

Dear MSPs

26 October 2022

Sex Matters is a human rights organisation campaigning for clarity about sex in law, policy and language. We have a board and advisory group including lawyers, academics, professionals and activists.

We are writing to you in advance of tomorrow's Stage one debate on the Gender Recognition Reform (Scotland) Bill to share our grave concerns about its implications for the integrity, cohesiveness and foreseeability of the law in Scotland and across the UK.

It is a fundamental principle that the law must be intelligible, clear and certain. As Lord Bingham of Cornhill observed in *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307, para 34:

*"The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law."*

There are dozens of laws and regulations across many aspects of life which relate to the two sexes, using the words man, woman, male, female, father and mother, and associated concepts such as same-sex, single-sex, opposite-sex, heterosexual and homosexual. These words need to be clearly understood, without confusion or embarrassment, and we have published a short guide to sex and the law, in ordinary language, which we are enclosing.

Some laws that relate to the sexes are reserved to the UK, and some are devolved. But the facts of biology and the underpinning human rights are not subject to national borders.

The Gender Recognition Act 2004 was brought in following two European Court of Human

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Rights rulings in 2002 (*Christine Goodwin v the United Kingdom* and *I v the United Kingdom*) concerning respect for the private and family life under Article 8 of the European Convention on Human Rights, in relation to post-operative transsexuals.

In *High Court of Northern Ireland Application for Judicial Review by JR111* [2021] NIQB 48 (paras. 31 and 135) Mr Justice Schofield describes a gender recognition certificate as conferring “a major change in the status of the individual in the eyes of the law...” and said it accepted the UK government’s position that when someone obtains a GRC this is a

*“significant and formal change in their status with potentially far-reaching consequences for them and for others, including the State.”*

The GRA 2004 provides for a strictly limited group of people, under medical supervision and with a diagnosis of gender dysphoria, to obtain a GRC. This in turn enables them to change the sex recorded on their birth certificate, lawfully claim to be the opposite sex in some situations, and to avoid disclosing their sex via administrative systems. Legislators who set the criteria for obtaining a GRC anticipated that while this would undermine the integrity of those systems, it would be to a tolerable degree, given the specific characteristics and small numbers of people involved.

Article 8 reflects a qualified right, which must be balanced in any particular situation with the rights of others. Exercise of the right can be constrained “**in accordance with the law** and where this is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” (Article 8(2))

The phrase “in accordance with the law” includes the requirement that the law be understandable and foreseeable, not uncertain and capricious. Courts and legal experts must be able to interpret and apply legislation in a way that is coherent and predictable to all involved.

Courts, public authorities and citizens need to be able to understand what words and categories mean. Does the word sex in a particular piece of legislation refer to biological sex, or sex by virtue of a certificate?

The meaning of the terms man and woman, male and female has been subject to legal consideration in recent years, resulting in some clarification (see *Forstater v CGD Europe* [2021], *McConnell v The Registrar General for England and Wales* [2021] and *For Women Scotland v The*

*Lord Advocate & Scottish Ministers [2022] CSIH 4).*

**However there remains differences of opinion.** The Equality and Human Rights Commission interpret the effect of the GRA 2004 read together with the Equality Act 2010 as meaning that trans people are “treated in line with their legal sex.” However, this is hard to reconcile with wording such as sex discrimination includes “less favourable treatment of a woman... because she is breast-feeding” (S13 (6)). The EHRC’s interpretation would mean that a “trans man” with a GRC would lose protection from sex discrimination in relation to fertility, pregnancy and breastfeeding. The Scottish Government has taken the same position about the definition of sex in its revised statutory guidance under Section 7 of the Gender Representation on Public Boards (Scotland) Act 2018. This is being challenged in a second judicial review by For Women Scotland.

Lord True and Mark Spencer MP<sup>1</sup> in a statement to the House of Lords and House of Commons 23rd May 2022 stated that while section 9 of the Gender Recognition Act 2004 provides that a reference to a “woman” in legislation, without more, will include someone who is a woman by virtue of a certificate, and will exclude someone who is a man by virtue of a certificate, **this may not be the desired result for any particular piece of legislation.** They said that legislative drafting should reflect policy intent, and that clarifying language will be included in new laws to make clear whether the GRA 2004 applies or not.

The Gender Recognition Reform (Scotland) Bill would introduce a third possibility to the meaning of sex, in existing and new legislation in Scotland and across the UK; sex as modified by a Scottish Gender Recognition Certificate, based on an entirely different set of criteria to the GRA 2004.

While the Scottish Government maintains that the Bill merely simplifies the process for applying for a Gender Recognition Certificate (GRC) in fact **it removes the process and changes the criteria.** As the policy memorandum states:

*“...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.”*

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<sup>1</sup> Spencer and True (2022). [Review of legislative drafting Statement to Parliament 23rd May 2022.](#)

If the Scottish Parliament passes a law which modifies the meaning of words related to the two sexes in other laws, including the Equality Act 2010, that will fundamentally undermine the ability of legislators to make clear laws, or to clarify existing ones, judges to interpret them coherently, or citizens to understand what they mean. This undermines the integrity, cohesiveness and foreseeability of the law in Scotland and across the UK.

Equal opportunities remains an area reserved from devolution under the Scotland Act 1998. The Gender Recognition Reform (Scotland) Bill is vulnerable to legal challenge on the basis that it overreaches devolved competence. The Bill also creates consequences that will engage fundamental human rights:

- Removing foreseeability of UK laws that relate to sex engages **Article 8**.
- Making it difficult for people to freely express their thoughts and beliefs and to secure their own family life, sexual consent and bodily privacy engages **Articles 3, 8, 9 and 10**.
- Making the Equality Act unintelligible and uncertain in relation to the protected characteristic of sex engages **Article 14**.

We urge you to ask questions about whether these legal issues, and to vote against this Bill if the answers you get are inadequate.

Yours sincerely,



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