



Equality
Network



Scottish
Trans

Written evidence for stage 1 of the Gender Representation on Public Boards (Amendment) (Scotland) Bill

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This submission is on behalf of both the Equality Network and Scottish Trans. The Equality Network is a national lesbian, gay, bisexual, transgender and intersex (LGBTI) equality organisation in Scotland existing since 1997. Scottish Trans, a project based within the Equality Network since 2007, focuses specifically on trans equality.

Summary of our position

We support the Gender Representation on Public Boards (Amendment) (Scotland) Bill.

It is our understanding that the Bill is the only way to literally remove from the statute book the definition included at section 2 of the Gender Representation on Public Boards (Scotland) Act 2018. This definition was ruled outside the competence of the Scottish Parliament by the Court of Session in February 2022.

This is important because it means that no one reading the legislation would be under the impression that the original definition, struck down by the Court of Session, continued to be the law.

Our involvement in the original Gender Representation on Public Boards (Scotland) Act 2018 and definition of woman included at Section 2

We supported the Gender Representation on Public Boards (Scotland) Act 2018 as it progressed through the Scottish Parliament. We think that women's representation matters, and so were pleased that the Scottish Government were proposing legislation to increase women's representation on the boards of certain Scottish Public Bodies.

At the Bill's introduction, we raised a concern that trans women without gender recognition certificates might not be included in the gender representation objective, because their sex under the Equality Act 2010, which regulates positive discrimination, would be considered male.

We gave evidence to the then Equalities and Human Rights Committee at Stage One of the Bill, suggesting that the Bill could be amended so that 'woman' was defined in a way that would ensure that all trans women who have transitioned and are permanently living as women, with or without gender recognition certificates, would be counted as women for the purposes of the gender representation objective. The Committee then recommended in their Stage One report that this be progressed: <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2017/11/20/Stage-1-report-on-the-Gender-Representation-on-Public-Boards--Scotland--Bill-3/EHRiCS052017R6Rev.pdf>

We worked with Mary Fee MSP to introduce an amendment to the Bill at Stage Two, which was agreed unanimously by the Committee: <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/EHRiC-21-12-2017?meeting=11289&iob=102758>

This is the definition that was then included in section 2 of the Gender Representation on Public Boards (Scotland) Act 2018.

Our involvement in the Judicial Review

We were a public interest intervener in the first stage of the Judicial Review into the Gender Representation on Public Boards (Scotland) Act 2018, taken by For Women Scotland against Scottish Ministers. At this stage, the Outer House of the Court of Session ruled in favour of the Scottish Ministers, and references to our intervention can be seen in Lady Wise's judgement: <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021csoh031.pdf>

We did not intervene in the Appeal taken by For Women Scotland, heard in the Inner House of the Court of Session. It was of course this decision which resulted in the definition of "woman" at Section 2 of the Gender Representation on Public Boards Act (2018) being ruled unlawful.

Our understanding of the ruling

The Court was very clear that their ruling was not about whether the Scottish Parliament had made the right or wrong decision by choosing to include a definition of 'woman' in the 2018 Act that would ensure that all trans women who have transitioned and are permanently living as women, whether they did or did not have a GRC, would be counted as women for the purpose of the gender representation objective:

“The sole issue for the court is thus whether sections 2 and 11 of the Act were within legislative competence. The answer to that question hinges not on a debate about the rights and wrongs of policy decisions in this area, but on the proper interpretation of these sections, considered in the light of section 29 of the Scotland Act 1998, and in particular, the PBE [Public Boards Exception] in schedule 5 of that Act.”

[27] <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf>

We, of course, continue to think that all trans women who have transitioned and are permanently living as women should be counted as women when it comes to positive action measures. We were therefore disappointed that the Court ruled that it was outside the competence of the Scottish Parliament to include a definition in the legislation that would have ensured the inclusion of all trans women in the gender representation objective.

Further details about relevant legal judgements

The February 2022 ruling related wholly to the competence of the Scottish Parliament in relation to the Public Boards Exception in schedule 5 of the Scotland Act 1998.

We are aware that some organisations attempt to misrepresent the ruling to argue that all trans women, whether they do or do not have a GRC, should be considered male for the purposes of the Equality Act 2010.

This argument was tested by a challenge to updated Scottish Government guidance produced to go alongside the Gender Representation on Public Boards (Scotland) Act 2018. The guidance was produced after the ruling of the Court of Session that the original definition at Section 2 was outwith legislative competence. The guidance states that only trans women with GRCs should be counted as women for the purposes of the gender representation objective:

<https://www.gov.scot/publications/gender-representation-public-boards-scotland-act-2018-statutory-guidance-2/>

For Women Scotland took Scottish Ministers to judicial review in relation to the guidance, claiming that no trans woman should be counted as a woman for the purpose of the gender representation objective. We were a public interest intervener in the case when it was heard at the Outer House of the Court of Session.

The Outer House of the Court of Session ruled in favour of Scottish Ministers in December 2022: <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2023csoh89.pdf>

For Women Scotland then appealed that decision. The Inner House of the Court of Session ruled in favour of Scottish Ministers in November 2023:

https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2023csih371cb71fe0-ea75-4892-b423-4751efe6e075.pdf?sfvrsn=554ad62c_1

In the most recent ruling, the Court was very clear on two key points:

1. The question of whether a trans woman with a Gender Recognition Certificate was considered a woman in law for the purposes of the Equality Act 2010 was not decided in the earlier case:

“The issue in the present case did not arise in and was not determined by FWS 1.” [32]

2. Trans women with GRCs are women in law for the purposes of the Equality Act 2010:

“Section 11 [of the Equality Act 2010], which refers to man or woman, is capable of being read naturally and consistently with the terms of section 9 GRA, whereby the acquired sex becomes that of “woman” or “man” accordingly. The definition of these terms contained within section 212(1), when applied in particular to section 11 (which is essentially the issue at the heart of this case) is equally capable of being interpreted in a way which accommodates those in possession of a GRC.” [48]

“A person with a GRC in the female gender comes within the definition of “woman” for the purposes of section 11 of the EA, and the guidance issued in respect of the 2018 Act is lawful.” [65]

Our views on the Bill

It is our understanding that the Bill is the only way to literally remove from the statute book the definition included at section 2 of the Gender Representation on Public Boards (Scotland) Act 2018. That definition is in any case no longer active, having been ruled outwith legislative competence in the 2022 Inner House judgement.

We agree with the position outlined by the Scottish Government in their [Equality Impact Assessment](#) related to the Bill that this Bill itself has no negative impact on trans people. It is not the Bill that will remove the definition of ‘woman’ in law at Section 2 – that already happened nearly two years ago as a result of the judgement.

We think it could be worthwhile to explore whether there are any potential changes to the law that could prevent the need for primary legislation in future where similar situations arise. Where a ruling of a Court means that a part of an Act is declared

outwith legislative competence, and no revisiting of the legislation more widely is needed, it would seem to us to reduce the burden on both parliamentary and government time for there to be a mechanism such as an SSI that could be used to bring the statute book into line with the court ruling. Of course, any such change should be suitably narrowly drawn so that such a mechanism could only be used in situations analogous to the current Bill – which is essentially a tidying up of the statute book.