

EXPLANATORY MEMORANDUM TO
THE GENDER RECOGNITION REFORM (SCOTLAND) BILL (PROHIBITION ON
SUBMISSION FOR ROYAL ASSENT) ORDER 2023

2023 No. 41

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Scotland and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This Order makes provision for the Secretary of State for Scotland to prohibit the Presiding Officer of the Scottish Parliament from submitting the Gender Recognition Reform (Scotland) Bill (the “Bill”) for Royal Assent. This Order has been made as the Bill modifies the law as it applies to the reserved matters of “Fiscal, economic and monetary policy”, “Social security schemes”, and ‘Equal opportunities’, as set out in Schedule 5 of the Scotland Act 1998¹ (the “1998 Act”) and because the Secretary of State for Scotland has reasonable grounds to believe that the modifications would have an adverse effect on the operation law as it applies to those reserved matters. This Order sets out the provisions of the Bill which would modify the Gender Recognition Act 2004² (the “2004 Act”) in Scotland, as it applies to reserved matters. This Order states the adverse effects the modifications would have on the operation of the law as it applies to reserved matters, including, amongst others, “Equal opportunities” through the Equality Act 2010³ (the “2010 Act”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Section 35 of the 1998 Act gives the Secretary of State for Scotland four weeks, following the passage of a Bill, to make an Order prohibiting the Presiding Officer of the Scottish Parliament from submitting a Bill for Royal Assent.
- 3.2 Within the four-week period, it has been necessary for the Secretary of State for Scotland to consider the Bill, seek relevant advice and prepare a draft order. This Order comes into force on the day after it has been laid, to prohibit the Presiding Officer from submitting the Bill for Royal Assent.
- 3.3 In these circumstances, therefore, it has not been possible for the Order to adhere to the ‘21-day rule’, a convention that stipulates statutory instruments should be laid before Parliament no less than 21 days before they come into force.

¹ 1998 c. 46. <https://www.legislation.gov.uk/ukpga/1998/46/contents>; Section A1 (Fiscal, economic and monetary policy), Section F1 (Social security schemes), Section L2 (Equal opportunities) of Schedule 5, Part II.

² 2004 c. 7. <https://www.legislation.gov.uk/ukpga/2004/7/contents>

³ 2010 c. 15. <https://www.legislation.gov.uk/ukpga/2010/15/contents>

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The 2004 Act governs the process of obtaining a Gender Recognition Certificate (“GRC”) in the United Kingdom. In 2004, the Scottish Parliament passed a ‘legislative consent motion’ to signal support for the UK Government to legislate on its behalf in respect of the matters in the 2004 Act which were within its legislative competence.
- 6.2 On 2 March 2022, the Scottish Government introduced the Bill to amend the 2004 Act and the process of obtaining a GRC in Scotland. The Bill passed its final stage in the Scottish Parliament on 22 December 2022.
- 6.3 Section 35 (1) of the 1998 Act allows the Secretary of State to make an order prohibiting the Presiding Officer from submitting a Bill for Royal Assent if the Bill: (a) contains provisions which the Secretary of State for Scotland has reasonable grounds to believe would be incompatible with international obligations or the interests of defence and national security or; (b) contains provisions which make modifications to the law as it applies to reserved matters and which the Secretary of State for Scotland has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters.
- 6.4 In relation to the Bill, the Secretary of State for Scotland is satisfied that the test set out in section 35(1)(b) has been met and therefore makes this Order in exercise of powers conferred by section 35 of the 1998 Act. The relevant provisions of the Bill, required under section 35(2) of the 1998 Act, are listed in Schedule 1 to this Order. The Secretary of State for Scotland’s reasons for making this Order, required under section 35(2) of the 1998 Act, are included in Schedule 2 to this Order. In line with section 36(4) of the 1998 Act, standing orders enable the Scottish Parliament to reconsider the Bill after the passing of an order made in exercise of powers conferred by section 35.
- 6.5 Prior to this Order, the powers conferred by section 35 have never been used.

7. Policy background

What is being done and why?

- 7.1 The Secretary of State for Scotland is prohibiting the Presiding Officer from submitting the Bill for Royal Assent.
- 7.2 The Bill makes amendments to the 2004 Act as it applies in Scotland. These amendments will significantly alter the requirements for obtaining a GRC under Scots

law. A person can apply if they are the subject of a Scottish birth register entry or if they are ordinarily resident in Scotland.

- 7.3 The amendments made to the 2004 Act by the Bill will make it quicker and easier for applicants to obtain a GRC, removing a number of measures which the UK Government regards as important safeguards, including any requirement for third party verification or evidence, from the process.
- 7.4 These amendments will allow a new and significantly broader category of people, who are currently unable to obtain a GRC under the 2004 Act, to do so. This new cohort comprises:
- applicants aged 16 to 17 years;
 - applicants without a diagnosis of gender dysphoria;
 - applicants who have not lived for two years in their acquired gender.
- 7.5 The Bill also provides for automatic recognition of all “overseas gender recognition” (apart from where contrary to public policy), in Scots law, whereas the current process only recognises GRCs from approved countries and territories.
- 7.6 The Bill modifies the law as it applies to the reserved matters of “Fiscal, economic and monetary policy”, “Social security schemes” and “Equal opportunities”. In particular, the Bill modifies the 2004 Act as it applies to the reserved matter of “Equal opportunities”, through its inter-relationship with the 2010 Act.
- 7.7 The 2010 Act protects people from discrimination, harassment and victimisation (in the workplace and in wider society) and advances equality for opportunity for all. The 2010 Act makes “sex” a protected characteristic and makes provisions about when conduct relating to that protected characteristic is unlawful. As a matter of general principle, in accordance with section 9 of the 2004 Act, a full GRC has the effect of changing the sex that a person has as a protected characteristic for the purposes of the 2010 Act.
- 7.8 The first category of adverse effects that are created by the Bill comes from the substantive modifications it makes to the basis upon which a GRC is obtained. As a result of the Bill there will be two parallel, and very different, regimes in the UK for issuing and interpreting GRCs (a “dual system”).
- 7.9 There are a number of specific adverse effects caused by the creation of a dual system, as well as the overall adverse effect created by a general lack of clarity both for GRC holders and service providers, employers (and others) for whom it may be unclear what status a particular GRC has in different contexts.
- 7.10 The most notable area in which the creation of a dual system has serious adverse practical consequences on the operation of the law as it applies to reserved matters is the administration of tax, benefit and State pensions. These are managed by integrated systems across the UK that span reserved and devolved functions, operating for both the UK and Scottish Governments. Existing IT infrastructure only allows one legal sex on any record and cannot change the marker for 16 to 17-year olds. Those responsible for these systems consider that it may be unmanageable, even with considerable time and expense, to build system capability to manage a dual identity for the same individual if someone’s legal sex could be different in Scots law and the law in England and Wales.

- 7.11 The second category of adverse effects arises because the Bill does not retain or create sufficient safeguards to mitigate the risk of fraudulent and/or malign applications, meaning that the reformed system will be open to abuse and malicious actors.
- 7.12 The change in how a full GRC could be obtained under the Bill expands the category of people who will be regarded as a woman or a man under the 2010 Act. This category will no longer be limited to a biological woman (or man) or a woman (or man) aged 18 or over who has obtained a full GRC as a result of having a medical diagnosis of gender dysphoria and has two years' experience of living in the acquired gender. Instead, in Scots law, it will include a person who has obtained a full GRC after having self-identified as a woman (or man) for six months if they are aged 18 or over, or a person who has self-identified as a woman (or man) for nine months if they are aged 16 to 17 years. This is a substantive change to what a woman or man is for the purposes of the 2010 Act.
- 7.13 The third category of adverse effects that are created by the Bill relates to the operation of the 2010 Act.
- 7.14 The UK Government has assessed that the creation of this new and very different cohort of eligible applicants would adversely affect the operation of the 2010 Act, identifying four key areas:
- clubs and associations (where exceptions in the 2010 Act apply in respect of sex but not in respect of gender reassignment);
 - the operation of the public sector equality duty;
 - equal pay; and
 - provisions where exceptions in the 2010 Act apply for both sex and gender reassignment.
- 7.15 The Bill would also adversely affect the operation of the 2010 Act with regard to schools. Under the 2010 Act, single-sex schools are able to put in place lawful admissions policies that discriminate on the basis of prospective pupils' sex; but where an individual has changed their legal sex for the purposes of the 2010 Act by obtaining a full GRC, a school's refusal to admit that child on the grounds of their gender reassignment would be direct gender reassignment discrimination and unlawful. Therefore, a new problem would be created by the Bill if the minimum age for obtaining a full GRC were to be reduced from 18 to 16 years, as it is not currently possible for the vast majority of school pupils to change their legal sex prior to leaving school.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 The Order does not amend other legislation, so raises no issues relating to consolidation.

10. Consultation outcome

- 10.1 A consultation on this Order has not taken place. Section 35 of the 1998 Act gives the Secretary of State four weeks to make an Order to prohibit the Presiding Officer from

submitting the Bill from Royal Assent. Given this restricted time period, it would not be possible to conduct a formal consultation. In any case, the Order does not make changes to law, instead it is used to preserve the status-quo by prohibiting the Bill from becoming law and amending the 2004 Act in Scotland.

- 10.2 The Presiding Officer of the Scottish Parliament and the relevant Scottish Ministers were informed of the Secretary of State for Scotland's decision to make an Order.

11. Guidance

- 11.1 Guidance in relation to this Order is not necessary as it does not make changes to the law in the United Kingdom.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 No formal monitoring or review of the Order is considered necessary nor is it required by the 1998 Act.
- 14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015⁴, the Secretary of State for Scotland has made the following statement "There is no need for review or monitoring as the Order does not regulate businesses".

15. Contact

- 15.1 Rachel Irvine at the Office of the Secretary of State for Scotland email: rachel.irvine@ukgovscotland.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Rachel Irvine, Deputy Director for Constitutional Policy, at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Secretary of State for Scotland at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.

⁴ 2015 c. 26. <https://www.legislation.gov.uk/ukpga/2015/26/contents/enacted>