



The Scottish Parliament  
Pàrlamaid na h-Alba

## Equalities, Human Rights and Civil Justice Committee

The Rt Hon Alister Jack, MP  
Secretary of State for Scotland

All correspondence c/o:  
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By e-mail

25 January, 2023

Dear Secretary of State,

### **UK Government decision to make a section 35 order in relation to the Gender Recognition Reform (Scotland) Bill**

Thank you for your letter of 20 January 2023. I note that you were unable to appear before the Committee due to other commitments. I note further that, in any event, you considered it inappropriate to attend the meeting because of potentially imminent court proceedings. Members of the Committee have had sight of your letter to the Cabinet Secretary and the statement of reasons.

You will be aware that the Committee thereafter extended its invitation to the Minister for Women and Equalities to appear but regrettably she was also unavailable to attend.

The Committee considered this issue at yesterday's meeting and, against the background that it is not aware of any currently live legal proceedings, expressed disappointment that it was not afforded the opportunity to clarify with you or Ms Badenoch the reasons behind the decision to make the Section 35 order. As a result, there are several areas relating to the Bill and potential cross-border conflict on which it would welcome clarification.

Following deliberations, Members agreed to write to you and to the Cabinet Secretary with a number of questions on which it would welcome a response. These questions are attached as an Annexe to this letter.

I am copying this letter to the Minister for Women and Equalities and the Cabinet Secretary for Social Justice, Housing and Local Government for their information and look forward to a reply at your earliest convenience.

If it is more appropriate for the Minister for Women and Equalities to reply on behalf of the UK Government, then we would have no objections to that.

Yours sincerely,

A handwritten signature in blue ink that reads "Joe FitzPatrick". The signature is written in a cursive style with a long horizontal flourish at the end.

Joe FitzPatrick MSP  
Convener, Equalities, Human Rights and Civil Justice Committee

## Annexe

1. Can you clarify your reasons for making a section 35 order instead of challenging the Bill on its legislative competence under section 33?
2. We understand that you have met once with the Scottish Government since the invoking of section 35. What further meetings are planned at official level and what further meetings are planned at Ministerial level? What is the purpose and agenda for these meetings? Are you looking at why section 35 was invoked or are you also discussing where and how the Bill could be amended?
3. What discussion has there been between the two governments on a Section 104 order and did you consider beginning work on this in advance of the Bill's passing given the strength of feeling on this issue? In your view, is there any reason why the issues you raise cannot be resolved via a Section 104 order, as is the case with all other cross-border issues that arise from Scottish legislation.
4. Following consultation on GRA reform in 2018, the UK Government made a decision not to reform the GRA. Neither cross border concerns with Scotland nor a potential impact of the operation of the Equality Act in Scotland were cited as a reason to maintain the status quo. Can you clarify what discussions took place between the two governments on a) UK Government concerns about cross- border issues and b) the impact on the operation of the Equality Act in Scotland should a new system have been introduced in England and Wales but not in Scotland.
5. Did the UK Government give consideration as to whether it wished to provide evidence to the Committee during its consideration at Stage 1, after the Stage 1 report was published or during the Stage 2 process to outline their concerns.
6. Do you believe that there is a way forward that could address the concerns you have raised but that doesn't require the Bill to be amended? Have you explored the potential role and development of guidance in relation to implementation of the Bill? What discussion have you had with the Scottish Government on this?
7. The EHRC has a role in providing guidance on the implementation of equality law. What discussions have you had with the Commission with regard to the production of guidance for these particular changes?
8. If no discussions have taken place, in what way do you believe the Bill could be amended in order that it does not 'make modifications of the law as it applies to reserved matters' and which you have 'reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters'? In terms of key aspects of the Bill, the Committee would welcome clarification on amendments you believe would be necessary in the following areas:

- a. The removal of the requirement to have a medical diagnosis of gender dysphoria
- b. Reducing the minimum age from 18 to 16
- c. The reduced time period for living in the 'acquired gender', from two years to three months (six months for 16-17 year olds), and a three-month reflection period
- d. Removal of requirement to provide evidence of living in the acquired gender
- e. Replacing the Gender Recognition Panel with the Registrar General

These points carried the support of cross-party members. Why did the UK Government not raise concerns at this stage?

9. What is the UK Government's view of the views expressed by a number of women's rights organisations in Scotland who have on the ground experience and who have stated their support for the GRR Bill (such as Scottish Women's Aid, Rape Crisis Scotland, Engender and Close the Gap")
10. In your view, can two different gender recognition regimes ever exist in the UK? Are there existing differing regimes in operation between Scotland and the rest of the UK and what are the consequences of those? With reference to paragraphs 26 and 27 of the statement of reasons which identifies the removal of medical diagnosis as leading to a "substantive change to what a man or a woman is for the purposes of the 2010 Act", does the UK Government believe that there are any circumstances in which de-medicalisation and self-declaration could be undertaken in Scotland that would not have such an effect? Can the UK Government advise how Scotland can seek to comply with Resolution 2048 of PACE (2015) while retaining the need for medical gatekeeping (Resolution 2048 expressed concerns that requiring someone seeking legal recognition of their acquired gender to have been medically treated is a break of their right to respect for their private life under Article 8 of the ECHR and calls for Member states to develop "quick, transparent and accessible procedures based on self-determination for changing the name and registered sex of transgender people on birth certificates and other documents).
11. In relation to Irish GRCs which have been in place for six years can the UK Government confirm if any concerns were raised about cross-border issues arising with Northern Ireland during this period and if not, why has the UK Government chosen to wait until Scotland updated the application process to raise concerns?
12. What has prompted the UK Government to consider updating the approved countries and territories list and why has it not been updated since 2011?
13. The Statement of Reasons says there would be practical consequences of a dual system, for example, in the administration of tax, benefit and State pensions. It is said that the existing IT infrastructure "only allows one legal sex on any record and cannot change the marker for 16 to 17 year olds."

However, to apply for Universal Credit, an individual does not need to provide a birth certificate or GRC as proof of their identity. They can provide a passport or driving licence, where people can change their sex marker without a GRC. Furthermore, it is estimated that the Bill could result in an increase in the number of GRCs issued from 30 to 250/300. Your own estimations say comparable countries suggest that number could be 550. Nonetheless, in either case, the numbers are small and at most would require the creation of 550 additional records. Can you therefore provide further clarification on what the practical consequences are on the administration of tax, benefit and State pensions and why they are significant?

14. The Statement includes concerns about overseas nationals from countries/territories not on the approved lists 'bypassing' the UK standard track for a GRC. What data do you have on the number of people who were granted a GRC who are from a country or territory not on the approved list?
15. The Statement sets out concerns regarding fraudulent or malign applications under the Bill. This is because the GRC process would move from 'very hard to meet' to being dependent on an applicant's judgement. However, there are several provisions in the Bill to counter fraudulent/malign applications, including the criminal offence, and the requirement on the Police to notify the Registrar General about individuals who have a sexual harm prevention order, a sexual risk order, or a sexual offences order. Can you clarify how the Bill could be amended in this area?
16. Furthermore, as an individual can be excluded from a single-sex space on the basis of their gender reassignment, regardless of whether they have a GRC, what alteration do you believe the Bill will have on the operation of single-sex spaces?
17. The Statement sets out what you consider to be the adverse effects of the Bill on the operation of the law as it applies to reserved matters. This includes the Equality Act, in terms of clubs and associations, the operation of the PSED, Equal Pay, Provisions where exceptions apply for both sex and gender reassignment, and single-sex schools. These considerations are based on more GRCs being granted in Scotland as a result of the Bill and that more people will change their legal sex, and what this means in terms of the Equality Act. Ministry of Justice data shows that the population of people with GRCs under the current system is already increasing, and it is likely that that population will grow without any changes in Scotland. Is the UK Government considering further work on the operation of the Equality Act in that respect?
18. Can you clarify how the UK Government will respond to or manage other legislation which may have a similar effect on the operation of the law as it applies to reserved matters, for example the proposal for the age for marriage to be raised to 18 in England and Wales?