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Your ref: 847Robison

21 February 2022

Dear Kishwer,

Thank you for your letter of 4 February.

While your prompt response was helpful I would welcome the further information sought in my last letter, dated 31 January. In that letter I asked for a more detailed explanation of the evidence base, consultation activity and legal considerations that informed EHRC's significant policy change on gender recognition reform. As I pointed to in my letter, as recently as May 2021 the EHRC was describing gender recognition reform as one of its key policy priorities, saying that "a de-medicalised system to change legal sex will better support trans people to live their lives free from discrimination".

Your letter of 4 February does not provide the clarification required so I must ask you again to set out the basis for EHRC's change in position.

Your letter reaffirms EHRC's duty to protect trans people from discrimination and harassment, and I am grateful for this. In order to uphold this duty, it is important that you clearly set out why you do not consider the Gender Recognition Act 2004 requires reform, when only nine months ago you were advocating for changes, specifically to address discrimination against trans people.

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Evidence from consultations

The evidence that you refer to in your letter consists of public consultations, most of which took place well before your briefing for the Scottish Parliament elections in May 2021 where you set out that gender recognition reform was a key policy priority. The two Scottish Government consultations closed in March 2018 and March 2020. The UK Government LGBT survey closed in October 2017 and its consultation closed in October 2018. Independent analysis reports show that nearly two-thirds of respondents to the UK Government consultation (64.1%) said that there should not be a requirement for a diagnosis of gender dysphoria in the future. In the first Scottish Government consultation a majority of respondents, 60% of those answering the relevant question, agreed with the proposal to introduce a self-declaratory system for legal gender recognition. The LGBT survey showed that of trans respondents who were aware of the legal gender recognition process, but had not applied for a Gender Recognition Certificate, only 7% said that this was because they were not interested in getting one. Much more common reasons included that they did not meet the requirements for the current process (44%), finding the process too bureaucratic (38%), or expensive (34%).

Analysis reports on those consultations were published online, and presumably informed the EHRC's position at the time that the current system required reform. I would ask you to set out in detail why EHRC is now using this as evidence that the current system "provides the correct balanced legal framework that protects everyone", as you said in your 26 January letter.

You have referred to the EHRC's own [consultation](#) on its draft Strategic Plan for 2022 to 2025, which ran from August to September 2021, as evidence for your significant policy change. I would be grateful if you could direct me to any published analysis or summary of this consultation and outcomes, or an indication of how the draft Plan has been updated following consultation.

I note that the draft Strategic Plan that was consulted on makes no reference to the process for applying for legal gender recognition. Other than listing the protected characteristics under the Equality Act 2010 the draft Strategic Plan appears to make no specific mention of LGBT rights or protection, therefore I would be grateful if you could elaborate on how the outcome of this consultation has informed your policy change.

If this EHRC consultation, which did not relate specifically to this issue, is one of the key pieces of evidence on which you have changed your position on gender recognition reform, I would urge you to publish information about the outcome of the consultation as soon as possible.

Scotland committee advice

In your letter you say that the EHRC Board decisions on these issues were unanimous and drew on the advice of the statutory committees in Scotland and Wales.

As part of explaining the basis of these decisions, and helping us and others understand why the EHRC has changed its position so significantly, I invite you to publish this advice and any records of discussions of these issues. It is particularly important to see the role played by members of the Scotland Committee, which is responsible for making sure the EHRC's work

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meets the needs and priorities of people in Scotland, and the weight that was given to their views.

The effect of the law

Your letter offers the following comment on the polarised nature of the debate: “The divergence of views is in part related to different understandings of the effect of the law, and in part to the impact of potential changes to the law, including on service providers and data users.”

I would be grateful for an explanation of what differences of understanding of the effect of the law, and what potential changes, this is referring to so we can ensure we have considered them.

If this relates to the effect of the Equality Act 2010 and the exceptions relating to single-sex services and gender reassignment, this is exactly the issue on which the UK Parliament Select Committee on Women and Equalities has been calling on the EHRC to publish further guidance since 2018.

The Select Committee’s [report](#) states: “We condemn the negligible engagement with our inquiry by both the Government Equalities Office Ministers and the EHRC, and the delay in response to the consultation which further polarised and toxified the debate...

“We reiterate our predecessor Committee’s recommendation for better guidance on the single-sex and separate-sex exceptions and urge the Government Equalities Office and Equality and Human Rights Commission to publish this guidance, using worked examples and case studies from organisations providing these services. We also strongly recommend that the Government Equalities Office and Equality and Human Rights Commission urgently develop and publish guidance, in collaboration with trans rights groups, on best practice to provide trans and non-binary inclusive and specific services, including specifically relating to domestic violence and sexual abuse.”

I am grateful that you have undertaken to write to me with an update on the publication of this guidance, given the EHRC’s role in addressing the differences in understanding which you have highlighted as a reason for not proceeding with reform.

I would also add that nothing in what we are proposing changes the single-sex exceptions in the 2010 Act, which is generally reserved. As the EHRC pointed out in response to the consultation on our draft Bill: “The operation of these exceptions does not depend on the existence of a GRC, and they would continue to operate as they do now – and have done since 2010 – should the draft Bill become law. We note that the EA 2010 became law several years after the GRA, and had the intention been for a GRC to be a pivotal factor in the operation of the exceptions, the EA 2010 could have been drafted as such – but it was not.”

Definitions of terms in law

In your letter you call on the Scottish Government to “take the opportunity to clarify certain definitions in law”. Can you clarify what specifically you are calling for.

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We have already stated that we have no intention through the Gender Recognition Reform (Scotland) Bill to change the legal effect of possessing a Gender Recognition Certificate, as set out in section 9 of the Gender Recognition Act 2004, or of altering how “gender” and “sex” are referred to in that section. If we were to do so that would lead to differing effects between Scotland and the rest of the UK.

If you are calling for changes to the Equality Act 2010, which covers “sex” and “gender reassignment” as protected characteristics, that would be an issue for the UK Government, as that legislation is largely reserved.

Other EHRC policies

Finally, in my letter I asked whether the EHRC had similarly changed its position on any of its other key priorities. In your letter you state: “We will also continue to engage with you if and when other relevant policy positions are being developed or reviewed”.

I do not find this reassuring and I ask you to set out what policies and principles the EHRC still holds to.

Yours sincerely,



SHONA ROBISON

**CABINET SECRETARY FOR SOCIAL JUSTICE,
HOUSING AND LOCAL GOVERNMENT**

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