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Kemi Badenoch MP
Secretary of State for Business and Trade, Minister
for Women and Equalities
House of Commons
London
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9 March 2023

Dear Kemi,

In giving evidence to the House of Commons Women and Equalities Committee on Wednesday 1 March you made comments in relation to the Gender Recognition Reform (Scotland) Bill and the UK Government's order under section 35 of the Scotland Act 1998. I would welcome clarification of some of your comments.

The transcript of the session reports your response to a question about what steps were taken by the UK Government during the passage of the Bill as follows:

"We had conversations with Scottish Ministers, but the template of interaction for when Bills are going through is that we in Westminster do not interfere. There is a limited scope for how much you can do without getting in the way. We believe in devolution, and we could see that there were very clear attempts across all parties within the Scottish Parliament to try to look at issues that were raised about the Bill and how it would impact the general UK settlement on the Gender Recognition Act.

"That should have been sufficient. We saw many amendments rejected which would have been quite helpful. I had a call with Shona Robison, and I know the Secretary of State for Scotland also had calls with his counterparts, where we expressed concerns about policy in general terms. But in terms of trying to intervene, to stop it getting to a section 35, that is the responsibility of the Scottish Government, not for us."

This is not accurate in terms of contact between governments during the passage of the Bill. There was only one meeting with UK Government Ministers during the passage of the Bill, which was the call between us to which you refer, which took place on 19 December 2022, in the final week of the Bill's passage. That meeting followed my letter to your predecessor Nadhim Zahawi of 21 October, to which you replied on 7 December seeking a meeting. There was further correspondence from you on 22 December seeking clarification on a specific point, which was resolved through an urgent response.

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It is not the case that the Secretary of State for Scotland had calls or meetings, or indeed any contact, with Scottish Ministers about the Bill during its passage. He first made contact through a letter on 16 January, after the Bill had been passed by the Scottish Parliament, and the day before he made the Section 35 Order. Could you therefore also clarify what “counterparts” you were referring to?

The Memorandum of Understanding between the UK Government and the devolved governments makes clear (in paragraph 27) that the use of section 35 would be “a matter of last resort”. It also sets out that, if the use of the power is being contemplated, “the UK Government will whenever practicable inform the devolved administration of its intentions in sufficient time to enable that administration to make any representations it wishes, or take any remedial action.” In this case, contrary to the MOU, the UK Government did not indicate it was contemplating using section 35 before the Bill was passed, including in our exchange of letters and meeting. There can be no responsibility on the Scottish Government to “stop it getting to a section 35” if there is no indication this is a possibility. The MOU is very clear that it is for the UK Government to make any such intention clear while there remains the chance to “resolve any difficulties through discussions” and potentially remedial action, that is *before* a bill has been passed by the Scottish Parliament.

I am particularly interested in your suggestion that specific amendments lodged, but not passed by the Scottish Parliament, would have been helpful in addressing your concerns. I would very much welcome further information on which amendments you are referring to as you did not mention any when we discussed the Bill at our meeting on 22 December, when all amendments were available.

You went on to say:

“Given that [the Scottish Government] have threatened legal action, anything I do could end up being relevant to a legal case. It is up to them to reach out and we have not had any representations on looking at the Bill. If they want to amend the Bill, they have plenty of time. There is no time limit to that.

“If they want to challenge the section 35, there is a time limit, but in terms of amending the Bill, the debate around this issue has been extensive enough that they will know what needs to be done. That is really making sure that the safeguarding elements are addressed, especially as they impact on the Equality Act 2010, which they do, as we put in the statement of reasons.”

It is not accurate to say that there haven’t been any representations from the Scottish Government in relation to the Section 35 Order. On 20 January I replied to the Secretary of State for Scotland’s letter of 16 January, offering a meeting as soon as possible. That meeting took place on 24 January and in that meeting I asked for clarification of what changes the UK Government is seeking to the Bill, and also suggested further engagement at ministerial and official level to work through the issues constructively. These offers were refused by the Secretary of State for Scotland, and he gave no further clarification of what changes to the Bill the UK Government is seeking, either then or since.

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Therefore it is not the case that the Scottish Government “will know what needs to be done” in terms of amending the Bill, especially since the UK Government’s Statement of Reasons suggests that *any* divergent process for gender recognition in Scotland would be at risk of the UK Government invoking Section 35.

I would therefore be extremely grateful for clarification from you of what amendments to the Bill, either those lodged but not passed during passage of the Bill or additional changes, the UK Government is seeking.

I am copying this letter to the Caroline Nokes, Chair of the Committee, and Alister Jack, Secretary of State for Scotland.

Yours sincerely,



SHONA ROBISON

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The Rt Hon Alister Jack MP
Secretary of State for Scotland
Dover House
Whitehall
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By email: secretaryofstate@ukgovscotland.gov.uk

12 April 2023

Dear Alister,

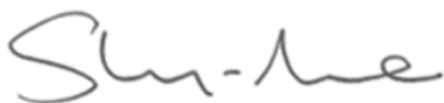
Further to correspondence between yourself and Shona Robison MSP, then Cabinet Secretary for Social Justice, Housing and Local Government, I write to inform you that the Scottish Ministers will shortly lodge a petition for judicial review of your decision to make an order under Section 35 of the Scotland Act 1998 to stop the Gender Recognition Reform (Scotland) Bill proceeding to Royal Assent.

The Order was made without any specific prior engagement or notification by yourself during the Bill process, and without any specific request for amendments to the Bill from any UK Minister.

Since the Order was laid, and despite requests, you have refused to provide any further clarification or engagement. We have offered to discuss specific changes to the Bill with you, but given that this offer has not been taken up, it is impossible to know what changes would satisfy the reasons you have given, particularly as you have stated that the existence of two different schemes within the UK is in itself problematic.

We have therefore been left with no reasonable option but to proceed with a legal challenge.

Yours sincerely,



SHIRLEY-ANNE SOMERVILLE

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