

**UNTO THE RIGHT HONOURABLE
LORDS OF COUNCIL AND SESSION**

P E T I T I O N

of

FAIR PLAY FOR WOMEN LTD, a company incorporated under the Companies Acts (Company Number 12273984) and having its registered office at 12 Constance Street, London E16 2DQ

PETITIONER

for

Judicial review of the guidance issued by National Records of Scotland to accompany the 'sex question' in the 2022 Scottish census

HUMBLY SHEWETH:

- I. The petitioner is fully designed in the instance. The respondents are as designed in Part 1 of the Schedule for Service. The persons specified in Part 2 of the Schedule for Service may have an interest. Service of this petition in common form is sought on the parties listed in the Schedule for Service. The petitioner is a private company limited by guarantee. The petitioner is a campaigning and consultancy group which raises awareness, provides evidence and analysis, and works to protect the rights of women and girls in the United Kingdom. As set out below, the petitioner reasonably apprehends that the guidance issued by National Records of Scotland (through the Registrar General for Scotland) is unlawful and directly impacts the rights of women and girls. This is a matter with which the petitioner is directly concerned. In any event,

the petitioner has the “sufficient interest” required under section 27B(2)(a) of the Court of Session Act 1988 such as to entitle it to bring this matter before this court by way of judicial review. The petitioner has standing.

2. The respondents and the interested parties are all domiciled in Scotland. This petition is an application to the supervisory jurisdiction of this court in relation to guidance published and designed to be used in Scotland. There are no proceedings pending before any other court or courts involving the present cause of action and between the parties hereto. There is no agreement among the parties prorogating jurisdiction over the subject matter of the present cause to any other court. This court accordingly has jurisdiction to determine this petition for judicial review.
3. That the date on which the grounds giving rise to the petition first arose was 31 August 2021. On that date, National Records of Scotland published “guidance for answering the sex question” in the census which is due to be held in Scotland in 2022 (“the Guidance”). National Records for Scotland operates under the leadership of the Registrar General for Scotland. The Guidance was published with the knowledge and approval of the Scottish Government. For the reasons set out in detail below, the Guidance is unlawful.
4. That the petitioner seeks the following remedies:
 - a. Reduction of the guidance for answering the sex question, published by National Records of Scotland on 31 August 2021;
 - b. Interdict and interdict *ad interim* prohibiting the respondents from publishing or publicly distributing the guidance for answering the sex question, published by National Records of Scotland on 31 August 2021, whilst these proceedings are in dependence;

- c. Such further orders (including an order for expenses and the scale on which such expenses should be assessed) as may seem to the court to be just and reasonable in all the circumstances of the case.
5. The petitioner challenges the Guidance on the following grounds.
6. The Census Act 1920 is a Westminster statute with application across Scotland, England, and Wales. The 1920 Act permits the holding of censuses. The 1920 Act contains in its schedule a list of particulars in respect of which questions may be asked in any such census. On or around 11 March 2020 the Census (Scotland) Order 2020 received Royal Assent. The 2020 Order (as amended) provides for the holding of a census in Scotland in 2022. Schedule 2 to the 2020 Order sets out the questions to be asked in the forthcoming Scottish census. The form of the census is prescribed by the Census (Scotland) Regulations 2020.
7. Paragraph 1 of the Schedule to the 1920 Act (matters in respect of which particulars may be required) lists the following matters: (i) name, (ii) sex, and (iii) age. Section 1(1) of the 1920 Act provides that no particulars shall be *required* to be stated other than those that are mentioned in the schedule to that Act. On 2 October 2018, Fiona Hyslop MSP introduced on behalf of the Scottish Ministers the Census (Amendment) (Scotland) Bill. The Bill, as introduced, sought to amend paragraph 1 of the Schedule to the 1920 Act so as to include the words “including gender identity” after the word “sex”. That amendment was not approved nor enacted by the Scottish Parliament. The relevant parliamentary committee had expressed a concern that the amendment would confuse sex and gender identity. The Census (Amendment) (Scotland) Act 2019 (the enacted form of the Bill) instead introduced new paragraphs 5B (“transgender status and history”) and 5C (“sexual orientation”) into the Schedule to the 1920 Act. Paragraph 1 of the Schedule was not amended.

8. Section 8(1) of the 1920 Act makes it an offence to refuse to answer a mandatory question on a census or to give a false answer to any such question. The only exceptions to this offence are in relation to religion, sexual orientation, or gender identity.
9. The 2020 Order at paragraph 6 requires the inclusion in the census of questions in relation to the particulars specified in paragraphs 1-27 of Schedule 2 to the 2020 Order. Those particulars include the questions about sex (para 4) and transgender status and history (para 6). Two distinct questions are posed in relation to these particulars in the 2020 Regulations: (i) “what is your sex?”, and (ii) “do you consider yourself to be trans, or have a trans history?”. The latter question includes the following instruction to the person responding to the census: “Trans is a term used by people whose gender is not the same as the sex they were registered at birth”.
10. As set out above, on 31 August 2021, National Records of Scotland issued guidance on the sex question. The Guidance is designed to accompany the census. The Guidance is designed to inform the person responding to the census of what is expected of them. The Guidance says:

“If you are transgender the answer you give can be different from what is on your birth certificate. You do not need a Gender Recognition Certificate.”

11. What is meant by “sex” in the 1920 Act is a matter of statutory interpretation, and as such a question of law. On 16 March 2021, the Administrative Division of the High Court of England & Wales issued a declaration by way of consent order in the matter of *Fair Play For Women v UK Statistics Authority and the Minister for the Cabinet Office*. That declaration was in the following terms:

“IT IS HEREBY DECLARED THAT “sex” in paragraph 1 of the Schedule to the Census Act 1920 ... and the “What is your sex” question in Schedule 2 to the

Census (England) Regulations 2020 means sex as recorded on a birth certificate or Gender Recognition Certificate”.

A declaration by way of consent order in England & Wales is sufficient to form a determination in law: *Greenpeace v Advocate General* 2021 SLT 1303. There is no compelling reason that paragraph 1 of the schedule to the 2020 Act should be interpreted differently in Scotland than in England & Wales.

12. The declaration of the High Court as set out above is supported by legal authority at the highest level. For legal purposes, “sex” means one’s sex as registered at birth: *Bellinger v Bellinger* [2003] 2 AC 467. In Scotland, that means the sex recorded in accordance with the legal obligations imposed by way of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 and the Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Regulations 1997. Prior to 2004, even where one had undergone gender reassignment surgery, it was not possible to alter one’s legally registered sex: *Bellinger v Bellinger* [2003] 2 AC 467. The Westminster Parliament subsequently enacted the Gender Recognition Act 2004. Section 9 of the 2004 Act provides that a person’s legal sex will be recognised as having changed once a full gender recognition certificate (“GRC”) is issued in relation to that person. The law therefore now permits a person to change their legal sex. A GRC is issued under the 2004 Act where a person complies with the legal procedures contained within that Act. A GRC cannot otherwise be issued in relation to a person. Absent the following of the prescribed legal procedure for changing one’s legally recorded sex, the law does not recognise a change in sex. The law therefore defines sex as either (i) the sex recorded on one’s birth certificate, or (ii) the gender recorded on one’s gender recognition certificate. In law, sex does not include any element of self-identification.
13. Where a public body issues a document which authorises or approves unlawful conduct by others, the document is itself unlawful: *Gillick v West Norfolk and*

Wisbech Area Health Authority [1986] AC 112; *R (A) v Home Secretary* [2021] 1 WLR 3931. The Guidance authorises and approves a person answering the sex question with an answer that is other than what is recorded on the person's birth certificate or gender recognition certificate. The Guidance is wrong to do so. In doing so, the Guidance authorises and approves unlawful conduct. Indeed, the Guidance authorises and approves conduct which could amount to an offence under the 1920 Act. The Guidance is therefore unlawful and should be reduced as sought by the petitioner. As the Guidance currently stands, there is a significant risk that the data in relation to sex will be inaccurate and unreliable. The census data is used by government to inform and underpin policy decisions. Inaccurate data in relation to sex will have a detrimental effect on policy decisions made in relation to women and girls. It is vital that the data collected by the census is accurate and lawful. The order for reduction, as sought by the petitioner, is required in order to protect the accuracy of the census data.

14. The identity of a person who identifies with a different gender from their legally registered sex is still collectible data in the proposed census because of the additional question that has been added in light of the addition of "transgender status and history" to the 1920 Act. Gender identity is therefore the subject of a different and discrete question. It is not the case that a transgender person's existence is not recognised by the census. Indeed, clarification on the matter ought to make the data of more use to the government in that it will be clear to what extent there is an element of Scottish society who identify with a gender that does not match their registered legal sex. Such data would be wholly unreliable if people were encouraged to answer the sex question with inaccurate legal responses. That one's legal sex might be different from one's self-identified gender is already recognised in law: cf section 9 of the Victims and Witness Act 2014. Any attempt to conflate the two concepts, as does the Guidance, is unlawful. The Guidance should be reduced.

15. Absent an order from this court, the petitioner is reasonably apprehensive that the Guidance will be published in its current form. Doing so would significantly undermine the quality of the data collected by the census. Doing so would make it all but impossible to rectify the way in which answers are given to the census. There is more danger of significant harm being done if the Guidance is issued and found to be unlawful than if the Guidance is not issued but ultimately found to be lawful. There is significantly more risk if interdict *ad interim* is not granted as sought than would be the case if such an order were to be made. The petitioner has set out a clear and strong *prima facie* case that the Guidance is unlawful. The balance of convenience rests with the granting of interdict *ad interim* as sought by the petitioner. Such an order should therefore be made.
16. The petitioner has sought to resolve the matters set out herein in pre-action correspondence with the Scottish Ministers. The Scottish Ministers have failed to acknowledge that the Guidance is unlawful. The Scottish Ministers have failed to undertake to prevent the Guidance being issued. Separately, the petitioner entered into correspondence with the Registrar General for Scotland. The matters have not been capable of resolution extra-judicially. These proceedings have therefore been rendered necessary in all the circumstances.

PERMISSION TO PROCEED

17. This petition is presented within the time limits contained at section 27A of the Court of Session Act 1988. *Esto* the petition is not presented in time (which is denied), it is in any event equitable in all the circumstances that the petition be permitted to be heard and determined and an extension to the time limit would be fair, just and reasonable in the circumstances of this case.
18. The petitioner satisfies section 27B(2) of the Court of Session Act 1988. The applicant has demonstrated that it has a sufficient interest in the subject matter of this application. As set out above, it is a representative and campaigning body with

a direct and material interest in the rights of women and girls. The rights of women and girls are materially undermined by the Guidance for the reasons set out above. The petitioner has a sufficient interest to justify bringing these proceedings and has standing to do so. Standing the consent order from the High Court in England & Wales on the same legislative provision as set out above, the application has a real prospect of success. It cannot be said that the arguments raised herein are fanciful or manifestly without substance. Permission should therefore be granted.

19. The following documents and authorities are necessary for the determination of permission:
- a. Census Act 1920, ss 1, 8 and schedule;
 - b. Census (Scotland) Order 2020, para 6 and schedule 2;
 - c. Census (Scotland) Regulations 2020;
 - d. Consent order of Mr Justice Swift dated 16 March 2021 in the matter of Fair Play For Women v UK Statistics Authority and another;
 - e. Guidance in relation to the sex question, published 31 August 2021;
 - f. Letter from petitioner to Registrar General for Scotland dated 1 April 2021;
 - g. Pre Action Letter from petitioner's solicitor to SGLD and NRS dated 10 November 2021;
 - h. Holding response letter from SGLD to petitioner's solicitor dated 17 November 2021;

- i. Letter from Chief Executive of NRS to petitioner's solicitor dated 25 November 2021;
- j. *Bellinger v Bellinger* [2003] 2 AC 467 at §§29-49;
- k. *R(A) v Home Secretary* [2021] 1 WLR 3931 at §§29-49;
- l. Gender Recognition Act 2004, ss1, 2, 3, 4, 9

TRANSFER TO THE UPPER TRIBUNAL

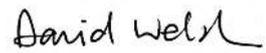
- 20. This petition is not subject to a mandatory or discretionary transfer to the Upper Tribunal.

PLEAS-IN-LAW

- 1. The guidance in relation to the sex question on the Scottish 2022 census, published by National Records of Scotland on 31 August 2021, being a document which authorises or approves unlawful conduct, is unlawful and should be reduced as sought by the petitioner.
- 2. The petitioner being reasonably apprehensive that the unlawful Guidance will be published and disseminated by the respondents in the absence of an order from this court and having set out a *prima facie* case in relation thereto, interdict *ad interim* should be granted as sought.

3. The balance of convenience favouring the granting of interdict *ad interim* such an order should be granted as sought.

According to Justice etc.

A handwritten signature in black ink, reading "David Welsh", enclosed within a thin black rectangular border.

SCHEDULE FOR SERVICE

PART 1: RESPONDENT(S)

1. **Paul Lowe, Registrar General for Scotland**, National Records of Scotland, General Register House, 2 Princes Street, Edinburgh EH1 3YY
2. **The Scottish Ministers**, Victoria Quay, Edinburgh EH6 6QQ

PART 2: INTERESTED PERSON(S)

1. The Right Honourable the Lord Keen of Elie QC, Advocate General for Scotland, Office of the Solicitor to the Advocate General for Scotland, Victoria Quay, Edinburgh EH6 6QQ
2. The Scottish Parliamentary Corporate Body, Scottish Parliament, Edinburgh EH99 ISP.

SCHEDULE OF DOCUMENTS

1. Consent order of Mr Justice Swift dated 16 March 2021 in the matter of Fair Play For Women v UK Statistics Authority and another;
2. Judgment of Mr Justice Swift in the matter of R (Fair Play for Women) v UK Statistics Authority and another [2021] EWHC 940 (Admin);
3. Guidance in relation to the sex question, published 31 August 2021;
4. Letter from petitioner to Registrar General for Scotland dated 1 April 2021;
5. Pre-Action Letter from petitioner's solicitor to SGLD and NRS dated 10 November 2021;
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BALFOUR+MANSON LLP
56-66 FREDERICK STREET, EDINBURGH