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The Equality Network is a national charity working for lesbian, gay, bisexual, trans and intersex (LGBTI) equality in Scotland. Scottish Trans Alliance is the Equality Network project to improve gender identity and gender reassignment equality, rights and inclusion in Scotland.

We welcome the opportunity to submit evidence on this bill – our evidence relates mostly to how the bill might impact transgender people. At Equality Network and Scottish Trans Alliance we use transgender as an inclusive umbrella term to refer to anyone whose gender identity or gender expression does not fully correspond to their sex assigned at birth, including trans men, trans women, non-binary people, and cross-dressing people.

**1. the impact, if any, on people applying for an appointment as a non-executive member of a public board;**

The bill should have a positive impact on women applying for appointment as a non-executive member of a public board. This will hopefully include a positive impact for a diverse range of women, including lesbian, bisexual, and intersex women.

One area of concern we have around the current wording of the bill is whether it will have a positive impact on transgender women's representation on public boards. In particular, we are concerned that transgender people might be treated as their legal sex when applying for an appointment as a non-executive member of a public board, rather than as their actual gender identity.

In the first draft of the bill, the wording for the gender representation objective was that boards should have at least 50% of people "who are female or who identify as female". In our response to the consultation, we said that this wording was a problem, as it implies that there is a difference between those who "are" and those who "identify as" a gender. Our suggestion was to change this to people "who identify as female", so that it was clear throughout that the bill sought to improve representation of all women on public boards, including transgender women without gender recognition certificates.

The current wording of the bill is now:

"The "gender representation objective" for a public board is that it has 50% of non-executive members who are women".

We are concerned that there may be uncertainty about who is included in the term "women". In particular, we are very concerned that transgender women without gender recognition certificates may be treated in a discriminatory manner when applying to be non-executive members of a public board. It is crucial that the bill is

written and implemented in a way that is clearly inclusive of all women, including transgender women who do not have gender recognition certificates.

For example, consider a scenario in which a transgender woman applies for a position as a non-executive member of a public board, and is judged equal to a candidate who is a man. If she did not have a gender recognition certificate (so despite being a woman, her legal sex would still be male), then on a restricted interpretation of “women” the appointing person would not be required to select her, because it may not be clear that appointing her would count as being:

“with a view to achieving (or making progress towards achieving) the gender representation objective immediately after the appointment takes effect.”

This kind of scenario would be discriminatory towards transgender women without gender recognition certificates, who are women, and should be recognised as such for the purpose of the bill and the gender representation objective.

We note that in the Scottish Government’s EQIA of the bill, it states:

“The Bill now uses the terminology “are women” and the Scottish Government will consider whether this needs to be expanded”

We appreciate that the Government may have decided to use “women” rather than “identify as female” to closely mirror the protected characteristic of sex, due to the fact that under section 37 of the Scotland Act 2016, devolved powers only extend to:

“Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions.”

However, we would argue very strongly that this terminology does need to be expanded. To ensure that all transgender women are included by the bill, our suggestion is that “woman” should be clarified within the bill (by amending section 2) as follows:

“woman” –

- (a) includes a person with the protected characteristic of gender reassignment who is living in the female gender, and
- (b) does not include a person with the protected characteristic of gender reassignment who is not living in the female gender.

Our suggested definition is based on the Equality Act protected characteristic of gender reassignment, to put beyond doubt that the bill remains within the devolved power set out in section 37 of the Scotland Act 2016. The phrase “living in the female gender” is based on the language used in the Gender Recognition Act 2004. Defining “woman” in this way would ensure that all women are included in the gender

representation objective, including transgender women who do not have gender recognition certificates.

Part (b) of the definition is needed to ensure that transgender men do not count towards the gender representation objective. Without this, a public board might be considered to have reached the objective when women remain a minority of the board, because one or more board members is a transgender man without a gender recognition certificate, who is treated under the legislation as a woman. This would be completely against the spirit and purpose of the bill.

It is vital that the bill is both written and implemented in a way which is inclusive and respectful of transgender people's identities. It must not provide additional barriers to transgender people's representation on public boards, or undermine their gender by appointing them on the basis of their formal legal sex when that is not the gender they identify and live as.

More broadly, we support the evidence in Engender's submission on the positive impact for women on improving their representation on public boards. It is essential that this positive impact is felt by all women, and that there is not uncertainty about the inclusion of transgender women without gender recognition certificates in the gender representation objective.

**2. the impact, if any, for those public authorities responsible for encouraging and recruiting women to public boards as non-executive members;**

We support the evidence in Engender's submission with regards to the positive impact that encouraging and recruiting women to public boards will have on those organisations that do so.

Similarly, we think that it is important that a range of methods are used to ensure women are better represented on public boards. Although this bill is a welcome step, we are supportive of the calls in Engender's submission for additional measures and approaches.

**3. the Bill requires public boards to report on the operation of the Act, although Scottish Ministers can regulate how this should happen; what should any reporting requirements cover and why;**

In order to be able to report on the operation of the Act, there should be guidance from Scottish Ministers on how to do inclusive monitoring of the gender of non-executive members of public boards.

Specifically, it is important that public boards are required to include a non-binary option when they report on the gender of their non-executive members. We would suggest that the government propose that public boards undertake monitoring in the way recommended in our guidance coproduced with Stonewall Scotland

[http://www.scottishtrans.org/wp-content/uploads/2017/06/getting\\_equalities\\_monitoring\\_right.pdf](http://www.scottishtrans.org/wp-content/uploads/2017/06/getting_equalities_monitoring_right.pdf)).

Our guidance around monitoring is based on research we undertook with 895 non-binary people across the UK. When asked whether they were able to accurately describe their gender on forms when accessing services, only 1% said they were always able to, and 58% said they never could.

When we asked non-binary people about the personal impact of the widespread lack of non-binary visibility in service provision, including their not being represented in the language used on forms, 84% said they felt like their gender identity wasn't valid, 83% felt more isolated or excluded, 76% had lower self-esteem and 65% felt they had poorer mental health.

It is important that these experiences of being excluded in services are not replicated by Scottish public boards. As reporting on the operation of the Act will require public boards to monitor and report on the gender of their non-executive members, Scottish Ministers should take this as an opportunity to show leadership on inclusive monitoring of non-binary people.

More broadly, we think that reporting requirements should be set out explicitly by Scottish Ministers, and that there should be requirements for boards to report publically on whether they have achieved the gender representation objective. Where boards have not achieved the objective, or made progress towards achieving the objective, they should be required to explain what measures they have been taking to do so.

#### **4. whether there should be penalties for non-compliance with the Bill and what these should be and why;**

We feel that there must be accountability measures in place to ensure that boards comply with the gender representation objective. We support the suggestions in Engender's submission on penalties for non-compliance.

#### **5. Please tell us about any other comments you feel are relevant to the Bill.**

We are also concerned that in section 4(4), the wording has been changed to say:

"The appointing person-

- (a) must consider whether the appointment of a candidate identified under subsection (2) who is not a woman is justified on the basis of a characteristic or situation particular to that candidate, and
- (b) if so, may give preference to that candidate."

In the consultation draft of the Bill, in place of "is justified on the basis of a characteristic or situation particular to that candidate", the test was "there are

exceptional circumstances”. The new wording seems like a significant reduction in the threshold for appointing someone who is not a woman in a situation where candidates are equally qualified, and appointing a woman would achieve progress towards the gender representation objective. We suggest that it would be useful to add language to this provision indicating that it is expected only to be used exceptionally.