



Alister Jack MP

Secretary of State for Scotland

*By email*

2 January 2023

Dear Mr Jack,

**GENDER RECOGNITION REFORM (SCOTLAND) BILL**

We are an independent policy analysis collective, with extensive experience in government policy making, academic research, and communications. Of particular relevance here, Ms Hunter Blackburn led the team responsible for electoral and constitutional policy aspects of the Scotland Act 1998 during its later stages of parliamentary consideration.

We have followed closely the development of the Gender Recognition Reform (Scotland) (GRR) Bill and its passage through the Scottish Parliament. We provided both oral and written evidence to the Scottish Parliament Equalities, Human Rights and Civil Justice Committee, and have written extensively on the Bill.<sup>1</sup>

It has been reported that the UK government is considering an intervention in relation to the GRR Bill, which completed Stage 3 on 22 December 2022. We believe there is a robust case for referring the GRR Bill to the UK Supreme Court under s33 of the Scotland Act. The outcome of such a referral would determine the case for using the powers under s35 of the Scotland Act.

In our view (a) the extent of the Scottish Parliament's ability to pass legislation affecting gender recognition for reserved purposes, including the Equality Act, raises significant issues and should be referred the Supreme Court for a general clarifying ruling, as a first step (b) even looking only at devolved areas, the specific approach adopted by the Scottish Parliament raises issues under ECHR and other international obligations and (c) there are issues for the operation of reserved legislation, which vary depending on whether the Parliament is competent to

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<sup>1</sup> See: <https://murrayblackburnmackenzie.org/gender-recognition-act-reform/>

legislate for GRCs which change a person's sex (or gender) for reserved purposes, but are not solely related to that.

## **1. Background: Scotland Act powers**

We note that when the devolution settlement was put in place by the then Labour Government, it was on the basis that the UK government should be entitled to intervene, in defined circumstances, where the Scottish Parliament was judged to be acting outside its powers. Such powers formed part of the proposals in the White Paper *Scotland's Parliament*, approved in the referendum of 1997.

We share the view that any intervention must be clearly justifiable under the terms of the relevant parts of the Scotland Act, and relatable to the potential for substantial effects on individuals, organisations or systems. We agree with those who argue it is not appropriate to use these powers due to political disagreement over policy content in devolved matters or concerns about how well legislation has been handled, however justified that disagreement or those concerns would be in this case.

Attempts by others to present this as a Scotland/UK constitutional issue should be met with scepticism and such a framing should be avoided by the UK government. Stakeholders with highly divergent views on the larger constitutional question are concerned that this legislation has wider effects than claimed and would like the UK Government to use its powers here to ensure that there are no adverse effects on important legal protections, particularly those for women, which are protected as a matter of reserved law or human rights. They are united by a desire to avoid constitutional point-scoring.

## **2. The Scottish Parliament's ability to pass legislation on gender recognition affecting reserved areas**

We raise this first because clarification of this point has substantial implications for the interpretation and practical impact of the GRR Bill. For legislation that has completed all its parliamentary stages, the extent to which the Bill should be understood to affect reserved matters remains extraordinarily ambiguous.

In a 2021 judicial review in the High Court of Northern Ireland, Mr Justice Schofield stated (emphasis added): *"I accept the [UK government's] submission that the legal change in a person's gender is a significant and formal change in their status with potentially far-reaching consequences for them and for others, including the State."*

These consequences flow mainly from Sections 9(1) and 22 of the GRA 2004, and the provisions about marriage and civil partnership. We focus here on Section 9(1).<sup>2</sup> This confers a change of sex "for all purposes", subject to s9(3). The central question of what, if any, limits there are on what "all" can mean in the context of legislation passed by the Scottish Parliament has not been properly addressed.

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<sup>2</sup> This states "Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."

### 3. Passage of the 2004 Act: Recognition of the limits of legislative competence to devolved matters

When the decision to enact UK-wide legislation was originally taken, the Memorandum to the Sewell Motion passed by the Scottish Parliament in 2004 noted that:

**‘The legal recognition of transsexual people combines reserved and devolved policy areas.** The devolved areas include process issues particularly the creation and maintenance of a Gender Recognition Register and the provision of birth certificates reflecting the acquired gender of a transsexual person, and the right to marry in the acquired gender. Some of the legal consequences are reserved particularly pensions, benefits and insurance consequences. **The Scottish Parliament could provide partial legal recognition of a transsexual person’s acquired gender but not the reserved policy aspects.** Including Scottish provisions in the Gender Recognition Bill will deliver comprehensive legal recognition of the acquired gender of transsexual people in Scotland.’ (Para. 8)

‘Including Scottish provisions within the Gender Recognition Bill offers the swiftest, most cost-effective means of remedying the human rights breaches and delivering comprehensive legal recognition of the acquired gender of transsexual people **embracing devolved and reserved policy consequences.** A UK wide approach will also **ensure consistency in the process of determining legal recognition and the legal consequences flowing from recognition of the acquired gender of a transsexual person thereby avoiding cross-border issues.**’ (Para. 12, emphases added)<sup>3</sup>

The Sewell motion itself said:

‘That the Parliament endorses the principle of giving transsexual people legal recognition of their acquired gender and agrees that the provisions in the Gender Recognition Bill **that relate to devolved matters** should be considered by the UK Parliament thereby ensuring a consistent UK approach and early compliance with the rulings of the European Court of Human Rights with respect to the Convention rights of transsexual people under Article 8 (right to respect for private life) and Article 12 (right to marry).’<sup>4</sup> (emphasis added)

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<sup>3</sup> See: [J1/S2/04/4/2](#) SEWEL MOTION AND MEMORANDUM FOR THE GENDER RECOGNITION BILL

<sup>4</sup> As above.

We note that the Equality Network's 2004 submission<sup>5</sup> to the Justice Committee noted that some aspects of the UK Bill "concern reserved matters – the Sex Discrimination Act, and pensions – and so do not relate to the Sewel motion."<sup>6 7</sup>

When legislated for in 2004, therefore, it appears to have been recognised inside and outside the Scottish Parliament that its powers in relation to gender recognition were limited to devolved matters. The precursor to the Equality Act was understood to be reserved (we note the definition of sex in that Act was not identified as a relevant issue).

After the Equality Act 2010 was introduced, there was no further consideration of gender recognition as a relevant reserved matter: gender recognition was not raised as an issue with the Smith Commission.<sup>8</sup>

#### **4. The GRR Bill: inference of reserved impact**

By contrast, the Policy Memorandum to the current GRR Bill, the interpretation of its purpose by the Scottish government and Scottish government amendments to the Bill encourage a view that the effect of a GRC issued under Scottish legislation will be identical to that issued under the present UK-wide Act (see Annex for further detail). Further, neither of two Scottish Government consultations mentioned gender recognition legislation in Scotland being restricted to devolved matters.

Some of the anxiety created by the GRR Bill could have been removed, had Ministers clarified that "all purposes" for a Scottish GRC would exclude any reserved legislation and therefore the Equality Act. Ministers were repeatedly pressed about the relationship with the Equality Act. That they chose not to allay concerns in this area suggests a deliberate desire to, at minimum, maintain formal ambiguity on that point.

#### **5. Purpose of Bill or incidental/consequential effect?**

We understand one argument here may be that effects on s9(1) on reserved matters are only incidental or consequential. The Annex to this letter sets out in more detail the basis for believing that:

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<sup>5</sup> See [J1/S2/04/4/3](#) UK Gender Recognition Bill – Sewel motion Submission to the Justice 1 Committee 21<sup>st</sup> January 2004. Equality Network.

<sup>6</sup> The Equality Network argued that the GRA 2004 should be used to bring in general protections from discrimination, of the sort eventually enacted through the creation of a new protected characteristic, gender reassignment, in Equality Act 2010.

<sup>7</sup> In the Scottish context, at least, there appears to have been no discussion in 2004 of the effect of a GRC on the definition of sex under the Sex Discrimination Act 1975. The SPICe briefing note on the draft Gender Recognition Bill produced in 2003 states: "The reserved issues relate mainly to the right to respect for private life which arose particularly in respect of employment law, national insurance, pensions and social security records. The draft bill at clause 14 makes it an offence for someone in an official capacity to disclose someone's previous gender without consent." (See page 92 in main document [here](#)).

<sup>8</sup> We cannot find any record of gender recognition being brought up as an issue requiring the Commission's attention in submissions to the Commission from the Scottish Government (<https://digital.nls.uk/pubs/scotgov/2014/9781784128500.pdf>) or from political parties or key organisations supporting the current Bill, although there was pressure to remove the reservation of equalities.

- From the outset the Scottish government specifically intended the GRR Bill, as one of its core *purposes*, to provide for Scottish GRCs having identical effects to those issued by the Gender Recognition Panel, including the same effects in reserved areas and across the UK.
- The Scottish government only conceded that the GRR Bill would have limited territorial extent in June 2022; this appears most likely to have been done to head off growing attention to being paid to effects outside Scotland; and
- The desired impact on reserved matters has meanwhile been purposively left unacknowledged and ambiguous, but any constraint under s29(2)(b) is relevant here in the same way as for territorial extent (s29(2)(a)).

We believe the Scottish government is sensitive to this last point, based on it having been extraordinarily resistant throughout the Bill process, to the point of absurdity at times, to setting out its understanding of the relationship between obtaining a GRC and a person's sex under the Equality Act. This continued throughout and even after the conclusion of the recent court case.

We believe this is most obviously explained by Scottish Ministers having received legal advice that if Scottish GRCs changed a person's sex for any reserved matter, that would raise a devolution issue under s29(2)(b) and that they should therefore avoid making any statement relevant to that.<sup>9</sup>

The concession on territorial extent is only political at present. Prior to that the Bill was widely read as potentially conferring the same rights as now on Scottish GRC holders, when they were in other parts of the UK. Concerns about that persist. This has been raised for example in relation to Scottish GRC holders within English prisons. We note that the Scottish Government for a long time did not address such concerns by ruling out effects beyond Scotland. It appears possible therefore that the courts might still read a Scottish GRC as having some effect beyond Scotland. A referral to the Supreme Court under s33, referring to s29(2)(a) of the Scotland Act, could be used to establish securely whether it is the case that the Bill as drafted will have no effects beyond Scotland.

## **6. The substantial effect of gender recognition in reserved matters**

We believe that the extent of the Scottish Parliament's ability to pass legislation affecting gender recognition in reserved areas, including the Equality Act, is a serious and significant matter, with implications going well beyond individual GRC holders. The "others" who may be directly affected (as noted by Mr Justice Scofield) are a wide group, not limited to those forming voluntary relationships with a GRC holder.

This is particularly the case if GRCs issued under the Bill have the effect of changing a person's sex for the purposes of the Equality Act. For the reasons recently argued by Michael Foran,<sup>10</sup> if a GRC grants a change of sex under the Equality Act, this has

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<sup>9</sup> We think legal advice of some sort may also explain the similarly extraordinary resistance of the Minister to using the word "woman" during Bill proceedings.

<sup>10</sup> See: [Michael Foran: Sex, Gender, and the Scotland Act](#) 21 December 2022

significant implications for how the Equality Act works in relation to sex. As Foran sets out, this has two dimensions. The first is potential additional complexity and difficulty in excluding male people holding a female GRC from women-only provision, in contexts where the law permits exceptions in relation to those with the characteristic of gender reassignment. This jeopardises the capacity and willingness of organisations to use the exceptions, to the general detriment of women seeking properly single sex provision in a range of contexts, many of them relevant when women are at their most vulnerable and to women with particular vulnerabilities. The second is an absolute loss of ability to distinguish between a male person holding a female GRC and those who are female, in other contexts governed by the Act where no exceptions can apply. This includes powers allowing single-sex associations, and measures aimed at addressing sex discrimination, including equal pay comparators. There is a link here also to the Act's separate protection of sexual orientation, for lesbian women seeking the ability to associate lawfully without being required to accommodate any male person. While these effects may occur under the law at present, they would be greatly magnified by the GRR Bill's expansive, low regulation and largely non-falsifiable approach to issuing GRCs, to the point of a substantial change in effect.

Following the judgment in *FWS vs The Scottish Ministers* by Lady Haldane, the legal position is that a GRC does grant a change of sex under the Equality Act. This has been clarified as the legal position only because the Scottish Government chose to press for the inclusion of GRC holders within the Equality Act definition of sex, in interpreting the Gender Representation on Public Boards (Scotland) Act 2018. The Scottish Parliament agreed the Bill fully aware of this.

Should the recent judgment be overturned on appeal, or if a change to the Equality Act is agreed at Westminster in future, the legal position would change. Neither of those, are however, in the gift of the UK Government, nor will they be resolved within the next few weeks. The effect of the legislation must be assessed in the context of the law as it stands.

**Before any other action is taken, the Supreme Court needs to be asked to clarify, as a novel and significant devolution issue, whether s9(1) of the GRA 2004 as amended by the Bill for Scotland must be read so that, for GRCs issued in Scotland, "all purposes" means only devolved purposes, as assumed in 2004; or, whether it has effect for some or all reserved purposes, and if so whether that extends to the Equality Act. The referral should also seek confirmation that the Scottish Government's assumption of limited territorial extent is correct.**

We assume that the Supreme Court would regard as irrelevant any attempt at bypassing s29 of the Scotland Act by adopting s9(1) of GRA 2004 for Scottish GRCs without making that explicitly "a provision" of an ASP<sup>11</sup>, given the reference to "a Bill or a provision of a Bill" in s33 of the Scotland Act and that the Bill would lack sensible meaning, if s9(1) is not regarded as falling within its effect.

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<sup>11</sup> See comments in Annex on the form of legislation adopted.

If territorial extent is, as conceded, limited to Scotland, and if the Scottish Parliament is competent to legislate for gender recognition in reserved matters, the implied position would be that a person could have one sex in Scotland and another in the rest of the UK for the same reserved purpose, including the Equality Act.

## **7. ECHR and other international obligations**

Separate from effects on reserved issues, we would ask the UK Government to consider how the system legislated for, even if applied only for devolved purposes, puts at risk compliance with international obligations, including those concerned with the safety, privacy, and dignity of women, in respect of any situation where the sex of one person is treated as having has implications for any other person.

We note the same arguments might also apply to the GRA as it stands. However (a) by opening the GRC process to a much larger, wholly self-defined group, and making it far quicker, with very limited restrictions, and almost no means of proving false or fraudulent applications, the impact and risks in practice will be much greater and (b) ECHR is only a legislative competence issue for the Scottish Parliament.

By reducing the age limit, the Bill also brings in, for the first time, rights relating to children and their families. We also raise one technical issue of ECHR compliance for those currently entitled to apply for a GRC, which we think should be clarified, by the Supreme Court if necessary, given the Scottish Government's position on this was contradictory over the final 24 hours of the Bill's consideration.

## **8. ECHR compliance**

We do not have the resources to undertake at speed a full assessment of the impact of the proposed changes on Convention rights for women, children and families. We concentrate here on Article 3 and prisons, but we think the opening up of GRCs as planned in Scotland has the potential to affect other Convention rights.

### **Article 3 and prisons**

We draw attention to Article 3 and the effect of the Bill in Scottish prisons. Note that prison rules are devolved and that this is an issue regardless of the Equality Act.

Throughout the GRR Bill development process the Scottish Government refused to engage with the argument that a GRC may strengthen a prisoner's right of transfer to accommodation used by prisoners of the opposite sex: our correspondence with the Scottish Government illustrates this (see [here](#)).

We also raised our concerns directly with the Scottish Prison Service (SPS) in February 2022 (see [here](#)). On 5 April we further noted by email "that an earlier draft of the Gender Identity policy [obtained through FoI] effectively stated that the SPS would not have discretion in the placement of trans prisoners with Gender Recognition Certificates" and asked, "Would it be possible to provide further information on this shift in position, and the reasoning underpinning it." The SPS response (in an email of 9 May, which we would be happy to pass on) merely restated the SPS's belief that it could ignore a GRC if it wishes. We understand however that the SPS has never knowingly dealt with a GRC holder under the



current system. We note that there has not yet been any output from the SPS's current review of its transgender prisoner policy. This was [first trailed in December 2018](#) and was due to report in the summer of last year. It should be established whether this delay is due to any concern on the part of SPS about the vulnerability of its policy to litigation from a GRC holder.

Compared to the current arrangements, the GRR Bill largely cedes any control over the number and nature of male prisoners able to obtain a change of legal sex and makes it possible to achieve that much more quickly. Nothing in the Bill prevents a GRC being used to obtain enhanced rights to accommodation with female prisoners. Attempts to amend it to rule out any effect in prisons were rejected.

We are therefore concerned that as a result of court action, the SPS could find itself required to accommodate with women prisoners an unpredictable number of male prisoners who have obtained a female GRC, with far less leeway to refuse a transfer than for a non-GRC holder, even in cases where its current policy would reject that, and in numbers whose impact on women the SPS could not be sure of being able to manage and contain through enhanced supervision or segregated accommodation arrangements. We believe that the GRR Bill as drafted therefore exposes women in prison in Scotland to new, excessive, undue, fully avoidable risk of being "subjected ...to inhuman or degrading treatment or punishment."

We are similarly concerned about the impact on searching policies in prisons and other settings; on intimate care for vulnerable women; on the ability to maintain single sex hospital wards, including in psychiatric units, inter alia. Some of these would cease to be relevant if a Scottish GRC conferred no change of status under the Equality Act, but not all would.

### **Existing ECHR rights to UK-wide gender recognition**

We note that during the Stage 3 debate on 21 December, the Cabinet Secretary was asked to "clarify whether people who are living in Scotland will be able to continue to obtain a GRC from the UK's gender recognition panel, or will that route be closed?" (Michael Marra MSP, SP Official Report col. 111) In response, the Cabinet Secretary stated:

"People who are living in Scotland will be able to do that **until the bill is enacted**. Obviously, there will be delay before the bill's commencement, once it has been passed into law. **Until that point**, the UK route will be open to people and, once the bill has been enacted, there will be a new route available" (Ibid, emphasis added).

This response suggested that the Bill would remove UK state-wide certain access to gender recognition from those living in Scotland. That would appear at first sight to be non-compliant with the ECHR. The following day, however, the Cabinet Secretary contradicted this, telling the Chamber:

"The bill provides a new and improved route to legal recognition in Scotland, but **the existing process will continue to be available across the whole of the United Kingdom**. The bill does not remove the ability of someone who



lives in Scotland to apply under the existing GRC process; it will still apply in law in the rest of the UK once the bill's provisions come into force, as the requirements in the 2004 act are not restrictive based on where someone lives."

(SP Official Report 22 December 2022 col. 32, emphasis added)

This statement is not easily reconciled with the repeal of parts of the GRA for Scotland, in the Schedule to the Bill. The Minister noticeably ignored a specific question about the effect of the repeals. The UK government may want to satisfy itself about the purpose and effect of these repeals, and that they do not create a situation where the Bill of itself removes access to UK-wide gender recognition in Scotland.

## **9. Other international human rights obligations**

A s35 Order would be required to deal with any infringement of international human rights obligations, other than under the ECHR. The extent of such potential infringement would depend on whether a Scottish GRC has an effect under the Equality Act.

### **Women**

For prisons, we make the same argument in relation to non-ECHR international obligations, as we do the ECHR rights, except that here we would raise compliance with The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) especially Rule 11 (accommodation) and Rule 52 (intimate searching) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 16, degrading treatment).

Looking more generally, we would urge the UK Government to consider any potential impact from the Bill on its ability to meet its obligations on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), especially in the event that Scottish GRCs changes a person's sex under the Equality Act, but also given the extension of s22 privacy protections to a much larger, self-defined, largely unregulated group, for similar reasons as discussed under reserved issues, below. We note the concerns raised by the UN Special Rapporteur on Violence Against Women and Girls and assume that these will be considered as part of assessing risks to compliance with international obligations.

### **Children and young people**

We would ask the UK Government to satisfy itself that no international obligations towards children are compromised. We are particularly concerned that the application of s22, a strict privacy provision designed for adults, could compromise the welfare of children in schools and other settings, both those with and without GRCs. We note the Children and Young People's Commissioner Scotland submitted detailed concerns to the government's 2019 consultation (see [here](#)). An amendment seeking to add a further exception to s22 for child safeguarding and welfare purposes was ruled inadmissible, on the grounds it would interfere with the effect of a GRC. The Bill is therefore purposefully designed to prevent the effect of a GRC

being adapted in any way to recognise new issues arising from making these available to 16- and 17-year-olds.

## **10. The operation of reserved legislation**

Adverse effects on the operation of reserved legislation would fall to be addressed using a s35 Order. These will depend on how far the Parliament is competent to legislate for who can be counted as which sex for reserved purposes, including under the Equality Act. An initial adjudication on whether the effect of a Scottish GRC is limited to devolved purposes, and if not, whether it can affect the Equality Act, would therefore clarify what reserved issues would be relevant to any s35 Order.

If the Court concludes that a Scottish GRC can affect sex under the Equality Act, we believe that the radical expansion in number and type of GRC holders (as available to anyone aged 16 or over based only on self-declaration) will have a substantial effect, given the recent court ruling, as discussed under section 6 above. We discussed the practical, operational impacts in [this paper](#).

The impact on the operation of the Equality Act of a person having a different sex in Scotland than in England also appears to have implications for the operation of pay comparators, data collection, the PSED, and other matters, for private and public sector employers who operate UK wide, including the UK government, and their staff.

If Scottish GRCs are limited to effects on devolved purposes, the main residual effects to which we draw attention are those from s22. An amendment adding an exception to s22 for information sharing related to the operation of the Equality Act was rejected as inadmissible. We think such an exception is needed, even if a Scottish GRC has no effect under the Equality Act, because of the scope for those operating services under the Act in Scotland being constrained from being able to share information when needed, to make the Act work in practice. Similar issues could arise for reserved functions more generally. The absence of an exception in s22 relating to the operation of the Equality Act already makes operating the exceptions in that Act more difficult, but in practice this will matter far more with a radical change in the size and nature of the GRC holding population.

If reserved functions are not affected, the boundary for having a different sex will not be territorial but functional: a person may have a different sex in law for devolved and reserved purposes. We do not offer a view on how far this situation could have an adverse effect on the operation of reserved functions. We assume there is at least scope for confusion over data collection on sex which is used both for reserved and devolved purposes.

## **11. Issues with potential wider UK effect**

Two further elements of the Bill appear likely to have wider UK effects which may or may not meet the threshold for s35, but we think merit attention.

### **Impacts on marriage/civil partnership**

The Bill allows anyone living elsewhere in the UK than Scotland, in a marriage or civil partnership solemnised in another part of the UK, to obtain a GRC by moving to Scotland for an undefined short period (or simply by being born here), with significant implications for their partner which were not considered during the passage of the Bill. Scottish GRC holders will, for example, be able to obtain a full GRC without spousal consent. We think that the impact of the Bill on the rights of partners living outwith Scotland should be considered further.

### **Overseas gender recognition**

The Bill as passed confers GRC status on any person aged 16 years or over who has changed legal gender in another jurisdiction. No supporting evidence is required to acquire this status.

A person from a jurisdiction not included on the overseas list used for the rest of the UK will therefore be able to obtain gender recognition in one part of the UK but not others, for some or all purposes. The specific implications of this were not discussed during the passage of the Bill, and we think require attention at UK level. For example, it may interfere with the ability of the UK government to operate the GRA for overseas cases as it currently does, by creating differences of treatment of people from the same jurisdiction in different parts of the UK.

## **12. Responsibility and accountability**

The Scottish Government could have avoided many of the issues presented here. We and others have raised the interaction of the GRA and the Equality Act with the Scottish Government for years, with cross-border effects part of that. As noted above, we have also repeatedly raised potential impacts on the prison estate, both with the Scottish Government and the SPS. Our correspondence and meetings with the Scottish Government can be found [here](#). This shows that the Scottish Government took nearly two years to respond our letter of March 2020. Their response is [here](#).<sup>12</sup> We also raised these issues in our [response](#) to the 2019 Scottish Government consultation, the Scottish Parliament [Call for Views](#), and a follow-up [Supplementary Note](#) to the Equalities, Human Rights and Civil Justice Committee.

Amendments which would have pre-empted many of the issues raised here were proposed and rejected, either as inadmissible given the design of the Bill, or simply as unacceptable to the government. Instead, at Stages 2 and 3 the Scottish

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<sup>12</sup> The letter appeared to concede that GRCs issued in Scotland were expected to have the same effect as those issued under the GRA at present: “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.”

Government foregrounded a set of misguided, or at least unclear, arguments about the Equality Act and risks to legislative competence. Overall, we read the Scottish Government approach to gender recognition as achieving, intentionally or otherwise, the effect of leaving unresolved ambiguity and taking risks at the boundaries of the devolution settlement rather than a clear, secure new Act of the Scottish Parliament on gender recognition.

### **13. Conclusion**

We would ask the UK government to take whatever action it believes is needed to ensure that protections for women and girls in Scotland provided under UK law and international human rights obligations are not put at risk by the GRR Bill.

We suggest the ability of the Scottish parliament to confer a change of sex on any person for reserved purposes raises a novel devolution issue which should be referred to the Supreme Court to clarify. The limitation of the Bill to Scotland should also be confirmed with the Court. The impact will be greatest if “all purposes” for Scottish GRCs includes sex under the Equality Act in Scotland, but the issues here are not limited to this. We also raise the impact on women in prison in Scotland, as an issue of human rights, under the ECHR and other international instruments. We believe the ability to meet other human rights obligations may be impeded, but do not have the capacity to analyse these in detail. The issues relevant to a s35 Order will depend on the extent of the Parliament’s powers to legislate for GRCs to have effect for reserved purposes and outwith Scotland.

We would be very happy to meet to discuss any of the points in this letter, and to provide further references to any points made here, if that would be helpful.

Copies go to Kemi Badenoch MP, Secretary of State for International Trade and President of the Board of Trade and Minister for Women and Equalities, Geoff Mawdsley and Catherine Carrigan (Scotland Office), Bryony Bonner and Daniel El-Gamry (Department for International Trade) and John Cooper (Cabinet Office).

Yours,

Lucy Hunter Blackburn

Lisa Mackenzie

Dr Kath Murray

## ANNEX

1. That it is a central purpose of the Bill that s9(1) should apply to Scottish GRCs in the same way as to existing GRCs is shown by:
  - Paragraph 56 in the Bill Policy Memorandum, which states: “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**” (emphasis added)<sup>13</sup>
  - A letter from the Cabinet Secretary to all MSPs in December 2022, which stated: ‘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. **The Bill does not however amend the legal effects of obtaining legal gender recognition which are set out principally in section 9 of the 2004 Act, with the intention that the rights and responsibilities of those obtaining legal gender recognition would remain the same as they are now under the 2004 Act.**’ ([Shona Robison MSP](#), 9 December 2022, emphasis added)
  - Scottish Ministers have had an extensive and often difficult correspondence with the EHRC over the Bill. This correspondence could have been concluded at any point by Scottish Ministers simply stating that GRCs issued under the Bill were not intended to have any effect for reserved purposes, including for the purpose of the Equality Act 2010. They did not do so
  - The Scottish government brought forward an amendment to the Bill which placed a duty on Ministers to produce guidance on the operation of the Equality Act. This could only have been regarded as relevant to the purposes of the Bill if there was understood to be an interaction between the matters covered in the Bill and the Equality Act.
  - In the rejection as inadmissible, on grounds of being “out of scope”, any amendments deemed to change the effect of a GRC, compared to now, including the attempted insertion of a new exception into the 2004 Act for Scottish GRCs, to make it clear that the Equality Act was not one of the purposes covered by S9(1). As the Official Report records, at Stage 2 Foysoil Choudhury MSP and at Stage 3 Ash Regan MSP each tried unsuccessfully to table such an amendment. We have also seen correspondence between MSPs and the parliamentary authorities showing various amendments being rejected on the basis the Bill did not admit any change to the effect of a GRC.

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<sup>13</sup> See: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf>

We draw attention to [this exchange](#) on a point of order just prior to the start of the Stage 3 debate on 20 December:

**Ruth Maguire MSP:** Colleagues from across the chamber have had amendments ruled out of scope for the reason that the bill relates to the process of applying for a gender recognition certificate, not to the effect of having a gender recognition certificate. That has left some of us unable to address concerns that constituents have raised, in particular in relation to the fact that the bill, if passed, will allow a much larger cohort of citizens to change their legal sex.

In raising this point of order, I wish to make it clear that I am not challenging your rulings on any individual rejected amendments. Rather, I am asking you to provide clarity, on the record, as to scope, so that members and our constituents who are watching can be very clear about the parameters for our consideration of the bill at this time.

**The Presiding Officer:** I thank Ms Maguire for her point of order. As members will be aware, there are four criteria for the admissibility of amendments, one of which is relevance. **Relevance is determined by the provisions of a bill at introduction**, rather than by the broader policy to which the bill relates. More guidance on admissibility can be found in the guidance on public bills that the Parliament publishes

- [Papers obtained through Freedom of Information](#) are also relevant here. They record internal discussion in 2017 about whether to amend Section 9(1) to remove references to “sex”. This was raised internally but rejected specifically for reasons related to the operation of services which lawfully distinguish between people based on sex, which will be mainly those governed by the Equality Act:

‘At Monday’s meeting, EN/STA set out why they are content with the terms sex and gender being used interchangeably [in Section 9 of the GRA]. When the GRA 2004 was being developed, Press for Change suggested the wording used in section 9 where sex and gender are used interchangeably. [redacted] advised that **this was intentional in order to prevent trans people from being discriminated against in terms of their sex**. Their view was that there was a risk that service providers, etc. would say something along the lines of “the act means **we recognise your acquired gender identity, however, your sex hasn’t changed**” and trans people would still be denied services.’

*Internal Scottish Government email 1 September 2017 10:39. [SG Fol release](#) p.49, emphasis added*

- ‘Legislation might conflate sex and gender – as we discussed at the meeting with the EN/STA, the GRA does exactly that but **it does it for policy reasons**.’

*Internal Scottish Government email 1 September 2017 18:09 [SG Fol release](#) p.48*

2. The choice of amending the GRA 2004, but not Section 9 or 22, and the description of the Bill's purpose, were clearly intended to ensure that Scottish GRCs would have the effect of changing a person's sex for "all purposes" in exactly the same way as existing GRCs, including for all reserved purposes, including the Equality Act. That effect is evidently not simply incidental or consequential.
3. It is also relevant that the obvious approach here would have been to legislate afresh for a new system of gender recognition in Scotland. Instead, Ministers chose to amend the GRA 2004, leading to two statutes, the Bill and the amended GRA, both of which are unnecessarily complicated for readers to make sense of, compared to what could have been achieved with a new freestanding ASP. None of the government's various consultation papers, policy documents, or parliamentary statements explain why this much more complex approach was preferred.
4. We note however that this approach means that the Bill applies s9(1) and s22 of the GRA to GRCs issued in Scotland, without the Bill itself requiring to make direct provision for either. We suggest that a new freestanding Scottish Bill which recreated s9(1) word for word would have drawn more attention to its relationship with reserved areas and so to its competence.<sup>14</sup>
5. We note further that:
  - The consultation papers issued in 2017 and 2019 made no reference to the effect of a Scottish GRC being limited either to Scotland or to devolved matters.
  - The concession of territorial limitation was only first made on 28 June 2022 at the Minister's Stage 1 oral evidence session: "Whether the UK Government changes its processes is clearly a matter for the UK Government itself, as is whether it recognises Scottish gender recognition certificates." (Shona Robison, Official Report, col. 10). This followed increased attention to concerns about the impact of the legislation on other parts of the UK.
  - The Scottish Government has at no point during the Bill process conceded any limitation of effects to devolved contexts, or otherwise discussed impacts on reserved areas. Ministers and civil servants have instead gone to extreme lengths to avoid discussing the effect of a GRC under the Equality Act, even while defending a court case based on arguing a wide interpretation of "all purposes", with the effect of including the definition of sex in the Equality Act.

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<sup>14</sup> We also note that an amendment\* was put down by the Scottish Government at Stage 3, removing a reference in the Bill to sending the GRC of a person born elsewhere in the UK to the relevant registrar. During the debate, the Cabinet Secretary stated the amendment "*seeks to future proof the bill against the possibility that the UK Government decides not to recognise a Scottish GRC*" (SP Official Report, 21 December, col. 112). We do not see why this "future proofing" could not have been done much sooner. The government must therefore have had some specific argument for why a late amendment was needed. Some sudden increase in concern about vires seems one likely reason. We note that in October 2022 the Scottish government told the EHRC, "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."

\*The original version of this letter mistakenly described this amendment as an emergency one, when in fact it was submitted to the normal deadline.