IN THE COURT OF SESSION

Court Ref: P578/22

WRITTEN INTERVENTION IN THE PUBLIC INTEREST

by

LGB ALLIANCE, a company limited by guarantee, incorporated under the Companies Act (company number 12338881) and having its registered office at 124 City Road, London EC1V 2NX, and a charity registered in England and Wales (charity number) 1194148

INTERVENER

in the petition of

FOR WOMEN SCOTLAND LIMITED, a company incorporated under the Companies Act and registered in Scotland with Company number SC669393 and with registered offices at 5 South Charlotte Street, Edinburgh EH2 4AN

PETITIONER

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

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1. Introduction

1.1. This written intervention is presented in accordance with this court's interlocutor of 21 October 2022 which, insofar as relevant permits the Intervener to lodge 'written submissions of no more than 5000 words, on condition that said submissions will not contain evidence but may include quotes or ex-parte statements as appropriate'. This document represents those written submissions.

1.2. Read short, the Intervener's position is supportive of the petitioner in that the revised statutory guidance of April 2022 (the "RSG") is unlawful and should be reduced. The RSG is unlawful as it attempts to conflate discrete and deliberately separated legal protections for minority groups in a manner which undermines the structure of the Equality Act 2010.

1.3. As was prefaced in the Intervener's application to this court, the Intervener's primary reason for intervening is to ensure that the court considers the consequences on other protected characteristics under the 2010 Act of the arguments being submitted by the Scottish Ministers and the EHRC. The Intervener is concerned that the hard-fought legal protections afforded to other characteristics will be undermined and therefore the protections diluted.

1.4. Whilst the petitioner understandably in the context of this challenge focuses on the conflation of sex and gender reassignment, the Intervener's primary focus is on the effect it has on other characteristics, in particular same sex sexual orientation.

1.5. The Intervener contends that the conflation of sex and gender is prejudicial to lesbians and gay men. Lesbians are entitled to lesbian only events and services as are gay men. Conflating sex and gender makes this impossible as set out below.

1.6. It is not a problem that is restricted to Scotland, or indeed to the United Kingdom. Sarah Bolt, the Tasmanian Anti-discrimination Commissioner recently rejected an application for approval of a lesbian only event that excluded males. Ms Bolt regarded the proposed event as involving 'offensive, humiliating, intimidating insulting and ridiculing conduct' and could not see how anyone could determine a person's biological sex 'without intrusive questioning and completely undermining a person's right to privacy'.[1]

2. The Intervener

2.1. The Intervener's interest in this matter is borne of its role as a registered charity.

2.2. The Intervener describes its mission as follows:

a. To advance lesbian, gay and bisexual rights:

[1] https://www.spectator.com.au/2021/08/why-women-are-at-risk-from-the-campaign-to-abolish-gender/

i. We advance the interests of lesbians, gay men and bisexuals, and stand up for our right to live as same-sex attracted people without discrimination or disadvantage;

ii. We will ensure that the voices of lesbians, gay men and bisexuals are heard in all public and political discussions affecting our lives.

b. To highlight the dual discrimination faced by lesbians:

i. We amplify the voices of lesbians and highlight the dual discrimination experienced by lesbians as women who are same-sex attracted in a male-dominated society.

c. To protect children who may grow up to be lesbian, gay, or bisexual:

i. We work to protect children from harmful, unscientific ideologies that may lead them to believe either their personality or their body is in need of changing. Any child growing up to be lesbian, gay or bisexual has the right to be happy and confident about their sexuality and who they are.

d. To promote free speech on lesbian, gay and bisexual issues:

i. We promote freedom of speech and informed dialogue on issues concerning the rights of lesbians, gay men and bisexuals. We assert that different opinions, even those we may disagree with, should be heard as part of the public debate.

2.3. The Intervener is a non-partisan charity. It engages with organisations and publications across the political spectrum. The Intervener was established in 2019 as the only group in the United Kingdom dedicated exclusively to the promotion of the sex based rights of lesbian, gay and bisexual people.

3. The law as regards the recognition of gender reassignment

3.1. The Intervener differs from LGBTQIA+ associations and organisations because the Intervener believes that biological sex is the fundamental basis of all human rights laws that are designed to protect lesbian, gay and bisexual people. Read short, the Intervener's view is that biological

sex is immutable. A homosexual relationship is a relationship between two people of the same sex. The hard-won protections afforded to the LGB community would be undermined by any suggestion to the contrary. The consequences of the decision in these proceedings could be very far-reaching indeed and are likely to affect rights significantly beyond those which are the focus of the proceedings.

3.2. The Intervener strongly believes that a large number of the problems such as those giving rise to these proceedings arise as a result of a conflation of the terms 'sex' and 'gender' when those two terms have come to have – if they have not always had – different meanings.

3.3. Much is made in these proceedings of the provisions set out at section 9 of the Gender Recognition Act 2004, which provides for the general effect of a Gender Recognition Certificate ("GRC").

3.4. As is apparent from sub-section 9(1), there is already an unhelpful conflation of the terms sex and gender. However, the clear meaning of that provision, read in light of the remaining structure of the 2004 Act, is that, having satisfied the requirements of the Act under section 1 (ie 'living in the other gender'), a person may acquire the gender in which they have been living by making an application to be determined by a Gender Recognition Panel. It is notable that there is no mention there at all of sex.

3.5. If and when the Gender Recognition Panel grants the application, either a full or interim GRC is granted under section 4 of the 2004 Act. It is the granting of a full GRC which gives rise to the provisions in section 9.

3.6. So, having followed the scheme through the 2004 Act, a person has lived in "the other gender", which we take to be the gender other than his or her sex, and has satisfied the Gender Recognition Panel through the provision of various elements of evidence, including evidence of gender dysphoria, and therefore *acquires* 'the other gender'. Thus at subsection 9(1):

'… *the person's gender becomes for all purposes the acquired gender* …'

3.7. The 2004 Act is effectively a legalistic mechanism, designed to recognise that a person's sex and gender identity may not align, and to create a legal fiction which purports to resolve (at least in part) that difficulty for the individual.

3.8. What the 2004 Act cannot do – and nor does it purport to do – is change a person's biology. It may permit a person to *update* certain governmental documents (some of which do not require a GRC to do so), but it cannot reverse time and change the realities of a person's birth nor the societal reaction to their sex prior to their acquiring of 'the other gender'. A person who, for example, is born male and lives their childhood as male, but latterly 'acquires the other gender' and thereafter lives as a transgender woman has undoubtedly had a different societal experience 'pre-transition' than someone who is born female and lives their whole life as a woman. It is simply impossible to suggest that the two people in that example have the same lived experience.

3.9. As a deeming provision, section 9 of the 2004 Act serves a clear purpose, but the legal fiction thereby created is only applicable so far.

3.10. Indeed, sub-section (3) makes it expressly subject to other enactments. In the submission of the Intervener, one such enactment is the Equality Act 2010.

4. Interaction between the 2004 Act and the 2010 Act

4.1. It appears to be suggested by the Scottish Ministers and by the EHRC that the 2004 Act is somehow immune from concepts such as implied repeal. That is clearly incorrect as a matter of law in that it is not a constitutional statute such as is the Scotland Act 1998, for example.

4.2. However, the argument is wrong on a much more obvious level. The provisions of sub-section 9(3) of the 2004 Act make section 9 subject even to *secondary* legislation. If it can be overridden by secondary legislation and does not even require primary legislation to override it, the argument that it should somehow be given special treatment as if it were a constitutional statute is lacking in any legal foundation.

4.3. Even if the intention of section 9 were to create a legal fiction that a person's <u>acquired gender</u> should also be taken to create a legal fiction that the person was *always* of that <u>sex</u> (notwithstanding reality), that is wholly displaced – as anticipated by section 9(3) – by the enactment of the 2010 Act. The structure of the 2010 Act is to create separate and discrete protected characteristics.

4.4. Having chosen to protect 'sex' separately from 'gender reassignment', the intention of Parliament was that they were not to be elided. That is the fundamental basis for the decision of the Inner House in the first of the petitioner's petitions (2022 SC 150) as follows:

'*[36] The protected characteristics listed in the 2010 Act include "sex" and "gender reassignment". The Scottish Parliament would, as we have noted, have been entitled to make provision in respect of either or both these characteristics. So far as the characteristic of sex is concerned, it would be open to the Scottish Parliament to make provision only for the inclusion of women, since a reference to a person who has a protected characteristic of sex is a reference either to a man or to a woman. For this purpose, a man is a male of any age; and a woman is a female of any age. Section 11(b) indicates that when one speaks of individuals sharing the protected characteristic of sex, one is taken to be referring to one or other sex, either male or female. Thus an exception which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a 'female of any age'. Provisions in favour of women, in this context, by definition exclude those who are biologically male.*

…

[38] P v S 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, West Yorkshire Police v A and anr (No 2) , 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 2010 Act 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 2004 Act were limited.

[39] By incorporating those transsexuals living as women into the definition of woman the 2018 Act conflates and confuses two separate and distinct protected characteristics, and in one case qualifies the nature of the characteristic which is to be given protection.

…

[40] In any event, the definition of woman adopted in the legislation includes those with the protected sex characteristic of women, but only some of those with the protected characteristic of gender reassignment. It qualifies the latter characteristic by protecting only those with that characteristic who are also living as women. The Lord Ordinary stated (para 52) that the 2018 Act did not redefine 'woman' for any other purpose than 'to include transgender women as another category' of people who would benefit from the positive measure. Therein lies the rub: 'transgender women' is not a category for these purposes; it is not a protected characteristic and for the reasons given, the definition of 'woman' adopted in the Act impinges on the nature of protected characteristics which is a reserved matter.'

4.5. As that passage narrates, the predecessor legislation to the 2010 Act for these purposes was the Sex Discrimination Act 1975. After it had been determined by the CJEU that dismissal based on gender reassignment was a breach of the relevant Council Directive, Parliament did not amend the domestic legislation so as to protect transsexuals under the existing provisions as regards sex. Instead, a new section 2A was added to the Act – separately and discretely carving out protections for transexuals without impinging on the protections on the ground of sex.

4.6. On that matter, Karon Monaghan KC, the author of the leading textbook on Equality Law writes as follows (the full passage will be provided):

'*… the law constructs a concept of "sex" which is binary and biologically determinist. One is a man or a woman, and a clear legal delineation between the two is maintained. In the case of Corbett v Corbett, the court concluded that sex (for the purpose of determining whether respective parties were male and female) was to be determined by the application of chromosomal, gonadal, and genital tests where these are congruent and ignoring any surgical intervention. "Sex" was to be determined and "fixed at birth (at the latest)", and could not be*

"changed, either by the natural development of organs of the opposite sex, or by medical or surgical means". … no uncertainty is assumed to pertain to the meaning of "sex", then, and this is achieved by ignoring its social - or gendered – aspects…. The EA 2010, like the Sex Discrimination Act 1975, treats "sex" (and therefore "gender") as immutable and connectedly biologically determined. When forced by the ECtHR and CJEU to protect transpersons against discrimination, the UK did so not by adopting a socially constructed concept of "sex"[2] *under the SDA, but by amending the SDA so as to make specific – and separate – provision addressing gender reassignment. This is now reflected in the EA 2010*.'

4.7. Provision is therefore made in the 2010 Act for (all of) the protected characteristics to be considered and enforced separately. That understanding, in accordance with section 9(3) of the 2004 Act, is to be preferred to the provisions at section 9 of the 2004 Act. Whether the provisions of section 9 are regarded as having been impliedly repealed or simply superseded in accordance with their terms, the practical effect is the same: for discrimination law purposes, 'sex' means a person's immutable sex at birth; someone who is proposing to undergo or has undergone gender reassignment is elsewhere and separately protected under 'gender reassignment'. Gender reassignment does not – and cannot – cause a biological man to become a woman for discrimination law purposes.

4.8. The provision in the 2010 Act which permits regard to be had to more than one characteristic is at section 14 and has never been brought into force. It is therefore of no assistance to the court in this matter.

5. The Guidance

5.1. The effect of all of this is that the RSG proceeds on a flawed understanding of the law.

5.2. Whilst it is doubtless correct that '*woman in the Act has the meaning under section 11 and section 212(1) of the Equality Act 2010*', the following section is incorrect as a matter of law and

[2] What Ms Monaghan KC refers to as 'a socially constructed concept of sex' is largely what is now referred to as 'gender identity'. Indeed the term 'transsexual' is increasingly replaced by the use of the term 'transgender'. Gender identity is not, of itself, however, a protected characteristic because it does not, of itself, satisfy the definition in section 7 of the 2010 Act of 'gender reassignment' unless and until 'the person is proposing to undergo, is undergoing or has undergone a process'.

should be reduced insofar as it suggests that a biological man who has undergone gender reassignment is capable of being regarded as a woman for the purposes of the Act:

'*In addition, in terms of section 9(1) of the Gender Recognition Act 2004, where a full gender recognition certificate has been issued to a person that their acquired gender is female, the person's sex is that of a woman, and where a full gender recognition certificate has been issued to a person that their acquired gender is male, the person's sex becomes that of a man*.'

The RSG is exactly the kind of guidance that the UK Supreme Court considered recently in at *R (A) v Home Secretary* [2021] 1 WLR 3931. The RSG positively authorises or at least approves of unlawful conduct: the inclusion of biological men in figures that are designed to increase the number of women on public body boards. There is no '*in addition'*. The RSG should not include the passage above.

5.3. The effect of the unlawfulness is clear: it undermines the whole purpose of the Act. The Scottish Government has chosen to give effect to a gender representation objective which it defines as a goal that "*a board has 50% of non-executive members who are women*".

5.4. As the Inner House has already held in the earlier petition, it is not lawful to dilute the provision which is for the benefit of women by including in their number biological men.

6. The wider effect

6.1. From the Intervener's perspective, this attempt by the Scottish Government to dilute protections for women is indicative of a wider policy problem whereby the protections afforded to other groups are seen as secondary to – or less worthy than – those afforded to transexuals, and they are, accordingly, undermined.

6.2. The same desire lay behind the recent move in Scotland to conflate the 'sex question' in the census with an ability to self-identify in whichever gender one chooses without having undergone any lawful process. It is the conflation of sex and gender on the part of the Scottish Government which leads to the problems. It should be noted that the decision as regards the census question (*Fair Play For Women v Registrar General for Scotland* 2022 SC 199) is different from the matters before the court in these proceedings as one is concerned here with the protected characteristics for the purposes of the 2010 Act - ie the matter at point here is

discrimination law and the protections thereunder – rather than simply what 'sex' means in the census legislation.

6.3. The Intervener campaigns against the conflation of protected characteristics because, should biological sex be removed from legislation so that an individual can 'identify' into being a member of the opposite sex without any legal mechanism or oversight, the implications for lesbian, gay and bisexual people are clear and fundamental: homosexuality would no longer exist in the sense of 'same-sex' sexual attraction. Homosexual relationships would be explained away and questioned on the basis that, the default being a heterosexual relationship, one of the couple must 'identify', whether they realise it or not, as being of 'the other gender'. This is not correct: lesbians are women who are sexually attracted to women; gay men are men who are sexually attracted to men; bisexual people are people who are sexually attracted to both men and women. Put even more bluntly: lesbians are not men, and gay men are not women. For that to mean anything, sex must mean immutable, biological sex. The definition of sexual orientation at section 12 of the 2010 Act refers only to sex for that very reason. The lived experience of lesbians, in particular, makes it clear that the blurring of definitions is already having a negative impact on their lives, as noted below.

6.4. Gender identity ideology is essentially premised on the notion that, if a person's behaviour does not conform to the stereotype of their sex, they may well be the opposite sex. That is fundamentally (and damagingly) incorrect. That one might be a 'butch' lesbian does not make one a man; that one might be an 'effeminate' man does not make one a woman. It is these outdated (and homophobic) stereotypes that are now being encouraged by a conflation of the protected characteristics under the 2010 Act. These are precisely the ideas that many of the Intervener's founders and supporters fought against for decades.

6.5. Indeed, there has been an exponential increase in the number of children who are 'gender non-conforming' being referred to gender identity medical services. It is often more acceptable to (particularly more conservative) families to explain away non-gender-conforming behaviour in a family member by reference to transgenderism rather than accepting that the family member may be homosexual. Same-sex-attracted females are hugely over-represented in referrals to such gender identity medical services, making up 75% of referrals. Many are prescribed puberty blockers and/or hormones and often undergo irreversible medical procedures such as double mastectomies and hysterectomies, resulting in sterility and a lifelong dependency on medications.

6.6. Dr Hilary Cass was appointed to investigate the treatment and care of young people with gender dysphoria. The Cass interim report has resulted in the closure of the GIDS clinic at the Tavistock and Portman hospital in Feb 2023 – as it is deemed 'unsafe and unsustainable'. The ongoing (and growing) ideology, which informs and directs the policies such as those which have led to the RSG that is the focus of these proceedings, has significantly larger public ramifications for other groups in society such as those represented by the petitioner and those represented by the Intervener.

6.7. The effects of gender identity ideology are already being felt by lesbian, gay and bisexual people in public discourse. For example, those who promote gender identity ideology, perhaps most notably Stonewall, say that any lesbian who refuses to have sexual relationships with a man who says he is a lesbian can be compared to a 'racist' and these preferences should be 'unlearned'.[3] For lesbians to assert that they are exclusively attracted to other females has been likened to anti-semitism and 'sexual racism' by Nancy Kelley, CEO of Stonewall.

6.8. Similarly, there are many examples of lesbians being excluded from lesbian dating sites simply because they state they only want to see profiles of other females and a survey of 80 lesbians found that 56% of the respondents reported being pressured or coerced to accept a transwoman as a sexual partner.[4]

6.9. This discriminatory view of lesbianism - sending us back to the days before Gay Liberation and bizarrely marketed as the 'new frontier of the civil rights movement' - is pervasive. For example, Cathryn McGahey KC, a former vice-chairwoman of the Bar Council's ethics committee, said at the trial of Allison Bailey v Garden Court Chambers and Stonewall, that '*you can persuade a lesbian that she might want to ... have sex with a trans woman in a way that was not coercive*'.

6.10. Ms McGahey compared the idea of encouraging male-bodied people to break through the 'cotton ceiling' and have sex with lesbians with Nelson Mandela's fight to end racial segregation in post-apartheid South Africa. Ms McGahey's comments appear to echo those of Nancy Kelley referred to above.

[3] See, for example: https://www.bbc.co.uk/news/uk-england-57853385
[4] http://www.gettheloutuk.com/attachments/lesbiansatgroundzero.pdf

6.11. Same sex attraction – or sexual orientation for 2010 Act purposes – is protected. Those protections are being undermined – as are the protections for women in these proceedings – as a result of a desire not to cause offence.

6.12. Whilst, of course, no offence is intended, a lesbian's right to protection on the grounds of sexual orientation is materially more important than not causing offence. There is no right in law not to be offended – and the Intervener appreciates that some people will find *their* position to be offensive in the same way that the Intervener finds it offensive when it is suggested that a biological man must be treated as a women because that is how he feels, or because he regards 'living as a woman' as meaning wearing women's clothes. The protections under the Equality Act are not ranked – there is no hierarchy of their importance: they apply to everyone equally and must be applied equally: *Billy Graham Evangelistic Association v Scottish Event Campus* [2022] SC GLW 33.

7. Conclusion re the guidance

7.1. These are difficult matters, but Parliament has chosen to keep the protected characteristics separate for a reason. The protection of minorities – just as with the protection of fundamental rights – is often at its core anti-democratic: it requires the protection of the minority *against* the majority. Those protections must have bright line separations so that it is clear who is protected and against what. It is simply unacceptable from the view of protection from discrimination for protections afforded to one group to be undermined by a desire to extend those protections to others for whom they were not designed by Parliament – particularly where that group has effective protection elsewhere under the same Act.

7.2. As the Lord Justice Clerk found in the first petition, it is open to the Scottish Government to enact legislation to increase the number of transsexuals serving on boards. But that is not what they have done. The Act is aimed at women. The RSG very clearly seeks to do by another route what the Scottish Ministers have already been told is unlawful in the first petition. Moving the definition from the Act into the guidance does not make it any less unlawful.

7.3. The RSG should be reduced.

8. The matter of privacy

8.1. It is often said in relation to these matters that causing transsexuals to be treated as their biological sex rather than their acquired gender would be a breach of their right to privacy. Read short: it would cause them to be 'outed' when they might otherwise not be.

8.2. Whilst the Intervener understands those concerns, they are very often overblown and, in any event, they fall very short of what would be required to permit this court to undermine a protection that has been afforded by Parliament. They should not be used by this court to explain away the dilution of the rights of others.

8.3. The Intervener has lodged by way of example, albeit in a much more extreme circumstance, publicly-available guidance from CliniQ,[5] with whom NHS England (but not NHS Scotland) has partnered, which states that:

'Deciding if and when to tell people you are trans can be tricky. Some guys might not tell their sex partners. Others might tell them straight away.'

8.4. That guidance from an NHS partner, expressly encourages transsexuals to refrain from telling sexual partners that they are transexuals because informing the individuals of the truth might be 'tricky'. It is usual practice when considering service provision and the evidence-base they are built on in Scotland, to take account of practice and evidence from NHS England.

8.5. Such behaviour is criminal. Since 2012, there have been at least 5 successful criminal prosecutions in the United Kingdom resulting from complainers being led to believe that they were having consensual sexual activity with a man only to discover after the sexual encounter that the individual was biologically female.[6] At least one of those cases was heard by the High Court of Justiciary in Scotland (*HMA v Wilson*) on the basis of 'obtaining sexual intimacy by fraud'. It simply cannot seriously be suggested that a transsexual's desire to keep his or her history secret entitles him or her to obtain consent to sexual activity by deceit or fraud. That is an extreme example, but one borne of multiple prosecutions – and therefore a real example.

8.6. The Crown Prosecution Service is conducting a public consultation on a proposed revision to its legal guidance on Rape and Serious Sexual Offences, specifically the section on consent in

[5] https://jirosworld.com/transgender/TransGuys-cliniq-safers.pdf
[6] R v Gemma Barker [2012]; HMA v Chris Wilson [2013]; R v Justine McNally [2013]; R v Gayle Newland [2015]; and R v Kyran Lee (Mason) [2015]

relation to Deception as to Gender.[7] The drivers of this change are gender identity idealogues, whose aim is to blur all boundaries relating to sex and gender. For example, the LGBT Foundation said in 2015:

'*Trans bodies are varied and the assumption that all men have penises and all women have vaginas is not only transphobic, but legally inaccurate. These convictions set a concerning legal precedent, that trans bodies can be considered, fraudulent, illegitimate and not "real*".'[8]

8.7. A trans person is, of course, entitled to privacy but that privacy is neither absolute nor overriding when it comes to a balance with the rights of others. A transsexual is not entitled to regard his or her privacy as a trump card over the rights of others. Simply claiming that there will be a breach of privacy is nowhere close to justifying the undermining of the protections afforded by law to those within the respective protected characteristics.

David Welsh, advocate

[7] https://www.cps.gov.uk/consultation/consultation-deception-gender-section-rape-and-serious-sexual-offences-rasso-legal

[8] https://lgbt.foundation/news/sex-by-deception---statement-from-lgbt-foundation/32