

Ruth Crawford KC for the respondents, the Lord Advocate and Scottish Ministers - Oral submission
04 October 2023

Useful links:

- Equality Act 2010: <https://www.legislation.gov.uk/ukpga/2010/15/contents>
- Gender Recognition Act 2004: <https://www.legislation.gov.uk/ukpga/2004/7/contents>
- Gender Representation on Public Boards (Scotland) Act 2018: <https://www.legislation.gov.uk/asp/2018/4/contents/enacted>
- Gender Representation on Public Boards (Scotland) Act 2018: Statutory guidance as revised 19 April 2022: <https://www.gov.scot/publications/gender-representation-public-boards-scotland-act-2018-statutory-guidance-2/>
- Intervention by Sex Matters: <https://sex-matters.org/wp-content/uploads/2023/10/P578-22-Petition-of-For-Women-Scotland-Limited-Submissions-for-Intervener.pdf>
- EHRC letter to Minister for Women and Equalities on the definition of the protected characteristic of 'sex' in the Equality Act 2010 (3 April 2023:): https://www.equalityhumanrights.com/sites/default/files/letter-to-mfwe-definition-of-sex-in-ea-210-3-april-2023_0.pdf

Ruth Crawford:

My Lady and My Lords, on behalf of the Lord Advocate and the Scottish Ministers, I would invite the court to refuse the reclaiming motion. I, like my learned friend, Mr O'Neill adopt my Note of Argument, subject to one minor addition. And we had some discussion about this this morning in the discussion with Mr O'Neill, relative to my citation of [paragraph 18\(1A\) of schedule 9](#) to the Equality Act, which is referenced in paragraph 16 of my Note of Argument. Mr O'Neill, I'm grateful to him, is of course correct to say that that provision is not in force, and I no longer rest some of the weight on that provision.

Lady Dorrian:

What paragraph was it in your Note...

Ruth Crawford:

Paragraph 16, My Lady. Where I point to some indicia (?) what I say makes plain that the United Kingdom Parliament was well aware of the Gender Recognition Act and the reach of its provisions. My Lady and My Lords, I should say at the outset, that I agree entirely with the fact that terminology and words matter and one has to be very careful in using words. And that caveat, in my submission, extends to the language employed by Mr O'Neill on behalf of the Reclaimers when he referred to "actual sex" and "certificated sex", because again, as we know, those words, those descriptors do not feature in any of the legislation, this Court has been looking at.

Lord Malcolm:

Ms Crawford, I think the microphone is pointing slightly away from you.

Ruth Crawford:

Is that better My Lord? Thank you. Before developing my submissions, however, it is, I would suggest, instructive for us to spend a moment or two looking at the process to obtaining a gender recognition certificate. And I say that because the gender recognition certificate or a gender recognition certificate, once issued, records an important and arguably the most important part or component of a person.

In [section 3, subsection \(4\)](#) of the Gender Recognition Act, which this court will find at page 401 of the joint bundle, the person going through the process requires to declare that they meet the conditions in [section 2\(1\)\(b\) and \(c\)](#). Those conditions the court will find at page 400 and at little c they include that the person intends to live in the acquired gender until death. And it is in the context of wishing to live in the acquired gender until death that Parliament legislated for the effects...

Lady Dorrian:

400 did you say?

Ruth Crawford:

400 I think, My Lady.

Lady Dorrian:

Yes, I see. So you're looking at 2(1).

Ruth Crawford:

2(1), yes. My Lady will see the conditions outlined there. But the one which I emphasise for the context of today's discussion is the intention to live in the acquired gender until death. And I would suggest that it's in that context that Parliament decided in [section 9](#), and I'll come on to look at 9(3) as well as 9(1), but we can see what the effects, having declared that intention, what the effects thereafter would be if the person then was issued with a full gender recognition certificate. And we can see that that gender recognition certificate is issued by the gender recognition panel. That's in [section 4](#) at page 412. And reading short the panel shall issue a gender recognition certificate if satisfied reading short of the section 2 and 3 conditions. It is, in my submission, reasonable to assume that Parliament, in requiring somebody to declare they intended to live in the acquired gender until death, did not anticipate situations such as we see in the McConnell case. It is this idea of permanence which runs through the Gender Recognition Act. And I would respectfully suggest or submit that a Gender Recognition Certificate is not just a symbol. It's not just evidence that somebody has the protected characteristic of gender reassignment. What it is, what lies behind the gender recognition certificate is the intention of living forever in the acquired gender. And if that is so, there is, I would submit, nothing absurd or irrational in the proposition that those persons are entitled amongst other things, to the protections afforded to the sex of their acquired gender. Those persons are until death, women or men, as the case may be. And in my submission, there is no contrary intention seen in the Equality Act that those persons who have declared that intention to live to death in the acquired gender, and issued with the full GRC. There is no contrary intention in the Equality Act that those persons are nonetheless not entitled to pray in aid the protections afforded to the sex of their acquired gender.

And, as I'll come on, to hopefully develop in the course of my submissions, in my submission, the Equality Act was enacted, and one has to assume this, in full knowledge of the Gender Recognition Act and a proper understanding of the process of acquiring a GRC. Namely, the intention to live until death in the acquired gender and the legal effects of being issued a full GRC.

Having set out that introduction, again, by way perhaps a preliminary point, I would make this observation which is perhaps self evident, but again, perhaps worth bearing repeating, to this effect that this judicial review is concerned with and only with whether it was lawful on the part of the Ministers to publish the revised guidance and in particular, that contained in [paragraph 2.12](#) which we saw this morning. And so don't think this Court needs to turn it off again, but it's in the appendix at page 242.

This court self-evidently is not concerned with the meaning of "woman" in other statutes or other secondary legislation.

Lady Dorrian:

Can I just go back to something for a moment that you said a few minutes ago, Ms Crawford, which was a submission that at the time of enacting this Parliament would not have anticipated, I think was how you put it, situations such as the McConnell case. And you rested that on the section 2(1)(b) declaration. I'm just wondering whether the other conditions in 2(1) may have a bearing on that issue as well.

Ruth Crawford:

They probably do My Lady.

Lady Dorrian:

The requirement for gender dysphoria, for example. Now, I know it was covered very briefly in one of the previous litigations that this is a very controversial issue. But nevertheless, it's in the statute and the living in the acquired gender for the period of two years prior to the application would, on the face of it, seem to have some bearing on that question as well.

Ruth Crawford:

Quite so, quite so. I mean, I would respectfully agree with My Lady on that. And perhaps my solution should be expanded to include all the conditions in section 2(1).

The issue for this court, of course, is to decide what is the proper construction of "woman" for the purpose of the 2018 Act. That in turn, I recognise requires this court to construe the "sex" protected characteristic in [section 11](#) of the Equality Act. Because as we know...

Lady Dorrian:

I'm sorry, I think I have to ask you to repeat that, I was...

Ruth Crawford:

The question for this court is the proper construction of women, the word "woman" for the purposes of the 2018 Act. And the submission I make, that that in turn requires the court to construe the protected characteristic of "sex" in the Equality Act, that being section 11. And the reason why that is so, is because this court knows full well from [For Women No. 1](#), just

as the Scottish Parliament has no legislative competence to do anything other than that permitted under the Public Boards Exception, as it was known by way of shorthand. Likewise, the Ministers have no executive competence to do anything which would stray beyond the Public Board Exception.

And the question is, whether "woman" is restricted to, as Mr O'Neill would have it, as actual sex or does it extend whatever is meant by actual sex? I would submit that's an equally loaded term. Or does it extend to those persons who hold a full GRC in an acquired gender? Putting matters another way, one can ask the question, do those persons with a full GRC in the acquired gender share the protected characteristic of sex with those born in the sex of the acquired gender? That question, that issue, I would respectfully submit to this court was not decided by this court in For Women No. 1.

The answer which I would invite this court to reach on that question is that sex: man/woman in section 11 of the Equality Act, and women in the 2018 Act is not restricted to those born and certificated it as such in their birth certificates issued at birth. It does in my submission extend to those who hold a full GRC in the acquired gender. And in that event, the protected characteristic of sex is shared with persons of the same sex whether, quote, born or acquired.

That answer, in my submission, follows from the clear terms of section 9(1) of the Gender Recognition Act which we've already looked at this morning, but for the courts notes can be found at page 426. Where a full GRC 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 female gender, the person's sex becomes that of a woman. And just pausing there, and we had some discussion this morning about what one can take from the explanatory notes, but I would invite the court to look at what is said in relation to that provision in the explanatory notes on the Gender Recognition Act, which the court will find in the appendix at page 5, [paragraph 27, where commenting on clause 9](#) the author has this to say: subsection (1) states the fundamental proposition that once a full gender recognition certificate is issued to...

Lady Dorrian:

Can you give me the PDF page?

Ruth Crawford:

Page 5 I think. I have it at page 5 of the appendix. And it should be the bottom of that page.

Lady Dorrian:

I have it. Thank you.

Ruth Crawford:

Subsection (1), clause 9, of course became section 9. Subsection (1) states the fundamental proposition that once a full gender recognition certificate is issued to an applicant, the person's gender becomes for all purposes, the acquired gender, so that an applicant who was born a male would in law become a woman for all purposes. She would, for example, be entitled to protection as a woman under the Sex Discrimination Act. And just pause there because that is a submission which I make to this court, but substitute for the Sex

Discrimination Act, the Equality Act. And the explanatory notes go on, she would be considered to be female for the purposes of section 11(c) of the Matrimonial Causes Act, and so be able to contract a valid marriage with a man and that of course, was because at the time, same sex marriages were not permitted. So the fundamental proposition to use...

Lord Malcolm:

Ms Crawford, am I right in thinking there are provisions in the Equality Act which effectively permit someone holding a GRC as a woman, male to female GRC being excluded lawfully from women-only single-sex services or spaces?

Ruth Crawford:

Indeed.

Lord Malcolm:

What are the implications of that for present purposes?

Ruth Crawford:

It doesn't mean that your sex is other than a woman, it means that it is permissible to discriminate against you, not on sex discrimination, that would be gender reassignment discrimination, that would be permissible discrimination. And we see that and I'll come on to...

Lord Malcolm:

Subject to a proportionality assess...

Ruth Crawford:

Subject to a proportionality exercise, of course.

Lord Malcolm:

Is there a reason for that provision?

Ruth Crawford:

Em, I imagine at the time, well, I would submit the reason for that provision is that Parliament at the time, recognised that if there wasn't that carveout, as one might describe it, it applies both to those who have the protected characteristic of gender reassignment, which includes as a subset those who have a full GRC. But I would imagine the reason for that is partly because it was recognised that those with the full GRC would otherwise be entitled to access those spaces, because their sex would be that of those they shared with born, Mr O'Neill's word, actual woman.

Lord Malcolm:

You say it's a carveout or a subset but if you didn't have the GRC, then you wouldn't be a woman?

Ruth Crawford:

No. True.

Lord Malcolm:

So the exception is really aimed at people holding a GRC. Is that right?

Ruth Crawford:

Well, I...I'm not sure that's actually correct because the carveout refers in terms to it will not be gender reassignment discrimination to exclude people from single-sex spaces and communal accommodation and the like.

Lord Malcolm:

Yes, but if it's a woman-only single-sex space and you're identifying as a woman but you don't have a GRC then it's not a question of gender reassignment discrimination. If you're excluded, you're excluded because you're still a man in terms of the law.

Ruth Crawford:

Well, that's true. It's difficult to speculate here because in the real world we probably all don't go around carrying our birth certificates with us to prove our identity. So I suppose My Lord is correct in that, on my analysis, the person who didn't have the full GRC retains their sex. That is correct. So I am speculating as to what was going through the minds of Parliament. One starts getting down into various rabbit holes when one tries to speculate on various hypothetical situations. But in my submission, my analysis does not run counter to the proposition which I'm advancing to this court. Indeed, in one view it supports the proposition I've advanced into this court that, but for those carveouts, my language, probably not very apt, those with a full GRC would be entitled to access single-sex spaces.

Lord Pentland:

We're speaking here is the exception created by [paragraph 28 of schedule 3](#) to the Equality Act. And an example is given in the explanatory notes to that Act of how that exception might operate. And the example is of a group counselling service for female victims of sexual assault, where the organisers could exclude a woman with the protected characteristic of gender reassignment if they judge that clients would be unlikely to attend the session if she was there. So it's of possible interest in light of what Lord Malcolm has highlighted, that the reference there is the broader reference to the protected characteristic of gender reassignment.

Ruth Crawford:

Correct.

Lady Dorrian:

I mean, don't we see following through in the schedule from [paragraphs 26 and 27](#)? Because 26 and 27 provide for an exception from sex discrimination.

Ruth Crawford:

Indeed.

Lady Dorrian:

And that extends to those who have changed sex for all purposes through a GRC, on your argument.

Ruth Crawford:

Yes.

Lady Dorrian:

So they would be able to avail themselves of that provision. So, they're exceptions to what would otherwise be discrimination on the basis of sex.

Ruth Crawford:

Indeed.

Lady Dorrian:

A person with a GRC would be able to access, would be entitled to access single-sex services, for example. But a person with the protected characteristic of gender reassignment but without a GRC would, because they would have the sex or gender attributed at birth they would not be able to access services provided for the other gender.

Ruth Crawford:

Or *may* not. But yes.

Lady Dorrian:

What do you mean, may not?

Ruth Crawford:

Well, paragraph 29 doesn't say that those with the protected characteristic of gender reassignment...

Lord Pentland:

I think it's paragraph 28, isn't it?

Ruth Crawford:

Yes, sorry. Paragraph 28. Sorry, My Lord. Paragraph 28... must be excluded. It's simply that if they are excluded, that wouldn't be discrimination. That's why I said "may".

Lady Dorrian:

Yes, but that's different discrimination. We're working our way through I think 26, 27 and 28. 26 and 27 are exceptions to what would otherwise be discrimination on the basis of sex. And on your approach, a person with a gender recognition certificate would be entitled to access single-sex services in relation to paragraph 26 and 27, leaving aside 28.

Ruth Crawford:

Yes.

Lady Dorrian:

So, for example, a person with a gender recognition certificate in the female sex could access a woman's group and a person with a GRC in the male gender could access, I don't know, the Men's Shed. But a person who did not have the GRC but who was otherwise within the categorisation of someone with a protected characteristic of gender reassignment

would have the gender assigned at birth, and it would not be discrimination on the grounds of sex to exclude them.

Ruth Crawford:

No.

Lady Dorrian:

The third exception is the one in paragraph 28. And that one is an exception to what would otherwise be discrimination on the grounds of the protected characteristic of gender reassignment. And that would allow the exclusion of those with a gender recognition certificate from the requisite group relating to their acquired gender, but the exclusion would not be on the basis of sex discrimination, it would be on the basis of gender reassignment and justifiable, perhaps, if the proportionality can be established.

Ruth Crawford:

I don't take issue with that analysis, My Lady.

Lady Dorrian:

I was just going to conclude it with saying you would not need to include those without the gender recognition certificate in that exception because they would not otherwise be entitled to access.

Ruth Crawford:

I see what My Lady means. Yes, yes. I see what My Lady means, yes.

Lady Dorrian:

Well, does that not suggest that the 28 exception is aimed squarely at those with a gender recognition certificate?

Ruth Crawford:

My Lady could well be right on that analysis, and I'm bound to say, it probably is correct.

Lord Pentland:

Even though it refers more broadly?

Ruth Crawford:

Even though it refers more broadly.

Lord Pentland:

to the discrimination on the basis of the protected characteristic of gender reassignment, in fact, you're saying it's aimed at a narrower class, or different class.

Ruth Crawford:

Having been walked through it, I think that must be correct, because as My Lady in the chair correctly points out, the person without the full GRC would not be entitled to access the single-sex services because they wouldn't have the sex of their acquired gender.

Lord Pentland:

Unless Parliament thought at the time of the 2010 Act, look, this is all extremely complicated, who knows how it's going to play out in practice over the years ahead. So let's just sweep everything up in paragraph 28, in the context of discrimination on the basis of the protected characteristic of gender reassignment, what's the harm? And that does seem to have been the understanding of the author of the explanatory notes by reference to the example which I mentioned.

Ruth Crawford:

I would be speculating either way. But for what it's worth, I think I prefer the analysis of My Lady in the chair. But whichever way one approaches it, in my submission neither approach, neither analysis, in any way counters the propositions which I've been advancing to this court.

Lord Malcolm:

The question that occurs, at least to me, from paragraph 28, is if the male to female person with the gender recognition certificate remained a man in terms of the definition of male and female in the Act, which is the proposition against you as I understand it, would there be any need for this exception?

Ruth Crawford:

Well, I would submit not and indeed I think that's a submission I made in the court below.

If I may, I mean I was going to spend some time on those paragraphs, but I think later on my submissions, and then I'll pass over that and I come to look at some of the provisions in the Equality Act, as I will in greater detail. But...actually I've already dealt with that submission, it's the same point, I'm quickly going to sound like the stuck record. Going back to the explanatory notes, the submission advanced on behalf of the Ministers and the Lord Advocate is to this effect: the fundamental proposition, to use the words of the explanatory notes in the GRA, is that those persons who have a full GRC in the acquired female gender, have for the purposes of the 2018 Act become women. and are therefore, if entitled is the right word, but are women for the purposes of the gender objective in the 2018 Act.

Lord Pentland:

It's quite clear that at the time of enacting the 2010 legislation, Parliament, as one would expect, and as we've just seen from these revisions buried deep in schedule 3, was extremely well aware of the rules already in force relating to gender reassignment.

Ruth Crawford:

Indeed. And we also see reference to them being fully aware of the Gender Recognition Act, not least because they repealed limited provisions of it..

Lord Pentland:

Exactly.

Ruth Crawford:

...and there is another paragraph buried in another schedule relative to solemnisation of marriages where a celebrant is not required, will not be discriminating, if he or she refuses to

solemnise a marriage to somebody who he or she reasonably believes to have acquired a gender under the GRA.

Lord Pentland:

So, if Parliament's policy reflected in the 2010 Act, was to undermine substantially the wide ranging effect of section 9 subsection (1) of the 2004 legislation, would it be reasonable to infer the Parliament would have faced up to that explicitly?

Ruth Crawford:

Well, again, that's a submission which I made before, in the court below. And as this court has already observed, the Equality Act, the 2010 Act, is a very complex piece of legislation. Not that easy to understand always, not always that easy to work with. But as we know, from what the House of Lords had to say in Ballenger, this whole topic was very, very complex, this topic of gender recognition and acquiring a gender. The House of Lords very properly said that's for Parliament. They did that in the Gender Recognition Act, in the manner in which we've seen wasn't just restricted to the question of marriage, and I would resist any submission to that effect. That Act having been made, being passed, six years later, we have the Equality Act. And in my submission, it is, it would be surprising if Parliament knowing all the work it had done in 2004 in the Gender Recognition Act and knowing what that was supposed to... knowing section 9, both 9(1) and 9(3), had not explicitly said something in the Equality Act. When we're talking about sex, we're not meaning those who have the acquired gender under section 9 of the Gender Recognition Act.

Lord Pentland:

There's a sense also, perhaps, one has seen from the correspondence between the Secretary of State and the Equality and Human Rights Commission, that this is continued work in progress.

Ruth Crawford:

Well, the submission I'm going to make, and it's a short submission...

Lord Pentland:

We haven't heard what's happened...

Ruth Crawford:

No, we haven't.

Lord Pentland:

..post the letter from the Commission in April of this year.

Ruth Crawford:

And I'm not in a position obviously to advise this court in relation to that. I don't think there's been a consultation exercise yet set up. But clearly, there would require to be consultation if the United Kingdom Government was minded to look at this. I say, clearly there would be, I would be surprised if there weren't consultation, would be a better way of putting it. In my submission...

Lord Pentland:

There's bound to be consultation, extensive consultation. And that's acknowledged by the Commission.

Ruth Crawford:

Yes. I would submit that the letter of April this year from the Equality and Human Rights Commission is very much a pre-consultation, a scoping exercise as to what the government might want to look at. And it's really no more and no less than that. Yes, the Equality and Human Rights Commission can point to perceived difficulties. I have no difficulty with that as a broad submission, but that's the very issue which Parliament should be considering, if faced with proposed legislation. I should say that there are some passages in the Equality and Human Rights Commission letter, which perhaps may not be accurate as a matter of law, but I don't think I need trouble this court with going through the weeds of that letter and picking holes in it. That would be for another day in another context, if one was ever responding to a consultation exercise.

Lord Pentland:

I mean, it's possible to take the view that in a sense the reclaimers are suggesting, that all of that exercise, complex, consultative, legislative, should be skipped over and a new definition written into the Equality Act, by way of judicial legislation. I just say that's a possible take on it.

Ruth Crawford:

They would say, I'm sure in response to that, that no, because their construction of woman, means actual women. But as I've already submitted when opening, I think that very word actual gives rise to a number of difficulties. And I would caution, if anything else, this court from not using words such as actual before the word sex.

The submission, as I understand it, made by the reclaimers, is that you don't need that consultation because their definition of sex, actual sex has to be correct. And in my submission, my response to that is that that just ignores section 9, both 9(1) and 9(3). And if I can come on briefly to 9(1), obviously subsection (1) is subject to, as the words of 9(3) say, provision made by the Gender Recognition Act or any other enactment. And we see in the GRA itself a number of examples such as, most obviously section 12, which was the focus of the discussion in McConnell. That being parenthood. There is also section 20, which addresses gender specific offences. The GRA did, prior to the Equality Act, include section 19 addressing sport, and section 14, which was headed discrimination and giving effect to schedule 6. Both sections 19 and section 14 and schedule 6 were repealed by the Equality Act. But the Equality Act had nothing to say about section 9(1) and the effect of being issued a full GRC in the acquired gender.

There is nothing in my submission to suggest, far less express that the Equality Act, or put it this way, there's nothing to suggest or express that section 9(1) is subject to anything in the Equality Act, which means that section 9(1) has no effect, no bite, so far as the protections in the Equality Act are concerned relative to the protected characteristic of sex.

Lady Dorrian:

Well, Mr O'Neill points to the provisions in relation to pregnancy.

Ruth Crawford:

And I'm going to come on and discuss pregnancy, I might as well do it now. The pregnancy provisions which one can find in [section 17](#), amongst other places in the Equality Act, in my submission, the use of the word "woman" in those provisions is limited to those women who are pregnant and/or on maternity leave as the case may be. It is the protected characteristic of pregnancy and maternity which is one of the nine protected characteristics which gives rise to the protections in the Equality Act, not the protected characteristic of sex.

Pregnancy and maternity discrimination is not, should not be, equiperated related to sex discrimination. It is a separate category of discrimination subject to the provisions of the Equality Act. And insofar as one can look at the explanatory notes, we see that being referenced, drawing a distinction between pregnancy and maternity discrimination and sex discrimination. We see that in the explanatory notes, paragraph 73, in the appendix at page 43.

Lady Dorrian:

Well, it's all very well to say that. But if you look at [17\(2\)](#), for example you find that the way in which the discrimination is conceived to operate is that a person discriminates against a woman if treated her unfavourably because of a pregnancy of hers, and we see the similar wording in section [18\(2\)](#) I think as well. So the fundamental requirement to be discriminated against on the basis of pregnancy is to be a woman.

Ruth Crawford:

Yes, which takes me back to why I made something at the start of my submission, in that the legislator, both in enacting the 2004 Act and the 2010 Act, would not have in mind somebody who was acquiring the male gender then going on to become pregnant subsequent to that.

Lord Pentland:

Why do you say that?

Ruth Crawford:

Going back to the conditions, which are required before one can make an application to the gender recognition.

Lord Pentland:

You're saying it's because of the permanent theme.

Ruth Crawford:

And the pregnancy and maternity, obviously, is time limited, so again, the person has the full GRC of the male gender, it is assumed that they will continue to live as a man in that male gender.

Lady Dorrian:

Well, assuming for a moment that you're right about that, that it could be said that situation was not anticipated. Where does that leave us about the interpretation of section 17 and 18, which seem to make it quite clear that the fundamental basis for discrimination on the basis of pregnancy is to be a woman.

Ruth Crawford:

Well, I can only submit to this court that it is only biological, and again, I'm slightly edgy about using that word, biological woman who can become pregnant. But the discrimination is not because you're a woman, it's because of the factual state of being pregnant or on maternity leave, as the case may be. That does not, in my submission, affect the submission which I'm making in relation to the protected characteristic of sex, which will include those who have the acquired gender of male or female as the case may be, man or woman, as the case may be.

Lady Dorrian:

Can a person with a gender recognition certificate in the acquired male sex avail themselves of the protections against discrimination on the grounds of pregnancy?

Ruth Crawford:

Em...that first point, that's not what this case is about. But second point is, I think they probably could, yes. Because the submission I make it's to do with the fact about that person being pregnant, rather than that person's sex.

Lady Dorrian:

And in that situation, how would one interpret the word woman in section 17(2) and 18(2)?

Ruth Crawford:

Well, woman is not, in that context, a defined term.

Lady Dorrian:

Is it not?

Ruth Crawford:

I just want to check a reference there My Lady, sorry, having made that submission, I just, if My Lady bears with me one one...

Lady Dorrian:

I'm not saying you're wrong, I'm just asking for an explanation as to why you say that.

Ruth Crawford:

My Lady just bears with me one moment.

Lord Pentland:

Was it [section 212](#)?

Ruth Crawford:

I was looking at section 212, yes.

Lord Pentland:

It's 638 of the PDF. And I think, as Mr O'Neill stressed, Ms Crawford, subsection (1) provides these various definitions, apparently for the purposes of the entire Act.

Lady Dorrian:

Yep, "in this Act".

Ruth Crawford:

Well, that gives rise, if I may, to perhaps further confusion. And I'm not sure if this assists the courts or otherwise but a similar issue may well arise when one looks to [section 7](#) and the protected characteristic of gender reassignment, which the court will find on page 480 of the PDF.

Lord Malcolm:

Before we leave pregnancy in section 17, is it effectively what you're saying that there is arguably a gap, or a lacuna, in the legislation and it hasn't envisaged the GRC male becoming pregnant? Therefore, on that view, the answer to our Ladyship's question is: that person is not entitled to the protection of section 17?

Ruth Crawford:

That may be another way of putting it, My Lord. What I do submit, is it doesn't run counter to the submissions which I've been making thus far to this court.

Lord Malcolm:

Well, we'll understand that.

Ruth Crawford:

I was going to, in this context, and as I say I'm not sure if this assists, but one can see further difficulties perhaps, if one looks to the protected characteristic of gender reassignment which is in section 7, at page 480 of the PDF going on to page 481. 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. Of course, again sex is a defined term. So, gender reassignment is itself defined under reference to reassigning a person's sex protected characteristic. And if the process of gender reassignment is complete, ie with a full GRC, the person's sex protected characteristic has been reassigned. And they will share it with those who already have it, or have acquired it under the GRA. I don't pretend in any view that this is easy. But in my...

Lady Dorrian:

Tell me again what's the problem you say with section 7.

Ruth Crawford:

Well, it's not a problem as such, but again, if one's looking to the definition of gender reassignment, I would say it supports my argument because if the process of reassignment is complete, as it would be if you have obtained a full GRC your sex has been reassigned. Sex being a defined term you will be a man or a woman, as the case may be, as defined under the Equality Act, which is consistent, I would suggest, with submissions I've been advancing thus far to this court.

Lady Dorrian:

But the characteristic of gender reassignment refers to a person at any stage of the process.

Ruth Crawford:

It does. The short point I make, My Lady, if one has completed the process, which I would submit would be the case if a full GRC is issued, you of course will be entitled to the characteristic of gender reassignment, but your sex will also have been reassigned.

Lord Pentland:

In other words, someone with a GRC retains the protected characteristic of gender reassignment.

Ruth Crawford:

indeed. But their sex has been reassigned to use the words of section 7.

Lady Dorrian:

Why is that? Why does that cause an issue about interpretation?

Ruth Crawford:

It doesn't cause an issue so far as I'm concerned. But if one is looking at defined terms, sometimes it might be a bit difficult to work out what is the...goes back, I think, to a point made, it may have been by Lord Pentland or Lord Malcolm, that Parliament perhaps didn't fully think through all these...

Lady Dorrian:

A person who does not have a GRC but has the protected characteristic of gender reassignment will also be able to avail themselves of protections against discrimination on the grounds of sex in relation to the sex assigned at birth.

Ruth Crawford:

Correct.

Lady Dorrian:

That person,, that very same person, may then obtain a GRC in which case they remain able to avail themselves of the protected characteristic of gender reassignment, they remain being able to avail themselves of protections against sex discrimination, but not in the gender assigned at birth, in the gender acquired by means of the GRC.

Ruth Crawford:

That's my submission, My Lady.

Lady Dorrian:

So, I'm not sure how this fits in with the issue that the court was expressing concern about in relation to section 17 and 18.

Ruth Crawford:

Okay, well, I'll move on, if I may? Conscious of the time. I'm just checking my notes... I've already made the point that the United Kingdom Parliament in enacting the Equality Act must have been taken to, known in both the GRA in section 9 and we've looked at paragraphs 26 and 27. But I wonder if it might also be worth looking at paragraphs [24](#) and [25](#) in the same schedule, which the court will find at pages 664 and 665.

And just to get some context, the court might care to look just at the bottom of page 663. And we can see that this part, part 6, is addressing marriage and gender reassignment. Paragraph 24 on the next page is concerned with gender reassignment in England and Wales and it might be more profitable therefore to look at part 6ZA at the bottom of the page dealing with gender reassignment in Scotland. In paragraph 25, we see this: an approved celebrant does not contravene section 29, which is the provision of services section, so far is relating to gender reassignment discrimination, only by refusing to solemnise the marriage of a person B, if A reasonably believes that B's gender has become the acquired gender, under the Gender Recognition Act 2004.

Lord Malcolm:

Sorry, it's my fault. Which provision are we looking at just now?

Ruth Crawford:

Sorry, at the bottom of page 664 in the PDF and it's paragraph 25.

Lord Malcolm:

Paragraph 25.

Ruth Crawford:

Yes.

Lord Malcolm:

Thank you.

Ruth Crawford:

Now I would suggest that that's a clear indication of Parliament recognising the effect of the Gender Recognition Act. One will note the phrase "acquired gender" which is a phrase used in section 9(1).

Lady Dorrian:

This has to do with protecting religious belief, is it?

Ruth Crawford:

It is. But the point I take from it is that this is in the context of a certificate being issued. The phrase acquired gender we see in section 9(1) which is the section, as we know, dealing with the effects of a full gender recognition certificate. And I point to it as a recognition of Parliament being fully aware of the Gender Recognition Act and the effect of a full GRC.

Lord Pentland:

Parliament's always assumed to understand the pre-existing law.

Ruth Crawford:

Well, I'm sure that's correct.

Lord Pentland:

That is a principle of statutory construction. I believe.

Ruth Crawford:

I think that's probably right, but my learned friend, would say if there is any...well, he says, against me, that the Equality Act is a contrary provision to section 9(1) and contrary enactment to section 9(1), and I say, well if that as so, why do we see references such as this and why do we see, working through as we have thus far, various provisions in the Equality Act, if the Equality Act trumps, I think the word was used, in submissions this morning, section 9(1)?

Lord Pentland:

Did you understand Mr O'Neill's submission to be that the whole of the Equality Act trumps the 2004 Act, or only certain parts of it?

Ruth Crawford:

I think it was the whole, but I may be wrong. No doubt he'll tell us if I've misunderstood him incorrectly.

And again, just to perhaps hammer home the point under reference to paragraph 25. This phrase "has become the acquired gender" is a phrase which is used in subsequent provisions in the Gender Recognition Act, for example, section 12, which I already referred to.

Turning if I may to the equality of terms provisions, to which I think some reference is made at least in the note of argument for the reclaimers, those being [section 64 through to 71](#) of the Equality Act. And also section 78, which for the courts note can be found at page 523 and following. I have a short submission to make in relation to those provisions, which will perhaps come as no surprise, namely that a woman with a full female GRC would be entitled to the protections afforded under those provisions. There is nothing in those provisions which indicates that they only apply to born slash actual women, whatever is meant by that phrase. And indeed, if the intention is as we know it is, under section 2 of the GRA to live in the female gender for life it would be entirely appropriate and proper for those women to be entitled to the protections afforded under the equality of terms provisions. Likewise, and perhaps more immediately relevant to the issue before this court, which of course has to do with the meaning of women in the 2018 Act, there is nothing I would submit extraordinary about the proposition that a woman with a full GRC is entitled to the positive measures we see in the 2018 Act.

A similar point can be made in relation to [section 104](#). For the court's notes, that's page 550, which concerns shortlists for parliamentary election. In my submission, there is nothing irrational or absurd about applying those provisions to persons who have a full GRC of the acquired female gender.

Likewise, regarding [section 193](#), page 627 of the PDF and providing charitable benefits. There is nothing extraordinary or irrational in providing benefits to women, including those who have a full female GRC. That is, I would submit, proper consequence of section 9 and reflecting the process of applying for and obtaining a full GRC.

Something was said again about the protected characteristic of sexual orientation which is set out, as defined I should say, in [section 12](#), page 482. The response I have to make in

relation to that discussion is that the protected characteristic of sexual orientation is there to protect the person who has that orientation, it is directed towards that person's attraction to a class of persons whether that class be of opposite sex, same sex or both sex it is not directed towards any individual within that class of person.

Lady Dorrian:

And...sorry.

Ruth Crawford:

Sorry, My Lady, could you please continue?

Lady Dorrian:

No...please. I will, if you're going to move on to something else.

Ruth Crawford:

I was going to continue just developing that section 12 point if I may.

Lady Dorrian:

HmMmm.

Ruth Crawford:

The section 12 protected characteristic is not in any way affected by the proposition that one's sex is that of an acquired gender under the GRA. Those who obtained a full GRC in an acquired gender may still have a sexual orientation which they may or may not share with others. Those other's sexual orientation is not changed by the fact a person may have changed, reassigned, their sex. Those others may not be attracted by such a person but that does not alter their own sexual orientation.

Lady Dorrian:

Well, I was going to say that I had some difficulty with understanding your submission on the letter by the Equality and Human Rights Commission in relation to this point. Do you want to say anything about that?

Ruth Crawford:

Well, I wasn't going to look at the letter in any great detail.

Lady Dorrian:

Page 272 of the appendix.

Ruth Crawford:

I think I've said earlier in my submissions that in my, sorry, My Lady, what was the page again?

Lady Dorrian:

272 of the appendix.

Ruth Crawford:

Thank you. I was going to suggest, earlier I did suggest that there were some I would suggest errors in the letter, and I'm just looking what they say about sexual orientation. Yes, the freedom of association for lesbians and gay men. I simply don't understand that. And I certainly don't understand the concept of this idea of being legally lesbian. I just, there's not much I can say here. I think that paragraph makes little or no sense.

Lady Dorrian:

I mean, it's replete with terms which have no actual meanings, as far as I can see.

Ruth Crawford:

Correct, correct. And I doubt there's much benefit in this court to trying to work out exactly what it is that the Equality and Human Rights Commission may be driving at in that paragraph. With respect to the EHRC, this may be an overblown concern on their part. In my submission, it fails to understand the protected characteristic of sexual orientation as set out in section 12.

Lady Dorrian:

And then, I mean, I know you don't want to dwell on this, but I think it's worth having at least a quick look at this, because whilst there may be an issue here about the issue of pregnancy, and we've covered that, they refer to other issues here, and the next one they refer to is a woman's book club. And a woman's book club may have to admit a transwoman who's obtained a GRC. Well, if they mean by that, that a person who has obtained a GRC with the acquired gender female would be entitled to avail themselves of access to some single-sex services, for example, and a woman's book club might be one, then that is so, but there are carveouts, as we've just seen, in schedule, 3, where the proportionality of that would be inappropriate. So, and as Mr O'Neill said, this is perhaps a rather trivial example compared to some of the other examples that can be given such as the ones he referred to, but in the ones that he referred to, there's a legitimate carveout that would stand with the definition that you're proposing.

Ruth Crawford:

Correct. Again, it's fairly trivial but this idea of the women's book club, again, there's a specific provision, perhaps my learned junior can find it in relation to membership, and the services provisions in the Equality Act don't apply to associations of less than 25 members. So again, fairly trivial, but it's...

Lady Dorrian:

It wouldn't arise anyway.

Ruth Crawford:

Indeed. I'm not aware of many book groups which are over 25. It would be unworkable. Certainly the one which I'm a member of...

Lady Dorrian:

No, who knows. But there are more formally organised ones, organised perhaps by libraries or other bodies. But equally the next one that they deal with, positive action, and they use the term, and I know Mr O'Neill was critical of this as well, about the transwomen reference,

but essentially what they're saying here is, the complaint, if you like, is that a person with a gender recognition certificate in the acquired female gender could benefit from women-only shortlists and other measures. Now that's directly relevant to the issue that we're addressing. So far, so good, perhaps. But then they say, and this appears to be the nub of the complaint, that a person with a gender recognition certificate in the male gender could not. And they suggest that this is an anomaly. But on what basis would that be an anomaly? That a person with a GRC in the male gender, living as a man, intending to live as a man, could not access women-only shortlists and other positive measures aimed at increasing female participation?

Ruth Crawford:

Precisely. I would agree. I don't see that as an anomaly. That is a valid decision on the part of the man, the person with the male GRC, wants to, has declared, they wish to live for life as a man. What is anomalous about them not being able to then join a woman-only shortlist. That is not how they want to live their lives.

Lord Pentland:

These are examples of what the Commission says is a lack of clarity in various areas, but according to your submission, there's no lack of clarity.

Ruth Crawford:

There's no lack of, people may disagree with the legislative choice...

Lady Dorrian:

Do you accept there's a lack of clarity in relation to any of these?

Ruth Crawford:

Other than perhaps the pregnancy one.

Lady Dorrian:

But the other ones, the occupational requirements, single-sex, separate services, sports, data collection. Do you accept that there is an issue in relation to any of these?

Ruth Crawford:

No, I don't. Frankly. I accept that it's an issue which is clearly a public interest and people may disagree with the legislative choice which has been arrived at both in the 2004 Act and the 2010 Act. But that's not for this court. And I recognise this as a very active debate. But it's for, frankly, our legislatures to work out if they think there is a problem in relation to the bounds which has thus far been struck on these very difficult, very sensitive issues.

Lord Pentland:

Not so much that there's a lack of clarity under the existing law, it's that the Commissioner suggesting that it may be appropriate, essentially, to change the existing law, quite fundamentally, by adopting an entirely different definition, namely what they describe as a biological definition. Of course, that would then have a number of consequences for each of these areas.

Ruth Crawford:

And Parliament's perfectly entitled to think yes, we think what's the law, current law is wrong, perfectly entitled to change the law. This court, of course, is not entitled to do that. This court requires to construe the 2010 Act having regard to the effect of a full GRC.

Lady Dorrian:

The other side of the coin on this letter, I'm sorry to...

Ruth Crawford:

No, no, My Lady's obviously interested in it.

Lady Dorrian:

Well, we were taken through it in some detail. That the other side of it is they say that the change which they're suggesting, and it's largely the change, which Mr O'Neill is urging on us as the appropriate meaning of the definition, would be more ambiguous or potentially disadvantageous in three areas. And they refer to equal pay provision, direct sex discrimination and indirect sex discrimination. Now this is the other side of the coin, do you have anything to say about whether this element of their submission has merit? In other words, if Mr O'Neill's submission were accepted, would that lead to ambiguity or disadvantage in relation to any of these?

Ruth Crawford:

No, I would submit not. The only way it leads to a disadvantage is if you have a particular view about the rights which you think somebody with a full GRC in an acquired gender should or should not be entitled to under Equality Act provisions.

Lord Malcolm:

The theme of this letter, as I understand it, I could be entirely wrong, is that the Commissioner has set all these examples out but they preface this by saying that, in their view, rightly or wrongly, whatever the law is saying about all of these carveouts, in practice people have been finding it very difficult to operate them.

Ruth Crawford:

Well, the obvious riposte to that is, well, we've had the Equality Act since 2010, we've had the GRA since 2004. Other than perhaps this recent legislation, I'm not aware of many problems which had been experienced over the last almost 15 years, when one looks to the 2010 Act.

Lord Malcolm:

Well, they say it has not been straightforward for service providers and employers to apply to the law including in areas such as sport and health services.

Ruth Crawford:

I would respectfully submit, noting, of course, who this letter was written by, the Equality and Human Rights Commission, that that is assertion and one would be looking for a bit more evidence to back that up.

Lord Pentland:

The other development which the Commission alludes to and regards as significant in this context, Ms Crawford, is that rather contrary to the absolute position reflected in Section 9(1), many trans people, to use their term, today would not describe themselves in fact as transitioning from one sex to another, but rather as having a more fluid gender identity without reference to a binary gender identity. That's the context in which this contribution to the debate is made.

Ruth Crawford:

And we're not dealing with that fluid situation, we're dealing with the person who has the full gender recognition certificate in an acquired gender, not dealing... We know this is a difficult, sensitive area. And life perhaps is not as simple as it might have been in previous decades. But if somebody declares they wish to live in an acquired gender for death, they can, if so advised, apply for a gender recognition certificate, which has effects. If you just wish to explore your gender, you're perfectly entitled to do so but you will not acquire the gender and therefore the sex of the acquired gender.

Lord Pentland:

But you will have the protected characteristic...

Ruth Crawford:

Protected characteristic of gender reassignment. You are not allowed to be discriminated against because you are doing that, because you are that person. But that's not the situation we're confronted with here in this case.

Lady Dorrian:

Yep, so we've rather taken you out of your...

Ruth Crawford:

No, no, not at all. Not at all. The short point I was going to make on the on the letter was that, if anything this is no more than scoping out what might be seen in a consultation exercise. In my submission, it displays a number of errors and perhaps posits a number of problems which don't actually exist, unless, of course, you disagree with the idea, the idea is the wrong way of putting it, unless you disagree with the fact that Parliament has legislated in the manner that I say it has.

Lord Pentland:

The Secretary of State asked the Commission for their considered advice of the advantages of the possible amendment to the current definition of sex. What we've got in the letter, the Commission explains, is simply their initial response. It's not their considered view.

Ruth Crawford:

And I think the Commission makes that plain.

Lord Pentland:

Yes. And they say should the government wish to pursue work in this area we recommend detailed policy and legal analysis. So it's really just an initial view about some of the difficulties and issues which may have to be addressed.

Ruth Crawford:

And we can see scrolling down, this is part of their strategic plan, apparently, noting that sex was important to the highest proportion of respondents and that many respondents were concerned about the interaction between the protected characteristics of gender reassignment and sex. And then we note their strategic plan. But again, one then looks to how they spell out what they see is the interaction between protected characteristics of gender reassignment and sex. None of the suggested difficulties which they set out as by way of their initial response, in my respectful submission, are actual difficulties. They are actual difficulties if you disagree with the fact that Parliament has legislated in the manner I say it has under section 9 of the 2004 Act.

I've already obviously made my submissions on the pregnancy provisions. And we've looked at sections 17 and 18. But I do place some emphasis on the phraseology that it's because of a pregnancy used in the subsections in those sections, but I think probably I've made all the submissions I need to make, other than emphasising that point in relation to the pregnancy provisions. I'm not sure if I need to say anything about this idea of implied repeal and Mr O'Neill's fourth ground of appeal. I'm not quite sure where Mr O'Neill ended up on that ground. With a short point I have to make if it's still being insisted upon, is this: that it's clear that the GRA and the Equality Act address different purposes. The GRA, as we know, prescribes the circumstances and the effect of acquiring a different gender and the Equality Act is of course, a general equality measure.

I do take issue with the suggestion or proposition that the GRA is just concerned as between state and individual. Obtaining a full GRC, I would submit, goes to the very heart of an individual's identity, as I submitted in opening, and it has, subject to the GRA itself and other enactments, it has effect for all purposes that the person's sex becomes that of the acquired gender. That is not simply a bureaucratic or administrative provision. And it's hardly surprising having regard to the Strasbourg jurisprudence explaining that one's identity is a very important part, of course, of one's right to private life under Article eight.

This court has been provided with an intervention by Sex Matters Limited and I wonder if I may make a few points in relation to that intervention. The first and most obvious point is that the reclaimers in this case do not have a challenge to the legislation which we're concerned with, the 2018 Act, on convention grounds. But so far as the intervention is concerned, there's much said in that intervention about various rights of those who would describe themselves using Mr O'Neill's terminologies, actual women, or men as the case may be. But there is strikingly no acknowledgement of the impact on persons who have been issued with the full GRC and their convention rights.

In any event this court, and I'm sure it wouldn't, but this court is not in a position to assess the compatibility of the 2018 Act in the abstract for each and every case, almost or always, and there's no basis provided for it to do so. Of course, in another case, if any person was of the view that their particular circumstances amounted to a breach of their convention rights It would be open to them to challenge that. Again, in addition to caution this court against using words such as actual sex, I would caution this court against saying anything in relation to convention rights and the compatibility of this legislation with convention rights.

Lord Pentland:

It's of some interest perhaps that at the end of the submissions for the intervenors they acknowledge that it may be the case that the matter can only definitively be resolved by way of legislative amendment to remove ambiguity about whether Parliament intends for a GRC to change a person's sex the purposes of the Equality Act.

Ruth Crawford:

Well, if that is...

Lord Pentland:

That's the conclusion.

Ruth Crawford:

Yes. And that is not something for this court. Obviously.

Lord Pentland:

They say they would very much favour this court expressing as much in its decision.

Ruth Crawford:

Well, again, I would very much caution this court against expressing a view as to how they think Parliament might wish to legislate. This court ought to construe the meaning of woman in the 2018 Act. But this court ought not to go further than that.

Mr O'Neill referred to various other statutes and the some general submission I make in relation to those other statutes is a short one that they afford no assistance to this court in construing the meaning of woman in the 2018 Act and also in the Equality Act. They do, perhaps, evidence examples of a contrary provision being contained in other enactments. Therefore, section 9(3) of the 2004 Act, Gender Recognition Act, would apply and section 9(1) would not operate. But that is really all in my respectful submission, one can say about those other statutes. They certainly do not afford assistance to this court so far as the proper construction of women in the 2018 Act is concerned, and more particularly, whether the Scottish Ministers acted unlawfully in the guidance at paragraph 2.12.

And with that final comment, unless there's anything else I can assist the court on, I would simply renew my motion, this reclaiming motion should be refused.

Lady Dorrian:

Thank you. I have nothing further to ask Ms Crawford. No. No, we have nothing further to ask. We're obliged for the submissions which have been made.