



Shona Robison MSP

Cabinet Secretary for Social Justice, Housing and Local Government

By email

24 January 2022

Dear Ms Robison,

REFORM OF THE GENDER RECOGNITION ACT

Thank-you for meeting us on Friday.

Process prior to introduction

We were grateful for your time, and that of your officials separately on Monday. However, short meetings at very short notice at this late stage with some of the groups who expressed concern in responses to a consultation that closed almost two years ago do not fulfil the commitment made in the SNP manifesto last May. It has not been met, and cannot now plausibly be met if the Bill is introduced within weeks. We further note that the initiative has never been taken by government to contact the groups it has now met. We put on record at the conclusion of our discussion that we had not been reassured that the government understands what it is doing here, and the range of risks attached, or had absorbed properly the material submitted to it in the consultation, by ourselves and others.

We would want to add that the parliamentary process is not a substitute for the government's responsibility to engage with different interests in the development of proposals it brings forward for legislation. Nor should it be treated as such. If the Policy Memorandum to the Bill is to give the Parliament a reliable account of the process behind the Bill, any reference it includes to the recent series of meetings should be in terms which are clear and accurate about their genesis, length, timing, and the feedback Ministers received as a result. We and others will pay close attention to how the process leading to the introduction of the Bill is described to legislators.

Removing the link with a diagnosis of gender dysphoria

You said the Bill would be introduced “soon” but could not confirm the report it was expected in the Parliament on 24 February. You also said the policy had “not been finalised”, with regard to removing the diagnosis of gender dysphoria and the move to self-declaration. However, the position you defended in discussion was clearly the one set out in the draft Bill published in late 2019.

Given your comments, we wanted to write quickly on one point, which is the removal of the diagnosis of gender dysphoria. As we explained in our response to the consultation and in a more recent options paper your officials have seen, the proposal to remove any medical oversight, as currently provided by the requirement of a medical diagnosis, is our central concern here.

Under the NHS Scotland gender reassignment protocol, a diagnosis of gender dysphoria is required to gain access to the treatment pathway: see extract attached. We are aware that the current protocol is under review; however, we assume it is very unlikely to conclude that NHS assistance with such treatment should in future be made available solely on the basis of self-declaration. We would be grateful for confirmation that Ministers are aware that by removing the diagnostic criterion they are opening up a change of sex in law to those who it is *by definition and on principle* deemed appropriate to exclude from NHS assistance with any sort of support for physical changes.

For the avoidance of doubt, we understand that since 2004 the European Court of Human rights has determined that legal provision cannot be made contingent on undergoing surgery; however, the Court has also upheld the right of states to link legal provision for this group with medical oversight through general diagnosis. We also of course understand that physical changes are already not a requirement for a GRC: revisiting the parliamentary record however makes clear that this was intended at the time as a compassionate and pragmatic concession for those who had a diagnosis, but who for some further reason could not or did not wish to undergo surgery.

You appeared to suggest that it was relevant to the government’s proposal to remove the requirement of a diagnosis that, as you put it, “the WHO has recategorised gender dysphoria as not being a mental illness” but the current legislation “still treats it as such”.

To the extent the diagnostic criterion in the Act has been overtaken since 2004 by an alternative conception of gender dysphoria, then that would be an argument for amending how the law refers to it, not for removing it.

However, in fact, the existing wording does not pre-suppose that gender dysphoria falls into any particular area of medicine. Section 2 simply requires that a person has a diagnosis of gender dysphoria, which is not elaborated on. Section 3 then requires that an application includes either “a report made by a registered medical practitioner practising in the field of gender dysphoria and a report made by another registered medical practitioner (who may, but need not, practise in that field) **or** a report made by a registered psychologist practising in that field and a report

made by a registered medical practitioner (who may, but need not, practise in that field).” It is therefore not clear why the current Act is regarded as unable to cope with changing conceptions of gender dysphoria, and still less why that might be an argument for completely removing any diagnostic criterion.

As this is the critical element on which we would want to press if it is indeed the case that decisions here are not final, but the Bill is due soon, we would be grateful for reassurance that the points made here will receive urgent attention.

Yours sincerely,

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Gender Reassignment Protocol

When implementing the protocol, the patient should be a full participant in decisions about their healthcare and wellbeing and be given any information or support that they need in order to do so.

