



F/T: 0300 244 4000  
E: scottish.ministers@gov.scot

The Rt Hon Alister Jack MP  
Secretary of State for Scotland  
Dover House  
Whitehall  
London  
SW1A 2AU

24 January 2023

Dear Alister

Thank you for your letter of today, following our earlier telephone conversation.

I am disappointed both by your decision to make a section 35 order and by your approach to engaging with the Scottish Government, and the Scottish Parliament, having made the order.

In our call, the only options you offered were that the Scottish Government revises the Bill – at which point you will consider whether to revoke the section 35 order; or the Scottish Parliament agrees to withdraw the Bill; or there is legal action to challenge your order. In your words: “Address it, or fix it, or drop it or take us to court.”

Your letter confirms that you will not engage with the Scottish Government in any way on the issues you have set out in the section 35 order, short of Scottish Government accepting there are adverse effects on reserved law and bringing forward a revised bill for your officials to consider - without specifying what these revisions could be. So you will not discuss in any way evidence for or against your reasons, any mitigations of the adverse effects you claim, or potential compromises or alternative approaches.

Your proposal that the Scottish Government revise the bill for your consideration, and present this to the Scottish Parliament as the only option acceptable to the UK Government, ignores the democratic role of the Scottish Parliament in legislating on devolved issues. I understand you and Kemi Badenoch have also turned down invitations to attend committees of the Scottish Parliament to explain an order that you have made to veto a bill passed by the Parliament.

I set out to you during the call and in my previous letter the engagement that has taken place on the bill between the UK and Scottish Governments, in particular the absence of discussion on a section 35 order as envisaged in the Memorandum of Understanding between the governments. The MOU says (at paragraph 27):

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Although the UK Government is prepared to use these powers if necessary, it sees them very much as a matter of last resort. The UK Government and the administration concerned will therefore aim to resolve any difficulties through discussion so as to avoid any action or omission by the devolved administration having an adverse impact on non-devolved matters. If formal intervention should become necessary, 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.

It is clear that this guidance refers to engagement well before the 28 day period following passage of the bill to which you made reference during our call, and in your letter. The MOU is also clear that issues which might lead the UK Government to consider using powers under sections 33 and 35 should be raised for discussion before the bill passes in the Scottish Parliament.

Your unwillingness now to engage with the Scottish Government on your section 35 order, and ways to address your concerns, continues your inadequate approach to finding a constructive way of working together on this issue and this bill, recognising the differences but respecting devolved, democratic decision-making.

To take one example, you have claimed the existence of two separate regimes for obtaining a Gender Recognition Certificate would create adverse effects for reserved matters. This is a change of view by the UK Government since 2018, as we discussed. It is also an argument that might have ramifications beyond the immediate issue of gender recognition reform. This is therefore an issue that would benefit from discussion for additional clarification of your specific issues, and what changes might address your claimed adverse effects.

My starting position today was to, in good faith, discuss a way we could resolve your issues and see if there was a way forward. At the very least I would have expected a discussion on the type of amendments that might address your concerns - without impacting on the principles of the bill - so we could consider with other parties in Parliament. Your flat refusal to engage in such discussions, together with the lack of previous engagement before vetoing a bill passed by the Scottish Parliament, leaves me with no reason to believe that you are in any way interested in finding a way, as the MOU puts it, "to resolve any difficulties through discussion so as to avoid any action or omission by the devolved administration having an adverse impact on non-devolved matters".



**Shona Robison**

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St Andrew's House, Regent Road, Edinburgh EH1 3DG  
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