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Dear Kishwer,

Thank you for your letter of 20 September and for meeting with me on 26 September.

It is disappointing that it has taken so long for EHRC to expand on the concerns that it has raised publicly in relation to the Gender Recognition Reform (Scotland) Bill and unfortunately your latest correspondence does not answer many of the questions raised in my previous correspondence, including my two last letters of 19 May and 27 June, to which no response was received at the time.

### Evidence base

I felt that our meeting did not provide me with any further clarification on the issues raised in your letter. As I said, many of these have been considered and debated both in the two public consultation exercises and in Parliamentary evidence sessions and were not raised by the Commission when they attended an evidence session on 17 May. I am also concerned that many of the issues seem only tangentially related to provisions of the Bill itself and without a firm evidence base. Therefore, as discussed, I hope you can provide that now.

In particular, I do not consider that EHRC has provided the evidence base on which the Commission reversed its position on support for reforming the process by which someone can obtain a gender recognition certificate (GRC). Ahead of the Scottish Parliament elections in May 2021 the EHRC published a paper setting out seven key policy priorities for all political parties, one of which was that: “The process for gender recognition must be simplified. A de-medicalised system to change legal sex will better support trans people to live their lives free from discrimination.”

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There has been extensive consultation on this issue. Our first consultation launched in November 2017 and the second in December 2019. The UK Government consulted on similar proposed reforms in July 2018. To all of these consultations the EHRC provided detailed, fully evidenced responses setting out strong support for reform.

Ahead of your appointment in December 2020 with four other commissioners, Liz Truss, then Minister for Women and Equalities, announced in September 2020 that the UK Government would not be proceeding with their own proposed and consulted on reforms. It has therefore been clear for the last two years that, if the Scottish Government proceeded with our plans - and a draft bill was published in December 2019 so those plans were clear - there were likely to be different processes for obtaining a GRC operating in different parts of the UK.

You indicated when we met that it was only in January of this year that the Board gave full consideration to these issues 'in the round'. You further suggested that this change in position was a consequence of a change in the evidence base. However, other than highlighting an increase in litigation in this area, and pointing to a survey of societal attitudes, the evidence base informing your current position remains unclear.

Therefore I would be grateful if you could set out your position in the same considered detail as was provided in your responses to earlier consultations, as I regret that I do not consider this has been provided to date whether through our correspondence and meetings, or in the evidence you provided to the Equalities, Human Rights and Civil Justice Committee.

### Scottish Parliament

It is concerning that you seem to be proposing that on the basis of the issues you have raised, the Scottish parliamentary legislative process should be halted. The Bill was introduced in March and as you will know, the progress and timing for the Bill is now a matter for Parliament. The Committee has completed its evidence sessions for Stage 1 of the Bill and published their Stage 1 Report and the evidence you provided to the Committee will have been taken into account. It is only four months since you had the opportunity to present the work you have undertaken since January to the Committee, however, if you have new evidence, I am sure the Committee would be interested to hear it, as would I.

### Engagement with the UK Government

The Scottish Parliament is empowered to legislate on devolved issues, and you acknowledge in your letter the democratic mandate of the Scottish Government to bring forward legislation on this matter. However you also specifically assert that the Bill should not proceed until the UK and Scottish Governments have worked constructively together to minimise the risk of uncertainty around potential cross-border issues.

Potential cross-border implications are not a reason to delay the Bill. It is common for Scottish legislation to have implications for the rest of the UK and for UK legislation to have impacts relevant to devolved areas in Scotland. The process for making orders under section 104 of the Scotland Act provides the mechanism for the UK and Scottish Governments to address this and make consequential modifications to reserved law and to the law in the remainder of the UK in consequence of an Act of the Scottish Parliament. It is usual for this

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formal process to take place following the passage of a Bill, which is of course subject to amendment before being passed by the Parliament.

I have already stated that the Scottish Government is working with the UK Government on a Section 104 Order for this Bill, and that in line with the usual procedures, the formal process has not yet begun. Scottish Government officials meet regularly with UK and Northern Irish Government officials on the Bill and have begun preparatory work for a section 104 order. This has been explained in evidence to the Committee. I also intend to write shortly to UK Ministers raising some of these matters and restating the Scottish Government's commitment to working constructively together.

### Cross-border issues

As I have already noted, it has been clear for some time that reforming the process by which someone can obtain a GRC in Scotland would mean a different process operating from that in other parts of the UK if they chose to maintain the current system.

The effect of the proposed reforms in Scotland will be that someone born or ordinarily resident in Scotland can obtain a GRC under the new Scottish process, and the Scottish birth register would be updated. We have proposed that the England and Wales and the Northern Irish Registrar Generals update birth certificates issued by them following a notification of a GRC from the Scottish Registrar General. As we have said, that is entirely dependent on UK and Northern Irish Government decisions. It is rightly a decision for England and Wales and Northern Ireland how to recognise a GRC obtained in Scotland, just as they should do with those obtained in Ireland, New Zealand or anywhere else.

If the UK Government does not recognise Scottish GRCs, someone with an English or Welsh birth certificate but ordinarily resident in Scotland would be able to obtain a GRC under the Scottish process but their birth certificate would presumably not be updated.

The effect therefore would be similar to the current situation with Republic of Ireland, which is not included on the UK's list of approved countries and territories because it has not been updated since before Ireland's gender recognition process was established, so Irish gender recognition is not recognised in the UK. I note there are many people whose lives and work go between the two, particularly those who move from Ireland to England, or who travel frequently within the British Isles; around 400,000 to Scotland's 800,000.

It would be helpful to see any evidence of significant cross-border issues caused by the current provision in Ireland as we are not aware of such issues arising. We are also speaking about a small proportion of the population (an estimated 0.7%) who are trans men and women.

### UK Government recognition of Scottish GRCs

There has been some debate and speculation around whether the UK Government would recognise GRCs issued in Scotland under the process established by the Bill. As I have said in evidence to Parliament, this is an issue for the UK Government, as is recognition in England and Wales of gender recognition obtained elsewhere in the world.

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You say there are potential issues whether the UK Government recognises Scottish GRCs or not however it is not clear what issues would arise if the UK Government recognised Scottish GRCs. That there could be two processes operating within the UK and so the UK Government may wish to consider their list of approved countries and territories we understand is a matter they are already considering.

You then set out in some practical implications where a Scottish GRC is not recognised by the UK Government in relation to employers and service providers in the rest of the UK. I would ask you to set out how EHRC view this situation as distinct from people who obtained gender recognition in another country not on the UK list of approved countries and territories, for example Ireland, and I note again the small proportion of the population who are trans and have a GRC.

Some of your comments here also seem to apply to the current system as well as the Bill such as your concerns about employers requesting sight of a birth certificate or GRC as evidence of legal sex. If employers would need evidence of legal sex under the current system that would need to be in the form of a GRC or birth certificate. Therefore, it is not clear how this is impacted by the Bill and further explanation would be helpful.

It is important to be clear that when talking about someone who lives in Scotland but works in England and how their employer should treat them, or any of the circumstances raised in your letter, they would continue to be protected from discrimination under the Equality Act 2010 throughout the UK as the protected characteristic of gender reassignment is not dependent on the possession of a GRC. It is the sex of a person for the purposes of the protected characteristic of sex that is considered to change as a result of obtaining a GRC as is the case under the current system.

You highlight equal pay between women and men, gender pay gap reporting, measures to address disadvantages experienced by women and an increase in the context of general population reporting, as issues potentially affected by the Bill. It would be helpful to have more detail on why and how you consider they would be affected given the small numbers involved. For example, on the gender pay gap issue which you raise, even with an increase in numbers obtaining a GRC, this is still a very small proportion of the population. Scotland has a population of around 5.5 million people and therefore an increase to between 250-300 GRCs issued per year is not a statistically significant impact on general population figures. This has been set out in some detail to the Committee. In terms of individual companies reporting on gender pay gap, this only applies to those with a headcount of 250 or more - so even at an individual company level it is not clear what you consider will be the significant impact.

In your letter you also call for detailed guidance that “would need to draw on case law that does not yet exist”, on an assumption that there would be “dual legal processes” if Scottish GRCs are not recognised in the rest of the UK. Clearly, any guidance would be updated having regard to any relevant case law in future, but the implication of your letter seems to be that a lack of case law is a barrier to reform. Can you clarify this, and whether you think there is a need for case law which interprets the Equality Act provisions, or for case law on an assumption that Scottish GRCs would not be recognised in the rest of the UK?

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## Equality Act

Your letter also mentions the increased number of people expected to obtain a GRC under the reformed system than currently do so. The evidence shows that the vast majority of trans people in the UK do not obtain a GRC. In July 2017 the UK Government launched a survey to gather information about the experience of LGBT people in the UK. A Summary Report published in July 2018 found that only 12% of trans people who had started or finished transitioning said they had a GRC, and that of those who said they did not have one, only 8% said they would not be interested in getting one. Key reasons for not making an application included not satisfying the requirements (44% said this) and the process being too bureaucratic (38%).

Our published Financial Memorandum sets out estimates that numbers of GRCs issued to people in Scotland would increase from about 25-30 a year to 250-300 per year. This is based on international evidence from other jurisdictions with similar systems for legal gender recognition and comparative population sizes. We are aware and anticipate that in the early years there could be a larger increase due to the reformed process as barriers are removed for trans people who are living in their acquired gender to apply for a GRC as outlined above - barriers the EHRC has previously identified.

The fact that the current system places disproportionate barriers on trans people seeking legal gender recognition, meaning that many trans people in the UK are unable to access their rights, was central to the EHRC's earlier support for reform, as it is to the Scottish Human Rights Commission's continued support. Increasing the number of GRCs issued is an aim of the Bill because it helps address a system that is failing to provide effective access to human rights for trans people in the UK. Indeed your letter seems to suggest that you still acknowledge the benefit of this: "The Commission recognises that the proposed reforms will undoubtedly make it easier for trans people... to change their status in line with their gender identity – an important legal and personal recognition for many."

In your letter you state that "trans people will nonetheless be treated in line with their legal sex under all aspects of the Equality Act". It's not clear that everyone shares this interpretation of the Act, with some arguing that sex in the Act refers to "biological sex". This view has been reflected in evidence to the Committee from some individuals. We broadly agree with the interpretation taken by EHRC, that the protected characteristic of "sex" takes into account when a full GRC is obtained. It's helpful for EHRC to provide clarity on this, however this distinction and debate relates to interpretation of the Equality Act as it currently stands, not to the effect of the Bill. As you acknowledged, the specific examples of sex discrimination issues that you raise already cover trans women with a GRC. The effect of the reforms will be to slightly increase the number of people in that group.

## Age

The only specific policy issue raised in your letter is minimum age for applicants, where you acknowledge that 16 is the legal age of majority in Scotland, but then mention the UNCRC definition of a child. It's therefore not clear from your letter what EHRC's actual position on this is or why it is being raised specifically. Given that you also state this will be a key element of your proposed briefing to MSPs, I would be keen to understand your concerns in its relation to young people, and if there are any changes to your position in your Committee evidence session. The letter seems to suggest your particular interest is in young people

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who obtain a Scottish GRC but then move to England or Wales before they turn 18 – how large do you anticipate this cohort would be and what is the impact you think there may be for them?

The SHRC have made clear that they support lowering the minimum age to 16. In evidence to the Committee on 21 June SHRC said: “Excluding young people from access to gender recognition procedures would curb their right to private and family life, so we are not in favour of the imposition of unnecessary minimum age requirements. We find that the age of 16 is in line with Scots law in terms of the Age of Legal Capacity (Scotland) Act 1991, which permits young people to enter into significant legal transactions. If the bill were to lower the age to 16, it would be in line with existing Scots law, which permits children to make decisions of such a nature.”

### Gender identity healthcare

In our meeting on the 26th you suggested that some of your concerns around lowering the age of application relate to the provision of, and access to, specialist gender identity healthcare for this cohort. You will note that health policy is not within my portfolio, but as I indicated I will ask my Ministerial colleagues to provide you with a more substantive response around gender identity healthcare.

However, as we have previously set out and advised the Committee, and as I reiterated when we met, applying for and receiving a GRC and clinical decisions about gender identity healthcare are entirely separate issues. A GRC is not required in order to access gender identity healthcare, and there has also never been a requirement for someone to have undergone surgery or any other medical treatment to obtain a GRC. As you know this is the case throughout the UK and therefore our Bill will not change this.

### EHRC next steps

You note in your letter your intention to provide further briefing to Members of the Scottish Parliament to assist them when the proposed legislation is debated and I appreciate your offer of early sight of this briefing. It would also be helpful if you could indicate how you will share such information. You gave the example of having recently briefed UK Justice Ministers on the proposed Bill of Rights legislation but this is clearly a different proposition to briefing all 129 MSPs. In our meeting you mentioned legislative amendments and again we would appreciate early sight. As I said, we are always keen to ensure we have the best legislation and as the parliamentary process is now underway, we will need to see these imminently if we are to consider them ahead of Stage 2 of the Bill.

I understand you met in person with MSPs the week before our meeting and the Bill was discussed. If that is the case, can I please ask that if you shared your letter and any other written briefings with them then in the interests of transparency you also send it to the Committee who are scrutinising the Bill. It would be useful for them to see any information you are providing to MSPs on the Bill over and above what is in public domain through your written evidence and oral evidence session, particularly ahead of Stage 2 of the Bill.

I also appreciate you undertaking to provide my officials with further written detail on your outstanding concerns, including the details of your legal position, and I look forward to receiving this in due course.

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Yours sincerely,



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