Case No:
UKSC 2024/0042

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM

THE SECOND DIVISION OF THE COURT OF SESSION

in the Petition of

FOR WOMEN SCOTLAND LIMITED

PETITIONER AND APPELLANT

for Judicial Review of the revised statutory guidance produced by the Scottish Ministers under Section 7 of the Gender Representation on Public Boards (Scotland) Act 2018

APPELLANT'S WRITTEN CASE

SFI = Statement of Facts and Issues

APP = Appendix to this Appeal

Introduction: the question before this court

1. In ***R (Elan-Cane) v. Home Secretary*** [2021] UKSC 56 [2023] AC 559 this court observed (at §§ 52-53):

   "52. … Some rights differ according to whether a person is a man or a woman: for example, rights of succession to hereditary titles. There are criminal offences that can only be committed against persons of a particular gender: for example, female genital mutilation. There is a raft of legislation which assumes that only a woman can give birth to, or be the mother of, a child, including legislation relating to maternity rights and benefits, health provision and fertility treatment, and nationality. …. Equality legislation protects people from discrimination if it arises from their being a man or a woman.

   53 A binary approach to gender also forms the basis of the provision of a wide variety of public services. The prison estate, for example, is divided into male and female prisons. Hospitals have wards where patients can only be of a single sex. Local authorities may fund rape crisis centres or domestic abuse refuges which offer their services only to women. Many schools only admit pupils of a particular sex. Much of this is underpinned by, or permitted by, legislation."

2. This appeal is concerned with the effect upon the Equality Act 2010 ("EA 2010") - specifically its provisions concerning protections for *women* - of individuals obtaining Gender Recognition Certificates ("GRC") under the Gender Recognition Act 2004 ("GRA 2004")

3. In ***For Women Scotland v. Scottish Ministers (No. 1)*** [2022] CSIH 4, 2022 SC 150 ("***FWS 1***") the Second Division of the Inner House of the Court of Session ruled (at § 36) that, in the light of the Section 212(1) EA 2010 definition of women as meaning "female of any age", "*positive action measures in favour of 'women', in this context, by definition exclude those who are biologically male*" and that (at § 39) "*by incorporating those transsexuals living as women into the definition of woman the 2018 Act [of the Scottish Parliament] conflates and confuses two separate and distinct protected characteristics*." This decision was never appealed against, and duly became final. The appellant submits that it correctly represents the law as it currently stands. The question which arises in the present appeal is a related, yet formally a previously undetermined, issue of statutory construction, namely: whether or not when an individual obtains a GRC this means that, for the purposes of the EA 2010, their "sex" also changes? If their GRC "acquired gender" is the "female gender", does that person's protected characteristic of "sex" under the EA 2010 becomes that of a "woman"? Conversely, if their GRC "acquired gender" is the "male gender", does that person's protected characteristic of "sex" under the EA 2010 becomes that of a "man"?

4. The judicial review petition contains no Convention rights based *ab ante* challenge to the validity of any legislative provisions (whether under reference to the EA 2010 or to the GRA 2004): see

the decision of the court below at § 64. [1] It is not constitutionally or jurisdictionally open to this court, in the context of this appeal, to approach or determine the issues of statutory construction which are raised in this appeal on the basis of interveners' competing assertions concerning the claimed impact of any particular interpretation on any individuals' Convention rights and/or their legitimate expectations. This court is simply not in a position to determine this appeal, abstracted from any determined facts, on the basis of its striking a purported balance between say, (i) the Article 8 ECHR rights of those women who neither have nor claim the EA 2010 protected category of "gender reassignment" to respect for their dignity and privacy and autonomy against, say, (ii) interveners' anecdotal claims as to "settled practice" or the "settled understanding" and heretofore reliance on a particular understanding of the law of those who, on the basis of a diagnosis of gender dysphoria, have already obtained a GRC under the GRA 2004 as it currently stands. These new competing claims are *not* open for determination by this court in this process. They are wholly irrelevant to the legal question as raised and framed in the petition for judicial review and therefore fall to be disregarded by this court, since the determination of, or adjudication on, any such newly arisen competing assertions fall outwith the court's institutional competence in this appeal. [2]

5. The jurisdiction of this court in this appeal is, instead, limited to the purely legal question of whether or not the Scottish Ministers' revised statutory guidance of April 2022 **[APP Tab 13/page 209]** (issued under s.7 of the Gender Representation on Public Boards (Scotland) Act 2018 ("the 2018 ASP")) is correct in stipulating that the term "woman" as it is used in that ASP's "gender representation objective" (s.1 2018 ASP) *necessarily* includes, by operation of s.9(1) GRA 2004, a man who has been issued with a full gender recognition certificate in the "acquired gender" of "female" [SFI § 13]. The parties are agreed that the necessary corollary of the Scottish Ministers' position is that a woman with a full GRC in the "acquired gender" of "male", is ***not*** a "woman" for the purpose of s.1 2018 ASP [SFI § 14] and therefore would not be able to invoke or rely on its workplace positive action measures in favour of women.

6. The appellant says this position is wrong as a matter of law. The appellant submits that these assertions of the Scottish Ministers' are based (i) on their misinterpretation of the EA 2010 protected characteristic of "sex", and more specifically the EA 2010 definition of "women" and its references to "female" and (ii) on their misunderstanding of the effect of s.9 GRA 2004 on the operation of the EA 2010. The appellant's position, in summary, is that when they issued

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[1] Cf ***Christian Institute v Lord Advocate*** [2016] UKSC 51, 2017 SC (UKSC) 29 and ***Re Abortion Services (Safe Access Zones) (NI) Bill*** [2022] UKSC 32 [2023] AC 505

[2] Cf ***Prior v. Scottish Ministers*** [2020] CSIH 36, 2020 SC 528 at §§ 37-38

statutory guidance to the effect that "sex" as defined under s.11 EA 2010 (and when and as used throughout the EA 2010) means "certificated sex" rather than just "sex" the Scottish Ministers misdirected themselves in law. In particular, in reaching this conclusion the Scottish Ministers failed properly to take account both of s.9(3) GRA 2004, and of the relevant and applicable standard rules of statutory construction.

The statutory guidance at issue

7. Section 7 2018 ASP requires the Scottish Ministers to publish guidance on the operation of the 2018 ASP. "Appointing persons" and public authorities are required to have regard to that guidance when carrying out their functions. This appeal arises within a judicial review challenge to the lawfulness of the April 2022 revised statutory guidance **(APP Tab 13/page 209)** produced by the Scottish Ministers under s.7 2018 ASP. The Guidance says this, among other things:

> ***"Introduction***
>
> *1.3 The intention of the Gender Representation on Public Boards (Scotland) Act 2018 is to help address the historic and persistent underrepresentation of women in public life …*
>
> ***The meaning of "woman" for the purposes of the Act***
>
> *2.12 There is no definition of "woman" set out in the Act with effect from 19 April 2022 following decisions of the Court of 18 February* [3] *and 22 March 2022. Therefore 'woman' in the Act has the meaning under section 11* [4] *and section 212(1)* [5] *of the Equality Act 2010. In addition, in terms of section 9(1)* [6] *of the Gender Recognition Act 2004 principle, where a full gender recognition certificate has been issued to a person that their acquired gender is female, the person's sex is that of a woman, and where a full gender*

[3] ***For Women Scotland Limited v. Scottish Ministers (No. 1)*** [2022] CSIH 4, 2022 SC 150.

[4] Section 11 EA 2010 provides as follows:

> ***"Sex***
>
> *In relation to the protected characteristic of sex—*
>
> *(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;*
>
> *(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex".*

[5] The "*General Interpretation*" provision Section 212 EA 2010 relevantly provides that *"(1) In this Act— … 'woman'* <u>*means*</u> *a female of any age*."

[6] Section 9 GRA 2004 is relevantly in the following terms (underlining emphasis added):

> ***"9 General***
>
> *(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).*
>
> *(2) …*
>
> <u>*(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation*</u>*."*

recognition certificate has been issued to a person that their acquired gender is male, the person's sex becomes that of a man."

The 2018 ASP as *a workplace positive action measure* *<u>in favour of women</u>*

8. It is common ground **(SFI § 7)** that the 2018 ASP was intended to be legislation which, consistently with the EA 2010, allowed for specific positive action measures lawfully to be taken in Scotland in favour of those sharing the protected characteristic of their "sex" as "women". [7] Section 159 EA 2010 permits, among other things, positive action concerning recruitment to, and promotion in, the workplace to be taken for:

    (a) *women* (being defined as a class by their shared sex as women);

    (b) where, it is reasonably thought,

        (i) either that women suffer a disadvantage which connected to their sex as women, or

        (ii) that participation in an activity by women is disproportionately low.

    In such circumstances - with the aim of enabling or encouraging women to (a) overcome or minimise that disadvantage, or (b) participate in that activity - a woman may, *because she is a woman*, lawfully be treated more favourably in connection with recruitment or promotion *than a man*.

9. It is therefore essential to the proper working of these workplace positive action measures for all those acting under reference to, or otherwise (potentially) relying on, the provisions of the 2018 ASP to be entirely clear as to which individuals *are* women (i.e. who share the EA 2010 protected characteristic of their sex as women) and who are *<u>not</u>* women (i.e. who do *not* share the EA 2010 protected characteristic of sex as women).

[7] Workplace positive actions measures in favour undoubtedly fell within the ambit of EU law while the UK was a Member State: ***R (Z) v. Hackney London Borough Council*** [2020] UKSC 40 [2020] PTSR 1830 per Lord Sales at §§ 60-64. However the Retained EU Law (Revocation and Reform) Act 2023 (to which Royal Assent was given on 23 June 2023) has since provided, for the "sunset" of any remaining post-Brexit EU law derived and retained rights, case law, and general principles of EU law which might otherwise be prayed in aid before the UK courts when called upon to decide questions about the validity, meaning or effect of EU law as it had applied in the UK as at IP completion day ("retained EU law"). Both Section 5(A1) and Section 5(A4) of European Union (Withdrawal) Act 2018 (as now amended by the 2023 Act) are to be applied by the courts with effect from 1 January 2024 in relation to all and any proceedings before them. These sections provide respectively:

- that "the principle of the supremacy of EU law is not part of domestic law. This applies after the end of 2023, in relation to any enactment or rule of law (whenever passed or made)";

and

- that "no general principle of EU law is part of domestic law after the end of 2023".

The First Inner House decision - *For Women Scotland v. Scottish Ministers (No. 1)* ("*FWS 1*")

10. In ***FWS 1*** the Second Division of the Inner House held that the Scottish Parliament had acted outwith its legislative competence when the 2018 ASP defined "women", for the purpose of its workplace positive action measures, to include persons with the "*protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female.*" (s.2, 2018 ASP). The Scottish Parliament's redefinition of "woman" in s.2 2018 ASP:

    (i) *excluded* all and any women who also had the protected characteristic of gender reassignment (as defined in s.7(1) EA 2010); and

    (ii) *included* all those *men* (that is *males* who did *not* share with women the protected characteristic of being *female*) who had the protected characteristic of gender reassignment (as defined in s.7(1) EA 2010).

11. The court held that, by *encompassing* men with the protected characteristic of gender reassignment within (and by *excluding* women with the protected characteristic of gender reassignment *from*) its statutory definition of "women", the Scottish Parliament legislation had conflated and confused two separate and distinct protected characteristics under the EA 2010 namely:

    (i) "sex" (specifically, being a female of any age per ss.11(1) and 212, EA 2010); and

    (ii) "gender reassignment" (per s.7(1), EA 2010).

12. The Second Division accepted that it would have been open to the Scottish Parliament to include an "equal opportunities objective" for public boards aimed at encouraging representation of *women* (as defined in s.11(1) and 212 EA 2010) *or* for any other EA 2010 "protected characteristic", including gender reassignment (s.7(1) EA 2010). But that was *not* what the Scottish Parliament had done. Instead, the Scottish Parliament had chosen to make a workplace positive action measure aimed at and for *women* (who were a class of persons sharing the protected characteristic of being of the *same "sex"*) but had then *altered* the statutory definition of "woman" from its s.212(1) EA 2010 definition as meaning "a female of any age". The Second Division observed as follows (at §§ 36, 38-39 – underlining emphasis added):

    "36….Section 11(b) indicates that when one speaks of individuals sharing the protected characteristic of sex, one is taken to be referring to one or other sex, either male or female. Thus an exception which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic

of sex, is limited to allowing provision to be made in respect of a 'female of any age'. Provisions in favour of women, in this context, by definition exclude those who are biologically male.

…

38. While it [the CJEU in Case C-13/94 ***P v S and Cornwall County Council*** *ECLI:EU:C:1996:170 [1996] ECR I-2143 [1996] ICR 795] recognised that discrimination on the basis of gender reassignment was most likely to be sex discrimination, neither it nor* ***Chief Constable, West Yorkshire Police v A (No 2)*** *[2004] UKHL 21 [2005] 1 AC 51 which anticipated the Gender Recognition Act 2004, is authority for the proposition that a transgender person possesses the protected characteristic of the sex in which they present. These cases do not vouch the proposition that sex and gender reassignment are to be conflated or combined, particularly in light of subsequent legislation on the matter in the form of the 2010 Act which maintained the distinct categories of protected characteristics, and did so in the knowledge that the circumstances in which a person might acquire a gender recognition certificate under the 2004 Act were limited.*

39. By incorporating those transsexuals living as women into the definition of woman the 2018 Act conflates and confuses two separate and distinct protected characteristics, and in one case qualifies the nature of the characteristic which is to be given protection."

13. The result of the Second Division's finding was this: not only was this purported re-definition of "woman" in s.2 2018 ASP beyond the legislative competence of the Scottish Parliament, but the Scottish Ministers' original June 2020 statutory guidance on the operation of the 2018 ASP **(APP Tab 11/page 163)** [8] was also to be struck down as *ultra vires*, insofar as based on and giving further guidance and explanation to the Scottish Parliament's purported redefinition of the term "woman" in s.2 2018 ASP.

The Scottish Ministers' revised statutory guidance: "certificated sex" *trumps* "sex" in fact

14. In the light of this decision of the Second Division in ***FWS 1***, the Scottish Ministers revised their statutory guidance reissuing in April 2022 **(APP Tab 13/page 209)**. However, the revised guidance continues to maintain that the 2018 ASP positive action measures in favour "women" *include* a class of men, and *exclude* a class of women. The Scottish Ministers now say that this is what is required when the EA 2010 is interpreted in the light of s.9(1) GRA 2004. According to the Scottish Ministers the effect of s.9(1) GRA 2004 on the EA 2010 is to impose a "transformation principle" which *requires* the EA 2010 protected characteristic of "sex" - and more specifically references to "woman" and "women" and "female" in and throughout the EA

[8] The relevant provisions which were struck down by the Inner House are contained in the Scottish Ministers *Statutory Guidance for the Gender Representation on Public Boards (Scotland) Act 2018* dated 2 June 2020 are §§ 2.12 to 2.15 with associated footnotes **APP Tab 11/page 163 at pages 168-169.**

2010 - to mean whatever an individual's "*certificated sex*" is, rather than just what that individual's sex is in fact. For these purposes, "certificated sex" means the sex recorded on an individual's current birth certificate, with the result that:

(a) those individuals with the protected characteristic of gender reassignment (as defined in s.7(1) EA 2010) who ***have*** obtained a GRC, have their birth certificate altered and have the certificated sex of their "acquired gender"[9];

(b) those individuals who have ***not*** obtained a GRC (regardless of whether they have the protected characteristic of gender reassignment or not) have the "sex" that is recorded on their birth certificate as it was originally recorded and registered.

15. This terminology of "certificated sex" is here used by the appellant on the basis that birth certificates as originally issued at birth will accurately *record* (***not*** *"assign"*) an individual's sex as being either female or male. But the terminology of "certificated sex" also allows for the fact that, under the GRA 2004, a birth certificate's original accurate record of sex may be ***altered*** to reflect the legally "acquired gender" of an individual with a GRC under the GRA 2004. In the case of those holding a GRC, their original birth certificate which accurately recorded their sex is then altered, by a legal fiction imposed by legal fiat, to become a factually *inaccurate* record of what their sex is in fact. On the basis that "sex" in the EA 2010 means "certificated sex" *in law*, rather than just sex *in fact* the Scottish Ministers say (see **SFI §§ 13-14)** that the class of "women" as defined by their "sex" in the EA 2010 (and consequently as applied in the 2018 ASP):

- ***excludes*** those ***women*** who, although on the facts, share the EA 2010 protected characteristic of being female, also have the EA 2010 protected characteristic of gender reassignment (as defined in s.7(1) EA 2010) and who have applied for, and obtained, from the State a GRC; and

- ***includes*** those ***men*** (who by definition and on the facts do ***not*** share with women the protected characteristic of being female) who have the EA 2010 protected characteristic of gender reassignment (as defined in s.7(1) EA 2010) and who have applied for, and obtained, from the State a GRC.

16. In sum, the Scottish Ministers are committed to the position that the facts don't matter. Instead, membership of the class of "women" (whether or not one is a "woman" or "female" for the purposes, at the least, of the EA 2010 provisions allowing for positive action measures) is to be

[9] Regulation 2(1)(b) The Gender Recognition (Prescription of Particulars to be Registered) (Scotland) Regulations 2005.

determined by reference to that individual's "*certificated* sex", as opposed to what their sex is *in fact*. The Scottish Ministers are equally committed to saying that what determines membership of the class of "men" (whether one is a "man" or "male" for the purposes of the EA 2010) is also determined by reference to "certificated sex", and *not* to what the individuals' sex is in fact.

The policy and objects of the EA 2010 compared to those of the GRA 2004

17. In ***Padfield v Minister of Agriculture, Fisheries and Food*** [1968] AC 997 Lord Reid noted at pages 1032-1033 that:

> *"If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act."*

Mutatis mutandis it is submitted that it is the *court's* duty to interpret and apply the wording in the provisions of a statute, such as the EA 2010, with a view better to achieving the policy and objects of the Act as intended by Parliament: cf ***R (Electoral Commission) v. City of Westminster Magistrates Court*** [2010] UKSC 40 [2011] 1 AC 496 per Lord Phillips at § 15 and per Lord Mance at § 103: "*legislation should be construed to serve its statutory purpose*".

18. In terms of the respective policy and objects of the GRA 2004 as compared to the EA 2010 what has always to be borne in mind is that whereas the GRA 2004 essentially concerns the *vertical relationship* between an individual and the *State* (how the State records and retains and certifies and presents personal data about an individual's sex), the EA 2010 is much broader. The EA 2010 is *not* confined to regulating discrimination against an individual by the State; it also regulates relationships between *private* individuals and *private* entities. The EA 2010 has *horizontal* as well as *vertical* effect. Thus the principles of non-discrimination in the EA 2010 apply to both public and private actors over a vast field of everyday relations and interactions whether in the workplace, in the regulation of the professions, the provision of goods and services, the provision of accommodation, or the operation of charities, schools, universities, private clubs and associations. The GRA 2004, by contrast, was essentially a targeted response by Parliament to two discrete and specific decisions of the European Court of Human Rights and of the Appellate Committee of the House of Lords: respectively, ***Goodwin v United Kingdom*** (Application No 28957/95) (2002) 35 EHRR 18; and ***Bellinger v Bellinger*** [2003] 2 AC 467. [10]

[10] ***Bellinger v Bellinger*** [2003] 2 AC 467 confirmed that as a matter of common law a "post-operative transsexual" remained the sex that they had been born and that in particular a post-

19. The background to the passing of the GRA 2004 was summarised by the Court of Appeal in ***R (McConnell) v Registrar General for England and Wales*** [2020] EWCA Civ 559, [2021] Fam 77 at §§ 44-45:

> *"44. The traditional rule in English law was that a person's sex was determined once and for all at the time of birth: see **Corbett v Corbett (or Ashley)** [1971] P 83. It followed therefore that people who were then called transsexuals could not marry in their new gender since, at that time, a marriage required there to be a union of one man and one woman. That remained the law until Parliament permitted same-sex marriages in 2013.*
>
> *45 The traditional rule of English law was the subject of challenge under the Convention in a series of cases beginning with **Rees v United Kingdom** (1986) 9 EHRR 56. Initially the court found that English law was not incompatible with the Convention, because there was no consensus in Council of Europe states and the matter fell within the margin of appreciation afforded to those states. The margin of appreciation, however, narrowed. The series of cases culminated in the decision of the Grand Chamber of the Strasbourg court in **Goodwin v United Kingdom** (2002) 35 EHRR 18, in which for the first time that court held that there was a violation of the Convention, in particular article 8 ECHR. It was that decision which led to the enactment of the GRA 2004."*

20. The effect of the decisions in ***Goodwin v. UK*** and ***Bellinger v. Bellinger*** was that, in order to ensure its legal systems' ECHR compatibility, the UK was required to *legislate*:

- for some form of legal recognition *by the State* of same-sex marriages between two people, at least in those cases where one of the couple was a "fully achieved and post-operative transsexual"; [11] and

- to afford a "male-to-female post-operative transexual" the right to cease making national insurance contributions and to retire and receive a State pension age at the same age as women [12] (although it is not disputed between the parties that there has since been an equalisation of State pension ages between men and women in the UK, the differential

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operative "male to female transsexual" remained a man, meaning that they were unable validly to marry another man, at least at a time when the law maintained a prohibition against same sex marriage: Lord Nicholls of Birkenhead observing at §§ 8 & 11.

[11] See ***Goodwin v United Kingdom*** (2002) 35 EHRR 18 at § 91 (emphasis added):

> 'As Lord Justice Thorpe observed in ***Bellinger v. Bellinger*** [2001] EWCA Civ 1140 [2002] Fam 150, any "spectral difficulties", particularly in the field of family law, are both manageable and acceptable *if confined to the case of fully achieved and post-operative transsexuals*.'

[12] At a time when there were different statutory retirement ages for men and women, the Strasbourg case law indicated that post-operative male to female transexuals (to use the terminology of the time) should be treated for State pension purposes as women. See on this ***Goodwin v United Kingdom*** (2002) 35 EHRR 18 at § 91.

between men's and women's pension age having gradually been equalised over time under the Pensions Act 1995).

21. It is to these obligations *of the State* that the GRA 2004 is primarily addressed, albeit that in passing the GRA 2004 Parliament extended the right to seek gender reassignment beyond the class of "fully achieved and post-operative transexuals". [13] But importantly, the GRA 2004 did not and does *not*, in general, impose any particular obligations on private citizens (as opposed to State functionaries) *vis à vis* those seeking a certificated reassignment of their "gender" as this is (to be) recorded on State records.

22. It therefore seems inherently unlikely that Parliament ever intended or envisaged that such a limited and targeted legislative measure as the GRA 2004 should condition and determine the scope of the EA 2010. The EA 2010 is a later, broader, and constitutionally more significant measure. It has much greater scope in its impact on relationships between private individuals than the GRA 2004. It would very much be a case of the earlier tail wagging the later dog, if the provisions of the GRA 2004 (a measure avowedly intended to address specific issues raised and experienced by a small proportion of the general population) to modify the meaning and scope of the non-discrimination rights and obligations otherwise created under the subsequent EA 2010, in particular in a manner which compromises or limits those rights and obligations created in favour of women/females of any age (some 52% of the population).

23. Having regard to the wording used in, and the general scope and objects of, the EA 2010, the appellant submits that the assertion that "certificated sex" trumps and replaces as a protected category within the EA 2010 the plain term of "sex" could *never* have been intended by Parliament when it passed the EA 2010. Accordingly the appellant moves the court (i) to allow this appeal, (ii) to recall the interlocutor of the courts below dismissing this judicial review, (iii) to pronounce appropriate orders (whether of declarator and/or reduction of the offending parts of the statutory guidance), and (iv) to award the appellant the expenses of process.

The position of the Equality and Human Rights Commission

24. The EHRC's public position on the *desirability/practical workability* of the reading of the EA 2010 which it had argued for before the first instance court below (namely that the EA 2010 protected category of "sex" is unproblematically defined by an individual's "*certificated sex*" rather than what is, in fact, their sex) appears to have become more nuanced since the hearing before the Lord

[13] ***R (Castellucci) v. Gender Recognition Panel*** [2024] EWHC 54 [2024] 2 WLR 1201 (Elisabeth Laing LJ, Heather Williams J) at § 113.

Ordinary in November 2022. [14] Reference is made to the terms of the EHRC correspondence of 3 April 2023 with the UK Government **[APP Tab 17/page 247]**. To be absolutely, clear this EHRC letter is *not* being referred to the court because it gives some kind of authoritative interpretation of the law. Any opinions on the law would be "no more than statements of opinion which do not bind the judiciary." [15] But the EHRC is *not* offering its own interpretation of the law in this April 2023 letter. All that its letter is doing is drawing out the implications for the operation of the EA 2010 as a whole which, says the EHRC, necessarily follow from the decision of the Lord Ordinary in ***For Women Scotland v. Scottish Ministers (No. 2)*** [2022] CSOH 90, 2023 SC 61 **[APP Tab 5/page 24]**. So the EHRC's 3 April 2023 letter is *useful* for the court, in that it sets out and summarises the views of the Expert Agency tasked by Parliament with considering the operation of the EA 2010 on the consequences for the broader functioning of the EA 2010 if it were to uphold the decision of the Lord Ordinary. But, of course, the position of the appellant is that there is *no* need for any change in the law in order to achieve the policy ends which the EHRC considers the EA 2010 should properly be seeking to achieve.

A note of caution on the terminology used in the EHRC April 2023 letter

25. The first thing to be noted from this letter is that the EHRC uses the term "legal sex", which is not a term of art used anywhere in *any* legislation. "Sex" has a firmly established, commonly accepted meaning that is reflected in the legal treatment of sex and not vice-versa. The letter also uses the phrase "biological sex" which, again, is unhelpful and question begging – as if it made sense to talk of *non-biological sex*. It also talks about "transmen" and "transwomen", terms which are nowhere statutorily defined and which can mean different things to different people. Importantly, none of the other terms commonly used by activists in this field (including the Scottish Ministers) – for example, "legal sex", "biological sex" "biological woman" "transwoman", "transgender woman" "biological man", "transman", "transgender man" and "assigned sex" have ever been used in any UK (or devolved or EU) legislation.

[14] The EHRC lodged answers to the petition and were represented at the first hearing on this judicial review by senior and junior counsel who made written and oral submissions in support of the EHRC's then position before the Lord Ordinary. When the case was reclaimed to the Inner House the EHRC decided to take no further part in the proceedings. In particular, the EHRC did not come before the Second Division to renew the submissions made by it before the Lord Ordinary and/or otherwise to defend the lawfulness of the first instance decision in ***For Women Scotland v. Scottish Ministers (No. 2)*** [2022] CSOH 90, 2023 SC 61.

[15] See e.g. ***Anderson v. Scottish Ministers*** [2001] UKPC D5, 2002 SC (PC) 63 per Lord Hope of Craighead at §§ 6-7. See, to like effect, ***Imperial Tobacco v. Lord Advocate*** [2012] CSIH 9, 2012 SC 297 per Lord Reed at § 59.

26. Certainly the Lord Ordinary whose decision was overturned by the Second Division in ***FWS1*** [2022] CSIH 4, 2022 SC 150 was found to have misdirected herself in law, in part, because throughout her judgment she had used terminology such as "*transwoman*", "*transgender women*", "*non-transgender women*", "*biological women*", "*women who are not transgender*", "*transgender men*", "*biological men*", "*biological sex*", and "*the biological sexes*". [16] But *none* of these terms appear anywhere in any legislation, and they significantly depart from the wording actually used in the relevant legislation. This non-statutory terminology should be avoided. Use by a court of terminology which Parliament has chosen *not* to use runs a risk of the court misdirecting itself in law, and falling into error such as to vitiate its decision. As the Second Division observed in ***FWS 1*** [2022] CSIH 4, 2022 SC 150 at § 40:

> *"The Lord Ordinary stated (§ 52) that the 2018 Act did not redefine 'woman' for any other purpose than 'to include transgender women as another category' of people who would benefit from the positive measure. Therein lies the rub: 'transgender women' is not a category for these purposes; it is not a protected characteristic and for the reasons given, the definition of 'woman' adopted in the Act impinges on the nature of protected characteristics which is a reserved matter."*

27. A similar error - in using, and then founding on the absence of, terminology which has never appeared in any legislation - was committed by the Lord Ordinary whose judgment was the subject of the reclaiming motion before the court below, who noted in ***For Women Scotland v. Scottish Ministers (No. 2)*** [2022] CSOH 90, 2023 SC 61 at §§ 48-49 **[APP Tab 5/p 24 at 42]**:

> *"48. … The contention is that the only way the Equality Act 2010 (and indeed any other related legislation) can be made to work is if the definition of woman in that Act is taken to mean biological woman. I have concluded that that argument is flawed for a number of reasons.*
>
> *49. In the first place, the word 'biological' does not appear in the definition. It would have been entirely open to the drafters of the legislation to put the matter beyond doubt by including that adjective or descriptor, but they did not. Again, well-established principles of statutory interpretation include the presumption that the drafters of the legislation, highly-skilled individuals, do not insert or omit words or use language carelessly."*

28. The appellant submits that innovating on the terminology actually used in the relevant statutes (for example referring to "legal sex") tends to mislead. This court should not use it, but instead stick to the words actually used in statute. As Lord Neuberger of Abbotsbury PSC observed in ***Cusack v Harrow London Borough Council*** [2013] UKSC 40, [2013] PTSR 921 at § 58:

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[16] ***For Women Scotland v. Scottish Ministers (No. 1)*** [2021] CSOH 31, 2021 SLT 639 (23 March 2021) per Lady Wise (§§ 25, 43, 52, 54, 63, 66).

"58 Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim or purpose."

29. With all that in mind, we can now usefully consider the text and context of the EHRC letter. The letter responds to a request, dated 21 February 2023 **[APP Tab 16/page 246]** from the then UK Government's Minister for Women and Equalities for advice under s.11(2)(a)-(c) of the Equality Act 2006. The EHRC was asked to advise the government about the effectiveness of the current law and the likely effect of any proposed change of law, as well as to recommend amendments to existing legislation. The EHRC was specifically asked to advise on "*the benefits or otherwise of an amendment to the 2010 Act on the current definition of 'sex' along with any connected of consequential enactments*". The EHRC letter of 3 April 2023 **[APP Tab 17/page 247]** is the subsequent advice. It is necessarily predicated on the Lord Ordinary having correctly interpreted the law in ***For Women Scotland v. Scottish Ministers (No. 2)*** [2022] CSOH 90, 2023 SC 61 **[APP Tab 5/page 24]** since it is not for an executive agency in this context to proffer any view as to whether the judgment of the Lord Ordinary correctly understood and expressed the law.[17] The appellant in this appeal, of course, *disputes* that the Lord Ordinary (whose decision was upheld by the Inner House) correctly interpreted the law. That is the matter which is now before this court for its determination.

30. The EHRC advised the UK Government as follows: **[APP Tab 17/page 249 ff** – underlining emphasis added]

"The Gender Recognition Act 2004 provides that the gender of a person with a Gender Recognition Certificate (GRC) becomes the acquired gender 'for all purposes' and recognised as their legal sex [sic], broadly equivalent to the way sex recorded at birth is recognised in law for other people. This concept of 'legal sex' has been confirmed by the courts in their interpretation of the meaning of the protected characteristic of sex in the EA 2010. The EHRC has consistently understood this to be the position in the law as it currently stands and we have based our guidance and interventions until now on that understanding.…

Notwithstanding the existence of statutory exceptions permitting different treatment of trans people where justified, and our guidance to explain the law, it has not been straightforward for service providers and employers to apply the law, including in areas such as sport and health services. … [W]e have come to the

[17] As was pointed out in the speech of Lord Reed in ***R (Majera) v. Home Secretary*** [2021] UKSC 46 [2022] AC 461 at (§ 44, 45-46).

view that if 'sex' is defined as biological sex for the purposes of EA 2010, this would bring greater legal clarity in eight areas. These are as follows.

(1) ***Pregnancy and maternity**: As things stand, protections in the EA 2010 for pregnant women and new mothers fail to cover trans men who are pregnant and whose legal sex is male. Defining 'sex' as biological sex would resolve this issue.*

(2) ***Freedom of association for lesbians and gay men**: If sex means legal sex, then sexual orientation changes on acquiring a GRC: some trans women with a GRC become legally lesbian, and some trans men with a GRC become gay men. As things stand a lesbian support group (for instance) may have to admit a trans woman with a GRC attracted to women without a GRC or to trans women who had obtained a GRC. On the biological definition it could restrict membership to biological women.*

(3) ***Freedom of association for women and men**: As things stand, a women's book club (for instance) may have to admit a trans woman who had obtained a GRC. On the biological definition it could restrict membership to biological women.*

(4) ***Positive action**. Currently, trans women with a GRC could benefit from 'women-only' shortlists and other measures aimed at increasing female participation. Trans men with a GRC could not. A biological definition of sex would correct this perceived anomaly.*

(5) ***Occupational requirements**. Employers are sometimes permitted to restrict positions to women or to men. An employer can (for example) require that a warden in a women's or girls' hostel be female. At present, such a role would be open to a trans woman with a GRC, but not to a trans man with a GRC. A biological definition of sex would correct this perceived anomaly.*

(6) ***Single sex and separate sex services**. Service providers are sometimes permitted to offer services to the sexes separately or to one sex only. For instance, a hospital might run several women-only wards. At present, the starting point is that a trans woman with a GRC can access a 'women-only' service. The service provider would have to conduct a careful balancing exercise to justify excluding all trans women. A biological definition of sex would make it simpler to make a women's-only ward a space for biological women.*

(7) ***Sport**. At present, to exclude trans women with a GRC from women's sports, the organiser must show that it was necessary to do so in the interests of fairness or safety. A biological definition of sex would mean that organisers could exclude trans women from women's sport without this additional burden.*

(8) ***Data collection***: *When data are broken down by legal not biological sex, the result may seriously distort or impoverish our understanding of social and medical phenomena. A biological definition of sex would require public bodies like universities to apply this category, without the complexity added by a legal definition of sex, to the analysis of data collected in fulfilling the Public Sector Equality Duty.*

The change would be more ambiguous or potentially disadvantageous in three areas.

(9) ***Equal pay provisions***. *At present, a trans woman with a GRC can bring an equal pay claim by citing a legally male comparator who was paid more. A trans man with a GRC could not. The proposed biological definition would reverse this situation. The effect would be to transfer this right from some trans women to some trans men.*

(10) ***Direct sex discrimination***. *At present, a trans woman with a GRC can bring a claim of direct sex discrimination as a woman. A trans man with a GRC could not. The proposed biological definition would reverse this situation. The effect would be to transfer the right from some trans women to some trans men.*

(11) ***Indirect sex discrimination***. *At present, a trans woman with a GRC could bring a claim of indirect discrimination as a woman. A trans man with a GRC could not. The proposed biological definition would reverse this situation. The effect would be to transfer this right from some trans women to some trans men.…*

[I]n cases where a State is balancing competing rights, for instance the rights of trans women and of biological women, Strasbourg has allowed a wider margin of appreciation. Indeed, human rights law may require the statutory recognition of biological sex. For instance, the enjoyment of separate sex and single sex spaces or sporting activities …, when closely related to biological sex, is likely to fall within the material scope of Article 8 ECHR….. **[APP Tab 17/page 253]**

On balance, we believe that redefining 'sex' in EA 2010 to mean biological sex would create rationalisations, simplifications, clarity and/or reductions in risk for maternity services, providers and users of other services, gay and lesbian associations, sports organisers and employers. It therefore merits further consideration."

31. The ECHR expands upon its advice and provides further reasons in support of each of these eight examples in Annex A of its letter **[APP Tab 17/page 256]**. The letter and Annex A usefully summarise a number of significant *problems* caused to the proper operation of the EA 2010 by the Lord Ordinary's interpretation (which was largely upheld by the court below). It illustrates how the Scottish Ministers' interpretation set out in their guidance completely skews

the proper operation of the protections which Parliament specifically afforded to "women". These problems do *not* arise on the appellant's interpretation of the EA 2010.

32. In their intervention before this court, the EHRC continues to highlight what it describes as "very real difficulties" in the safeguarding and continued protection of women's rights under the EA 2010 if it is held that a necessary consequence of an individual obtaining GRC is to require the application of the legal fiction that, for the purposes of the EA 2010, that individual has achieved a "sex change". For example, the EHRC accept that this reading entails that there will be a group of persons who are to be treated as men/male under the EA 2010 following the issue of GRCs, but who are nevertheless able to become pregnant. According to the EHRC this means that the pregnancies of women with a GRC (and necessarily then also the children resulting therefrom) fall outside the protection of ss. 17 and 18 EA 2010. The EHRC accepts that this reading would adversely impact upon the provision of "single sex services" allowed for under paras. 26-28 of Sch. 3 EA 2010 and of sex-segregated communal accommodation allowed for under para. 3 of Sch. 23 EA 2010. In particular, say the EHRC, providers would have great difficulty in ensuring lawfully the availability of women-only spaces, such as changing rooms or segregated swimming areas or times, notwithstanding that these are considered important from consideration of decency and dignity by many women and as absolutely *essential*, for example for religious reasons, by other women. And this reading, as the EHRC accepts, makes it to all intents and purposes impossible *in practice* for medical staff and hospital managers to make lawful provision for women only hospital wards or rooms. The appellant submits, by contrast, that these identified adverse consequences and "difficulties" simply cannot ever have been intended by Parliament when it enacted the complex and carefully worded carve-outs from sex discrimination seen in these EA 2010 provisions, among others.

33. In ***R (Daly) v Secretary of State for the Home Department*** [2001] 2 AC 532 Lord Steyn famously observed (in para.28) that "*in the law, context is everything*". Accordingly, by way of relevant context for the proper interpretation and application of the EA 2010, the court must recognise and take into account the facts of historic, institutionalised and legalized discrimination against women within the UK where "*genuine equality between the sexes is still a work in progress*" [18] As the South African Constitutional Court has recognised: "*when enacting remedial legislation, Parliament must be aware of the <u>historic omnipresence of patriarchy</u> which will otherwise undermine even the noblest of legislative endeavours*"[19]. Against that background within a UK context, this, it is submitted, is the

[18] ***R (C) v. Secretary of State for Work and Pensions*** [2017] UKSC 71 [2017] PTSR 1476 per Baroness Hale (with whom Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hughes agreed) at § 1.
[19] ***Rahube v. Rahube*** [2018] ZACC 42 [2019] 1 LRC 541 at § 74 (underlining emphasis added)

only way properly to understand the EA 2010 and, in particular, its provisions which may be prayed in aid specifically by ***women*** – whether as regards:

(a) *women's* fair participation in sport; [20]

(b) women's access to positive actions measures *for women* - whether in the workplace [21] (including women only shortlists for Parliamentary seats[22]) and/or in the provision of services;[23]

(c) *women's* ability to access any particular role or job which has been designated as *reserved for women*, on the basis that *being a woman* is an 'occupational requirement' for that role. [24] Significantly the example given in the Explanatory Notes to the EA 2010 makes it clear that "woman" means what it says, a woman and *not* a male with a GRC. It says this: *"A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress;"* [25]

(d) specific protections for ***women*** pursuant to an enactment. In particular para.2(2) Sch. 22, EA 2010 permits acts done under the Health and Safety at Work Act 1974 and the Employment Act 1989 in order to prevent health and safety "risks specifically affecting women". This protection would be actively undermined by the use of "certificated sex" since risks would no longer be specific to an individual actually being a woman.

(e) *women's* freedom to form associations with, and only for, other *women*; [26]

(f) *women's* pregnancy and maternity protections;

(g) *women's* right to equal pay with men; [27]

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[20] Section 195 EA 2010.
[21] Section 159 EA 2010.
[22] Section 104 EA 2010.
[23] Section 158 EA 2010.
[24] Sch. 9, paragraph 1 EA 2010.
[25] Cf ***Adams v Edinburgh Rape Crisis Centre***, 2024 SLT (Trib.) 89, ET at § 192:

> *"[T]his is one of these cases where sex does matter in that the respondents are a Rape Crisis Centre. They specifically refer to using the exemption provided in Schedule 9 of the Equality Act on the basis that it is an occupational requirement for employees to be women. In this case there did not appear to be any suggestion from either party that it would be appropriate for a man to be so employed."*

[26] Sch. 16, para. 1, EA 2010.
[27] Section 64, EA 2010. ***Lord Chancellor v. McCloud and others*** [2018] EWCA Civ 2844 [2019] ICR 1489 was claim brought by mixed group of male and female judges founded on, and upheld on the basis of, their claims of unjustified direct discrimination on grounds of *age*. It was conceded by the government that the increased number of women judges appointed in recent years meant that women were disproportionately in the younger age group who were put at a particular disadvantage by the operation of transitional provisions concerning judicial pensions But the

(h) *women's* ability to access to benefits provided by charitable foundations targeted at and for *women*;[28]

(i) *women's* right to access accommodation and services expressly intended to be provided to and *for women only*, for example in hospitals, rape crisis centres, domestic abuse shelters, and prisons; [29]

(j) should the current age at which a GRC might be obtained were dropped from 18 to 16 (as the Scottish Parliament legislated for in its Gender Recognition Reform (Scotland) Bill 2022 [30]) the provision of single sex schools for *girls* (including *girls-only* boarding schools);[31]

(k) the provision of single sex institutions for *women* in the context of further and higher education for *women*; [32]

(l) the provision of residential accommodation for *women* (which would include dormitories or other shared sleeping accommodation) which, for reasons of privacy, should be used only by persons of the same sex; [33]

(m) the obligation of public authorities, in the exercise of their functions, to have due regard to, among other things, the need both: to eliminate discrimination against and harassment and victimisation of ***women***; and separately to advance equality of opportunity for ***women*** *vis à vis* ***men*** [34]

(n) the prohibition against ***direct*** sex discrimination against women[35] - whether in the workplace or in the provision of goods and services – which requires a judgment to be made about whether the treatment of a ***woman*** is less favourable treatment, by reference to a comparative analysis of the treatment that was, or would have been afforded, to a man (and vice versa) (see s.23, EA 2010);

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court did not uphold any independent or free standing equal pay claimed based on sex alone in this case.

[28] Section 193, EA 2010.

[29] Sch. 3, paras 26-27, EA 2010.

[30] Though see The Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 preventing the measure becoming law.

[31] Sch.11, Part 1, paras 1 to 4, EA 2010.

[32] Sch. 12, Part 1, paras 1 to 3, EA 2010.

[33] Sch. 23, para. 3, EA 2010.

[34] Section 149, EA 2010.

[35] Section 13(1) EA 2010.

(o) the prohibition against ***indirect*** sex discrimination in relation to "*women*"[36], whether in the workplace or in the provision of goods and services. Indirect sex discrimination occurs where a provision, criterion or practice (PCP) is applied generally but where it places "*women*" at a "*particular disadvantage*" compared to "*men*", and the application of that PCP cannot be demonstrated to be a proportionate means of achieving a legitimate aim. Indirect discrimination focuses on the *particular* disadvantage suffered by the claimant and those sharing her protected characteristic. But if you change the definition of the group constituting women from those who are "female" to "*some* of those who are female (so long as they do *not* hold a GRC) and *all* those who are male (so long as they *do* hold a GRC)" then you are radically altering the mechanism for measuring the comparative disadvantage and wholly undermining the purpose of the statutory protection afforded to "women" i.e. females of any age - considered as a group. This is very likely to have a whole series of otherwise unanticipated practical consequences. For example, height requirements (such as used to be imposed for service in the police) would be likely to place women at a particular disadvantage. However, when men are included within the definition of woman, the nature of any actual disadvantage will inevitably be reduced. None of this, again, could be said to be consistent with what Parliament intended to achieve.

34. The historic context against which these provisions have to be understood includes that the fact that women, *simply because they were women*, even within living memory in some cases, were *denied*:

(i) the right to equal pay to men, for work of equal value done by women in the workplace; [37]

(ii) the right not to be dismissed from, or not to be refused a post in, the workplace simply because they were married women, [38] or were (able to become) pregnant, [39] or were nursing an unweaned infant or bore the brunt of childcare responsibilities;

(iii) the right to attend and/or graduate from university; [40]

(iv) the right to qualify for and work in the (liberal) professions; among them doctors, lawyers and judges; [41]

[36] Section 19(1) EA 2010.
[37] cf ***Roberts v. Hopwood*** [1925] AC 578.
[38] cf ***Short v. Poole Corporation*** [1926] Ch. 66.
[39] qv ***Webb v. Emo: UKHL reference to ECJ*** [1993] ICR 175.
[40] qv ***Jex-Blake* v. *Senatus of the University of Edinburgh,*** (1873) 11 M. 784.
[41] See ***Hall v. Incorporated Society of Law-Agents in Scotland*** (1901) 3 F. 1059 and ***Bebb v. Law Society*** [1914] 1 Ch. 286.

(v) the right to (equal) inheritance compared to their male relations (including to peerages and right of succession to the Crown);

(vi) the right to vote. [42]

35. But it is not just that *historic* background but also the immutable *biological* facts that the aim and objects of the EA 2010's provisions regarding women have to be understood. For example, of its being

- only *women* who can experience menarche,
- only *women* who can go through regular periods of menstruation,
- only *women* who can become pregnant and (nursing) mothers,
- only *women* who can undergo menopause.

36. And then, of course, there are the inescapable *sociological* facts: of it being women who continue to be left with the lionesses' share of running households and rearing children; and that it is women and girls, who *because they are women and girls*, are the objects of violence perpetuated against them by men, both within and beyond the domestic sphere.

37. Simply against that background, it is inherently unlikely that Parliament positively intended - in legislating in the EA 2010 specifically for and about "women", as individuals and as members of the class of those belonging to the "female sex" – to *exclude* a particular group of women, namely those who have obtained a GRC, from the ambit of provisions concerned with the protection of *women's* rights. It is similarly unlikely, against that background, for it to be imputed to Parliament the intention to *include* within the protections and rights afforded specifically to *women*, all and any *men* with who have obtained a GRC.

38. So against that sociological, biological and historical background concerning the law's treatment of women, it is submitted that, for the court below to be correct in its interpretation of the EA 2010 there would have to be an express, unequivocal and inescapable provision in the EA 2010 itself admitting of no doubt or any possible interpretation other than that Parliament intended that the legal protections afforded under the EA 2010 to women should *exclude* some women (those women who have obtained a GRC in the "male gender" under the GRA 2004) and *include* some men (again those who have obtained a GRC in the "female gender" under the GRA 2004).

[42] ***Nairn v. University of St. Andrews***, 1909 SC (HL) 10.

The reliance on Section 9(1) GRA 2004 without due reference to Section 9(3) GRA 2004

39. The appellant submits that the first and besetting legal error in the respondent's revised statutory guidance is that they focus *on and only on* the words of s.9(1) GRA 2004 which provides as follows:

> *"(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).*

40. The appellant, by contrast, directs the court's attention to subsection 9(3), GRA 2004, which provides as follows:

> *"(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."*

41. The terms of the legislation upon which the Scottish Ministers and EHRC and the court below all rely, expressly state that the principle that a GRC changes a person's "sex" is dependent upon and subject to any other enactment or any subordinate legislation. What this means, in the appellant's submission, is that s.9(1) GRA 2004 is ***not*** – as the Scottish Ministers and the EHRC would have it - some free-standing general interpretative principle to the effect that when the word "sex" is used in ***any*** enactment (whether passed before or after an individual's GRC has been issued) it is to be interpreted as meaning the *mutable* bureaucratic categorisation of "certificated sex" (i.e. whatever it says in an individual's current birth certificate either as altered under the GRA 2004 or as originally issued) rather than being a reference to the *immutable* reality of what, in fact, an individual's sex is. [43]

[43] On the immutability of "sex" see ***Bellinger v Bellinger*** [2003] 2 AC 467 per Lord Hope at § 57 (underlining emphasis added):

> "*57. The essence of the problem, as I see it, lies in the impossibility of changing completely the sex which individuals acquire when they are born. A great deal can be done to remove the physical features of the sex from which the transsexual wishes to escape and to reproduce those of the sex which he or she wishes to acquire. The body can be altered to produce all the characteristics that the individual needs to feel comfortable, and there are no steps that cannot be taken to adopt a way of life that will enable him or her to enter into a satisfactory and loving heterosexual relationship. But medical science is unable, in its present state, to complete the process. It cannot turn a man into a woman or turn a woman into a man. That is not what the treatment seeks to do after all, although it is described as gender reassignment surgery. It is not just that the chromosomes that are present at birth are incapable of being changed. The surgery, however extensive and elaborate, cannot supply all the equipment that would be needed for the patient to play the part which the sex to which he or she wishes to belong normally plays in having children. At best, what is provided is no more than an imitation of the more obvious parts of that equipment. Although it is often described as a sex change, the process is inevitably incomplete. A complete change of sex is, strictly speaking, unachievable.*"

42. Instead, the appellant submits – wholly consistently with the approach taken by the Second Division in its earlier decisions in both ***FWS 1*** [2022] CSIH 4, 2022 SC 150 and in ***Fair Play for Women Ltd v Registrar General for Scotland*** [2022] CSIH 7, 2022 SC 199 – the question of whether the s.9(1), GRA 2004 "transformation principle" can be prayed in aid - or instead the s.9(3), GRA 2004 "exception principle" applies - is *always* dependent on the context, aims, objectives and the actual wording of the particular legislation at issue (and, in particular, the definitions actually used in that legislation). As the Second Division stated in ***Fair Play for Women Ltd v Registrar General for Scotland*** [2022] CSIH 7, 2022 SC 199 at §21:

> *"[M]arriage is a legal status which affects rights in other fields such as immigration, social security, pensions, and housing. There are other circumstances in which matters affecting status, or important rights, in particular the rights of others, may demand a rigid definition to be applied to the term 'sex' of the kind proposed by the appellants. Examples, include* ***R v Tan*** *[1983] QB 1053, where being a male was an essential prerequisite for the commission of a particular criminal offence. Some of these limitations have been carried over to apply even where a person has successfully obtained a GRC under the GRA 2004. Examples may be seen in secs 9 and 12 of that Act, as illustrated in* ***R (McConnell) v Registrar General for England and Wales*** *[2020] EWCA Civ 559 [2021] Fam 77. The point which these examples all have in common is that they concern status or important rights."*

43. While it is clear that in the event of any conflict, the provisions of a later statute (such as the EA 2010) take precedence over those of an earlier statute (such as the GRA 2004)[44] the issue before this court in this appeal is not about *implied* repeal [45] but instead whether the presumption otherwise set out in s.9(1) GRA 2004 has been *expressly* disapplied in relation to the EA 2010 by virtue of s.9(3) GRA 2004.

44. The Scottish Ministers in drafting their statutory guidance – and the EHRC in its intervention before this court - have simply ignored this crucial issue. Neither of them (nor the court below) give any explanation as to why s.9(3) GRA 2004 does or should *not* apply within the context of the EA 2010 provisions, specifically those concerning the promotion of *women's* rights and the provision of protections in favour of *women*. *No* reference is made (whether by the court below, by the Scottish Ministers or by the EHRC) to the EA 2010's particular structure, its wording, its

[44] ***In re Allister judicial review*** [2023] UKSC 5 [2023] 2 WLR 457 per Lord Stephens at § 66:
"Even if it is engaged in this case, the interpretative presumption that Parliament does not intend to violate fundamental rights cannot override the clearly expressed will of Parliament. Furthermore, the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute."

[45] On which see ***Hamnett v Essex County Council*** [2017] EWCA Civ 6 [2017] 1 WLR 1155 per Gross LJ at § 26.

definitions, its aim, its objects, its scope and/or the historic, biological or social context against which Parliament has made provision in passing the EA 2010 for *women's* rights and protections in favour of *women.*

45. It is worth underlining, too, that the consequence of reading and applying Section 9(1) GRA 2004 as if it embodied a free-standing and overriding principle to which the provisions of the EA 2010 was subject across the board is that *women's* rights (whether to pregnancy/maternity protections, of access to women's only services and accommodation, to positions where being a women is a genuine occupational requirement - for example being a counsellor in, or chief executive of, a rape crisis centre [46] - to positive action measures in favour of women (including women only short-lists in the selection by registered political parties of candidates for election, to the freedom of association to same-sex attracted women, to women's fair competition within sports) are *eroded and compromised* whereas men's rights are enhanced. This is the very definition of patriarchy. It is, to say the least, ironic that the EHRC *in particular* should seek to argue that s.9(1) GRA 2004 has to be interpreted and applied as the means whereby women's EA 2010 rights are eroded, and the patriarchy revived and strengthened.

46. What is perhaps most striking and revealing about both the respondents' and the EHRC's advocacy for this reading of the EA 2010 - in which all references to and provisions for "women" within the context of the protected category of sex have to be re-read as "women without a GRC and men with a GRC" - is that this is required to ensure that "men with a GRC" do not lose the rights afforded under the EA 2010 to "women". But no proper recognition or adequate weight is given to the impact of such a reading on "women with a GRC". On the EHRC analysis, as "EA 2010 men" these women with a GRC *lose* the rights which the EA 2010 affords to *women*. For example, the EHRC's analysis means that to qualify as a "single-sex service" for women falling within para. 27 of Sch. 3 EA 2010, the provider has to ensure that women with GRC are *excluded* from it. So we have a zero sum game in which: women, when they obtain a GRC, *lose* women's rights; whereas men who obtain a GRC *gain* the protection of women's rights. Patriarchy thereby irrepressibly re-asserts itself.

47. Before the courts below the Scottish Ministers made passing reference to the predecessor statute, the Sex Discrimination Act 1975 ("SDA 1975") and Explanatory Notes apparently associated with the GRA 2004. This all pre-dates the consolidated and reforming statute which is the EA 2010. As regards the Scottish Ministers' purported reliance on the terms of the now repealed

[46] *Adams v Edinburgh Rape Crisis Centre*, 2024 SLT (Trib.) 89, ET.

SDA 1975, Lord Neuberger of Abbotsbury PSC observed in ***Cusack v Harrow London Borough Council*** [2013] UKSC 40, [2013] PTSR 921 at §65:

> *"65 Extensive reference to the genealogy or archaeology of a consolidating statute is almost always unhelpful, and is sometimes positively confusing."*

48. As regards the Scottish Ministers' purported reliance before the courts below on the Explanatory Notes to the GRA 2004, in ***R (McConnell) v Registrar General for England and Wales*** [2020] EWCA Civ 559, [2021] Fam 77 the Court of Appeal said at §37:

> *"37 In principle the Explanatory Notes to an Act of Parliament are an admissible aid to its construction: see* ***R (Westminster City Council) v National Asylum Support Service*** *[2002] 1 WLR 2956, § 5 (Lord Steyn). However, as Lord Steyn said, this is in so far as the Explanatory Notes 'cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed'. We do not consider that the Explanatory Notes to the GRA are inconsistent with what we regard as the correct interpretation of sections 9 and 12 but, in any event, if they were, those Notes could not alter the true interpretation of the statute. Our task is to construe what Parliament has enacted, not what the Explanatory Notes say it enacted."*

49. So even if the material the Scottish Ministers were relying on before the courts below was properly admissible (which is doubtful[47]) it can hardly be said to be of any *relevance* to (and

[47] See ***R (Derry) v. HMRC*** [2019] UKSC 19 [2019] 1 WLR 2754 *per* Lord Carnwath at §§ 9-10:

> *"9 In* ***Eclipse Film Partners (No 35) llp v Revenue and Customs Comrs*** *[2014] STC 1114, § 96 Sales J likened the correct approach to statutory interpretation to that appropriate to a consolidation statute (as explained by the House of Lords in* ***Farrell v Alexander*** *[1977] AC 59):*
>
> > *'When construing a consolidating statute, which is intended to operate as a coherent code or scheme governing some subject matter, the principal inference as to the intention of Parliament is that it should be construed as a single integrated body of law, without any need for reference back to the same provisions as they appeared in earlier legislative versions.*
> >
> > …
> >
> > *An important part of the objective of a consolidating statute - or a project like the Tax Law Rewrite Project - is to gather disparate provisions into a single, easily accessible code. That objective would be undermined if, in order to interpret the consolidating legislation, there was a constant need to refer back to the previous disparate provisions and construe them.' (para.97)*
>
> *10 I would respectfully endorse this guidance, which should be read with Lady Arden 's comments (§§ 84—90) on the relevance of prior case law."*

per Lady Arden at §§ 87-88

> *"87 It would often be laborious for a court to investigate what provisions had been consolidated in any particular provision of a consolidating statute. It would be wrong in general for it to do so. The process of drafting a consolidation statute requires specialist techniques and skills and can be very complex.*
>
> *88 But the position is different in relation to prior case law. The restraint required by the House of Lords in* ***Farrell v Alexander*** *[1977] AC59 relates to legislative history, and not to relevant antecedent case law. Moreover, in practice, even where a statute is a consolidation statute, courts often look at previous*

certainly of no weight in) the interpretation of the EA 2010 and the understanding of Parliament's intention in passing the EA 2010 in the terms that it did.

The definition of "woman" in the EA 2010, compared to the SDA 1975

50. It was common ground between the parties in the courts below that the EA 2010 is an amending and consolidating statute which, in terms of its long title, was intended "*to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics*" (one of those enactments being the SDA 1975).

51. What that tells one straight-off, is that caution must be exercised by the courts so as not to undermine Parliament's objective of reform, harmonisation and restatement of the law in the EA 2010. Furthermore, pre-EA 2010 case law should not be assumed to be a reliable guide on how Parliament intended the EA 2010 should now be interpreted. Reference back to previous disparate predecessor provisions is of little, if any, assistance to the proper construction and contemporary application of the reformed and consolidated EA 2010. But if this is done, it is necessary to pay close attention to any changes to statutory formulations used in earlier statutes.

Sex discrimination under the SDA 1975

52. Section 5(1)(b) SDA 1975 defined "*<u>sex</u>* discrimination" as discrimination falling within the following provisions:

    (1) Section 1 SDA 1975, concerning "direct and indirect discrimination against *<u>women</u>*"; or

    (2) Section 2 SDA 1975, concerning "sex discrimination against men", in the identification of which Section 2(2) SDA 1975 specifies that "no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth"; or

    (3) Section 3A SDA 1975 concerning workplace-related discrimination against <u>women</u> on the ground of pregnancy or maternity leave; or

    (4) Section 3B SDA 1975 concerning discrimination in the provision of goods, facilities, services or premises against <u>women</u> on the ground of pregnancy or maternity .

53. Section 2A, SDA 1975, as amended, specifically excluded "discrimination on the grounds of gender reassignment" from the definition of "sex discrimination" (s.5(1)(b), SDA 1975) and did <u>not</u> treat a person with the protected characteristic of "gender reassignment" as becoming of

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case law on provisions that are consolidated to assist them interpret the new provision where there is any doubt or simply to confirm the view that they have formed."

the "sex" of their gender they identified with. This was the case even after the GRA 2004 was promulgated, and regardless of whether a person had received a GRC.

54. This distinction is maintained in the EA 2010 which maintains separate tracks concerning:

(a) sex discrimination because of being a woman/female of any age or being a man/male of any age: per ss.11(1) and 212 EA 2010; and

(b) discrimination because of the protected characteristic of "gender reassignment" (as defined in s. 7(1) EA 2010).

"Means" in Section 212(1) EA 2010 versus "includes" in Sections 5(2)/82 SDA 1975

55. One change in the wording used as between the SDA 1975 and the EA 2010 is that s.212(1) EA 2010 provides that "*'woman' means a female of any age*" and "*'man' means a male of any age*". This is to be *contrasted* with the previous provisions in ss.5(2) and 82 of the SDA 1975 which stated that "'woman' *includes* a female of any age" [our emphasis]. Section 212(1) EA 2010 is *not*, then, a simple re-enactment of ss.5(2) and 82 SDA 1975. And in any event there has never been any prior authoritative judicial interpretation of the SDA 1975 to the effect that the acquisition of a GRC changed an individual's sex for the purposes for the SDA 1975. So there is no space for presumption or inference that these provisions of the EA 2010 have to be read in the light of, or conformably with, the now repealed prior provision in the SDA 1975.[48] Instead the change of wording in the s.212(1) EA 2010 definition of "men" and of "women" from that used in the SDA 1975 is significant in that it clarifies and removes any possible ambiguity. In passing the EA 2010 Parliament chose *not* to use the (potentially ambiguous) statutory formulation previously used in the SDA 1975 of "includes" when defining "woman" for the purposes of the EA 2010.[49] "Means" is *not* ambiguous. If woman *means* "*female* of any age", then a "*male* of any age", *does not and cannot* fall within that definition of "woman", even if holding a GRC. Thus Parliament chose to say what the term "woman" *means* for the purposes of the EA 2010 (and by

[48] ***R (ZH and CN) v London Borough of Newham*** [2014] UKSC 62 [2015] AC 1259 per Lord Hodge at § 53 and per Lord Carnwath at §§ 83-86.

[49] The word "includes" *is ambiguous*. One meaning that the word "includes" can conceivably bear is that of referring to an *open* list of examples. That appears to be what the Scottish Ministers are contending for: they say that while "woman" may *include* "female of any age" that is *not* to say that it may not *also include*, on the Scottish Ministers' contention, a "male of any age who holds a GRC". But if the *open* list approach to the word "includes" is the *intended* meaning, then lawyers and statutory draftspersons habitually add "including, without prejudice to the foregoing generality …" or "including, but not restricted to …". This is because lawyers often also apply - when interpreting the words "includes" or including" - the legal maxim *expressio unius est exclusio alterius* – i.e. if one chooses expressly to list particular instances of a condition one is to be taken to be understood as *excluding* any other (even like or similar example) which are not expressly mentioned.

corollary what it does ***not*** mean); and it created, for the first time, the *separate* protected characteristic of gender reassignment in s.7 EA 2010. Indeed, for what it is worth, the Explanatory Notes to the EA 2010 state as follows (at paragraphs 54, 58, 59, 659-660)

> ***"Section 11 EA 2010: Sex***
>
> ***Effect***
>
> *54. This section is a new provision which explains that references in the EA 2010 to people having the protected characteristic of sex are to mean being a man or a woman, and that men share this characteristic with other men, and women with other women. […]*
>
> ***Section 13 EA 2010: Direct discrimination***
>
> ***Effect***
>
> *58. This section defines direct discrimination for the purposes of the Act. […]*
>
> *62. The section also provides that: . …*
>
> *(a) in non-work cases, treating a woman less favourably because she is breast feeding a baby who is more than six months old amounts to direct sex discrimination.*
>
> *(b) men cannot claim privileges for women connected with pregnancy or childbirth […]*
>
> ***Section 212: General interpretation***
>
> ***Effect***
>
> *659. This section explains what is meant by various words and phrases which appear in more than one Part of the Act.*
>
> ***Background***
>
> *660. While a key objective of the Act is to present discrimination law in plain language and most words used in the Act have an ordinarily obvious meaning, it is sometimes necessary to make clear the specific legal meaning of some words and phrases that are used several times in the Act.*"

56. Thus, not only is the term "woman" defined in the EA 2010 as meaning "female of any age", but that is the **only** definition of "woman" in the EA 2010. Accordingly Parliament can be taken to have intended that this same definition of "woman" (as meaning "female of any age") be used and applied throughout the EA 2010 in ***all*** its provisions; rather than intending there to be some variable definition of "woman", as sometimes referring to "certificated sex" and sometimes just to what their "sex" is in fact depending on the particular clause or phrase or wording used in any specific provision. The yardstick by which the application or non-application of "certificated sex" should be judged is entirely unclear. Why, for instance, did the court below determine that it would *not* make sense to apply "certificated sex" to pregnancy

protections, yet it somehow *did* make sense for "certificated sex" to be applied in the EA 2010 provisions on the protection of single sex spaces and of single sex services? This is the court below stepping into the arena of the legislator and improperly making an arbitrary general determination abstracted from any facts and involving the implicit re-writing of the legislation.

57. And the very idea that individuals who are tasked with attempting to apply and conform to the requirements of the EA 2010 in practice – for example health boards, or individual NHS staff determining issues around admissions to single ***sex*** wards – have to read individual provisions of the EA 2010 and determine whether, in their judgment in that particular case "certificated sex" was intended by Parliament (as opposed to what an individual's sex is in fact) is to turn this statute into a legalistic morass, and an ambulance-chasing equality lawyer's delight. But that is ***not*** how statutes are intended by Parliament to work, particularly when imposing rights and obligations on private individuals in relation to other private individuals. Instead, the presumption in terms of the interpretation and application of a statute must always be in favour of clarity, comprehensibility and ease of application. As Lord Hope observed in ***Imperial Tobacco v. Lord Advocate*** [2012] UKSC 61, 2013 SC (UKSC) 153 at § 14:

> *"The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used."*

58. Thus, Occam's razor applies: entities are not to be multiplied. So the word "sex" does ***not*** have multiple meanings within the one statute. Thus "woman" when used in the EA 2010 always and only means "a female of any age": that is what Parliament expressly tells us in s.212 EA 2010. It does *not*, sometimes or anytime, mean or include, "a male of any age who also holds a GRC" or exclude "a female of any age who also hold a GRC".

Policy of EA 2010 to be read and applied independently of the policy of GRA 2004

59. The court below maintained its mistaken and misguided interpretation and analysis of the proper relationship between the GRA 2004 and the EA 2010, even when it was plain that it ran wholly contrary to the thrust and aim of the EA 2010 as a whole. In doing so it thwarted and ran counter to the overall policy and objects of the EA 2010 and its decision was vitiated by error of law: ***Padfield v. Ministry of Agriculture, Fisheries and Food*** [1968] AC 997 Lord Reid (p.1030), Lord Pearce (p.1053) and Lord Upjohn (p.1060). In particular, the analysis adversely impacted upon the scope of the protections which Parliament clearly intended that the EA 2010 provide against discrimination because of protected characteristics which also have a

relationship to the sex that an individual in fact is, namely: (i) gender reassignment; (ii) marriage and civil partnership; (iii) pregnancy and maternity; and (iv) sexual orientation.

60. The matters adversely affected/distorted include: compliance with the health and safety protections afforded to, and only to, ***women*** in the workplace (qv para. 2 of Sch.22 EA 2010); and the lawfulness of any requirement imposed for a person to be a man and ***not*** a transexual person in order to ensure the combat effectiveness of the Armed forces (qv para. 4 of Sch. 9 EA 2010).

61. The court below misdirected itself in law by refusing fully and properly to examine the impact of its new (and wholly unsupported) ruling to the effect that the acquisition of a GRC effects a "sex change" for the purposes of the EA 2010. Instead it stated (at §53 **[APP Tab 3/page 7 at page 19]**) that

> *"it is neither practical nor necessary for the court to attempt to examine every section and every schedule of an Act of Parliament, which stretches to some 336 pages, to determine whether in some different and hypothetical set of circumstances it may be necessary to adopt a contextual interpretation of terms such as "sex" or "gender" based on biology."*

62. But this approach represents an *abdication* by the court below – apparently on the basis that the statute was just too long and complicated - of the court's constitutional responsibility to ensure that its legal analysis maintains a consistency and coherence in the proper approach to the EA 2010 considered as a whole. This amounts to yet another self-misdirection in law such as to vitiate the conclusion of the court below.

63. In the judgment appealed against **[APP Tab 3/page 7 at pages 16, 19]** the court noted (at para 33, 50):

> *"33…Parliament does not legislate in a vacuum and must be taken to be aware of legislation already on the statute book. When the EA was passed in 2010 it must be assumed that Parliament was fully cognisant of the purpose, terms and effect of the GRA…*
>
> *50…It would be anomalous in our view to suggest that a person with a GRC in the male sex, having regard to the conditions for granting the same, should be able to assert protection against sex discrimination as a woman, and vice versa. Such an approach would seriously undermine the intention behind the GRA. It cannot be viewed as mandated by or an intended consequence of the EA."*

64. The approach which the court below took was in effect to give precedence to what it regarded as the aims and policy of the GRA 2004 (which it described as a "far-reaching enactment" which was intended "to put into place a detailed mechanism that ultimately effected a change to a person's status in the eyes of the law, specifically, their sex.") and then read the EA 2010 in the

light of aims and intent of the earlier statute. and interpret and apply the EA 2010's provisions in a Procrustean manner, so as to make the later statute consistent with the GRA 2004.

65. This is to get things the wrong way round, however. As already noted, the EA 2010 reforms and harmonises equality law into a complex and lengthy code with many inter-related provisions by which Parliament sets out its judgment on how the different protected characteristics (among them "sex" as distinct from "gender reassignment") are to be acknowledged and protected. There is ***no*** ambiguity in the term "woman" as used in the EA 2010. That statute clearly and unequivocally provides a definition of the term "woman" as a female of any age. [50] And as the Second Division stated and ruled in ***FWS 1*** [2022] CSIH 4, 2022 SC 150 (at § 36):

> "36 *For this purpose a man is a male of any age; and a woman is a female of any age. Section 11(b) EA 2010 indicates that when one speaks of individuals sharing the protected characteristic of sex, one is taken to be referring to one or other sex, either male or female. …. Provisions in favour of women, in this context, by definition exclude those who are biologically male*."

66. So, the first aim of any court is to establish what the EA 2010 as the later statute requires in order to be interpreted and applied in accordance with the intention of Parliament. The provisions of an earlier statute, such as the GRA 2004, cannot be used to introduce any element of ambiguity into what are otherwise plain provisions of the later statute. Instead, if and insofar as any provisions of an earlier statute (such as the GRA 2004) cannot be reconciled with that interpretation of the EA 2010, then it is the earlier statute which gives way. This is also expressly anticipated by s.9(3) GRA 2004.

67. The judgment and conclusion of the court below is instead predicated on its wholly ill-founded and unwarranted assumption that the GRA 2004 should be afforded (quasi-) constitutional status and was therefore ***not*** to be subject to possible implied repeal by the later provisions of the EA 2010. Such a finding has ***no*** basis in, and is wholly contrary to, the fundamentals of UK constitutional law, which is premised on the sovereignty of the UK Parliament and the principle that no Westminster Parliament can bind its successors. As was noted ***In re Allister judicial review*** [2023] UKSC 5 [2023] 2 WLR 457 per Lord Stephens at §66

[50] Section 4 of the (Australian) Sex Discrimination Act 1984 (Cth), as originally enacted, contained the following definitions of the words man and woman: "'man' means a member of the male sex irrespective of age; 'woman' means a member of the female sex irrespective of age". These definitions were removed when that Act was amended in 2013 to include "gender identity discrimination": ***Tickle v Giggle for Girls Pty Ltd (No 2)*** [2024] FCA 960 per Bromwich J at § 67.

"The most fundamental rule of UK constitutional law is that Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme"

68. This constitutional principle entails that the provisions of a later statute have precedence over the provisions of an earlier statute, such that the GRA 2004 as a whole can only properly be read and applied subject to the provisions and requirements of the EA 2010 overall. That is indeed what s.9(3) GRA 2004, properly interpreted, means. The meaning of "sex" and "woman" in the EA 2010 is made plain by its terms, such as the pregnancy and maternity protections afforded to, and only to, women, and a number of other specific provisions: ss. 13(6), 17, 18, 25(5), 39(6), 49(12), 50(12), 72-76, 106(6)(b); paras. 14 and 23(2)(d) in Sch. 3; para. 2 in Sch. 7; paras. 17 and 20(2)(c) in Sch. 9; para. 2 in Sch. 16; and para. 2 in Sch. 22.

The pregnancy and maternity protections for women in the EA 2010: a case study in statutory (mis)interpretation

69. The Scottish Ministers claim that s.9(1) GRA 2004 applies to the EA 2010 such that ***all*** references in the EA 2010 to "women" "men" or "sex" means their "certificated sex" rather than what their sex is in fact. That is the ***only*** way for them to conform to the fact that the EA 2010 contains only ***one*** definition of the terms "women" "men" or "sex", which therefore apply – in a "constant and predictable" manner - uniformly and consistently whenever these terms are used throughout the EA 2010. But then, that creates a problem for the Scottish Ministers because the protected characteristic of "pregnancy and maternity" in the EA 2010 specifies that such protection is only available to "women". On the Scottish Ministers' reading (and apparently also on the EHRC submissions) that would *exclude* the pregnancies of individuals (such as Freddy McConnell, who became pregnant after obtaining a GRC in the male gender) from the pregnancy and maternity protections of the EA 2010.

70. It is also important to bear in mind that the pregnancy and maternity provision of the EA 2010 are aimed at the protection both of those (women) who bear children, and also of the children who are borne and born. Any reading (such as that proposed by the EHRC before this court) which results in the *exclusion* from statutory cover of the pregnancies of *some* individuals and in the deprivation of those individuals' post-childbirth protections, also risks adversely affecting those individuals' children. There would have to be a very clear and unequivocal rationale and justification for such selective disapplication of rights otherwise afforded by the State to persons deemed to be vulnerable and in need of its specific protections. [51] No such justification has

[51] Cf Case C-103/16 ***Jessica Porras Guisado v Bankia SA*** EU:C:2018:99 (CJEU Third Chamber, Judgment of 22 February 2018) at §§ 60-62 (emphasis added):

been offered by the EHRC and the Scottish Ministers' suggestion (which appeared to find favour with the court below) was that Parliament simply overlooked the possibility of, and need for continued protections being afforded to, those who became pregnant and gave birth after obtaining a GRC.

71. It is, instead, clear that the issue of post-GRC individuals continuing to conceive/bear children would have been known to the legislature when passing the EA 2010. As the Court of Appeal noted in ***R (McConnell) v Registrar General for England and Wales*** [2020] EWCA Civ 559, [2021] Fam 77 at § 46

> "*46 It is important to appreciate, however, that the sort of case which the Strasbourg court had in mind was 'the case of fully achieved and post-operative transsexuals'. In enacting the GRA 2004 Parliament took a different course. It did not impose a requirement for surgery or for there to be a transition physiologically to the new gender. Parliament went further than the judgment of the Strasbourg court strictly required. We were informed at the hearing that in many states it was necessary for a trans person to be sterilised before being recognised in their acquired gender and that the most obvious physical attributes of the former gender had to be extinguished. In that context we note the decision of the Strasbourg court in* ***AP, Garçon and Nicot v France*** *(Application Nos 79885/12, 52471/13 and 52596/13) (unreported) 6 April 2017, in which the court held that a requirement that a trans person be sterilised in order to receive legal recognition breached article 8 of the Convention. In any event, that is not the position which Parliament took in enacting the GRA 2004. It is that fact which has led to the physical possibility that a trans man such as Mr McConnell can conceive, become pregnant and give birth to a child. He is by no means unique. The material before the court shows that there are other trans men who have been able to bear children in both this country and abroad.*"

72. If and insofar as it is accepted (as was correctly found by the court below) that the intention of Parliament in passing the EA 2010 was to continue to provide pregnancy and maternity

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> "*60 As regards the preventive protection of pregnant workers and workers who have recently given birth or are breastfeeding, it must be noted that this is of particular importance in the context of Directive 92/85.*
>
> *61 According to the 15th recital of that directive, the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers and workers who have recently given birth or who are breastfeeding and provision should be made for such dismissal to be prohibited.*
>
> *62 It is in view of the harmful effects which the risk of dismissal may have on the physical and mental state of workers who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that, pursuant to Article 10 of Directive 92/85, the EU legislature provided for special protection for women, by prohibiting dismissal during the period from the beginning of pregnancy to the end of maternity leave.*"

protections to females even after they may have obtained a GRC, there are only two possible options:

(1) Words requiring the protections to be afforded to (some) "men" should be *read into* the EA 2010 provisions regulating pregnancy and maternity; or

(2) "Woman" must be interpreted as a reference to the female of the species, regardless of whether or not they hold a GRC. That sex means the sex they are as a *matter of fact* rather than to whatever "sex" they currently have a formal legal certificate attesting to.

73. The read-in option would involve re-writing the EA 2010 to make it say that its pregnancy and maternity provision cover situations when "woman *or a man*" is treated unfavourably, by something along the following underlines:

(1) *except* in a case where B is a man *by virtue of holding a full Gender Recognition Certificate*, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(2) "because of a pregnancy of *his or hers*" or

(3) "in relation to a pregnancy of *his or hers*"; or

(4) because of the pregnancy, or … because of illness suffered by *him or her* as a result of it";

(5) "because *he or she* has given birth"; or

(6) relative to the exercise of right to "*paternity*" as well as "maternity leave" ?

74. But the read-in option runs directly contrary to, and is therefore precluded by, the terms of s.13(6)(b) EA 2010 which provides, in context, as follows:

"13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. […]

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

75. This leaves only the second option, namely that in the pregnancy/maternity protection provisions of the EA 2010 "woman" refers to what "sex" an individual is as a matter of fact, regardless of their "certificated sex". The simple and straightforward position - consonant with Parliament's intention from the words actually used by it - is that when the EA 2010 refers, in its pregnancy and maternity provision, to the protections afforded to a *woman*, it has to be understood as referring to the sex they actually are, since only *female* persons can get pregnant. This is indeed the option followed by the court below (at §§ 61-63 of its judgment [**APP Tab 3, page 7 at pages 21-22**]). But it must necessarily follow that the challenged revised statutory guidance of the Scottish Ministers is *wrong in law*, since

(i) It is accepted that in the context of pregnancy and maternity related protections the EA 2010 is clearly using the term "women" to refer to the "sex" they are, *not* the "certificated sex" they hold paperwork for (i.e. the s.9(1) GRA 2004 transformation principle does *not* apply); and

(ii) There is no basis from the actual wording used in the EA 2010 to the effect that Parliament envisaged and intended that within the EA 2010 the term "women" be a variable category, sometime referring to what sex they in fact are, and at other times to whatever their current paperwork specifies as their "certificated sex".

76. The court below conceded (at §60 **[APP Tab 3/page 7 at page 21]**) that its conclusion that the acquisition of a GRC effected a "sex change" for the purposes of the EA 2010 made a nonsense of the express provisions in the EA 2010 protecting women *and only women* against discrimination because of or related to their pregnancy and maternity, among them: subs. 13(6) EA 2010; s.17 EA 2010; section 18 EA 2010; ss. 72 to 76 EA 2010; paras. 1 and 2 of Sch. 7 EA 2010; para. 2 of Sch. 22 EA 2010.

77. This is because its finding meant that men with a GRC would be able to claim pregnancy and maternity protections under the EA 2010, while women who obtained a GRC would ipso facto be deprived of the protections that would otherwise have been afforded to them as pregnant and nursing women. Rather than determining, from this absurd result, that its conclusion could not be correct, the court below instead engaged in a re-writing of the plain words of statute at § 62 in stating as follows **[APP Tab 3/page 7 at page 21]:**

> *"Section 212 EA 2010 does not include the words "except where the context otherwise requires" but these are implicit [sic] in any statutory definition. In our view this is a situation where the context manifestly "otherwise requires": pregnancy is a matter of fact which hinges entirely on biology. To interpret these provisions as including only those who are pregnant both as a matter of fact and biology, regardless of the*

terms of any GRC, does not detract from the proposition that the default interpretation of "woman" or "female" would, elsewhere in the Act, include such a person."

78. There is simply no authority for the proposition that "the words "except where the context otherwise requires" … are implicit in any statutory definition". Indeed this is ***not*** an application of the (permissible) principle of *exegesis* but a claim to (impermissible) *eisegesis*. In any event, the court below simply gave insufficient weight to the plain and unambiguous terms of the s.212(1) EA 2010 definition of women. Instead, the court below purported to follow what it claimed to be a "purposive interpretation" to allow it to give precedence to the provisions of the GRA 2004 over the terms of the EA 2010. But why did the court below not make a similar decision about the equally absurd result of men being permitted into women's spaces or participating in women's sports etc.? It is submitted that this again was the court below crossing the threshold from interpretation to legislating for itself. Yet in ***Shahid v. Scottish Ministers*** [2015] UKSC 58, 2016 SC (UKSC) 1 Lord Reed in this court observed (at §§ 20-21 - underlining emphasis added) that:

> *"20 … No amount of purposive interpretation can however entitle the court to disregard the plain and unambiguous terms of the legislation.…*
>
> *21 The only principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid absurd or perverse consequences."*

79. In fact it is the approach of the court below to the legislation in question – reached in error of law and contrary to the plain and unambiguous terms of the EA 2010 and separately of s.9(3) GRA 2004 - which has been productive of "absurd or perverse consequences" which could never have been intended by Parliament when enacting the EA 2010, as more fully noted below. Even if this could be described as a strained reading, as opposed to an interpolation, it is wholly contrary to the plain and unambiguous definition contained in s.212(1) EA 2010 which, as we have seen, states unequivocally "woman" means a female of any age.

80. In sum, the purported re-writing by the court below of clear and unambiguous statutory provision – in particular the s.212(1) EA 2010 definition of "man" and "woman" - is beyond the proper constitutional role of the courts. The approach taken by the court below turns the relevant provisions of the EA 2010 entirely on their head. Instead - as the court had previously correctly held in *FWS 1* (at § 36) - in defining the term "man" as meaning "a male of any age" and "woman" as meaning "a female of any age", s.212(1) EA refers to the "sex" that they are in fact. This is reference to women's biology. By definition it excludes those who are biologically male. This clear and unequivocal reference to inescapable factual reality and realities of "sex" -

and, in particular, to "woman" - is confirmed and applied in and by the pregnancy and maternity protections of the EA 2010.

81. The court below **[APP Tab 3/page 7]** simply asserts that "male" and "female", "man" and "woman" are *no longer* biologically referable terms in the EA 2010, except when a court decides (on what basis or bases remains entirely unclear). In doing so it has invented a new rule of statutory interpretation to the effect that, within the same statute, even when the terms are expressly and precisely defined, the same word can have contradictory meanings (i.e. in some contexts the term "woman" excludes *all* men; but, in other contexts, the *same* term "woman" *excludes* some women). In apparent supposed justification for this approach the court below made the following wholly speculative remarks about s.212 EA 2010, in respect of which simply no evidence was before the court (at § 63 **[APP Tab 3/page 7 at page 22]**):

> *"It may be, as was submitted for the respondents, that at the time when these provisions were enacted it was not anticipated, for example, that a person in the position of the appellant in* ***R (McConnell) v Registrar General for England and Wales*** *[2020] EWCA Civ 559 [2021] Fam. 77 might give birth, given the conditions which the GRA imposes for the granting of a GRC. It may be that the issue was simply not adequately considered* [by Parliament] *in the passage of what was on any view a complex and multifaceted piece of legislation which underwent various iterations and amendments during its passage from bill to statute. Extensive amendments were proposed during the passage of the bill, and in the debates, though ultimately many were withdrawn. The Committee sat twenty times and debate was equally protracted in the Upper Chamber."*

82. Yet the court below here contradicts itself. As we have seen earlier in the same judgment it stated (at § 33 **[APP Tab 3/page 7 at page 16]**):

> *"When the EA was passed in 2010 it must be assumed that Parliament was fully cognisant of the purpose, terms and effect of the GRA".*

83. In any event, it is *not* for the court below (or any court) to engage in such irrelevant speculation as to the reasons behind legislation. The court's task is to interpret and apply, in a consistent and coherent manner, the words used in statute. ***Lord Advocate's Reference (No. 1 of 2001)***, 2002 SLT 466, 2002 SCCR 435 (Lord Justice General (Cullen), Lady Cosgrove, Lord Nimmo Smith, Lord Wheatley, and Lord Menzies forming the majority; Lord Marnoch and Lord McCluskey dissenting) per Lord McCluskey at § 4:

> *"4. … [J]udges, in deciding cases in court, have no power to reform the law. The principle that lies behind the constitutional duty of judges to apply the law as they find it, rather than as they think it should be, is*

that justice requires that the law should, as far as possible, be certain. This principle was well expressed by Lord Eldon in Sheddon v Goodrich (1803) 8 Ves Jun 497, 32 ER 441:

'It is better that the law should be certain than that every Judge should speculate upon improvements in it'."

84. The court below fell into this error. The attempt by the court below to recognise and apply a new definition of "certificated sex" in priority to the commonly understood and longstanding definition of sex adopted and used in the EA 2010 led to it failing to apply the law as it found it. It wrongly relied upon speculations about Parliament (perhaps) having failed to appreciate - through lack of Parliamentary time or proper consideration - that the acquisition of a GRC did not affect a man's ability to father a child or a woman's ability to become pregnant and bear a child. In doing so it misdirected itself in law and took into account irrelevant and wholly constitutionally inappropriate considerations.

The EA 2010 gender reassignment exceptions and the meaning of sex

85. It is common ground that there are provisions in the EA 2010 which permit what would otherwise constitute *gender reassignment discrimination*, and do not 'carve out' an exception for persons having been issued with a GRC in the acquired gender. The EA 2010 also allows for a limited number of carve-outs from what would otherwise constitute *sex discrimination* under the EA 2010. Parliament clearly intended, in passing these EA 2010 provisions, to allow for the exclusion of people with the protected characteristic of gender reassignment (regardless of whether or not they have a GRC) in order to keep these single sex spaces or allow for separate sex provision.

86. These provisions, like the rest of the EA 2010 (and not just, as the court below had it, its pregnancy and maternity provisions) are predicated on sex meaning what one's sex is *as a matter of fact*. That is to say that the proper functioning of the EA 2010 is dependent upon sex being understood as referring to the biological facts, whether or not a GRC may subsequently have been obtained to alter the still factually accurate terms of an individual's birth certificate.

87. For example paras. 24 and 25 Sch. 3, EA 2010 allow a priest or minister of religion not to solemnise what would be, in reality, a same *sex* marriage. [52] If the minister/celebrant reasonably believes that one of the ostensibly opposite sex engaged couple has, in *fact*, an "acquired gender"

[52] Paragraph 5(3) of Sch. 3 to the Marriage (Same Sex Couples) Act 2013 provides that, for the purposes of interpreting provision made by the Act and any subordinate legislation made under it, or new England and Wales legislation,

> "a reference to marriage of same sex couples is a reference to— (a) marriage between two men, and (b) marriage between two women".

under the GRA 2004, then the minister/celebrant is able lawfully to refuse them marriage on that basis, and thereby avoid compromising his or her religion's prohibition against same sex marriage. [53] Similarly, s.195(2) EA 2010 (concerning the preservation of fair competition or the safety of competitors in a "gender-affected" sport), paras. 26 and 27, Sch. 3 EA 2010 (concerning the provision of and access to single-sex services), para. 3, Sch.23 EA 2010 (concerning communal accommodation) and subparas. 1(3)(a), 2(4)(b), 4(2), Sch.9 EA 2010 (concerning the imposition of occupational requirements), cannot be made sensibly to work if "sex" is read as meaning "certificated sex".

88. The court below chose to deal only with some of these provisions in its judgment. But what the court below failed to appreciate or advert to in its treatment of the provisions it chose to discuss is that these exceptions become *unworkable* if references to "sex" are understood as references to "certificated sex". Paragraphs 26-28 of Sch. 3 EA 2010 allow for the provision exclusively to women of *separate* or *different* services from those that might be provided to men. This differential treatment will not constitute unlawful sex, or gender reassignment, discrimination against *men* if it can be shown to be a proportionate means of achieving a legitimate aim. Legitimate aim for these purposes would include considerations related to such needs and requirements which might specifically be associated with the women's sex as women, for example the preservation of decency and dignity and a sense of safety which might otherwise be compromised by and in mixed sex environments. [54]

89. The analysis by the Court below on how a definition of "certificated sex" would affect the specific protections for single sex spaces is dealt with in its judgment at §§ 55 and 56. The Court's conclusion was that there is "no basis within paras. 26 and 27" of Sch. 3 EA 2010 for excluding a man with the "certificated sex" of a woman, from women-only spaces. The Court appears to conclude, however, that a man with the "certificated sex" of a woman could be excluded from women's spaces by relying upon the exception from gender reassignment discrimination in para.28, EA 2010. The Court's subsequent attempt to avoid the inevitably absurd result of removing women's safe spaces relies upon a self-misdirection in law:

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[53] The provisions of Paragraph 18(1A)(c) and 18(1B) of Sch. 9 EA 2010 - which relate to marriages between persons of the opposite sex where one spouse subsequently obtains a GRC ("a relevant gender change case") - have *never* been brought into force: see Article 3(j)(iii) of The Marriage (Same Sex Couples) Act 2013 (Commencement No.2 and Transitional Provision) Order 2014 (SI 2014/93) and Article 2 of the Marriage (Same Sex Couples) Act 2013 (Commencement No. 4) Order 2014 (SI 2014/3169).

[54] As was recognised by the Second Division in ***FWS 1*** [2022] CSIH 4, 2022 SC 150 at §§ 36, 38-39.

1) At § 55 **[APP Tab 3/page 7 at page 20]** the court below says that "A person with a GRC has *a prima facie right to access the services of their acquired sex*." That is wrong. The GRA 2004 refers only to "acquired gender" and never to "acquired sex", a term invented by the court below. The primary question, *before consideration of the GRA 2004*, is "what right of access to single-sex spaces does the EA 2010 afford?" There is no reference to either "acquired gender" or "acquired sex" in the EA 2010. There is no reason for these fundamental and important exceptions to be read subject to the policy objectives of the GRA 2004. Indeed to do so would be contrary to s.9(3) GRA 2004;

2) At § 56 of the judgment **[APP Tab 3/page 7 at page 20]** when the court below addresses the exception in para. 28 of Sch. 3 EA 2010 it concluded that it "entitles the service provider, subject to a proportionality test, to exclude a transsexual person …. whether or not the person holds a GRC".[55] But on the court's misreading of the protected characteristic of "sex" in the EA 2010 as always meaning "certificated sex", in the circumstances it describes, the exception in para. 28(2) simply does *not* apply. This means that the proportionality test or justification for excluding men with the protected characteristic of gender reassignment would not apply. If sex means "certificated sex" then excluding a man holding a GRC in the female gender from a women-only space would not be being done for the purpose of providing separate services for *persons of each sex* as required under para. 28(2). The man holding a GRC in the acquired female gender would, on the reading of the court below, have the same "certificated" sex as the women for whom the women only service was intended. Again, this problem only arises because the court below does not recognise the protected characteristic of "sex" in the EA 2010 as a *biological* category and description of reality, rather than some kind of assigned and variable Foucauldian social construct or application of a legal fiction.

90. For these reasons, a service provider refusing a person with a GRC access to the services of the sex corresponding to their "acquired gender", would simply not be able to pray in aid the

[55] Paragraph 28 Sch. 3 EA 2010 provides as follows:

"28 (1) A person does not contravene section 29 EA 2010, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within subparagraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.

(2) The matters are—

(a) the provision of separate services for persons of each sex;

(b) the provision of separate services differently for persons of each sex;

(c) the provision of a service only to persons of one sex."

exceptions provided for in either paras. 26, 27 or 28 of Sch. 3 EA 2010. Thus the conclusion of the court below that the acquisition of a GRC under the GRA 2004 results in a "sex change" for the purposes of the EA 2010 significantly undermines and may indeed be said to render void of meaning and empty of effect the paras. 26-28, Sch. 3 EA 2010 exceptions from sex and gender reassignment discrimination (notably the considerations of decency and privacy particularly informing the paras. 27(6) and (7) right of a person of one sex reasonably to object to the presence of a person of the opposite sex). None of this can ever sensibly be thought to have been the intention of Parliament in making this provision and is instead indicative of the court having misdirected itself in law.

91. The court below separately misdirected itself in law when it concluded that a definition of "certificated sex" caused no significant problems on the provision of communal accommodation and was consistent with the requirements of the EA 2010. Because the court below found that the acquisition of a GRC entailed a "sex-change" for the purposes of the EA 2010 then these provisions (para. 3 Sch. 23 EA 2010), on the reading of the court below, have to be amended to read as follows:

> *"(5) Communal accommodation is residential accommodation which includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex who do not hold a GRC sharing with persons of the opposite sex who do hold a GRC.*
>
> *(6) Communal accommodation may include—*
>
> > *(a) sleeping accommodation shared between men without a GRC and women with a GRC;*
> >
> > *(b) sleeping accommodation shared between women without a GRC and men with a GRC;*
> >
> > *(c) residential accommodation all or part of which should, because of the nature of the sanitary facilities serving the accommodation, be used only by persons of the same sex (who do not hold a GRC) sharing with persons of the opposite sex who do hold a GRC.*

92. So, contrary to the claims of the court below (at § 59 [APP Tab 3/page 7 at page 21]), major difficulty does arise from the fact "*that 'sex' in this context is defined as including birth sex, where still living in that sex, and those in possession of a GRC in an acquired sex*", since it undercuts the very considerations of privacy and decency between the sexes both in the availability of communal sleeping accommodation and in the use of sanitary facilities which Parliament intended to make express provision for. The court below has failed to see and carry through the logic of its own position which makes a nonsense of this provision and runs contrary to the plain intention of Parliament. This error is again such as to vitiate the court's conclusion that the acquisition of a GRC effects a "sex change" for the purposes of the EA 2010.

When there is no *express* disapplication of the Section 9(1) GRA 2004 legal fiction substituting "certificated sex" for what one's "sex" is as a matter of fact

93. At times before the court below the Scottish Ministers appeared to argue that s.9(1) GRA was a "transformation principle" which required, in all statutory contexts, the substitution of "certificated sex" for sex in fact, unless there was an express reference in the relevant statute to the exception in s.9(3) GRA 2004 or to the disapplication of s.9(1) GRA 2004.

94. Ultimately that seemed indeed to be the line of reasoning which found favour with the Lord Ordinary when she held in ***For Women Scotland v. Scottish Ministers (No. 2)*** [2022] CSOH 90, 2023 SC 61 at §§ 48-49 (**[APP Tab 5/page 24 at page 42]**) that the *absence* of the word "biological" in the EA 2010 definition of "sex" and "women" and "men" was *positively indicative* of Parliament intending throughout the EA 2010 to use and reference "certificated sex" in the light of s.9(1) GRA 2004, rather than to what one's "sex" is as a matter of fact, as is clearly allowed for under s.9(3) GRA 2004 and in terms of the principle of Parliamentary Sovereignty.

95. That is and was a bad argument, particularly in the light of the failure to recognise that the starting position under the common law is that a human's sex is, in fact, immutable and binary (See ***Corbett v Corbett*** [1971] P 83 at 104D-G, 106B0D and 107A per Ormrod J; ***Bellinger v Bellinger*** [2003] 2 AC 467, HL, §§ 11-12 & 36-37 per Lord Nicholls, §§ 56-57 & 62 per Lord Hope; and ***Chief Constable of West Yorkshire Police v A (No.2)*** [2005] 1 AC 51, HL, § 3 per Lord Bingham, § 19 per Lord Rodger, § 30 per Baroness Hale):

> *"19. In March 1998 the chief constable had been advised that, even though she had successfully undergone all the usual treatment, including surgery, in law Ms A's sex was still male. In my view that advice on the domestic law of the United Kingdom was, and remains, correct: Bellinger v Bellinger (Lord Chancellor intervening) [2003] 2 AC 467 , especially at p 480, para 45 per Lord Nicholls of Birkenhead. Section 54(9) of the Police and Criminal Evidence Act 1984 ("PACE") provides: "The constable carrying out a search shall be of the same sex as the person searched." Parliament's laudable aim is to afford protection to the dignity and privacy of those being searched in a situation where they may well be peculiarly vulnerable. While her application to join the force was pending, Ms A herself very properly drew attention to the possible problem posed by this provision. On the basis of the legal advice given to him, the chief constable considered that, because of section 54(9), Ms A could not lawfully search female suspects. And, in practice, she could not search male suspects. Nor could the chief constable arrange for Ms A not to have to carry out searches without it becoming known why he was doing so. Since he understood that she was not willing for this to happen, the chief constable decided that he could not accept her application to join the force." (Per Lord Rodger).* (see also Baroness Hale at para. 30).

96. This argument also fails, when considering the EA 2010, to apply the relevant law as set out in earlier decisions of the Second Division , namely ***FWS 1*** [2022] CSIH 4, 2022 SC 150 and ***Fair Play for Women Ltd v Registrar General for Scotland*** [2022] CSIH 7, 2022 SC 199. In these cases it was recognised that there are some statutes, such as the EA 2010, in which the status or rights conferred are in context, referrable to sex in fact, and where the usual biological distinction is necessary for the proper understanding and operation of the statute. In such statutory contexts a definition of sex based on, and only on, sex by reference to the immutable biological facts must be adopted, regardless of the terms of s.9(1) GRA 2004.

97. The court below also refused to take proper account of the fact that if a GRC effected a change of "sex" unless the GRA 2004 was *specifically* disapplied, then this would be very likely to affect a wide variety of statutes and render unworkable provisions in and of amongst others: the Abortion Act 1967; the Surrogacy Arrangements Act 1985; the Human Fertilisation and Embryology Act 1990; the National Health Service (Free Prescriptions) (Scotland) Regulations 2011; and the Victims and Witnesses (Scotland) Act 2014. These Acts and regulations (which do *not* refer to s.9, GRA 2004) would have to be reinterpreted – as the Scottish Ministers would have it - to cover "certificated sex" rather than be a reference to what one's "sex" is as a matter of fact; and the intention and will of the legislator would thereby be frustrated. All these statutory provisions were referred to before the Lord Ordinary and to the court below, but other than to record they had been referred to, the courts below make no reference to them in their reasoning.

(1) **<u>Abortion Act 1967</u>** – since there is no express disapplication of s.9(1) GRA 2004 in the Abortion Act 1967, if the Scottish Ministers were right "sex" and "women" refer to "certificated sex" rather than sex in fact. This would mean that there is no regulation at all under the Abortion Act 1967 governing the termination of a woman's pregnancy where she held a GRC in the "male gender". According to the Scottish Ministers and the courts below, a "pregnant man" would <u>*not*</u> be covered by the relevant terms of the 1967 Act.[56]

(2) **<u>Surrogacy Arrangements Act 1985</u>** - since there is no express disapplication of s.9(1) GRA 2004, the prohibition against receiving payments or of commercial arrangements for carrying another's child *in utero* would *not* apply to a woman with a GRC in the "male gender". [57]

[56] See in particular Section 1(1) of the Abortion Act 1967.
[57] See Section 1 of the Surrogacy Arrangements Act 1985 as it applies in Scotland.

(3) **Human Fertilisation and Embryology Act 1990**: Section 3ZA(6)(a) states that, 'woman' and 'man' include respectively a girl and a boy (from birth). There is no express disapplication of s.9(1) GRA 2004. If the definitions of man and woman referred to "certificated sex" rather than sex in fact then this would mean that there was a lacuna in the statutory scheme concerning the production of human embryos since that scheme applies only to "Permitted eggs, permitted sperm and permitted embryos". A "permitted egg" is defined in s. 3ZA(2) as "one (a) which has been produced by or extracted from the ovaries of a woman, and (b) whose nuclear or mitochondrial DNA has not been altered." Similarly the s. 3ZA(3) definition of permitted sperm is "sperm (a) which have been produced by or extracted from the testes of a *man*, and (b) whose nuclear or mitochondrial DNA has not been altered." Yet, on the Scottish Ministers' reading an egg which has been produced by or extracted from the ovaries of a woman with a GRC in the "male gender" would not be a "permitted egg" and so would be unregulated by the 1990 Act. And similarly sperm which has been produced by or extracted from the testes of a man with a GRC in the "female gender" would not be "permitted sperm" and so would be unregulated by the 1990 Act. And any embryo resulting from gametes taken from an individual holding a GRC would *not* fall within the 1990 Act definition of a "permitted embryo" since it would not have been created by the fertilisation of a "permitted egg" by "permitted sperm", as envisaged under s. 3ZA(4)(a) of the 1990 Act.[58]

(4) **National Health Service (Free Prescriptions) (Scotland) Regulations 2011**: Regulation 4(1)(d) and (e) of these regulations exempts certain women from paying specified prescription charges:

> *"(d) a woman to whom a Health Board has issued an exemption certificate on the ground that she is an expectant mother or has within the last 12 months given birth to a live child or a child registrable as still-born under the Registration of Births, Deaths and Marriages (Scotland) Act 1965;* and

[58] See e.g. ***R (McConnell) v Registrar General for England and Wales*** [2020] EWCA Civ 559 [2021] Fam 77 at § 25:

> *"Before the President, and to some extent before us, there was argument about the Human Fertilisation and Embryology Act 1990 and the Human Fertilisation and Embryology Act 2008 ('HFEA 2008'). In particular there was debate about whether the infertility treatment which was given to Mr McConnell could lawfully be given to a man as opposed to a woman. The President addressed this issue, in particular at §§ 150-169:* ***R (TT) v Registrar General for England and Wales*** *[2020] EWHC 2384 (Fam) [2020] Fam. 45 (per Sir Andrew Macfarlane P.). He was troubled by the fact that, despite an invitation to take part in the proceedings, the Human Fertilisation and Embryology Authority ('the Authority') had not done so."*

(e) a woman with a valid exemption certificate, issued under arrangements for exemptions from charges for drugs and appliances in England or Wales, on the ground that she is an expectant mother or has within the last 12 months given birth to a live child or a child registrable as still-born under the Births and Deaths Registration Act 1953."

Since there is no express disapplication of s.9(1) GRA 2004 in these regulations then a woman with a GRC in the male gender, but who was pregnant or had recently given birth, would ***not*** be entitled to a free prescription, because such a person would, according to the Scottish Ministers, be a "pregnant man" and so not covered by the relevant terms of these regulations made by the Scottish Ministers themselves.

(5) **Victims and Witnesses (Scotland) Act 2014 as amended by the Forensic Medical Services (Victims of Sexual Offences)(Scotland) Act 2021**: Section 9(2) 2014 ASP as amended by the 2021 ASP specifies that before a forensic medical examination by a registered medical practitioner is to be carried out (by virtue of s.2 2021 ASP) on a victim of a sexual assault, the person subject to this medical examination *"must be given an opportunity to request that any such medical examination be carried out by a registered medical practitioner of a sex specified by the person*". Before the amendment effected by para. 5(3)(b)(iii) of the Sch. to the Forensic Medical Services (Victims of Sexual Offences)(Scotland) Act 2021 the reference in the 2014 ASP was to the *gender* of the registered medical practitioner. But even now - given that there is no express disapplication of the s.9(1) GRA 2004 principle in these ASP provisions - when a woman victim of a sexual assault requests an examination by another woman, she would on the Scottish Ministers' reading, simply be told that her request had been honoured because the man who was examining her held a GRC in the female gender. In this insidious way the legitimate dignity concerns of women and girls who are *victims* of sexual assault - at a time of particularly vulnerability, distress and upset are simply swept aside – all to be subordinated to the application of the legal fiction of "certificated sex" trumping the biological realities of sex in fact.

98. The Lord Ordinary thought it was just *obvious* that, at least in the case of s.9(2) of the Victims and Witnesses (Scotland) Act 2014 (as amended by the Forensic Medical Services (Victims of Sexual Offences)(Scotland) Act 2021) the s.9(1) GRA 2004 legal fiction of "certificated sex" should *not* be substituted for the factual reality of just "sex". But she referred to no particular principle of statutory construction which led her to that conclusion other than vague claims to the effect that "certificated sex" should *not* be substituted for sex in fact where it is "clear" when

"read fairly" that "'sex' means *biological* sex" in the legislation at issue. [59] "Clarity" and "fairness" are alas wholly subjective terms and provide no proper basis for any objective principles of statutory interpretation, since (lack of) clarity and (lack of) fairness lie very much in the eye of the various beholders, who in this fiercely divided issue come at the matter from wholly different perspectives. The court below (wrongly) concluded that these issues were academic issues within the context of the present proceedings, rather than accepting that the difficulties in the proper interpretation and application of these other statutory provisions arose from the court's own conclusions on the primacy of s.9(1) GRA 2004 and its requirement to use "certificated sex" to define woman/women not just in the EA 2010 but in all other statutory contexts.

99. The consequences are not confined to the civil law. Scottish criminal law also relies upon the biological concept of sex. In ***HM Advocate v Wilson*** unreported 6 March 2013 (HCJ) a woman who entered into sexual relations with two girls on the basis of her false claims of being a man was convicted in the High Court of "obtaining sexual intimacy by fraud" and given a deferred sentence of three years imprisonment, 240 hours of community service and placed on the sex offenders register for life. [60] However the Crown Office Procurator Fiscal Services (COPFS) September 2014 *Guidance for prosecutors in relation to transgender accused* (now apparently "under review") anticipates the erroneous judgment of the court below in this case and spells out precisely the implications of the court's analysis for the criminal law in this field in stating this (at Guidance for prosecutors in relation to transgender accused | COPFS)

> *"Prosecutors [in Scotland] should recognise that a transgender accused may not consider there has been any deception at all because they simply do not identify with the gender assigned at birth but rather identify with*

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[59] See ***For Women Scotland v. Scottish Ministers (No. 2)*** [2022] CSOH 90, 2023 SC 61 per the Lord Ordinary, Lady Haldane, at § 53 – underlining emphasis added ([**APP Tab 5/page 24 at pages 43-44]**):.

> *"53. I conclude that in this context, which is the meaning of sex for the purposes of the 2010 Act, 'sex' is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex. Such a conclusion does not offend against, or give rise to any conflict with, legislation where it is clear that 'sex' means biological sex. Senior counsel for the petitioner referred to the example of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 (asp 3) where references to the sex of the forensic medical examiner can only mean, read fairly, that a victim should have access to an examiner of the same biological sex as themselves. I agree. There are no doubt many other such examples. That does not give rise to the inevitable conclusion, as was urged upon me, that 'sex' in the present context must mean the same thing as it does in others. A rigid approach in this context is neither mandated by the language of either statute nor consistent with their respective aims and purposes."*

[60] See similarly in England and Wales: ***R. v McNally (Justine)*** [2013] EWCA Crim 1051 [2014] QB 593 (CA (Crim Div)); ***R v Newland (Gayle)*** (Chester Crown Court, **His Honour Judge Dutton** presiding,12 November 2015); and ***R. v Staines (Jennifer)*** [2016] EWCA Crim 1696 (Hallett LJ, King J and Dove J, 12 October 2016) at §§ 1-3, 29-31.

a different gender and therefore often there may be no intention to deceive. Accordingly there would not be the necessary mens rea present to give rise to a criminal offence. Whether the necessary mens rea is present will depend on facts and circumstances, even in **R. v McNally (Justine)** *[2013] EWCA Crim 1051 [2014] QB 593 (CA (Crim Div)) the court recognised that much will depend on the circumstances whether a criminal offence has been committed. There should be no assumption made that there has been a deliberate deception simply because the person's birth gender has not been disclosed and it will be necessary for Prosecutors to carefully consider all the facts and circumstances in assessing whether 1. a criminal offence has been committed – that there was intentional deception such that consent would be vitiated and 2. That in all of the circumstances it is in the public interest to instigate proceedings. Where a transgender person has received a Gender Recognition Certificate, their legal gender will therefore match their self-defined gender identity and, per* **Goodwin v. UK** *(2002) 35 EHRR 18 their right to keep private their gender history is legally established. Consequently, where a person who has received a Gender Recognition Certificate keeps their gender history private, there can be no mens rea of intention to deceive."*

100. It should be noted that according to COPFS' own appended Equality Impact Assessment Record (at Equality Impact Assessment Record (copfs.gov.uk)) this COPFS policy was formulated notwithstanding feedback from Police Scotland to the effect that:

"the policy read as unbalanced. That it was strong from perspective of the transgender accused but underwritten [sic.] in relation to impact such an offence would have on a victim".

101. This policy was drafted after what COPFS described as an "in depth consultation exercise [which] took place with Scottish Transgender Alliance and Equality network" and in the light of claims to it from the Scottish Human Rights Commission that:

"in order to ensure compliance with ECHR the policy ought to be amended to make clearer that failure to disclose birth gender could not be taken to vitiate consent to sexual activity as this was something that was relevant to the status of the transgender accused rather than the nature of the act that had taken place and thus would interfere with a transgender accused's right to privacy"

102. The idea that a party's acquisition of a GRC transforms a non-consensual homosexual encounter or relationship, into a consensual heterosexual one (or vice versa) is simply a pernicious absurdity. But that is precisely one of the consequences of the conclusion of the court below that the acquisition of a GRC involves a person changing their sex. Such a claim not only undermines the EA 2010 protections against discrimination because of the protected characteristic of "sexual orientation" by effectively destroying the very concept of sex based attraction – defined in s.12 EA 2010 as a sexual orientation towards persons based on "sex", but it also undermines the other statutes listed, and separately the criminal law and the protection of the vulnerable in the "sex by deception" cases outlined above.

Effect of GRC as "sex change" on EA 2010 sexual orientation discrimination

103. At § 57 **[APP Tab 3/page 7 at page 21]** the court below observed as follows

> *"It is not a necessary inference from Section 9 of the GRA that a person's sexual orientation changes on acquiring a GRC. There is no such thing as being 'legally lesbian', and we have not identified a problem which would require that sex be referable to biology alone."*

104. Sexual orientation is defined in s.12(1) EA 2010 by reference to the sex of the persons to whom one is sexually attracted. In order to ascertain a person's sexual orientation it is therefore necessary to know what sex that person is, and the sex of the persons to whom they are sexually attracted: qv ***Macdonald v. Advocate General for Scotland*** [2003] UKHL 34, 2003 SC (HL) 35. In ***Innospec Ltd. v. Walker*** [2017] UKSC 47 [2017] ICR 1077 this court found to be incompatible with EU law and ordered the disapplication of provisions in para. 18 Sch. EA 9 2010 which had been brought into force to carve out from the prohibition against sexual orientation discrimination certain differential treatment between same sex unions and opposite sex marriages in relation to the benefits available under reference to marital status.

105. The substitution by the court below of "certificated sex" for "sex" in fact, and its accompanying denial of the legal recognition of the sexual orientation of a woman attracted to other women because of that other's *sex in fact*, comes perilously close to denying the validity of same sex attraction, and *does* undermine the hard-won rights of gay people.

106. For example, take the case of a man attracted to women. He is attracted to persons of the opposite sex. But, on the analysis of the court below, if and when such a man obtains a GRC with the certificated sex of a woman, he *becomes* a woman for the purposes of the EA 2010. Accordingly, his continued post-GRC sexual attraction to women means that he is now, according to the interpretation favoured by the court below, attracted to persons of the *same* "sex" and he would have, and share, the protected characteristic of being a lesbian. Accordingly, the EHRC letter of 3 April 2023 (which the court below confessed to having difficulty following) is entirely correct when it states that **[APP Tab 17/page 247 at page 250]**: *"a lesbian support group (for instance) may have to admit a trans woman with a GRC attracted to women without a GRC or to trans women who had obtained a GRC. On the biological definition it could restrict membership to biological women."*

107. The fact that the court below appeared unable or unwilling to follow through the perfectly sound reasoning of the EHRC and/or the logic of the court's own position on this matter indicates yet another misdirection in law such as to vitiate its conclusion that acquisition of a GRC under the GRA 2004 entails a sex change for the purposes of the EA 2010.

Conclusion

108. In upholding this appeal, this court will be ensuring that Parliament's intention - of providing in the EA 2010 specific rights and protections to *women/females of any age*, regardless of whether or not they have the protected characteristic of gender reassignment and regardless of whether or not they have obtained a gender recognition certificate under the GRA 2004 – is indeed realised. Thus, for example, the right of Freddy McConnell and others in a like position, to pregnancy and maternity protections in respect of the children borne by them remains ***assured*** in and by the wording of the EA 2010 as it is, as passed by Parliament. The rights and protections afforded under the EA 2010 to all *women/females of any age* (regardless of whether they also claim gender reassignment and/or have obtained a GRC) will thereby be ***fully*** guaranteed. And the possession of a GRC by any party will ***not*** involve any compromising or removal of the various rights and protections which Parliament in passing the EA 2010 in the terms that it intended be available to and for women/females of any age. This is to be contrasted with the Scottish Ministers' and EHRC's reading which would instead involve ***compromising*** women's EA 2010 rights both: by giving ***males*** with a GRC in the female gender the right to claim EA 2010 ***women's*** rights; and in ***denying*** access to these EA 2010 women's rights to females with a GRC in the male gender.

109. It should also be borne in mind that, under the appellant's reading of the EA 2010, all those with the protected characteristic of gender reassignment, regardless of whether they have a GRC, will be able ***both*** to claim the protections against discrimination afforded under the EA 2010 to the protected characteristic of "gender reassignment" ***and*** also the protections afforded to individuals against ***sex*** discrimination, always under reference to what sex they are in *fact*. And individuals holding a GRC also retain the protections afforded against discrimination by stereotyping and/or by perception. If a man with a GRC is treated by a discriminator as if a woman (regardless of whether or not actually thought or believed by the discriminator to be a woman) the EA 2010 allows for that individual to raise a sex discrimination and/or sexual harassment claim qua *perceived* or *treated as* a woman by the discriminator: ***Chief Constable of Norfolk Constabulary v. Coffey*** [2019] EWCA Civ 1061 [2020] ICR 145 per Underhill LJ at § 11 and ***English v. Thomas Sanderson Ltd.*** [2008] EWCA Civ 1421 [2009] ICR 543.

110. The assertion by the court below that, aside from the pregnancy and maternity protection provisions, the definition of "women" and the protected characteristic of "sex" in the EA 2010 (or per the EHRC intervention always and only) refers to "certificated sex" renders the provisions of the EA 2010, particularly those concerned with the protection of women, unworkable in practice. This could never have been Parliament's intention for the EA 2010.

Parliament clearly intended in its enactment of subsection 9(3) GRA 2004 that subsection 9(1) GRA 2004 should *not* be read as embodying an exceptionless and universal principle applicable to all past and future statutory provisions. The decision of the court below, and the submissions of the respondents and the intervention by the EHRC all proceed on the assumption or bald assertion that there is nothing in the EA 2010 – whether it provisions, its structure, its overall policy and consideration of its practical efficacy – which is sufficient to engage generally s.9(3) GRA 2004. But neither the court below in its decision, nor the respondents in their submissions, nor the EHRC in its intervention before this court, provide any rationale or justification for their claim that the "inescapable effect" of s. 9(1) GRA is to require the reading in of "certificated sex" into the EA 2010 use of the protected category of "sex".

111. By contrast the appellant's reading that, throughout the EA 2010, all references to and uses of the terms "men", "women", "male", "female" and to "sex" are referents to, and only to, biological categories. This interpretation has the following virtues, corresponding with the fundamental canons of statutory construction:

(i) it is (unlike the approach of the court below) a *consistent* reading which applies throughout the EA 2010;

(ii) it is a reading which complies with the "general definition" provisions of s.212(1) EA 2010;

(iii) it is a reading which allows for a common sense understanding and application of, among other EA 2010 provisions of general application: s.11 "sex", s.12 EA "sexual orientation", subsection 13(6) re "direct discrimination if the protected characteristic is sex", and the pregnancy and maternity discrimination protections afforded to women as set out in ss.17 and 18;

(iv) this compliance with "ordinary language usage" is of particular importance in a statute such as the EA 2010: (a) which imposes obligations on both public bodies and on private individuals; (b) whose provisions cover activities which fall within the sphere of private law just as much as public law; and (c) which is intended to be administered and complied with day to day in relation to everyday actions by non-lawyers;

(v) it allows for the ready and lawful administration in practice, as Parliament had intended, of many of the EA 2010's provisions, in particular relating to: pregnancy and maternity protection; positive action measures for women; genuine occupational requirements for women; equal pay for women; the provision of single sex and separate sex services and accommodation (including in schools, hospitals and prisons); the provision of sex-

segregated communal accommodation; freedom of association for women and men; freedom of association for lesbians and gay men; and fair participation and competition for women in sport.

112. This leaves the GRA 2004, then, also to operate just as Parliament had intended in an "always speaking" manner: by giving those with the protected characteristic of gender reassignment (who are protected by the EA 2010 under reference to that protected characteristic) the ***option*** of seeking the ***additionality*** of formal State recognition in the State's own records of their gender reassignment, by allowing their birth certificates to be altered so as to record, and their marriage/civil partnership and/or death certificates to reflect, their "acquired gender" under the GRA 2004. Given that same sex marriage is now permitted, and pension ages have been equalised - this recognition retains a largely symbolic value. But much has changed (legislatively and socially) since 2004; and, in any event, symbols themselves have enduring value. As the campaign group, the Equality Network, submitted in another process: "*There are … very few occasions in which having a GRC has a practical effect. That does not detract from what it means to a trans person to have a GRC; … but in the day-to-day life of a trans person, the concept of 'legal sex' is unimportant. The circumstances in which a person - whether trans or not - has to prove what sex they are, are very rare.*"[61]

113. For the reasons summarised above, the appellant submits that the appeal should be allowed on the bases that:

(1) the meaning of the terms "sex", "man" and "woman" in and throughout the EA 2010 is always and only a reference to the *facts* of immutable *biological* criteria;

(2) the issuing to an individual of a full Gender Recognition Certificate under the GRA 2004 in the acquired gender of "female" does *not* result in that individual thereby falling *within* the definition of "woman" under the EA 2010;

(3) the issuing to an individual of a full GRC under the GRA 2004 in the acquired gender of "male" does *not* result in that individual thereby falling *outside* the definition of "woman" under the EA 2010;

(4) on a proper interpretation of both the EA 2010 and GRA 2004, the revised statutory guidance issued by the Scottish Ministers under s.7 2018 ASP is unlawful, having regard to the limits imposed on the Scottish Ministers' powers, notably their devolved competence under s.54 SA 1998.

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[61] ***Scottish Ministers v. Advocate General for Scotland*** [2023] CSOH 89, 2024 SC 173 at § 63.

ACCORDING TO JUSTICE, ETC.

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