

## SCHEDULE 2

Article 4

### REASONS FOR MAKING THIS ORDER

#### **Identification of the modifications of the law as it applies to reserved matters**

1. The provisions of the Bill listed in Schedule 1 make modifications to the Gender Recognition Act 2004<sup>(1)</sup> (the “2004 Act”) as it applies to the reserved matters of “Fiscal, economic and monetary policy”, “Social security schemes” and “Equal opportunities”<sup>(2)</sup>. The modifications to the 2004 Act significantly alter how an applicant can be issued with a gender recognition certificate under Scots law and the process by which a person who has obtained overseas gender recognition is to be treated as if they had been issued with a full gender recognition certificate. Section 9 of the 2004 Act provides that where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender.

2. The 2004 Act applies to the reserved matter of “Equal opportunities” through its interaction with the Equality Act 2010<sup>(3)</sup> (the “2010 Act”). A full gender recognition certificate has the effect of changing the sex that a person has as a protected characteristic for the purposes of the 2010 Act<sup>(4)</sup>. This is subject to a contrary intention being established in relation to the interpretation of particular provisions of the 2010 Act.

3. The modifications of the 2004 Act also apply to the reserved matters of “Fiscal, economic and monetary policy” and “Social security schemes”.

#### **Secretary of State’s assessment of adverse effect on the operation of the law as it applies to reserved matters**

4. The Secretary of State believes that the modifications to the 2004 Act, as it applies to reserved matters, would have three categories of adverse effect on the operation of the law as it applies to the reserved matters identified. These are:

- (a) the impacts of the creation of two parallel and very different regimes for issuing and interpreting gender recognition certificates within the United Kingdom;
- (b) the impacts that removing safeguards could have on safety, in particular that of women and girls, given the significantly increased potential for fraudulent applications to be successful;
- (c) the impacts on the operation of the 2010 Act that result from the change to a person’s protected characteristic of sex, particularly given the expansion of the cohort of people able to obtain a gender recognition certificate.

5. The Secretary of State considers that each reason articulated individually amounts to an adverse effect which justifies the making of this Order.

#### **Adverse effects arising from the creation of different regimes within the United Kingdom**

6. A gender recognition certificate issued under the terms of the 2004 Act as it would be modified by the Bill does not have any legal effect other than in Scots law. An adverse effect arises from a general lack of clarity both for holders of gender recognition certificates and service providers, employers etc for whom it may be unclear what status a gender recognition certificate has in

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(1) 2004 c. 7

(2) Scotland Act 1998 (c.46), Schedule 5, Part II, Section A1 (Fiscal, economic and monetary policy), Section F1 (Social security schemes), Section L2 (Equal opportunities).

(3) 2010 c.15

(4) Section 11 of the Equality Act 2010 (c. 15) sets out the protected characteristic of sex.

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different contexts. The lack of clarity is exacerbated by the application of section 22 of the 2004 Act (Prohibition of disclosure of information).

7. More particularly, the Secretary of State considers there to be a particular adverse effect on the operation of the provisions of the 2010 Act where those provisions are applied to a scenario applicable to individuals in both Scotland and England and Wales. The adverse effects of having different regimes across the United Kingdom in relation to the 2010 Act include, but are not limited to –

- (a) single sex club or association: a single-sex club or association could have different membership in different parts of the United Kingdom;
- (b) the public sector equality duty: a cross-border public authority would have to apply the public sector equality duty differently as regards Scotland and England and Wales;
- (c) equal pay: an employer operating across the United Kingdom could have employees who could not use a colleague as a comparator in an equal pay claim if it were brought in Scotland but could do so in England (and vice versa).

8. The creation of a dual-system has serious adverse practical consequences on the operation of the law as it applies to the administration of tax, benefits and State pensions which are managed by integrated systems across the United Kingdom.

9. The Bill creates a diverging system for overseas citizens to obtain gender recognition certificates between certificates recognised in Scotland and in the rest of the United Kingdom. This increases the cohort of people who have or are treated as having a gender recognition certificate in Scots law for the purposes of the adverse effects described.

#### **Adverse effects resulting from increased risk of fraudulent applications**

10. The Secretary of State does not believe that the Bill retains or creates sufficient safeguards to mitigate the risk of fraudulent or malign applications and believes that the reformed system will be open to abuse and malicious actors. Adverse effects identified are of particular concern in relation to the operation of the 2010 Act provisions relating to sex-segregated spaces, services, competitive sports and occupational requirements. The Secretary of State considers there is a risk of people self-excluding from sex-segregated settings as a result of concern about the possibility of someone with malicious intent being able to obtain a gender recognition certificate.

#### **Adverse effects in relation to the operation of the 2010 Act**

11. The threshold for applications under the 2004 Act as modified by the Bill changes the cohort of people with gender recognition certificates in two substantial ways. It changes the nature of people eligible to apply and, in doing so, it is likely to significantly increase the number of people able to do so. An effect of the Bill would be that there is no longer significant control over who might be included in the group.

12. The Secretary of State considers that the creation of this new cohort of eligible applicants would adversely affect the operation of the following provisions of the 2010 Act –

- (a) Part 7 (Associations): the Bill significantly changes the profile and number of individuals that associations will be unable to exclude from membership on grounds of sex. Where an association had reason to exclude the opposite sex, it is reasonable to assume that a liberalisation of the process for changing legal sex will create new challenges, problems or concerns. The Bill changes the nature and level of expectations of single-sex associations as compared to those set by the 2010 Act when enacted. It may lead to associations being at greater risk of being found to be operating unlawfully or making decisions to cease operating because of the perceived risks. Potential founders of new such associations may not proceed.

- (b) Section 149 (Public sector equality duty): an increase in the number of people holding gender recognition certificates will make it more difficult to monitor UK-wide disparities between women and men or transgender and non-transgender people, if membership of those groups differs between Scotland and the rest of the United Kingdom.
- (c) Chapter 3 of Part 5 (Equality of terms): when a claimant brings an equal pay claim they must show that they have been paid less than a person of the opposite sex employed on equal work. Where an equal pay claim is brought by a claimant with a gender recognition certificate, or a comparator with a gender recognition certificate is used in the claim, an individual may have been treated as the opposite to their current legal sex for a significant proportion of their career. This may lead to the comparator test identifying an equal pay issue where one does not properly exist or failing to identify such an issue. An increase in the number of people holding gender recognition certificates may increase the incidence of this issue.
- (d) Provisions where exceptions apply for both sex and gender reassignment: the 2010 Act provisions for sex-segregated services, competitive sports and occupational requirements allow for the exclusion of people with the protected characteristic of gender reassignment where this can be objectively justified. Someone who has the protected characteristic of gender reassignment but does not have a gender recognition certificate could be subject to a blanket exclusion from these services, settings and roles on the basis of their legal sex. Someone who has a gender recognition certificate cannot be excluded on the basis of their legal sex, but can be excluded on the basis of gender reassignment if there is an objective justification for doing so. The expansion of the cohort of gender recognition certificate holders would result in more case-by-case decisions needing to be made. People's perception of whether a setting is likely to be biologically sex segregated will alter and they may be more likely to self-exclude as a result of that perception.
- (e) Part 6 (Education): the provisions relating to single-sex school admissions contain exceptions for sex discrimination. There is no corresponding exception for direct gender reassignment discrimination. It is not currently possible for the vast majority of school pupils to change their legal sex prior to leaving school. The Bill would modify the 2004 Act to allow persons aged 16 or 17 to apply for a gender recognition certificate and this would result in school pupils being more likely to obtain a certificate. Schools in Scotland would be required to apply provisions which had not been intended to apply to pupils who had changed their sex by virtue of having obtained a gender recognition certificate. Schools in England and Wales could be left in doubt about the reliability of a birth certificate issued by the Registrar General for Scotland as documentary evidence of a 16 or 17 year old's legal sex in England and Wales.