

Letter from For Women Scotland

12 June 2024

SCOTTISH ELECTIONS (REPRESENTATION AND REFORM) BILL

We are writing in connection to supplementary evidence provided to the Committee on 5th June by Engender in which they encourage the inclusion of gender quotas in the Bill, similar to those proposed in the Elections and Elected Bodies (Wales) Bill.¹

This Bill is currently under consideration by the Senedd and was introduced despite the Llywdd's (Presiding Officer) statement that it would not be within the legislative competence of the Senedd because it:

- (a) relates to the reserved matters of equal opportunities, and
- (b) modifies the law on reserved matters, namely the Equality Act 2010.²

The legal issues under consideration relate to:

- (a) the permissive aspect of section 104 of the Equality Act which **allows** political parties to address under-representation and whether it would be modified by the Bill which **requires** them to do so,
- (b) whether the bill relates to the reserved matter of preventing, eliminating or regulating sex discrimination in Equal Opportunities as well as the non-reserved matter of Senedd effectiveness,
- (c) the requirement for candidates to make a statement that they are a woman or not a woman, and whether this is a proportionate means of implementing and enforcing compliance with the quota rules.

There is no consensus on whether the Bill falls within the competence of the Senedd, although submissions to the Reform Bill Committee from legal professionals largely conclude that the Bill is outside the Senedd's competence.³

The Reform Bill Committee published its Stage 1 report on 7th June, which post-dates Engender's submission, and calls for the Counsel General to refer the Bill to the Supreme Court in order to put any legal uncertainty beyond doubt.⁴

In addition, the Equality and Human Rights Commission raised concerns⁵ regarding confusion caused by the Bill referring to "women" (the correct reference to the

¹ <https://senedd.wales/media/b2jib2uz/pri-ld16394-e.pdf>

² <https://senedd.wales/media/jmeascd1/pri-ld16394-pos-e.pdf>

³ See page 14 for links to the submissions: <https://senedd.wales/media/3tcftcsq/cr-ld16520-e.pdf>

⁴ Recommendation 19: <https://senedd.wales/media/k1kk33yx/cr-ld16518-e.pdf>

⁵ <https://www.equalityhumanrights.com/our-work/advising-parliament-and-governments/our-letter-senedd-reform-bill-committee>

protected characteristic of sex of which section 104 of the Equality Act applies) while the Explanatory Memorandum repeatedly uses the term “gender”. Consequently, it was unclear whether the proposed “gender statements” from candidates related to sex or self-identified gender.

As you will be aware, the Scottish Court of Session Inner House has issued two separate rulings on relevant cases regarding representation of women. The most recent, relating to statutory guidance for the Gender Representation on Public Boards (Scotland) Act 2018 is under appeal and will be heard by the UK Supreme Court later this year. However, the judgment being appealed did not overrule the earlier Inner House ruling on the meaning of “woman” in the Act. This remains the leading authority in Scotland (although it is not binding on courts in Wales) and states that, with regard to the Equality Act:

“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.”⁶

We welcome measures to address the under-representation of women and see no reason why these should be limited or shied away from because of tensions surrounding the continuing debate on gender recognition reform and self-identification. Any positive action measures must, however, comply with the court’s ruling and relate to the protected characteristic of sex – any use of the term gender is inappropriate in this context. We also urge caution on introducing legislation similar to the Welsh Bill which almost certainly will be referred to the UK Supreme Court for clarification on whether it relates to or modifies reserved matters.

⁶ §36, <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022/csih4.pdf>