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Convener, Equalities, Human Rights and Civil  
Justice Committee  
By email

5 February 2023

Dear Convener

Thank you for your correspondence of 25 January regarding the UK Government's decision to make an order under Section 35 of the Scotland Act 1998 to prevent the Gender Recognition Reform (Scotland) Bill from receiving Royal Assent.

As I have set out in correspondence with the Secretary of State for Scotland<sup>1</sup>, we view his use of a Section 35 Order on a Bill overwhelmingly passed by the Scottish Parliament, after ignoring every opportunity to seek changes over several years, as an attack on the democratically elected Scottish Parliament and its ability to make decisions and pass legislation on devolved matters.

I share the Committee's disappointment that UK Ministers have refused invitations to explain their intervention to the Committee. I have also seen Mr Jack's written response to the Committee, which gives no answers to the specific questions and simply refers to already published material. This is consistent with his response to my own discussion with him on this issue: he has refused further engagement, including at officials level, and given no indication of potential amendments to the Bill or clarification of what, if any, alternative approach in Scotland, in his view, would mean there are no longer 'reasonable grounds' the Bill would have an 'adverse effect on the operation of the law as it applies to reserved matters'.

I know that the House of Commons Women and Equalities Committee had a session on 31 January which will be of interest to members of the Committee. I would particularly highlight the comments from former Lord Chancellor and Secretary of State for Justice Lord Falconer:

*"When we were passing S35, and this was made explicit by the Minister proposing the provision, the impact of using S35 would be so serious that we would expect... that Whitehall and Holyrood would engage and reach solutions..."*

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<sup>1</sup> [Gender recognition: letter to the Secretary of State for Scotland - 21 January 2023 - gov.scot \(www.gov.scot\)](#)  
[Gender recognition: letter to the Secretary of State for Scotland - 24 January 2023 - gov.scot \(www.gov.scot\)](#)



*“Overall, the practice should be if there is any chance of S35 being used, there should be intense engagement between the two in order to try to work out a way whereby it doesn’t have to be used, because it’s not good for devolution that S35 is used.”*

There was none of this kind of engagement from the UK Government at any point in the last six years.

The UK Government did query the competence of provision relating to asylum seekers added at Stage 2, which the Scottish Government opposed at that time on competence grounds. That provision was removed by a Scottish Government amendment at Stage 3.

We are examining the reasons given by the UK Government for their order and I will set out next steps to Parliament in due course. As I have said in correspondence with Mr Jack, we will respond to the reasons stated in the section 35 Order in the appropriate forum which, given the approach taken by the UK Government, may be through the courts.

In the meantime I am happy to provide answers to the Committee’s questions as fully as I can in that context in the annex to this letter.

I hope the Committee find this helpful.

Yours sincerely



**SHONA ROBISON**

## ANNEX – RESPONSES TO COMMITTEE QUESTIONS

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?*

This is of course for the Secretary of State to answer. We can only guess at his reasoning, but as the Bill is clearly within the legislative competence of the Scottish Parliament, this is likely why the UK Government have not invoked a section 33 order as a route to stopping the Bill from obtaining Royal Assent. Mr Jack has said in the House of Commons: “On this occasion, the advice is that section 33 is not appropriate, but that section 35 is<sup>2</sup>.”

Our view is their decision to invoke a section 35 order is a political one that seeks to undermine the democratically elected Scottish Parliament and its ability to make decisions on devolved matters.

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?*

I met with Mr Jack on 24 January, following an offer made in my letter to him. I approached that meeting in good faith, hoping to be able to discuss the issues and clarify the UK Government’s areas of concern and potential amendments that might make the Bill acceptable to him. I will share with the Committee a note of that meeting for information.

However he made clear there would be no further engagement at any level. He set out that the only options open to the SG were to revise the Bill at which point he would consider whether the Bill as amended could be put to the Scottish Parliament, revoke the Bill or take legal action. As he put it: “Address it, or fix it, or drop it or take us to court”.

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?*

It is of course common for Scottish legislation to have implications for the rest of the UK and reserved matters, as it is for UK legislation to have impacts relevant to devolved areas in Scotland. A Section 104 order under the Scotland Act 1998 provides a mechanism for the UK and Scottish Governments to work together following the passing of such legislation and to allow UK ministers to 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.

Work was already underway on a Section 104 order at official level, as part of regular engagement between my officials and UK Government officials. This had also involved input from Mr Jack’s officials in the Scotland Office. No concerns were raised in that initial engagement – they asked for additional detail and that was provided at the time. It is therefore not clear why the issues raised by the UK Government could not have been

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<sup>2</sup> [Scotland Act 1998: Section 35 Power - Hansard - UK Parliament](#)

addressed in this way and Mr Jack provided no further clarity on that point when I raised it with him.

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?*

In July 2017, the UK Government Equalities Minister at the time said she would consult in autumn of that year on reforming the GRA including removing need for medical diagnosis of gender dysphoria – a commitment also made that autumn by the former Conservative PM Theresa May. The UK Government then announced in September 2020 that following that public consultation exercise they would not be proceeding with legislative reform. It was therefore that government that changed policy intent, not the Scottish Government and it was clearly apparent from that moment that there would be divergent systems in the UK. The UK Government gave no indication at that time that a divergence in approaches would be problematic in their view. At this time our own draft bill had also been published so our proposals were very clearly in the public domain. They have raised no such concerns since, despite ongoing discussions before and after the Bill was introduced to Parliament, let alone suggesting approaches would be so irreconcilable they would consider using a Section 35 order.

Indeed this is contrary to the commitment they made in their 2018 consultation to working closely with the Scottish Government on implementation of Scottish reforms in the context of reserved equalities issues. That UK Government consultation said:

“Gender recognition is devolved to Scotland. That means Scotland can have its own system for gender recognition if it wants to. Some areas dealt with by the GRA are not devolved, however, such as pension and benefit entitlements. The Scottish Government consultation clearly sets out what is and is not devolved with respect to its proposals and where, in the future, they might have to work with the UK Government.

“The UK Government is committed to working closely with the Scottish Government on its proposals, especially on the implementation of its proposals where powers are not devolved, mutual recognition of certificates issued in different parts of the UK across the UK (this would include those issued under the current system and those issued in the future), residency requirements that applicants might need to meet and the implications of any difference in legal rights conferred by the issuing of a GRC in Scotland as opposed to England and Wales.”

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?*

I have had many discussions with the Equality and Human Rights Commission and I wrote to them on 30 November noting that I would be happy to work with them on any updates to

their guidance that may be required to take account of the new process in Scotland and the EHRC responded on 4 January welcoming my suggestion. That work is now of course on hold because of the UK Government's intervention. Of course, as I also made clear during the passage of the GRR Bill, the EHRC is a reserved body with functions outwith the competence of the Scottish Parliament so we cannot direct their work, and the Bill could not include that they should do any such guidance.

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*

This is precisely the kind of question I have sought to engage with Mr Jack on, but it is now clear that the UK Government are not interested in a way forward other than the Scottish Government providing them with a revised Bill for their consideration before it can be sent to the Scottish Parliament, and without any information being provided as to what amendments they think would be necessary for the SoS to no longer believe there would be an adverse effect on reserved matters. As we have seen in commentary and evidence at the House of Commons Women and Equalities Committee session, there are divergent views and everyone is needing to second guess what changes or consensus could be found.

At present, however, I do not immediately see how the Bill could be amended in a way that would keep the principles of the Bill – as supported by overwhelming majority of Parliament, and would satisfy the UK Government, given that at least part of their argument is that the very existence of an alternative system in Scotland is problematic. Mr Jack stated this clearly in the House of Commons: "In short, two different regimes create adverse effects."

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?*

There are clearly a variety of different systems in various devolved policy areas between Scotland and the UK, from social security to education to legal system, and many examples where a Section 104 Order has been used in consequence of an Act of the Scottish Parliament. Legal gender recognition is devolved to the Scottish Parliament and therefore it has to be the case that divergent systems can exist in the UK. The Gender Recognition Act 2004 was of course passed with the legislative consent of the Scottish Parliament. If Scotland cannot decide to do things differently on a devolved issue, the entire devolution system within the UK is undermined.

The First Minister of Wales Mark Drakeford has also expressed concerns on the impact of this intervention. Speaking at the Senedd on 17 January he said: “I think the UK Government’s decision to use powers that have never been used in the whole history of devolution is a very dangerous moment, and I agree with the First Minister of Scotland that this could be a very slippery slope indeed.”

The position taken by the UK Government appears to nullify gender recognition as a devolved matter which as noted above is contrary to the commitment they made in their own consultation and our understanding of their position throughout.

There are countless examples of legislation taken forward by the Scottish Parliament or by the UK Parliament that resulted in different regimes operating across the UK. This includes minimum unit pricing in Scotland and the UK Government’s moves to raise the minimum age for marriage. It is the very nature of devolution that it leads to different approaches within the UK. There are also examples from other countries where individual regions take different approaches to gender recognition, for example USA, Canada and Australia.

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?*

Discussions on the practical implications have been ongoing in the development and passage of the Bill and again at no point has it been suggested any changes to IT systems or other practical concerns would result in the consideration of a section 35 order. We consider the practical implications to be minimal and a normal outcome of a change in the law or capable of being straightforwardly provided for by section 104 order and certainly do not outweigh the positive impact of the reforms.

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?*

Under the current system, people who have obtained legal gender recognition in another jurisdiction can apply through the overseas track and are not required to provide any medical evidence. By not updating that list for over ten years, the UK Government has already provided a route for individuals to obtain a UK GRC without a medical diagnosis or any other specific requirement if they have changed their legal gender in other countries or territories including Belgium, Denmark, Iceland, Luxembourg, Malta, Norway and Switzerland.

The Ministry of Justice does not publish information on GRC applications under the overseas track by individual countries.

*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?*

The current UK-wide system does not take a risk based approach to applications: the Gender Recognition Panel can only assess that an applicant meets the requirements of the Act and does not consider any risk from them having successfully applied. The 2004 Act does not ban or pause applications from people who have been charged or convicted of certain offences. The Bill as passed by the Scottish Parliament includes a range of safeguards that incorporate a risk based approach for certain applications. In doing so it goes further than the current system.

*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?*

The Bill does not change provisions and guidance on data collection. The Chief Statistician's published guidance for public bodies highlights that for the vast majority of people, sex and gender identity questions will provide the same result. Therefore whether there is a question about sex or about gender identity will not skew the statistics when disaggregated by either concept. The guidance sets out that the vast majority of official data is currently collected on the basis of self-defined sex. The guidance proposes a voluntary sex question followed by a voluntary question about 'trans status' and a voluntary open text box for people to describe their 'trans status'.

The numbers of GRCs issued under the current process have increased recently, including following the UK Government's decision to decrease the application fee and create an online application process. Those increases have not had any apparent negative impact under the Equality Act.

As set out in the Bill's Financial Memorandum and Equality Impact Assessment, our analysis suggested that GRC applications could increase from around 25-30 per year to about 250-300 per year. As a proportion of the population this is tiny and, while we are considering the contents of the reasons in the section 35 Order and Statement of Reasons in detail to respond in the appropriate forum, in general we see no meaningful impact on the Equality Act as a result of this increased number of applications.

## **Note of telephone meeting on Gender Recognition Reform (Scotland) Bill Section 35 Order, 24 January 2023**

### Participants

Shona Robison MSP, Cabinet Secretary for Social Justice, Housing and Local Government  
Alister Jack MP, Secretary of State for Scotland

### Also present

Gender Recognition Unit Head  
Policy Team Leader  
Special Adviser  
Private Secretary

Laurence Rockey, Director of Scotland Office  
Constitutional Policy Team Leader  
Special Adviser  
PPS to Secretary of State

### Discussion

1. AJ opened the telephone meeting stating that his position had been set out in his letter, that he believes the Gender Recognition Reform Bill would have adverse effects on reserved UK law, and that it is for the SG to bring forward proposals to address that.
2. SR said the SG has been open to discussion throughout the process but before we can consider changes to the Bill at this stage, the UKG needs to be clear what possible changes might be agreed to, since AJ seems to have a fundamental objection to two different systems operating in the UK.
3. AJ said that his legal advice was clear that the Bill has an adverse effect so a S35 was needed. He said it was ultimately his decision to invoke S35 but his advice was “incredibly strong” and that S35 exists to be used where there is adverse impact on UK law.
4. AJ said that the onus is on the SG to reconsider the Bill and agree with Scottish Law Officers a version that has no adverse impact. AJ offered that the Advocate General would consider an amended version of the Bill before it is taken to the Scottish Parliament to provide a “second opinion”.
5. AJ said that if the view of Scottish Ministers and Scottish Law Officers is that there is no adverse effect on UK law from the Bill as passed, SG would have to pursue legal routes. He emphasised that he expects this matter to end in court. He summarised his view as: “Address it, fix it, drop it or take us to court.”
6. SR offered that SG and UKG officials could continue working together to clarify and address the concerns raised. AJ refused any further official level engagement on these issues, emphasising that was not on offer from the UKG.
7. SR asked for clarification of UKG position on having different systems for gender recognition within the UK, especially since the 2018 UKG consultation document is very clear in saying there can be, but AJ now seems to believe there cannot. AJ acknowledged

that UKG has changed its position on this issue but denied having said that it would be impossible for Scotland to have a different system, but said that it would be very difficult.

8. There was some discussion of engagement between the governments on amendments to the UNCRC Bill as a comparator. AJ commented that there had been no ministerial level communication on this for some time. [Note: there have been extensive contacts at official level on these amendments as agreed by both governments as the way forward and Ministerial level contact is now being considered.]

9. SR asked why AJ had not raised concerns at any point in the long process or flagged the potential use of the S35 power in advance, given the 2013 Memorandum of Understanding makes clear it should be a last resort following earlier engagement. AJ acknowledged that the MOU had not been followed, but said it is not for him to come to the SG in relation to a S35 Order or to suggest changes when a Bill is going through, that the Order had to be laid within 28 days of the Bill passing, and he had not considered the Bill in terms of S35 before seeing the final form as passed.

10. AJ said that a S104 Order is sometimes used to address cross-border impact of Bills but it was not appropriate in this case given his advice on the adverse effects of the bill.

11. SR requested a written response to her letter. AJ agreed to provide this.