UNTO THE RIGHT HONOURABLE THE LORDS OF COUNCIL AND SESSION

PETITION

of

SEX MATTERS, a charitable incorporated organisation (charity number 1207701) with its registered office at 63/66 Hatton Garden, Fifth Floor Suite 23, London, EC1N 8LE

PETITIONER

for

Judicial review of the failure by the Scottish Ministers

to restore and protect the provision of single sex toilet facilities

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HUMBLY SHEWETH:—

Parties

1. That the petitioner is as designed in the instance. The petitioner's aim, as a human rights charity, is to promote clarity about "sex" in law, policy and language in order to protect everyone's human rights. Core to the petitioner's work is encouraging understanding, compliance with and enforcement of the Equality Act's protections against discrimination, harassment and victimisation in relation to sex, gender reassignment

and religion or belief (as well as other relevant protected characteristics including sexual orientation and disability) and other relevant laws. The petitioner campaigns for clarity in law and the protection of human rights. The petitioner was an intervener in the recent appeal by For Women Scotland against the Scottish Ministers and was described by the UK Supreme Court as having given focus and structure to the argument that "sex", "man" and "woman" should be given a biological meaning. Since the decision of the UK Supreme Court was issued, the petitioner has engaged with the Scottish Ministers about the implementation of that decision as quickly as possible. As set out below, the petitioner has met with and corresponded with the Scottish Ministers on the matter, leading to the letter sent by the Scottish Ministers to the petitioner dated 11 July 2025 which crystallised the Scottish Ministers' position as intending to continue to act unlawfully. Given its campaigning role in society and its direct engagement with the Scottish Ministers on the matters giving rise to this petition, the petitioner has sufficient interest in the matters raised herein, and has standing in relation to this petition.

2. The respondents, the Scottish Ministers, are as designed in Part 1 of the Schedule for Service. The persons specified in Part 2 of the Schedule for Service may have an interest in the matters raised in this petition.

The Decision

3. That the date on which the grounds giving rise to the petition first arose was 11 July 2025. On that date, the respondents confirmed their position in relation to their Trans and Non Binary Equality and Inclusion Policy (the "Policy"). In particular, the respondents confirmed that they did not agree with the petitioner's request that the Policy be withdrawn or amended in light of the UK Supreme Court's decision in *For Women Scotland v Scottish Ministers* 2025 SLT 443 ("For Women Scotland"). Instead, the respondents confirmed that they would take no immediate steps to either withdraw or amend the Policy (the "Decision"). The Decision is, for the reasons set out below, unlawful and not a position the respondents are entitled to adopt. *Esto* the grounds giving rise to the petition first arose prior to 11 July 2025 (which is not admitted), the Policy remains in place and the position adopted by the respondents remains unlawful

to the detriment of those who are entitled to access and use single sex spaces without suffering harassment. There is, therefore, a continuing unlawfulness. That is a matter bearing substantial weight in the exercise of assessing whether or not to grant an extension of time: *Wightman v Advocate General for Scotland* 2018 SC 388 at §33; *Avaaz Foundation v Scottish Ministers* 2021 SLT 1063 at §23. It would, accordingly, be equitable, having regard to all the circumstances, for the time limit under section 27A of the Court of Session Act 1988 to be extended in order for these proceedings to proceed. If such an extension is necessary, the petitioner seeks it in terms of Rule of Court 58.3(5).

Remedies

4. That the petitioner seeks the following remedies:

    a. Declarator that the Scottish Ministers are acting irrationally and, therefore, unlawfully by failing to withdraw or amend paragraph 4.6 of the Trans and Non Binary Equality and Inclusion Policy because the terms of that policy authorise or approve of unlawful conduct by those to whom it is directed.

    b. Reduction of paragraph 4.6 of the respondents' Trans and Non Binary Equality and Inclusion Policy.

    c. Declarator that, in a workplace, where toilet and washing facilities are provided to men and to women, this must be on the basis of biological sex and in compliance with Regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992.

    d. An order *ad factum praestandum* requiring the Scottish Ministers to take immediate action to provide, in every workplace for which the Scottish Ministers are responsible, toilet facilities in compliance with Regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992.

e. Such further orders (including an order for expenses) as may seem to the court to be just and reasonable in all the circumstances of the case.

5. That the petitioner challenges the Decision on the grounds set out below.

Factual Background

6. On 16 April 2025, the UK Supreme Court issued its decision in For Women Scotland. The effect of that decision was, among other things, to clarify that "sex", "woman" and "man" in sections 11 and 212(1) of the Equality Act 2010 mean (and always meant) biological sex, biological woman and biological man respectively (§264). This is an important clarification and requires the protected characteristics of (i) sex and (ii) gender reassignment not to be conflated in a manner which removes the protections they were enacted to provide.

7. Shortly after the For Women Scotland decision was handed down by the UK Supreme Court, the petitioner attended an online stakeholder meeting with Catherine McMeekan, Deputy Director for Equalities for the Scottish Government. That meeting took place on 5 June 2025. At that meeting, the petitioner became concerned at the respondents' proposed delays with the implementation of the law as clarified by the UK Supreme Court. In particular, in relation to single sex spaces, Ms McMeeken appeared to suggest that the CEO of the EHRC, John Kirkpatrick, had provided advice that the Scottish Government was not required to take any steps to rectify its practices, procedures and guidelines and to bring them in line with the Supreme Court's decision until the EHRC's statutory guidance had been updated. If that advice was given to the respondents in those terms, it is clearly incorrect as a matter of law. The effect of the UK Supreme Court's decision – and therefore the lawfulness of the respondents' actions – was not suspended in any way pending the updated guidance from the EHRC. It is the law now. The respondents have no power knowingly to act unlawfully, however temporarily.

8. On 17 June 2025, the petitioner wrote to the respondents in order to set out in writing its concerns in relation to access to single sex spaces. A copy of the letter of 17 June 2025 is produced, adopted and held to be herein incorporated for the sake of brevity. In that letter, the petitioner requested confirmation from the respondents in relation to three matters:

    a. that the respondents accept that single-sex toilets and changing facilities must be provided on a biological sex basis, noting that the respondents are free also to provide "unisex" (ie mixed-sex) facilities *in addition* to the single sex facilities;

    b. that the respondents would issue a statement to the effect that its published guidance documents which make reference to single -sex spaces and the access of transgender people to those spaces are to be suspended with immediate effect and replaced with updated and lawful guidance at the earliest possible opportunity; and

    c. that the respondents would issue a statement to the effect that all Scottish public bodies and service providers are required to take immediate action to provide single-sex facilities on the basis of biological sex, and that it will not be acceptable to continue unlawful practices whilst updated statutory guidance from the EHRC is awaited.

9. The respondents failed to provide the confirmation requested by the petitioner in the letter of 17 June 2025. Instead, by reply dated 27 June 2025, John Somers, the respondents' Director of Equality, Inclusion and Human Rights noted that the respondents were taking action to establish a short life working group which would review existing policies. A copy of the letter of 27 June 2025 is produced, adopted and held to be herein incorporated for the sake of brevity. The respondents noted that the work of the short life working group was "*enabling [them] towards a state of readiness to take all necessary steps to implement the ruling [of the UK Supreme Court]*." Whilst it was noted in the letter of 27 June 2025 that the respondents were seemingly

encouraging other public bodies to satisfy themselves that they were compliant with the law, there was no indication that the respondents were doing so themselves.

10. Not having been satisfied with the respondents' letter of 27 June 2025, the petitioner wrote again to the respondents on 2 July 2025. A copy of the letter of 2 July 2025 is produced, adopted and held to be herein incorporated for the sake of brevity. That letter set out in detail the facts relating to the number of toilets in the respondents' buildings, and the nature of those toilets insofar as can be ascertained from information recovered under the Freedom of Information legislation. The petitioner indicated, in light of those facts, that the respondents appeared to have no problem with a lack of infrastructure. Instead, the petitioner indicated that the unlawfulness arises because the respondents continue to operate the Policy. The Policy provides as follows at paragraph 4.6:

*"**4.6 Use of Scottish Government facilities***

Trans staff should choose to use the facilities they feel most comfortable with, including using accessible toilets if they prefer. The following venues have gender neutral toilets at the time of publication;

- *VQ – 45. Gender neutral toilets on the ground and first floors opposite the lifts.*

- *AQ5 - 24 Gender neutral toilets on the ground and first floors opposite the lifts.*

- *Marine Lab – 17"*

11. In light of that, the petitioner requested that the respondents issue a statement to the effect that "*all facilities designated as male or female within the Scottish Government estate are to be interpreted as meaning biological sex, and that gender-neutral options are widely available*". The petitioners requested that such a statement be issued within 7 days of the letter of 2 July 2025.

12. In response to that letter, Dr Nicola Richards, the respondents' Director of People, wrote to the petitioner on 11 July 2025. A copy of the letter of 11 July 2025 is produced, adopted and held to be herein incorporated for the sake of brevity. Insofar as relevant to these proceedings, the letter of 11 July 2025 provides as follows:

"The Trans and Non Binary Equality and Inclusion policy is an internal employment policy for civil servants and other staff. I can confirm that, in light of the ruling in For Women Scotland Ltd V The Scottish Ministers, this policy is one of the many areas under active review, with work ongoing to identify and prepare to implement any changes required. This work includes regular engagement between relevant corporate teams and preparation for a revised Equality Impact Assessment (EQIA). Changes will be consulted on in line with normal practice and concluded when the Scottish Government receives clarification from the EHRC on the issues raised in response to the recent consultation. These relate directly to those raised in your letter. As you may be aware, these issues are also, in part, the subject of a legal challenge by the Good Law Project in England and Wales concerning, amongst other matters, the interpretation of the Workplace (Health, Safety and Welfare) Regulations 1992.

Given these complexities, the Scottish Government does not agree that it is appropriate or straightforward to take immediate steps to either withdraw or amend the current policy. It is my understanding that the approach of the Scottish Government in this regard, of reviewing policies and, where appropriate, seeking guidance from the EHRC, is consistent with the position of the UK and Welsh Governments.

Appropriate changes will be made to the policy referred to in your letter, and others impacted by the ruling, as soon as the Scottish Government has further clarity. This will follow any required and appropriate consultation and engagement."

13. As the letter of 11 July 2025 makes clear, the respondents refuse to take any immediate action to bring the existing lawfulness to an end. The respondents therefore propose to continue to act unlawfully until at least (i) the EHRC publishes its guidance, (ii) the respondents have consulted "in line with normal practice", and (iii) any required further

"engagement" (whatever that is taken to mean). Such a delay in rectifying a current unlawfulness is unconscionable.

14. On 30 July Sex Matters met with Nichola Richards and colleagues online. The petitioner expressed their concerns. The petitioner requested that the Scottish Government comply with the law. The Scottish Government representatives said (as they provided in notes of the meeting afterwards):

"On current practice, SG stated that a range of facilities are provided (male, female, accessible, and gender-neutral), and that these arrangements are being reviewed."

"The Trans and Non-binary Equality and Inclusion Policy remains under review, and staff are advised that any changes will follow legal guidance and consultation. Concerns are handled on a case-by-case basis."

The respondents maintained that "*current provision complies with workplace regulations*".

Legal Argument

15. The respondents are required to act within the law. The respondents are not permitted by law – and have no power – to choose to continue to act unlawfully pending the issuing of guidance that on no basis can make the acts complained of lawful. The Decision nonetheless indicates that the clear intention of the respondents is to continue to act unlawfully for the foreseeable future. The Decision, as narrated above, is irrational and therefore unlawful.

16. For the purposes of the Equality Act 2010, the respondents are both (i) a service provider, and (ii) an employer. Section 29 of the 2010 Act makes it unlawful for a service provider to harass those to whom their service is provided. Section 40 of the 2010 Act makes it unlawful for an employer to harass an employee. In accordance with section 26 the 2010 Act, harassment is made out where *inter alia* a person engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose

or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. The entry by a man into a toilet or changing room which has been designated for the use of women is, for the women, unwanted conduct relevant to a protected characteristic (sex) and it has, at least, the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for those women. It is therefore unlawful.

17. As set out above, that "men" and "women" means biological men and women respectively: *For Women Scotland* at §264. Similarly, sex for these purposes is binary in nature – one is either a man or a woman: *For Women Scotland* at §171. The effect of the Policy is to authorise or approve trans-identifying men (ie biological men) to "choose" to use the toilets and changing rooms assigned for the use of women. Furthermore, as the definition of "trans" in the Policy makes clear, the Policy also authorises or approves of "non-binary people" to "choose to use the facilities they feel most comfortable with". As such, the effect of the Policy is to authorise or approve of harassment of service users and employees. As noted above, that is unlawful as a result of (at least) sections 29 and 40 of the 2010 Act. The Policy is, therefore, unlawful: *R (A) v Home Secretary* [2021] 1 WLR 3931.

18. Separately, the respondents are required, as an employer, to provide sufficient toilet facilities for male and female employees. These are to be provided as separate facilities on the basis of biological sex. The only permitted exception is where each toilet is contained in a separate room (not a cubicle). Such fully enclosed facilities are sometimes known as "superloos". The toilets in the respondents' buildings that are superloos comprise approximately 18% of the total number. Most of the toilets, as would be expected, are provided as separate sex facilities. However, the option of using a unisex "superloo" is widely available. Regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992 provides as follows (emphasis added):

"(1) Suitable and sufficient sanitary conveniences shall be provided at readily accessible places.

(2) Without prejudice to the generality of paragraph (1), sanitary conveniences shall not be suitable unless—

(a) the rooms containing them are adequately ventilated and lit;

(b) they and the rooms containing them are kept in a clean and orderly condition; and

(c) separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside.

(3) It shall be sufficient compliance with the requirement in paragraph (1) to provide sufficient sanitary conveniences in a workplace which is not a new workplace, a modification, an extension or a conversion and which, immediately before this regulation came into force in respect of it, was subject to the provisions of the Factories Act 1961, if sanitary conveniences are provided in accordance with the provisions of Part II of Schedule 1."

Part II of Schedule 1 of the 1992 Regulations, read short, provides that (i) toilets should be provided for the exclusive use of women at the rate of 1 toilet per 25 female employees, and (ii) toilets should be provided for the exclusive use of men at the rate of 1 toilet per 25 male employees.

19. The respondent's Policy as regards the use of toilet facilities means that the respondents' provision of toilet facilities is not compliant with Regulation 20 of the 1992 Regulation. The respondents' current provision of toilets for its employees is, as a result, not compliant with the law.

20. Whatever the EHRC guidance may or may not eventually say, it cannot make the unlawful lawful. Therefore, it cannot as a matter of law make §4.6 of the Policy lawful. The respondents are not entitled to continue to act unlawfully pending the issuing of that guidance. The Decision is one that no reasonable executive would make if acting reasonably. The Decision is irrational. The Decision is unlawful. The respondents refuse

to accept that they are currently acting unlawfully. The declarators sought ought therefore to be pronounced. Additionally, paragraph 4.6 of the Policy is unlawful. The respondents refuse to suspend or amend the Policy. The order for reduction of paragraph 4.6 of the Policy is therefore necessary and should be pronounced as sought.

21. Separately, the respondents are required to cease their unlawfulness immediately. The respondents have made it clear by way of the Decision that they intend to continue to act unlawfully. The respondents are required to provide single-sex toilet facilities on the basis of biological sex as set out above, including providing instructions to employees. Their failure to do so constitutes ongoing unlawful action. The respondents should be ordered to take the necessary actions to make their actions lawful. The order *ad factum praestandum* sought by the petitioner should be pronounced.

PERMISSION TO PROCEED

22. The petitioner satisfies section 27B(2) (requirement for permission) of the Court of Session Act 1988. As set out above, the correspondence leading to the Decision was between the petitioner and the respondents. The letter containing the Decision, being addressed to the petitioner, clearly provides the petitioner with sufficient interest to challenge its lawfulness. The grounds of review set out in detail above are more than sufficient to pass the low threshold required for permission to proceed to a substantive hearing: cf *Wightman v Advocate General* 2018 SC 388 at §9. The petitioners' arguments have a real prospect of success. In any event, where there is any uncertainty in the judicial mind as to whether the low threshold required for permission has been achieved, the benefit of the doubt is to be given to the petitioner and permission should be granted: *MIAB v Secretary of State for the Home Department* 2016 SC 871 at §66. Permission to proceed should be granted.

23. If the Court is of the view that an extension of time is required in relation to this petition for the purposes of section 27A of the 1988 Act (which is not admitted), the Court should allow this petition to proceed for the reasons set out in statement 3 above.

24. That the following documents are necessary for the determination of permission:

a. Letter from the petitioner to the respondents dated 17 June 2025.

b. Letter from the respondents to the petitioner dated 27 June 2025.

c. Letter from the petitioner to the respondents dated 2 July 2025.

d. Letter from the respondents to the petitioner dated 11 July 2025.

e. Meeting notes (of meeting on 30 July) provided by the respondent to the petitioner on 4 August 2025

f. The respondents' policy "Scottish Government Trans and Non Binary Equality and Inclusion Policy".

g. Freedom of information request letter from the respondents to Lucy Blackburn dated 14 April 2025.

TRANSFERS TO THE UPPER TRIBUNAL

25. That the petition is not subject to a mandatory or discretionary transfer to the Upper Tribunal.

PLEAS IN LAW

1. The respondents' failure to withdraw or amend paragraph 4.6 of the Trans and Non Binary Equality and Inclusion Policy being irrational and, therefore, unlawful, declarator to that effect should be pronounced.

2. Paragraph 4.6 of the Trans and Non Binary Equality and Inclusion Policy being unlawful, it should be reduced.

3. There being a dispute about what is required in terms of Regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992, the declarator sought thereanent is necessary and should be pronounced.

4. The respondents having refused to take immediate action to rectify their unlawful actions *et separatim* the respondents having no power to continue to act unlawfully, the respondents should be ordered to take such immediate action.

According to Justice etc.

David Welsh

SCHEDULE FOR SERVICE

PART 1: RESPONDENT(S)

1. The Scottish Ministers, Victoria Quay, Edinburgh EH6 6QQ

PART 2: INTERESTED PERSON(S)

1. The Equality and Human Rights Commission, Arndale House, The Arndale Centre, Manchester M4 3AQ

SCHEDULE OF DOCUMENTS

1. Letter from the petitioner to the respondents dated 17 June 2025.
2. Letter from the respondents to the petitioner dated 27 June 2025.
3. Letter from the petitioner to the respondents dated 2 July 2025.
4. Letter from the respondents to the petitioner dated 11 July 2025.
5. Meeting notes (of meeting on 30 July) provided by the respondent to the petitioner on 4 August 2025.
6. The respondents' policy "Scottish Government Trans and Non Binary Equality and Inclusion Policy".
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AGENTS FOR THE PETITIONERS