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# Gender Representation on Public Boards (Amendment) (Scotland) Bill

Nicki Georghiou

The aim of the Gender Representation on Public Boards (Amendment) (Scotland) Bill is to remove the definition of 'woman' in section 2 of the Gender Representation on Public Boards (Scotland) Act 2018. This follows Court of Session decisions in 2022 that the definition was outwith the legislative competence of the Scottish Parliament and was 'not law'.

Representation on Public Boards (Amendment) (Scotland) Bill  
THE FOLLOWING ACCOMPANYING DOCUMENTS ARE ALSO PUBLISHED:  
Explanatory Notes (SP Bill 37-EN), a Financial Memorandum (SP Bill 37-FM), a Policy Memorandum (SP Bill 37-PM) and statements on legislative competence (SP Bill 37-LC).

## Gender Representation on Public Boards (Amendment) (Scotland) Bill [AS INTRODUCED]

An Act of the Scottish Parliament to amend section 2 of the Gender Representation on Public Boards (Scotland) Act 2018 to repeal the definition of "woman".

**1 Amendment of the 2018 Act**

In section 2 (key definitions) of the Gender Representation on Public Boards (Scotland) Act 2018, the definition of "woman" is repealed.

**2 Commencement**

This Act comes into force on the day after Royal Assent.

**3 Short title**

The short title of this Act is the Gender Representation on Public Boards (Amendment) (Scotland) Act 2024.

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# Summary

The [Gender Representation on Public Boards \(Amendment\) \(Scotland\) Bill](#) is a single issue Bill that seeks to remove text from the Gender Representation on Public Boards (Scotland) Act 2018.

This follows decisions of the Court of Session that the definition of 'woman' in the 2018 Act was not law and had no legal effect.

The definition of 'woman' in section 2 of the 2018 Act was inclusive of trans women who were living as women, whether or not they had a gender recognition certificate (GRC).

The Court of Session decided in a judicial review and reclaiming motion (appeal) brought by For Women Scotland, that the definition of 'woman' in section 2 was outwith the legislative competence of the Scottish Parliament, and that it was 'not law'. This has been the legal position since 19 April 2022.

The Bill will remove the definition in the 2018 Act that has had no legal effect since 19 April 2022 but still appears on the statute book, to ensure that the statute book is no longer misleading.

There has been no formal consultation on the Bill as its sole purpose is to amend the statute book in light of the court's ruling.

# Introduction

The [Gender Representation on Public Boards \(Amendment\) \(Scotland\) Bill](#) ('the Bill') was introduced in the Scottish Parliament on 7 November 2023 by the Cabinet Secretary for Social Justice, Shirley-Anne Somerville MSP.

The aim of the Bill is to amend the [Gender Representation on Public Boards \(Scotland\) Act 2018](#) ('the 2018 Act') by removing the definition of 'woman' set out in section 2. This follows decisions at the Court of Session of 18 February 2022<sup>1</sup> and 22 March 2022<sup>2</sup> in the judicial review and reclaiming motion (appeal) brought by For Women Scotland.<sup>3</sup>

The court decision, that the definition of 'woman' in section 2 of the 2018 Act was outside the legislative competence of the Scottish Parliament and was not law, has had effect from 19 April 2022.

This short Bill will, therefore, remove the definition of 'woman' in section 2 of the 2018 Act to align with the court's decision and correct the 2018 Act as it appears in the statute book:

“ The Scottish Government is taking necessary steps in light of a court decision to ensure that the definition, which no longer has legal effect, is removed from the face of the statute book. The alternative would be to leave the redundant definition on the face of the statute book, which could be misleading and cause confusion about the legal position.<sup>4</sup> ”

# Background

## Gender Representation on Public Boards (Scotland) Act 2018

### What does the Act do?

The aim of the [Gender Representation on Public Boards \(Scotland\) Act 2018](#) is to help address the historic under-representation of women in public life.

The 2018 Act introduced the 'gender representation objective' - a target that women should make up 50% of non-executive board membership. The objective applies to certain public bodies, colleges, and Higher Education Institutions. It also applies to Scottish Ministers as they appoint non-executive board members through the Public Appointments process.

The 2018 Act also introduced positive action provisions. The 'appointing person', which for many public authorities will be 'the Scottish Ministers', has a duty to give preference to a woman when making an appointment to a public board, but only in certain circumstances. The appointing person must determine who is best qualified for a position and appoint them on merit. If there are two or more candidates, one of whom is a woman, and they are considered equally qualified, then preference must be given to the woman if it would result in the board achieving or making progress on the gender representation objective. This is often referred to as the 'tie-breaker' provision.

However, preference may still be given to the candidate who is not a woman, if it can be justified because of a 'characteristic or situation' particular to that candidate.

The appointing person and public authorities must also take steps to encourage women to apply for non-executive positions on public boards. There is nothing to prevent an appointing person or public authorities from taking steps to encourage people with other protected characteristics to apply to become non-executive members of the public board.

There is a requirement for Scottish Ministers to lay reports before the Scottish Parliament on the operation of the Act, at intervals of no more than two years. Appointing persons and public authorities must also publish reports on the carrying out of their functions under the Act.

The Scottish Government published the first progress report to Scottish Parliament (December 2021) on public boards' progress towards the 'gender representation objective' in August 2023<sup>5</sup> and a second progress report was published in January 2024.<sup>6</sup>

Statutory guidance is also required by the Act.<sup>7</sup>

### How did the Act define 'woman'?

When the [Gender Representation on Public Boards \(Scotland\) Bill](#) was introduced, it did not include a definition of 'woman'.

The former Equalities and Human Rights Committee in session 5 scrutinised the Bill.

During Stage 1, the Committee heard arguments calling for a definition of 'women' that would include trans women, whether they hold a gender recognition certificate (GRC) or not. The Committee supported this view and said it expected the Scottish Government to address this issue at Stage 2.<sup>8</sup>

An amendment was proposed by Mary Fee MSP at Stage 2 of the Bill to make it inclusive of all trans women who were living as women:

“ Without the amendment, the inclusivity of the bill would be limited. The definition of 'woman' in the bill as introduced only covers trans women who have a full gender recognition certificate.<sup>9</sup> ”

The former Cabinet Secretary for Communities, Social Security and Equalities, Angela Constance MSP, welcomed the amendment and thanked Mary Fee MSP and the Scottish Trans Alliance for helping with the amendment.<sup>9</sup>

The amendment was agreed without division.<sup>10</sup> This added the following definition of 'woman' to section 2:

“ 'woman' includes a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female.”

This amendment made the Bill inclusive of all trans women and was not dependent on whether a trans woman had a GRC.

For further information on the Bill as it progressed through Parliament, see SPICe Briefings:

- [Gender Representation on Public Boards \(Scotland\) Bill: Consideration Prior to Stage 3](#)
- [Bill Summaries - Session 5: Gender Representation on Public Boards \(Scotland\) Bill](#)

## **Judicial review of the definition of 'woman' contained in the Gender Representation on Public Boards (Scotland) Act 2018 (FWS1)**

For Women Scotland brought a judicial review against the Scottish Government relating to the definition of 'woman' contained in the Gender Representation on Public Boards (Scotland) Act 2018.

The petition argued that:

- certain provisions of the 2018 Act related to reserved matters and so were beyond the legislative competence of the Scottish Parliament

- certain provisions of the 2018 Act were incompatible with EU law and the UN Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW')
- Scottish Ministers acted unlawfully and breached the Public Sector Equality Duty under section 149 of the Equality Act 2010 and associated regulations when bringing the substantive provisions of the 2018 Act into effect and issuing statutory guidance.

The ruling, issued by Lady Wise on 23 March 2021, found that the Scottish Government had acted lawfully by including trans women as women, as defined in section 2 of the 2018 Act.<sup>11</sup>

In her opinion, Lady Wise said:

“ It should be understood at the outset that the case does not form part of the policy debate about transgender rights, a highly contentious policy issue to which this decision cannot properly contribute.”

And in reference to the Gender Recognition Act 2004:

“ In my view none of the provisions of that legislation or its consequences have any bearing on the statutory provisions under discussion in this case.”

A key point was that the Scotland Act 1998, as amended, includes some exceptions to the reservation on equal opportunities. A specific exception was the inclusion of people with protected characteristics in non-executive posts on boards of Scottish public authorities. ([Schedule 5, L2](#))

The ruling said:

“ The Act was within the legislative competence of the Scottish Parliament and does not offend against the fundamental principle of equality of treatment.”

## Appeal

For Women Scotland appealed this ruling.

Lady Dorrian delivered the ruling on behalf of the Court on 18 February 2022.<sup>1</sup>

Lady Dorrian quoted Lady Wise in the original ruling to indicate what the case was not about:

“ ... the case does not form part of the policy debate about transgender rights, a highly contentious policy issue to which this decision cannot properly contribute. At its core, this litigation is concerned with whether certain statutory provisions were beyond the legislative competence of the Scottish Parliament.<sup>1</sup> ”

It was noted that some of the submissions referenced the Gender Recognition Act 2004, but Lady Dorrian said “Policy issues of this kind are wholly beyond scope of the case.”

Lady Dorrian noted that the Scottish Parliament has the legislative competence to make provision for women on public boards, and could have made provision for all people with the protected characteristic of gender reassignment:

“ It is clear that in the exercise of devolved competence the Scottish Parliament is entitled to make provision for the inclusion of women on such boards. They would also have been able to make such provision in relation to those with the protected characteristic of gender reassignment.”

The primary issue was whether the definition of 'woman' takes the matter beyond legislative competence.

The ruling noted that the Scottish Parliament does not have the power to modify existing provisions in the Equality Act 2010.

The Scottish Parliament could make provision only for women, since the protected characteristic of 'sex' is a reference to either a man or a woman under [section 11 of the Equality Act 2010](#). It could also make provision for any other protected characteristic, including gender reassignment.

“ ... 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.”

The definition of gender reassignment is a reference to a transsexual person ([section 7 of the Equality Act 2010](#)), and no distinction is made between those for whom the relevant process would involve reassignment from male to female or female to male.

“ In other words, it is the attribute of proposing to undergo, undergoing or having undergone a process (or part of a process) for the purpose of reassignment which is the common factor, not the sex into which the person is reassigned. It is reasonable to assume that at some stage of the process in question the individual will start living as a member of the sex to which they are seeking to transition, but it is not a specified requirement for the acquisition of the protected characteristic.”

The ruling said that the 2018 Act impinged on the nature of protected characteristics which is a reserved matter.

“ 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. It would have been open to the Scottish Parliament to include an equal opportunities objective on public boards aimed at encouraging representation of women. It would have been open to them separately to do so for any other protected characteristic, including that of gender reassignment. That is not what they have done. They have chosen to make a representation objective in relation to women but expanded the definition of women to include only some of those possessing another protected characteristic.”

In short, the Scottish Government could have added within legislative competence the protected characteristic of gender reassignment, which would have included trans men and trans women. But it created a new protected characteristic of trans women, which it did not have the power to do.

The court granted a decree of reduction of the definition of 'woman' on 22 March 2022, which had effect from 19 April 2022.<sup>2</sup> This means that the definition of 'woman' in the



2018 Act has not been law since 19 April 2022.<sup>12</sup>

# Consultation

The Scottish Government has not conducted a formal consultation because it is a single issue Bill that is removing a definition following a court decision. It has spoken to stakeholders to confirm why the Bill is being introduced. <sup>4</sup>

# The Bill

This is perhaps the shortest Bill to have been introduced in the Scottish Parliament.

It contains one substantive section, section 1, which is to repeal the definition of 'woman' in the 2018 Act.

The other two sections deal with commencement (on the day the Act comes into force) and the short title of the Bill.

There are no costs associated with the implementation of the Bill. <sup>13</sup>

# Impact assessments

The Scottish Government has published the following impact assessments on the Bill:

- [Gender Representation on Public Boards \(Amendment\) \(Scotland\) Bill: fairer Scotland duty impact assessment](#)
- [Gender Representation on Public Boards \(Amendment\) \(Scotland\) Bill: equality impact assessment](#)
- [Gender Representation on Public Boards \(Amendment\) \(Scotland\) Bill: child rights and wellbeing impact assessment](#)

None of the impact assessments reported any negative impacts.

The equality impact assessment does indicate that there may be some concern among the trans community. It seeks to provide reassurance that the Scottish Government has not changed its position on support for trans rights:

“ The trans community may perceive the Bill to have a negative impact on their community, as they could mistakenly view it as a step backwards from their work to achieve equality or a sign that the Scottish Government is changing its position on support for trans rights. However any substantive impact on the operation of the law is as a result of the Court's decisions, not this Bill which simply clears up confusing wording. Officials are engaging with *LGBTQ+* stakeholders to reassure them of the Scottish Government's ongoing commitment to achieving greater equality.”

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