

t: 0131 200 1299
f: 0131 608 1004
e: sindi.mules@balfour-manson.co.uk
DX: ED4 Edinburgh

Scottish Government Legal Directorate
and
Registrar General for Scotland, National Records of
Scotland

Our Ref: SM/JN/FAI/189/I

Your Ref:

10 November 2021

By e-mail only

Helen-anne.Lyle@gov.scot
Katherine.Marshall@gov.scot
censuscorrespondence@nrscotland.gov.uk
statisticscustomerservices@nrscotland.gov.uk

Dear Sir/Madam

**FAIR PLAY FOR WOMEN LTD
CENSUS SCOTLAND 2022
GUIDANCE FOR ANSWERING SEX QUESTION**

We are instructed by Fair Play for Women Ltd.

The matter concerns planned Guidance to accompany the sex question in the 2022 Census in Scotland.

Our client's concern is with the Guidance published by National Records of Scotland (NRS) which can be found [here](#). A copy is attached for ease of reference.

Our client considers that the Guidance ought to be withdrawn and that it should be confirmed that the question "What is your sex?" means sex as recorded on a birth certificate or gender recognition certificate.

Their position is based on legal authority for the proposition that "sex" in law means the sex that is registered at birth in accordance with the obligations imposed by law by way of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 and Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Regulations 1997.

The House of Lords held in *Bellinger v Bellinger* [2003] 2 AC 467 that one's registered sex at birth could not, in law, be changed. Following the decision in *Bellinger*, Parliament enacted the Gender Recognition Act 2004. The 2004 Act provides at section 9 that a person's legal sex will be recognised as having changed where a full gender recognition certificate is issued to a person.

Parliament having considered how to respond to the finding in *Bellinger*, there is now, therefore, a statutory procedure set down in the 2004 Act which must be followed in order for a gender recognition certificate to be issued. Nothing short of that statutory procedure will suffice in law to change one's legally registered sex. In particular, there is no provision currently recognised in law that permits any form of self-identification to affect one's legally registered sex.

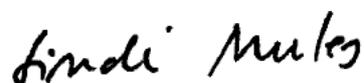
To the extent that the guidance suggests that any answer may be given to the question "What is your sex?" other than the sex registered on one's birth certificate or gender recognition certificate, it is mistaken in law and, on that hypothesis, unlawful and it should be withdrawn. Your attention is drawn in particular to the UK Supreme Court's recent discussion of the matter of unlawful guidance and the continued application of *Gillick v West Norfolk and Wisbech Area Health Authority* in *R(A) v Secretary of State for the Home Department* [2021] 1 WLR 3931.

It is assumed that you will be familiar with the recent decision by the High Court in England *R (on the application of Fair Play for Women Ltd) v UK Statistics Authority* [2021] EWHC 940 (Admin). A copy of the Opinion and Consent Order is attached for ease of reference.

Please confirm that the guidance will be withdrawn and that the section relating to the question of "What is your sex?" will be reworded in order to make it lawful. We are instructed to request a response within seven days of this letter and to inform you of our client's intention to initiate legal proceedings.

We look forward to hearing from you.

Yours faithfully



Sindi Mules
Partner
Balfour+Manson LLP