IN THE COURT OF SESSION

P318-23

WRITTEN SUBMISSIONS

for

(FIRST) STONEWALL EQUALITY LTD, a registered charity (registered number SC039681) and having its registered office at 188-192 St John Street, London, EC1V 4JY; **(SECOND) THE INSTITUTE FOR CONSTITUTIONAL AND DEMOCRATIC RESEARCH,** a registered charity (registered number: 1194293) and having its registered office at 2-3 Gray's Inn Square, London, WC1R 5JH; and **(THIRD) GENDERED INTELLIGENCE,** a registered charity (registered number: 1182558) and having its registered office at VAI, 200a Pentonville Road, London, N1 9JP

INTERVENORS

in the

PETITION

of

THE SCOTTISH MINISTERS

for

Judicial Review of the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 made and laid before the UK Parliament by the Secretary of State for Scotland (under s.35 of the Scotland Act 1998) on 17 January 2023.

INTRODUCTION

1. The intervenors seek to supplement the petitioners' submissions by focusing on three issues: (i) international comparators; (ii) the proper standard of scrutiny to be applied

to the respondent's Statement of Reasons ("**SOR**"); and (iii) the alleged impact of the Bill on UK equalities law.

ISSUE 1: INTERNATIONAL COMPARATORS AND POSITIVE IMPACTS FOR TRANS PEOPLE

2. The international experience does not support the concerns set out by the respondent in its SOR. Over 30 jurisdictions internationally have adopted gender recognition laws based on self-identification ("**self-ID**"). More than 250 million people worldwide live in a jurisdiction where legal gender recognition is based on self-ID: **Madrigal-Borloz, *Mandate of the UN Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity* (December 2022), p. 13.: Production 27/4.**

3. The first intervenor has produced a **Table of International Comparators (Production 27/6 at p.3)**[1], which sets out a sample of those jurisdictions and provides a comparison in relation to the key terms of the Bill. Read in this international context, the terms of the Bill are far from controversial. The Bill is in line with international best practice and with the self-ID laws that have been implemented across these other jurisdictions. In the comparable jurisdictions, trans individuals are able to access legal recognition through making a simple application or request, usually involving only a statutory declaration or other written statement.

4. In particular, the proposals to dispense with any requirement for a medical diagnosis of gender dysphoria and introduce a minimum age of 16[2] are uncontroversial, and the following features of the Bill are more stringent than the majority of other jurisdictions with self-ID laws: (i) specifying a time period applicants must have lived in their

[1] Production 27/5 contains two tables: Table 1 (p.3) is a high-level summary, comparing the provisions of the Bill to (a significant sample of) other jurisdictions that have implemented similar regimes for legal gender recognition; and Table 2 (p.14) is a more comprehensive version of Table 1, and contains detailed information on the specific laws in other jurisdictions to enable a more fulsome comparison of the GRR Bill to international practice.

[2] The court will note that many jurisdictions allow applications from minors younger than 16 but with additional application criteria, such as consent from a parent or guardian.

acquired gender before applying; (ii) a three-month reflection period[3]; and (iii) a specific criminal sanction, punishable by up to two years' imprisonment, for any false declaration made in relation to an application for a GRC.

5. The review of international comparators also makes clear that the specific adverse impacts anticipated by the respondent in its SOR have not arisen in other jurisdictions. Such evidence was readily available to the respondent through publicly-available online sources had it applied its mind and ought to be taken into account when assessing the reasonableness of the reasons provided by the respondent.

No evidence that GRCs are obtained for fraudulent reasons

6. The **SOR, paras. 14-21** outlines the respondent's apparent concern that the Bill will lead to an increased risk of fraudulent applications for GRCs. The respondent argues, essentially, that it is necessary to retain the "*safeguards*" included within the current legal regime, failing which there is an increased probability that someone with "*malicious intent*" will obtain a GRC for bad faith reasons. The SOR expresses these concerns in a speculative manner. It does not provide examples of such conduct taking place either domestically or internationally. It makes no attempt to quantify the risk.

7. An examination of the international context reveals that the respondent's concerns have not resulted in harm in other jurisdictions where a system of self-ID has been adopted.

8. Reference is made to **Köhler, *Self-Determination Models in Europe: Practical Experiences* (2022), TGEU** ("**the TGEU Report"**): **Production 27/3**. The report surveyed the legal regimes in relation to gender recognition in nine European countries which had adopted self-ID processes. Its results revealed (**p. 21**) that in all of the countries surveyed there were either: (i) no fraudulent applications recorded; or (ii) no data available to suggest that there had been fraudulent applications. The conclusions mirror those reached by the Tasmanian Law Reform Institute (**"TLRI"**), in its report ***Legal Recognition of Sex and Gender*** **(June 2021)** (**Production 27/2**)**,** which

[3] The court will note that a number of jurisdictions, including Ireland, Iceland and Norway prescribe **no** reflection period at all.

discussed proposed amendments to Tasmania's gender recognition laws. It concluded[4] (**para. 2.4.75 – 2.4.77**) that concerns regarding 'misuse' of the GRC process were *"misplaced"*. In relation to the risk that trans individuals would use a GRC to gain access to a gender-specific space for malicious purposes, the TLRI found that there was no evidence of increased criminality by trans individuals that might warrant this concern.

9. The respondent has presented no argument to suggest that the Scottish experience will differ from the international experience, as regards fraudulent applications. His concerns are, accordingly, misconceived and unreasonable.

Single-sex services not jeopardised by self-ID

10. **Paras. 28 and 31-36 of the SOR** envisage adverse effects regarding the provision of single-sex services and associations. To the extent that this concern is directed at the risk of individuals who have obtained a GRC through fraudulent means, reference is made to the submissions above. To the extent that any concerns are said to be wider than that, those concerns are misconceived. If ID is required to access single-sex services, the commonly-used ID in the U.K. include sex-markers but do not require a GRC to alter. The court will have judicial knowledge that birth certificates are virtually never required. Further, under the Equality Act 2010, trans people can be excluded from single-sex services if to do so is a proportionate means to a legitimate aim.[5] The Bill would not affect this. The concerns set out at **para. 35 of the SOR** are entirely speculative and unsupported by reference to the international context.

11. Of note, the current regime in Scotland, as well as the proposals in the Bill, have been subject to consideration by the UN's Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, who considered the Scottish approach from an international, comparative perspective. At p.11 of the Independent Expert Report (**Production 27/4**), he notes:

[4] Having considered information from its official Registrar, scholarly commentary and approaches adopted in other jurisdictions.
[5] Equality Act 2010, s.27

In the current matter, there is no credible evidence supporting the submission that requirements currently in place in Scotland for legal gender recognition are effective or efficacious safeguards to prevent sexual and gender-based violence, or that these requirements are even remotely connected to it; there is also no credible evidence supporting the idea that maintaining them in whole or part or devising other gatekeeping mechanisms will serve that preventive purpose either. The only connection between undue obstacles to legal recognition for trans women and freedom of all women from gender and sexual-based violence is based on an erroneous perception of trans women as being males and, specifically, predatory males.

12. Having considered similar concerns expressed during the law reform process in Tasmania, the TLRI considered that there was "*no evidence that these fears are warranted*": ***Legal Recognition of Sex and Gender*** **at para. 2.5.14.** The TLRI took the view that domestic providers of single-sex spaces, such as women's refuges already have sensible policies and safety-checks in place and, subject to those policies, largely already allow use by self-identified trans women: ***ibid.*****, paras. 2.5.16-2.5.20.** That largely mirrors the Scottish experiences with organisations such as Rape Crisis Scotland: **Stonewall,** ***Gender Recognition Reform (Scotland) Bill: Stonewall Scotland Stage One Parliamentary Briefing'*** **(October 2022), p. 2.**: **Production 27/1**. The **TGEU Report** discloses that European jurisdictions have largely not reported any concerns as regards the use of single-sex services, following the introduction of self-ID laws: **TGEU Report, pp. 22-23.**

13. **Para. 40 of the SOR** appears to envisage difficulties with data collection in relation to gender, as a result of self-ID. The **TGEU Report** at p. 23 notes that no surveyed country reported any difficulties with collecting such data as a result of self-ID provisions.

<u>Positive impacts for trans people</u>

14. In making his decision to exercise section 35, the Secretary of State failed to consider the positive impact of the proposed reforms on trans people. The case studies produced by the first intervenor and the third intervenor (**Productions 27/5 and 27/6**) illustrate the impact of the current process on the lives of trans people. The current process is complicated and unnecessarily medicalised. The case studies describe the process as

"demeaning",[6] *"awful … unnecessarily strict"*,[7] *"…could be made a lot simpler for people which would give them their dignity and rights back"*,[8] *"incredibly arduous"*,[9] "*daunting, with many barriers that made a successful application difficult and created a lot of anxiety for me"*.[10] The case studies tell of the *"humiliation of psychological scrutiny"*[11] caused by needing to prove that you are "trans enough" for a GRC.

Trans people pursue this process because of the significant advantages that follow from obtaining a GRC. Without a GRC, the gender marker on a trans person's birth, marriage or death certificate will not match their gender presentation (and may not match the gender marker on legal documents such as passports and driving licenses, which do not require a GRC to change the gender marker). Any time a trans person is required to produce a birth, marriage or death certificate, they will be outed as trans. One case study explains how, without a GRC, the individual could not get married without outing himself to his partner's father.[12] Another explains how applications for rental accommodation and applications for jobs always involve a consideration of the risk of transphobia resulting from being outed due to gender markers on legal documents not matching their gender presentation.[13]

ISSUE 2: THE INTENTION OF PARLIAMENT & THE APPROPRIATE STANDARD OF SCRUTINY

15. Under this issue, submissions are made as to the appropriate standard of scrutiny to be applied to the question as to whether the Secretary of State has "reasonable grounds" to believe that the Bill will have an "adverse effect" on the law as it applies to reserved matters. The Petitioner argues that the proper standard is "anxious scrutiny" [**Petition, para. 25**]. The Secretary of State argues that it is irrationality: **Respondent's NoA, paras. 3-4**. (Submissions were also to be made as to Parliamentary History but it is noted that the Petitioners now deal with this at paragraph 14 of their NoA.)

[6] Gendered Intelligence, Case Study 3.
[7] Gendered Intelligence, Case Study 1.
[8] Gendered Intelligence, Case Study 1.
[9] Gendered Intelligence, Case Study 3.
[10] Gendered Intelligence, Case Study 2.
[11] Stonewall, Case Study 1.
[12] Gendered Intelligence, Case Study 1.
[13] Stonewall, Case Study 4.

16. It is submitted, in summary:

    a. Where a statutory power impacts on constitutional or fundamental rights, a more forensic standard should be applied to "reasonable grounds" test: ***R (Evans) v Attorney General*** **[2015] AC 1787**;

    b. Parliament, in adopting the language of section 35, explicitly chose not to give the Secretary of State the power to overrule the Scottish Parliament on mere policy grounds;

    c. The appropriate standard of review is, therefore, one of "anxious scrutiny", as used in the review of other powers which impact on constitutional rights.

17. Whilst some reference is made to ***Evans*** in the Petitioner's NoA and to the standard to be applied (see e.g. **paras. 21 and 39**) it is hoped that these more detailed submissions will assist the Court.

The Supreme Court's Approach to Comparable Provisions

18. In ***Evans*** the Supreme Court considered section 53(2) of the Freedom of Information Act 2000 ("**the 2000 Act**"). That provision empowers the Attorney General to (in effect) veto a decision by the Information Commissioner or Tribunal that certain information must be disclosed. The power may be used where the Attorney General has "*reasonable grounds to believe*" that an exemption to the duty to disclose applies.

19. The section 53(2) power is similar to the section 35 power:

    a. Both empower the executive branch to abridge the fundamental rights of citizens;

    b. Both do so by empowering a member of the executive branch to (in effect) veto a decision taken by another branch of government which is constitutionally independent of the executive and has its own independent constitutional legitimacy;

c. The conditions which authorise the use of the power are substantively similar (there must be a "*reasonable belief*").

20. ***Evans*** concerned a request for information contained in communications between the (then) Prince Charles and various members of the government. The relevant ministers refused disclosure. The matter reached the Upper Tribunal, which ordered disclosure of some of the information. The Attorney General vetoed the Upper Tribunal's decision, exercising the section 53(2) power. Mr Evans sought judicial review.

21. The Attorney General, in ***Evans***, adopted the same approach as the Advocate General adopts in the instant matter. He argued:

    a. Parliament had given the Attorney General a final veto over the disclosure of information in the form of Section 53(2): **pp. 1792-3**;

    b. The words "reasonable grounds" bore their ordinary meaning. They did not imply a higher test.

    c. The question of legality did not, therefore, arise (**pp. 1796-7**). Essentially, the proper standard of review was rationality: **para. 128**.

22. The Supreme Court rejected the Attorney General's approach. Lord Neuberger PSC (with whom Lord Kerr and Lord Reed JJSC agreed) concluded:

    a. The principle of legality means that Parliament cannot be taken to have conferred a power which authorises the executive to abridge "*the basic principles on which the law of the United Kingdom is based*" unless "*the statute conferring the power makes it clear that such was the intention of Parliament*": **para. 57** and cases referenced therein**;**

    b. If section 53(2) was to be construed in the manner suggested by the Attorney General, it would empower the executive to abridge the right to information guaranteed by the 2000 Act without any form of accountability save for a rationality challenge. If Parliament intended to convey such a meaning it would need to be "*crystal clear*": **para.58**.

c. The language of "*reasonable grounds*" "*falls far short*" of saying that "*a member of the executive can override the decision of a court because he disagrees with it.*": **para. 58**.

23. Lord Mance JSC (with whom Lady Hale JSC agreed) reached the same conclusion for similar (albeit for slightly differing) reasons:

a. The words "*reasonable grounds*" impose "*on any view… a higher hurdle than mere rationality would be*": **para. 129**;

b. The court must be able to scrutinise the Attorney General's reasons more intensively than the ***Wednesbury*** test permits: **para. 128**.

c. Where the Attorney General uses the section 53(2) power to veto the decision of a tribunal that has undertaken the full judicial process, the courts will be slow to prefer the view of a member of the executive who has done no more than discussed the matter internally: **para. 130**.

24. The Supreme Court's analysis bears directly on the instant case:

a. The matter concerns "*the basic principles on which the law of the United Kingdom is based*" for the reasons set out in the **Petition at para. 19**.

b. The section 35 power allows the executive (which has no independent democratic legitimacy [***R (Miller and Ors) v Prime Minister and Ors* [2020] AC 373, para. 55**]) to veto the decisions of a democratically elected legislature. Parliament cannot be taken have intended this power to be exercised merely on the basis that a member of the executive disagrees with a decision of the Scottish Parliament unless it used "*crystal clear*" language.

c. As in ***Evans***, the words "*reasonable grounds*" fall well short of the crystal clear statement required.

d. Further, or in the alternative, the contrast in decision-making processes in the instant case mirrors that in ***Evans***. The Scottish Parliament passed the Bill after

subjecting its provisions to the full rigour of the legislative process and two separate public consultations [**Petition, para. 6**]. By contrast, the Secretary of State merely consulted internally before making the Order. The Court may decide to echo Lord Mance and Lady Hale JJSC's reticence to endorse the latter ahead of the former.

Other Comparable Cases

25. Further, or alternatively, the power must be construed in line with the overarching intention of the Act: ***R (Padfield) v Minister of Agriculture*** **[1968] AC 997**. This implies a restrictive interpretation:

    a. The purpose of the Act is to devolve power from the UK Parliament to the Scottish Parliament.

    b. It is both inevitable and intended that the Scottish Parliament and the UK Parliament/ executive will not always agree (there would otherwise be no point in the Act).

    c. It is, similarly, inevitable that some (arguably most) Acts of the Scottish Parliament will have some sort of impact on reserved matters (for example, having different healthcare policies, Covid 19 responses, higher education funding regimes etc inevitably impact across the border);

    d. If the Secretary of State was entitled to veto any act of the Scottish Parliament that impacted on reserved matters merely because they disagreed with it on policy grounds, it would, in effect, mean that the Scottish Parliament could only legislate insofar as the UK executive consented. This runs contrary to the original purpose of the Act and, in particular, to the decision of Parliament to give the Scottish Parliament independent democratic legitimacy. The respondent's submissions anent this issue (at **para 3 of his NoA)** are accordingly misconceived.

The Intention of Parliament

26. Parliament, in passing the 1998 Act, explicitly rejected an executive policy veto over the Scottish Parliament on policy grounds. Section 38 of the Scotland Act 1978 ("t**he 1978 Act**"), the predecessor to section 35, adopted a "*governor generalship*" approach, whereby the Secretary of State was empowered to veto a Bill of the Scottish Parliament merely because they disagreed with it on policy grounds. The veto power could be exercised if: *"it appears to the Secretary of State":*

> *"(a) that a Bill passed by the [Scottish] Assembly contains any provision which would or might affect a reserved matter, whether directly or indirectly, and*
>
> *(b) that the enactment of that provision would not be in the public interest;*
>
> …
>
> (emphasis added)

27. If Parliament, in passing the 1998 Act, intended section 35 to have the same effect as section 38 of the 1978 Act, then it would have been drafted in the same terms. Instead, the test of "*would not be in the public interest*" was replaced with "*would have an adverse effect on the operation of law*". The language is notably narrower. While not explicitly a term of art, "*the operation of law*" normally refers to the mechanics of the law itself, rather than the policy behind it or the acceptability of its impacts in public policy terms.

Conclusions - The Standard of Scrutiny

28. The starting point must be the language of the provision itself. The Secretary of State has "*reasonable grounds to believe*" that the Bill "*would have an adverse effect…*" (emphasis added). The Secretary of State has, in relation to a number of reasons in the Statement of Reasons, merely concluded that certain allegedly adverse impacts

"*could*", "*could potentially*", or "*may*" occur: **see, for example, the SOR, paras. 18, 21, 35-37, 41, 44**. This does not meet the required level of certainty.

29. For the reasons set out above, the appropriate standard of scrutiny for those conclusions which are sufficiently definitive to *prima facie* meet the "would" test is, for the reasons set out above, "anxious scrutiny".

ISSUE 3: IMPACT ON EQUALITIES LAW

30. The **Order (para. 7 of Schedule 2)** and the **SOR (para. 18)** allege that the Bill will, in various ways, have an adverse impact on the operation of certain provisions of the Equality Act 2010, particularly the Public Sector Equality Duty (the "***PSED***"). That view is misconceived.

31. The burden is on the respondent, which has chosen to make the section 35 Order, to explain and evidence the impacts that it asserts will occur. This falls to be done in a context where, under section 35, the Secretary of State must have "*reasonable grounds to believe*" that the changes "*would have*" this adverse effect.

32. Having regard to the submissions above, it is implicit in these requirements that the alleged negative impacts must follow logically from the Bill, and that the reasonable grounds must be supported by evidence. The following analysis of the respondent's reasons demonstrates, rather, the reasons are unsupported by evidence and turn on legal errors. These are addressed below in turn.

Lack of evidence base

33. There is no cogent evidence which supports the conclusion that the proposed reforms would have an adverse effect on equalities law in the ways asserted. The petitioners are correct to say that these adverse effects are "*insufficiently cogent*" to justify the Order (**para 43, NoA**), with several relating to hypothetical scenarios unlikely to arise in practice **(para 54(e), NoA)**.

34. Save for at **para 54**, the petitioners' NoA does not deal expressly with the alleged impacts in relation to the PSED. In this regard, the intervenors submit as follows:

a. At **SOR para. 38** it is asserted that the Bill will mean that "*decision makers will not always be considering the impact on biological women as a distinct disadvantaged group compared to the impact on biological men*". This is described as an "*existing problem*". However, no supporting detail or evidence has been provided for the assertion that this is a "*problem*" at present.

b. Nor is any evidence provided for the assertion that the Bill "*will*" make the so-called problem worse, which is said to be due to an "*increased number and range*" of GRC holders. In terms of evidencing the "*number"* of GRC holders, the only data sets referenced in the SOR appears to be to the Scottish Government's own data (**p. 6**). As for "*range*", the SOR describes a "*new and very different cohort*" (**para. 50**) and its "*heterogeneity*" (**para. 25**). The respondent does not explain why heterogeneity or difference *per se* would lead to adverse effects.

c. Moreover, as Scotland's Chief Statistician has stated, it is assumed that the vast majority of official data is already collected on the basis of self-defined sex – for example, by asking '*are you male or female*' without providing any guidance as to how people should interpret the question.[14] It is therefore unclear why an increase in GRCs would impact substantially or at all on data collection on sex.

35. The SOR fails to demonstrate that a numerical increase in GRCs would have any impact, let alone an adverse one, on the operation of the law. However, even if this were in principle possible, the UK Government would need to demonstrate that the expected increase would be statistically significant vis-à-vis PSED data, and <u>also</u> why such adverse impact could not be addressed or mitigated (for example, by changes to survey methods: see **para. [42]** below). It has failed to do so. By way of comparison, quantitative analysis has indicated that self-declaration would not have a meaningful impact on gender pay gaps.[15]

[14] Scottish Government's Bundle of Marked Up Documents p.482

[15] See: **Close the Gap, Submission to the Equalities, Human Rights and Civil Justice Committee on the Gender Recognition Reform (Scotland) Bill (May 2022); Production 27/7.**

Legal errors

Mischaracterisation of the PSED

36. Throughout **SOR paras. 37-40** the reference to the PSED is relatively generic, with reference made to data collection and impact assessment. It is not explained precisely which provisions are at stake nor are they cited or analysed in detail. The respondent's **NoA** provides no further clarification on this issue.

37. However, the PSED is multi-faceted and involves more than just data collection,[16] for example, compliance may involve training decision-makers or engagement with service users. Indeed, as the EHRC's guidance notes state, there is no explicit legal requirement under the general duty specifically to collect and use equality information).[17] As such, the SOR fails to adequately explain and justify its assertions about adverse effects.

Application vs operation of the PSED

38. The **SOR says at para. 38** that "*it is possible*" that the creation of a larger cohort of people with a GRC will have an effect on the "*application of*" the PSED. Quite apart from the fact that mere possibility falls short of "*reasonable grounds to believe*", section 35 requires impact on the "*operation*" of the law itself, not merely its "*application*" on the facts of a given scenario. This error is repeated at **para. 39**, where it is said that the PSED will be "*more difficult to apply*" if the reforms go ahead, as a result of the Bill.

39. Even if the adverse impacts canvassed above were compelling on their facts (which they are not), they relate not to the operation of the PSED as a legal duty itself, but rather to the perceived practical difficulties of applying an existing, unchanged set of legal principles post-reform.

40. More broadly, the underlying concerns of the Respondent in respect of the impact on equalities law appear to arise from a belief that the composition of the group of people

[16] See, for example, the EHRC's 'Essential Guide to the Public Sector Equality Duty: A Guide for Public Authorities (Scotland)' (updated June 2016) (**production 27/8, p.1**), available along with other guidance at https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-scottish-public-authorities

[17] See EHRC guidance on 'The public sector equality duty and data protection' (updated April 2021). (**production 27/8, p.27**).

possessing a given protected characteristic (namely, sex) may be broader post-reforms. As such, the **SOR at para. 40** says, the laws requiring public bodies to monitor and respond to that change (i.e. the PSED) may return slightly different results following the enactment of the Bill having an effect on the interpretation of such equality monitoring data. However, this is a social change which equality monitoring data will track, not a change in how the law operates.

41. Policy or legislative choices will often impact on practical circumstances in a way that has an inevitable secondary impact on data collected for PSED purposes. For example, policy reforms may result in improved healthcare, or increased immigration. These could result in demographic changes that alter the composition of and number of people in the UK possessing the protected characteristics of say age or race. UK equalities monitoring will then reflect these changes. Significant shifts of this kind may require new interpretative techniques or new questions to be asked. Where there is a material change in policy, it may be necessary to adapt data monitoring techniques in order to comply with equalities monitoring duties – for example, asking a different question in a survey. But none of this suggests that there will be a change to the *operation of the law*. The Petitioners' submission (**para. 54(c) of their NoA**) that "*[m]ore people using, or falling within the scope of, a legal provision does not constitute an effect upon the operation of the law*", is correct. Indeed, the Respondent has admitted (**para. 18 of his Answers**) that "*the effect of acquiring a SGRC under the Bill would remain that prescribed by s.9 of the 2004 Act*".

Material legal error: biological sex and the EA 2010

42. It is asserted at **para. 38 SOR** that there will be difficulties in monitoring UK-wide disparities between "*legal women and men*". This is incorrect. "*Sex*" is a legal term and the PSED requires actions to be taken with reference to that legal term, as defined in the EA 2010. Definitionally, there can be no issue with the data collected about sex, if it is collected in a formally correct way. Such monitoring will capture the relevant disparities between women and men as defined in law, since possession of a GRC changes one's sex for legal purposes.

43. It appears that the respondent regards it as a problem that, post-reforms, this data collection would fail to track "*biological sex*". This is clear from the SOR itself – see, for example, the comment at para. 38 that "*decision makers will not always be*

considering the impact on biological women as a distinct disadvantaged group compared to the impact on biological men". This fails to acknowledge that, as mentioned above (at **para 34(c)**), most official data already appears to be collected on the basis of self-defined sex.

44. This highlights the underlying material legal error in the SOR, which pervades the section on the Equality Act. It is the tacit underlying assumption that "*sex*" within the Equality Act 2010 should be interpreted as sex assigned at birth, or "*biological sex*", which is wrong as a matter of law: ***For Women Scotland v Scottish Ministers*** **[2023] SC 61, para. 53**.[18]

45. The intervenors endorse the analysis at **para. 29 of the Petition** to the effect that the reforms do not modify the law as it applies to reserved matters in the first place. As noted in ***For Women Scotland v Scottish Ministers*** **[2023] SC 61 at para. 52**, the 2004 and 2010 Acts "*have different purposes, as is clear, if nothing else, from their titles*". In short, one might say: the GRA 2004 is gender recognition law, not equality law. That the definition of "*sex*" in the EA 2010 is silent on gender recognition processes, when it was open to legislators to include such matters, supports this interpretation – and indeed it remains open for them to implement the EHRC's recommendation.

46. It is clear from this analysis that the adverse impacts set out above are not really about the changes made by the Bill itself. They are about the definition of "*sex*" in the Equality Act 2010. The approach taken in the SOR and the Order thus effectively represents a collateral attack on the existing definition of sex in the Equality Act 2010, and to that extent it is both procedurally (as well as constitutionally) inappropriate.

CONCLUSION

47. It is respectfully submitted that the court ought to grant the prayer of the petition.

[18] This is a matter which is currently being publicly debated, and which the EHRC have suggested may require amendment of the Equality Act 2010 in order to define *"sex"* as *"biological sex"*: see **production 27/8, p.41**. However, no such amendment had been made as at the date of the section 35 Order, or as at the date of this Minute of Intervention.

James Findlay K.C.

David Blair, Advocate

Advocates Library

4 September 2023

SCHEDULE OF DOCUMENTS:

1. **Stonewall,** ***Gender Recognition Reform (Scotland) Bill: Stonewall Scotland Stage One Parliamentary Briefing' Stonewall*** **(October 2022)**

2. **Tasmanian Law Reform Insitute,** ***Legal Recognition of Sex and Gender*** **(June 2020)**

3. **Köhler,** ***Self-Determination Models in Europe: Practical Experiences*** **(2022), TGEU**

4. **Madrigal-Borloz,** ***Mandate of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*** **(December 2022)**

5. **Stonewall, Table of International Comparators, and case studies detailing the experiences of trans people in the UK (4 September 2023)**

6. **Gendered Intelligence, Case studies detailing the experiences of trans people in the UK (4 September 2023)**

7. **Close the Gap,** ***Submission to the Equalities, Human Rights and Civil Justice Committee on the Gender Recognition Reform (Scotland) Bill*** **(May 2022)**

8. **Compiled extracts from Equality and Human Rights Commission guidance documents relative to the Public Sector Equality Duty**