v United Kingdom* ([2013] 57 EHRR 21)).

Conclusion

The rights of all prisoners are affected by policies on same sex or mixed prisons, and obviously, the consequences of an unlawful and unsympathetic policy are greater in terms of respect for safety and dignity in the prison environment than they are in a working environment.

The decision of the Outer House, as with the Supreme Court's ruling in 2025, is based on common and formal legal sense and the adoption of the traditional rules of statutory interpretation (through the words of the legislation and the intention of the legislature). That interpretation is also consistent with the reasoning of segregating male and female prisoners, the safety of the prison population. By adopting that method, the courts appear to have resolved certain dilemmas regarding sex and trans sexual status rights as they might apply to controversial areas such as prisons and toilets and changing facilities. However, the duty to recognise various protected rights (under equality laws and human rights legislation) makes the application of equality policies less certain, and open to further claims from both groups. In the context of mixed toilet facilities, the courts are gradually resolving and balancing those rights and claims to ensure that the policies comply with all rights of protected individuals. However, with respect to prisons, creating initial and inflexible classifications from the outset may lead to enormous unrest in the prison environment, and to further legal challenges by those whose rights to life, dignity and privacy are affected by such policies.