

Edinburgh 22 March 2022

Lord Justice Clerk  
Lord Malcolm  
Lord Pentland

Act: O'Neill QC

Alt: Crawford QC and Irvine

The Lords, having heard counsel By Order on the single bills;

1. find and declare that the definition of "woman" in section 2 of the Gender Representation on Public Boards (Scotland) Act 2018, is outside the legislative competence of the Scottish Parliament in that it relates to reserved matters and is accordingly not law in terms of section 29(1) and (2)(b) of the Scotland Act 1998;
2. grant decree of reduction of the definition of woman included in section 2 of the 2018 Act;
3. grant decree of reduction of paragraphs 2.12 to 2.15 inclusive (together with the supporting footnotes of these paragraphs) in the Scottish Ministers' final version of their statutory guidance published on 2 June 2020 and produced under and in terms of section 7 of the 2018 Act;
4. make an order, in terms of section 102 of the Scotland Act 1998, removing any retrospective effect of this decision and suspending the effect of the decision for a period of 4 weeks from this date;
5. find the respondent liable to the petitioner and reclaimer in the expenses of process in both the Outer House and Inner House, remit an account thereof, when lodged, to the Auditor of Court to tax.

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The Lords, decern against the respondent for payment to the petitioner and reclaimer of the expenses referred to the foregoing interlocutor as taxed by the Auditor of Court.

#### Note

In a decision dated 18 February 2022 the court allowed a reclaiming motion challenging the definition of “woman” adopted for the purposes of the Gender Representation on Public Bodies (Scotland) Act 2018. The court considered (para 40) that

“..the definition of “woman” adopted in the Act impinges on the nature of protected characteristics which is a reserved matter. Changing the definitions of protected characteristics, even for the purpose of achieving the GRO (gender recognition objective), is not permitted and in this respect the 2018 Act is outwith legislative competence.”

The case was allocated to be heard by order for discussion of the appropriate orders which should follow. Parties were agreed that the court should pronounce declarator that the definition (contained in section 2 of the Act) was “not law” by virtue of section 29(1) and (2)(b) of the Scotland Act 1998; and reduction of paragraphs 2.12 to 2.15 of the statutory guidance produced under section 7 of the 2018 Act and published on 2 June 2020. The respondent’s submissions were neutral on the issue of reduction of the relevant part of section 2. Given the fact that the legislation will not be amended for some time and that the motion is essentially unopposed we will also grant the orders for reduction.

The court will therefore pronounce a declarator in the following terms:

“The definition of “woman” in Section 2 of the Gender Representation on Public Boards (Scotland) Act 2018, is outside the legislative competence of the Scottish Parliament in that it relates to reserved matters and is accordingly not law in terms of section 29(1) and (2)(b) of the Scotland Act 1998.”

The court will pronounce an order for reduction of the definition of woman included in section 2 of the 2018 Act, and an order for the reduction of the relevant parts of the guidance.

The reclaimer submitted that in addition the court should pronounce:

(i) declarator that 'woman' in the 2018 Act is defined in the same way as in section 212(1) of the Equality Act 2010; and

(ii) an order substituting a definition in section 2 of the 2018 Act that "'woman' means a female of any age".

The court does not consider it necessary to make these orders. The court's opinion made it clear that a definition which impinged upon the nature of protected characteristics as identified under the Equality Act 2010 is not within the legislative competence of the Scottish Parliament. That position is quite clear and we are satisfied that these supplementary orders are not necessary.

The respondent submitted that the court should make an order:

(i) under section 102(2)(a) of the Scotland Act removing the retrospective effect of its decision; and

(ii) under section 102(2)(b) of the Scotland Act suspending the effect of its decision for a period of four weeks.

The four week suspension sought by the respondent was specifically for the purpose of preparing and publishing revised statutory guidance. The period sought is a fairly short one, selected to minimise any adverse effect relative to any appointment process which may be ongoing. The guidance may be amended swiftly but the real issue relates to the difficulties inherent in disseminating the guidance to all those involved. Subject to the undertaking which counsel offered, that no appointments would be made, at least in respect of any regulated boards during that period, and that best efforts would be made to prevent such appointments in the case of unregulated boards, we are satisfied that the order for suspension should be made.

We are also satisfied for the reasons advanced by the respondent that an order removing the retrospective effect of the court's decision should be made. Counsel for the respondent explained that it is not possible to identify definitively any appointments made on the basis of the impugned definition or on the basis of the gender representation objective having been met when it may not have been met, but on any view at most this would be a very small number. We recognise that if our decision had retrospective effect it could create uncertainty not only in respect of past appointments but also for past decisions made by boards. In these circumstances it seems to us to be appropriate, for the sake of clarity and in the interests of orderly public administration, to remove retrospective effect of the court's decision.

The reclaimer sought expenses, which motion was opposed on the basis that there had been divided success.

On the matter of expenses, it is true that there were certain aspects of the reclaimer's case which did not succeed. These were however points which were largely advanced in support of the primary argument that the definition of woman was

outside legislative competence. The reclaimer was entirely successful on that primary argument. We also recall that it was only on the morning of the hearing that the respondent intimated that the cross appeal was not insisted in. Overall, therefore we are satisfied that the reclaimer has enjoyed substantial success to the extent that a full award of expenses should be made.

### **Undertaking**

The respondent undertook that no appointments would be made, at least in respect of any regulated boards during the 4 week period of suspension of the orders granted, and that best efforts would be made to prevent such appointments in the case of unregulated boards.