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Dr Kath Murray, Lucy Hunter Blackburn and Lisa  
Mackenzie  
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1 March 2022

Dear Dr Murray, Ms Hunter Blackburn and Ms Mackenzie

Thank you again for meeting with the Cabinet Secretary for Social Justice, Housing and Local Government and separately with officials to discuss the Gender Recognition Reform (Scotland) Bill. I am writing following those meetings and your letter of 24 January, and also to follow up on earlier correspondence with Director of Justice, Neil Rennick in March 2020. As was explained at the time, the urgent need to reprioritise work in the face of the COVID-19 pandemic meant that it was not possible to follow up on your letter to Neil Rennick at that time.

Given the passage of time and developments since then it may not be possible or helpful to pick up every aspect of your correspondence from March 2020. Nonetheless I am writing to formally respond to your letter of 11 March 2020, particularly those areas where you ask for further information, and also to pick up on issues that emerged during the two meetings more recently.

### The Gender Recognition Unit

You asked for more information on the Gender Recognition Unit, and highlighted that the Scottish Government website does not give information on the team.

The Gender Recognition Unit is a relatively new team that sits within Civil Law and Legal System Division, as part of the Justice Directorate. It currently consists of myself as unit head, and four other civil servants. Our main function is to take forward the Gender Recognition Reform (Scotland) Bill and we also manage correspondence, Freedom of Information requests and policy briefing related to this work.

Thank you for highlighting that it might be helpful to include some information on the team and its functions on the Scottish Government website. We intend to take this forward.

### Access to consultation responses

As discussed, the Scottish Government on 2 September 2021 published an independent analysis of all responses to the consultation on the draft Bill which closed in March 2020, alongside responses from organisations that gave permission to publish. You can access this information here: [Gender Recognition Reform \(Scotland\) Bill consultation - gov.scot \(www.gov.scot\)](https://www.gov.scot/Information/Consultations/2021/Gender-Recognition-Reform-Scotland-Bill-consultation).

The consultation paper invited respondents to indicate whether they would be content for their response to be published, and set out next steps that included publication of responses that gave this permission, which is the usual practice with consultations. However, due to the number of responses to the consultation, and the need to individually check each response for legal reasons, it was not possible in this instance to publish all responses from individuals without disproportionate cost and delay. All responses informed and are reflected in the analysis report.

You asked whether it would be possible for an individual to have access to all responses. As discussed, in order for us to consider this request fully it would be helpful for you to set out your proposal in more detail, such as who would have access, for how long and for what purpose.

As discussed, we consider this would likely raise some of the same issues that were raised in publishing the responses before making them available for individual access and facilitating this would also raise practical challenges. Any systematic review of that number of responses would be a significant undertaking.

The main concern you highlighted in respect of publication is that some who responded to the consultation did so in the expectation of seeing their own response published, and were disappointed that this did not happen. This would not be addressed by your proposal for individual access. Individuals and organisations are of course able to share their own responses and many have done so.

### Approach to publication of consultation responses

In your earlier correspondence, you set out a number of recommendations around handling and redaction of consultation responses.

Some redactions were made to remove material that might breach data protection legislation, could be potentially defamatory, or referred to live court cases. This was in line with the description of data handling processes set out in the consultation document.

### Living in the acquired gender

You have asked about the definition of living in the acquired gender. This is a requirement of the current gender recognition process, and we have proposed reducing the minimum period from two years to three months. We are not proposing to change the meaning of living in the acquire gender under the Gender Recognition Act 2004, so it would continue to have the same meaning it currently does and has done for 18 years. Guidance will be published to support applicants.

### Sex offenders

In the meeting with the Cabinet Secretary, you asked about specific provision for banning registered sex offenders from applying for legal gender recognition. The draft Bill published with the consultation takes the same approach as the existing arrangements under the

Gender Recognition Act 2004. There is currently no requirement that an applicant must not be a registered sex offender. We have considered the issues which you raised.

### Bill policy on medical evidence

In your letter of 24 January you sought further clarification of the status of Scottish Government policy on removing the requirement for medical evidence. The Cabinet Secretary explained in the meeting that the Bill had not yet been finalised for introduction, however as set out in the consultation on the draft Bill removing the requirement for medical evidence is central to the Scottish Government's view of a balanced and proportionate way of improving the system.

### Prisons

The Cabinet Secretary undertook to provide some additional information on Scottish Prison Service management of trans prisoners. You referred to the recent legal case in England and Wales in this area.

We recognise the importance of protecting women in prison. Decisions taken by the Scottish Prison Service as to the most appropriate location to accommodate transgender people are made on an individualised basis after careful consideration of all relevant factors, including risk. Such decisions seek to protect both the wellbeing and rights of the individual as well as the welfare and rights of others around them, including staff, in order to achieve an outcome that balances risks and promotes the safety of all. Possession of a GRC does not guarantee access to specific accommodation.

As discussed, the Scottish Prison Service is currently undertaking a review of its gender reassessment policy.

If you wish to, you can raise any concerns directly with SPS using this email address: [gaolinfo@sps.pnn.gov.uk](mailto:gaolinfo@sps.pnn.gov.uk) or you can write to the address below:

Scottish Prison Service Headquarters,  
Communications Branch  
Room G20  
Calton House  
5 Redheughs Rigg  
Edinburgh  
EH12 9HW

### Hospital accommodation

You raised concerns about single sex wards and the Cabinet Secretary undertook to provide more information. As noted in the meeting, this is not directly related to the Bill's proposed reforms.

The Scottish Government expects everyone to be treated with consideration, dignity and respect when accessing and using NHS services. NHS staff will make every effort to ensure that the privacy and dignity of all patients are maintained in Scottish hospitals.

All patients should routinely be cared for in wards or bays which are for single sex occupancy. The Scottish Government provided guidelines and recommendations on the elimination of mixed sex accommodation in 1999 and 2000. There are some exceptions such

as high dependency areas and intensive care units where single sex accommodation may not be practicable. There may also be times where hospitals experience extreme situations or pressure on beds that may necessitate patients being admitted to mixed sex areas. If this occurs they should be transferred to single-sex accommodation as soon as possible.

Further guidance and direction regarding the provision of clinically appropriate single room accommodation in all planned new buildings and major refurbishments was provided in 2008 and 2010.

The Equality Act 2010 is generally reserved legislation, and the Equality and Human Rights Commission have published a statutory Code of Practice to give public authorities, including health boards, the information they need to understand the Act and implement their responsibilities. The Code of Practice also offers guidance specifically on communal accommodation.

We are clear that all organisations need to take account of the Equality Act 2010 to ensure everyone's rights are protected. We note that the Equality and Human Rights Commission have set out their intention to publish updated guidance on the use of the single-sex exceptions in due course. You also asked about guidance for Scottish Government policy makers on improving and enhancing trans rights in policymaking and service design, while continuing to protect women's rights. We remain committed to developing this guidance.

### Legal rights

In your correspondence you have suggested that the Scottish Government is unable to state whether obtaining a Gender Recognition Certificate (GRC) provides new legal rights which impact on other people, or makes a difference to the holder's rights to access single sex provision under the Equality Act.

I should note first that the Equality Act 2010 Act is generally reserved to the UK Parliament and therefore it would be a matter for the UK Government or the Equality and Human Rights Commission in the first instance to comment on its effect. As you will appreciate, the Scottish Government cannot provide legal advice to external bodies on an application of law and any definitive interpretation of the 2010 Act is ultimately a matter for the courts. As set out in Chapter 5 of the consultation on the Bill, I can respond in terms of the Scottish Government's view of the 2010 Act in relation to the Gender Recognition Reform (Scotland) Bill.

The Equality and Human Rights Commission have [published guidance](#) for individuals, organisations and the public sector. In 2011, they also published a statutory [Code of Practice](#), which assists service providers with understanding the relevant issues. They have also published guidance on gender reassignment discrimination and the interaction between the two Acts here: [Gender reassignment discrimination | Equality and Human Rights Commission \(equalityhumanrights.com\)](#).

As set out in the EHRC's guidance, a trans person with or without a gender recognition certificate could be excluded from a single sex service, or provided with an alternative service, where in the particular circumstances of that case, it is proportionate to do so. Whether an individual has a GRC may be a factor in the decision taken by a service provider, but it would not be the only factor nor the determining factor. In this regard, you may wish to be aware of the [response from the EHRC](#) to the consultation on the Bill.

On the impact of gender recognition reform on how the single sex exceptions in the 2010 Act can be applied, then as noted above the 2010 Act provides for a service provider to exclude

trans people from single sex services where this is a proportionate means of achieving a legitimate aim, including where a trans person has legal gender recognition. This will not change following gender recognition reform.

We recognise the need for more guidance on the use of the exceptions and I note that the House of Commons Women and Equalities Committee, in its report on Reform of the Gender Recognition Act, reiterated its call for better guidance on single-sex and separate-sex exceptions. As noted above, the EHRC have set out their intention to publish updated guidance in due course.

Under the Gender Recognition Act 2004, someone who obtains a GRC is considered to be of their acquired gender and can access rights appropriate to that gender.

Therefore it would be possible under the existing law for a GRC to provide new legal rights which could impact on other people: for example an employer might be required to treat the individual the same as others of their gender in terms of pay and pensions. The UK Government's guidance points this out, but also that the same act prohibits discrimination because of sex, which means this is unlikely to be a material impact.

In this regard, you raised specific issues around treatment of prisoners who have obtained legal gender recognition. We have set out the approach taken by the Scottish Prison Service above and noted that whether or not a person has legal gender recognition would not guarantee their access to specific accommodation.

### Alternative approaches

I note that your earlier correspondence raises some potential alternative approaches that you feel the Scottish Government should have considered earlier in the process. Your more recent paper also sets out various possible options and you noted that these other options are dependent on retaining the requirement for a medical diagnosis.

In developing the provisions in the proposed Bill, the Scottish Government have now consulted twice, and have considered the responses to those consultations.

As was set out in the consultation on the draft Bill, removing the requirement to provide medical evidence is central to the Scottish Government's view of a balanced and proportionate way of improving the system.

### "De-transition"

You ask in your letter why the Scottish Government reached the view that no specific provision was needed for those in possession of a GRC to revert to their gender assigned at birth. As you mention in your letter, this appears to be a rare circumstance. Under the draft Bill, someone wanting to do this would apply through the same process as is the case under the current system.

Yours sincerely

**Gender Recognition Unit Head**