Shona Robison MSP, Cabinet Secretary for Communities, Social Security and Equalities of Scotland

**By email only**

**From**: Baroness Kishwer Falkner, Chairwoman

Ref: 1082Robison

20 September 2022

Dear Cabinet Secretary

**Gender Recognition Reform (Scotland) Bill**

As you know, the Equality and Human Rights Commission is an independent public body that regulates an equality legal framework for Great Britain protecting nine overlapping protected characteristics, including sex and gender reassignment. In England and Wales and in relation to reserved matters, we also have a mandate to protect human rights. In fulfilling our statutory remit, we have a duty to consider how the rights of one person or group might be affected by those of others.

When we met virtually on 21 January this year, I undertook to share with you any further developments in our thinking on the implications of your Government’s proposals to reform the process for obtaining legal gender recognition in Scotland. I write now to set out our views on the possible implications for the operation of the Equality Act 2010 in Scotland and more widely in Great Britain.

**Our engagement to date on gender recognition reform in Scotland**

On 26 January 2022, we shared our views with you and with the previous Minister for Women and Equalities, the Rt Hon Liz Truss MP on proposals in the Gender Recognition Reform (Scotland) Bill to change the process through which a person can change their legal sex in Scotland. In doing so, we set out our view that further consideration was needed before these reforms proceeded, and that the established legal concept of sex, together with the existing protections from gender reassignment discrimination for trans people and the ability for them to obtain legal recognition of their acquired gender, collectively provided the correct balanced legal framework that protects everyone. We also called for action to address the unacceptable delays in obtaining a gender dysphoria diagnosis, which impact people’s ability to obtain a Gender Recognition Certificate (GRC) under the current system as well as vital clinical treatment and support.

On 17 May 2022, we also gave evidence in line with this position to the Equalities, Human Rights and Civil Justice Committee at the Scottish Parliament. Since then, we have been examining further the potential implications of a different process for obtaining legal gender recognition in one nation of the UK for the operation of the Equality Act 2010 across Great Britain.

**Potential cross-border implications of reform**

The Commission recognises that the proposed reforms will undoubtedly make it easier for trans people (used here as shorthand for people with the protected characteristic of gender reassignment, which applies at every stage of their transition) to change their status in line with their gender identity – an important legal and personal recognition for many. We also acknowledge the democratic mandate of the Scottish Government to legislate on these matters, and that there appears to be majority support to do so in the Scottish Parliament.

However, we have a statutory mandate to, in this case, advise Governments on the implications of potentially having two different processes for obtaining a GRC within Britain. Given that the Scottish proposals will, for example, remove the need for a diagnosis of gender dysphoria and significantly reduce the time period of living in the acquired gender, as required in the rest of the UK, it is assumed that a wider group of trans people (who may not meet the current UK criteria for a GRC) will in future be able to obtain legal gender recognition in Scotland. This has a number of possible implications.

* While the Equality Act makes provision to treat people with the protected characteristic of gender reassignment differently in relation to occupational requirements, separate- and single-sex services, sport and communal accommodation where justified, trans people will nonetheless be treated in line with their legal sex under all aspects of the Equality Act. Thus, the operation of other provisions relating to sex discrimination across Great Britain, including equal pay between women and men, gender pay gap reporting, and measures to address disadvantages experienced by women, will be affected by the proposed changes to the law in Scotland.
* In our view, there are implications for the operation of the Equality Act 2010 whether or not the UK Government elects to recognise Scottish GRCs obtained under the reformed system in the other nations of the UK.
* If it chooses to do so, two systems using different criteria for legal gender recognition will co-exist within Britain. Consideration will also need to be

given to the role of the existing system whereby GRCs secured in ‘Approved Countries and Territories’ are translated into their UK equivalents.

* If it chooses not to do so, practical difficulties or confusion are likely to arise in cross-border situations, such as where a person’s residence is in Scotland and the employer or service provider is in England, Wales or Northern Ireland; where a person qualifies for a Scottish GRC by virtue of having a Scottish birth or adoption certificate, but lives and works elsewhere in the UK; and whenever the sex discrimination provisions in the Equality Act apply.
* In all these situations, it may be difficult for trans people with Scottish GRCs to be certain of their legal status and rights. It may also present challenges for employers and service providers in England and Wales in determining a Scottish person’s legal sex, unless they ask the employee or service user to present their GRC or birth certificate – which many people will find intrusive or offensive (while also noting that many employers use other forms of identification that can be changed without obtaining a GRC, such as passports and driving licences). In some cases, it could constitute unlawful discrimination for a service provider or employer to request to see a GRC, given that other groups are rarely asked to meet a similar threshold.
* Enabling employers and service providers to navigate these issues will required detailed guidance, and would need to draw on case law that does not yet exist, to clarify how any dual legal processes should operate in practice.

The Commission’s view is that, before this legislation proceeds, the UK and Scottish Governments must work constructively together to minimise the risk of uncertainty and discrimination experienced by trans people – a marginalised group who already experience poorer outcomes in many areas of life – and other groups across Britain whose rights may be impacted by this change, while providing clarity for duty holders. The forthcoming process of parliamentary scrutiny of the Gender Recognition Reform (Scotland) Bill must also provide greater clarity on these points, and we plan to provide briefing to Members of the Scottish Parliament to assist them when the proposed legislation is debated.

**Specific matters within the draft legislation**

We will also provide briefing on specific proposals in the draft Scottish Government legislation, in particular on proposals to allow 16 and 17 year olds to change their legal sex. We recognise that 16 is the legal age of majority in Scotland in other areas, such as marriage and voting, and support in principle the rights of young people to explore their gender identity freely and safely.

However, while we defer to the Scottish Human Rights Commission (SHRC) on devolved issues, we note that the UN Convention on the Rights of the Child defines anyone under 18 as a child. Our role requires us to consider the implications of the proposals for the rights of children and young people in England and Wales, including 16 and 17 year olds with Scottish GRCs in other parts of the UK.

We have also considered the [interim review](https://cass.independent-review.uk/publications/interim-report/) of gender identity services for children and young people by Dr Hilary Cass, which recommended that fundamental reforms were needed in how such services are provided in England and Wales. It informed the decision to close the Tavistock clinic in London and calls to close the equivalent provision in Scotland, the Sandyford clinic.

The Commission remains wholly committed to protecting the rights of trans people, including through use of our enforcement powers to tackle discrimination and harassment and by helping improve the evidence base to drive meaningful action on barriers they face. The wider public debate on sex and gender-based rights continues to evolve, not least as key concepts are tested in court, and we will contribute to a respectful and constructive debate on issues that continue to divide opinion. We stand ready to work productively with both the UK and Scottish Governments on our many shared goals to make Britain fairer.

I am writing in parallel to the Chancellor of the Duchy of Lancaster and Minister for Equalities, the Rt Hon Nadhim Zahawi MP. This letter is also copied the Scottish Human Rights Commission.

Yours sincerely,

Baroness Kishwer Falkner
**Chairwoman
Equality and Human Rights Commission**