Case No:
UKSC 2024/0042

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM

THE SECOND DIVISION OF THE COURT OF SESSION

in the Petition of

FOR WOMEN SCOTLAND LIMITED

PETITIONER AND APPELLANT

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

APPELLANT'S SPEAKING NOTE

AB = Authorities Bundle Tab
App = Appendix Tab
CV = Core Volume Tab
EF = Electronic File Number page
SA = Supplementary Appendix Tab

1. INTRODUCTION

1.1 At the outset the appellant formally adopts in full their written Case **CV Tab 6 EF pages 151 to 201**. The appellant also endorses and agrees with submissions made in the Written Intervention on behalf of the first interveners Sex Matters **CV Tab 8 EF pages 243 to 262**. And the appellant also agrees with and endorses the submissions made by the second interveners, Scottish Lesbian and others **CV Tab 9 EF pages 263 to 282**. On the basis of what is already contained in its written Case and as will be set out in its oral submissions, the appellant ask this court to uphold this appeal.

1.2 The appellant disagrees with the analysis - and disputes most of the arguments - set out in the Statement of Case for the Scottish Minsters and the Lord Advocate **CV Tab 7 EF pages 203 to 242** and in the Written Intervention of the fourth intervener Amnesty International UK **CV Tab 11 EF pages 420 to 439.**

1.3 The appellant notes that only this written intervention from Amnesty International - somewhat surprisingly given that organisations' original area of expertise and public involvement - made *no* reference to how its preferred interpretation of "sex" as meaning "certificated sex" might have an impact on issues around women's incarceration and the preservation of women's only prison accommodation, particularly against the background that the Strasbourg Court itself has repeatedly has referred to and taken account of "the various European and international instruments addressing

> "the needs of *women* for protection against *gender-based violence, abuse and sexual harassment in the prison environment*, as well as the needs *for protection of pregnancy and motherhood*". [1]

1.4 As regards the Written Submissions for the Commission for Equality and Human Rights **CV Tab 10 EF pages 398 418)** the position of the appellant is that, while it contains much that is valuable and useful on the issue of the essential unworkability of much of the EA 2010 if "sex" is taken to mean "certificated sex", its arguments for its conclusion that "sex" in the EA 2010 nonetheless still does mean "certificated sex" are

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[1] See e.g. *Khamtokhu v. Russia* (2017) 65 EHRR 6 at **AB 72 EF page 2805 at 2827 § 82**:
> "[I]n so far as the applicants felt aggrieved by being treated differently from adult *female* offenders of the same age group as theirs (18–65) and who were exempted from life imprisonment on account of their gender, the Court has taken note of various European and international instruments *addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood*: [viz. the UN Rules for the Treatment of Women Prisoners and Non-custodial measures for Women Offenders (the "Bangkok Rules"); and the Committee of Ministers of the Council of Europe 11 January 2006 Recommendation Rec(2006) to Member States on the European Prison Rules]."

fundamentally flawed and cannot be relied upon, and should be rejected by this court (along with the arguments to similar effect from the Scottish Minsters/Lord Advocate) and Amnesty International.

1.5 In what follows in these oral submission the appellant will mainly seek to highlight why it is that the Scottish Ministers/EHRC/Amnesty International insistence that "sex" in the EA 2010 (and the related terms of "woman" and "man") references "certificated sex" is just *wrong* and should be rejected by this court.

1.6 The court should instead find in favour of the appellant/Sex Matters/Scottish Lesbians conclusion that, in the EA 2010 "sex" just means "sex", as that word – and the words "woman" and "man" are understood and used in ordinary everyday language used every day and in everyday situations by ordinary people. For as Lord Hope observed in ***Imperial Tobacco v. Lord Advocate*** [2012] UKSC 61, 2013 SC (UKSC) 153 at § 14 [**AB Tab 40, EF Page 1781 at 1787**]:

> "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."

2. THE QUESTION BEFORE THIS COURT

2.1 The purely *legal* question before this court is on its face beguilingly straightforward and (for those who like that sort of thing) apparently wonderfully black letter with one right yes or no answer.

2.2 It is this:

(A) Does the *legal fiction* set out in Subsection 9(1) of the Gender Recognition Act 2004 ("GRA 2004") [**AB Tab 99, EF Page 3840 at 3875**] (to the effect that on the issue of a full gender recognition certificate ("GRC") that an individual's "acquired gender is the female gender" then "the person's *sex* becomes that of a *woman*", and conversely that on the issue of a full gender recognition certificate that an individual's "acquired gender is the male gender" then "the person's *sex* becomes that of a *man*") *apply* to the words "sex", "woman" and "man" whenever these are used in the Equality Act 2010 (EA 2010) ?

- The position which is taken by the respondents the Scottish Ministers - and by two of the interveners before this court (the Commission for Equality and Human

Rights and Amnesty International) - is that Subsection 9(1) GRA 2004 applies and requires that the words "sex", "woman" and "man" whenever these are used in the Equality Act 2010 are now to be understood as referencing a new category, created by application of the legal fiction set out in subsection 9(1) GRA 2004, of "certificated sex".

- That is to say your "sex" - whether you are a "man" or a "woman", a "girl" or a boy" - is determined by whatever it says on your birth certificate; whether this is the *unaltered* birth certificate as originally issued at birth, or as that birth certificate has subsequently altered because the individual has been issued with a gender recognition certificate under the GRA 2004

- That means, according to the Scottish Ministers and their supporting interveners, that the word "woman", throughout the EA 2010, is to be understood as meaning, by operation of the Section 9(1) GRA 2004 legal fiction:

  (1) any *woman* who does *not* have a gender recognition certificate, regardless of whether she has the EA 2010 protected characteristic of "gender reassignment";

  together with

  (2) any *man* who *has* been issued a gender recognition certificate to the effect that their "acquired gender is the female gender"

  and to *exclude*

  (3) any woman who *has* been issued a gender recognition certificate to the effect that their "acquired gender is the male gender";

  along with

  (4) any man who does *not* have a gender recognition certificate, *regardless* of whether he *has* the EA 2010 protected characteristic of "gender reassignment"

OR is it, instead, the case (as the appellants, For Women Scotland - and the interveners Sex Matters and Scottish Lesbians - all say)

(B) Subsection 9(3) of the Gender Recognition Act 2004 [**AB Tab 99, EF Page 3840 at 3875**] (which states that the application of the subsection 9(1) legal fiction's construct of "certificated sex" "is *subject to provision made by* [i] this Act or [ii] *any other enactment* or [iii] any subordinate legislation") applies in the case of the EA

2010 and mean that the words "sex", "woman" and "man" whenever these are used in the EA 2010 are ***untouched*** by the subsection 9(1) GRA 2004 legal fiction of "certificated sex", and instead bear their ordinary language and common law meanings which reference the ***facts*** of biological reality (rather than the ***fantasies*** of legal fiction).

- That is to say your "sex" - whether you are a "man" or a "woman", a "girl" or a boy" - is determined, from conception *in utero* even prior to birth, by your ***body***. And is an ***immutable*** biological reality.

- So, *for the purposes of the EA 2010*, a woman ***remains*** a woman even if she has the protected characteristic of gender reassignment, and even if she has been issued with a gender recognition certificate stating the legal fiction that her "acquired gender is the male gender";

- And equally, *for the purposes of the EA 2010*, a man ***remains*** a man even if he has the protected characteristic of gender reassignment and even if he has been issued with a gender recognition certificate stating the legal fiction that his "acquired gender is the female gender".

2.3 In sum does the subsection 9(1) GRA 2004 legal function triumph in and throughout the EA 2010 (as the Scottish Ministers, the EHRC and Amnesty International all claim) or does subsection 9(3) GRA 2004 saves the day for *biological reality* (or, as For Women Scotland, Sex Matters and Scottish Lesbians submit)

2.4 And let me make it plain at the outset it is not "*transphobic*" for For Women Scotland and Sex Matters and Scottish Lesbians to make that argument. The burden of their submissions is that it could never have been Parliament's intention that the application of the EA 2010 should result in absurd or nonsensical outcomes. They submits that the only course which ensure that the EA 2010 provisions (particularly those relating to women rights and protections) can and do work as intended by Parliament is for this court to uphold the appellant's argument (and paradoxically they appear to be supported in this last contention by the EHRC).

2.5 All that will be developed later. Because - as this court will doubtless be sick of being reminded – in the law ***context*** is everything.[2]

[2] In ***R (Daly) v Secretary of State for the Home Department*** [2001] 2 AC 532 Lord Steyn famously observed (in §. 28) that "*in the law, context is everything*" **[not produced]**

3. THE OMNIPRESENCE OF PATRIARCHY

3.1 From the outset of this part of my submissions, I have to ask the forbearance of Lady Rose and of Lady Simler as I attempt, in some introductory scene-setting remarks, to "mansplain feminism" to the remaining 60% of the bench.

3.2 The context of this case is that women do ***not*** start from a position of being on a level playing field with men. Women start from a position of being the heirs to institutional discrimination by and in the law. They start from a position in which:

- just being a woman was accounted to be a form of legal *disability*;
- the law refused to recognise that women had any *independent* agency;
- the law *deemed* that women could not be trusted even to look after their own interests;
- if and insofar as the law did allow them to conclude contracts or to own property is was only with the consent and concurrence of the ***man*** whom the law stipulated and imposed on women as their "guardian" (whether their father, husband, brother or other nearest relative)
- women were *barred* from taking up any public office
- women were excluded from being admitted any of the liberal professions; and
- of course women were denied the right to vote.

3.3 Of course one might say (if one is a man), that we are so much more enlightened now. That the law has now been changed to recognise and reflect the fundamental ***equality*** of women and men. That all these historic injustices formally perpetrated by the law against women have been righted. And that we live in a world where instead where what has been outlawed is discrimination in its multiplicity of forms: not only discrimination against women, but discrimination against men; race discrimination; discrimination against those who identify as "trans"; discrimination against the disabled, sexual orientation discrimination; discrimination against the married; pregnancy and maternity discrimination; age discrimination; discrimination because of religion or belief. Even inequalities of outcome which result from socio-economic disadvantage are now covered by the Equality Act 2010.

3.4 Ultimately we can ***all*** pray in aid the protection of anti-discrimination law, even those among us who identify as late middle-aged, upper middle-class, privately schooled,

Oxbridge educated, Christian, well-off white men. After all, apart from anything else, public schoolboys are very much a *minority* in this country.[3]

3.5 But as we have seen the impetus for equality law started off from the manifest inequalities expressly imposed for centuries *by the law* on *women*. And the law has what we may call a "muscle memory" in the common law as interpreted and applied by the *judges*. It is the judges who, through the constant development of case law across centuries of adjudication, created, gave effect to and maintained those legal rules to disempower women and keep them subordinate.

3.6 It is only *women* as *women* who as a group have had the common law historically skewed against them in this way. As Lord Neaves put it in ***Jex-Blake* v. *Senatus of the University of Edinburgh*** (1873) 11 M. 784 **AB Tab 8 EF page 921 at 968-969**

> "[T]he case is put of an abstinence from University study by Roman Catholics, Jews, Indians, or negroes. It is asked, 'Can it be said that the University could not, by vote and resolution, have admitted these persons ?' In my view of the matter no vote or resolution would be needed for such persons ; they *would be admitted as a matter of course*, because *no legal principle could be assigned for excluding them*.
>
> The *general law* does *not* make any distinction of religion in matters of *right*, and, where the national will does so, it operates by imposing a *test* upon admission. Where there is no test there is no foundation for a plea of exclusion.
>
> As little, and perhaps even less, can it be said that there is any ground for excluding students in respect of the colour of their skin.
>
> But the material element of consideration here is, that the law does recognise the difference of sex as an established and well-known element, leading sometimes to the exemption and sometimes to the absolute exclusion, of women from a variety of duties, privileges, and powers.
>
> The Roman law, the great parent of our own system, laid this down in the clearest and strongest manner:-
>
> > *'Feminae ab omnibus officiis civilibus vel publicis remotae sunt: et ideo, nece judices esse possunt, nee magistratum gerere, nec postulare, nec pro alio intervenire nec procuratores existere.'* [4]
>
> [which being translated:
>
> > Women are debarred from all civil and/or public functions/offices and therefore cannot be judges or perform the duties of magistrates or bring a lawsuit, or intervene/stand surety for others, or act as procurators/attorneys before the court]
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> To a great extent this has *always* been our own law."

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[3] Although if only 7% of the UK population were educated privately, then having even *one* former public schoolboy on the court could be said to be their over-representation.

[4] Digest 50.17.2 Ulpianus *On Sabinus* Book 1 (D 50.17.2 pr Ulpianus libro primo ad Sabinum)

3.7 So when approaching questions of statutory interpretation and the interplay of the legislation at issue in this case (the Gender Recognition Act 2004, the Equality Act 2010 and the Gender Representation on Public Boards (Scotland) Act 2018) all of which *directly* impact upon women's rights, this court has to be aware of, and guard against, and counter the inevitable and insidious pull towards Patriarchy which would *favour*:

- an *interpretation of the law* whereby *men's* concerns are given precedence, and *women's* rights compromised;
- an interpretation of the law which ignores or discounts its *adverse* impact upon *women*
- an interpretation of the law in which the woman's perspective is not *seen*, and women's voices are not *heard*.

3.8 The South African Constitutional Court got things rights when it stated in ***Rahube v. Rahube*** [2018] ZACC 42 [2019] 1 LRC 541 **AB Tab 86 EF page 33362**at § 74 **EF page 3387** that:

> "*when enacting remedial legislation, Parliament must be aware of the historic omnipresence of patriarchy which will otherwise undermine even the noblest of legislative endeavours*".

3.9 Two fish are swimming along a stream. One says to the other: "The water is nice today"; the other replies: "What's water ?".

3.10 A man and a woman walk into this courtroom this morning. The woman says to the man: "The patriarchy is out in force today"; the man replies: "What's Patriarchy ?"

3.11 She says

> "the fact that you have a bunch of mainly men arguing before a bench made up with a majority of men about what a woman is, and in particular: whether the law says 'you are *not born* a woman (as if to echo Simone de Beauvoir), the *law makes* you one". And that, therefore being a 'woman' is a purely *legal* category, which *men* can *gain*, and *women* can *lose*."

3.12 But for a man this is just the normal state of affairs. There is nothing to see here. We happen all to be gathered here because this is just another knotty interesting legal question for the country's top court to unravel, after it has heard rational and objective argument largely from men on this issue. And the fact that it is mainly men who are arguing the point, and predominantly men who are deciding it, is just the way the world is.

3.13 The paucity of women's voices being heard before this court on the issue of "who is a woman (and why)" is instead said to be "complex" and "multi-factorial"; but is certainly *nothing* to do with male privilege, male entitlement. It is just that, *magically* men's, seem to have a greater ability to access, to navigate and to master the professional networks that end up with ***you*** speaking before, or sitting on, the Supreme Court.

3.14 Well that's Patriarchy. And the men who will be heard arguing from this front bench here on the question of what a woman is, and the men deciding on that issue from the judicial bench are all the ***beneficiaries*** of it. We are all implicated in this, me as much as the next *man*.

3.15 So Patriarchy, from the perspective of men in position of power in our society, is simply what is normal and in the natural order of things. It is both how things are, and how they were *meant* to be. It all just reflects "common sense". And the "common law" may be seen in many ways as simply the accumulated and institutional ingathering of this collective male "common sense", honed over the centuries and applied to a wide variety of situations (yet always, unspoken and unacknowledged, from the position and perspective of Patriarchy).

3.16 But as Baroness Hale, speaking extra-judicially, put it pithily in 2005 (in an essay published in the *Irish Jurist*:

> "One ***man's*** common sense is another ***woman's*** hopeless idiocy." [5]

3.17 The justice of this remark is quickly revealed when looking at how male judges have applied and enforced ***their*** Patriarchal presumptions (while clothing them as ***objective*** fundamental constitutional principles which inform the common law and which are reflective sheer common sense) to cases in which women have resorted to law and sought the courts' assistance to try and counter Patriarchal assumptions and Patriarchal norms applied against them ***as women***.

3.18 And it is necessary exercise to raise and air these older decisions before this court in this case, because those who ***cannot*** or ***will not*** remember their history, are doomed to repeat it (and that is what we don't want to happen here). And as it was put (again extrajudicially) by the US Supreme Court Associate Justice Louis Brandeis in 1913:

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[5] Baroness Hale "Law Maker or Law Reformer: What is a Law Lady for?" (2005) 40 *Irish Jurist* 1-16 at page 4

> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." [6]

3.19 Thus in ***Jex-Blake* v. *Senatus of the University of Edinburgh***, (1873) 11 M. 784 **AB Tab 8 EF page 921** the Court of Session sitting in grand plenum (by a majority) struck down Regulations which the university's governing authorities made in 1869 to admit women as medical students and making provision for these women to be taught medicine by university professors in separate women's-only classes. These regulations were held to be ultra vires the university authorities on the basis that that the Universities of Scotland had been instituted and maintained for the special and exclusive purpose of conferring the benefits of the higher education upon and only *men*. Lord Neave observed by way of his "justification" for this decision (at **EF page 970, 972)**

> "I should regret to see our young females subjected to the severe and incessant work which my own observation and experience have taught me to consider as indispensable to any high attainment in learning.
> ...
> "[T]he Universities were *not* instituted for *them*; though women would undoubtedly receive *indirectly* the benefits the Universities were *calculated to confer*, in making better *men* of their fathers, their brothers, their husbands, and their sons.

3.20 Staying with the universities, by Sections 9, and 27 to 41 of the Representation of the People (Scotland) Act 1868 Parliament reintroduced the pre-1707 union practice into Scotland of Parliamentary constituencies for the Scottish universities. The voters in these university constituencies were the Chancellor, the Members of the University Court, and the Professors for the Time as well as graduates (no matter where now resident) of any of the universities of St. Andrews, Aberdeen, Glasgow or Edinburgh. In 1889 Parliament passed the Universities (Scotland) Act 1889 which at last *allowed* women (notwithstanding Lord Neave's, among others', expressed concerns in *Jex-Blake*) to matriculate as students in Scottish universities. In ***Nairn v. University of St. Andrews***, 1909 SC (HL) 10 **AB Tab 30 EF page 1497** a group of women graduates from the university of St. Andrews and from the university of Edinburgh relied on these statutory provisions to argue that, by virtue of their being "persons" (that term was used in Section 28 of the Representation of the People (Scotland) Act 1868) who had duly graduated they were now entitled to vote in the Parliamentary elections for their university constituency. The Lord Chancellor (Robert Reid, the 1st Earl Loreburn) **EF page 1499, 1500** expostulated:

> "It is *incomprehensible* to me that anyone acquainted with our laws or the methods by which they are ascertained can think - if indeed anyone does think - there is *room*

[6] Louis Brandeis "What publicity can do" *Harper's Weekly*, 20 December 1913 **[not produced]**

for argument on such a point. *It is notorious that this right of voting has in fact been confined to men.*

...

It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process.

It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from *the unguarded use of a single word*, or that the language used in statutes *is so precisely accurate that you can pick out from various Acts this and that expression, and skilfully piecing them together lay a safe foundation for some remote inference*."

And Lord Roberston (concurring) in ***Nairn v. University of St. Andrews***, 1909 SC (HL) 10 **AB Tab 30 EF page 1497** said at **EF page 1503**:

"I think that a judgment is wholesome and of good example which puts forward subject matter and *fundamental constitutional law as guides of construction, never to be neglected in favour of verbal possibilities*."

3.21 The *Napier* decision was perhaps prefigured in the "whole court" (five judges sitting in the Second Division of the Inner House of the Court of Session) ***Hall v. Incorporated Society of Law-Agents in Scotland*** (1901) 3 F. 1059 **AB Tab 9 EF page 981** on the question of women's entitlement to qualify as solicitors in Scotland it was held by that while the Court was authorised under the Law Agents Act 1873 to admit "persons" as law-agents in Scotland, for these purposes women were *not* "persons".

3.22 And the same result under different legislation was reached by the Court of Appeal of England and Wales in ***Bebb v. Law Society*** [1914] 1 Ch. 286 **AB Tab 19 EF page 1205** where the court held that women were *not* "persons" for the purposes of being admitted as solicitor under the Solicitors Act 1843, notwithstanding that section 48 of that Act provided that "every word importing the masculine gender only shall extend and be applied to a female as well as a male". Phillimore LJ observed in his justification of the court's decision as follows **EF page 1218**

"A difficulty ... at once arises if a woman is to be admitted an attorney or a solicitor, because it is clear that *married* women - not having an absolute liberty to enter into binding contracts, binding themselves personally - would be unfitted either for entering into articles or for contracting with their clients.

Well, it is true that that difficulty does not apply to *single* women, *but every woman can be married at some time in her life*, and it would be a serious inconvenience if, in the middle of her articles, or in the middle of conducting a piece of litigation, a woman was suddenly to be disqualified from contracting *by reason of her marriage*."

3.23 In ***Short v. Poole Corporation*** [1926] Ch. 66 **AB Tab 20 EF page 1219** the Court of Appeal confirmed that statute (the Education Act, 1921) did not constrain or

render unlawful a local authority's policy to dismiss women from the workforce when and because they married, with Sargant LJ noting **EF page 1247**:

> "*A mere decision to discontinue the employment of married women teachers, or of any women teachers at all, or a decision to employ women teachers only, could not, in my judgment, be interfered with by the Courts*, however mistaken such a decision might appear to be. *It is quite conceivable that the majority of a popularly elected body might genuinely consider that such a policy was beneficial*."

3.24 And in ***Roberts v. Hopwood*** [1925] AC 578 **AB Tab 31 EF page 1504** the Appellate Committee of the House of Lords ruled that notwithstanding the terms of Section 62 of the Metropolis Management Act 1855 which (as applied to metropolitan borough councils), empowered the council to allow such wages to their servants as they "may think fit" a local authority's policy to pay women at the same rate as men for work of equal value was *unlawful.* Lord Atkinson saying this **EF page 1520**:

> "The council would, in my view, *fail in their duty* if, in administering funds which did not belong to their members alone, they put aside all these aids to *the ascertainment of what was just and reasonable remuneration to give for the services rendered to them*, and *allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world*"

3.25 In each of them the court is considering question of statutory construction. And in each of them the statutory constriction which is adopted by the court results in the *denial* of women's rights. Thus

- in ***Jex-Blake*** [7] university regulations which purport to allow women to enter the university to study medicine are struck down as *ultra vires*;
- in ***Roberts v. Hopwood***[8] a council's exercise of its statutory remuneration power to introduce of equal pay between and men and women employed by it is struck down as *ultra vires*
- conversely in ***Short v. Poole Corporation*** [9] councils are told by the courts that *nothing* in statute prevents from sacking their employees simply because they are women, or because they are women who have got married; and

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[7] ***Jex-Blake*** **v.** ***Senatus of the University of Edinburgh***, (1873) 11 M. 784 **AB Tab 8 EF page 921**

[8] ***Roberts v. Hopwood*** [1925] AC 578 **AB Tab 31 EF page 1504**

[9] ***Short v. Poole Corporation*** [1926] Ch. 66 **AB Tab 20 EF page 1219**

- in ***Nairn v. University of St. Andrews***, [10] ***Hall v. Incorporated Society of Law-Agents in Scotland*** [11] and ***Bebb v. Law Society*** [12] women are deemed *not* to be "persons" across a variety of statutes so as to be to deny women the right to vote and/or the right to qualify as a solicitor.

3.26 So in each of these decision the court has *warped* the statutory or regulatory provisions and wrestled with their wording so as to accommodate the judges' Patriarchal presuppositions, such as to lead the court in each of these cases to reach what appears to be their pre-determined conclusion to find *against* women and their claims and rights and interests.

3.27 That apparent presumption applied by the courts that when in doubt choose a statutory interpretation which denies or diminishes women's rights has to be acknowledged and confronted and repudiated by this court.

3.28 *That* then is the historic and common law context against which the legislation at issue - a measure which was intended to tackle (within the limits of the legislative competence of the Scottish Parliament) the issue of the under-representation of women in senior positions in the workforce by allowing for certain positive action measures in favour of *women* – is to be interpreted and applied.

Genuine equality between the sexes is still a work in progress

3.29 But as this court recognised in *R (C) v. Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] PTSR 1476 **AB Tab 48 EF page 2000 at 2004** "***Genuine* equality between the sexes is still a work in progress.** Baroness Hale delivering judgment in that case on behalf of a unanimous court (Baroness Hale of Richmond PSC, Lord Kerr of Tonaghmore, Lord Wilson, Lord Carnwath, Lord Hughes JJSC) observed at §1:

> "'We lead women's lives: we have no choice'.
>
> Thus has the Chief Justice of Canada, the Rt Hon Beverley McLachlin, summed up the basic truth that women and men do indeed lead *different lives*.

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[10] ***Nairn v. University of St. Andrews***, 1909 SC (HL) 10 **AB Tab 30 EF page 1497,**

[11] ***Hall v. Incorporated Society of Law-Agents in Scotland*** (1901) 3 F. 1059 **AB Tab 9 EF page 981**

[12] ***Bebb v. Law Society*** [1914] 1 Ch. 286 **AB Tab 19 EF page 1205**

How much of this is down to unquestionable biological differences, how much to social conditioning, and how much to other people's views of what it means to be a woman or a man, is all debatable and the accepted wisdom is perpetually changing. But what does not change is the importance, even the centrality, of gender in any individual's sense of self.

Over the centuries many people, but particularly women, have bitterly resented and fought against the roles which society has assigned to their gender.

Genuine equality between the sexes is still a work in progress."

If there is a level playing field, why are there not more women judges in this case?

3.30 Equality law, of course, long recognised that the decisions of any decision-makers may be influenced by subconscious motivations, unconscious bias and/or or stereotyping. [13] Parliament has recognised that even judges are *not* immune from this. That is one of the main reasons why, in non-employment related discrimination cases, professional judges hearing cases at first instance are expected to sit along with lay assessors. [14] Sitting with lay assessors is intended to allow professional judges to be more alive to and ready to recognise subconscious and unconscious biases, not just of the parties appearing before them, but also their own prejudices and presuppositions informed by their own background and upbringing and, indeed, by their sex. [15]

3.31 Thus in 2001 when giving the annual Mario G. Olmos Law and Cultural Diversity Lecture at UC-Berkeley Sonia Sotomayor, now a Justice of the US Supreme Court, made the following observation:

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[13] As stated by Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 1 AC 501 at 511-H-512C **[not produced]**

> "I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be [religion or belief] motivated

[14] Section 114 EA(7) and (8) 2010 **AB Tab 101 EF page 3975 at 4084** provide as follows:

> "(7) In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) must be exercised unless the judge is satisfied that there are good reasons for not doing so.
>
> (8) In proceedings in Scotland on a claim within subsection (1), the power under rule 44.3 of Schedule 1 to the Sheriff Court (Scotland) Act 1907 (appointment of assessors) must be exercised unless the sheriff is satisfied that there are good reasons for not doing so."

[15] In *Cary v Commissioner of Police of the Metropolis* [2014] EWC Civ 987 [2015] ICR 71 **[not produced]** Clarke LJ giving the judgment of the court noted at § 51:

> "51. .. [T]hose who in fact discriminate on any grounds (e g sex, race, religion, disability, same sex orientation) often say that they would have acted in exactly the same way if the protected characteristic had been absent.
>
> An ability to discern whether people are deceiving the court *or, sometimes as likely, themselves*, when they say that they would have behaved no differently if there was no question of sex, race etc playing any part, is thus an advantage in an assessor, as is experience of the sort of masks, pretences and protests that those who discriminate often put forward and of the way in which unconscious bias or stereotyping can operate.
>
> This is a skill in evaluation and analysis which can be honed by the experience of dealing with complaints of discrimination in, for instance, the workplace, and/or listening to and adjudicating on tribunal cases in which discrimination is alleged and disputed."

"I would hope that a wise Latina woman - with the richness of *her* experiences – would, more often than not, reach a better conclusion than a white male who hasn't lived that life."

3.32 And in 2003, the then Chief Justice of Canada, Beverley McLachlin, put matters this way (in a speech which this court already quoted approvingly from in *R (C) v. Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] PTSR 1476 **AB Tab 48 EF page 2000**:

> ""The … most important reason why I believe we need women on our Benches is because we need the perspectives that *women* can bring to judging."
> …
> [J]urists are human beings, and, as such, are informed and influenced by their backgrounds, communities, and experiences.
>
> For cultural, biological, social and historic reasons, *women do have different experiences than men*." [16]

3.33 As Lord Hodge will doubtless recall, on the first day of our both starting out at Edinburgh Law School in October 1978, it was proudly announced to the new students that this was the first year in which women commencing the study of law (whether as undergraduates or postgraduates) *outnumbered* the men. But yet, 46 years later, one has to ask (certainly when surveying the gender balance among the judges and lawyers speaking in this court): *where have all those women gone ?*

3.34 It is therefore more than a little ironic, given what is at stake in this case, that this case comes for final determination before a court which even now - 15 years after its foundation – has *men* making up five/sixths of its membership, ten *men* out of its total complement of twelve justices (a matter which should, rightly, be a cause for public scandal).

3.35 So again the question arises, not only *where* have all those women who started out studying law 46 years ago at the same as Lord Hodge and myself, but *how much longer do women have to wait (and why ?)* before they see at the very least equal numbers of women and men on the benches of its top court ?

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[16] Rt Hon Beverley McLachlin PC, Chief Justice of Canada, in prepared remarks to the Association of Women Barristers in a seminar at the House of Commons in London on 2 July 2003, quoted in Baroness Hale "Law Maker or Law Reformer: What is a Law Lady for?" (2005) 40 *Irish Jurist* 1-16 at page 1 **[not produced]**

3.36 The judges who reached the decisions in all the cases of ***Jex-Blake***,[17] ***Roberts v. Hopwood***, [18] ***Short v. Poole Corporation***, [19] ***Nairn v. University of St. Andrews***, [20] ***Hall v. Incorporated Society of Law-Agents in Scotland*** [21] that we looked at above could doubtless more or less accurately all be described as late middle-aged; upper middle-class; privately schooled; Oxbridge educated; well-off; white men.

3.37 But the demographic of the UK Supreme Court in its current constitution and make-up appears to be indistinguishable (in its still very largely *mal*e guise) from the individuals who formed the bench formed in and for these late 19th and early 20th century cases. The concern for women then arises as to whether *this* court can trusted itself that it has indeed move on from those awful assumption of Patriarchy which cleared informed its predecessors' earlier judgments we have quoted above.

3.38 So the baggage which may all unwittingly and unconsciously be brought by the judges themselves to their deliberation is of particular importance in this case. This is because is it *not* a case about the judges determining whether other people have acted unlawfully in doing (or not doing something). This is instead – just like ***Jex-Blake***, [22] ***Roberts v. Hopwood***, [23] ***Short v. Poole Corporation***, [24] ***Nairn v. University of St. Andrews***, [25] ***Hall v. Incorporated Society of Law-Agents in Scotland*** [26] and

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[17] ***Jex-Blake* v. *Senatus of the University of Edinburgh***, (1873) 11 M. 784 **AB Tab 8 EF page 921**

[18] ***Roberts v. Hopwood*** [1925] AC 578 **AB Tab 31 EF page 1504**

[19] ***Short v. Poole Corporation*** [1926] Ch. 66 **AB Tab 20 EF page 1219**

[20] ***Nairn v. University of St. Andrews***, 1909 SC (HL) 10 **AB Tab 30 EF page 1497**

[21] ***Hall v. Incorporated Society of Law-Agents in Scotland*** (1901) 3 F. 1059 **AB Tab 9 EF page 981**

[22] ***Jex-Blake* v. *Senatus of the University of Edinburgh***, (1873) 11 M. 784 **AB Tab 8 EF page 921**

[23] ***Roberts v. Hopwood*** [1925] AC 578 **AB Tab 31 EF page 1504**

[24] ***Short v. Poole Corporation*** [1926] Ch. 66 **AB Tab 20 EF page 1219**

[25] ***Nairn v. University of St. Andrews***, 1909 SC (HL) 10 **AB Tab 30 EF page 1497,**

[26] ***Hall v. Incorporated Society of Law-Agents in Scotland*** (1901) 3 F. 1059 **AB Tab 9 EF page 981**

Bebb v. Law Society [27] - purely a case about statutory interpretation. What do the words mean (to you the judge) ?

3.39 And having seen the results of (and linguistic contortions employed in) those earlier cases the focus inevitably falls on the question of what do the judges not before us *as embodied individuals* (rather than as disembodied Platonic philosopher kings) themselves *think* on this particular issue of social and political moment and neuralgic sensitivity. Our courts, as we have seen, have a long record of reaching conclusions to the effect that

- women are *not* "persons",
- that women are *not* capable of university study,
- that women are *not* suitable to qualify as solicitors,
- that women have *no* right to be paid the same as men for work of equal value,
- that women have *no* right to expect security of employment.

3.40 These conclusions of the *male* judges who made up these courts were doubtless presented at the time as just being "common sense", and a necessary outworking and happy application of the common law. These decisions are now rightly to be regarded (and doubtless *were* regarded at least by *women* at the time) as "hopeless idiocy" (to pick up the words of Baroness Hale's Dublin lecture).

3.41 But in being presented as simply how the law *works* and as the outcome of objective impartial judicial reasoning, these cases have a corrosive effect on women. In undervaluing and undermining women and women's achievements, these cases make women doubt the soundness of their own judgments and reasoning and perhaps most crucially for this court, their faith and trust in the law at least as interpreted by the courts.

3.42 So one thing I would therefore counsel the *male* judges on this court, when considering this case, is always to "check your male privilege", to try and prevent the assumptions and presumptions of patriarchy from insidiously, subconsciously infecting and affecting (in the manner in which the judgments we've referred to from the last and previous century were) one's judgment as to *the obvious* or *the normal* or *natural* or the common sense approach to statutory interpretation.

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[27] ***Bebb v. Law Society*** [1914] 1 Ch. 286 **AB Tab 19 EF page 1205**

If there is a level playing field, where are the women leading counsel speaking in this case ?

3.43 But also taking seriously the injunction "Physician, health thyself !" (per Luke 4:23) and/or (lest I be accused of hypocrisy) "take the beam out of your own eye before removing the mote from your brother's" (pre Matthew 9:3-5), it is also undoubtedly ironic and concerning that in a case centrally concerned with determining just who falls within the category of "women" for the purposes of legislation which is intended to remedy the under-representation of women in the workplace, that not only is this issue going to be decided by a court in which *men* form the majority but it is being argued before this court largely by *men*.

3.44 Thus I, together with my male junior Spencer Keen, represent For Women Scotland. The feminist campaign group, Sex Matters, are also represented by two male counsel, Ben Cooper KC and David Welsh. The case for the interveners, the Equality and Human Rights Commission, will be presented by a male senior counsel in Jason Coppel KC (appearing with Zoe Gannon as his junior).

3.45 It is only the Scottish Ministers' oral submissions which will be presented by a woman, Ruth Crawford KC (with Lesley Irvine as her junior). No other women's voice will be heard presenting submission in this case. Although the interveners Scottish Lesbians and others have instructed Karon Monaghan KC and Beth Grossman - and Amnesty International are represented by Sarah Hannett KC, Raj Desai and Roisin Swords-Keiley - these interveners have been permitted to put in written submissions only. I don't know if Karon Monaghan or Sarah Hannett are in the courtroom today, but if they *are* here, their *voices* are unheard.

3.46 So things are not looking good from a visibility, inclusion and representation angle anywhere in this court room, in a case which is centrally concerned about legislation which is predicated on the legislature having recognising and acknowledging the existence of situational (and often unseen) barriers which militating against *women's* continued full participation in the workforce and against women's *advancement* to the highest levels when in the workforce.

3.47 What can and must be drawn from this state of affairs - where even women's groups have apparently taken the view that the more effective presentation of their case before this majority *male* court will be if a *man* is instructed to present their arguments - is the *insidious* and omnipresent nature of Patriarchy. Because Patriarchy gets inside all of us: it empowers men, and demoralises women.

3.48 In sum if you *still* require a monument or some other kind of reminder of the reality of Patriarchy then, look round you in this court - but also look *inside* you.

How Patriarchy is expressed

3.49 To tie everything together – in preparation for the more detailed examination of the arguments ranged against those whom I represent by the Scottish Ministers, the Equality and Human Rights Commission and Amnesty International - the position of *For Women Scotland* is this:

(1) When young *women* (often same-sex attracted) at the cusp, or in the throes, of puberty suddenly experience and express profound discomfort at becoming the *unwelcome objects* of the male gaze and male appraisal and male judgment as assessment as to their physical attractiveness, then this can be understood as those young women (perhaps for the first time) experiencing the brute realities of Patriarchy. But then offering such young women a diagnosis of (Rapid Onset)

Gender Dysphoria [28] and advising them that one way to become once again invisible to, or immune from, the male sexual gaze is for them to choose "re-identify" themselves as men (and seek medical treatment and irreversible surgical intervention [29] in an attempt to "pass" as men), constitutes a

[28] See André Leonhardt, Martin Fuchs, Manuela Gander, Kathrin Sevecke "Gender dysphoria in adolescence: examining the rapid onset hypothesis" (Received: 11 April 2024 / Accepted: 6 June 2024) (2024) *Neuropsychiatrie* https://doi.org/10.1007/s40211-024-00500-8 **[not produced]**:

> **The concept of rapid-onset gender dysphoria**
> The term "rapid-onset gender dysphoria" was initially coined by Lisa Littman in a 2018 publication, referring to a subgroup of adolescents identifying as trans and seeking clinical treatment for their gender dysphoria. In her study, Littman gathered data from 256 parents of adolescents experiencing gender dysphoria. These parents completed a survey including both multiple-choice and open-ended questions aimed at exploring shared experiences with their children (*82.8% of whom where natal females*), who suddenly showed signs of gender dysphoria during or after puberty without a prior history of issues related to their gender identity.
>
> Many parents noted that their children had previously been diagnosed with a mental health disorder or neurodevelopmental disability (e.g., autism) before the onset of gender dysphoria. A substantial portion of adolescents were described to be part of friend groups where a significant portion of the members simultaneously became transgender identified, hinting at possible social and peer influences.
>
> Prior to identifying as trans, 63.5% of adolescents were reported by their parents to have significantly increased their social media and Internet use, where they were allegedly exposed to affirmative and persuasive narratives surrounding transgenderism.
>
> In her study, Littman introduced the notion of a distinct adolescent subgroup experiencing rapid onset gender dysphoria. This subgroup, *primarily comprising natal females*, is conceptualized as exhibiting a sudden onset of gender dysphoria, lacking any previous gender identity issues, but having pre-existing psychological problems. Littman's conclusions, drawn from parental reports, suggest that their children's identification as transgender may be significantly influenced by an immersion in social media consumption and an ideologically homogeneous peer group with a shared belief that their trans identity was the cause of their mental health problems.
> ...
> **Concluding remarks**
> ...
> Treatment in specialized clinics is inherently fraught with desires, anticipated disappointments, and anxieties. Neither an attitude of generalized suspicion nor an uncritically permissive approach is adequate to meet the complex needs of adolescent patients with gender dysphoria. Given that interventions on young and healthy bodies often provoke strong emotional reactions from clinical staff, parents, and society at large, we must be wary of our own ideological predispositions. Ultimately, they dictate which explanatory models we consider more appropriate and which we reject.
>
> From a perspective where clinical experience with adolescents with gender dysphoria and research in the field converge, we advocate further investigation of this phenomenon. Should Littman's theory be substantiated, this conceptual framework can enhance our understanding and refine clinical treatment."

[29] See e.g. ***Bell v. Tavistock and Portman NHS Foundation Trust*** [2021] EWCA Civ 1363 [2022] PTSR 544 at para 4 **[not produced]**:

> "4 The first claimant in the underlying judicial review proceedings is a former patient of Tavistock who was treated with puberty blockers as a 16-year-old, progressed to cross-sex hormones and began surgical intervention as an adult to transition from female to male. She terminated her treatment having changed her mind and regrets having embarked upon the treatment pathway.

capitulation to Patriarchy, rather than any confrontation of it.

(2) When a woman seeking help and support at a rape crisis centre or women's refuge who expresses her concerns and discomfort and lack of consent or her counselling or support session being conducted by a man who holds a certificate of acquired gender as the female gender is told to "reframe her trauma" and/or that is Patriarchy in action. [30]

(3) When a woman victim of sexual assault, on reporting matters to the police requests that her medical examinations be carried out by another *woman*, but is then attended on instead with a male doctor who holds a certificate of acquired gender being the female gender, [31] and is then told that it is unacceptable transphobia on her to question the sex of her doctor as a woman, that is Patriarchy in action.

(4) When a lesbian support group is told that the law requires that they welcome into their group *as a fellow lesbian* a heterosexual man who holds a certificate to the effect of having an acquired gender is the female gender, [32] that is Patriarchy in action.

(5) When a woman, giving evidence in court against a man who identifies as a women and who uses female pronouns (whether or not holding a certificate stating their acquired gender to be the female gender), has to seek permission

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[30] Cf ***Adams v Edinburgh Rape Crisis Centre***, 2024 SLT (Trib.) 89, ET [**AB Tab 1, EF Page 714**] where a counsellor who raised her concerns to the effect that "it would be extremely damaging if someone went to see someone that they thought was a woman and later discovered that that person was actually biologically a man" (**§ 203 EF Page 722**) was subject to unwarranted disciplinary action (which action was subsequently found by the constitute harassment of the employee on grounds of her protected gender critical beliefs and to have resulted in her constrictive dismissal) by the chief executive of the organisation, one Mridul Wadhwa about whom the Tribunal notes (at **§ 214 EF Page 722**) "there had been extensive publicity around the fact that Mridul was biologically male and did not hold a Gender Recognition Certificate" The Tribunal notes in its judgment (at **§ 214 EF Page 724**)) that Mridul Wadhwa "stated to the meeting at Edinburgh University she saw firing people as a way of ensuring the staff in the organisation fully complied with her definition of trans inclusion."

[31] See Victims and Witnesses (Scotland) Act 2014 as amended by the Forensic Medical Services (Victims of Sexual Offences)(Scotland) Act 2021 [**AB Tab 107, EF Page 4645**]

[32] See the EHRC letter of 3 April 2023 **[App Tab 17 EF page 686 at 689]**:

> Freedom of association for lesbians and gay men: If sex means legal sex, 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, *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 it could restrict membership to biological women."

from the court [33] before she can describe her assailant in court as a man and to use male pronouns when referring to the person who assaulted her, [34] that is

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[33] The Judicial College *Equal Treatment Bench Book* (February 2021 edition) said this at page 326 **[not produced]**:

> **Treatment of trans people in court**
> It should be possible to recognise a person's gender identity and their present name for *nearly all court and tribunal purposes, regardless of whether they have obtained legal recognition of their gender by way of a Gender Recognition Certificate.*
>
> A person's gender at birth or their transgender history should *not* be disclosed unless it is necessary and relevant to the particular legal proceedings.
>
> The Gender Recognition Act 2004 (section 22) explicitly prohibits disclosure of such 'protected information' where a person has applied for, or obtained, a Gender Recognition Certificate. It makes a specific exception where disclosure is for the purpose of proceedings before a court or tribunal, but this exception should be interpreted narrowly. For more detail on section 22, see 'Disclosure of protected information under section 22 of the Gender Recognition Act'.
>
> In the *rare* circumstances where it is necessary in the proceedings to disclose a person's previous name and transgender history, the court may consider making reporting restrictions to prevent the disclosure of this information more widely or directing a private hearing."

This has since been amended (after representations were made from women) in the Judicial College *Equal Treatment Bench Book* (July 2024) Equal Treatment Bench Book which now states (at pages 211, 212 §§19-21) **[not produced]**:

> **"Treatment of trans people in court**
> 19. It should be possible to work on the basis of a person's chosen gender identity and their preferred name/pronouns, "he/she or they", for most court and tribunal purposes, regardless of whether they have obtained legal recognition of their sex/gender by way of a GRC.
>
> Whilst in many cases it should be possible to use the trans person's preferred name/pronouns, there will be situations where it is clearly inappropriate. For example, *a victim of domestic abuse, sexual violence or assault by a trans person is likely to describe the perpetrator in accordance with the victim's experience and perception of the events*. To do otherwise would be likely to affect the quality of their evidence of traumatic events. In the end, it is for the judge to ensure that a proper balance is struck between respecting how a trans person
>
> 20. The court should always put witnesses in the position of giving their best evidence. As in any case (e.g. a fraud where a defendant has used multiple identities), witnesses should give evidence referring to the defendant in the way they knew that person, including by the name, they knew them/how they perceive and understand them, as placing additional or artificial barriers on a witness is likely to detract from their ability to give best evidence. Accordingly, witnesses giving evidence in trials should *not* be required to call an accused "she", particularly if they knew the accused as a male.
>
> 21. There may be some situations where the *judge* may decide *not* to use the trans person's preferred name/pronouns to ensure a witness can give best evidence, e.g. a female rape victim may find it incomprehensible if the judge and others in court refer to her attacker as "she"."

[34] See INTERVIEW: Maria MacLachlan on the GRA and the aftermath of her assault at Speaker's Corner

> "**MM:** My experience of court was much worse than the assault. I was the one on trial that day and if it hadn't been for the clear video evidence that I'd been assaulted, my assailant wouldn't have been convicted, even though there were over a dozen witnesses who could have said what happened. I was asked "as a matter of courtesy" to refer to my assailant as either "she" or as "the defendant." I have never been able to think of any of my assailants as women because, at the time of the assault, they all looked and behaved very much like men and I had no idea that

Patriarchy in action.

(6) When women athletes are expected to compete directly in sporting competition (including in body contact sports such as boxing and rugby) against individuals who have undergone male puberty but who now choose to "identify" as women, and then ***not*** be permitted to complain of any unfairness under threat of their being labelled transphobic, [35] that is Patriarchy in action.

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any of them identified as women. After he was arrested, the defendant posted vile misogynistic comments on his Facebook page that no woman would ever make. He was also filmed aggressively intimidating a woman on a picket line, shouting obscenities at her. In what sense is this person a woman? (https://womansplaceuk.org/footage-of-picket-line-attack/)

I tried to refer to him as "the defendant," but using a noun instead of a pronoun is an unnatural way to speak. It was while I was having to relive the assault and answer questions about it while watching it on video that I slipped back to using "he" and earned a rebuke from the judge. I responded that I thought of the defendant "who is male, as a male."

The judge never explained why I was expected to be courteous to the person who had assaulted me or why I wasn't allowed to narrate what happened from my own perspective, given that I was under oath. His rebuke and the defence counsel's haranguing of me for the same reason just made me more nervous and I so continued to inadvertently refer to my male assailant as "he." In his summing up, the judge said I had shown "bad grace" and used this as an excuse not to award compensation. One writer said , "It was as if the state had colluded with the defendant to take one last stab at the victim," and that's exactly how it felt. (https://www.newcenter.ca/news/2018/5/6/terfs)"

[35] See for example ***Semenya v. Switzerland*** [2023] ECtHR 10934/21 (Third Section, 11 July 2023) [**AB Tab 78, EF Page 3070**]at § 5 **EF Page 3108-9**] quoting from Resolution 2465 (2022) *on the fight for a level playing field - ending discrimination against women in the world of sport* which adopted by the Parliamentary Assembly of the Council of Europe on 13 October 2022 adopted. The relevant paragraphs of which read as follows:

"3. … The Assembly condemns the hate speech and sexism directed at female athletes, including lesbian, bisexual, transgender, intersex (LBTI) athletes.

4. Female athletes must be recognised *in all their diversity* so that appropriate measures to prevent and combat discrimination can be implemented. Taking into account the intersectional dimension paves the way for a targeted response and proper policies. The Assembly calls to promote access to sport for all women and notes that *discrimination against LBTI women has a negative impact on women in general.* The Assembly condemns the use of sport as a means of controlling women's bodies.

…

7. In the light of these considerations, the Assembly calls on Council of Europe member and observer States, as well as on all States whose parliaments enjoy observer or partner for democracy status with the Assembly, to:

…

7.2 as regards combating gender-based discrimination and gender stereotypes:

…

7.2.7 abolish discriminatory policies against LBTI athletes and respect the human rights of female athletes *in all their diversity*;

7.2.8 ensure full and equal access to the practice of sport to all women and, to this end, *allow transgender and intersex athletes to train and compete in sports competitions consistent with their gender identity*;

7.2.9 prevent and combat harassment of LBTI athletes and prevent and *combat lesbophobia, biphobia, transphobia and interphobia in sport*

…

8. The Assembly calls on sports federations to:

(7) When (notably in publications concerning women's health):

- women are referred to as "menstruators" [36] or as "people who menstruate" [37] or as "anyone with a cervix"; [38] or

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...
8.3 ensure full and equal access to the practice of sport to all women and, to this end, allow transgender and intersex athletes to train and compete in sports competitions consistent with their gender identity"

[36] See for example Klara Rydström "Degendering Menstruation: Making Trans Menstruators Matter" Degendering Menstruation: Making Trans Menstruators Matter - The Palgrave Handbook of Critical Menstruation Studies - NCBI Bookshelf Chapter 68 in C. Bobel et al. (eds.), *The Palgrave Handbook of Critical Menstruation Studies* (2020) https://doi.org/10.1007/978-981-15-0614-7_68:

"*Menstruators, Not Menstruating Women*
The term 'menstruator' likely comes as no surprise for any critical menstruation scholar. Chris Bobel's use is prominent, with her book *New Blood: Third-Wave Feminism and the Politics of Menstruation* (2010) underlining how the term

"expresses solidarity with women who do not menstruate, transgender men who do, and intersexual and genderqueer individuals"

Here, it is clear that a move beyond the perception of menstruation as a female experience not only functions to make our work inclusive of trans and intersex people, but the menstruator term likewise substantiates theorizing around the fact that not all women menstruate, for example, trans women, postmenopausal women, pregnant women, and those experiencing amenorrhea.

I would like to stretch it further to state that the menstruator term is a foundational part of our terminology; it captures the critical engagement driving the field of menstruation studies.

Referring to people who menstruate as 'menstruators' does not come without criticism. Related to a more general debate within feminism(s), the term reifies the question: is it possible to make resistance toward patriarchal structures while leaving behind the term 'woman?' Here, the division between those aligning with sexual difference theory—stressing the necessity of the categorical label 'women'—versus those aligning with gender theory—recognizing gender as a construct—is made explicit (Bobel 2010, 155–56). Nevertheless, taking into consideration that "transsexual lives are lived, hence livable" (Scheman, quoted in Stone 2009), the perceived issue at stake becomes a nonissue. Menstruators *are* of a variety of gender identities (far beyond those who identify as trans) and, hence, menstruation cannot be equated singularly with cis/womanhood. To argue otherwise would be to ascribe menstruation to a biologically essentialist idea of corporeality."

[37] See Karan Babbar, Jennifer Martin, Pratyusha Varanasi, and Ivett Avendañoe "Inclusion means everyone: standing up for transgender and non-binary individuals who menstruate worldwide" (2023) 13 *The Lancet Regional Health – Southeast Asia*: 100177 (Published Online 19 March 2023) https://doi.org/10.1016/j.lansea.2023.100177:

"Inclusivity starts with language. A common term used in academia to account for adolescent girls, women, transgender men, non-binary and agender people, and other gender minorities who menstruate is 'menstruators.' Therefore, we suggest using the term women, adolescent girls and *people who menstruate*. This term was first coined to support the inclusion of all women, adolescent girls, and people who menstruate, but instead reduced them to their bodily functions and body parts. This sweeping language also extends to period products, frequently categorised as "women's hygiene products", indicating that the products are only for women and that menstrual health is only a "hygiene" issue. Multiple transgender and non-binary individuals have suggested this induces higher gender dysphoria during menstruation. Products should be labelled "period products," and terms that indicate they are unclean should be avoided."

[38] See NHS Inform "**Inclusive language:** A guide to using inclusive language on NHS inform" Inclusive language | NHS inform

"Gender

- pregnant women are referred to as "birthing people" or as "people with uteruses"; or
- breastfeeding is referred as "chest feeding" or "body feeding" [39]

all with a view to avoid use of the word "women" for fear of giving offence to those *men* who "identify" as women (some of whom who may even have a certificate attesting their acquired gender to be the female gender) and yet who do not and cannot menstruate, cannot get pregnant, cannot give birth, and cannot breastfeed, that is Patriarchy in action.

3.50 But the EA 2010 was and is intended by Parliament to be, in large part, a measure which continues the work started by the Equal Pay Act 1970 and the Sex Discrimination Act 1975 as originally enacted and begin to *undo the presumptions of Patriarchy*. These provisions sought to unshackle women from the legal disabilities imposed on them *as women* by the common law (as evidence by cases from the last century and the century before quoted above).

3.51 The only proper presumption of this court ***must*** therefore always be to favour an interpretation of the EA 2010 which furthers this broad social aim sought by Parliament, rather than one which places yet further obstacles in the road which should be aimed ultimately toward the liberation of men as much as women, from the bonds and burdens of Patriarchy.

> Use gender neutral and inclusive language like 'they' and 'them'.
> Refer to 'people' (not 'men' or 'women') unless you have to medically.
> To reference specific body parts say:
> 'women and *anyone with a cervix*'
> 'men and anyone with a prostate'
>
> Use 'transgender' or 'trans' as an umbrella term to describe people whose current gender identity differs from the sex they were registered with at birth. Only use this if it's relevant to the topic being discussed.
>
> Use 'gender identity'. This is what an individual experiences as their innate sense of themselves as a man, woman or as having a non-binary identity.
>
> Use 'transitioning'. This is the steps a trans person may take to live in the gender with which they identify."

[39] See National Institutes of Health (NIH) *Inclusive and Gender-Neutral Language* Inclusive and Gender-Neutral Language | National Institutes of Health (NIH):

> "It is not *always necessary to avoid the word women* by substituting phrases like *birthing people*, or *people with uteruses*, especially in public health content. Gender neutral terms like pregnant patients, *pregnant people*, birth parent, or other wording as applicable (e.g., pregnant teens), present an inclusive alternatives. Use judgement and context to determine whether to use pregnant women, pregnant people, pregnant patients, or other inclusive descriptors. Specific phrasing *like people with uteruses can be helpful* when writing NOFOs or advertising studies to ensure only eligible participants are enrolled for the specific research conducted."

3.52 The problem which women faced in the 19th and 20th century cases quoted above was "biological determinism" – that is to say, you cannot do that, simply because you are a "woman". [40] The problem now faced by women in the current climate is "biological denialism" – that is to say that being a woman has nothing to do with biology and therefore it is not open to women to deny men who identify as "women" access to women's spaces. But both the earlier *biological determinism*, and the current fashion of "*biological denialism*" are just different aspects of the same shape-shifting Patriarchy which affords men an ineffable sense of entitlement and burdens women with a constant, nagging feeling of disempowerment. Thus:

(1) when *men* - having obtained a Gender Recognition Certificate from the State to the effect that their acquired gender is the female gender - *insist* that this certification process then gives them rights, regardless of *women's* views and wishes

- to access and use services specifically designated as for women-only;
- to be accommodated in spaces which have been designated as being for women-only, including women's hospital wards and women's prisons;
- to benefit from positive action measures in favour of *women* (whether in the workplace or elsewhere) such as the measures set out in the Gender Representation on Public Boards (Scotland) Act 2018 [**AB Tab 106, EF Page 4645**]) [41]
- to apply for and take jobs for which *being a women* is a genuine occupational qualification, for example as a counsellor in a women's refuge;

then this is Patriarchy in action. It means that men get rights that were intended *by the legislature* to be for and only for women. For this court to favour an interpretation of the EA 2010 which upholds the lawfulness of such men's claims is again to capitulate to Patriarchy, rather than to confront it.

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[40] For an example of such biological determinism declared by the Strasbourg Court to be Convention incompatible see ***Moraru v. Romania*** (2023) 77 EHRR 3 at § 118 **AB 75 EF page 2942 at 2969**

> "118 By instituting and maintaining a blanket rule on mandatory termination of women's employment at a lower age than that set for men (see paragraphs 24 and 28 above) with the possibility of only a few exceptions introduced by Law no. 156/2018 (see paragraph 29–30 above), the legislature perpetuates a stereotypical view of gender roles and treats women as a homogenous group deprived of agency, one whose personal situations or desires in terms of professional life and career development as well as their alignment with those of men are completely disregarded."

[41] At least following the amendment the Gender Representation on Public Boards (Scotland) Act 2018 in the light of the judgment of the court below in ***For Women Scotland v. Scottish Ministers (No. 1)*** [2022] CSIH 4, 2022 SC 150 ("***FWS 1"***) **AB Tab 10 EF page 988**)

(2) When women, having obtained a Gender Recognition Certificate from the State stating that their acquired gender is the male gender are advised that this certification process *takes away* from them the rights which they previously enjoyed as women, such as now rendering them *unable lawfully*:

- to access and use services specifically designated as being for women-only;
- to be accommodated in spaces which have been designated as being for women-only (including women's hospital wards and women's prisons);
- to benefit from positive action measures in favour of *women* - such as the measures set out in the Gender Representation on Public Boards (Scotland) Act 2018 – which were to do something to offset the disadvantages, overcome the obstacles and surmount the barriers and experienced by women, whether in the workplace or elsewhere
- to apply for and take jobs for which *being a women* is a genuine occupational qualification, for example as a counsellor in a women's refuge;
- to claim, in respect of the themselves and the children they might bear, whether from their employers or from the State, pregnancy protections and maternity related benefits

then this is Patriarchy in action. It means that women *lose* rights that were intended by the legislature to be for, and only for, women. [42] For this court to favour an interpretation of the EA 2010 which upholds the lawfulness of such claims in favour of *men* is again to capitulate to Patriarchy, rather than to confront it.

(3) When a service provider is told that they can only lawfully exclude from designated single-sex services spaces (such as hospital wards) men with certificates showing an acquired gender as the female gender *only if*, at the same time, they also apply a policy to exclude all and any women who hold certificates showing their acquired gender to be the male gender, then this is Patriarchy in action.

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[42] For an example of a Convention compatible national measures affording special treatment to women (as regards their pension age compared to men) see *Andrle v. Czech Republic* (2015) 60 EHRR 14 **AB Tab 10 EF page 2760 at 2772 at § 60**

> "60. .. [T]he original aim of the differentiated pensionable ages based on the number of children women raised was to compensate for the factual inequality between men and women. In the light of the specific circumstances of the case, this approach continues to be reasonably and objectively justified on this ground until social and economic changes remove the need for special treatment for women."

It means that the price to be paid in order for *men* with a certificates showing an acquired gender as the female gender lawfully to be deprived of their claimed right to access single sex women-only spaces and services, then other *women* (those with a certificates showing an acquired gender as the male gender) have to lose their right to access these same women-only spaces and services.

So once again women are losing out in order to accommodate men's claims. For this court to favour an interpretation of the EA 2010 which upholds the lawfulness of such men's claims is again to capitulate to Patriarchy, rather than to confront it.

4. THE ABSURD OR PERVERSE CONSEQUENCES OF THE "CERTIFICATED SEX" APPROACH

4.1 Happily perhaps for this court, this case can in any event *also* be upheld not only on the basis of the feminist analysis set out above, but also on the basis of more classic approach to statutory interpretation, which at least the *male* judges on this bench might be more comfortable working with.

4.2 In ***Shahid v. Scottish Ministers*** [2015] UKSC 58, 2016 SC (UKSC) 1 **AB Tab 45 EF page 1942 at 1948** Lord Reed in this court observed (at §§ 20-21 - underlining emphasis added) that:

> "20 … No amount of purposive interpretation can however entitle the court to disregard the plain and unambiguous terms of the legislation….
>
> 21 The *only* principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid *absurd or perverse consequences*. [43]
>
> Indeed, even greater violence can be done to statutory language where it is plain that there has been a drafting mistake. [44]"

4.3 And similarly in *Fowler v Revenue and Customs Commissioners* [2020] UKSC 22, [2020] 1 WLR 2227 **AB Tab 51 EF page 2072 at 2081** Lord Briggs observed at §27(4)

> "A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language."

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[43] See, e.g. *Inland Revenue Commissioners v Hinchy* [1960] AC 748 per Lord Reid at p 768 [**not produced**]; *R (on the application of Edison First Power Ltd) v Central Valuation Officer and anr* [2003] UKHL 20 [2003] 4 All ER 209 per Lord Hoffmann at para 25, and per Lord Millett at para 116 [**not produced**]

[44] *Federal Steam Navigation Co Ltd v Department of Trade and Industry (The Huntingdon)* [1974] 1 WLR 505 per Lord Reid at p 509 [**not produced**]; *Inco Europe Ltd and ors v First Choice Distribution (A Firm) and ors* [2000] 1 WLR 586 per Lord Nicholls of Birkenhead, at p 592 [**not produced**]

4.4 Usefully, the EHRC in its Written Submissions **CV Tab 10 EF page 398** highlights what it coyly calls "particular problems" that would occur with the operation of the EA 2010 *in practice* if "sex" were to be made to mean "legal/certificated sex" (instead of "biological/natal sex") when ascertaining the extent to which the rights of *women qua women* are protected under the EA 2010. Indeed the EHRC offers to go further , stating **CV Tab 10 EF page 398 at 412 para 31:**

> "Should it assist the Court the Commission will stand ready to provide oral submissions on the other difficulties identified in the 3 April Letter **[App Tab 17 EF page 686**]

4.5 The "particular problems" with a finding that if "sex" in the EA 2010 means "legal/certificated sex" (instead of "biological/natal sex") are said by the EHRC (at **CV Tab 10 EF page 398 at 400, 401 para 6)** to

> "include, but are not limited to
> - a notable *inconsistency* in the rights of same sex attracted persons, when compared with other protected characteristics (particularly with regard to the formation of associations),
>
> and
>
> - the challenges faced by those who wish to *maintain single sex spaces* aimed at *protecting the safety and/or dignity of women*"

and that

> "that outcome
> - *impairs the proper functioning of aspects* of the EA 2010
>
> and
> - has the potential to *jeopardise the rights and interests of women*, not least given changes in the social landscape *since 2004*."

And, the EHRC thunders

- "This is a wholly unsatisfactory state of affairs"

  (*which might be thought to be understating matters*)

4.6 The EHRC continues **CV Tab 10 EF page 398 at 412 para 31:**

> "31. .... [T]he *difficulties* and *inconsistencies* in the operation of the EA 2010 caused by the second definition [i.e. that the term "*woman*" includes those whose natal sex is male, but who later obtain a GRC and are recognised under the GRA as a woman], as identified by the Commission in the 3 April Letter **[App Tab 17 EF page 686**]
> ...
> - are significant and concerning,
>
> - that they impair the proper functioning of the EA 2010,
>
> - that it is unlikely that Parliament appreciated the serious implications for the rights of women of s. 9(1) GRA applying to the EA 2010
>
> and
>
> - that these implications have become more serious with societal change since the

GRA 2004.

4.7 In relation to *women's* freedom to form associations with, and only for, other *women* guaranteed under the EA 2010, [45] the written submissions from Scottish Lesbians and others make it clear **CV Tab 9, EF Page 263 that** the freedom of *same-sex attracted women* to form associations with, and only for, other *same-sex attracted women* [46] is particularly at risk and compromised by reading of the EA 2010 which insists that a heterosexual man once issued with a certificate that their "acquired gender is the female gender" will now become, in law, a "woman" sexually attracted to women. So while the Garrick get to *vote* on whether or not to continue to exclude *women* from membership, Lesbian associations have no choice but to *admit* men into their ranks. It is all looking again very like Patriarchy. The EHRC in its Written Submissions comments on this point as follows **CV Tab 10 EF page 398 at 414 para 38:**

> "[A] lesbian students club (that meets the definition of an association under s.107 EA 2010 [**AB Tab 101, EF Page 3975 at 4079**]) could not lawfully exclude a trans woman with a GRC, and so a "*woman*", who was attracted to women. §1(1) of Sch. 16 EA 2010 [**AB Tab 101, EF Page 3975 at 4292-4293**] permits the club to restrict membership to those who share the protected characteristic of same sex orientation but in this case the likely analysis is that a person who shares that characteristic has nevertheless been (unlawfully) excluded *on grounds of their gender reassignment*.
>
> It is deeply problematic, and unfair, that lesbians and gay men *for whom the biological aspect of their same sex attraction is defining* may be precluded from forming (and maintaining the integrity of) an association, when those with another shared protected characteristic are not."

Access to single sex services

4.8 In relation to *women's* right under the EA 2010 to access accommodation and services expressly intended to be provided to and *for women only* [47] - for example women's only hospital wards, rape crisis centres focussing on violence against women, women's refuges

[45] Sch. 16, §. 1, EA 2010 [**AB Tab 101, EF Page 3975 at 4292-4293**]

[46] Sch. 16, §. 1, EA 2010 [**AB Tab 101, EF Page 3975 at 4292-4293**]

[47] Sch. 3, §§ 26-27, EA 2010 [**AB Tab 101, EF Page 3975 at 4216-4217**].

provided safe spaces for women subjected to domestic abuse and domestic violence, [48] and prisons, the EHRC in its Written Submissions rightly comments as follows **CV Tab 10 EF page 398 at 414, 417 paragraphs 39, 44:**

> "39. … These provisions are *critical* for maintaining the availability of women-only spaces, including changing rooms, or segregated swimming areas, which are considered *significant* by some women and *absolutely essential*, for example for religious reasons, by others.
> …
>
> 44 …[T]he Court is invited *to acknowledge the very significant difficulties which may arise in practice* from applying section 9 GRA to provisions which were drafted for the case of, and make sense in the context of, single natal sex services"

Likely to be physical contact

4.9 The provisions allowing for single sex services are contained within Paragraph 27 Schedule 3 EA 2010 **AB Tab 101 EF page 4217-4218.** Paragraph 27(1) states that a person does not contravene the rule against discrimination in the provision of service *so far as relating to sex discrimination* by providing a service only to persons of one sex if *any* of a list of conditions is satisfied. Among that list is subparagraph 27(7) Schedule 3 EA 2010 **AB Tab 101 EF page 4218** which provides as follows:

> "(7) The condition is that—
> (a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and
> (b) B might reasonably object if A were not of the same sex as B.

4.10 The forthcoming article by Michael Foran "Defining Sex in Law" (2025) *Law Quarterly Review* which is **AB Tab 127 EF page 4882** (which I would commend to the court for its analysis overall) notes as follows in relation to this provision **at EF page 4899**:

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[48] 79. *Luca v Moldova* (2024) 79 EHRR 2 at §§ 103, 107 **AB Tab 79, EF Page 3191 at 3220-3221**

> "103 *It is hardly in doubt that domestic violence in the Republic of Moldova predominantly affects women; this is so in all member States of the Council of Europe.*
>
> However, the applicant did not argue a prima facie case of general and discriminatory passivity on the part of the Moldovan authorities with respect to domestic violence directed against women.
> …
> 107. … The courts also described her requests for protection as "aggressive" and inappropriate in domestic violence proceedings, although they merely followed the language of domestic law (see paragraphs 15 and 16 and compare in paragraphs 46 and 47 above). This type of language seems to convey stereotypes, preconceived beliefs and myths about women abusing the system put in place to protect them from domestic violence.
>
> It is precisely this kind of considerations that led CEDAW to call on State parties and their judicial bodies to ensure that all legal procedures in cases involving allegations of gender-based violence against women are impartial, fair and unaffected by gender stereotypes or the discriminatory implementation of law, evidentiary rules, investigations and other legal and quasi-judicial procedures."

"If the conditions set out above are interpreted as referring to sex *as modified by a GRC*, it renders their applicability practically non-existent.
Take the physical contact condition. For this to be met there must be a service where there is likely to be physical contact and where B might reasonably object if A were not of the same legal sex as B.

In the example of a female victim of sexual violence without a GRC, B would need to be comfortable with a biological male who has a GRC engaging in physical contact but then reasonably objecting if that same person did *not* have a GRC.

It is hard to see how a private document would make the difference here. The objection that B might reasonably have here can only fairly be interpreted as being to the biological sex of the person engaging in potentially intimate physical touching.

Indeed, while it may be reasonable for a woman to object to physical touching from a biological male for religious or other reasons, it would be almost absurd for a GRC to make a difference.

This interpretation requires the Court to accept that there are women for whom it matters greatly whether a person has applied for and been issued with certain paperwork by the state, but not ones for whom sex in its ordinary meaning is salient."

Likely to be used by two or more persons at the same time

4.11 A separate condition which might justify the provision of single sex services is subparagraph 27(6) Schedule 3 EA 2010 **AB Tab 101 EF page 4218** which provides as follows:

"(6) The condition is that—
(a) the service is provided for, or is likely to be used by, two or more persons at the same time, and
(b) the circumstances are such that a person of one sex might *reasonably* object to the presence of a person of the opposite sex."

4.12 The EHRC says of this provision **CV Tab 10 EF page 398 at 416 paragraph 42**:

"[I]f "*men*" and "*women*" may be of either natal sex [. i]t may, for example, be *unreasonable* for a woman to object to the presence of a trans woman *without a GRC*, who is both a biological and a legal male, where a trans woman with a GRC, and *so is a biological male but legally female,* as a result of s. 9 GRA, is entitled to use the service.

There may be no difference whatsoever in appearance between the two trans women in this example. The only difference between them may be non-observable and immaterial to the provision, namely that one has a GRC and the other does not.

The Commission has advised service-providers that they should *not* ask to see a GRC when presented with a potential customer who is transgender in its Single Sex Service Guidance, p.11.

Residential accommodation for women

4.13 Under reference to 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, [49] the EHRC in its Written Submissions says this **CV Tab 10 EF page 398 at 417 paragraph 46:**

> "The … interpretation of §3 of Sch. 23 EA 2010 [offered by the EHRC] … gives rise to *practical difficulties in its application*.
>
> Establishing that accommodation is "*managed in a way which is as fair as possible to both men and women*" (§3(2)) can be *very challenging in practice* and the need to establish such matters could be a significant deterrent to maintaining women-only communal accommodation.
>
> As in the case of the single sex service provisions, fairness between "men" and "women" [on the EHRC's reading of these terms] *must* mean fairness between,
>
> - *on the one hand* the *three artificial categories* in §41 above **CV Tab 10 EF page 398 at 416** [namely "men" defined by the EHRC, as encompassing
>   "(a) a person who is a natal *male* and does *not* identify as transgender;
>   (b) a person who is a natal female but *has a GRC*, and
>   (c) a person who is a natal male, is a trans woman, but does *not* have a GRC],
>
> - and on the other hand the three converse categories of "*woman*" [that is to say according to the EHRC definition, encompassing
>   "(a) a person who is a natal female and does *not* identify as transgender,
>   (b) a person who is a natal male but *has a GRC*, and
>   (c) a person who is a natal female, is a trans man, but does *not* have a GRC]

Separate hospital wards for women

4.14 A further condition which might justify the provision of single sex services is subparagraph 27(5) Schedule 3 EA 2010 **AB Tab 101 EF page 4218** which provides as follows:

> "(5) The condition is that the service is provided at a place which is, or is part of—
> (a) a hospital, or
> (b) another establishment for persons requiring special care, supervision or attention."

4.15 In the Appellant's case at paragraph 32 **CV Tab 6 EF page 151 at 167** we noted in passing as follows:

> "[This reading [whereby "sex" in the EA 2010 means "certificated sex"], *as the EHRC accepts*, makes it to all intents and purposes impossible *in practice* for medical staff and hospital managers to make lawful provision for women only hospital wards or rooms."

4.16 The EHRC objects to the Appellant so characterising their position. The EHRC states **CV Tab 10 EF page 398 at 416-7 para 43:**

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[49] Sch. 23, §. 3, EA 2010 [**AB Tab 101, EF Page 3975 at 4358-4359**]

"43. Similar difficulties may arise in relation to the other conditions in §§27(2)-(7) Schedule 3 EA 2010 [**AB Tab 101, EF Page 3975 at 4216-4217**], save for that relating to hospitals and analogous establishments in §27(5).

Contrary to [AC§32], it is *not* the Commission's position that it is impossible in practice, on the second definition, to make provision for women-only hospital wards.

4.17 Sadly the EHRC nowhere enlightens us as to what their position *is* as regards the effective provision of women only hospital wards, and neither the Scottish Ministers' Case nor Amnesty International in its written submissions address the issue. But it is clear from the EHRC's own account that, on their (and the Scottish Ministers' and Amnesty International's) reading of the EA 2010 women-only wards will have to accommodate (using their terminology):

a person who is a natal female and does *not* identify as transgender,

a person who is a natal female, is a trans man, but does *not* have a GRC; and

a person who is a natal male but *has a GRC*, and

4.18 As the EHRC have said, it is *not* a condition that a natal male should be able to "pass" as a woman to be issued with GRC to that effect that their acquired gender is the female gender. What is required is a medical diagnosis of gender dysphoria. This is a self-reported psychological condition. This diagnosis does *not* involve any "appearance test" (such as "do they make a convincing woman ?"), nor any requirement for surgery, or for any form of hormone treatment. In sum you can't tell from looking whether a natal man with the protected category of gender reassignment does, or does, not a GRC.

4.19 How then is a ward sister or hospital administrator supposed to be able to distinguish, using the EHRC terminology, between,

- on the one hand, a person who is a natal male with the protected category of gender reassignment and who *has a GRC* showing their "acquired gender to be the female gender who would (on the EHRC/Scottish Minister/Amnesty International) account by operation of the subsection 9(1) GRA 2004 legal fiction" be *legally* a "woman" and therefore entitled to admission to the women-only ward
- on the one hand, a person who is a natal male with the protected category of gender reassignment and who *does* not have GRC and therefore cannot rely on the subsection 9(1) legal fiction" therefore all parties ae agreed legally remains a man and therefore not entitled to admission to a women-only ward ?

4.20 The EHRC says that natal males seeking admission to a woman-only ward cannot be asked if they have (and/or to produce a GRC). This advice appears to arise from the concern that to ask to see a natal male's GRC showing their "acquired gender to be the female gender would involve the hospital staff acquiring "protected information" (that someone has a GRC – qv subsection 22(2) GRA) in an "official capacity" – qv Section 22(3) GRA. And subsection 22(1) GRA 2004 makes it an offence for any hospital staff member to disclose that GRC information to anyone else ,unless the GRC holder has agreed to this disclosure about them: subsection 22(4)(b) GRA 2004. [**AB Tab 99, EF Page 3975 at 3886-3887 4216-4217**]

4.21 And there would be no point in asking for other proof of one's sex under reference say to a UK passport [50] or a UK driving licence [51] as it is clear that the sex markers in these documents can be changed by the authorities simply at the request of their individual holders, without having to acquire a GRC (or indeed demonstrate to the authorities that they have the protected characteristic of gender reassignment.

4.22 Against that background I would ask the EHRC that, in their oral submissions to this court, they clarify why it is that they say it *is* possible in practice, on their "second definition", to make effect provision for women-only hospital wards.

4.23 Just how do they say that can be done ? because it looks fairly impossible to me.

What *Parliament* was told in the Explanatory Notes about single sex services

4.24 Certainly the explanatory notes to the Equality Bill 2009 which were actually before Parliament when it was considering the Bill (and in particular the December 2009 explanatory notes prepared on the Bill as it had been amended at second reading by the

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[50] See *R (Elan-Cane) v. Home Secretary* [2021] UKSC 56, [2023] AC 559 [**AB Tab 56, EF Page 2212 at 2222**]at § 6

> "His Majesty's Passport Office (HMPO) continues to operate a policy that an applicant for a passport must state on the application form whether their gender is male or female. If no gender is stated, the gender shown on the applicant's supporting documents is selected. The passport is issued recording the passport-holder's gender as male ('M') or female ('F'). Transgender people, in the sense of people who have acquired a different gender from the one recorded at birth, can obtain passports showing their acquired gender."

[51] See *R (Elan-Cane) v. Home Secretary* [2021] UKSC 56, [2023] AC 559 [**AB Tab 56, EF Page 2212 at 2229**]at § 38

> "A United Kingdom driving licence bears no *obvious* marker of gender. Counsel explained to the court that a multi-digit number which appears on the licence *includes one digit which is an encoded reference to gender (which can be changed from one gender to the other on request)*, but the significance of the digit is not apparent on the face of the licence, and is not something of which most people are aware.

House of Commons) give no indication that it was anticipated that the EA 2010 if passed would give rise to any of the difficulties which the EHRC now identifies and highlights. The Explanatory Notes give the following examples of single sex services which might fall within the paragraph 27 exceptions (at page 178, para 726):

"726. These exceptions would allow:

- a cervical cancer screening service to be provided *to women only*, as *only women* need the service;
- a fathers' support group to be set up by a private nursery as there is insufficient attendance by *men* at the parents' group;
- a domestic violence support unit to be set up by a local authority *for women only* but there is no men-only unit because of insufficient demand; [52]
- separate male and female wards to be provided in a hospital;
- separate male and female changing rooms to be provided in a department store;
- a massage service to be provided *to women only by a female massage therapist* with her own business operating in her clients' homes because she would feel uncomfortable massaging *men* in that environment.

4.25 In relation to these examples set out in the December 2009 Explanatory notes to the Bill as sent from the Commons to the Lords, Foran notes as follows **at EF page 4899**:

> "None of these examples would make sense if they intended to refer to GRC status rather than biological sex, bearing in mind that GRC status has no necessary relationship to physical interventions or 'visual indistinguishability', and relies, further, on whether a person eligible in theory has chosen to acquire one in practice.
>
> Female-to-male trans people with GRCs stating that they are men may still need a cervical cancer screening service and may be at an increased risk of cancer generally as a result of the administration of cross-sex hormones, delivered in high doses and over a period of decades. If sex means sex as modified by a GRC in this context, then it is simply false that only "women" need the service, because some "men" would need it."

The very definition of the protected characteristic of "gender reassignment" relies on an understanding of sex as a biological and a physiological reality

[52] See *Opuz v. Turkey* (2010) 50 EHRR 28 at § 147 [**AB Tab 69, EF Page 2710 at 2746**]
"[I]n domestic violence cases perpetrators' rights cannot supersede victims' human rights to life
and to physical and mental integrity"

4.26 Further the position of the appellant is that the very definition of the protected characteristic of "gender reassignment" relies on an understanding of sex as a biological and a physiological reality

4.27 The Scottish Ministers at paragraph 48 of their Case [**CV Tab 7 EF page 203 at 225-226**] refer to any rely upon the definition of the protected characteristic of "gender reassignment" in Section 7(1) EA 2010 **AB Tab 101 EF page 3983** as if it assisted their argument that "sex" in the EA 2010 means the legal construct of "certificated sex" rather being reference to factual realities.

4.28 But the terms of Section 7(1) EA 2010 wholly undermine their argument. It provides:

> **"7 Gender reassignment**
> (1) 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."

4.29 The following points may immediately be made on this:

(i) the process which defines the protected characteristic of gender reassignment is said to be one of "changing physiological or other attributes of sex."

(ii) So the definition of "gender reassignment is predicated on a definition of the "sex" which one is seeking to "reassign" as having at the very least "physiological attributes". This can only mean that "sex" is being used to mean, at the bare minimum, least a *physical* condition, rather than a metaphysical fiction attested only by the terms of the certificate one happens to hold

(iii) The definition is also predicated on "sex" having other non-physiological attributes". For example the higher testosterone levels which characterise the post-pubertal male sex are associated not only with physiological markers such as denser bone mass, fat distribution characteristic of men, bulkier muscle mass and greater muscle strength, deepened voices, thicker bodily and facial hair and also male pattern baldness but also with psycho-social factors such as increased aggression and competitiveness a need to assert dominance in social group and, it may be thought an increased sense of male entitlement.

(iv) And if you are going to seek to *change* physiological or other attributes of your "sex", you have to start off from a position on knowing and acknowledging what the current physiological or other attributes of your "sex" are.

4.30 But if word "sex" in the EA 2010 already means and only "certificated sex", then this empties the concept of the protected characteristic of any meaning, because there are not going to be physiological or any other attribute of certificated sex, since certificated sex is and is only a statement on a piece of paper rather than any form of physiological or other descriptor of an individual.

4.31 If Section 7(1) EA 2010 is read as referring to a process "for the purpose of reassigning the person's *certificated sex* by changing physiological or other attributes of the person's *certificated sex*." then then the effect would be to *deprive of any protection under the protected characteristic of gender reassignment* those who identified as a transexual person (to use the terminology of the EA 2010) but who chooses not to seek to be issued with a GRC.

4.32 This is because the only process which Parliament has put in place for changing one's certificated sex is by applying for an obtaining a GRC. So if the person claiming the protected characteristic of gender reassignment

- is *not* proposing to undergo,
- is *not* undergoing or
- has *not* undergone

a process (or part of a process) for seeking a GRC then they have done nothing for the purpose of "reassigning the person's sex". Accordingly they would not have the protected characteristic of "gender reassignment" as defined in Section 7(1) EA 2010.

Justified discrimination because of gender reassignment ?

4.33 In any event, the court below in *For Women Scotland v. Scottish Ministers (No. 2)* [2023] CSIH 37, 2024 SC 117 (*"FWS 2"*) **AB Tab 12 EF page 1014 at 1032 para 56** thought that these "difficulties" in relation to the provision of single sex services could be avoided by reliance on the provisions of the EA 2010 which allow, in paragraph 28 Schedule 3 EA 2010 **AB Tab 101 EF page 4218** for a carve out from the prohibition against gender reassignment discrimination in relation to the provision of single sex services. As the court below noted:

> "[T]he importance of this paragraph is that it provides the only basis upon which a person might be permitted to exclude a person with a GRC from services which are provided for their acquired sex. We note that this is consistent with guidance issued by the Equality and Human Rights Commission as to the operation of these provisions."

4.34 Paragraph 28 Schedule 3 EA 2010 **AB Tab 101 EF page 4218** provides as follows:

"**28 Gender reassignment**

(1) A person does *not* contravene section 29, *so far as relating to gender reassignment discrimination*, only because of anything done *in relation to a matter within sub-paragraph (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."

4.35 The December 2009 explanatory notes to the Equality Bill 2009 given only one example in relation to this provision, as follows (at para 728 page 178):

"A group counselling session is provided for *female* victims of sexual assault. The organisers do not allow *transsexual people* to attend as they judge that the clients who attend the group session are unlikely to do so *if a male-to-female transsexual person* was also there. This would be lawful."

4.36 The Scottish Ministers say at paragraph 58 of their Case [**CV Tab 7 EF page 203 at 230** that on their reading of the EA 2010 (that the protected characteristic of "sex" means "certified sex" rather than "actual sex") paragraph 28 Schedule 3 EA 2010 would still allow for a group counselling session to be provided just for *some female* victims of sexual assault (namely of those women who did *not* hold a GRC). Presumably they would apply the same logic of having women hospital wards available just for *some* women (i.e. those women who were *not* men).

4.37 The Scottish Ministers say that by relying on the possibility of justified discrimination because of the protected characteristic of gender reassignment, the group session for female victim of sexual assault (and presumably also the women only hospital ward) could lawfully exclude *all and any men* who held a certificate of their acquired gender being the female gender.

4.38 What the Scottish Ministers *ignore* is that the counselling group (and the administrator of the single sex hospital wards) can only rely on the provisions of paragraph 28 Schedule 3 EA 2010 to exclude all and any men who held a certificate of their acquired gender being the female gender, if at the same time the group (and the hospital) *has and enforces* a policy of excluding *from their women-only support services* and women's only ward and women's only medical services all and any women who held a certificate of their acquired gender being the male gender.

4.39 If this was *not* done, then the group counselling session (and the women's only hospital ward) would no longer constitute the provision the provision of a service only to persons of *one* certified sex (since they would be admitting women who on the Scottish Ministers/EHRC/Amnesty International account would have the "certified sex" of men). And if it is the provision of a service only to persons of one certified sex, then paragraph 28 Schedule 3 EA 2010 has no application.

4.40 So on the Scottish Ministers/EHRC/Amnesty International analysis women who held a certificate of their acquired gender being the male gender could not lawfully be given access to health services designated as "for women only" (such as screening or surveillance measures against breast cancer, cervical cancer, or uterine cancer) or be accommodated within "women only hospital wards" (even if they are pregnant, in need of specific specialist gynaecological care). The EHRC blithely puts their position on this point as follows **CV Tab 10 EF page 398 at 415 para 39(6)**:

> "The Appellant is correct to note [**CV Tab 6 EF page 151 at 167 AC § 46** [53]] that a single-sex service *must* exclude persons of that natal sex with a GRC, and whose "sex" for the purposes of the EA 2010 is now different.
>
> However, it is clear on the face of the GRA that the grantee of a GRC *stands to lose accesses and privileges afforded to persons of their natal sex*, as a result (*inter alia*) of s. 9(1) GRA."

The problem of the "pregnant man"

4.41 At paragraphs 69 through to 84 of our Case **CV Tab 6 EF pages 182 to 188** we set out, in our view, the insurmountable problems posed for the proper operation of the EA 2010 by the fact that on the Scottish Ministers/EHRC/Amnesty International interpretation a "natal woman" with a certificate of their acquired gender being the male gender will be a "man" and *not* a "woman".

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[53] The Appellant's Case says this [**CV Tab 6 EF page 151 at 167 at §46**

> "46. What is perhaps most striking and revealing about both the respondents' and the EHRC's advocacy for this reading of the EA 2010 - in which all references to and provisions for "women" within the context of the protected category of sex have to be re-read as "women without a GRC and men with a GRC" - is that this is required to ensure that "men with a GRC" do not lose the rights afforded under the EA 2010 to "women".
>
> But no proper recognition or adequate weight is given to the impact of such a reading on "women with a GRC". On the EHRC analysis, as "EA 2010 men" these women with a GRC *lose* the rights which the EA 2010 affords to *women*.
>
> For example, the EHRC's analysis means that to qualify as a "single-sex service" for women falling within para. 27 of Sch. 3 EA 2010, the provider has to ensure that women with GRC are *excluded* from it.
>
> So we have a zero sum game in which: women, when they obtain a GRC, *lose* women's rights; whereas men who obtain a GRC *gain* the protection of women's rights. Patriarchy thereby irrepressibly re-asserts itself."

4.42 That persons with a GRC (whether a natal male with an acquired gender in the female gender or a natal female with an acquired gender in the male gender) might choose to have children is of course perfectly foreseeable. That this is not now an uncommon phenomenon is attested to the fact that the matter has now come before the European Court of Human Rights. [54]

4.43 If natal female with an acquired gender in the male gender then becomes pregnant (what has been called the Freddy McConnell scenario – qv ***R (McConnell) v Registrar General for England and Wales*** [2020] EWCA Civ 559, [2021] Fam 77 [**AB Tab 29, EF Page 1471**) they would on the basis of the interpretation of the EA 2010 insisted upon by both the EHRC and Anesty International *not* be able to claim the rights and protections which the EA 2010 afford specifically to *women* by reason of their pregnancy and subsequent maternity (which result may raise its own human rights issues). In particular:

(2) Sections 17, 18, 72 through to 76 and Schedule 9 paragraph 17 EA 2010 [**AB Tab 101, EF Page 3975 at 3989-3991, 4046-4049, 4264**] all concern *women's* pregnancy and maternity pay protections

(3) Schedule 7 paragraph 2 EA 2010 [**AB Tab 101, EF Page 3975 at 4239**] specifies that:

> "a sex equality clause [defined in Section 66 EA 2010 **AB Tab 101, EF Page 3975 at 4041**]does not have effect in relation to terms of work *affording special treatment to women in connection with pregnancy or childbirth*"

(4) Schedule 22 paragraph 2(2)(a) EA 2010 [**AB Tab 101, EF Page 3975 at 4352**] maintain the lawfulness and effect of anything done to comply with:

(i) any pre Sex Discrimination Act 1975 enactments concerning the protection of women in relation to pregnancy and maternity; and/or

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[54] *OH & GH v. Germany* [2023] ECtHR 53568/18 & 54741/18 (Fourth Section, 4 April 2023) AB Tab 76, EF Page 2973 concerned a refusal by German courts to allow a natal woman with the civil status of a "man" under German law to be recorded as "father" of the child they had given birth to, recording the parent instead as being the child's "mother". Conversely *AH and others v. Germany* [2023] ECtHR 10934/21 (Fourth Section, 4 April 2023) AB Tab 77, EF Page 3975 at 4041 concerned the German court's refusal to record as being the "mother" on the birth certificate of child a "natal man" whose sperm had fertilised an egg to produce a human embryo and subsequently a full term child, insisting instead that they be recorded as the child's father. In both cases the Strasbourg court upheld the Convention compatibility of the German position as being within the State's margin of appreciation.

(ii) the requirements of any provision concerned with protection of women at work in relation to pregnancy and maternity as specified in Schedule 1 to the Employment Act 1989; and/or

(iii) 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, in relation to pregnancy and maternity, of a woman (or a description of women which includes her)

4.44 Rather oddly the EHRC claims **CV Tab 10 EF page 398 at 413 para 33** that (using the EHRC's terminology] a trans man with a GRC who is pregnant has the possibility of a claim for discrimination on *grounds of gender reassignment* if a natal woman who is pregnant is or would be afforded greater protection or better treatment than him.

4.45 The Scottish Ministers essay the same argument **CV Tab 7 EF page 203 at 228 para 52** claiming that:

> "[A] person such as Mr McConnell would *potentially* be entitled to protection under section 13 EA 2010 *on grounds of gender reassignment* – on the basis that, in so far as the protections afforded to "women" in respect of birth and maternity fall within the regulated activities, he would, in being treated less favourably by being denied those protections, have been directly discriminated against on that ground."

4.46 But that can't be right. A trans man with a GRC is on the Scottish Ministers and EHRC's account a "man". If he, being pregnant, is treated less favourably than a "pregnant woman" then this is, on the face of this EHRC's definition of "man" and "woman", direct *sex* discrimination" between a "pregnant man" and a "pregnant woman". But Section 13(1) and 13(6)(b) EA 2010 tells us that

> "**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— … (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, childbirth or maternity."

4.47 So the *sex* discrimination case based differential treatment between a "pregnant man" and a "pregnant woman" necessarily fails.

4.48 A "trans man with a GRC who is pregnant" who wished to raise a claim for discrimination on *grounds of gender reassignment* would have to compare his treatment with that of *another man* who did *not* have the protected characteristic of gender

reassignment and who was also pregnant. Even on the basis of hypothetical comparators, that is pushing it. "Natal men", to use the EHRC terminology, can't get pregnant. And since pregnancy is *not* an illness – or as the CJEU puts it "pregnancy is not in any way comparable to a pathological condition" [55] - it would *not* be a relevant comparison for the pregnant trans man to compare his treatment with how a "natal man" absent from work for other medical reasons might be treated. So there is no relevant comparator in this case for a claim for discrimination on *grounds of gender reassignment*

4.49 There would only be discrimination on ground of "gender reassignment" if a pregnant *woman* with the protected characteristic of gender reassignment but who did not have a GRC (in EHRC terms a "trans man") was treated less favourably or given less protection that a pregnant women who did not have the protected characteristic of gender reassignment. This would *not* be sex discrimination (as they are both women) but would be discrimination because of gender reassignment.

4.50 In any event the EHRC concludes on the "pregnant man" problem in its Written Submissions in its section on "Particular challenges created by the second definition" **CV Tab 10 EF page 398 at 413 para 36** as follows:

> "[T]here is a range of EA 2010 provisions directed at the protected characteristic of pregnancy which do *not*, on the second definition *serve to protect those who have GRCs in the male acquired gender and who may have the capacity to become pregnant."*

4.51 The EHRC then simply refuses to address the issue which was specifically raised in our Case at paragraph 70 **CV Tab 6 EF page 151 at 182-183** as follows:

> "70. It is also important to bear in mind that the pregnancy and maternity provision of the EA 2010 are aimed at the protection both of those (women) who bear children, and also of the children who are borne and born.
>
> Any reading (such as that proposed by the EHRC before this court) which results in the *exclusion* from statutory cover of the pregnancies of *some* individuals and in the deprivation of those individuals' post-childbirth protections, also risks adversely affecting those individuals' children.
>
> There would have to be a very clear and unequivocal rationale and justification for such selective disapplication of rights otherwise afforded by the State to persons deemed to be vulnerable and in need of its specific protections.
>
> No such justification has been offered by the EHRC."

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[55] Qv Case C-394/96 *Brown v. Rentokil Ltd.* [1998] ICR 790 at § 22 [**AB Tab 81, EF Page 3244 at 3279**]

4.52 As the Grand Chamber CJEU reiterated in Case C-506/06 *Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] 2 CMLR 27 **AB Tab 82, EF Page 3282 at 3303 at para 34:**

> "It is precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including *the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy*, that, pursuant to Art.10 of Directive 92/85, the Community legislature laid down special protection for women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave"

4.53 The CJEU reference to pregnant women being prompted voluntarily to terminate their pregnancy in the absence of any provision for the "special protection for women" prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave also highlights that the Abortion Act 1967 **AB Tab 88, EF Page 3674 to 3680** makes no provision for the pregnancy of the "pregnant man" whom the Scottish Ministers/ECHR/Amnesty International all hold to be a *legal* reality.

4.54 The Scottish Ministers try an alternative argument (one that was successful before the court below) to deal with the problem of EA 2010 and the "pregnant man". The Scottish Ministers assert in their Statement of Case at **CV Tab 7 EF page 203 at 227-228 para 52** that

> "Those [pregnancy and maternity] protections are all predicated on the fact of pregnancy or the fact of having given birth to a child and the taking of leave in consequence of that fact. They are all capable of being interpreted so as to apply to 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** [**AB Tab 29, EF Page 1471**)- i.e. a 'pregnant man'.
>
> Although interpreting those provisions in that way would require a different meaning to be given to the term "woman" in this context, that is not impermissible as a matter of statutory construction

4.55 This is where the EHRC and the Scottish Ministers part company. The EHRC says this **CV Tab 10 EF page 398 at 412-413 paras 33-33**:

> "*(i) The provisions concerning discrimination on grounds of pregnancy and maternity*
>
> 32. The court below reasoned in *For Women Scotland v. Scottish Ministers (No. 2)* [2023] CSIH 37, 2024 SC 117 (*"FWS 2"*) at §§62-63 **AB Tab 12 EF page 1014 at 1033-1034** that the use of the term "*woman*" in sections 17 and 18 EA 2010, which limits the scope of protection afforded on grounds of pregnancy and maternity, should not be regarded as depriving a person of protection who is "*pregnant as both a matter of fact and biology, regardless of the terms of any GRC*".

The approach of the court extends the meaning of the word "*woman*" in sections 17 and 18 to persons who are to be regarded as "*male*" elsewhere in the EA 2010.

The Commission submits that it would be deeply unsatisfactory, for the same word to have a different meaning in different sections of the EA 2010. In particular where that word, "*woman*", is foundational to the protected characteristic of "*sex*" and so to a fundamental aspect of the protection afforded by the EA 2010. In the interests of legal certainty and clarity, there should be a single definition which applies across the EA 2010.

33. Adopting the second definition, and applying it to section 17 and 18 EA 2010, *would* mean that a group of persons with the biological capacity to become pregnant, that is, natal women with a GRC, is left without the specific protection of the EA 2010 for that particular protected characteristic."

4.56 The appellant's agree with the above remarks from the EHRC but see them the conclusion the EHRC reaches as being a reason why their proposed "second definition" should be rejected as unworkable as it leaves without the law's protections *children* as much as their *mothers* who carried and bore them, a matter which the EHRC simply ignores.

4.57 But before finishing with the problem of the "pregnant man" we have to deal with the fact that there is a change in wording between the SDA 1975 and the EA 2010 of which inadequate account is giving by either the EHRC or Scottish Ministers.

4.58 First there is clear *change* in the actual *wording* used between the SDA 1975 and the EA 2010 when defining the word "woman". Section 82(1) of the Sex Discrimination 1975 Act **AB Tab 87 EF page 3653 at 669, 3672** provided:

> **82.— General interpretation provisions.**
> (1) In this Act, *unless the context otherwise requires*— *"woman" includes* a female of any age.

Whereas Section 212(1) EA 2010 says **AB Tab 101 EF page 4178-9**

> **212. - General Interpretation**
> "(1) In this Act— … 'woman' *means* a female of any age."

4.59 So where Section 82(1) SDA 1975 defined "woman" by reference to what the word "*includes*", the Section 212(1) EA 2010 specified what a woman is by reference to what that word "means" in that Act. And whereas Section 82(1) SDA 1975 included the draftsman's get out clause of "*unless the context otherwise requires*" that get out clause was removed in Section 212(1) EA 2010. It is presumed that these changes were done by Parliament for a reason. And in any event it is of course the court's duty to interpret and

apply the words which are actually used in the relevant legislation and thereby give effect to Parliament's intention.

4.60 There might well be good reasons for these changes in wording in the EA 2010. For example they may have been made precisely to show that the EA 2010 is self-contained and contains its own complete dictionary. In wording the definition of women in Section 212(1) EA 2010 it may also be said that Parliament has clearly therefore excluded the presumption set out in Section 6 of the Interpretation Act 1978 [**not produced**] as regards gender and number which is to the effect that

> **6. Gender and number.**
> In *any* Act, *unless the contrary intention appears*,—
> (a) words importing the masculine gender include the feminine;
> (b) words importing the feminine gender include the masculine;
> (c) words in the singular include the plural and words in the plural include the singular.".

4.61 But in any event what the Scottish Ministers' reinterpretation argument (so that the EA 2010 include "pregnant" men in its pregnancy and maternity protections) amounts to is that this court should now ***read in*** to Section 212(1) EA 2010 a phrase such as "*unless the context otherwise requires*" or alternatively "*unless the contrary intention appears*" and that for the word "means" is to be replaced with "includes" such that Section 212(1) EA 2010 is now to read with the following additions (which the draftsman unaccountably failed to include in the EA 2010 as passed):

> **"212. - General Interpretation**
>
> "(1) In this Act— … 'woman' means a female of any age ***who does not hold a GRC, a male of any age who holds a GRC and, unless the context otherwise requires it, does not include a female of any age who holds a GRC***

4.62 But the only way in which one might read phrases into primary statutes (when not exercising the interpretative obligations under Section 3 HRA 1998 **AB 95 EF page 3771** or the *Marleasing/Litster* principle [56]) is on the basis of "necessary implication". The quotation they rely upon from Craies says that in terms: that

> where a provision elsewhere in the legislation to which the definition purported to apply showed by express provision or necessary implication that the definition was not intended to apply there"

4.63 The Scottish Ministers have not even attempted to raise the conditions for "necessary implication" which are, as Lord Hobhouse of Woodborough noted *R (Morgan Grenfell) v Special Commissioners of Income Tax* [2003] 1 AC 563 at §45 [**not produced**]:

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[56] Qv *Litster v Forth Dry Dock & Engineering Ltd.*, 1989 SC (HL) 96 and Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentaciòn SA* [1990] ECR I-4135

"A *necessary* implication is *not* the same as a *reasonable* implication, as was pointed out by Lord Hutton in *B v DPP* [2000] 2 AC at 481.

A *necessary* implication is one which *necessarily* follows from the express provisions of the statute construed in their context. [57]

It distinguishes between what it would have been *sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included* and *what it is clear that the express language of the statute shows that the statute must have included.*

A necessary implication is a matter of *express* language and logic *not* interpretation."

4.64 So the reality is that this court is left with a clear choice: if it follows the Scottish Ministers/EHRC/Amnesty International "second definition" approach that "sex" in the EA 2010 means "certificated sex" then the resulting "pregnant men" and their children will have none of the pregnancy and maternity protections otherwise afforded to pregnant women under the EA 2010.

4.65 If, on the other hand, the court adopts the appellant's approach then all who become pregnant, regardless of whether they have the protected characteristic of gender reassignment or hold or do not hold a GRC, will together with their children receive the pregnancy and maternity protections which Parliament intended that they should have.

The problem with sport

4.66 Provision is made as regards *women's* fair participation in sport in Section 195 EA **2010 AB Tab 101 at EF page 4166**. In particular subsection 195(2) allows that a restriction in a gender affected activity on the participation as a competitor who has the protected characteristic of gender reassignment will *not* constitute unlawful direct or

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[57] This aspect of the test was slightly qualified by Lady Hale in *R (Black) v Secretary of State for Justice* [2017] UKSC 81 [2018] AC 215 at [36] **[not produced]**:

"(3) The goal of all statutory interpretation is to discover the intention of the legislation.

(4) That intention is to be gathered from the *words used by Parliament*, considered in *the light of their context and their purpose*. In this context, it is clear that Lord Hobhouse of Woodborough's dictum in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563, 616, para 45, that

"A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context'

must be modified to include *the purpose, as well as the context*, of the legislation."

indirect discrimination because of gender reassignment if it is necessary to do so to secure (a) fair competition, or (b) the safety of competitors in relation to the activity.

4.67 Section 195(3) EA 2010 specifies that:

> "(3) A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances in which the *physical strength, stamina or physique* of average persons *of one sex* would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity."

4.68 The provisions of Section 195 EA 2010 as a whole is means not only that a man with the protected characteristic of gender reassignment who has undergone male puberty as well as a woman who in expression of her protected characteristic is taking male hormones and has therefore acquired greater muscle and bone mass more characteristic of natal males.

4.69 Contrary to the EHRC rather bizarre claims in its Written Submissions **CV Tab 10 EF page 398 at page 410-411 para 30(1)** Section 195 EA 2010 provision (having regard in particular to the provisions of Section 195(3) EA 2010) is entirely consistent with "sex" meaning "natal sex" (and the physical strength, stamina or physique associated with it) and wholly inconsistent with "sex" meaning "certificated sex" (because it is impossible to work out who or what constitutes average persons of any one particular certificated sex).

Marital status benefits

4.70 Finally in terms of chasing down hares, at paragraph 30(3) of its Written Submissions **CV Tab 10 EF page 398 at page 411-412** the EHRC seeks support for its claim that in the EA 2010 "sex" means "certificated sex" on provisions of the EA 2010 which all are agreed have never been brought into force. namely Paragraph 18 of

Schedule 9 EA 2010 is to be found at **AB Tab 101 at EF pages 4264-4265**. [58] On the face of this 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 -

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[58] Subparagraph 18(1A)c) and (1B) Schedule 9 EA 2010 have their origin in paragraph 17 in part 6 of Schedule 4 to the Marriage (Same Sex Couples) Act 2013 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.
(1) Sub-paragraph (1): for "married" substitute "within sub-paragraph (1A)".
(2) (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."

Article 3(j)(iii) of The Marriage (Same Sex Couples) Act 2013 (Commencement No.2 and Transitional Provision) Order 2014 (SI 2014/93) **AB Tab 110 EF page 4702 at 4703** 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;

And Article 2 of the Marriage (Same Sex Couples) Act 2013 (Commencement No. 4) Order 2014 (SI 2014/3169) **AB Tab 111 EF page 4708 at 4709** provides as follows

"Provisions coming into force on 10th December 2014
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

(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."

4.71 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*".[59]

(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*" on which the EHRC relies 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 **[AB Tab 11 EF page 1004 at 1011**

> "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 from, a marriage between two people of the *opposite* (biological) sex.

(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 to one of a married couple who were of the opposite sex at the time of

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[59] Section 12 EA 2010 **AB Tab 101 at EF pages 3986** 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."

their marriage does *not*, in reality, transform that marriage into a same sex partnership.

(v) That is precisely why – and therefore contrary to the EHRC position but, instead, wholly consistently with the appellant's analysis that a gender recognition certificate under the GRA 2004 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, 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 *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.

4.72 So in fact, rather than helping or supporting the EHRC 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) EA 2010 wholly undermine it.

4.73 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 **AB Tab 101 at EF pages 4210-4211** 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.

4.74 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).

4.75 So the scheme of the EA 2010 on this point is – unlike the EHRC submissions – at least coherent and consistent in this regard: "sex" in and throughout the EA 2010 means biological, physiological, actual, immutable natal sex.

5. THE INTER-RELATION BETWEEN SUBSECTION 9(1) AND 9(3) GRA 2004

5.1 Section 9 GRA 2004 [**AB Tab 99, EF Page 3840 at 3875**] states as follows:

Consequences of issue of gender recognition certificate etc.
9 General
(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).

"(2) Subsection (1) does *not* affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

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

5.2 Notwithstanding that the Scottish Ministers/EHRC/Amnesty International "certificated sex" approach to the EA 2010 produces all the unjust and anomalous results and the absurd or perverse consequences as noted above (as the EHRC largely accepts) the EHRC still submits that the Scottish Ministers/EHRC/Amnesty

International is the one this court has to follow and apply. The EHRC says **CV Tab 10 EF page 398 at page 400 para 6:**

"Notwithstanding these difficulties, tensions and apparent inconsistencies, the Commission considers it *unavoidable* that Parliament *intended*, at the time of passing the GRA 2004 and then the EA 2010, that a GRC would have the effect of changing a person's sex for the purposes of the application of the EA 2010.

However, the Commission also considers that that outcome impairs the proper functioning of aspects of the EA 2020 and has the potential to jeopardise the rights and interests of women, not least given changes in the social landscape since 2004. This is a wholly unsatisfactory state of affairs."

5.3 This is very odd line to take on the part of the EHRC. It is saying that with the EA 2010 Parliament passed a defective statute which was and is *unavoidably* "impaired in its proper functioning". Indeed the EHRC is submitting to this court that Parliament simply didn't know what it was doing when passing the EA 2010 (which might be said to be rather a novel approach to statutory interpretation". In the words of the EHRC **CV Tab 10 EF page 398 at 412 para 31:**

> "the difficulties and inconsistencies in the operation of the EA 2010 caused by the second definition [that the term "*woman*" includes those whose natal sex is male, but who later obtain a GRC and are recognised under the GRA as a woman], as identified by the Commission in the 3 April Letter **[App Tab 17 EF page 686]**
> ...
> (1) are significant and concerning,
> (2) that they impair the proper functioning of the EA 2010,
> (3) that it is unlikely that Parliament appreciated the serious implications for the rights of women of s. 9(1) GRA applying to the EA 2010 and
> (4) that these implications have become more serious with societal change since the GRA 2004.

5.4 The EHRC's position is that the Section 9(3) GRA "get out" is too weak to overcome the overwhelming nature of the subsection 9(1) GRA 2004 in its application to the EA 2010 on the basis that it characterises that **CV Tab 10 EF page 398 at 406 para 21:**

"what is at stake is the disapplication of the right conferred upon a person with a GRC to be treated as their acquired gender for all purposes".

5.5 So when it comes to the crunch the EHRC says that men's rights (to gain women's rights under the EA 2010 by obtaining a GRC showing their acquired gender to be the female gender) trumps

- all and any of the consideration relating to the proper realisation and protection of those women's rights under the EA 2010 respect and
- that the *loss* of women's rights to women (and their children) when and if they are issued with a GRC showing their acquired gender to be the *male* gender is simply

collateral damage, which can be ignored and discounted against the overwhelming need to vindicate men's sense of entitlement.

5.6 This is looking awfully like Patriarchy *redivivus*.

5.7 In highlighting the unworkability of the EA 2010 as regard the proper protection of women's rights if the Scottish Ministers/EHRC/Amnesty International "certificated sex" approach to the EA 2010 is adopted, yet insisting that it nonetheless be adopted the EHRC speaks here as a "house divided", presumably reflecting its own deep and irreconcilable divisions within its Commission, its Commissioner and its staff.

5.8 If this is indeed the case – and there seems little convincing alternative explanation for the otherwise incomprehensibly Janus-faced position as set out in their written submissions – then this court should properly exercise some caution before relying on these EHRC submissions.

5.9 The court should certainly ***not*** treat them as if they present some objective or impartial account of the law, which one might otherwise hope and expected from a specialist body set up to monitor and give guidance on the EA 2010 as well as the HRA 1998. The submissions appear instead the product of careful negotiation and compromise from an organisation riven by internal conflicts on the legal issue raised in this appeal. But it is not for this court to get involved in the EHRC's particular psychodramas. It should stick instead with the plain statutory language.

5.10 In any event the EHRC are just plain wrong. The line which they take throughout their Written Submissions **CV Tab 10 EF page 398 at 400, 402, 406 paras 5, 10, 21:** is that the meaning and effect of section 9(3) GRA 2004 is that subsection 9(1) legal fiction (that the law can change your "sex") can ***only*** be disapplied ***expressly,*** or by ***necessary implication***, or as the EHRC puts it at para 10

> "obtaining a GRC would change the sex of a person in law, subject to an express or necessarily implied exception made in the Act itself or in other enactments (s.9(3))."

5.11 But if section 9(3) GRA 2004 is stating only that the subsection 9(1) certificated sex legal fiction can be "disapplied expressly or by necessary implication" then it is wholly redundant and pointless. The ability to express disapply this provision in any primary legislation is a given against the background of Parliamentary sovereignty.

5.12 But what is interesting in the terms of subsection 9(3) GRA 2004 is that Parliament says that such disapplication can also be done by any subordinate legislation. Interestingly the EHRC omits from this summary of subsection 9(3) GRA 2004 the fact that it in fact that it also says that the subsection 9(1) 2004 legal fiction is subject to "any provision made by … any *subordinate* legislation". In their written submissions the Scottish Ministers, the EHRC or Amnesty International all effectively ignore this reference to disapplication of the Section 9(1) legal fiction by any subordinate legislation and would make nothing of it. But the fact that provision contained in mere regulation, or in any type of subordinate legislation *can* result in the disapplication of the subsection 9(1) GRA 2004 legal fiction rather tells *against* Parliament regarding the claims of a person with a GRC to be treated as if they had changed *sex* for the purposes of the EA 2010:

- either to have a high constitutional status (on a par with "the principle of legality" the EHRC ventures **CV Tab 10 EF page 398 at 406 para 21**; and comparable in intent and effect to Section 3 HRA 1998 say the Scottish Ministers **CV Tab 7 EF 203 at pages 216-217 para 35)**;

- and/or to be one of the most fundamental of fundamental rights ("to give legal recognition to trans people pursuant to the body of human rights case law, and the underlying values of human dignity and personal autonomy as well as legal and administrative coherence" as Amnesty International puts it **CV Tab 11 EF 420 at pages 429 para 23**)

5.13 As for the claim by the EHRC that subsection 9(3) permits the possibility of disapplication of the subsection 9(1) legal fiction by "necessary implication" again that makes no sense. The disapplication of otherwise applicable provisions by necessary implication needs no specific legislative sanction. The clue is in the word *necessary*. And we have already directed the court to the remarks of as Lord Hobhouse of Woodborough in *R (Morgan Grenfell) v Special Commissioners of Income Tax* [2003] 1 AC 563 at §45 [**not produced**] about a "*necessary* implication" *not* being the same as a "*reasonable* implication" and that "a necessary implication is a matter of *express* language and logic *not* interpretation."

5.14 So contrary to the EHRC - on the basis that Parliament is not to be resumed to legislate in vain and that individual provisions contained in Acts of Parliament are

intended to have specific effect [60]to no effect or purposes - section 9(3) must be doing something more than saying that the saying that the section 9(1) legal fiction can only be disapplied by express provision or necessary implication.

5.15 What Parliament is saying in subsection 9(3) GRA 2004 is that the subsection 9(1) GRA 2004 legal fiction is subject to (and can be disapplied therefore by) (provision made by) *any* enactment or any subordinate legislation. That such dis-application need *not* be limited to *express* provision appears to be common ground. Thus as we have seen the Scottish Ministers suggest in their Statement of Case at **CV Tab 7 EF page 203 at 227-228 para 52** that the subsection 9(1) GRA 2004 legal fiction can be disapplied without any express provisions to that effect to allow for their "pregnant man" to fall within the EA 2010 definition of "woman".

5.16 But neither is such disapplication limited to the case of *necessary implication*. That is *not* what section 9(3) GRA 2004 says (as it might have done if Parliament wished to make provision to that effect). Instead it is clear that Section 9(1) GRA 2004 legal fiction can be disapplied wherever necessary to ensure that its application does not compromise the overall aims and purposes of the enactment or regulations which it might otherwise be implied into.

5.17 In this case we are clear what the aims and purposes of the EA 2010 are - to protect women's rights (so long denied by patriarchal assumptions made at common law) and sunder a separate heading to protect , among others those with the protected characteristic of gender reassignment (which as we have noted above itself is predicated on a sex as meaning a biological/physiological reality, rather than a legal fiction)

5.18 The position of the appellant as regards the proper interpretation and application of subsection 9(3) GRA 2004 [**AB Tab 99, EF Page 3840 at 3875**] is therefore this:

(1) the *legal fictions* set out in Subsection 9(1) GRA 2004") [**AB Tab 99, EF Page 3840 at 3875**] to the effect that

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[60] *RM v Scottish Ministers* [2012] UKSC 58, 2013 SC (UKSC) 139 per Lord Reed at § 34 **[not produced]**:

"Parliament is not given to idly passing legislation. As Viscount Simon LC observed in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 (p 1022), Parliament would legislate only for the purpose of bringing about an effective result. Its intention can ordinarily be taken to be that an enactment, when brought into force, will not be futile but will have practical consequences for the life of the community."

- on the issue of a full gender recognition certificate ("GRC") that an individual's "acquired gender is the female gender" then "the person's ***sex*** becomes that of a ***woman***",
and conversely
- that on the issue of a full gender recognition certificate that an individual's "acquired gender is the male gender" then "the person's ***sex*** becomes that of a ***man***"

(2) are *subject to*
(3) provision made by
(4) ***any*** other enactment

5.19 This is clear and unequivocal. Section 9(3)GRA 2004 tells us:
(i) Look at the provision made
(ii) By any other enactment
(iii) And apply the Section 9(1) legal fiction
(iv) Only if and insofar as compatible with the
(v) The proper operation of this provision
(vi) In the manner intended by Parliament.

5.20 Section 9(3) makes it clear that Section 9(1) GRA 2004 does ***not*** embody or enjoin some dominant and dominating interpretative principle - along the lines of Section 3 HRA 1998 or the *Marleasing/Litster* principle - as regards the words "sex", "man" or " woman" wherever they have appeared or will appear in any statute or regulation.

5.21 The GRA 2004 is ***not*** a constitutional statute. If anything has a better claim to bring a constitutional statute it is instead the EA 2010 in its instantiation of the fundamental principle of fairness and equal treatment and in its historic mission of capturing the multiple strands of anti-discrimination law in one code applicable to all, imposing obligations directly private individuals as much as on public law bodies and emanations of the State. So it is the EA 2010 rather than the GRA 2004 Act which falls to be construed and applied in a manner ensure that its purposes fully achieved (and paramount among those purposes is the vindication of the rights of women and the repudiation of the patriarchy under which women have so long laboured.

5.22 And in any event the provisions of Section 9 GRA 2004 always have to be interpreted in accordance with the HRA 1998. And in contrast to the common law (at least as

interpreted and applied in living memory) the HRA 1998 does *not* embody Patriarchy. Men wishes to be given access to women's rights comes at a cost to, and to the detriment of, women. Men's sense of wounded entitlement and/or grievance is not to be given precedence over the fundamental rights of women to respect for their privacy, their dignity their beliefs and their freedom to associate, as and when they might choose, with and only with other women.

6. THE *IRRELEVANCE* OF EU LAW

6.1 The Scottish Ministers at paragraph 42 of their Case **CV Tab 7 EF page 203 at 223**, the EHRC at paragraph 12-16 in its Written Submissions **CV Tab 10 EF pages 402-404** and Amnesty International at paragraphs 26-37 of its Written Intervention **CV Tab 11 EF 420 at pages 429 to 434** all make long (and longing) reference to EU law and cases of the CJEU.

5.1 Loath as I am, as an EU Lawyer, to say it – sadly EU law is entirely irrelevant to this case, for at least the following reasons

(1) The decision they discuss and rely upon concerning EU law – namely Case C-13/94 *P v S and Cornwall CC* [1996] ICR 795 [1996] ECR I-2143 [**AB Tab 80, EF Page 3223**], Case C-117/01 *KB v National Health Service Pensions Agency and Secretary of State for Health* [2004] IRLR 240 [**not produced]** and *Chief Constable of West Yorkshire Police v A (No.2)* [2004] UKHL 21, [2005] 1 AC 51 [**AB Tab 35, EF Page 1607**] all concerns factual situations predating the enactment and coming into force of GRA 2004 They are therefore not any kind of guide to the proper interpretation of its provisions whether as they stand alone, or in the light of the EA 2010

(2) The decisions all involved respondents who were "emanations of the State" for the purposes of EU law. Accordingly the provisions of the Equal Treatment Directive 76/207 could be given direct effect in all these cases (as they could *not* have been were these cases involving private parties on both side. So the appellant's point about the fact the GRA 2004 "essentially concerns the *vertical relationship* between an individual and the *State* (how the State records and retains and certifies and presents personal data about an individual's sex)" **CV Tab 6 EF page 151 at 159 para 18** remains a good one and is unaffected by anything said or observed in these decisions.

(3) The implementation into UK national law of the requirements of the Equal Treatment Directive 76/207 as reinterpreted by the CJEU in Case C-13/94 *P v S and Cornwall CC* [1996] ICR 795 [1996] ECR I-2143 [**AB Tab 80, EF Page 3223**] to take account of the phenomenon of "post-operative transsexuals who were visually ... indistinguishable from non-transsexuals" as described by Lord Bingham in *Chief Constable of West Yorkshire Police v A (No.2)* [2004] UKHL 21, [2005] 1 AC 51 [**AB Tab 35, EF Page 1607** was ultimately done by UK executive and by the UK Parliament

(4) In particular the implementation by the UK government and UK Parliament of the CJEU's re-interpretation of EU law in this area was done:

(i) initially by the UK government in making the Sex Discrimination (Gender Reassignment Regulations) 1999 **AB Tab 108, EF Page 4668**- which created a new category of protected characteristic distinct from "sex" namely gender reassignment

(ii) then by the UK Parliament passing the GRA 2004

(iii) and then by the UK Parliament consolidating and harmonising the law in the EA 2010 in which it followed the precedent set by the 1999 regulations by distinguishing "gender reassignment" from sex as being two distinct protected characteristics.

(5) So the court below when deciding *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150 ("*FWS 1")* **AB Tab 10 EF page 988** got it right when it considered that UKHL's partial implementation *Chief Constable of West Yorkshire Police v A (No.2)* [2004] UKHL 21, [2005] 1 AC 51 [**AB Tab 35, EF Page 1607** of what it considered EU law required as a result of the CJEU decisions in Case C-13/94 *P v S and Cornwall CC* [1996] ICR 795 [1996] ECR I-2143 [**AB Tab 80, EF Page 3223**], Case C-117/01 *KB v National Health Service Pensions Agency and Secretary of State for Health* [2004] IRLR 240 [**not produced]** at least as regards "post-operative transsexuals who were visually ... indistinguishable from non-transsexuals" has been *superseded* by the more comprehensive *legislation* which now governs these matters.

(6) The court below in *For Women Scotland v. Scottish Ministers (No. 1)* [2022] CSIH 4, 2022 SC 150 ("*FWS 1")* **AB Tab 10 EF page 988 at 1002** noted at para 38:

> [38] Case C-13/94 *P v S and Cornwall CC* [1996] ICR 795 [1996] ECR I-2143 [**AB Tab 80, EF Page 3223** was decided at a time when protection against

discrimination on the basis of gender reassignment was not included in the UK legislation, then the Sex Discrimination Act 1975 (cap 65).

The case was referred to the European Court of Justice on the question whether dismissal for a reason connected to gender reassignment was a breach of Art 5(1) of Council Directive 76/207/EEC ([1976] OJ L39/40), designed, inter alia, to prevent discrimination on the grounds of sex.

The conclusion was that, standing the fundamental purpose of equality between the sexes which underlay the Directive, its scope was not confined to discrimination based on the fact that a person was of one or other sex, but also extended to discrimination arising from the gender reassignment. It led to recognition of gender reassignment as a basis of discrimination being added to the 1975 Act, in sec 2A.

While it recognised that discrimination on the basis of gender reassignment was most likely to be sex discrimination, neither it nor *Chief Constable of West Yorkshire Police v A (No.2)* [2004] UKHL 21, [2005] 1 AC 51 [**AB Tab 35, EF Page 1607**, 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 EA 2010 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 GRA 2004 were limited."

(7) In any event, the present appeal concerns whether or not statutory guidance produced by the Scottish Ministers correctly interpreted the law as it now stands (so that users can when implementing or relying upon the positive actions measures in favour of women contained in the Gender Representation on Public Boards (Scotland) Act 2018 [**AB Tab 106, EF Page 4645** now and in the future) can know whether or not their actions are in accordance with law. That means that this court is concerned with the law as it now stands (not how it stood when the guidance was promulgated). And the law as it now stands is post-Brexit as determined by the provisions of the EU Withdrawal Act 2018 as amended by the Retained EU Law (Revocation and Reform) Act 2023 (which largely came into force on 1 January 2024) to get Brexit finally and properly done.

(8) The EU Withdrawal Act 2018 now relevantly says among other things in its amended Section 5 [**AB Tab 103, EF Page 4635**:

"(A1) The principle of the supremacy of EU law is not part of domestic law. This applies after the end of 2023, in relation to any enactment or rule of law (whenever passed or made).

(A2) Any provision of assimilated direct legislation—

(a) must, so far as possible, be read and given effect in a way which is compatible with all domestic enactments, and

(b) is subject to all domestic enactments, so far as it is incompatible with them.

....

"(A4) No general principle of EU law is part of domestic law after the end of 2023.

"(4) The Charter of Fundamental Rights is not part of domestic law on or after IP completion day [31 December 2020]"

(9) Yet the approach taken by the UKHL in *Chief Constable of West Yorkshire Police v A (No.2)* [2004] UKHL 21 [2005] 1 AC 51 [**AB Tab 35, EF Page 1607** appears to have been based on considerations of the *direct effect* of EU law as set out in the Equal Treatment Directive (and hence vertically directly effective against an emanation of the State such as the Chief Constable in this case). The whole tenor of the decision is predicated on the *disapplication* of inconsistent domestic UK law (as regards the definition of "sex")) rather than the re-interpretation of domestic law in an EU complaint fashion. There is certainly no mention of either *Marleasing* or *Litster* in the judgment. Instead Lord Bingham states at para 9 [**AB Tab 35, EF Page 1613**

"It is of course well-established that the law of the Community *prevails* over any provision of domestic law inconsistent with it".

Further Lady Hale's judgment underlines (again consistently with the direct effect approach which relies on the disapplication of contrary national law in the particular case before the national court) that the decision in the case is specific to the fact of it, noting (at paras 60-61, 63 – emphasis added [**AB Tab 35, EF Page 1630-1631**)

"60. Until the matter is resolved by legislation, there will of course be questions of demarcation and definition. Some of these, for the reasons explained in *Bellinger v Bellinger* [2003] UKHL 21 [2003] 2 AC 467 [**AB Tab 33, EF Page 1559**), will be sensitive and difficult. That is presumably why the Court of Justice in Case C-117/01 *KB v National Health Service Pensions Agency and Secretary of State for Health* [2004] IRLR 240 [**not produced] *acknowledged the role of the national court in deciding whether the principle did in fact apply in the particular case*. *One can well envisage a person who claims to have gender dysphoria but who has not successfully achieved the transition to the acquired gender*. ... The Gender Recognition Bill provides a definition and a mechanism for resolving these demarcation questions. But until then it would be for the Employment Tribunals to make that *judgment* in a borderline case.*"

..

> 61. In this case, however, Ms A has done everything that she possibly could do to align her physical identity with her psychological identity. She has lived successfully as a woman for many years. She has taken the appropriate hormone treatment and concluded a programme of surgery. She *believes* that she presents as a woman in every respect.
> ...
> 63. In my view community law required in 1998 that *such a person* be recognised *in her reassigned gender* for the purposes covered by the Equal Treatment Directive."

was centrally based on the primacy of the need to ensure that the relevant UK law was read and given effect to in a manner which complied with the requirements of EU law. This case is therefore since based on the principle of the primacy of EU law over the domestic law approach to the word "sex" is certainly not a reliable precedent in the present case for the proper interpretation of this legislation in our post-Brexit polity.

(10) In any event as the EHRC rightly notes, things have moved on a lot since 2004. Frankly the passages from the decision of the Employment Tribunal (which are recorded in the judgment of Baroness Hale feel discordant to modern sensibilities – particularly against the background that in *Valasinas v. Lithuania* (2001) 12 BHRC 266 **[not produced]** the Strasbroug court held that forcing a male prisoner to be strip searched in front of a female prsion officer was a relevant factor in finding a breach of the Article 3 ECHR prohibition against

inhuman and degrading treatment. [61] Yet the Employment Tribunal in *Chief Constable of West Yorkshire Police v A (No.2)* [2004] UKHL 21 [2005] 1 AC 51 [**AB Tab 35, EF Page 1607** is recorded as finding at **EF Page 1624-1625** as follows:

> "that there are many people in our society who would have religious, cultural or moral objections to being searched by a transsexual.'

But they continued, at para 33:

> "Whilst respecting these objections, we do not think that they are contemplated by the expression 'might *reasonably* object [in section 7(2)(b) of the 1975 Act]. ... Given the application of the principle of equal treatment, we cannot see that there is any obligation upon the respondent to disclose to anyone that the applicant is transsexual. .... The respondent also employs officers who are known to be homosexual. ... Again there are persons who for cultural or moral reasons might object to being searched by a homosexual. The common factor in such an objection is *knowledge*, something of which the suspect or prisoner is rightly *deprived*."

(11) The act that these findings apparently then meet the approval of both Lord Bingham (who states **at 1614 at para 11** that nobody who is intimately searched by a member of the opposite biological sex could *reasonably object* if the person

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[61] In *Valasinas v. Lithuania* (2001) 12 BHRC 266 the Court observed as follows:

"The body search of 7 May 1998

114. The applicant complained that the search of his person on 7 May 1998 amounted to degrading treatment in breach of art 3 of the convention (see para 26, above). In particular, he was allegedly obliged to strip naked in the presence of a woman prison officer with the intention of humiliating him. He was then ordered to squat, and his sexual organs and the food he had received from his visitor were examined by guards who were not wearing gloves.

115. The government submitted that they doubted the truth of these allegations as the staff were aware of the relevant regulations and the norms of hygiene.

116. As regards the disputed fact involving the presence of a woman officer during the search, the court notes that its delegates found that a woman, identified by the applicant as Ms J, worked in the prison and that her presence during the check of 7 May 1998 was possible both theoretically and practically. They also found that a search after a personal visit could include stripping the prisoner naked. In the court's view, the absence of any record of an inquiry by the prison director into the applicant's complaints at the material time about this search shows a reluctance on the part of the prison authorities to investigate the incident properly. Given that no evidence was presented for the court to disbelieve the applicant's allegations and that, on the contrary, the court received some evidence tending to corroborate his claims (see, mutatis mutandis, *Timurtas v Turkey* [2000] ECHR 23531/94 at para 45), the court finds that the search was conducted in the manner described by the applicant.

117. The court considers that, whilst strip searches may be necessary on occasions to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. Obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands, showed a clear lack of respect for the applicant, and diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him. The court concludes, therefore, that the search of 7 May 1998 amounted to degrading treatment within the meaning of art 3 of the convention."

searching them was "visually and for all practicable purposes indistinguishable" and by Baroness Hale (and who states **at 1630 at para 59**

> "it may well be rational to object to being *nursed* by a heterosexual person of the opposite sex. It may also be rational to object to being *nursed* by a homosexual person of the same sex. But *it would not be rational to object on similar grounds to being nursed by a trans person of the same sex. In those circumstances it is not surprising that the Employment Tribunal held that an objection to being searched by a trans person would not be reasonable.*"[62]

(12) If Homer nods, [63] and Solon nods, [64] then even Solomon and Deborah, in the persons of Lord Bingham and Baroness Hale, may also nod and just get things wrong against the background that is it now clearly unacceptable for a court to make a finding tat if a woman does not know (or is kept in ignorance of the fact) that se is being search by a male person who deintifies as a woman then she suffer no harm. That can't be right. If anything, the harm suffered is *compounded* by this deception played on her.

7. Conclusion

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[62] ***Chief Constable of West Yorkshire Police v A (No.2)*** [2004] UKHL 21, [2005] 1 AC 51 **AB Tab 37 EF page 1607 at 1630 per Baroness Hale at para 59:**

> "There are many occupations which involve physical contact with members of the opposite sex. Although these are not usually in the circumstances of compulsion entailed in a section 54 [of
> the Police and Criminal Evidence Act 1984 ('PACE" which provides: 'The constable carrying out a search shall be of the same sex as the person searched'] of the search, they are often not truly voluntary - as for example in hospital wards where there are doctors and nurses of both sexes. And there are some, such as compulsory hospital patients, who have no choice. We generally depend upon the professionalism of the individual, backed up by the ordinary law and complaints mechanisms, to protect people's sensibilities. Those sensibilities may be rational as well as real. For example, it may well be rational to object to being nursed by a heterosexual person of the opposite sex. It may also be rational to object to being nursed by a homosexual person of the same sex. But *it would not be rational to object on similar grounds to being nursed by a trans person of the same sex. In those circumstances it is not surprising that the Employment Tribunal held that an objection to being searched by a trans person would not be reasonable.*"

[63] *Murray v. Weldex International Offshore Ltd.*, 2002 SCLR 591, CSOH per Lord Eassie at para 17 [**not produced]**:

> Even the best may yet make such a mistake. As the poet Horace observed, even Homer nods: '*Quandoque bonus dormitat Homerus*'.

[64] *Revenue and Customs Commissioners v. Stringer* [2009] UKHL 31 [2009] ICR 985 per Lord Rodger of Earlsferry at para 28:

> "28 The House is, of course, concerned with a possible failure to amend section 27(1) when the 1998 Regulations were drafted. *If Homer nodded, doubtless Solon did too.* So there is always the possibility of a simple error."

7.1 In upholding this appeal, 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.

7.2 Thus, for example, the right of Freddy McConnell and others in a like position, to pregnancy and maternity protections in respect of the children borne by them remains *assured* in and by the wording of the EA 2010 as it is, as passed by Parliament. 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.

7.3 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. This is to be contrasted with the Scottish Ministers' and EHRC's reading which would instead involve *compromising* women's EA 2010 rights both: by giving *males* with a GRC in the female gender 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 in the male gender.

7.4 It should also be borne in mind that, under the appellant'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 what sex they are in *fact*.

7.5 And individuals holding a GRC also retain the protections afforded against discrimination by stereotyping and/or by perception. If a man with a GRC is treated by a discriminator as if a woman (regardless of whether or not actually thought or believed by the discriminator to be a woman) the EA 2010 allows for that individual to raise a sex discrimination and/or sexual harassment claim qua *perceived* as or simply *treated as if* a woman by the discriminator.

7.6 For example in ***Chief Constable of Norfolk Constabulary v. Coffey*** [2019] EWCA Civ 1061 [2020] ICR 145 per Underhill LJ at §11 confirmed that "discrimination" because

one was (mistakenly) perceived to have a particular protected characteristic was outlawed under the EA 2010: **AB Tab 27 EF page 1443 at 1447-1448:**

> "11 It is common ground before us, as it was before both tribunals below, that an act will be caught by section 13(1) EA 2010 where A acts because he or she *thinks that B has a particular protected characteristic even if they in fact do not*: this is generally labelled 'perception discrimination'.
>
> Judge Richardson gave an example at para 47 of his judgment, taken from the Explanatory Notes to the 2010 Act:
>
> > 'If an employer rejects a job application form from a white man whom he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception.'
>
> I should say, because it appears that a case of perception discrimination under the EA 2010 has not previously been before this court, that I am satisfied that the consensus on this issue below was correct. As a matter of ordinary language the phrase 'because of [a protected characteristic]' is wide enough to cover the case where A acts on the basis that B has that characteristic, whether they do or not; and the Explanatory Notes confirm that that was Parliament's intention."

7.7 And in ***English v. Thomas Sanderson Ltd.*** [2008] EWCA Civ 1421 [2009] ICR 543 **AB Tab 23 EF page 1321** the Court of Appeal by a 2:1 majority (Sedley LJ and Lawrence Collins LJ forming the majority, Laws LJ dissenting) that it was enough to make out a relevant claim under what is now the EA 2010 to have suffer detrimental treated by others by reference to a protected characteristic which they knew you did not have. In upholding a claim of harassment because of sexual orientation made by a heterosexual man (even although he was neither *perceived* nor thought by his work colleague to be gay) on the basis that he that he had been subjected for a protracted period to banter and innuendo of a homophobic nature by his colleagues (apparently because they perceived him as having stereotypical characteristics which they associated with a homosexual in that he had attended a boarding school and lived in Brighton). Sedley LJ observed at para 37 **EF page 1334:**

> "The single critical assumed fact was that the claimant was repeatedly taunted as gay. In my judgment, it did not matter whether he was gay or not. The calculated insult to his dignity, which depended not at all on his actual sexuality, and the consequently intolerable working environment were sufficient to bring his case both within regulation 5 of the 2003 Regulations and within Directive 76/207.
>
> The incessant mockery ('banter' trivialises it) created a degrading and hostile working environment, and it did so on grounds of sexual orientation. That is the way I would prefer to put it. Alternatively, however, it can be properly said that the fact that the claimant is not gay, and that his tormentors know it, has just as much to do with sexual orientation - his own, as it happens - as if he were gay."

and Lawrence Collins LJ stated at paras 45-46 **EF page 1335**.

"45. … If one were to ask the question whether the repeated and offensive use of the word 'faggot' in the circumstances of this case was conduct 'on grounds of sexual orientation' the answer should be in the affirmative *irrespective of the actual sexual orientation of the claimant or the perception of his sexual orientation by his tormentors*.

46 If the conduct is 'on grounds of sexual orientation' it is plainly irrelevant whether the claimant is actually of a particular sexual orientation.

7.8 Even if there were no specific protected categories of "sexual orientation" or "gender reassignment" in the EA 2010 it could anyway be argued Such an analysis - under which the protections afforded by the law against discrimination on grounds of "sexual orientation" [65] and/or "gender non-conformity" are already encompassed within existing prohibition on sex discrimination. But this would be, if and only if, sex discrimination is predicated on the ordinary meaning of sex as a *biological* referent. This was the finding of the US Supreme Court in *Bostock v. Clayton County, Georgia* (2020) SCOTUS 17-1618 (15 June 2020) **AB Tab 85 EF page 3389** where that court noted **EF pages 3397, 3401-3402, 3425**:

"The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to

"status as either male or female [as] determined by reproductive biology."

The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation.

But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, *we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.*

…

[I]t is *impossible* to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.

Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.

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[65] This is an argument which was essayed and rejected by the Appellate Committee of the House of Lords in *Macdonald v Ministry of Defence* [2003] UKHL 34, 2003 SC (HL) 35 [**not produced**] which was unwilling to countenance the possibility that the UK Armed Forces' then policy of enforced dismissal of serving gay and lesbian service personnel was unlawful because in breach of the Sex Discrimination Act 1975.

> Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.
> ...
> Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making
> it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

7.9 Returning to the case before us, the assertion by the court below that, aside from the pregnancy and maternity protection provisions, the definition of "women" and the protected characteristic of "sex" in the EA 2010 (or per the EHRC intervention always and only) refers to "certificated sex" renders the provisions of the EA 2010, particularly those concerned with the protection of women, unworkable in practice. This could never have been Parliament's intention for the EA 2010.

7.10 Parliament clearly intended in the wording it actually used when enacting subsection 9(3) GRA 2004 that the subsection 9(1) GRA 2004 legal fiction should *not* be read as embodying an exceptionless and universal principle applicable to all past and future statutory provisions.

7.11 The decision of the court below, and the submissions of the Scottish Ministers and the intervention by the EHRC and Amnesty International all proceed on the assumption or bald assertion that there is nothing in the EA 2010 – whether it provisions, its structure, its overall policy and consideration of its practical efficacy – which is sufficient to engage generally s.9(3) GRA 2004.

7.12 But neither the court below in its decision, nor the respondents in their submissions, nor the EHRC or Amnesty International in their intervention before this court, provide any proper rationale or justification for their claim that the "inescapable effect" of s. 9(1) GRA is to require the reading in of "certificated sex" into the EA 2010 use of the protected category of "sex".

7.13 By contrast the appellant's reading that, throughout the EA 2010, all references to and uses of the terms "men", "women", "male", "female" and to "sex" are referents to, and

only to, biological categories. This interpretation has the following virtues, corresponding with the fundamental canons of statutory construction:

(i) it is (unlike the approach of the court below) a *consistent* reading which applies throughout the EA 2010;

(ii) it is a reading which complies with the "general definition" provisions of s.212(1) EA 2010;

(iii) it is a reading which allows for a common sense understanding and application of, among other EA 2010 provisions of general application: s.11 "sex", s.12 EA "sexual orientation", subsection 13(6) re "direct discrimination if the protected characteristic is sex", and the pregnancy and maternity discrimination protections afforded to women as set out in ss.17 and 18;

(iv) this compliance with "ordinary language usage" is of particular importance in a statute such as the EA 2010: (a) which imposes obligations on both public bodies and on private individuals; (b) whose provisions cover activities which fall within the sphere of private law just as much as public law; and (c) which is intended to be administered and complied with day to day in relation to everyday actions by non-lawyers;

(v) it allows for the ready and lawful administration in practice, as Parliament had intended, of many of the EA 2010's provisions, in particular relating to: pregnancy and maternity protection; positive action measures for women; genuine occupational requirements for women; equal pay for women; the provision of single sex and separate sex services and accommodation (including in schools, hospitals and prisons); the provision of sex-segregated communal accommodation; freedom of association for women and men; freedom of association for lesbians and gay men; and fair participation and competition for women in sport.

7.14 This leaves the GRA 2004, then, also to operate just as Parliament had intended in an "always speaking" manner: 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 (and, if men issued with GRC

showing an acquired gender of the female gender, to receive a State pension at the age fixed for women. [66])

7.15 Given that same sex marriage is now permitted, that pension ages between women and men have been equalised [67] - this recognition retains a largely symbolic value. But much has changed (legislatively and socially) since 2004; and, in any event, symbols themselves have enduring value. As the campaign group, the Equality Network, submitted in another process:

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[66] See e.g. *Grant v United Kingdom* (2007) 44 EHRR 1 **AB Tab 65 EF page 2553 at 2561:**

> "42. … Contrary to the applicant's argument, the Court did not make any finding in *Goodwin v United Kingdom* (2002) 35 EHRR 18 **AB Tab 62 EF page 2479** that the refusal of a pension at an earlier time violated that applicant's rights. The differences applicable to men and women concerning pension ages and national insurance contributions was adverted to in the context of examining the consequence of the lack of legal recognition of transsexuals. The finding of a violation was, in light of previous findings by the Court that the Government had been acting within their margin of appreciation, made with express reference to the conditions pertaining at the time the Court carried out its examination of the merits of the case.16
>
> "43. Consequently, in so far as the applicant makes specific complaint about the refusal to accord her the pension rights applicable to women of biological origin she may claim to be a victim of this aspect of the lack of legal recognition from the moment, after the *Christine Goodwin* judgment, when the authorities refused to give effect to her claim, namely, from September 5, 2002.
>
> "44. Subject to the above considerations, the Court finds that there has been a breach of the applicant's right to respect for private life contrary to Art.8 of the Convention."

[67] For a history of the equalisation of previous differential State pension ages in the UK see *Stec v. United Kingdom* (2006) 43 EHRR 47 at §§ 33-35 **AB Tab 64 EF page 2566 at 2572-2573:**

> "33. … The Sex Discrimination Act 1986 had amended the Sex Discrimination Act 1975 to make it unlawful for an employer to have different retirement ages for men and women. The view of the Government, expressed in the White Paper, was that the preferential pension age for women had no place in modern society and it was proposed to equalise pensionable age for men and women.
>
> "34. It was decided to equalise at 65, rather than a lower age, because people were living longer and healthier lives and because the proportion of pensioners in the population was set to increase. It was estimated that any move towards paying male state retirement pensions earlier than 65 would cost in the order of £9.8 billion per year gross (representing additional pension payments to men between 60 and 65 and lost income from National Insurance contributions from these men) or a net sum of £7.5 billion per year (when account was taken of savings on
> payment of other, non-National Insurance Fund benefits to such men). It was decided to introduce the change gradually to ensure that women affected by the change and their employers had ample time to adjust their expectations and arrange their financial affairs accordingly.
>
> "35. In order to bring male and female pensionable age into line with each other, therefore, s.126 of the Pensions Act 1995, together with Sch.4, provide for the pensionable age of women born between April 6, 1950 and April 5, 1955 to increase progressively. With effect from 2010, the pensionable age of men and women in the United Kingdom will begin to equalise, and by 2020 both sexes will attain pensionable age at 65."

> "There are … very few occasions in which having a GRC has a practical effect. That does not detract from what it means to a trans person to have a GRC; … but in the day-to-day life of a trans person, the concept of 'legal sex' is unimportant. The circumstances in which a person - whether trans or not - has to prove what sex they are, are very rare."[68]

7.16 For all the reasons set out in the appellant's written Case **CV Tab 6 EF page 151** (which for the avoidance of doubt is adopted in full before this court) as supplemented by the further points made in oral submission, the appellant submits that the appeal should be allowed on the bases that:

(1) the meaning of the terms "sex", "man" and "woman" in and throughout the EA 2010 is always and only a reference to the *facts* of immutable *biological* criteria;

(2) the issuing to an individual of a full Gender Recognition Certificate under the GRA 2004 in the acquired gender of "female" does *not* result in that individual thereby falling *within* the definition of "woman" under the EA 2010;

(3) the issuing to an individual of a full GRC under the GRA 2004 in the acquired gender of "male" does *not* result in that individual thereby falling *outside* the definition of "woman" under the EA 2010;

(4) on a proper interpretation of both the EA 2010 and GRA 2004, the revised statutory guidance issued by the Scottish Ministers under s.7 2018 ASP is unlawful, having regard to the limits imposed on the Scottish Ministers' powers, notably their devolved competence under s.54 SA 1998.

[68] ***Scottish Ministers v. Advocate General for Scotland*** [2023] CSOH 89, 2024 SC 173 at § 63 **AB Tab 7 EF page 878 at 910**.