IN THE COURT OF SESSION

SPEAKING NOTE

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

October 2023

Sindi Mules,
Balfour + Manson

Edinburgh

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Glossary

ARP = Appendix to the Reclaiming Print
JBA = Joint Bundle of Authorities

BP = Bundle of Papers containing:
(1) Reclaiming Print
(2) Grounds of Appeal for the Petitioner and Reclaimer
(3) Respondents' Answers to the Grounds of Appeal
(4) Note of Argument for the Petitioner and Reclaimer
(5) Note of Argument for the Respondents

1. INTRODUCTION

1.1 This speaking note sets out the record of the reclaimer's opening oral submissions in the substantive hearing in this matter, which has been set down by the court to be heard over one day on Wednesday 4 October 2023.

1.2 The reclaimer formally adopts its grounds of appeal pages 1-11 **[BP Tab 2/pages 77-87]** and the reclaimer's 10 page note of argument pages 1-11 **[BP Tab 4/pages 95-106]** which have been lodged with the court.

1.3 Rather than simply read through and repeat the terms of that note of argument pages 1-11 **[BP Tab 4/pages 95-106]**, in these oral submissions the reclaimer will focus on the terms of the (14 page) note of argument pages 1-14 **[BP Tab 5/pages 107-121]** which has been lodged by the Scottish Ministers in order to establish to the court what is, and what is not, common ground among these parties, and so allow the court to be clear on precisely where it is that battle lines are drawn between the parties.

2. THE QUESTION BEFORE THIS COURT

What is under review by the court ?

2.1 Formally, this is a judicial review of the statutory guidance (**ARP Tab 6/page 242**) which was produced by the Scottish Ministers under Section 7 the Gender Representation on Public Boards (Scotland) Act 2018 (**JBA Tab 24/Page 958 at page 961**).[1]

2.2 This Guidance says this, among other things:

> **"Introduction**
> 1.1 *Women represent over half the population of Scotland - nearly 52%*. It is therefore absolutely right that *women* are part of the decision making of our public bodies, colleges and universities, decisions that can affect all aspects of people's lives in Scotland.
> ....
> 1.3 The intention of the Gender Representation on Public Boards (Scotland) Act 2018 (**JBA Tab 24/Page 958**) is to help address *the historic and persistent underrepresentation of women in public life.*

[1] Section 7 the Gender Representation on Public Boards (Scotland) Act (**JBA Tab 24/Page 958 at 961**) provides as follows:

> **"Guidance on operation of Act**
> (1) The Scottish Ministers *must* publish guidance on the operation of this Act.
>
> (2) The guidance must in particular cover—
> (a) an appointing person's functions in—
> (i) appointing non-executive members under sections 3 and 4,
> (ii) *encouraging applications by women* under section 5(1),
> (iii) taking any steps under section 6(2),
> (iv) reporting under section 8(4),
> (b) a public authority's functions in—
> (i) *encouraging applications by women* under section 5(2),
> (ii) taking any steps under section 6(3),
> (iii) reporting under section 8(5).
>
> (3) An appointing person *must have regard to the guidance* in carrying out its functions under this Act.
>
> (4) A public authority *must have regard to the guidance* in carrying out its functions under this Act."

....

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 [2] and 22 March 2022.

Therefore 'woman' *in the Act* has the meaning under section 11 [3] and section 212(1) [4] of the Equality Act 2010.

In addition, in terms of section 9(1) [5] of the Gender Recognition Act 2004 2004 principle (**JBA Tab 11/Page 205**), 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 recognition certificate has been issued to a person that their acquired gender is male, the person's sex becomes that of a man."

The Gender Representation on Public Boards (Scotland) Act 2018 (JBA Tab 248/Page 958) as *a workplace positive action measure in favour of women*

2.3 It is common ground that Section 159 EA 2010 **(JBA Tab 18/Page 639)** [6] allows for the possibility of positive action workplace measures to be put in place for persons (such as

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[2] *For Women Scotland Limited v. The Lord Advocate and The Scottish Ministers* [2022] CSIH 4, 2022 SC 150 (**JBA Tab 1/Page 3**).

[3] Under section 11 of the Equality Act 2010 (**JBA Tab 18/Page 482**), in relation to the protected characteristic of sex, a person who has a particular protected characteristic is a reference to a man or to a woman.

[4] Under section 212(1) of the Equality Act 2010 (**JBA Tab 18/Page 639**), 'woman' means a female of any age.

[5] Under section 9(1) of the Gender Recognition Act 2004 ((**JBA Tab 11/Page 205**)), 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)

[6] Section 159 EA 2010 (**JBA Tab 18/Page 599**) provides as follows:

"159 Positive action: recruitment and promotion

(1) This section applies if a person (P) reasonably thinks that—

(a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or

(b) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) Part 5 (work) does not prohibit P from taking action within subsection (3) with the aim of enabling or encouraging persons who share the protected characteristic to—

(a) overcome or minimise that disadvantage, or

(b) participate in that activity.

(3) That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not.

(4) But subsection (2) applies only if—

(a) A is as qualified as B to be recruited or promoted,

"women") who share a protected characteristic of "sex" and who, it is reasonably thought, either suffer a disadvantage connected to the characteristic, and/or where participation in an activity by women (as persons who share this protected characteristic of sex) is disproportionately low.

2.4 It is also common ground that the Gender Representation on Public Boards (Scotland) Act 2018 **(JBA Tab 248/Page 958)** is intended to be a workplace positive action measure in favour of women.

The decision of this court in *For Women Scotland v. Scottish Ministers* [2022] CSIH 4, 2022 SC 150 (JBA Tab 1/Page 3)

2.5 In *For Women Scotland v. Scottish Ministers* [2022] CSIH 4, 2022 SC 150 **(JBA Tab 1/Page 3)** this court held that the statutory re-definition of the word "woman" - for the purposes of defining the class of those entitled to benefit from the workplace positive action provisions of the Gender Representation on Public Boards (Scotland) Act 2018 **(JBA Tab 24/Page 958)** - in Section 2 of the 2018 ASP (**JBA Tab 24/Page 958 at 959**) to mean:

> "includes a person who has 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*"

was *outside* the legislative competence of the Scottish Parliament.

> (b) P does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it, and
> (c) taking the action in question is a proportionate means of achieving the aim referred to in subsection (2).
>
> (5) "Recruitment" means a process for deciding whether to—
> (a) offer employment to a person,
> (b) make contract work available to a contract worker,
> (c) offer a person a position as a partner in a firm or proposed firm,
> (d) offer a person a position as a member of an LLP or proposed LLP,
> (e) offer a person a pupillage or tenancy in barristers' chambers,
> (f) take a person as an advocate's devil or offer a person membership of an advocate's stable,
> (g) offer a person an appointment to a personal office,
> (h) offer a person an appointment to a public office, recommend a person for such an appointment or approve a person's appointment to a public office, or
> (i) offer a person a service for finding employment.
>
> (6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act."

2.6 This court ruled that the Scottish Parliament had exceeded its legislative competence is because - by incorporating those *men* with the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) into the definition of "woman" - the 2018 Act **(JBA Tab 24/Page 958)** conflated and confused two separate and distinct protected characteristics as defined under the EA 2010 **(JBA Tab 18/Page 475)** namely

(i) "sex" (and more specifically being a woman/female of any age per Section 11(1) and 212 EA 2010 (**JBA Tab 18/Pages 482 and 639**); and

(ii) gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**).

2.7 This court 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 Section 11(1) and 212 EA 2010 (**JBA Tab 18/Pages 482 and 639**), *or* for any other EA 2010 "protected characteristic", including that of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**).

2.8 But that is *not* what the Scottish Parliament had done. Instead, the Scottish Parliament had chosen to make a workplace positive action measure representation objective avowedly aimed at and for *women* (who under Sections 11(1) and 212 EA 2010 **(JBA Tab 18/Page 475)** were a class of persons who shared the protected characteristic of being of the female sex) but then *altered* the statutory definition of "woman" from its Section 212 EA 2010 meaning of "a female of any age": (**JBA Tab 18/Page 639)**

2.9 For the purposes of the Gender Representation on Public Boards (Scotland) Act 2018 positive action measures avowedly in favour of Section 212 EA 2010 defined "woman" as meaning (**JBA Tab 18/Page 639)**, "a female of any age" in fact: **(JBA Tab 24/Page 958)** the Scottish Parliament's redefinition of "woman" in Section 2 of the 2018 ASP:

- *excluded* all and any women who - although they share the EA 2010 protected characteristic of being *female* with other women - also had the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**); and

- *included* all those *men* (*males* who did *not* share with women the protected characteristic of being *female*) but who did have the EA 2010 protected characteristic

of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**).

2.10 The result of this court's finding was, not only was this purported re-definition of "woman" in Section 2 of Gender Representation on Public Boards (Scotland) Act 2018 **(JBA Tab 24/Page 959)** beyond the legislative competence of the Scottish Parliament, but that the Scottish Ministers' original guidance **ARP Tab 4/page 190** [7] on the

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[7] The relevant provisions which were struck down by this court are contained in the Scottish Ministers *Statutory Guidance for the Gender Representation on Public Boards (Scotland) Act 2018* dated 2 June 2020 are paragraphs 2.12 to 2.15 which were in the following terms **ARP Tab 4/page 195-196:**

> **"The definition of 'woman' for the purposes of the Act**
> 2.12 Section 2 of the Act provides that for the purposes of the Act, 'woman' includes 'a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 20102) 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'.
>
> 2.13 *A trans woman with a UK Gender Recognition Certificate or with gender recognition from another EU Member State is legally a woman.* To be included, *a trans woman without a UK Gender Recognition Certificate or without gender recognition from another EU Member State* must therefore meet the three following criteria:
>
> (1) **have the characteristic of gender reassignment as defined in the Equality Act 2010**. the definition of gender reassignment in the Equality Act 2010 is –
>
> "*a person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex*".
>
> This definition includes those reassigning their sex from male to female as well as those reassigning their sex from female to male.
>
> A person who meets this definition is *not* covered by the definition of "woman" in the Act unless they also meet the following two criteria. The person does not need to have undergone any specific treatment or surgery: see https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignmentdiscrimination#
>
> 2. **be proposing to undergo, is undergoing or undergone a process (or part of a process) for the purpose of reassigning their sex to female**. This element of the definition means that a person with the protected characteristic of gender reassignment is only covered if they are proposing to undergo, is undergoing or have undergone a process to reassign their sex to female. A person reassigning their sex from female to male would not be included in the definition of woman for the purposes of the Act.
>
> 3. **be living as a woman.** This would not require the person to dress, look or behave in any particular way. However, it would be expected that there would be evidence that the person was continuously living as a woman, such as – always using female pronouns; using a female name on official documents such as a driving licence or passport, or on utility bills or bank accounts; using female titles; updating the gender marker to female on official documents such as a driving licence or passport; describing themselves and being described by others in written or other communication as a woman.

operation of the of Gender Representation on Public Boards (Scotland) Act 2018 **(JBA Tab 24/Page 958)** was also to be struck down as *ultra vires*, insofar as based and further explicating on the Scottish Parliament's Section 2 of the 2018 ASP's unlawful redefinition of the protected category of "woman" **(JBA Tab 24/Page 959)**

2.11 In particular, in *For Women Scotland Limited v. The Lord Advocate and The Scottish Ministers* [2022] CSIH 4, 2022 SC 150 this court observed as follows at §§ 36, 38-39 **(JBA Tab 1/Page 16, 17)**:

> "36. The protected characteristics listed in the 2010 Act include 'sex' and 'gender reassignment'. The Scottish Parliament would, as we have noted, have been entitled to make provision in respect of either or both these characteristics. So far as the characteristic of sex is concerned, *it would be open to the Scottish Parliament to make provision only for the inclusion of women, since a reference to a person who has a protected characteristic of sex is a reference either to a man or to a woman.*
>
> *For this purpose a man is a male of any age; and a woman is a female of any age. 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 recognised [in Case C-13/94 *P v S and Cornwall County Council* ECLI:EU:C:1996:170 [1996] ECR I-2143 [1996] ICR 795] 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."

> 2.14 This definition in section 2 provides clarity that, for the purposes of applying the provisions of the Act, "woman" includes a trans woman who meets the definition set out. This provision only relates to the meaning of "woman" in the Act. This does not have the effect of creating a new legal definition of woman in any other context.
>
> 2.15 The Act does not require an appointing person to ask a candidate to prove that they meet the definition of woman in the Act."

The Scottish Ministers' new statutory guidance: certificated sex *trumps* actual sex (ARP Tab 6/page 242)

2.12 Undaunted by the reasoning and the decision of and these observations by this court in *For Women Scotland Limited v. The Lord Advocate and The Scottish Ministers* [2022] CSIH 4, 2022 SC 150 **(JBA Tab 1/Page 3),** the Scottish Ministers' new statutory guidance (**ARP Tab 6/page 242)** still insists that the 2018 ASP positive action measures in favour "women" continues to *include* a class of men, and to *exclude* a class of women. [8]

2.13 But - the Scottish Ministers now say - this definition of "women" is what is *required* under and in terms of the EA 2010 (**JBA Tab 18/Page 639)**, *as interpreted in the light of Section 9(1) of the GRA 2004* **(JBA Tab 16/Page 426)**.

2.14 According to the Scottish Ministers the Section 9(1) GRA 2004 transformation principle **(JBA Tab 16/Page 426)** *requires* that when the EA 2010 (**JBA Tab 18/Page 639)** refers to the protected characteristic of "sex", that has to be read and understood in all cases when the EA 2010 applies to mean an individual's "*certificated sex*" rather than that individual's *actual* sex.

2.15 For these purposes, "certificated sex" means what an individual's current birth certificate says. And this may be:

- for an individual *with the protected characteristic of gender reassignment* (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) *who has obtained a Gender Recognition Certificate* ("GRC") under the Gender Recognition Act 2004 ("GRA 2004") (**JBA Tab 16/Page 399**). This means that their birth certificate is altered to reflect their "acquired gender", and then reissued under and in terms of Regulation

[8] See in particular the Scottish Ministers' Answers to the Grounds of Appeal **BP Tab 3/page89]** at page 1 para 1.2:

> "Explained and averred that the *ratio* of FWS 1 is contained in paragraphs 39-40 of the Court's opinion in that case. It is that the definition of "woman" in section 2 of the Gender Representation on Public Boards (Scotland) Act 2018 ("**2018 Act**"), in so far as including within its terms persons with the protected characteristic of gender reassignment but only where 'living as women', 'impinged' on the nature of protected characteristics and thereby impermissibly related to the reserved matter of equal opportunities.
>
> *The dicta in paragraph 36 of that opinion which is relied on by the petitioner and reclaimer does **not** form part of the ratio of FWS 1*. It does not directly address the issue raised by this petition. The Lord Ordinary did not err in her consideration of the decision in FWS 1 or otherwise."

2(1)(b) The Gender Recognition (Prescription of Particulars to be Registered) (Scotland) Regulations 2005 (**JBA Tab 17/Page 472**);

- for those individuals who have *not* obtained a Gender Recognition certificate (*regardless of whether they have the protected characteristic of gender reassignment or not*) what their birth certificate as originally registered at birth records as being their "sex".

2.16 This terminology of "certificated sex" is used 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.

2.17 But the terminology "certificated sex" also allows for the fact that, under the GRA 2004 **(JBA Tab 16/Page 399)**, a birth certificate's original accurate record of sex may be *altered* to reflect the legally "acquired gender" of an individual with a gender recognition certificate under the GRA 2004 (**JBA Tab 16/Page 399**).

2.18 In the case of those holding such a GRC their previously *accurate* birth certificate record of their actual sex is altered, by legal fiat, as to become a factually *inaccurate* record of actual sex.

2.19 On the basis that "sex" in the EA 2010 (**JBA Tab 18/Page 639**) means "certificated sex" rather than "actual sex" the Scottish Ministers say that the class of "women" as defined by their "sex" in the EA 2010 (and consequently as applied in the 2018 ASP (**JBA Tab 24/Page 958**):

- *excludes* all and any women who, although they share the EA 2010 protected characteristic of being female (**JBA Tab 18/Page 639**), also have the EA 2010 protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**); **and who, in *acknowledgment/recognition* of their protected characteristic of gender reassignment *by the State*, have obtained a gender recognition certificate under the GRA 2004** (**JBA Tab 16/Page 399**);

and

- includes those *men* (who by definition do *not* share with women the protected characteristic of being of the female sex) who have the EA 2010 protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**); **and who, *in acknowledgment/recognition of their protected***

***characteristic of gender reassignment <u>by the State</u>*, have obtained a gender recognition certificate under the GRA 2004 (JBA Tab 16/Page 399).**

2.20 In sum, the Scottish Ministers are committed to the position that membership of the class of "women" (whether one is a "woman" for the purposes of the EA 2010) is to be determined by reference to that individual's "*<u>certificated</u>* sex", as opposed to their *<u>actual</u>* sex.

2.21 *Mutatis mutandis* the Scottish Ministers are equally committed to saying that what determines membership of the class of "men" (whether one is a "man" for the purposes of the EA 2010) is to be determined by reference to that individual's "certificated sex", as opposed to their *<u>actual</u>* sex.

Summary of the reclaimer's position

2.22 So the question before the court is a simple and straightforward one: are the Scottish Ministers getting the law wrong when they say this in their statutory guidance [**ARP Tab 6/page 242]**: – in particular are they misinterpreting the EA 2010's protected category of "sex" and its definition of "women", by misunderstanding or misrepresenting the effect of Section 9 GRA 2004 on the operation of the EA 2010 provisions protecting *women* against discrimination/unequal treatment ?

2.23 The reclaimer says that the answer to that question is: "undoubtedly *yes*".

<u>The Scottish Ministers rely on Section 9(1) GRA 2004 but ignore Section 9(3) GRA 2004</u>

2.24 In short the reclaimer's position is that the Scottish Ministers have misdirected themselves in law by treating Section 9(1) GRA 2004 **(JBA Tab 16/Page 426)** in *isolation*. They have failed to take account of, in particular, Section 9(3) GRA 2004 **(JBA Tab 16/Page 426)**.

2.25 Section 9(3) GRA 2004 **(JBA Tab 16/Page 426)** makes it plain, the reclaimer submits, that any assertion that "certificated sex" trumps and replaces "actual sex" depends on the precise wording used in particular statute as read in the light of the definitions of terms actually used in the statute as well as against the background of favouring that interpretation which is more consonant with realising the general scope and achieving the objects overall of the particular enactment.

<u>The policy and objects of the EA 2010 compared to the policy and objects of the GRA 2004</u>

2.26 In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 [**not produced**] Lord Reed noted at 1032-1033 that:

> "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."

2.27 *Mutatis mutandis* it is submitted that it is the *court's* duty so as 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 Act as intended by Parliament.

2.28 In terms of the respective policy and objects of the GRA 2004 **(JBA Tab 16/Page 399)** as compared to the EA 2010 **(JBA Tab 18/Page 475)** what has always to be borne in mind is that *whereas* the GRA 2004 essentially concerns the 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 **(JBA Tab 18/Page 475)** *goes much wider than that*.

2.29 The EA 2010 **(JBA Tab 18/Page 475)** also centrally regulates what the law considers to be right relationship among and between *private* individuals and private entities i.e. it is not confined just to discrimination against an individual by the State.

2.30 Thus the non-discrimination provisions in the EA 2010 **(JBA Tab 18/Page 475)** apply *across the board* to both public and private actors over a vast field of everyday relations and interaction whether in the workplace, or in regulation of the profession, or in the provision of goods and services or the provision of accommodation, or the operation of charities, schools and universities or private clubs and association.

2.31 The GRA 2004 **(JBA Tab 16/Page 399),** by contrast, was essentially was a targeted response 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 **(Tab 2 of the Authorities for the Intervener, *Sex Matters*) BP Tab 10/page 388**; and

- *Bellinger v Bellinger* [2003] 2 AC 467 [9] **(JBA Tab 5/Page 68**

[9] *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-operative "male to female transsexual" remained a man, meaning that they were unable validly to marry another man, at

2.32 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 paras 44-46 [**JBA Tab 4/Pages 58-59**]

> "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.

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

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least at a time when the law maintained a prohibition against same sex marriage. Lord Nicholls of Birkenhead observing as follows (at paras, 8, 11) **(JBA Tab 5/Page 68 at pages 73-74)**:

> "8. … [T]he most that medical science can do in order to alleviate the condition [of gender dysphoria] is, in appropriate cases, to rid the body of its intensely disliked features and make it accord, so far as possible, with the anatomy craved. This is done by means of hormonal and other treatment and major surgery, popularly known as a 'sex change' operation. In this regard medical science and surgical expertise have advanced much in recent years. Hormonal treatment can change a person's secondary sexual characteristics. Irreversible surgery can adapt or remove genitalia and other organs, external and internal. By this means a normal body of one sex can be altered so as to give the appearance of a normal body of the other sex. But there are still limits to what can be done. Gonads cannot be constructed. The creation of replica genital organs is particularly difficult with female to male gender reassignment surgery. Chromosomal patterns remain unchanged. The change of body can never be complete.
>
> …
>
> 11. The present state of English law regarding the sex of transsexual people is represented by the well-known decision of Ormrod J in *Corbett v Corbett* [1971] P 83, 104, 106. That case, like the present one, concerned the gender of a male to female transsexual in the context of the validity of a marriage. Ormrod J held that, in this context, the law should adopt the chromosomal, gonadal and genital tests. If all three are congruent, that should determine a person's sex for the purpose of marriage. Any operative intervention should be ignored.
>
> *The biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.*"

- for some limited 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 "post-operative transsexual"; [10]

and

- to afford a "male-to-female *fully achieved* and post-operative transexual" the right to retire and receive a State pension age at the same age as women.[11]

2.34 It is to these obligations *of the State* which the GRA 2004 primarily addresses, 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".

2.35 But importantly, the GRA 2004 **(JBA Tab 16/Page 399)** did not and does *not*, in general, impose any particular obligations on private citizens (as opposed to State

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[10] See *Goodwin v United Kingdom* (Application No 28957/95) (2002) 35 EHRR 18 **(Tab 2/page 42-43 of the Authorities for the Intervener Sex Matters) at para 101 BP Tab 10/page 388 at 416-417]:**

> "101 … The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that *post-operative transsexuals* have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed."

[11] 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* (Application No 28957/95) (2002) 35 EHRR 18 **(Tab 2/page 39 of the Authorities for the Intervener Sex Matters) at para 91 BP Tab 10/page 388 at 413]**

> "91. The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, as is made clear by the report of the Interdepartmental Working Group, these problems are far from insuperable, to the extent that the Working Group felt able to propose as one of the options full legal recognition of the new gender, subject to certain criteria and procedures. As Lord Justice Thorpe observed in the *Bellinger* case, 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*. Nor is the Court convinced by arguments that allowing the applicant to fall under the rules applicable to women, which would also change the date of eligibility for her state pension, would cause any injustice to others in the national insurance and state pension systems as alleged by the Government."

It is however now a matter of agreement between the parties - see in particular the Scottish Ministers' Answers to the Grounds of Appeal at page 4 para 3.2 **[BP Tab 3/page 91]** - that there has been an equalisation of State pension ages between men and women in the UK, that differential between men and women pension age having been gradually equalised over time under and in terms of the Pensions Act 1995.

functionaries) *vis à vis* those seeking a certificated reassignment of their "gender" as this is (to be) recorded on State records.

2.36 It therefore seems inherently unlikely that Parliament ever intended or envisaged that such a limited and targeted legislative measure as the GRA 2004 **(JBA Tab 16/Page 399)** should condition and determine the scope of the EA 2010 **(JBA Tab 18/Page 475)**.

2.37 This because the EA 2010 **(JBA Tab 18/Page 475)** is a later, broader, and constitutionally more significant measure; with much greater scope in its impact on relationships between private individuals than the GRA 2004 **(JBA Tab 16/Page 399)**.

2.38 It would very much be a case of the earlier tail wagging the later dog, if the provisions of the GRA 2004 **(JBA Tab 16/Page 399)** – a measure intended to address specific issues raised and experienced by a vanishingly small proportion of the general population – were, as the Scottish Ministers claim, intended by Parliament to pre-modify the meaning and scope of the non-discrimination rights and obligations otherwise created under the subsequent EA 2010 **(JBA Tab 18/Page 475)**, in particular those rights and obligations created in favour of *women/females of any age* (some 52% of the population).

2.39 Having regard to the wording used in, and the general scope and objects of, the EA 2010 the reclaimer submits that the Scottish Ministers' reading - in which "certificated sex" trumps and replaces "actual sex" for the purposes of defining the protected characteristic of "sex" and defining the scope of the protections afforded in particular to "women" - could *never* have been intended by Parliament when passing the EA 2010.

2.40 Accordingly, says the reclaimer, the court must allow this reclaiming motion, recall the interlocutor of the Lord Ordinary and pronounce appropriate orders (whether of declarator and/or reduction of the offending parts of the statutory guidance), and award the reclaimer the expenses of process.

3. THE POSITION OF THE EQUALITY AND HUMAN RIGHTS COMMISSION

3.1 To be fair to the Scottish Ministers, the position that membership of the class of "women" (whether one is a "woman" for the purposes of the Equality Act 2010) is to be determined by reference to that individual's "certificated sex", as opposed to their actual sex - was one which was also adopted and argued for by the Equality and Human Rights Commission (EHRC) in the court below.

3.2 The EHRC lodged answers to the petition and were represented by senior and junior who made written and oral submissions in support of the EHRC's then position before the Lord Ordinary. Yet now the EHRC has decided to take no further part in these proceedings.

3.3 In particular, the EHRC had *not* come before this court to 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 in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**).

3.4 Indeed, the EHRC's public position on the *desirability/workability* of the reading of the EA 2010 which they had argued for before the court below (namely that the EA 2010 protected category of "sex" is defined by an individual's *certificated* rather than their *actual* sex) appears radically to have shifted since the hearing before the Lord Ordinary in November 2022, as is now plain from the terms of the EHRC letter of 3 April 2023 [**ARP Tab 8/page 269]**

3.5 To be absolutely, clear this letter is *not* being referred to the court because it gives some kind of authoritative interpretation of the law. If it did offer its opinions on the law, these would be "no more than statements of opinion which do not bind the judiciary." [12]

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[12] See e.g. *Anderson v. Scottish Ministers* [2001] UKPC D5, 2002 SC (PC) 63 **[not produced]** in which Lord Hope of Craighead notes in paras 6-7:

> "6. … Section 31(1) the Scotland Act 1998 provides that a member of the Scottish Executive who is in charge of a Bill shall before its introduction, state that in his view it is within the legislative competence of the Parliament. This corresponds to sec 19 of the Human Rights Act 1998, which requires a Minister of the Crown before second reading of a Bill in either House of the Parliament at Westminster to make a statement of compatibility. Section 31(2) requires the Presiding Officer, on or before the introduction of the Bill, to decide whether the Bill would be within the Parliament's legislative competence and to state his decision. This enables him to issue a warning to the Parliament if he is of the opinion the Bill would be outside its competence.
>
> 7. Important though these two safeguards may be in practice to the work of the Scottish Parliament, *they are no more than statements of opinion which do not bind the judiciary*."

See, to like effect, *Imperial Tobacco v. Lord Advocate* [2012] CSIH 9, 2012 SC 297 **[not produced]** per Lord Reed at para 59:

> "59. The procedure laid down in Section 31 of the Scotland Act 1998 forms an important element in the legislative procedure of the Scottish Parliament, *but it has no bearing on the court's decision as to whether legislation passed by the Parliament lies within its competence.* Section 31(1) requires that a member of the Scottish Executive in charge of a Bill shall, on or before the introduction of the Bill in the Scottish Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament. Section 31(2) requires the Presiding Officer to decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and to state his decision. *These statements cannot influence the court's decision of a question of law: the court must reach its decision independently of the Scottish Executive or the Presiding Officer*."

3.6 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 implication for the operation of the EA 2010 as a whole which says the EHRC necessarily follow from the decision of the Lord Ordinary in in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**) – i.e. the decision which is under appeal before this court - to uphold the Scottish Ministers' submissions that in the EA 2010 "sex" as a protected characteristic means "certificated sex" rather than "actual sex".

3.7 So the EHRC account in its 3 April 2023 letter is *useful* for the court, in that it clearly sets out and summarises the views of the Expert Agency tasked by Parliament with considering the operation of the EA 2010, as what it is that *this court would be deciding for the broader functioning of the EA 2010 if it were to uphold the decision of the Lord Ordinary*.

3.8 But, of course, the position of the reclaimer is that the decision of the Lord Ordinary *should be set aside* as she has reached it in error of law.

3.9 And if this court accepts the reclaimer's submissions then there is *no* need for any change in the law by the legislature, in order to achieve the very 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 letter

3.10 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. It is an odd and misleading term – is there an *illegal* sex?

3.11 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*, like one talks about *non-biological* washing powder.

3.12 And it also talks about "transmen" and "transwomen".

3.13 Rather than use this misleading terminology the reclaimer will stick with the terms "certificated sex" and "actual sex".

3.14 Further, 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" - have ever been used in any UK (or devolved or EU) *legislation.*

3.15 Accordingly, it is submitted that this non-statutory terminology they should be *avoided*. This is because use by the *court* of terminology which *Parliament* has chosen *not* to use in its legislation on these issues, runs a risk of the court misdirecting itself in law and falling into error such as to vitiate its decision.

3.16 Certainly the Lord Ordinary whose decision was overturned by this court in *For Women Scotland v. Scottish Ministers* [2022] CSIH 4, 2022 SC 150 **(JBA Tab 1/Page 3)** 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*". [13] But *none* of these terms appear

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

> "25. … Senior counsel for the respondents [the Scottish Ministers] then *stated in terms that Scottish Government policy was that transgender women are to be treated as non-transgender women unless to do so would be prohibited by law. She stated that such a policy reflected the recommendations of CEDAW and initially went so, far as to say that the policy found its way into the 2018 Act in that the inclusion of transgender women was within the legislative competence of the Scottish Parliament.*
>
> …
>
> 43. … There was no basis for the petitioner's apparent belief that express inclusion of *transgender women* would negatively impact *women who are not transgender*. *The arguments about the exclusion of transgender men from the 2018 Act measure ignored the fact that biological women* reassigning their gender are *visually indistinguishable from biological men and would not want or expect to be counted as women.*
>
> …
>
> 52. The essence of the petitioner's argument is that the term "woman" means *biological woman* for the purposes of equalities legislation and that the Scottish Parliament had no power to alter that reserved matter. In my view this argument is misconceived. *Section 2 of the 2018 Act acknowledges that those whose biological sex is female will be included in those who may benefit from the positive action measure. The provision does not redefine woman for any purpose other than to include transgender women as another category of people who can benefit from that measure.* As indicated the Scottish Parliament's ability to do so emanates from the wording of the exception allowing for the inclusion of people with different protected characteristics to be the subject of Scottish legislation.
>
> …
>
> 54. … *Most transgender women will have two protected characteristics, one of sex and the other of gender reassignment*. A provision of inclusion such as s.2 of the 2018 Act does not seem to me to offend against a requirement not to discriminate against someone because of a combination of two relevant protected characteristics. *Much was made in argument of the effect of the 2018 Act being to exclude or discriminate against biological women who are changing gender and living as men, who could not benefit from its positive action measures. That ignores the obvious point that such people are visually and socially male and so not operating as women for the purposes of the gender representation objective.*

...
61. ... [F]ar from EU law restricting the ambit of equality between the sexes to *the biological sexes*, there is sufficient authority to support a conclusion that in discrimination matters it acknowledges that *transgender people* are to be included as being of the sex to which they have reassigned (or to which they intend to reassign) where issues of equal treatment arise. EU law on equal treatment includes as sex discrimination, unfair treatment of those who fall within the gender reassignment category. This is reinforced by the preamble to the successor Equal Treatment Directive 2006/54/EC, which refers to *P v S*. In any event, art.3 of the current Directive provides that Member States may maintain or adopt measures within the meaning of art.141(4) of the treaty with a view to ensuring full equality and practice between men and women in working life. *Women in this context would clearly include transgender women*. So far as the proportionality argument is concerned, it should be remembered that the purpose of the legislation is not to make provision in respect of transgender discrimination, it is to take positive actions measures to increase the participation of women on public boards. As *EU law confirms that discrimination against transwomen is sex discrimination* about which Member States can legislate, the 2018 Act does not seem to me to offend the principle of equal treatment and the limited permitted derogation from that principle. Alternatively, if the purpose of the legislation is understood as increasing the participation of those with protected characteristics, *transgender women fall within the protected characteristic of gender reassignment*.
...
63. ... While the 2010 Act uses *biological sex* to define the protected characteristic of sex in s.11, that has no real bearing on the discussion about the inclusion of *transgender women* in the 2018 Act.

Senior counsel for the petitioner relied on the case of *R. (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 [2021] Fam. 77 (**JBA Tab 4/Page 42**) as support for the contention that a woman who had changed gender to male and subsequently given birth could not be registered as the father rather than the mother of the child notwithstanding that a full gender recognition certificate had been issued.

In my view that decision has no bearing on an argument about whether or not s.2 of the 2018 Act goes beyond the Equality Act definition of women and/or those with the protected characteristic of gender reassignment. It related to a completely different matter, namely the consequences for birth registration of the issuing of a gender recognition certificate.
...
On the face of it the provisions of the 2018 Act represent a measure designed to achieve broad equality of gender representation, expressed as an objective. It was not suggested by senior counsel for the petitioner that a measure with that aim would be disproportionate so long as *women were defined by their biological sex. However, once it is understood that discrimination measures relating to sex can include those who are undergoing gender reassignment, the 2018 Act appears to fall within the type of action permitted by article 14 ECHR*. A choice had to be made as to the *inclusion of transgender people as women or men* in this context.

Biological women and *transgender women* can be regarded as in analogous or relevantly similar situations to *biological women* for the purpose of analysing the measure. *Transgender women will for practical purposes be indistinguishable from non-transgender women* in the implementation of the measure. On that basis no issue of the proportionality of the measure arises from treating *transgender women* as *women* for this purpose.
...
66. ... In oral argument, the issue of whether the 2018 Act did or did not represent a new policy or practice on the part of Scottish Government in so far as it included *transgender women as women* was discussed. Initially senior counsel for the respondents stated, *on instructions*, that the government's policy was that "*transwomen are woman*" as a generality. She was constrained to accept however, that there had been no announcement far less assessment of such a policy and she later explained that *she had not intended to use the word "policy" as a term of art, but rather as a statement of the government's view*. It was accepted that the question of whether *transwomen* could be included as *women* in other contexts was for a future discussion."

anywhere in any legislation, and significantly departs from the wording actually used in the relevant legislation. As this court observed in *For Women Scotland v. Scottish Ministers* [2022] CSIH 4, 2022 SC 150 at para 40 **(JBA Tab 1/Page 18)**:

> "The Lord Ordinary stated (para 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."

3.17 A similar error - in using, and then founding on the absence of, terminology which has never appeared in any legislation - is committed by the Lord Ordinary whose judgment is being reclaimed in the present case. She notes in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 at paras 48-49 (***Reclaiming Print* Page 72 BP Tab 1/Page 73**):

> "48. … The contention is that the only way the Equality Act 2020 (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."

3.18 In sum, careless terminology costs cases. Do not use it. 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 (**JBA Tab 8/Page 132 at page 150**):

> "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*."

3.19 With that in mind we can now usefully consider the terms of the EHRC letter

The EHRC letter of 3 April 2023

3.20 By letter dated 21 February 2023 [**ARP Tab 7/page 268]** the UK Government's Minister for Women and Equalities formally requested the EHRC – under reference to its powers and duties under Section 11 (specifically sub-section 11(2)(a)-(c)) of the Equality

Act 2006[14] to advise 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 – to provide its considered advice of the benefits or otherwise of an amendment to the 2010 Act on the current definition of "sex"

3.21 The EHRC letter of 3 April 2023 [**ARP Tab 8/page 269**] is the EHRC's considered response to this request from the UK Government. As we have noted, this EHRC advice is necessarily predicated on the decision of the court below in this case having *correctly* interpreted the law, 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. [15] The reclaimer of course disputes that the Lord Ordinary correctly interpreted the law in this regard. That is the question now before this court for it to decide.

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[14] Section 11 of the Equality Act 2006 [**not produced**] provides as follows:

> **"11 Monitoring the law**
> (1) The Commission *shall* monitor the effectiveness of the equality and human rights enactments.
>
> (2) The Commission *may*–
> (a) *advise* central government about the *effectiveness* of any of the equality and human rights enactments;
> (b) *recommend* to central government *the amendment*, repeal, consolidation (with or without amendments) or replication (with or without amendments) *of any of the equality and human rights enactments*;
> (c) advise central or devolved government about *the effect of an enactment* (including an enactment in or under an Act of the Scottish Parliament);
> (d) advise central or devolved government about *the likely effect of a proposed change of law*.
>
> (3) In this section–
> (a) "central government" means Her Majesty's Government,
> (b) "devolved government" means–
> (i) the Scottish Ministers, and
> (ii) the Welsh Ministers, the First Minister for Wales and the Counsel General to the Welsh Government, and
> (c) a reference to the equality and human rights enactments is a reference to the Human Rights Act 1998, this Act and the Equality Act 2010."

[15] As was pointed out in the speech of Lord Reed in *R (Majera) v. Home Secretary* [2021] UKSC 46 [2022] AC 461 **[not produced]**:

> "44 It is a well-established principle of our constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or, conceivably, overruled by legislation).
> ...
> 45. .... First, there is a legal duty to obey a court order which has not been set aside: 'it must not be disobeyed.' As the mandatory language makes clear, this is a rule of law, not merely a matter of good practice.
>
> Secondly, the rationale of according such authority to court orders, as explained in the second and third sentences, is what would now be described as the rule of law. As was said in *R (Evans) v Attorney General* [2015] UKSC 21 [2015] AC 1787, para 52,

3.22 The EHRC advises the UK Government as follows in its April 2023 letter [**ARP Tab 8/page 269 – footnotes transposed from the Appendix to the EHRC letter]**

> "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, 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 view that* if **'sex' is defined as biological sex for the for the purposes of EA 2010**, this would **bring greater legal clarity in eight areas**.
>
> These are as follows.
>
> (1) **Pregnancy and maternity**: [16] As things stand [in the light of the decision in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**)], protections in the

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> 'subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive'.
>
> This principle was described (*ibid*) as 'fundamental to the rule of law.
>
> Thirdly, as the Lord Chancellor made clear in *Chuck v Cremer* (1846) 1 Coop temp Cott 338, the rule applies to orders which are 'null', as well as to orders which are merely irregular. Notwithstanding the paradox involved in this use of language, a court order which is 'null' must be obeyed unless and until it is set aside.
>
> 46 This rule was applied by the Court of Appeal in *Hadkinson v Hadkinson* [1952] P 285. In a well-known passage, Romer LJ stated at p 288:
>
> > 'It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.'"

[16] **Pregnancy and maternity**: Sections 13(6), 17 and 18 EA 2010 [**JBA Tab 18/pages 483, 485-486]** outlaw discrimination against *women* on the basis of pregnancy or maternity. Currently these provisions would fail to cover *trans men who are pregnant and whose legal sex is male*. The affected cohort is not hypothetical, as the case of Freddy McConnell illustrates [qv *R. (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 [2021] Fam. 77 [**JBA Tab 4/page 42]**. Mr McConnell is a trans man who sought and obtained fertility treatment, became pregnant and delivered the baby. If references to sex in these provisions were read to refer to biological women, *a trans man like Mr McConnell would be protected whether or not he had obtained a GRC*.

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 [which is what the reclaimer submits it already means] would *resolve* this issue.

(2) **Freedom of association for lesbians and gay men**: [17] If sex means legal sex [as held [in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**)], 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 [[in the light of the decision in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**)] 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 [which is what the reclaimer submits it already means] it *could* restrict membership to biological women.

(3) **Freedom of association for women and men**: [18] As things stand [in the light of the decision in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**)], a

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[17] **Freedom of association for lesbians and gay men**. Section 12 EA 2010 [**JBA Tab 18/page 482]** defines a person's sexual orientation as their orientation towards persons *of the same sex* or towards persons *of the opposite sex*.

Schedule 16 para 1 EA 2010 [**JBA Tab 18/page 722]** permits the restriction of membership to persons who *share* a protected characteristic. Currently the law does *not* allow the exclusion of trans people who hold a GRC from an association whose membership is restricted on the basis of sexual orientation.

For instance, on the current definition of sex, a lesbian support group (if it met the definition of an association: see Section 107 EA 2010 [**JBA Tab 18/page 553]** and explanatory notes [**ARP Tab 3/page 85 para 329 page 173 paras 905-907]**) could *not* restrict membership to biological women. It would have to admit a trans woman with a GRC attracted to biological women or trans women with a GRC. *There is no provision in law for it to exclude them*.

This has an impact on freedom of association for lesbians: Lesbian_Spaces_-_Advice_for_FiLiA.pdf (squarespace.com) sections 46-53 A change in the law would allow sexual-orientation-based associations to restrict membership on the basis of biological sex as well as sexual orientation.

[18] **Freedom of association for women and men**. Schedule 16 para 1 EA 2010 [**JBA Tab 18/page 722]** permits the restriction of membership to persons who *share* a protected characteristic. Currently the law does not allow the exclusion of trans people who hold a GRC from an association whose membership is restricted on the basis of sex. For instance, on the current definition of sex, a women's social club or religious organisation (if it met the definition of an association: see Section 107 EA 2010 [**JBA Tab 18/page 553]**and explanatory notes [**ARP Tab 3/page 85 para 329 page 173 paras 905-907]**) could *not* restrict membership to biological women. It would have to admit any trans woman who had obtained a GRC. *There is no provision in law for the association to exclude them*. This has an impact on freedom of association for women. A change in the law would allow sex-based associations to restrict membership on the basis of biological sex.

women's book club (for instance) may have to admit a trans woman who had obtained a GRC.

On the biological definition [which is what the reclaimer submits the EA 2010 already uses] it *could* restrict membership to biological women.

(4) **Positive action**. [19] Currently [in the light of the decision in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**)], 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 [which is what the reclaimer submits the EA 2010 already uses] would *correct this perceived anomaly*.

(5) **Occupational requirements**. [20] Employers are sometimes permitted to restrict positions to women or to men. An employer can (for example) require that a

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[19] **Positive action**. Section 104 EA 2010 [**JBA Tab 18/page 550-551]** provides that political parties can restrict shortlists for electoral candidates to those who share a protected characteristic.

Section 158 EA 2010 [**JBA Tab 18/page 598]** creates a general power for employers, service providers and others to implement measures to improve participation for under-represented or disadvantaged protected characteristic groups.

Section 159 EA 2010 [**JBA Tab 18/page 599]** creates a specific power for employers to favour under-represented or disadvantaged protected characteristic groups in recruitment and selection in 'tie - breaker' situations.

Currently, where positive action measures are created in favour of women, they benefit women without GRCs and trans women *with* GRCs. They do not benefit trans men who have obtained GRCs. It may be viewed as unjust that trans men with GRCs, who may have experienced discrimination as women at all earlier stages of their careers, lose the benefit of these measures at the point of legal transition. It may also seem unjust that trans women, who may have benefited from these structures prior to their transition, can obtain the benefit of these measures from the point of legal transition. The proposed change would resolve these difficulties. It would ensure that sex-based positive discrimination measures are applied to biological women only, including those with GRCs.

[20] **Occupational requirements**. Schedule 9, paragraph 1 EA 2010 [**JBA Tab 18/page 695]** permits employers to restrict recruitment and other in-work benefits (such as promotion and training) to those sharing a particular protected characteristic, on the basis that it is an 'occupational requirement' of the role that the holder has that protected characteristic. For example, it might be an occupational requirement that wardens in a women's or girls' hostel, or counsellors in a women's refuge, be female.

Currently, if an employer establishes a sex-based occupational requirement that a job-holder be a 'woman', the role would be open to a trans woman with a GRC, and would exclude a trans man with a GRC.

Some argue that it is inappropriate to include some trans women within an occupational requirement of this nature. They consider that the reason the requirement has been instituted – for example, to protect the privacy, safety or dignity of female service users – may be at issue when a biological man is employed, whether or not they hold a GRC. The change to a 'biological sex' approach would resolve these concerns, by ensuring that trans women would not meet the requirement in question but trans men would.

On the other hand, Schedule 9 paragraph 1(3) EA 2010 [**JBA Tab 18/page 695]** already gives employers a specific power to exclude trans persons from an occupational requirement where it is

warden in a women's or girls' hostel be female. At present [in the light of the decision in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**)] , 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 [which is what the reclaimer submits the EA 2010 already uses] would *correct this perceived anomaly*.

(6) **Single sex and separate sex services**. [21] 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 [in the light of the decision in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**)], 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* [**and arguably too – so as to avoid claims for sex discrimination of otherwise similarly situated people – *also* excluding from the women's ward any women with the protected characteristic of gender reassignment who had obtained a GRC, even if they were otherwise in for obstetrics/gynaecological care]**.

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proportionate to do so, and irrespective of whether they hold a GRC. However, under the current definition of sex, any such exclusion would be an additional explicit step. Taking this step may create prohibitive risks or costs; whereas under the proposed definition a restriction to biological sex would be the starting point.

[21] **Single sex and separate sex services**. Schedule 3, paragraphs 26-27 [**JBA Tab 18/pages 668-669]** EA 2010, make it lawful in some circumstances for service providers to discriminate on the basis of sex. For instance, it is lawful for a hospital to operate a 'women only' ward if this can be justified as a proportionate means of achieving a legitimate aim.

Currently, women who do not possess a GRC, and trans women who possess a GRC, have a *prima facie* right of admission to a 'women only' ward. To exclude all trans women, the service provider would have to take an additional explicit step subject to an additional proportionality assessment under Schedule 3 Paragraph 28 EA 2010 [**JBA Tab 18/page 669-670]**. This is the subject of our recent guidance *Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment provisions* | Equality and Human Rights Commission (equalityhumanrights.com)

On the other hand, *including* a trans woman in possession of a GRC would risk indirect sex discrimination against biological women, who may feel uncomfortable or unsafe with the presence of a trans woman.

In many circumstances it will be sensitive and impractical for service providers to take steps to find out whether a service user or customer has a GRC, and in some circumstances may risk the commission of a criminal offence (pursuant to section 22 of the Gender Recognition Act 2004 [**JBA Tab 16/pages 433-434]**, which prohibits disclosure of information about a GRC unless certain conditions are met).

The current position therefore puts operators of 'women only' services in a difficult position whether or not they wish to exclude all trans women.

The effect of adopting a 'biological sex' definition would be that a provider of a 'women only' service would not need to take further steps to exclude trans women who possessed a GRC. Although the service provider may still need to consider inclusion on an exceptional basis, the new definition would create simplicity and clarity for anyone proposing to segregate hospital or other services on the basis of a biological rather than a legal distinction.

A biological definition of sex [which is what the reclaimer submits the EA 2010 already uses] would make it *simpler to make a women's-only ward a space for biological women*.

(7) **Sport**. [22] At present [in the light of the decision in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**)], 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 [which is what the reclaimer submits the EA 2010 already uses] would mean that organisers *could exclude trans women from women's sport without this additional burden*.

(8) **Data collection:**[23] When data are broken down by legal not biological sex [as is apparently now required in the light of the decision in *For Women Scotland v.*

[22] **Sport**. Section 195 EA 2010 [**JBA Tab 18/page 629]** creates a general rule which allows sport to be organised on a single sex basis. Currently, trans women with a GRC can be excluded from women's sport, but to do this the organizer must show that the exclusion is necessary for the purposes of (a) fair competition or (b) safety.

Under the biological sex definition, there would be a shift in favour of excluding trans women. Sporting bodies would no longer specifically have to justify the exclusion of all trans women from women's sport. We note that this issue has been the subject of recent clarifications by a number of sports bodies.

[23] **Data Collection**. Section 149 EA 2010 [**JBA Tab 18/page 591-593]** creates a duty on public authorities to have due regard to (inter alia) the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. This is the Public Sector Equality Duty (PSED).

Currently, a public authority (for instance, a university or a local health authority) might in pursuit of this duty collect data on, say admission to university or educational outcomes that are segregated by 'sex' in the sense of legal sex; and that are segregated by sexual orientation in the sense of legal sexual orientation.

Many people find the idea that small numbers of misclassified cases can be substantively important in statistical analysis counter intuitive. However, small numbers of people identifying into the opposite sex can in fact have substantive implications for research findings and for assessing policy interventions. Small errors can make a big difference when the baseline category is also small. One instance where this is likely to make a difference is data on gay, lesbian and bisexual people. *The removal of sex as a category risks erasing lesbians and gay men as meaningful categories for analysis*. For example, in data from over 40,000 people responding to the UK Household Longitudinal Study 'Understanding Society', two per cent said that they were gay, lesbian or bisexual. Of the 482 people who stated they were gay/lesbian, 183 were recorded as female: Booker, C.L, Rieger, G., and Unger. J.B. "Sexual orientation health inequality: Evidence from Understanding Society, the UK Longitudinal Household Study" (2017) 101 *Preventative Medicine* pp. 126-132. Given the small size of the gay and lesbian categories, it only takes a small number of people to switch sex-category to skew the data. Heterosexuals are by far the dominant category, and when opposite-sex attracted people identify as the opposite sex, they are also likely to reclassify as same-sex-attracted. If one per cent of male respondents to the 'Understanding Society' study identified as lesbians, they would slightly outnumber the current lesbian category. If just 40 males were classified as lesbians, they would represent 18 per cent of the lesbian category, which would clearly represent a major skew in the sex composition of the lesbian category. Such a skew in the data would risk significant distortion of research findings on gay and lesbian people. (This analysis comes from Sullivan, Murray, McKenzie 'Why do we need data on sex?' in Sullivan et al. (ed.) *Sex and Gender: A Contemporary Reader*. Routledge: forthcoming 2023.)

Scottish Ministers (No. 2) [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**)], the result may seriously distort or impoverish our understanding of social and medical phenomena.

A biological definition of sex [which is what the reclaimer submits the EA 2010 already uses] 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**. [24] At present [in the light of the decision in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print* Pages 44-74 BP Tab 1/Pages 45-75**)], 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 [which is what the reclaimer submits the EA 2010 already uses] would reverse this situation. *The effect would be to transfer this right from some trans women to some trans men.*

(10) **Direct sex discrimination**. [25] At present [in the light of the decision in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61

Under the biological definition, the PSED would require public authorities to use biological sex and sexual orientation as instruments of data analysis. The effect would be to improve the efficacy of data as a means of advancing equality of opportunity between those who share, and those who do not share, these protected characteristics.

[24] **Equal pay provisions**. Section 64 EA 2010 [**JBA Tab 18/page 523]** requires that to bring an equal pay claim, the potential claimant must find a comparator of the opposite sex who is being paid more. Currently, a trans woman possessing a GRC could make such a claim on the basis of a legally male comparator who was being paid more. A trans man possessing a GRC could *not* make a claim on the same basis. Under the biological sex definition, a trans woman possessing a GRC would not be able to bring an equal pay claim on that basis. On the other hand, a trans man possessing a GRC would *gain* the right to bring an equal pay claim. The comparator in this case would be a person of the opposite biological sex, that is, a trans woman. So the effect is to transfer the right, to bring such a claim, from some trans women to some trans men.

In a group equal pay case, a person with a GRC would be able to participate by way of a "piggy-back" claim and so would not lose the benefit of successful group litigation: see *Hartlepool Borough Council v Llewellyn* [2009] ICR 1426

[25] **Direct sex discrimination**. Section 13(1) EA 2010 [**JBA Tab 18/page 483]** outlaws direct discrimination against someone because of a protected characteristic such as sex. For instance, a woman may be asked to provide a guarantor for a loan in circumstances where a man would not be asked to do so. Currently, a trans woman in possession of a GRC could bring a claim of direct discrimination if she had been treated less favourably because she was a woman. A trans man in possession of a GRC could not. Under the biological sex definition, the situation would be reversed. As in the case of equal pay provisions, the effect of the redefinition is a transfer of rights from some trans women to some trans men. However, it may be possible for a trans woman, whether or not in possession of a GRC, to bring a claim of discrimination by perception within section 13(1) EA 2010 [**JBA Tab 18/page 483]**. It is not clear whether such a claim would require the claimant to 'out' themselves as trans.

(***Reclaiming Print*** **Pages 44-74 BP Tab 1/Pages 45-75**)], 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 [which is what the reclaimer submits the EA 2010 already uses] would reverse this situation. *The effect would be to transfer the right from some trans women to some trans men.*

(11)**Indirect sex discrimination**. [26] At present [in the light of the decision in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print*** **Pages 44-74 BP Tab 1/Pages 45-75**)], 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 [which is what the reclaimer submits the EA 2010 already uses] 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 [which is what the reclaimer submits the EA 2010 already uses].

For instance, the enjoyment of separate sex and single sex spaces or sporting activities …, when closely related to biological sex [which is the very concept, the reclaimer submits, the EA 2010 already uses], is likely to fall within the material scope of Article 8 ECHR.

….

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.**"

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[26] **Indirect sex discrimination**. Section 19(1) EA 2010 [**JBA Tab 18/page 486]** outlaws indirect discrimination against someone because of a protected characteristic such as sex. For instance, a woman may be forced to leave her job because her employer operates a practice that staff must work in a shift pattern which she is unable to comply with because she needs to look after her children at particular times of day, and no allowances are made because of those needs. Currently, a trans woman in possession of a GRC could bring a claim of indirect discrimination against (for instance) an employer that put in place a provision, criterion or practice that particularly disadvantaged women as a group. But a trans man in possession of a GRC could not.

Under the biological sex definition, the situation would be reversed. As in the case of equal pay provisions, the effect of the redefinition would be the transfer of rights from some trans women to some trans men. It may be possible for a trans woman to bring a claim of indirect discrimination by association following the principles established in the European case of Case C-83/14 *CHEZ Razpredalnie Bulgaria AD* EU:C:2015:480 [2015] All ER (EC) 1083 which found that a claimant can establish indirect discrimination even if they do not share the protected characteristic of the disadvantaged group. (In 2020 the Employment Tribunal upheld a claim of indirect discrimination by association in ET 2201937/2018 *Follows v Nationwide* (14 March 2021). However, the *CHEZ* precedent is legally complex, and as an ECJ precedent may not be secure in the post-Brexit legal landscape. It is unclear whether such a claim would require the claimant to 'out' themselves as trans.

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3.23 In sum, the EHRC April 2023 letter usefully summarises the *problems* caused in the proper operation of the EA 2010 across the board by the Lord Ordinary's interpretation. This letter, and demonstrates how the Scottish Ministers interpretation of the meaning of "sex" and "woman" as being a referent to "certificated sex" rather than actual sex completely skews the proper operation of the protections which Parliament specifically considered were to be afforded to "women". By contrast what the reclaimer submits the EA 2010 *already says* solves these "problems" identified by the EHRC.

3.24 In *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 famously Lord Steyn observed (in paragraph 28) that "in the law, context is everything".

3.25 Accordingly, by way of relevant context for the proper interpretation and application of the EA 2010, the court has to recognise and take into account the facts of historic institutionalised and legalized discrimination against women within the UK. This, it is submitted, is the 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; [27]

(b) women's access to positive actions measures for women - whether in the workplace [28] (including women only shortlists for Parliamentary seats [29]) and/or in the provision of services [30]

(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 designated as an 'occupational requirement' for that role. [31] Significantly the example given in the Explanatory Notes to the EA 2010 **[ARP Tab 3/Page 28 at Page 155 para 789]** being as follows: make it clear that the reference to a woman for these purposes means what it say, 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.

[27] Section 195 EA 2010 [**JBA Tab 18/page 629]**

[28] Section 159 EA 2010 [**JBA Tab 18/page 599]**

[29] Section 104 EA 2010 [**JBA Tab 18/page 550-551]**

[30] Section 158 EA 2010 [**JBA Tab 18/page 598]**

[31] Schedule 9, paragraph 1 EA 2010 [**JBA Tab 18/page 695]**

(d) specific protections for *women* pursuant to an enactment. In particular paragraph 2(2) of Schedule 22 EA 2010 [32] 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 any person's actual sex

(e) *women's* freedom to form associations with, and only for, other *women*; [33]

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

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[32] Schedule 22 paragraph 2 EA 2010 [**JBA Tab 18/page 768-769]** provides as follows

Protection of women

2 (1) A person (P) does not contravene a specified provision only by doing in relation to a woman (W) anything P is required to do to comply with—

(a) a pre-1975 Act enactment concerning the protection of women;

(b) a relevant statutory provision (within the meaning of Part 1 of the Health and Safety at Work etc. Act 1974) if it is done for the purpose of the protection of W (or a description of women which includes W);

(c) a requirement of a provision specified in Schedule 1 to the Employment Act 1989 (provisions concerned with protection of women at work).

(2) The references to the protection of women are references to protecting women in relation to—

(a) pregnancy or maternity, or

(b) any other circumstances giving rise to risks specifically affecting women.

(3) It does not matter whether the protection is restricted to women.

(4) These are the specified provisions—

(a) Part 5 (work);

(b) Part 6 (education), so far as relating to vocational training.

(5) A pre-1975 Act enactment is an enactment contained in—

(a) an Act passed before the Sex Discrimination Act 1975;

(b) an instrument approved or made by or under such an Act (including one approved or made after the passing of the 1975 Act).

(6) If an Act repeals and re-enacts (with or without modification) a pre-1975 enactment then the provision re-enacted must be treated as being in a pre-1975 enactment.

(7) For the purposes of sub-paragraph (1)(c), a reference to a provision in Schedule 1 to the Employment Act 1989 includes a reference to a provision for the time being having effect in place of it.

(8) This paragraph applies only to the following protected characteristics—

(a) pregnancy and maternity;

(b) sex.

[33] Schedule 16 para 1 EA 2010 [**JBA Tab 18/page 722]**

(g) *women's* right to equal pay with men; [34]

(h) *women*'s ability to access to benefits provided by charitable foundations targeted at and for *women*;[35]

(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; [36]

(j) the provision of single sex schools for *girls* (including *girls-only* boarding schools); [37]

(k) the provision of single sex institutions for *women* in the context of further and higher education for *women*; [38]

(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; [39] and

(m) the prohibition against *direct* discrimination [40] - whether in the workplace or in the provision of goods and services - against *women because of their sex.*

(n) the prohibition against *indirect* discrimination [41] - whether in the workplace or in the provision of goods and services - in relation to their being a "*woman*".

On this point, it should be noted that the Scottish Minsters' claim that "in relation to their being a *woman*" for the purposes of establishing *indirect* sex discrimination is to be read as a reference to their "certificated sex" rather than "actual sex" would have profound ramifications for the proper operation of the

[34] Section 64 EA 2010 [**JBA Tab 18/page 523]**

[35] Section 193 EA 2010 [**JBA Tab 18/page 627-628]**

[36] Schedule 3, paragraphs 26-27 [**JBA Tab 18/pages 668-669]**

[37] See paragraphs 1 to 4 in Part 1 of Schedule 11 EA 2010 [**JBA Tab 18/page 709-711]**

[38] See paragraphs 1 to 3 in Part 1 of Schedule 12 EA 2010 [**JBA Tab 18/page 713-714]**

[39] See paragraph 3 to Schedule 23 EA 2010 [**JBA Tab 18/page 775]**

[40] Section 13(1) EA 2010 [**JBA Tab 18/page 483]**

[41] Section 19(1) EA 2010 [**JBA Tab 18/page 486]**

prohibition against indirect sex discrimination as set out Section 19 EA 2010 [**JBA Tab 18/page 486]**.

Under this provision indirect sex discrimination occurs where a provision, criterion or practice (PCP) is applied generally but that when applied to "women" its puts them at a particular disadvantage when compared to "men", and the application of that PCP cannot be demonstrated to be a proportionate means of achieving a legitimate aim. So what indirect discrimination focuses on is *group* disadvantage.

But this means that if you change the definition of the group who 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 hold a GRC" then you are radically altering the and wholly undermining the purpose of the statutory protection afforded to "women" i.e. females of any age- considered as a group. This may well have a whole series of otherwise unanticipated practical consequences. For example height requirements (such as used to imposed for service in the police) which would be indirectly discriminatory against women defined by reference to their actual sex may in fact not be indirectly discriminatory when measured against a group consisting of "only those females without a GRC and all those males with a GRC".

None of this, again, could be said to be consistent with what Parliament intended to legislating against indirect discrimination against women, particularly against the example of indirect discrimination against women being given in the Explanatory Notes to the EA 2010 **[ARP Tab 3/Page 28 at 45]** being as follows:

> "A woman is forced to leave her job because her employer operates a practice that staff must work in a shift pattern which she is unable to comply with because she needs to look after her children at particular times of day, and no allowances are made because of those needs. *This would put women (who are shown to be more likely to be responsible for childcare) at a disadvantage*, and the employer will have indirectly discriminated against the woman unless the practice can be justified."

(o) the policing of the duty 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* [42]

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

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

(ii) *denied* the right not to dismissed from, or not to be refused a post in, the workplace simply because they were married women, or were (able to become) pregnant, or were nursing an unweaned infant;

(iii) *denied* the right to attend and/or graduate from university;

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

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

(vi) *denied* the right to vote.

3.27 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

3.28 And then, of course, there are the inescapable *sociological* facts: of it being women who continue to be being 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, whether within or beyond the domestic sphere.

[42] Section 149 EA 2010 [**JBA Tab 18/page 591-592]**

3.29 This is the necessary context - *the context of women living in, with and under an historically conditioned patriarchy* - in which the aim and policy of the Parliament is to seek, however gradually, to challenge and dismantle in favour of a society in which the substantive (and not simply formal) equality of men and women. That is the ultimate hope.

3.30 And it is against that hope and intention of Parliament, that the overall aims and objectives of the EA 2010 in relation to women have to be understood; and, consequently, that the EA 2010 provisions relating to women have properly to be interpreted and applied.

3.31 Simply against that background, once more it seem 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 with the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) who have obtained a GRC under the GRA 2004 (**JBA Tab 16/Page 399**) from the ambit of those EA 2010 provisions which in their application may be said to be concerned with the protection of *women's* rights and protections.

3.32 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 the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) who have obtained a GRC under the GRA 2004 (**JBA Tab 16/Page 399**).

3.33 So against that sociological, biological and historical background concerning the law's treatment of women, it is submitted that, for the Scottish Ministers to be correct in their interpretation of the EA 2010 *there would have to be absolutely unequivocal and inescapable provision in the EA 2010 itself* admitting *of no doubt or any other possible interpretation other than* that Parliament *intended* that the legal protections which on their face afforded to – and, in some cases and statutory context, the legal duties and responsibilities and imposed on - *women* should *exclude* some women (those with the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) and who have obtained a GRC under the GRA 2004 (**JBA Tab 16/Page 399**)) and *include* some men (again those with the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) and who have obtained a GRC under the GRA 2004 (**JBA Tab 16/Page 399**)).

3.34 We accordingly turn to the Scottish Ministers' note of argument **[BP Tab 5/pages 107-121]** to see what those unequivocal argument in favour of their interpretation of the law actually are. And when we look at and for these unequivocal arguments, we find there are none, and instead they have produced a note of argument filled with, and vitiated, by legal error (and poor argument).

4. THE ERRORS IN THE RESPONDENTS' SUBMISSIONS BEFORE THIS COURT

4.1 There is at least a line of clear blue water between the reclaimer and respondents, for the purposes of the present reclaiming motion; in that their respective position all turn on nice, neat and discrete points of purely *statutory* interpretation.

4.2 Yet this court should also be aware that the Scottish Ministers have also presented an *esto* argument in their ongoing judicial review challenge (currently before the Outer House) to the lawfulness of the UK Government making The Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order (SI 2023/41) **(JBA Tab 27/Page 1028-1033)**.

4.3 This *esto* argument is set out in Statement 35A of the Scottish Minsters' petition in the following terms **[not produced]**:

> "35A That, *esto* ***For Women Scotland Ltd v Scottish Ministers*** 2023 SC 61 is wrongly decided in respect of the effect of s.9 of the 2004 Act (which is denied), the Secretary of State has based his decision to make the Order, and the reasons offered in support of the Order, upon a material error of law.
>
> The premise of the Secretary of State's decision, and the reasons provided to support it, proceed on the basis the law is as explained by the Lord Ordinary in ***For Women Scotland Ltd***. That is admitted by the respondent: Ans.21. [43]
>
> If that decision does not correctly state the law, the Secretary of State has proceeded upon an erroneous understanding of the law. Such an error is material to his decision to make the Order.
>
> Accordingly, if the decision in ***For Women Scotland Ltd*** is materially changed on appeal, the Order will be based upon a material error of law and will fall to be reduced."[44]

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[43] The UK Government states so far as relevant in their Answer 21 [**not produced**] to the Scottish Ministers' JR petition:

> "The 2010 Act interacts with the 2004 Act as the effect of a GRC under section 9 is to change the legal sex of an individual who obtains a GRC for the purposes of the 2010 Act. 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. (*For Women Scotland Ltd v Scottish Ministers* 2023 SLT 50 at §45)".

[44] The Scottish Ministers' Note of Argument in their petition sets out their supporting argument for this position in paragraph 27 as follows **[not produced]**:

> **"PART 5: ERROR OF LAW**
> 27. It is convenient to start by dealing briefly with ***For Women Scotland Ltd v Scottish Ministers*** 2023 SC 61. The Secretary of State's analysis, and almost all of his concerns about the Bill, is underpinned by the assumption that the meaning and effect of s.9 GRA is correctly explained by the Lord Ordinary in that case. The petitioners agree that it is.
>
> If, however, the Lord Ordinary's explanation of the meaning and effect of s.9 GRA was not supported by the appellate courts, then the Secretary of State's decision to make the Order has proceeded on an incorrect understanding of the law, that incorrect understanding is material

4.4 This *esto* argument by the Scottish Ministers is to the effect that the Lord Ordinary in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print*** **Page 44 BP Tab 1/Page 45**) misdirected herself in law when she *upheld the submissions of the Scottish Ministers and of the EHRC* and ruled that the effect of Section 9 GRA 2004 is to require the substitution throughout the EA 2010 of "certificated sex" for "actual sex".

4.5 On that *esto* basis the Scottish Ministers argue that the UK Government therefore itself *erred in law* in making the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order (SI 2023/41) **(JBA Tab 27/Page 1028-1033)** because this Order is predicated on the basis that the Lord Ordinary in *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 (***Reclaiming Print*** **Page 72 BP Tab 1/Page 73**) had correctly and authoritatively ruled on the proper relationship between the two statutes.

4.6 So - says the Scottish Ministers on an *esto* basis - there is in fact no proper legal basis for the UK Government's Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order (SI 2023/41) **(JBA Tab 27/Page 1028-1033)** and that Order should accordingly be quashed by the court on that basis.

4.7 So there is a strong element of the Scottish Ministers attempting to ride, in two different cases, two horses which are pulling in quite different directions Doubtless there are what seem to be sound *political* reasons behind such apparently opportunistic adoption of apparently contradictory positions before different courts, even if only on an *esto* basis.

4.8 But it cannot help but cast doubt on the solidity and soundness of the Scottish Ministers' currently adopted position before this court on the matters at issue, particularly when the Scottish Ministers totally mischaracterise matters when they state (at paragraph 22 of their note of argument) that

> "The Lord Ordinary was tasked with construing *the term "woman" for the purposes of resolving the apparent ambiguity in that term,* the resolution of which 'ambiguity' is central to this case.

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to the decision to make the Order, and the Order would fall to be reduced. This is the *esto* argument set out in para. 35A of the petition.

The Court is respectfully invited to determine the petitioners' *esto* argument so that, in the event of a successful appeal in ***For Women Scotland***, the consequence for this petition is clear (and it would not require to be re-argued)."

4.9 *Sed contra*, there is *no* ambiguity in the term "woman" as used in the EA 2010. That statute clearly and unequivocally provides as a definition of the term "woman" as a female of any age. And as this court has already stated and ruled in in *For Women Scotland Limited v. The Lord Advocate and The Scottish Ministers* [2022] CSIH 4, 2022 SC 150 this court observed as follows at § 36 **(JBA Tab 1/Page 16)**:

> "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*.

4.10 So this case is not and never was about there being any "ambiguity" in the term "woman" as used in the EA 2010. Rather it is about how is Parliament to be understood as intending how two statutes (the GRA 2004 and the EA 2010) properly interact with one another.

Respondent's reliance on Section 9(1) GRA 2004 (JBA Tab 16/Page 426)

4.11 The reclaimer submits that the respondent's first and besetting error in their revised statutory guidance (and in their defence of it, to date, before this court) on this point, is that they focus *on and only on* the words of Section 9(1) GRA 2004 (which remains in the form in which it was originally enacted (**JBA Tab 15/Page 367**) in continuing to provide as follows (**JBA Tab 16/Page 426**:

> (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***).

4.12 The reclaimer, by contrast, directs the court's attention to subsection 9(3) GRA 2004 (which also remains as originally enacted (**JBA Tab 15/Page 367**)) in continuing to provide as follows (**JBA Tab 16/Page 426**:

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

4.13 That is to say that the *very legislation upon which the Scottish Ministers rely* says that the claim that where a full gender recognition certificate is issued to a person under the GRA 2004 (**JBA Tab 16/Page 399**), 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) *is subject to …any other enactment or any subordinate legislation*.

4.14 So, the very terms of the legislation upon which the Scottish Ministers rely upon in formulating their Statutory Guidance about who or what constitute a woman for the purposes of the workplace positive action measures set out in the 2018 ASP, says that *the principle that a Gender Recognition Certificate issued* under the GRA 2004 (**JBA Tab 16/Page 399**) *changes a person's "sex"* is *dependent upon and subject to what is actually said about a person's "sex" in any other enactment or any subordinate legislation in which it might be suggested that that Section 9(1) GRA 2004 "transformation provision"* **(JBA Tab 16/Page 426)** *otherwise falls to be applied.*

4.15 What this means, in the reclaimer's submission, is that Section 9(1) GRA 2004 **(JBA Tab 16/Page 426)** is *not* – as the Scottish Ministers would have it - some free-standing general interpretative principle to the effect that:

- *when the word "sex" is used in all and any enactments (whether passed before or after an individual's Gender Recognition the certificate has been issued) it is to be interpreted as meaning the mutable bureaucratic category of "certificated sex" (i.e. whatever it says in an individual's current birth if altered under the GRA 2004 or as originally issued if unaltered by the GRA 2004) rather than being a reference to the immutable reality of an individual's "actual sex".* [45]

4.16 Instead, the reclaimer submits – wholly consistently with the approach taken by this court in both *For Women Scotland Limited v. The Lord Advocate and The Scottish Ministers* [2022] CSIH 4, 2022 SC 150 (**JBA Tab 1/Page 3**) and in *Fair Play for Women Ltd v Registrar General for Scotland* [2022] CSIH 7, 2022 SC 199 **(JBA Tab 2/page 19)** – the question of whether the Section 9(1) GRA 2004 "transformation principle" **(JBA Tab 16/Page 426)** can be prayed in aid - or instead the Section 9(3) GRA 2004 "exception principle" **(JBA Tab 16/Page 426)** applies - is *always* dependent on the context, aims,

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[45] On the immutability of "sex" see *Bellinger v Bellinger* [2003] 2 AC 467 per Lord Hope at para 57 **(JBA Tab 5/Page 68 at page 83)**:

> " 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*."

objectives and the actual wording of the particular legislation at issue (and, in particular, the definitions actually used in that legislation).

4.17 As this court stated in in *Fair Play for Women Ltd v Registrar General for Scotland* [2022] CSIH 7, 2022 SC 199 at para 21 **(JBA Tab 2/page 19)**:

> "[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 reclaimers.* 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 (**JBA Tab 4/Page 42**).
>
> *The point which these examples all have in common is that they concern status or important rights*.

4.18 While it is clear that in the event of any conflict between them the provisions of a later statute (such as the EA 2010) take precedence over those of an earlier statute (such as the GRA 2004) [46] the issue before this court is *not* concerned with implied repeal [47] (as the

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[46] *In re Allister judicial review* [2023] UKSC 5 [2023] 2 WLR 457 per Lord Stephens at § 66 **(JBA Tab 10/page 178 at 195]:**

> "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."

[47] On which see *Hamnett v Essex County Council* [2017] EWCA Civ 6 [2017] 1 WLR 1155 per Gross LJ at § 26 **[JBA Tab 3/Page 28 at 38]**

> "[T]he well known common law doctrine of implied repeal: where the provisions of two statutes cannot stand together, the later provisions prevail and the earlier provisions are treated as repealed by implication or amended to the extent necessary to remove the inconsistency. As expressed in Bennion, *Statutory Interpretation*, 6th ed (2013), para 87:
>
> > '(1) Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the *maxim leges posteriors priores contrarias abrogant* (later laws abrogate earlier laws). This is subject to the exception embodied in the maxim *generalia specialibus non derogant*...'
>
> It must be underlined that the court will not lightly invoke the doctrine of implied repeal; necessary repeals are usually effected expressly:
>
> > 'The rule is, therefore, that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together ...' (Halsbury's *Laws of England*, 5th ed, vol 96 (2012), para 698.)'

Scottish Ministers focus on in paragraphs 17-18 (pages 8-9) of their Note of Argument [**BP Tab 5/Pages 114-115**]) but instead the circumstances when the provisions of Section 9(3) GRA 2004 might apply to any particular enactment so as to disapply any presumption which might otherwise be set out in Section 9(1) GRA 2004.

4.19 The Scottish Ministers simply ignore this crucial issue. They give no explanation as to why they say that the Section 9(1) GRA 2004 presumption does – and therefore necessarily that Section 9(3) GRA 2004 is *not* applicable – within the context of the EA 2010 provisions, specifically those concerning the promotion of *women's* rights and the provision of protections in favour *women*. The Scottish Ministers make *no* reference to any of the EA 2010's particular structure, its wording, its 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 *women.*

4.20 All we get from the Scottish Ministers is a passing reference to the predecessor statute, the SDA 1975, and reliance upon some Explanatory Notes apparently associated with the GRA 2004 **[ARP Tabs 1 and 2/pages 3-13, 14-47]**. This is all material which pre-date the consolidated and reforming statute which is the EA 2010.

4.21 As regards the Scottish Ministers' purported reliance on the terms of the now repealed SDA 1975, Lord Neuberger of Abbotsbury PSC observed in *Cusack v Harrow London Borough Council* [2013] UKSC 40, [2013] PTSR 921 at § 65 (**JBA Tab 8/Page 132 at page 151**):

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

4.22 And as regards the Scottish Ministers' purported reliance 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 para 37 [**JBA Tab 4/Page 57**]

> "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, para 5 (Lord Steyn). However, as Lord Steyn said, this is in so far as the Explanatory Notes

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See too *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590, 595-596, 597 and *Thoburn v Sunderland City Council* [2003] QB 151, esp., para 42 and following and para 60, per Laws LJ (a decision dealing with 'constitutional statutes', with which we are not concerned).

As to the exception or qualification spoken of by Bennion, the doctrine is inapplicable or more difficult to apply where the earlier enactment is particular and the later general, in nature: see *Pattinson v Finningley Internal Drainage Bd* [1970] 2 QB 33, 37-39.

'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*."

4.23 So even if what the Scottish Ministers rely on were properly *admissible* material (which is doubtful [48]) it can hardly be said to be of any *relevance* to (and 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 definition

4.24 At paragraph 12 (page 6) of their note of argument **[BP Tab 5/page 112]** the respondents say this:

"12. The 2010 Act is an amending and consolidating statute which, in terms of the long title, was intended "to *reform* and harmonise equality law and restate the greater part

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[48] See *R (Derry) v. HMRC* [2019] UKSC 19 [2019] 1 WLR 2754 *per* Lord Carnwath at §§ 9-10 **[JAB Tab 9 page 153 at page 157]**:

"9 In *Eclipse Film Partners (No 35) llp v Revenue and Customs Comrs* [2014] STC 1114, para 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*.'

10 I would respectfully endorse this guidance, which should be read with Lady Arden JSC's comments (paras 84—90) on the relevance of prior case law."

Per Lady Arden **[JAB Tab 9 page 153 at pages 176-177]**

"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 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."

of the enactments relating to discrimination and harassment related to certain personal characteristics" (one of those enactments being the 1975 Act).

4.25 So parties are *agreed* that Parliament's intention in passing the EA 2010 was *not* one limited to restating the previous law on discrimination and harassment, but was instead to *amend*, *reform* and *harmonise* equality law generally.

4.26 What that tells one *straight-off*, is that pre-EA 2010 case law is *not* necessarily a reliable guide on how Parliament intended the EA 2010 should be interpreted and applied since the EA 2010 is in part amending and reforming the law, and this may mean in effect reversing or revising past case law decisions.

4.27 And as part of this amending, reforming and harmonising intention of Parliament is passing the EA 2010, it is necessary to pay close attention to when Parliament has decided to *change* in the EA 2010 the statutory formulations which may have been used in earlier statutes.

Sex discrimination under the SDA 1975

4.28 Staying with the predecessor SDA provisions on which the Scottish Ministers seek to rely, it is to be noted that Section 5(1)(b) SDA 1975 (**JBA Tab 28/Page 1050**) defines "*sex* discrimination" as referring only to such discrimination outlawed under the SDA 1975 which falls within the following provisions:

(1) section 1 SDA 1975 (**JBA Tab 28/Pages 1035-1036**), concerning "direct and indirect discrimination against *women*"; or

(2) section 2 SDA 1975 (**JBA Tab 28/Page 1037**), 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 (**JBA Tab 28/Page 1042-1043**) concerning *workplace-related* discrimination against *women on the ground of pregnancy or maternity leave*; or

(4) Section 3B SDA 1975 (**JBA Tab 28/Pages 1044-1045**) concerning discrimination *in the provision of goods, facilities, services or premises* against *women on the ground of pregnancy or maternity*

4.29 Significantly, Section 2A SDA 1975 (**JBA Tab 28/Pages 1038-1039**) concerning "discrimination on the grounds of gender reassignment" is specifically *excluded* from the SDA 1975 definition of "sex discrimination" in Section 5(1)(b) SDA 1975 (**JBA Tab 28/Page 1050**).

4.30 This would appear to indicate that, even within the context of the SDA 1975 in its form as amended immediately prior to its replacement by the EA 2010, a person with the protected characteristic of "gender reassignment" was *not* to be treated as becoming of the "sex" of their gender they identified with, regardless of whether this was duly their *certificated* as having become their "acquired gender" on the basis of their having obtained a GRC under the GRA 2004 (**JBA Tab 16/Page 399**).

4.31 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 Sections 11(1) and 212 EA 2010 (**JBA Tab 18/Pages 482 and 639**);

from

(b) discrimination because of the protected characteristic of "gender reassignment" (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**)

"Means" in the Section 212 EA 2010 v. "includes" in Sections 5(2)/82 SDA 1975

4.32 But one of these changes in the wording used as between the SDA 1975 and the EA 2010 is in fact highlighted by the Scottish Ministers in paragraph 13 of their note of argument **[BP Tab 5/page 113]** when they say:

> "The interpretation provision of the 2010 Act (section 212) provides in subsection (1) that, in the 2010 Act, "'woman' *means* a female of any age" and "'man'" means a male of any age".
>
> *That is in similar terms to the equivalent provisions of the 1975 Act (sections 5 and 82), which provided that " 'woman' includes a female of any age".*"

4.33 But in fact there is clear distinction between a definition provision, such as Section 212 EA 2010 (**JBA Tab 18/Page 639**), which tells you what the statute "*means*" when it uses the word "*woman*" (i.e. female of any age").

4.34 This is to be *contrasted* with the provisions in EA 2010 predecessor statutes such as Section 5(2) and 82 of the Sex Discrimination Act 1975 ("SDA 1975") , which tells what that statute "*includes*" when it uses the words woman" (**JBA Tab 28/Page 1050**).

4.35 This is because the word "includes" is *ambiguous*.

4.36 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".

4.37 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.

4.38 By contrast, "means" is *not* ambiguous. If women *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.

4.39 So – contrary to the Scottish Ministers gloss that "means" as used in the EA 2010 definition of "woman" and "includes" as used in the SDA 2010 definition of "woman" are "similar terms" - what *is* significant that in passing the EA 2010 Parliament chose *not* to use the ambiguous statutory formulation previously used in the SDA 1975 of "includes" when defining "woman" for the purposes of the EA 2010. Instead, Parliament chose to say what the term "woman" *means* for the purposes of the EA 2010 (and by corollary what it does *not* mean).

4.40 Indeed, for what it is worth, the Explanatory Notes to the EA 2010 state as follows (at paragraphs 54, 58, 59, 659-660) **[ARP Tab 3/Pages 39, 40-41 at 45]**

> "***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: . …

(c) 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.

(d) *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*.

4.41 Now the UK Government, apparently seeking accurately to reflect the *ratio* of the judgment of the court below, provides as follows in paragraph 2 to Schedule 2 of the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order (SI 2023/41) **(JBA Tab 27/Page 1030):**

"A full gender recognition certificate *has the effect of changing the sex that a person has as a protected characteristic for the purposes of the 2010 Act. This is subject to a contrary intention being established in relation to the interpretation of particular provisions of the 2010 Act*."

4.42 *Sed contra*, claim this fails to take into account that, 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" used in the EA 2010.*

4.43 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 that Parliament intending there to be some variable definition of "woman" in the EA 2010, as sometimes referring to "certificated sex" and sometimes to "actual sex" depending on the particular clause or phrase or wording used in any specific provision of the EA 2010

4.44 The very idea that individuals 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 "actual sex" is to turn this statute into a legalistic morass and an ambulance chasing lawyer's delight.

4.45 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.

4.46 Instead, the presumption in terms of the interpretation and application must always be in favour of clarity and comprehensibility and ease of application. As Lord Hope observed in *Imperial Tobacco v. Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153 at para 14 **[JBA Tab 7/page 116 at page 122]**

> "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*."

4.47 Thus, Occam's razor applies: entities are not to be multiplied. So the word "sex" does *not* have multiple meanings in 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 Section 212 EA 2010. It does *not sometimes or anytime* mean or include, "a *male* of any age who also holds a GRC". It does *not sometimes or anytime* exclude "a *female* of any age who also hold a GRC".

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

4.48 As we have seen, the Scottish Ministers are committed by the terms of the revised statutory guidance to the claim that Section 9(1) GRA 2004 **(JBA Tab 16/Page 426)** applies to the EA 2010 such that *all* references in the EA 2010 Act to "women" "men" or "sex" mean "certificated sex" and *not* actual sex.

4.49 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.

4.50 But then, that faces the Scottish Ministers with (for them a *problem)* that when making provision against discrimination because of the protected characteristic of "pregnancy and maternity" the EA 2010 specifies that such protected is available to be claimed only by "women".

4.51 This is was the Scottish Ministers say on this point in their note of argument before this court (at paragraph 15) **[BP Tab 5/pages 113-114]**:

> "Although the pregnancy and maternity specific protections in the 2010 Act are afforded only to a "woman" (*and not, on the face of it, persons issued with a full GRC in the acquired male gender - i.e. "men"*), they apply to a "woman" who is treated unfavourably "because of a pregnancy of *hers*" or "in relation to a pregnancy of *hers* [...] because of the pregnancy, or [...] because of illness suffered by *her* as a result of it"; "because *she* has given birth"; or relative to the exercise of various rights to different types of "maternity leave": 2010 Act, ss 17-18.
>
> They are all predicated, therefore, *on the fact of pregnancy or the fact of having given birth to a child*, and are all *potentially capable of being construed to accommodate the circumstances of persons such as the claimant* in *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2021] Fam 77 [**JBA Tab 4/Page 42**]- i.e. a 'pregnant man'."

4.52 The Scottish Ministers are (rightly) presuming that the legislature intended that individuals such as Freddy McConnell - who became pregnant after obtaining a GRC under the GRA 2004 (**JBA Tab 16/Page 399**) formally certifying their "maleness" - should *not* be excluded from the pregnancy and maternity protections of the EA 2010.

4.53 The reclaimer agrees with the Scottish Ministers on that, as it is 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 para 46 [**JBA Tab 4/Pages 58-59]**

> "*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': see para 91 of its judgment* [*in Goodwin v United Kingdom* (Application No 28957/95) (2002) 35 EHRR 18 **(Tab 2 of the Authorities for the Intervener Sex Matters) BP Tab 10/page 388 at 413]**
>
> > 'As Lord Justice Thorpe observed in the *Bellinger* case, 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*.']
>
> *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*. [49]

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 ECHR.

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*."

4.54 But given that that it is common ground the intention of Parliament in passing the EA 2010 was to continue to provide pregnancy and maternity protections to females even after they had obtained a GRC, how do the Scottish Ministers say that that was achieved within the terms of the EA 2010 as they insist the terms "woman" and "man" when used in the Act have to be interpreted (i.e. as modified by Section 9(1) GRA 2004 **(JBA Tab 16/Page 426)** to mean their *certificated* sex rather than their *actual* sex?

4.55 There are only two options for the Scottish Ministers:

(1) either the Scottish Ministers say that when the EA 2010 is referring to pregnancy and maternity, words referring to the protections to be afforded to (some) "men", should be *read into* these provisions;

or

(2) the Scottish Ministers accept that when the EA 2010 afford pregnancy and maternity related protection to "women" it is using the term "woman" as a reference to the female

[49] And it may now be noted that The Gender Recognition Reform (Scotland) Bill 2023 as passed by the Scottish Parliament **(JBA Tab 26/Page 992)** goes even further than the original GRA 2004 in allowing for GRCs to be obtained in Scotland by individuals without the need for them to have any medical diagnosis of gender dysphoria, or evidence of any prolonged period of their living/presenting themselves as if of the opposite gender, or any objective consideration of the evidence and exercise of judgment by a specialist panel on whether the criteria for gender reassignment had been met in the individual's case. As the UK Government noted in paragraph 11 of Scheule 2 to The Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order (SI 2023/41) **(JBA Tab 27/Page 1032)**:

> " The threshold for applications under the 2004 Act as modified by the Bill changes the cohort of people with gender recognition certificates in two substantial ways. It changes the nature of people eligible to apply and, in doing so, it is likely to significantly increase the number of people able to do so. An effect of the Bill would be that there is no longer significant control over who might be included in the group."

of the species, regardless of whether or not they hold a GRC i.e. that sex means "actual sex", *not* "certificated sex".

4.56 But if the Scottish Ministers follows the second option, then this amounts to a *concession* that their revised statutory guidance is *wrong in law*, since

(i) they would be accepting that in the context of pregnancy and maternity related protections the EA 2010 is clearly using the term "women" to refer to their "actual sex", *not* "certificated sex" (i.e. the Section 9(1) GRA 2004 transformation principle **(JBA Tab 16/Page 426)** does *not* apply);

and

(ii) as we have seen, 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" is a variable category, sometime referring to their "actual sex" and at other times to their "certificated sex"

4.57 So the Scottish Minsters are left only with the "read-in" option in order to ensure that the EA 2010 pregnancy and maternity provision which are expressly stated to be in favour and only of women, also cover the situation of a "pregnant (post GRC) man" such as Freddy McConnell.

4.58 But that then runs directly contrary to the terms of Section 13(6)(b) EA 2010 which provides, in context, as follows [**(JBA Tab 18/Page 483)**:

> **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*.

4.59 Thus the Scottish Ministers have to purport to *re-write* the wording of the EA 2010 to make it say that its pregnancy and maternity provision cover situations when "woman *or a man*" is treated unfavourably 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"?

4.60 What would be the basis the Scottish Ministers saying that words have to be read into the EA 2010 in this way? It can *only* be on the basis that the draftsperson simply *forgot* to include these words when drafting the Bill that became EA 2010.

4.61 But any such claim then runs directly contrary to the Scottish Ministers' otherwise reliance (at paragraph 17 of their note of argument, pages 8-9 **[BP Tab 5/page 115]**) on the "high standards of parliamentary draftsmanship" and the presumption against inadvertent *lacunae* being "stronger the more 'weighty' the enactment in question".

4.62 The Scottish Ministers' position also has to be that Parliament was similarly forgetful of the impact of the Section 9(1) GRA 2004 principle **(JBA Tab 16/Page 426)** when it passed the pregnancy and maternity protection provisions just for "women" in the EA 2010.

4.63 This is all so much unsustainable nonsense, however. The simple and straightforward position - consonant with Parliament's intention from the words in fact 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 their actual sex, since only *female* persons can get pregnant.

The EA 2010 gender reassignment exceptions and the meaning of sex

4.64 In paragraph 15 (pages 7-8) of the Scottish Ministers' Note of Argument **[BP Tab 5/pages 113-114]** the following is also stated:

> "15. There are provisions in the 2010 Act which effectively operate to permit gender reassignment discrimination, *and do not 'carve out' an exception for persons having been issued with a full GRC in the acquired gender*, but those provisions are subject to a proportionality requirement - see e.g. Schedule 3 Part 7 in relation to the provision of and access to single-sex services; Schedule 23 paragraph 3 in relation to communal accommodation; and Schedule 9 in relation to the imposition of occupational requirements.

4.65 The Scottish Ministers are right to draw this court's attention to these provisions, but what they have again failed to do is to advert that these provisions can only work and make

sense if they are again understood as referring to "actual sex" and not "certificated sex", that is to say that notwithstanding an individual's acquisition of a GRC their sex for the purposes of these provisions of the EA 2010 remains as it was before the GRC was obtained.

4.66 This because the provisions which the Scottish Ministers allude to expressly state that among the legitimate ends which justify otherwise apparent discrimination because of gender reassignment are "the provision of separate services for persons of each *sex*", the provision of separate services differently for persons of each sex" and "the provision of a service only to persons of one sex". [50]

4.67 But applying the Scottish Ministers' notion of "certificated sex" a service provider cannot exclude logically one kind of "woman" - such as, as the Scottish Ministers would have it "a male with a GRC" - and yet argue that such exclusion of this type of "woman" was justified in order to keep the space single sex and so preserved only for "women".

4.68 The Scottish Ministers' position in their Note of Argument is (correctly) to the effect that Parliament clearly intended, in passing the EA 2010 provisions they allude to, to allow for the exclusion of people with the protected characteristic of gender reassignment in order to keep these single *sex* spaces or separate *sex* provision.

4.69 Given that that is their position, it necessarily therefore commits the Scottish Ministers to accepting that the definition of sex for the purposes of such single or separate sex provision refers to *actual* sex and *not* to certificated sex. So once again the Scottish Ministers are necessarily committed to conceding that their statutory guidance is wrong.

When there is no *express* disapplication of the Section 9(1) GRA 2004 (JBA Tab 16/Page 426) legal fiction substituting certificated sex of actual sex

4.70 At times before the Lord Ordinary the Scottish Ministers appeared to argue that, in order to be able to rely upon the Section 9(3) GRA 2004 exception **(JBA Tab 16/Page 426)** as opposed to their Section 9(1) GRA "transformation principle" **(JBA Tab**

[50] Schedule 3, paragraph 28 [**JBA Tab 18/pages 669-670]** 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."

16/Page 426) (which required in all statutory context, the substitution of "certificated sex" for actual sex"), there had to be some form of *express* reference in the relevant statute to that Section 9(3) GRA 2004 exception **(JBA Tab 16/Page 426)** or some other express Section 9(1) GRA 2004 disapplication **(JBA Tab 16/Page 426)**.

4.71 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 paras 48-49 (***Reclaiming Print*** **Page 72 BP Tab 1/Page 73**) 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 Section 9(1) GRA 2004 **(JBA Tab 16/Page 426)**, rather than "actual sex" as is clearly allowed for under Section 9(3) GRA **(JBA Tab 16/Page 426)**.

4.72 That is and was a bad argument, particularly in the light of the fact that it fails to apply the relevant law as set out in decisions of this court which bound the Lord Ordinary, namely *For Women Scotland v. Scottish Ministers* [2022] CSIH 4, 2022 SC 150 **(JBA Tab 1/Page 3)** and *Fair Play for Women Ltd v Registrar General for Scotland* [2022] CSIH 7, 2022 SC 199 **[JBA Tab 2/page 19]**. 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, regardless of the terms of Section 9(1) GRA 2004 **(JBA Tab 16/Page 426)**. 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 under the GRA 2004 (**JBA Tab 16/Page 399**) unsupported by or contrary to their biology.

4.73 Just in case the Scottish Ministers should try and revive before this court that (bad) argument that was successful before the Lord Ordinary, this court is referred to the following statutory provisions which make reference to "women" (but with no reference to the Section 9 GRA 2004).

4.74 The reclaimer submits that if the provisions of these Acts and regulations were reinterpreted – as the Scottish Ministers would have it - to cover "certificated sex" rather than "actual sex" this would clearly result in the intention and will of the legislator being frustrated.

4.75 It should be noted that all these other statutory provisions in which specific reference is made to "women" were referred to before the Lord Ordinary but other than to record they she had been referred to them, she decided (apart from the last mentioned) to make no reference to them in the reasoning that led to her judgment in favour of the Scottish Ministers.

(1) **Abortion Act 1967** – (**JBA Tab 11/Page 205**) if the Scottish Ministers were right that "sex" and "women" referred to "certificated sex" rather than actual "sex", then this would mean that (since there is no express disapplication of the Section 9(1) GRA 2004 **(JBA Tab 16/Page 426)** principle in the Abortion Act 1967 (**JBA Tab 11/Page 205**) then is simply no regulation at all under the Abortion Act 1967 in relation to the lawful termination of the pregnancy of a woman who had the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) and who had obtained a gender recognition certificate under the GRA 2004 (**JBA Tab 16/Page 399**). This is because such a person would, according to the Scottish Ministers, be a "pregnant man" and so *not* covered by the relevant terms of the 1967 Act. [51]

[51] See in particular Section 1(1) of the Abortion Act 1967 – (**JBA Tab 11/Page 205**):

"1 Medical termination of pregnancy.

(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith -

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health *of the pregnant woman* or any existing children of *her family*; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of *the pregnant woman*; or

(c) that the continuance of the pregnancy would involve risk to the life of the *pregnant woman*, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(2) **Surrogacy Arrangements Act 1985** (**JBA Tab 13/Page 214**) - if the Scottish Ministers were right that "sex" and "women" referred to "certificated sex" rather than actual "sex", then (since there is no express disapplication of the Section 9(1) GRA 2004 principle (**JBA Tab 11/Page 205**) in the Surrogacy Arrangements Act 1985 (**JBA Tab 13/Page 214**) this would mean from the terms of the statute that there was simply no regulation at all under the Act in relation to the prohibition against payment/commercial arrangement for carrying another's child *in utero* since the pregnancy of a woman who had the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) and who had obtained a gender recognition certificate under the GRA 2004 (**JBA Tab 16/Page 399**) would on the Scottish Ministers interpretation be that of a "pregnant man" and so not covered by the relevant terms of the 1985 Act. [52]

(3) **Human Fertilisation and Embryology Act 1990** (**JBA Tab 15/Page 214**): Section 3ZA(6)(a) states that in that section 'woman' and 'man include respectively a girl and a boy (from birth). If the Scottish Ministers were right that "sex" and "women" and "men" referred to "certificated sex" rather than actual "sex" then – since there is no express disapplication of the Section 9(1) GRA 2004 principle (**(JBA Tab 16/Page 426)** in the Human Fertilisation and Embryology Act 1990 (**JBA Tab 15/Page 214**)- 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 Section 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

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[52] See Section 1 of the Surrogacy Arrangements Act 1985 as it applies in Scotland (**JBA Tab 13/Page 214-215**)

1 Meaning of "surrogate mother", "surrogacy arrangement" and other terms. S

(1) The following provisions shall have effect for the interpretation of this Act.

(2) 'Surrogate mother'; means a *woman who carries a child in pursuance of an arrangement*—

(a) made before she began to carry the child, and

(b) made with a view to any child carried in pursuance of it being handed over to, and the parental rights being exercised (so far as practicable) by, another person or other persons.

(3) An arrangement is a surrogacy arrangement if, were a *woman* to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.

(4) In determining whether an arrangement is made with such a view as is mentioned in subsection (2) above regard may be had to the circumstances as a whole (and, in particular, where there is a promise or understanding that any payment will or may be made *to the woman or for her benefit* in respect of the carrying of any child in pursuance of the arrangement, to that promise or understanding).

(5) An arrangement may be regarded as made with such a view though subject to conditions relating to the handing over of any child.

the Section 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, if "certificated sex" is to be substituted for "actual sex" then you could, instead, have an egg which was has been produced by or extracted from the ovaries *of a man with a GRC* and *sperm* which have been produced by or extracted from *the testes of a woman with a GRC* The result of the union of gamete produced from the *egg* of a female holding a GRC (and so, apparently attesting to their being a "man") and the *sperm* of a male holding a GRC (and so, apparently attesting to their being a "woman") 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 Section 3ZA(4)(a) of the Human Fertilisation and Embryology Act 1990. [53]

(4) **National Health Service (Free Prescriptions) (Scotland) Regulations 2011** (**JBA Tab 19/Page 812**): Regulation 4(1)(d) and (e) of these regulations exempts certain women from paying any charge under these Regulations, namely:

> "(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
>
> (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 the Section 9(1) GRA 2004 principle **(JBA Tab 16/Page 426)** in the National Health Service (Free Prescriptions) (Scotland) Regulations 2011 (**JBA Tab 19/Page 812**) then a woman who had the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab**

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[53] See e.g. *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 [2021] Fam 77 at para 25 (**JBA Tab 4/Page 55**)

> "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 paras 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."

18/Pages 480-481) and who had obtained a gender recognition certificate under the GRA 2004 (**JBA Tab 16/Page 399**) and 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 (JBA Tab 23/Page 911) as amended by the Forensic Medical Services (Victims of Sexual Offences)(Scotland) Act 2021** (**JBA Tab 25/Page 972**): Section 9(2) of the 2014 ASP as amended by the 2021 ASP specifies that **(JBA Tab 23/Page 928)** before a forensic medical examination a registered medical practitioner is to be carried out (by virtue of section 2 of 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 paragraph 5(3)(b)(iii) of the Schedule to the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 **(JBA Tab 25/Page 990)** 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 Section 9(1) GRA 2004 principle (**JBA Tab 11/Page 205**) in these ASP provisions - then when a woman victim of a sexual assault who requests that she be examined by another woman, she could on the Scottish Ministers' reading, simply be told her request had been honoured because the person of the *male sex* who was examining her had the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) and held a gender recognition certificate issued under the GRA 2004 (**JBA Tab 16/Page 399**) to prove it.

In this insidious way the legitimate dignity concerns of female *victims* of sexual assault - at a time of particularly vulnerability and doubtless too of distress and upset are simply swept aside – all to be subordinated to and under the legal fiction of the "certificated sex" of a medical examiner with the protected characteristic of gender reassignment (as defined in Section 7(1) EA 2010 (**JBA Tab 18/Pages 480-481**) and a GRC issued under the GRA 2004 (**JBA Tab 16/Page 399**).

4.76 The Lord Ordinary thought it was just *obvious* that, at least in the case of Section 9(2) of the Victims and Witnesses (Scotland) Act 2014 (**JBA Tab 23/Page 911)** (as amended

by the Forensic Medical Services (Victims of Sexual Offences)(Scotland) Act 2021 (**JBA Tab 25/Page 972**) the Section 9(1) GRA 2004 (**JBA Tab 11/Page 205**) concept of "certificated sex" should not be substituted for "actual sex".

4.77 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 "actual sex" where it is "clear" when "read fairly" that "'sex' means biological sex" in the legislation at issue. [54]

4.78 "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 matter from wholly different perspectives.

There is no provision in the EA 2010 making any reference to the effect of section 9 GRA 2004 on the EA 2010 protected characteristic of "sex" and/or on the EA 2010 defined term "woman"

4.79 It is common ground between the parties that there is no provision in the EA 2010 making any express reference to the effect of section 9 GRA 2004 on the EA 2010 protected characteristic of "sex" and/or on the EA 2010 defined term "woman"

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[54] See *For Women Scotland v. Scottish Ministers (No. 2)* [2022] CSOH 90, 2023 SC 61 per the Lord Ordinary, Lady Haldane, at para 53 (***Reclaiming Print*** **Pages 74-75 BP Tab 1/Pages 75-76**):.

> "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."

4.80 At paragraph 16 of their note of argument, page 8 **[BP Tab 5/page 114]** to this court, the respondents accept this but nonetheless try and nonetheless then claim that there *clear indications* in the EA 2010 that its use of terminology such as "sex", "man" and "woman" are subject to what the Scottish Ministers call "the general rule of interpretation in section 9(1)" GRA 2004 (**JBA Tab 11/Page 205**), which is to say that sex means "certificated sex", saying this:

> "16. *There is no express reference in the 2010 Act to the effect of section 9 of the 2004 Act* (**JBA Tab 11/Page 205**) *on the protected characteristic of "sex" and the term "woman".*
>
> There are, however, *clear indications* in the 2010 Act that the 2004 Act was intended to continue to have effect, and to do so as provided for by the general rule of interpretation in section 9(1) (**JBA Tab 11/Page 205**).
>
> See e.g. *paragraph 18 of Schedule 9 to the 2010 Act*, which is concerned with discrimination on grounds of sexual orientation relative to benefits dependent on marital status, and refers to "sex" in the context of "a relevant gender change case", being defined as
>
> > "a case where—(a) the married couple ***were*** *of the opposite sex* at the time of their marriage, and (b) *a full gender recognition certificate has been issued to one of the couple under the Gender Recognition Act 2004*".
>
> *That provision obviously preserves, for the purposes of the 2010 Act, the effect of the 2004 Act and, moreover, recognises the consequence, as regards "sex", of the issuing of a GRC.*"

4.81 Paragraph 18 of Schedule 9 EA 2010 is to be found at **JBA Tab 18/page 703**. On the face of it appears to be in the following terms:

> "*Benefits dependent on marital status, etc.*
> 18 (1) A person does not contravene this Part of this Act, *so far as relating to sexual orientation*, by doing anything which prevents or restricts a person who is *not* within sub-paragraph (1A) from having access to a benefit, facility or service -
> > (a) the right to which accrued before 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force), or
> > (b) which is payable in respect of periods of service before that date.
>
> (1A) A person is within this sub-paragraph if the person is-
> > (a) a man who is married to a woman, or
> > (b) a woman who is married to a man, or
> > (c) *married to a person of the same sex in a relevant gender change case*.
>
> (1B) The reference in sub-paragraph (1A)(c) to a relevant gender change case is a reference to a case where -
> > (a) *the married couple were of the opposite sex at the time of their marriage, and*
> > *(b) a full gender recognition certificate has been issued to one of the couple under the Gender Recognition Act 2004*.

(2) A person does not contravene this Part of this Act, *so far as relating to sexual orientation*, by providing *married persons and civil partners* (to the exclusion of all other persons) with access to a benefit, facility or service."

4.82 The following can immediately be noted:

(i) This provision concerns an exception to and only to a possible discrimination claim because of "sexual orientation". It is to be borne in mind that the provisions on sexual orientation are predicated on sexual orientation towards person of persons of a particular "*sex*". [55] And yet the Scottish Ministers claim - at para 23 of their Note of Argument, page 11-12 **[BP Tab 5/page 118]** before this court – that

> "The provisions concerning sexual orientation are not, in any event, of direct relevance to the resolution of the issues raised by this case.

(ii) The reference in subparagraph 18(1A)(c) of Schedule 9 EA to a person "of the same *sex in a relevant gender change case*" is and is only within the context of *marriage*. And yet as was noted by this court in *Fair Play for Women Ltd v Registrar General for Scotland* [2022] CSIH 7, 2022 SC 199 at § 21 **[JBA Tab 2/page 19 at 26]**

> "As was noted in *Chief Constable, West Yorkshire Police v A (No 2)* [2004] UKHL 21 [2005] 1 AC 51 per Lady Hale at § 51
> '*Marriage can readily be regarded as a special case* .... marriage is still a status good against the world in which clarity and consistency are vital.'

(iii) And paradoxically - but wholly logically – subparagraph 18(1A) puts marriage to "a person of the same sex in a relevant gender change case" in the same category as, and in facts as no different to, a marriage between two people of opposite sexes.

(iv) That is to say, the provision of paragraph 18 as a whole is predicated on the fact that the subsequent issuing of a full Gender Recognition certificate under the GRA 2004 (**JBA Tab 16/Page 399**) to one of a married couple who were of the

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[55] Section 12 EA 2010 **(JBA Tab 18/page 482)** provides as follows:

12 Sexual orientation

(1) Sexual orientation means a person's sexual orientation towards -
(a) persons of *the same sex*,
(b) persons of the *opposite sex*, or
(c) persons of *either sex*.

(2) In relation to the protected characteristic of sexual orientation-
(a) a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation;
(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation."

opposite sex at the time of their marriage does *not*, in reality, transform that marriage into a same sex partnership.

(v) That is precisely why – and therefore contrary to the Scottish Ministers position but, instead, wholly consistently with the reclaimer's analysis that a gender recognition certificate under the GRA 2004 (**JBA Tab 16/Page 399**) does *not* change the "sex" of the other person to a marriage – that the legislature considered it to *necessary* to make provision for the exception in paragraph 18(1A)(c) of Schedule 9 EA 2010 in order to *avoid* a claim of discrimination because of sexual orientation.

(vi) This is because, in the absence of the subparagraph 18(1)(c) exception, then if one treated an actual same sex marriages between two *gay* people differently from a marriage where one of an opposite sex married couple gets a GRC under the GRA 2004 (**JBA Tab 16/Page 399**), then you are differentiating between these two marriage because of the actual *sex* of the parties. The gay marriage involves partners who are in fact of the *same sex* to each other, whereas the marriage of an originally opposite sex couple one of whom obtains a GRC under the GRA 2004 (**JBA Tab 16/Page 399**) *remains a marriage between two people of opposite sex even after the GRC has been obtained*. So, in treating these two marriage differently you are discriminating between them because of one marriage being between persons of *the same sex* and the other (post GRC marriage) remaining one between persons of the *opposite sex*, which constitutes for the purposes of Section 12 EA 2010 discrimination because of sexual orientation.

4.83 So in fact, rather than helping or supporting the Scottish Minsters case - that all the EA 2010's references to "sex", "men" and "women" are to be taken to be mean only "certificated sex" - the provisions of the subparagraphs 18(1A)(c) and (1B) wholly undermine it.

4.84 The same logic which underpins the provisions of subparagraphs 18(1A)(c) and (1B) of Schedule 9 EA 2010 applies *mutatis mutandis* to the express exceptions set out in paragraphs 24 and 25 of Schedule 3 EA 2010 to any finding of discrimination because of gender reassignment. This provision was inserted to allow a priest or minister of religion not to be required to solemnise what would be, in reality, a same *sex* marriage. If the minster/celebrant reasonably believes that one of the ostensibly opposite sex engaged couple has in fact an "acquired gender" under the Gender Recognition Act 2004, then the

minister/celebrant is able lawfully to refuse them marriage on that basis, and thereby compromising his or her religion's prohibition against same sex marriage.

4.85 In sum:

(i) while subparagraphs 18(1A)(c) and (1B) of Schedule 9 EA 2010 are predicated on the scheme of the EA 2010 being to the effect that the *subsequent* acquisition of GRC by one party to marriage does *not* change their originally opposite sex marriage into a same *sex* partnership (because a GRC does not change sex for these purposes);

(ii) paragraphs 24 and 25 of Schedule 3 EA 2010, by corollary, is predicated on the scheme of the EA 2010 being to the effect that the *prior* acquisition of GRC by one party to a *proposed* marriage does *not* change a same sex couple into an opposite sex couple (because a GRC does not change sex for these purposes).

So the scheme of the EA 2010 on this point is – unlike the Scottish Ministers' submissions – at least coherent and consistent in this regard.

Provisions of paragraph 18 of Schedule 9 EA 2010 relied upon by respondents are not *in, and will not be brought into, force*

4.86 Yet even, *esto* (which is denied) it were thought helpful to the Scottish Ministers' case - that all the EA 2010's references to "sex", "men" and "women" are to be taken to be mean only "certificated sex" - the problem which the Scottish Ministers then face is that these reference in paragraph 18 of Schedule 9 EA 2010 to the case of a person "married to a person of the same sex in a relevant gender change case" and/or to a "married couple [who] were of the opposite sex at the time of their marriage" have never been, and will never be, brought into force.

4.87 This means that a claim of discrimination because of *sexual orientation* can be made in respect of any differential treatment between the marriage of two gay people of the same sex, and the marriage of two people of the opposite sex, one of whom has obtained a GRC under the GRA 2004 (**JBA Tab 16/Page 399**).

4.88 Just to nail down the fact that the EA 2010 has *never been amended to include the subparagraph 18(1A)c) and (1B) references on which the Scottish Ministers rely*, these

references have their origin in paragraph 17 in part 6 of Schedule 4 to the Marriage (Same Sex Couples) Act 2013 **JBA Tab 20/page 865-866** which provides as follows:

> **PART 6**
> OCCUPATIONAL PENSIONS AND SURVIVOR BENEFITS
> *Benefits dependent on marriage of same sex couples*
>
> 17 (1) Paragraph 18 of Schedule 9 to the Equality Act 2010 (work: exceptions) is amended as follows.
>
> (7) Sub-paragraph (1): for "married" substitute "within sub-paragraph (1A)".
>
> (3) After sub-paragraph (1) insert—
>
> "(1A) A person is within this sub-paragraph if the person is—
> (a) a man who is married to a woman, or
> (b) a woman who is married to a man, or
> (c) *married to a person of the same sex in a relevant gender change case.*
>
> *(1B) The reference in sub-paragraph (1A)(c) to a relevant gender change case is a reference to a case where—*
> *(a) the married couple were of the opposite sex at the time of their marriage, and*
> *(b) a full gender recognition certificate has been issued to one of the couple under the Gender Recognition Act 2004."*

4.89 Article 3(j)(iii) of The Marriage (Same Sex Couples) Act 2013 (Commencement No.2 and Transitional Provision) Order 2014 (SI 2014/93) **JBA Tab 21/page 903** provides as follows:

> **"3.** The following provisions of the Act come into force on 13th March 2014—
> **...**
> (j) the following paragraphs of Schedule 4 so far as they are not already in force, and section 11(4) so far as it relates to those paragraphs—
> ...
> (iii) paragraph 17 *except so far as it relates to a relevant gender change case for the purposes of the Equality Act 2010*; [56]

4.90 And Article 2 of the Marriage (Same Sex Couples) Act 2013 (Commencement No. 4) Order 2014 (SI 2014/3169) **JBA Tab 22/page 907** provides as follows

> **"Provisions coming into force on 10th December 2014**

[56] The Explanatory note to this commencement order **JBA Tab 21/page 905** notes as follows:
"Article 3 brings into force on 13th March 2014 the majority of the Act extending marriage to same sex couples, allowing notice of such marriages to be given from that date. *The provisions which are commenced exclude those relating to where a spouse changes legal gender under the Gender Recognition Act 2004 and those relating to conversion of a civil partnership into a marriage under section 9 of the Act.*

2. The Marriage (Same Sex Couples) Act 2013, so far as not already in force, *comes into force* on 10th December 2014 *except for*—

(a) …

(b) paragraph 17 of Schedule 4 *so far as it relates to a person (A') who is married to a person of the same sex in a relevant gender change case where A is the spouse to whom a full gender recognition certificate has been issued, and section 11(4) so far as it relates (to that extent) to that paragraph* [57]

4.91 Thus it is clear that what the Scottish Ministers *wrongly thought* were references in the EA 2010 to

5. "being married to a person of the same *sex* in a relevant gender change"; and
6. "the married couple were of the opposite sex at the time of their marriage case" before "a full gender recognition certificate has been issued to one of the couple under the Gender Recognition Act 2004"

have *never* been brought into force.

4.92 This means that the EA 2010 has *never* therefore been amended to include these reference upon which the Scottish Ministers rely. So there is simply *no foundation at all* for Scottish Ministers' claim that there are "clear indications" in the EA 2010 to the effect that the Section 9(1) GRA 2004 (**JBA Tab 11/Page 205**) presumption applies to transform all the EA 2010's references to "sex", "men" and "women" into reference only to "certificated sex" rather than "actual sex".

5 CONCLUSION

5.1 For all the reasons set out above, and in the reclaimer's note of argument **[BP Tab 4/pages 95-106]** and its Grounds of Appeal **[BP Tab 2/pages 77-87]** (both of which documents are again formally adopted by the reclaimer) the reclaimer renews its motion for this court to allow the reclaiming motion by:

(1) quashing the decision of the Lord Ordinary;

[57] The Explanatory note to this commencement order **JBA Tab 22/page 908** notes as follows:

908 This Order therefore brings into force all remaining uncommenced provisions of the Act with two exceptions. First, it does not commence an amendment to Civil Partnership Act 2004 which is redundant. Secondly, it commences, in part, paragraph 17 of Schedule 4 to the Act, which makes an amendment to provisions in the Equality Act 2010 dealing with benefits in occupational pension schemes for those couples who married as an opposite sex couple and who remain married after one spouse obtains a gender recognition certificate. The partial commencement is to ensure that there is consistency between those provisions, and equivalent provisions in the Pension Schemes Act 1993 (c. 48) as amended by paragraphs 18 to 25 of Schedule 4 to the Act and which relate to contracted-out benefits in occupational pension schemes."

(2) repelling the first and second pleas in law for each of the Scottish Ministers (***Reclaiming Print*** **Page 37-38 BP Tab 1/Page 38-39**) and the Equality and Human Rights Commission (EHRC) (***Reclaiming Print*** **Page 38 BP Tab 1/Page 39**);

(3) upholding the first and second pleas in law for the petitioner and reclaimer (***Reclaiming Print*** **Pages 37 BP Tab 1/Page 38**);

(4) pronouncing the orders for declarator and reduction sought in Statement 6 of the petition (***Reclaiming Print*** **Page 8 BP Tab 1/Page 9**); and

(5) awarding the reclaimer the expenses of process.

5.2 In so deciding, 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 remains *assured* in and by the wording of the EA 2010 as it is, as passed by Parliament.

5.3 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.

5.4 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.

5.5 This is to be contrasted with the Scottish Ministers' reading which would instead involve *compromising* women's EA 2010 rights both: by giving *males* with a GRC 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.

5.6 And it should also be borne in mind that, under the reclaimer'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 their ***actual*** sex.

5.7 This leaves the GRA 2004, then, to operate just as Parliament had intended: 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.

5.8 In many ways – given that same marriage is now permitted and pension ages have been equalised - this recognition will now have a purely symbolic value. But much has changed (legislatively and socially) since 2004 and, in any event, symbols have enduring value.

4 October 2023
AIDAN O'NEILL KC