

SCHEDULE 2

REASONS FOR MAKING THIS ORDER

Adverse effects in relation to the operation of the 2010 Act

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

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by the Registrar General for Scotland as documentary evidence of a 16 or 17 year old's legal sex in England and Wales.