



Ian Duddy

Chair

Scottish Human Rights Commission

By email

5 December 2022

Dear Ian,

GENDER RECOGNITION REFORM (SCOTLAND) BILL: ECHR NON-COMPLIANCE FOR INDIVIDUALS ENTITLED TO GENDER RECOGNITION

We are writing to draw to your attention that, in the light of recent statements in the Parliament by the First Minister and the Cabinet Secretary for Social Justice, Housing and Local Government on the GRR(S) Bill, it appears to us that the Bill as currently drafted may remove rights under the ECHR from some people in Scotland. We wanted to raise this with you, as a matter of urgency while the Bill is still open to amendment, as such an effect would fall within the Commission's remit as the lead body on human rights issues in Scotland. We should stress that we are raising this as an effect that appears possible at first sight, but requires the confirmation of legal specialists.

The issue

The Bill repeals the current UK-wide GRC arrangements for Scotland. This appears to us to close the existing route to a GRC for those living here. This second point is the critical one.

However, the Bill cannot grant new GRCs issued by the Registrar General for Scotland any effect outside Scotland (and their effect in reserved areas, such as applying for a passport in Scotland, is not clearly guaranteed).

If both these propositions are correct, the Bill as a piece of freestanding legislation leaves those in Scotland who currently have sure access to effective *state-wide* gender recognition without such access in future. One straightforward consequence of this would be that, if born elsewhere in the UK, the Bill taken by itself removes their ability to obtain a new birth certificate.

If the UK government took *separate* action to recognise these GRCs, we presume using a section 104 Order under the Scotland Act, it would solve the problem.

However, the Bill itself does not secure that; any separate recognition granted now could in future be revoked; and the reasons why the UK government might not wish to grant this now or in future are accumulating. This includes the relationship between social transition and medical pathways, as identified in the Interim Cass Review, and the concerns expressed by the Equalities and Human Rights Commission. Most recently the UK Government received a strong statement of concern about the Bill from the UN special rapporteur on violence against women and girls. The UK Government has made no commitment to cross-border recognition.

Why has this not emerged sooner?

We were only alerted to this apparent effect of the Bill by the Minister's recent response to Russell Findlay MSP's amendment 114 on 15 November at Stage 2, which proposed that the new Scottish system should not be open to those on the sex offenders' register. The Minister asserted, but did not explain, that this would breach ECHR. The First Minister took the same approach at First Minister's Questions last week. The only reason we can think this would raise an ECHR issue is if those people would lose all access to a GRC. We assumed when we first heard the argument made that this was wrong. From the point the Minister confirmed to the Committee (on 28 June: see Annex for whole relevant extract) that Scottish GRCs would only have effect in Scotland, we had assumed that ECHR compliance would so clearly require that the UK route be left open in parallel, to avoid exactly the effect above, that that was the Bill's effect.

However, going back to look at the Bill again, we found loss of the UK route does indeed seem to be its technical effect (see below).

We are not aware the Scottish Government has even been explicit that access to the UK scheme is removed by the Bill for those in Scotland. If the Bill does not do this, there is no problem. But then the line being used to explain the response to Mr Findlay is hard to understand.

If our analysis is correct, at no point has the Scottish Government explained the net effect of its proposals on those with existing rights under the 2004 Act. Accompanying documents to the Bill and statements made to the Parliament if anything have obscured this.

The Bill and accompanying documents

Part 1 of the Schedule to the Bill, paragraphs 1 to 3, repeals the existing arrangements for obtaining a GRC for Scotland. The only recognition of that of this outside the Bill text itself we have been able to quickly find is in the [explanatory notes](#) for that part, which state that (emphasis added):

122. Paragraph 2 repeals, **for Scotland**, section 1 and schedule 1 of the GRA. Section 1 provides for an application for a GRC to be made to a Gender Recognition Panel, and schedule 1 makes provision about the constitution of GRPs.

123. Paragraph 2 of the schedule also repeals **for Scotland** the following sections of the GRA, all of which are replaced by provision on the same matters in the Bill [a list of the sections putting in place the UK arrangements follows]

On territorial extent of Scottish GRCs, the [Policy Memorandum](#) to the Bill was silent, stating instead (emphasis added):

59. The Bill amends the 2004 Act to introduce a new process for applying for legal gender recognition in Scotland, and new criteria which require to be satisfied by applicants to obtain a GRC. This reflects that although the Bill changes the process by which legal gender recognition can be obtained and the criteria, **it does not change the effects of a GRC and the rights and responsibilities which a person has on obtaining legal gender recognition.**

This fails to acknowledge that a Scottish GRC has more limited extent, territorially and potentially in terms of reserved matters within Scotland, than one issued by the Panel.

The human rights assessment in the Policy Memorandum simply says “**Scotland must have a system for obtaining legal gender recognition, to comply with the ECHR**” (para 135). This leaves undiscussed what responsibility the Scottish Government has for ensuring that *Scottish residents* do not lose the ability to access such recognition *UK-wide*.

Stage 1 debate

Questioned by Rachael Hamilton MSP on 28 June about, inter alia, cross border effects and legislative competence (see annex for longer extract from the Official Report) the Minister said that the question of cross-border recognition “**does not affect our ability to make changes to the law here**”, not making clear that in removing access to the UK scheme, the Scottish Government was risking the loss of existing ECHR rights for some people, with implications for legislative competence.

Ms Hamilton also asked “Do you see a risk in not considering that you may need a section 104 order before the bill goes through?” and was told by the Minister that this was a matter for “once the bill has finished its passage through Parliament, **rather than being part of the bill as such**. There is **nothing odd** about that; it is just the **normal** course of events. It is **a technical issue with which we do not envisage there being any issues**” (emphasis added).

We wonder whether the compliance of an Act of the Scottish Parliament with ECHR resting on a s104 Order is normal or merely technical, especially in the absence of any agreement at the point the legislation is passed? It is not clear on what basis no issues were envisaged, in the absence of any reassurances having been received even in broad principle, and the UK government having rejected the approach being adopted in Scotland.

This would have been an obvious moment to clarify that the proposed approach would lead to a situation where the Bill was revoking the UK system, without of itself

being able to put in place an equally compliant (UK-wide) system, and that the s104 Order was essential for ECHR compliance and legislative competence, but the Minister did not do this.

Stage 2

At Stage 2, Sue Webber MSP laid amendments deleting the repeal for Scotland of the sections of the GRA providing for the existing system. In arguing against this, the Minister did not explain why they could not be retained alongside the new arrangements, only setting out that it was the Scottish Government's policy that gender recognition should be available on the self-declared basis in the Bill. We are not aware of any other time the Scottish Government has explained its decision to revoke access to the existing UK system.

The amendments were rejected, meaning that it is not clear if the Presiding Officer would normally agree for them to be discussed again at Stage 3.

Conclusion

We are conscious that the various third sector organisations who represent potential GRC holders who would be affected have not raised this as a concern. We know (from Fol responses) that these organisations approached Scottish Government officials in August 2021 to discuss a s104 order related to the Bill, but we were informed no record of that discussion exists. This contributes to our caution about our reading, as these bodies have worked closely with the Scottish Government on the Bill and have not flagged any problem of this sort.

On a related point, section 8M provides that UK GRCs are to be treated as if they are Scottish GRCs in Scotland. That at first sight raises a further question about the effectiveness of UK GRCs for their holders in relation to reserved functions *within Scotland*.

Whatever one thinks about the new system, it would evidently be wrong if the Bill were to remove certain access to effective state-wide gender recognition as required under the ECHR for those currently able to obtain that. This risk could however be easily averted with a policy change, and related amendment, which retained parallel access to the UK system, and made the new Scottish system supplementary, providing a permanent protection against any change over time in attitudes to the Scottish system at Westminster.

If the Bill does have this effect on ECHR rights, it is obviously better that it should be fixed in the Bill, rather than becoming a problem later. We have no desire to cause concern to individuals where none is justified and so are raising this with you, copying to the Commissioners, for the SHRC's urgent attention, with no plan to publicise this letter.

We would also have preferred to wait for the SHRC's assessment before taking any other steps. However, as the timetable for completing the Bill now appears likely to be very tight, and any action needed would be urgent, we are taking the unusual step of copying this letter now to the Presiding Officer and to Rachael Hamilton MSP, as it appears questions would arise about responses she was previously given, if we

are correct. We do this with the proviso that this may not be the effect of the Bill and that they should take advice from you and/or others.

Yours sincerely,

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