IN THE COURT OF SESSION

NOTE OF ARGUMENT FOR THE PETITIONER AND RECLAIMER

in the

RECLAIMING MOTION

IN THE P E T I T I O N

of

FOR WOMEN SCOTLAND LIMITED, a company incorporated under the Companies Act and registered in Scotland with Company number SC669393 and with registered offices at 135 Greengairs Road, Greengairs, Airdrie, ML6 7SY.

PETITIONER AND RECLAIMER

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

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1. INTRODUCTION

1.1 The petitioner and reclaimer moves this court to allow the reclaiming motion by: quashing the decision of the Lord Ordinary; repelling the first and second pleas in law for each of the Scottish Ministers and the Equality and Human Rights Commission (EHRC); upholding the first and second pleas in law for the petitioner and reclaimers; and pronouncing pronounce the orders for declarator and reduction sought in Statement 6 of the petition.

1.2 Although the EHRC lodged answers to the petition and were represented before the court below, it appears that the EHRC has decided to take no further part in these proceedings. The EHRC does *not* renew before this court the submissions made by it before the Lord Ordinary and/or otherwise to defend the lawfulness of the decision of the court below [2022] CSOH 90, 2023 SC 61. The EHRC's public position on these matters seems to have shifted since the hearing before the Lord Ordinary: see the letter from the EHRC dated 3 April 2023 responding to the 21 February 2023 letter from the Minister for Women and Equalities

2. GROUND OF APPEAL 1: FAILURE TO FOLLOW BINDING CSIH AUTHORITY

2.1 The first ground of appeal is that the Lord Ordinary misunderstood and failed to apply the relevant law as set out in the binding decisions of this court, namely *For Women Scotland v. Scottish Ministers* [2022] CSIH 4, 2022 SC 150 ("*FWS 1*") and *Fair Play for Women Ltd v Registrar General for Scotland* [2022] CSIH 7, 2022 SC 199. These cases, when read together, have established that:

(i) there is no universal legal definition of the word "sex" which applies by necessity or by default in all statutes and, instead, following ordinary language usage, the meaning of the word "sex" may vary depending on how the word is defined and/or used in the particular statute; but

(ii) there are some statutory contexts in which a definition of sex based on, and only on, a reference to biology *must* be adopted. In particular a definition which uses the word "sex" in terms of being purely a reference to an individual's biology (as being either male or female, woman or man) may require to be applied in matters in statutory contexts concerning individuals' status, or their rights or, importantly, the rights of others of that same biological class. And where it is necessary for the proper understanding and operation of a statute to construe "sex" as requiring a biological referent, this will require the exclusion from its ambit those who claim a particular "certified sex" (by virtue of their having obtained a gender recognition certificate ("GRC") under the Gender Recognition Act 2004 ("GRA 2004") unsupported by or contrary to their biology.

2.2 The Scottish Ministers' Answers to the Grounds of Appeal makes no reference to this court's decision and reasoning in *Fair Play for Women Ltd* and say, only, that the *ratio* of this court's decision in *FWS 1* is *confined* to §§ 39-40 of this court's opinion. The Scottish Ministers then (mis)characterise and (wrongly) dismiss as non-binding (and apparently, in the view of both the Lord Ordinary and Scottish Ministers, wholly unpersuasive) *obiter dicta* the statement by this court at § 36 in *FWS 1* that

> "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."

2.3 The position of the Scottish Ministers appears to be that this statement by this court in *FWS 1* - and presumably also the context-specific approach adopted in *Fair Play for Women Ltd.* - were each adopted by this court *per incuriam*, on the basis that in neither decision did this court expressly advert to or take into account the provisions of subsections 9(1) and 9(2) GRA 2004. The Scottish Ministers say that these 2004 statutory provisions condition and modify the definition of the word, and protected category of, "sex" as used in Equality Act 2010 ("EA 2010"). The effect of these 2004 provisions is to *untether* the protected category of "sex" (and sex related terms used in the EA 2010 such as: woman, female, man or male) from requiring *any* biological referent. Instead, say the Scottish Ministers, the common law and common sense/ordinary language approach – which is that sex (and sex related terms such as such as woman, female, girl, man, male or boy) fall to be determined under reference to an individual's *biology*: qv *Bellinger v Bellinger* [2003] 2 AC 467 - has been *overturned* by Section 9 GRA 2004. [1] Section 9 GRA 2004, on the Scottish Ministers' reading, therefore provides a *new* universal legal definition of the word "sex" which applies by necessity or by default in all statutes: following the enactment of Section 9 GRA 2004 *all* references to sex and sex related terms in statute or regulation – whether pre-dating or post-dating the enactment of the GRA 2004 – are to be read and applied as referring to an individual's *certificated sex*. That is to say, that one's "sex" is defined and determined - not least for the purposes of the EA 2010 - by whatever box has been duly administratively ticked in an individual's birth certificate, whether as originally

[1] The Scottish criminal law relies upon the biological concept of sex. In *HM Advocate v Wilson* unreported 6 March 2013 (HCJ) a biological female who entered into sexual relations with two girls on the basis of 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. The idea that a party's acquisition of a Gender Recognition Certificate transforms a non-consensual homosexual encounter or relationship, into a consensual heterosexual one (or *vice versa*) is simply a pernicious absurdity. Separately, any such claim also has the potential to undermine the EA 2010 protections against discrimination because of the protected characteristic of "sexual orientation" by effectively depriving the very concept– defined in Section 12 EA 2010 by reference to sexual orientation towards other persons on the basis of "sex" - of any meaning in the face of a GRC.

issued at the time of birth, or as subsequently modified (even if contrary to that individual's biology) by virtue of an individual having obtained a full gender recognition certificate ("GRC") under the GRA 2004. But the Scottish Ministers' own position on the meaning and effect of Section 9 GRA 2004 is simply wrong; in that it fails to advert to Section 9(3) GRA which provides - wholly consistently with this court's approach context specific in *FWS1* and *Fair Play for Women Ltd*. to the word "sex" - that subsection 9(1) is subject to provision made by the GRA 2004 itself or any other enactment (such as the EA 2010) or any subordinate legislation. These decisions were <u>not</u> made *per incuriam;* and the finding in *FWS 1* - that provisions in favour of women in the context of the EA 2010, exclude those who are biologically male - bound the Lord Ordinary.

3. GROUND OF APPEAL 2 – THE PROPER INTERPRETATION OF THE EA 2010

3.1 The Scottish Ministers' answer to this ground of appeal reveals some common ground between the parties in this reclaiming motion, in that it appears all are agreed that,

(1) everyone has the EA 2010 defined protected characteristic of "sex"
(2) the EA 2010 protected characteristic of "sex" will be either male or female (as the EA 2010 defines sex as a binary);
(3) in the EA 2010 "sex" is a "protected characteristic" which is distinct from "gender reassignment";
(4) the EA 2010 affords distinct protections to "sex" different from that which it affords to "gender reassignment", even if attested to by a GRC: see e.g. § 25 Sch. 3 EA 2010
(5) not everyone will have the protected characteristic of "gender reassignment";
(6) in order to be able to claim the protected characteristic of "gender reassignment" – which is defined in Section 7 EA 2010 as a "process … <u>*changing*</u> physiological or other attributes of <u>*sex*</u>" - it is necessary to know what the "sex" of the individual us, in order to determine that/whether its attributes are being, or to be, subject to "change";
(7) the GRA 2004 was <u>*not*</u> intended to regulate equality law issue, in particular discrimination against individual of their protected characteristic of gender reassignment and/or because they have acquired a GRC.
(8) it is <u>*not*</u> necessary to have obtained a GRC under the GRA 2004 in order to be able to claim the protected category of "gender reassignment",
(9) but – contrary to the Lord Ordinary at § 51 - anyone who has obtained a GRC will *necessarily* also have the protected category of "gender reassignment"

(10) an individual *may* possess the protected characteristic of "gender reassignment" but *will* necessarily and *always* have the protected characteristic of sex (defined as above as either male or female)

3.2 Parties appear to be in agreement that, in the light of the decision of this court in *FWS 1*, a claim to having the protected characteristic of "gender reassignment" *simpliciter* does *not* mean that there has been any change in the protected characteristic of the "sex" of that individual. But parties *disagree* as to whether having the protected characteristic of "gender reassignment" *which has been duly certificated by the obtaining of a GRC*, *does* mean that there has been any change in the protected characteristic of the "sex" of that individual. The Scottish Ministers say "yes" to this question, the reclaimers "no". The reason why the reclaimers say "no" to this question" is that it is the only way in which to preserve the integrity of the EA 2010 and make overall sense of its provisions. The definition of the sex of a woman (or a man) is fundamental to equality law and underpins the protections intended specifically to be afforded to *women* in the EA 2010, e.g.:

(i) to seek to remedy the historical and consistent differences in pay between *male and female employees* see section 64 to 71, 78 EA 2010

(ii) Section 104 EA 2010, allowing registered political parties to make arrangements for single sex shortlists in relation to the selection of election candidates to address the under-representation of *women* in elected bodies;

(iii) Section 193 EA 2010, allowing charities, if in line with their charitable instrument and if it objectively justified or to prevent or compensate for disadvantage, to provide benefits only to "*women*" as people who share the same protected characteristic of "sex";

(iv) Section 195 EA 2010 concerning participation of individuals as competitors in a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex

(v) the provisions - contained in paragraphs 26 and 27 in Part 7 of Schedule 3 EA, 2010 - allowing for the provision of services, if so advised, to and for *women only*: for example in hospitals, rape crisis centres, domestic abuse shelters, and prisons;

(vi) the provisions relating to ensuring combat effectiveness in the armed forces set out in paragraph 4 of Schedule 9 EA 2010);

(vii) the provision of single sex schools, contained in paragraphs 1 to 4 in Part 1 of Schedule 11 EA 2010;

(viii) the provision of single sex institutions in the context of further and higher education, contained in paragraphs 1 to 3 in Part 1 of Schedule 12 EA 2010.

(ix) the provision of 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 as allowed for in paragraph 3 to Schedule 23 EA 2010

3.3 Separately while "pregnancy and maternity" constitutes a distinct protected characteristic", the EA 2010, *in terms*, extends workplace pregnancy and maternity protections to, and only to, "women" (on the basis that only, but not *all* women, can get pregnant and become mothers): see e.g. Section 72 to 76 EA 2010. The Scottish Ministers claim "it is the *fact* of being pregnant or having given birth that gives rise to the relevant protections being afforded, *not* the fact of the person in question being a "woman". But that is *not* what the EA 2010 says: it does *not* refer to "persons", or to "men or women", becoming pregnant; it refers only to "women". And it is not unknown for a person born female who has obtained a GRC then to become pregnant: *R. (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 [2021] Fam. 77. Yet on the Scottish Ministers' reading of the EA 2010 those born female who had a GRC would be *excluded* from, among other things the "maternity and pregnancy" protections afforded under the EA 2010 (and other statutes) since those are made available only to "women", whereas a born female who had a GRC would in their reading have become a "man". Similarly, on the Scottish Ministers' reading of the EA 2010, any positive action measures (whether in the workplace or general service provision) in favour of "women" otherwise allowed for under and in terms of Section 158 to 159 EA 2010 would, in order to be lawful, have to *include* those born male who had obtained a GRC, and to *exclude* anyone born female who obtains a GRC. This all runs contrary to and undermines the whole policy underpinning positive action measures in favour of encouraging greater participation by *women* in the workplace, whether by active positive action measures or by workplace pregnancy/maternity protections.

3.4 The Lord Ordinary's position ultimately appeared to be that use of the term "sex" (and sex related terms such as man or woman") in the EA 2010 did not *always* mean "biological sex", yet did not *always* mean "certified sex". The Lord Ordinary did think it significant that the EA 2010 does *not* contain phrases such "biological sex" or use terminology such as a "biological woman". She thought that "omission" supportive of her assertion that, within the EA 2010, "sex" *could* mean "certified sex" and was not "limited to" "biological sex". Yet the Lord Ordinary (and the Scottish Ministers defending her decision) wholly failed to set out any actual clear objective interpretative criteria to allow *all* those applying or seeking to comply with the EA 2010 day to day – whether police, prison governors, hospital staff, teachers, corporate boards, local authorities, charities, anyone supplying goods or services to the public on a commercial basis – distinguishing situations when sex for the purposes of the EA 2010 means "certified sex", and when it is to be "limited to" actual

"biological sex". Their approach makes the EA 2010 unworkable in real life, because it becomes inconstant and unpredictable in its application. This is a distinct reason in itself as to why the Lord Ordinary's - and Scottish Ministers' - approach is wrong. As Lord Hope noted in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153 at § 14:

> "[R]ules [in the Scotland Act 1998] must be interpreted in the same way as any other rules that are found in a UK statute. The system that those rules laid down must, of course, be taken to have been intended to create a system for the exercise of legislative power by the Scottish Parliament that was coherent, stable and workable. This is a factor that it is proper to have in mind. But it is not a principle of construction that is peculiar to the 1998 Act. It is a factor that is common to any other statute that has been enacted by the legislature, whether at Westminster or at Holyrood. *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.*"

3.5 The fact is, that in accordance with the ordinary meaning of the words used, the EA 2010 contains in Sections 11 and 212(1) EA 2010 only one (biological) definition man and woman. For the purposes of the EA 2010 there are simply "women" and "men", and the (biological factual) reality of two different sexes, which differences in biology may impact on indirect discrimination as well as direct discrimination. [2] And the EA 2010 specified "protected characteristics" of "sex", "gender reassignment" "pregnancy and maternity" and "sexual orientation" – and the distinct protections which the EA 2010 affords to them - are all predicated on, and only on, *biological* referents to "sex". Any other claim or reading renders the EA 2010 as a whole nonsensical and unworkable.

4 GROUND OF APPEAL 3 – THE PROPER INTERPRETATION OF THE GRA 2004

4.1 The reclaimers submit that a GRC issued and obtained under the GRA 2004 evidences the fact that the State has formally recognised that an individual has the EA 2010 protected characteristic of "gender reassignment". But that GRC cannot, and does not change an individual's "sex" not least for the purposes of the EA 2010. Accordingly the reclaimers submit that within the context of a proper interpretation of the EA 2010, the provisions of Section 9(3) GRA 2004 have to be interpreted and applied such as render wholly inapplicable the claims and legal fictions set out in Section 9(1) GRA 2004. For the avoidance of doubt what the reclaimer's analysis means is that <u>no-one</u> is deprived of the legal protection against discrimination because of sex under the EA 2010. But it <u>does</u> mean, that contrary to the Scottish Ministers claim that, when and if any born women obtain a GRC they do <u>not</u> <u>lose</u> the legal protections which the EA 2010 (and other

[2] See e.g. *Wisbey v City of London Police* [2021] EWC Civ 650 [2021] ICR 1485 on a work-related PCP relating to colour blindness adversely impacting on men more than women.

enactments) afford specifically to women (including pregnancy and maternity protections). And similarly when and if any born men obtain a GRC under reference to the requirements of the GRA 2004, they do *not acquire* the legal protections which the EA 2010 (and other enactments) afford specifically to women. What in both cases these individuals do obtain/retain is a right not to be discriminated against because of their (now fully and duly State certified, recorded and registered) protected characteristic of gender reassignment.

4.2 Such a reading is consistent with the specific historic and legislative context of the GRA 2004 which was intended to remedy the human rights incompatibility in UK law which was identified in *Goodwin v. United Kingdom* (2002) 35 EHRR 18 and in respect of which a declaration of incompatibility was made in *Bellinger v Bellinger* [2003] UKHL 21 [2003] 2 AC 467, namely the inability of couples of the same sex, one of whom had undergone a process of gender reassignment, to marry. But "'marriage can readily be regarded as a special case": *Chief Constable, West Yorkshire Police v A (No 2)* [2004] UKHL 21 [2005] 1 AC 51 *per* Baroness Hale at § 51. The reference to "sex" in Section 9(1) GRA 2004 (and not simply to "gender") was therefore intended to ensure and put beyond doubt that Parliament intended that for a very limited class of same sex couples seeking to marry - namely those where one of them had gender reassignment – the requirement that one party be male and the other female for a marriage to be valid was disapplied. But now that same sex couples are able to marry regardless of gender reassignment (and opposite sex couples to enter into civil partnerships) then the "marriage mischief" that the GRA 2004 was specifically intended to address has fallen away. That has now been subsumed under the subsequent general legal changes which have provided for couples to marry [3] - or to enter civil partnerships [4] - regardless of their sex (or whether they claim gender reassignment). Further, it is common ground that since the decision in *Goodwin* there has been a gradual equalisation of pension ages between men and women in the UK, and so one's sex is no longer a determinant factor of pension age: cf *R (C) v Work and Pensions Secretary* [2017] UKSC 72 [2017] 1 WLR 4127 *per* Baroness Hale at § 32. Accordingly, properly interpreted (contrary to the claims of the Scottish Ministers), the only continuing practical significance of the GRA 2004 are its provisions regarding the alteration of/additions to the official birth, marriage and death registers recording an individual's "certified sex".

[3] The Marriage and Civil Partnership (Scotland) Act 2014 extended marriage to same sex couples in Scotland. The Marriage (Same Sex Couples) Act 2013 legislated for the extension of marriage to same sex couples in England and Wales.

[4] Following the declaration of Convention rights incompatibility of the exclusion from civil partnerships of opposite sex couples pronounced by the UK Supreme Court *R (Steinfeld) v. Secretary of State for International Development* [2018] UKSC 32 [2020] AC 1 the Civil Partnership Act 2004 was amended by the Westminster Parliament to allow opposite sex couples to conclude civil partnerships

4.3 Against that background - since the principal mischiefs which the GRA 2004 was intended to address have now been remedied in and by the general law - Section 9(1) GRA 2004 has essentially become a redundant provision, and the GRA 2004 process as a whole important primarily for its symbolic value of the State formally recognises, certifies and registers on the official record an individual' s protected characteristic of gender reassignment. It was indeed on the basis of this symbolism – as against any substantive effect in terms of the actual legal protections afforded under the law by obtaining a GRC - that the Scottish Ministers promoted and the Scottish Parliament passed the Gender Recognition Reform (Scotland) Bill 2023. This sought to allow, for those with a Scottish birth certificate or who ordinarily resident in Scotland, a GRC to be obtained on the basis a simple statutory declaration to the Registrar General for Scotland from an applicant aged at least 16. [5] This was to replace the GRA 2004 requirements, still otherwise applicable in the rest of the UK, which allow persons aged 18 or more to obtain a GRC only on satisfying a Gender Recognition Panel (on the basis of medical and psychological reports supplied to the panel) of their: (a) having or having had gender dysphoria; (b) having lived in the acquired gender throughout the period of two years ending with the date on which the application is made; and (c) intending to continue to live in the acquired gender until death.

4.4 The Scottish Ministers nonetheless claim that in ***all*** statutory contexts - whether pre-dating or subsequent to the coming into force of the GRA 2004 - the word "sex" has to be taken to mean (unless this Section 9 GRA 2004 substitution was expressly disapplied by the relevant legislature) always and only the individual's "certified sex". Yet the Scottish Ministers provide no answer to the reclaimer's point that these claims for Section 9(2) GRA 2004 as having an all-encompassing general effect of substituting for any previous understanding of "biological sex" the new post GRA 204 concept of "certified sex" will render nonsensical and certainly unworkable past provisions which have used the term "sex" and sex related terms such as "women". One may reference on this, among other enactments: the Abortion Act 1967; the Surrogacy Arrangements Act 1985; the Human Fertilisation and Embryology Act 1990; the Victims and Witnesses (Scotland) Act 2014 and the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021; the Gender Representation on Public Boards (Scotland) Act 2018; and the National Health Service (Free Prescriptions) Scotland Regulations 2011. It is clear that, in order to achieve a reading which in fact confirms to the original intention of the legislature in passing these statutory provisions, a biological notion of sex and a biological definition of women has to be maintained. Yet this would, on the Scottish Ministers reading, be incompatible with the requirements of Section 9 GRA 2004 which they say requires meaning to be given to

[5] See now the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 (SI 2023/41)

statutes which are incompatible with the original intention of the legislature when enacting them. That is an untenable and unconstitutional contention to be maintained by the Scottish Ministers.

5 Ground of Appeal 4 – the implied repeal of earlier statutes

5.1 The Lord Ordinary's decision was founded in part on her claim (at § 52), in error of law, that the GRA 2004 had a "weighty" (quasi-) constitutional status. The Scottish Ministers in their answers support this constitutionally novel claim. Further and in any event, in stating that "there is nothing in the EA 2010 that suggests that Parliament intended that statute to repeal, in whole or in part, the GRA 2004" the Lord Ordinary gives voice to a misapprehension or error in law (in which she is again supported by the Scottish Ministers): namely that that the doctrine of implied repeal concerns attributing a particular intention of Parliament. The doctrine of implied repeal is, instead, a principle of general statutory interpretation which follows inexorably from the constitutional principle of the sovereignty of Parliament (and the corollary that no Parliament can bind its successors). "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": *In re Allister judicial review* [2023] UKSC 5 [2023] 2 WLR 457 per Lord Stephens at § 66. There is <u>no</u> hierarchy to be afforded among Acts of Parliament, other than the time when they were passed. And because Parliament cannot bind its successors this means that the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. But it is also the case that the provisions of an earlier statute may, by the requirements of a later statute, be repealed or suspended or disapplied by <u>*implication*</u> in any particular factual situation: *Hamnett v Essex County Council* [2017] EWCA Civ 6 [2017] 1 WLR 1155 per Gross LJ at § 26.

5.2 Further, the Lord Ordinary's statement (again supported by the Scottish Ministers) that "the principle of *lex specialis derogat legi generali* is not applicable here on the basis that these two Acts have different <u>*purposes;*</u> as is clear, if nothing else, from their titles" again is vitiated by error in law. The long title to the GRA 2004 states that it seeks to "to make provision for and in connection with change of gender". The long title to EA 2010 states that among its purposes was

> "to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics; to enable certain employers to be required to publish information about the differences in pay between *male and female employees*; to prohibit victimisation in certain circumstances; to require the exercise of certain functions to be with regard to the need

to eliminate discrimination and other prohibited conduct; … to increase equality of opportunity".

5.3 As we have seen among the EA 2010 protected characteristic is "gender reassignment". All and any individuals who have duly acquired a full GRC under and in terms of the GRA 2004 have the protected characteristic of "gender reassignment". So there is clearly a practical overlap between the two statutes but the EA 2010 make specific and detailed provision, in the context of its overall reform and harmonisation of equality law, of how "discrimination because of sex" and "discrimination because of gender reassignment" are distinct legal concepts with distinct levels and bases of protection. If and insofar as the avowedly "general" provisions of Section 9 GRA 2004 conflates what the EA 2010 carefully distinguishes – for example the protected characteristics of "sex" as distinct from the protected characteristic of "gender reassignment" or, in the words of the GRA 2004 long title "change of gender" - then those general provisions such as Section 9 GRA 2004 are impliedly repealed by the later and provisions of the EA 2010 which are special to the issue of equality law and more specifically to the promotion of equality of opportunity between men and women. If there were any doubt that such a result was what was always intended by Parliament when it passed the GRA 2004 then this is laid to rest by the express terms of Section 9(3) GRA 2004.

6 GROUND 5 –THE GRPB(S)A 2018

6.1 The Scottish Ministers maintain in their Answers to the Grounds of Appeal that a person issued with a full GRC in the acquired female gender is a woman for the purposes of the Gender Representation on Public Boards (Scotland) Act 2018 ("GRPB(S)A 2018"), which all parties are agreed is measure which seeks to encourage and increase the participation of women in the workplace. Although they do not expressly say or admit it, it is a necessary corollary of the Scottish Ministers' position that that a born woman once issued with a full GRC in the acquired male gender is <u>*not*</u> to be considered a woman for the purposes of the positive action measures contained in the 2018 Act and cannot seek to pray them in aid. In maintaining these claims the Scottish Ministers fail to take into account and apply the analysis of this court in *FWS 1* particularly at §§ 38-39 that the GRPB(S)A 2018 was intended to make provision, consistently with the overall equal opportunities requirements embodied the EA 2010, for lawful positive action to be put in place for <u>*women*</u> in the workplace. While - as this court confirmed in its decision in *FWS 1* - there is undoubtedly significant and weighty evidence attesting to the under-representation of women (who form just over half of the total population overall) in the workplace, there simply was and is <u>*no*</u> evidence to support the Lord Ordinary's assumptions/presumptions in interpreting the GRPB(S)A 2018 either: that there <u>*is*</u> significant workplace under-representation (which

mirrors the degree of underrepresentation of women overall) of the distinct category or class of "men with the EA 2010 protected characteristic of gender reassignment who had obtained a gender recognition certificate under the GRA 2004"; or that there is *no* significant workplace under-representation (in contrast to the degree of underrepresentation of women overall) of the distinct category or class of "women with the EA 2010 protected characteristic of gender reassignment who had obtained a gender recognition certificate under the GRA 2004"

6.2 The result is that the Scottish Ministers' revised statutory guidance subverts and undermine the properly lawful purpose of the Scottish Parliament in enacting the GRPB(S)A 2018: that is to say to encourage, consistently with the positive action provisions in the EA 2010, to increase the workplace representation and participation of *women*. Instead, the result of the Scottish Ministers' guidance is that the 2018 Act is to be misinterpreted so that a sub-class of *men* (those with the EA 2010 protected characteristic of gender reassignment who had obtained a gender recognition certificate under the GRA 2004) *can* claim the positive action protections of the 2018 Act while a sub-class of women (those with the EA 2010 protected characteristic of gender reassignment who had obtained a gender recognition certificate under the GRA 2004) are *unable* to claim its protections. That is an interpretation of the 2018 Act which is wholly inconsistent with its intended purpose as being a positive action measure to encourage the fuller participation of women within a particular sector of the workplace in Scotland. It should accordingly be struck down and reduced by this court.