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Equalities, Human Rights and Civil Justice Committee

Stage 1 Report on the Gender Representation on Public Boards (Amendment) (Scotland) Bill



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Equalities, Human Rights and Civil Justice Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- a. matters relating to equal opportunities, and upon the observance of equal opportunities within the Parliament; and
- b. matters relating to human rights.
- c. matters relating to civil justice within the responsibility of the Cabinet Secretary for Justice and Home Affairs.

2. In these Rules

(a) “equal opportunities” includes the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds or on grounds of disability, age, sexual orientation, language or social origin or of other personal attributes, including beliefs or opinions such as religious beliefs or political opinions; and

(b) “human rights” includes Convention rights (within the meaning of section 1 of the Human Rights Act 1998) and other human rights as for example contained in any international convention, treaty or other international instrument ratified by the United Kingdom.

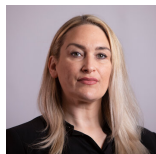


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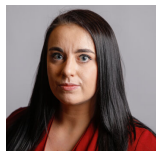
Committee Membership



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Scottish National Party



Deputy Convener
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Scottish Conservative
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Membership changes

1. Kaukab Stewart served as Convener from 25 April 2023 until 12 February 2024. Karen Adam was appointed as Convener on 20 February 2024.

Introduction

2. The Gender Representation on Public Boards (Amendment) (Scotland) Bill ¹ (“the Bill”) was introduced in the Parliament by the Cabinet Secretary for Social Justice, Shirley-Anne Somerville on 7 November 2023.
3. The Parliament designated the Equalities, Human Rights and Civil Justice Committee as the lead committee for Stage 1 consideration of the Bill. On 17 January, the Parliament agreed a stage 1 deadline of 29 March 2024.
4. Under the Parliament's Standing Orders Rule 9.6.3(a) it is for the lead Committee to report to the Parliament on the general principles of the Bill. In doing so, it must take account of views submitted to it by any other Committee. The lead Committee is also required to report on the Financial Memorandum ² and Policy Memorandum ³ which accompany the Bill.
5. The Bill and its accompanying documents are available online on the Scottish Parliament's website ⁴ .

Background

6. When the original Gender Representation on Public Boards (Scotland) Bill ⁵ was introduced to the Scottish Parliament in 2017, it did not include a definition of “woman”. An amendment (amendment 10 ⁶) to include a definition was made at Stage 2 of the Bill’s scrutiny following the Session 5, Equalities and Human Rights Committee’s stage 1 report.
7. According to the Scottish Government’s Policy Memorandum, an amendment was made “to make the Bill more inclusive by including trans women who were living as trans women even if they did not have a full gender recognition certificate under the Gender Recognition Act 2004”.
8. Decisions by the Court of Session on 18 February 2022 ⁷ and reclaiming motion (appeal) on 22 March 2022 ⁸ in response to a judicial review brought by For Women Scotland, found that the definition as added by the stage 2 amendment was out with the legislative competence of the Scottish Parliament and was not lawful. (see also judgment summary ⁹).
9. Further detail on the provisions of the 2018 Act and background to the Court of Session decisions can be found in the SPICe Briefing on the Gender Representation on Public Boards (Amendment) (Scotland) Bill ¹⁰ .

Policy objectives of the Bill

10. According to the Policy Memorandum, the aim of the Bill is to amend the Gender Representation on Public Boards (Scotland) Act 2018 ('the 2018 Act')¹¹ by removing the definition of 'woman' set out in section 2.
11. 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 lawful, has had effect from 19 April 2022.
12. The definition in section 2 which is to be removed is: “ “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”.
13. There has been no formal consultation on this short, single-issue Bill, as its sole purpose is to amend the statute book in light of the court's ruling.

Alternative approaches

14. According to its Policy Memorandum, the Scottish Government's view was that there was "no suitable alternative" approach to removing the definition following the Court's decision.
15. The Scottish Trans Alliance/Equality Network (STA/EN) suggested the use of an SSI instead of a Bill. However, to enable that, a specific power would be needed within the primary legislation. The only regulation making powers in the 2018 Act are in sections 8 and 9. Section 8 covers reports on the operation of the Act, and regulations under section 9 can modify Schedule 1 and the list of public authorities. There is no power in the 2018 Act which would allow for Scottish Ministers to repeal the definition of 'woman' via regulations.
16. SPICe has advised that it is not aware of a provision under any other Act that would allow for the 2018 Act to be amended. It is not clear whether it would be possible to create a provision in future legislation that would allow for narrow amendments to legislation, following a Court ruling. This is because the direction of what should be amended would come from the Courts.

Structure of the Bill

17. The Bill comprises three sections:

- Section 1 of the Bill amends section 2 of the Gender Representation on Public Boards (Scotland) Act 2018 by repealing the definition of “woman”.
- Section 2 of the Bill deals with commencement.
- Section 3 of the Bill deals with the short title.

Consideration by other Committees

Consideration by the Finance and Public Administration Committee

18. The Committee considered the Financial Memorandum (FM) on 12 December 2023 and, given the limited financial implications of the Bill (the FM for the Bill states that “the substantive provision of the Bill is of a technical nature and will not result in any significant new or additional costs or savings”), the Committee decided not to issue a call for views or take any further action in relation to the FM.

Consideration by the Equalities, Human Rights and Civil Justice Committee

Written evidence

19. The Committee undertook a Call for Views ¹² on the Bill between 8 and 29 January 2024. The 56 responses ¹³ have been published.
20. The responses could be broken down into the following categories:
 - Twenty-five submissions supported the Bill.
 - Three submissions offered statements on i) women’s sex-based rights or ii) biology.
 - Three submissions wanted a definition based on biological sex.
 - Four submissions wanted a definition to be trans inclusive.
 - Twenty-one submissions misunderstood the Bill.
21. Of the 25 responses that supported the Bill:
 - One submission agreed with the Bill, but stated that the court ruling was wrong.
 - Four submissions agreed with the Bill.
 - Six submissions agreed with the Bill because it is in line with the court ruling. This included For Women Scotland, who questioned what discussion there could be on the Ministers’ legal obligation to comply with the court order. Their submission also states: “Any deviation could risk the Scottish Ministers facing further proceedings in the Court of Session for contempt.”
 - Six submissions agreed with the Bill because it is in line with the court ruling, but state that the ruling did not say the definition was wrong rather, it was outside legislative competence. This included Close the Gap and the Young Women’s Movement.

- Eight submissions agreed with the Bill but were disappointed with the court ruling. This included Scottish Trans/Equality Network and Engender. The other six are from individuals, four of whom refer to the Equality Impact Assessment on the Bill which states:

“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 LGBTQI+ stakeholders to reassure them of the Scottish Government’s ongoing commitment to achieving greater equality.”

22. The STA/EN submission set out the contribution they made to the definition of woman’ in the 2018 Act.
23. During Stage 1 consideration, they raised a concern that trans women without a GRC might not be included in the gender representation objective, because their legal sex would still be male under the Equality Act 2010.
24. STA/EN suggested a definition of ‘woman’ could be provided for in the Bill that would include all trans women who have transitioned and are permanently living as women, with or without a GRC. They would be counted as women for the purpose of the gender representation objective.
25. STA/EN worked with Mary Fee MSP to introduce an amendment to the Bill at Stage 2 on the definition of ‘woman’. The amendment was welcomed by the Scottish Government and was agreed unanimously by the Committee.
26. While the court ruling on the definition is accepted by STA/EN, it is noted that it focused on legislative competence, and not whether the definition was right or wrong:

“The sole issue for the court is thus whether sections 2 and 11 of the [Equality] Act were within legislative competence. The answer to that question hinges not on a debate about the rights and wrongs of policy decisions in this area, but on the proper interpretation of these sections, considered in the light of section 29 of the Scotland Act 1998, and in particular, the PBE [Public Boards Exception] in schedule 5 of that Act.” ⁷

27. As such, STA/EN continue to support the view that all trans women who have transitioned and are permanently living as women should be counted as women when it comes to positive action measures. They are therefore disappointed at the ruling.
28. While they support the Bill, they question whether a Bill was necessary to make this change to the statute book:

“We think it could be worthwhile to explore whether there are any potential changes to the law that could prevent the need for primary legislation in future where similar situations arise. Where a ruling of a Court means that a part of an Act is declared outwith legislative competence, and no revisiting of the legislation more widely is

needed, it would seem to us to reduce the burden on both parliamentary and government time for there to be a mechanism such as an SSI that could be used to bring the statute book into line with the court ruling. Of course, any such change should be suitably narrowly drawn so that such a mechanism could only be used in situations analogous to the current Bill – which is essentially a tidying up of the statute book.”

Oral evidence

29. The Committee held an informal briefing with the Scottish Government’s Bill team in private on 12 December 2023. This was to enable members to understand the context of the Bill. It agreed to revisit whether it wished to take oral evidence once the call for views concluded and did so at its meeting on 6 February 2024 ¹⁴ .
30. At its meeting on 6 February 2024, the Committee agreed that it was content with evidence provided in the written submissions and to take oral evidence from the Cabinet Secretary and Scottish Government officials only.
31. Accordingly, at its meeting on 20 February 2024 ¹⁵ , the Committee heard from:
 - Shirley-Anne Somerville MSP, Cabinet Secretary for Social JusticeSupported by:
 - Eileen Flanagan, Head of the Women’s Equality Unit
 - Lucy Galloway, Solicitor, Legal Directorate
 - Annie Milović, Senior Policy Advisor, Gender Equality Policy Team, Scottish Government.
32. The Cabinet Secretary set out to the Committee the reasons for the Bill’s introduction. She explained that the Court of Session ruled that the section 2 definition in the Gender Representation on Public Boards (Amendment) Scotland Act 2018 Act has no legal effect and that had been the position since 19 April 2022. She said “Our Counsel told the court that we would remove the definition. The Bill if passed will provide clarity by removing the redundant definition from the statute book”.
33. The Committee sought clarification on why, when the judgment was made in April 2022, it had taken the Scottish Government until 2024 to make the change. The Cabinet Secretary told us “It was important that we considered whether we could use another legislative vehicle such as another Bill that was going through Parliament. In many ways, that would have been an easier process than introducing a whole Bill to do just this one thing but that was not possible”.
34. The Cabinet Secretary also confirmed that the Government has no intention of amending the bill explaining that it is short and has only one purpose. She said “We intend to carry on with the Bill as introduced. The legal definition of woman stands as it is in the Equality Act 2010 and the Gender Recognition Act 2004. The legal definitions are there for all to see. There will be no definition in the 2018 Act”.

35. The Committee raised a wider point as to whether there needs to be consideration of the way in which technical fixes could be addressed which did not require primary legislation. The Cabinet Secretary acknowledged this point and that the process of introducing a Bill could be time consuming.
36. When asked what the consequence would be of not introducing the Bill the Cabinet Secretary told us “In many ways there would be no legal effect. In no way is there a legal necessity for us to carry this through. This is a tidying up exercise but if the definition remains on the statute book it could be confusing even though it has no legal effect. People with wider knowledge could read something in the 2018 Act that they know that the court judgment has dealt with and that could lead to confusion, so it is important that we tidy it up”.

Recommendations on the general principles of the Bill

37. The Committee is satisfied that this Bill provides a technical fix, in order to tidy up the statute book, following the rulings of the Court of Session on 18 February 2022 and 22 March 2022.
38. Accordingly, the Committee is content to recommend that Parliament agrees the general principles of the Bill.

- [1] Scottish Parliament. (2023, November 7). The Gender Representation on Public Boards (Amendment) (Scotland) Bill [as introduced]. Retrieved from <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-representation-on-public-boards-amendment-scotland-bill/introduced/bill-as-introduced.pdf>
- [2] Scottish Parliament. (2023, November 7). Gender Representation on Public Boards (Amendment) (Scotland) Bill Financial Memorandum. Retrieved from <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-representation-on-public-boards-amendment-scotland-bill/introduced/financial-memorandum-accessible.pdf>
- [3] Scottish Parliament. (2023, November 7). Gender Representation on Public Boards (Amendment) (Scotland) Bill Policy Memorandum. Retrieved from <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-representation-on-public-boards-amendment-scotland-bill/introduced/policy-memorandum-accessible.pdf>
- [4] Scottish Parliament. (2023, November 6). Gender Representation on Public Boards (Amendment) (Scotland) Bill webpage. Retrieved from <https://www.parliament.scot/bills-and-laws/bills/gender-representation-on-public-boards-amendment-scotland-bill/introduced>
- [5] Scottish Parliament. (2017, June 15). Gender Representation on Public Boards (Scotland) Bill [as introduced]. Retrieved from <https://www.parliament.scot/bills-and-laws/bills/gender-representation-on-public-boards-scotland-bill#target3>
- [6] Scottish Parliament. (2017, December). Gender Representation on Public Boards (Scotland) Bill Marshalled List of Amendments for Stage 2. Retrieved from <https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/gender-representation-on-public-boards-scotland-bill/stage-2/marshalled-list-of-amendments-stage-2-gender-representation-on-public-boards-scotland-bill.pdf>
- [7] Court of Session Scotland. (2022, February 18). Opinion of the Court. Retrieved from https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf?sfvrsn=7920df79_1
- [8] For Woman Scotland Limited. (2022, March 20). Reclaiming motion. Retrieved from <https://forwomen.scot/wp-content/uploads/2022/03/Interlocutor.pdf>
- [9] Judiciary of Scotland. (2022, February 18). Judgment Summaries: For Women Scotland versus the Lord Advocate and the Scottish Ministers. Retrieved from <https://judiciary.scot/home/sentences-judgments/judgments/2022/02/18/for-women-scotland-v-the-la-the-scottish-ministers>
- [10] Scottish Parliament. (2024, February 1). Scottish Parliament Information Centre (SPICe) briefing on the Gender Representation on Public Boards (Amendment) (Scotland) Bill. Retrieved from <https://digitalpublications.parliament.scot/ResearchBriefings/Report/2024/2/1/a7eae3c4-71eb-4d56-b6bf-836715c99f68>
- [11] UK Government. (2018, March 9). Gender Representation on Public Boards (Scotland) Act 2018. Retrieved from <https://www.legislation.gov.uk/asp/2018/4/contents>
- [12] Scottish Parliament. (2024, January 8). Gender Representation on Public Boards (Amendment) (Scotland) Bill call for views. Retrieved from <https://yourviews.parliament.scot/ehrcj/gender-representation-public-boards-bill/>

- [13] Scottish Parliament. (2024, January 29). Gender Representation on Public Boards (Amendment) (Scotland) Bill published responses to call for views. Retrieved from <https://yourviews.parliament.scot/ehrcj/gender-representation-public-boards-bill/>

- [14] Scottish Parliament. (2024, February 6). Minutes of the Equalities, Human Rights and Civil Justice Committee. Retrieved from <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-equalities-human-rights-and-civil-justice-committee/meetings/2024/ehrcjs6244/minutes>

- [15] Scottish Parliament. (2024, February 20). Official Report of the Equalities, Human Rights and Civil Justice Committee. Retrieved from <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/EHRCJ-20-02-2024?meeting=15719>

