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The Rt Hon Alister Jack MP
Secretary of State for Scotland
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20 January 2023

Dear Alister

I have noted your letter received on the evening of 16 January, informing us of your intention to make an order under section 35 of the Scotland Act 1998 which you then tabled on 17 January.

As the First Minister has set out, we consider that this unprecedented intervention represents an attack on the democratically elected Scottish Parliament and its ability to make decisions on devolved matters. The Gender Recognition Reform (Scotland) Bill is within the legislative competence of the Scottish Parliament, which passed the Bill last month by an overwhelming majority of MSPs with support from members of all five parties.

Your letter provided scant detail on the reasons for the order, and like everyone else we had to wait until publication late on Tuesday afternoon of your policy statement to see any substantive explanation. We will respond in full to the points raised in the appropriate forum which, given the approach taken by the UK Government, is now likely to be through the courts.

My immediate concern, however, is to clarify contradictions in your letter and statement.

You have said that you hope we can work together to find a constructive way forward which respects devolution and the operation of UK legislation. This seems utterly incompatible with your approach of waiting until after the Bill has been passed to implement a power of veto never used before, with no warning communicated about the use of that power or prior attempt to engage on the detailed issues now raised. Please would you clarify how the Scottish Government can work constructively with you under these circumstances.

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It is disappointing that you have refused the invitation to appear at the Scottish Parliament's Equalities, Human Rights and Civil Justice Committee to explain your decision. This does not seem consistent with your stated aim to do all you can to respect the devolution settlement.

You have said that you are open to consideration of an amended Bill, yet the reasoning you have set out includes a fundamental objection to the existence of two different systems within the UK.

This is in direct contradiction of the position set out in the UK Government's 2018 consultation on gender recognition reform¹, which stated:

"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."

If it is now the UK Government's position that the existence of two different gender recognition systems within the UK is unacceptable, please clarify what an amended Bill could possibly include, and how this position can be consistent with the recognition both by your Government and by the Equalities and Human Rights Commission that gender recognition is a devolved matter.

I will also note that the positions of the UK and Scottish Governments were broadly consistent, with each proposing similar reforms, until September 2020 when the UK Government announced it would not take forward the proposed reforms set out in its 2018 consultation, despite 64% of respondents agreeing that the requirement for a diagnosis of gender dysphoria should be removed. That was the point when it became clear that there would likely be different approaches within the UK – over two years ago.

The Gender Recognition Reform (Scotland) Bill has been years in the making, has involved input from tens of thousands of organisations and individuals through public consultation,

¹ [GRA Consultation document \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

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extensive evidence-taking and consideration by the Scottish Parliament's Equalities, Human Rights and Civil Justice Committee, and significant joint working from MSPs of all parties.

The UK Government has had countless opportunities to engage, express views, or request changes since we set out our intention to reform the Gender Recognition Act 2004 in our Programme for Government of September 2016.

This included the two Scottish Government consultations that closed in March 2018 and March 2020, the Scottish Parliament call for views that closed in May 2022, and the Equalities Committee's detailed consideration of the Bill from March to October 2022.

Officials in the Scottish and UK Governments have had ongoing and regular cordial discussions on cross-border interaction of the Bill.

There has also been Ministerial engagement on the Bill. I wrote to then Equalities Minister Nadhim Zahawi in October 2022 highlighting relevant policy decisions for the UK Government and committing to work together on an order under section 104 of the Scotland Act, which is the usual process for handling cross-border issues or implications for reserved law.

Kemi Badenoch's letter of 7 December to me was in response to that letter, two months later. I believe in comments you made during your statement in the House of Commons you may have given the impression that Ms Badenoch initiated this correspondence but that was not the case.

Following that correspondence I met with Ms Badenoch on 19 December. Both Ms Badenoch and I committed to working together constructively, including ongoing official level meetings.

In none of the above opportunities for engagement or actual discussions has the UK Government given any indication it would consider using any powers, let alone a Section 35 power to effectively veto the bill, or that it had issues that could possibly warrant doing so.

The UK Government has only raised concerns about two specific issues with the Bill, both of which were quickly resolved. The first was provision relating to asylum seekers added at Stage 2 by an MSP and which the Scottish Government was clear it did not support. The competence of this amendment was queried by the Office of the Advocate General, and it was removed by a Scottish Government amendment at Stage 3. The second was an issue raised by Ms Badenoch on the morning of 22 December, during the Stage 3 process, in relation to remarks made on the evening of 21 December during the Stage 3 debate. This was resolved the same day through clarification that the existing GRC process will continue to be open to those in Scotland.

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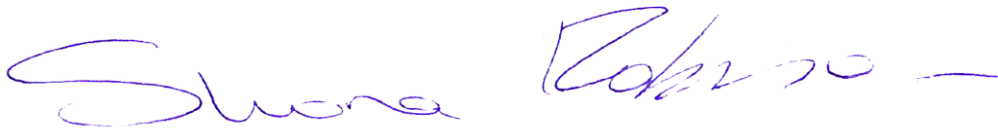
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Using the Section 35 power to impose a veto on the Bill when already passed by the Scottish Parliament, after ignoring every opportunity to raise these issues or seek changes to the Bill over several years, demonstrates complete disregard for devolution, and flies in the face of the 2013 Memorandum of Understanding between our Governments² which states that these powers should be seen “very much as a matter of last resort”.

I therefore ask that if you really want to work together in a partnership of equals, then you should acknowledge that your use of Section 35 in this way is completely incompatible with such a partnership, and you should immediately revoke the order. That would enable constructive discussions about the issues you have raised.

I am of course happy to meet with you to discuss any of these issues as soon as possible, as I would have been at any point throughout the Bill process.



SHONA ROBISON

² [MoU between the UK and the Devolved Administrations.pdf \(publishing.service.gov.uk\)](#)

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ANNEX – CHRONOLOGY OF GENDER RECOGNITION REFORM (SCOTLAND) BILL AND OPPORTUNITIES FOR ENGAGEMENT

6 Sept 2016	Scottish Government (SG) Programme for Government sets out commitment to consult on changes to the Gender Recognition Act 2004 (GRA) process to bring it into line with international best practice
9 Nov 2017 – 1 Mar 2018	SG first consultation on GRA reform setting out proposed approach
3 July – 22 Oct 2018	UK Government (UKG) consultation setting out their proposal to reform GRA along the same lines as SG, noting that <i>“Gender recognition is devolved to Scotland. That means Scotland can have its own system for gender recognition if it wants to”</i> and including a commitment to work closely with SG on implementation of SG proposals, <i>“especially on the implementation of its proposals where powers are not devolved, mutual recognition of certificates issues in different parts of the UK across the UK”</i> .
17 Dec 2019 – 17 Mar 2020	SG second consultation on GRA reform including full draft Bill and draft impact assessments.
22 Sept 2020	UKG sets out response to their consultation, stating that the GRC process would not be substantially reformed. This is the point at which it was clear a divergence of approaches between SG and UKG was likely.
Over the course of 2022	Regular official-level meetings between SG, UKG and Northern Ireland officials on the GRR Bill and related issues. This included sharing of a draft Policy Summary for a Section 104 process, thematic discussions of relevant policy areas including pensions and benefits, passports and driving licenses, healthcare, young people, education, etc.
2 Mar 2022	GRR Bill introduced at Scottish Parliament. Legislative Competence memorandum published. Bill shared with the Office of the Advocate General.
21 Mar – 16 May 2022	Scottish Parliament call for views on GRR Bill
15 Mar – 27 Oct 2022	Stage 1 consideration of GRR Bill by Equalities Committee
21 Oct 2022	Shona Robison writes to Nadhim Zahawi, then UK Minister for Equalities, (copied to Alister Jack) highlighting relevant policy decisions for UKG, committing to work together on a Section 104 process.
Dec 2022	Correspondence with officials in the Office of the Advocate General in which they raised questions about the competence of provision relating to asylum seekers added to the Bill by Non-Government amendment at Stage 2.

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	That provision was removed by SG amendment at Stage 3.
15 – 22 Dec 2022	Stage 2 of GRR Bill
7 Dec 2022	Kemi Badenoch writes to Shona Robison as a reply to her letter to Nadhim Zahawi asking for a meeting before the end of 2022.
19 Dec 2022	Shona Robison meets with Kemi Badenoch. Constructive discussion where both sides committed to working together, including ongoing official level meetings.
20-22 Dec 2022	Stage 3 of GRR Bill
22 Dec 2022	Kemi Badenoch writes to Shona Robison asking for urgent clarification (by 1pm that day) that the UK system would remain open to those in Scotland. Shona Robison’s private office replied confirming this is the case and Ms Robison stated this in the Chamber that afternoon.

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