

SEX MATTERS WELCOMES UK GOVERNMENT DECISION TO BLOCK SCOTTISH GENDER RECOGNITION REFORM BILL

For immediate release

17th January 2023: Human-rights organisation Sex Matters welcomes Scottish Secretary Alister Jack's order under Section 35 of the Scotland Act 1998 preventing the Gender Recognition Reform (Scotland) Bill from receiving Royal Assent.

We are particularly pleased that the government has recognised that changing both the size and the nature of the cohort in possession of a gender recognition certificate (an official document that changes a person's sex for some legal purposes) will **exacerbate problems with the existing regime**. This was intended to make provision for a tiny number of people with a rare medical condition, not to replace the concept of sex in law with self-declared "gender identity".

We also welcome the UK government's recognition that it is not just the strict legal effects of the GRR Bill that matter, but also its **potential to cause real-world harm** by creating fear and uncertainty well beyond its legal effects.

After the GRR Bill was passed in Holyrood on December 22nd, the UK government had a three-way choice:

1. Do nothing, and allow the bill to go forward for Royal Assent unhindered.
2. Refer the bill to the Supreme Court under Section 33 of the Scotland Act on the basis that it relates to reserved matters (matters on which the Scottish Parliament is not entitled to legislate), or is contrary to the UK's obligations under the European Convention on Human Rights.
3. Make an order preventing the bill from going for Royal Assent because it contains provisions that will have an adverse effect on the operation of the law as it applies to reserved matters.

The main effect of the GRR Bill is to alter the eligibility requirements for receiving a GRC. Currently these requirements are the same across the UK, and are as set out in the Gender Recognition Act 2004. They include:

- having received a medical diagnosis of gender dysphoria
- providing evidence of having "lived in the acquired gender" for a minimum of two years
- being at least 18.

The Gender Recognition Reform Bill amends the Gender Recognition Act by:

- removing the requirement to have received a diagnosis of gender dysphoria
- lowering the minimum age from 18 to 16
- reducing the period during which an applicant must have lived in their acquired gender from two years to three months (or six months for applicants aged under 18)

- removing the requirement to provide any evidence (beyond a statutory declaration) of having lived in the acquired gender
- removing the requirement to satisfy a panel that the requirements have been met.

Alister Jack has opted for the less radical option of an order under Section 35. Although this has been described as the “nuclear” option, it really isn’t.

In responses to questions in the House of Commons, and in a written statement, the Secretary of State has pointed out that:

- the GRR Bill will create a twin-track system under which UK GRCs have effect UK-wide, but Scottish GRCs have effect only in Scotland
- the impacts of the GRR Bill on the operation of the Equality Act will erode safeguards for women and girls
- the GRR Bill creates a significantly increased scope for fraudulent applications for GRCs.

Administrative upheaval

Mr Jack said that the GRR Bill does not (and could not) produce GRCs that have effect other than in Scots law, and warned of the chaos that would result from a system in which a person may be a man in Scotland but a woman in England and Wales, or vice versa. Tax, benefits and state pensions are all managed by integrated UK-wide systems, and the difficulties of devising administrative systems that can cope with people who simultaneously have one sex in one part of the UK and the other in other parts will be immense.

Widespread harms

Mr Jack argued that the removal of safeguards and consequent expansion of the category of those who can apply for Scottish GRCs will exacerbate problems that already exist under the UK-wide GRC regime, and create new ones.

He pointed to particular difficulties created by the Scottish bill for single-sex clubs and associations, which, as he rightly said, can lawfully exclude people on grounds of sex, but not on grounds of “gender reassignment” (one of the protected characteristics in the Equality Act, which applies broadly to people who assert trans identities).

The notice uses bland administrative language, speaking of “the effect of its requirements on single-sex associations, who will be required to accept, without discrimination, members from a new, larger and different cohort”. What this means is that the GRR Bill contains nothing that would stop the “new, larger and different cohort” – for example, men who cross-dress for erotic purposes – from demanding access to women-only clubs and associations.

The obvious conclusion to be drawn from these effects is that the GRR Bill also engages the Article 11 right to freedom of association. But the Secretary of State did not follow this line of reasoning to its logical conclusion, namely that the bill is incompatible with Convention rights, and therefore with the UK’s obligations under international law. Such reasoning would require a

reference under Section 33. But the government is instead taking the less confrontational Section 35 route.

Twin-track system?

The Secretary of State's reasoning takes as its starting point that Scottish GRCs will not have effect on the rest of the UK. We think that is far from obvious, and may need to be resolved in court in due course, if the GRR Bill becomes law. But we agree that a dual regime is certainly possible – and that it would cause chaos.

What happens next?

The Scottish Government is near certain to seek judicial review of the Order. In theory, that process could go on appeal to the Inner House of the Court of Session (the Scottish equivalent to the Court of Appeal), and then to the Supreme Court. But given the constitutional significance of the questions, it is more likely that it will be referred by the Court of Session directly to the Supreme Court.

We would have preferred to see a direct challenge to the lawfulness of the Bill under Section 33, because we think that it infringes Articles 10 and 11 (and perhaps others) of the European Convention on Human Rights, and makes such more fundamental changes to the operation of the Equality Act that it could properly be said to “relate to” equal opportunities. But we are delighted that the practical consequences of the gender-recognition regime will now receive a full and detailed airing in the Supreme Court.

Maya Forstater, Executive Director of Sex Matters, said: “Blocking the GRR Bill was absolutely the right decision. The process whereby it was passed in Holyrood was deeply troubling. Individuals and groups seeking to provide evidence of its harmful effects on women and children were sidelined; proponents of gender self-identification, which the government in Westminster rejected in 2020 after consulting widely, were listened to uncritically.

“The UK government has a nationwide remit to protect human rights, as well as a duty to stop devolved lawmaking from creating malign cross-border effects. We are delighted that the issues caused by conflating immutable, binary sex with self-declared gender identity will now be considered in court.”

Notes for editors:

About Sex Matters

Sex Matters is a human-rights organisation co-founded in 2021 by Maya Forstater, who is its director, to campaign for sex-based rights. It lobbies for clarity on sex in law and

institutions; publishes research, guidance and analysis; supports and mobilises people to speak up; and holds organisations accountable.