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Baroness Kishwer Falkner  
Equality and Human Rights Commission

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30 November 2022

Dear Kishwer,

Thank you for your correspondence of 14 November and sharing your briefing to MSPs on the Gender Recognition Reform (Scotland) Bill.

While I am grateful to our officials for meeting, as this was in advance of my letter of 17 October I would welcome a substantive response from you on the issues raised. Your briefing also discusses a number of matters that I would be grateful for further clarification on.

Your briefing recommended MSPs consider amendments that raise the minimum age to 18 or consider additional safeguards. I have heard from young trans people that they currently feel excluded from the system, particularly at an age where they want consistent documentation before entering higher or further education, or starting their first job. While it is of course possible to point to comparators for what you can and cannot do at specified ages, applying for legal gender recognition generally aligns with the Age of Legal Capacity (Scotland) Act 1991 where under Scots law, a person of or over the age of 16 years generally has legal capacity to enter into any transaction having legal effect.

However, I have spoken with MSPs about finding the balance between autonomy and protection of young people and was supportive of amendments that would require young trans people to have lived in their acquired gender for a minimum of 6 months before applying and to confirm to the Registrar General they have accessed support, advice and guidance. I consider these amendments strike the right balance without placing a disproportionate barrier on young people seeking to apply as did the Committee which agreed them during their stage 2 consideration.

You note in your briefing that the Scottish and UK Governments must work together constructively. I agree and have written to UK Ministers to highlight the importance to trans people that a gender recognition certificate issued in Scotland will be recognised in the rest of the UK. I also noted in my letter to them the points you have raised about the potential implications of non-recognition for service providers and employers in England and Wales



and I am sure they will fully consider those implications before setting out their position. Our view is that they should recognise certificates issued in Scotland but that is for them to decide as for any other jurisdiction.

As you know, under the current system, some of those who have obtained overseas legal gender recognition can apply in the UK by providing evidence of having changed gender under the law of an “approved country or territory” and are not required to provide any medical evidence. This route is available to persons in many countries including those that have introduced similar reforms to those proposed in Scotland such as Belgium, Denmark, Iceland, Luxembourg, Malta, Norway and Switzerland. Legal gender recognition on the basis of self-determination has therefore been recognised in the UK from many other jurisdictions over a number of years.

Your briefing recommended the Committee agree amendments that would require the Scottish Government to provide guidance on or make provision about the effect of a GRC on the Equality Act 2010. The Scottish Parliament can legislate on devolved issues in Scotland, but as the Equality Act is generally reserved to the UK Parliament some of the amendments you recommended would appear to be outwith legislative competence.

As I have previously set out, the effects of a GRC were provided for in the 2004 Act and those effects are not changed by this Bill. The Equality Act makes no specific provision about the effect of a GRC including in relation to the protected characteristic of sex and the effect of a GRC on this protected characteristic is not changed by the Bill.

The application of the rules in the Equality Act is not for the Scottish Government to explain or advise on as the Equality Act provisions are reserved. You of course know that it is for the Equality and Human Rights Commission as a reserved body, not the Scottish Ministers, to provide a code of practice and guidance on the effects of the Equality Act. I made clear these points to the Committee.

However, I did say I was supportive of one amendment which states for the avoidance of doubt that the Bill does not modify the Equality Act. This was the one amendment in relation to these issues that was agreed to by the Committee. I would be happy to work with you to consider whether any of the guidance provided by EHRC would require to be updated to take account of the new process in Scotland should the Bill pass.

There were also several amendments to review and report on the operation and impact of the Bill across a number of areas. The Committee has supported some amendments in this area and I intend to continue to work with members on an agreed post-legislative review position ahead of Stage 3. I agree it will be important to review this legislation and will consider what information is appropriate and possible to be gathered and the most appropriate timescales in order to ensure the effectiveness of any review.

You also raised concerns in your briefing about the requirement in the Bill that someone must have lived in the acquired gender for a set period before applying, and how that would be defined. Given living in the acquired gender is an existing requirement of the 2004 Act, you may also wish to raise those same concerns with the UK Government.

As I have set out, the requirement is not about looking or dressing a certain way but about the ways in which a person may demonstrate their lived gender to others. In this respect the Bill does make any changes to the requirement as it is currently understood, for which the Gender Recognition Panel suggest that examples include having updated official documents such as passport and driving licence. You also say that the requirements to be born or

ordinarily resident are broad criterion but under the 2004 Act there are no such requirements.

The briefing also refers to a wider group of trans people who may not meet the current criteria being able to apply for legal gender recognition in Scotland. The same group of people who apply under the 2004 Act will continue to be able to apply under the proposed system in Scotland, that group of people are trans men and women. We expect an increase in the number of people applying as we remove barriers to that group in accessing their human rights, particularly in the first years.

Finally, the Cabinet Secretary for Health and Social Care has written to you separately on the issues you have raised regarding gender identity healthcare.

I look forward to your response.

Yours sincerely,



**SHONA ROBISON**