



The Scottish Parliament  
Pàrlamaid na h-Alba

## Equalities, Human Rights and Civil Justice Committee

Ms Shona Robison MSP  
Cabinet Secretary for Social Justice,  
Housing and Local Government

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25 January, 2023

Dear Cabinet Secretary,

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

At its meeting on 17 January 2023, the Committee agreed to invite the Secretary of State for Scotland and the Scottish Government to attend its meeting yesterday to explore further the decision by the UK Government to make a section 35 order in relation to the Gender Recognition Reform (Scotland) Bill.

The Committee was disappointed that neither the Secretary of State nor the Minister for Women and Equalities was able to attend due to other commitments. Accordingly, the proposed session with both governments was not able to proceed.

The Committee considered this issue at yesterday's meeting and agreed there are a number of areas relating to the Bill and potential cross-border conflict on which it would welcome clarification. These would have formed the basis of our planned meeting which did not proceed. Therefore, Members agreed to write to you and to the Secretary of State for Scotland with questions on which it would welcome a response. These areas are provided as an Annexe to this letter.

A copy of my letter to the Secretary of State for Scotland has also been copied to you for information.

I look forward to a reply at your earliest convenience.

Yours sincerely,

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

## Annexe

1. Why do you think the Secretary of State for Scotland chose 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 Secretary of State since the invoking of section 35. Can you update us on what was discussed at that meeting? What further meetings are planned at official level and what other 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 discussions have 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? Is there any reason that you can think of that prevents the cross-border issues raised from being resolved in a s104 order, as is the case with all other cross-border issues that arise from Scottish legislation?
4. The UK Government consulted on GRA reform in 2018 for England and Wales, and then in 2020 said it [would not reform the GRA](#). The reasons for maintaining the status quo did not appear to include cross-border concerns with Scotland, or the impact of the operation of the Equality Act in Scotland. What discussions were there between the two governments during that period given:
  - a. The UK Government's concerns about cross-border issues?
  - b. The impact on the operation of the Equality Act in Scotland should a new system have been introduced for England and Wales, but not Scotland?
5. During the passage of the Bill you said that it was the role of the EHRC to produce guidance on "how these changes would operate and that you would work with them to deliver this. What discussions have you had with the Commission since the passing of the Bill in this regard? Have you explored the potential role and development of guidance in relation to implementation of the Bill, with the UK Government?
6. Do you think the GRR Bill can be amended in order that, in the Secretary of State's view, it does not 'make modifications of the law as it applies to reserved matters' and which the Secretary of State has 'reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters'? And specifically on 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
7. What is your view on whether two different gender recognition regimes can ever exist in the UK? What other examples are there of different regimes operating in Scotland and the rest of the UK and what are the consequences of those?
  8. 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. Therefore, what is your view on the suggestion of practical consequences on the administration of tax, benefit and State pensions? Were there areas you were preparing to draft section 104 orders for and if so, what can you tell us about the content of these?
  9. The Statement includes concerns about overseas nationals from countries/territories not on the approved lists 'bypassing' the UK standard track for a GRC. Have you had access to data on the number of people who were granted a GRC who are from a country or territory not on the approved list?
  10. 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. How could the Bill be amended in this area?
  11. The Statement sets out what the Secretary of State considers 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. What work has the Scottish Government undertaken to consider

these points regarding the Equality Act and what was its assessment on how an increased number of GRCs would impact on the Equality Act?