OFFICIAL REPORT
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Equalities, Human Rights and Civil Justice Committee

Tuesday 31 May 2022

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 31 May 2022

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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
16th Meeting 2022, Session 6

CONVENER

*Joe FitzPatrick (Dundee City West) (SNP)

DEPUTY CONVENER

*Maggie Chapman (North East Scotland) (Green)

COMMITTEE MEMBERS

*Karen Adam (Banffshire and Buchan Coast) (SNP)
*Pam Duncan-Glancy (Glasgow) (Lab)
*Pam Gosal (West Scotland) (Con)
*Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jen Ang (JustRight Scotland)
Sandy Brindley (Rape Crisis Scotland)
Malcolm Clark (LGB Alliance)
Dr Kate Coleman (Keep Prisons Single Sex)
Lucy Hunter Blackburn (MurrayBlackburnMackenzie)
Naomi McAuliffe (Amnesty International Scotland)
Catherine Murphy (Engender)
Susan Smith (For Women Scotland)

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 31 May 2022

[The Convener opened the meeting at 09:30]

Interests

The Convener (Joe FitzPatrick): Good morning, and welcome to the 16th meeting in 2022 of the Equalities, Human Rights and Civil Justice Committee. We have received no apologies.

I welcome to the committee a new member, Rachael Hamilton, who replaces Alexander Stewart as one of our Scottish Conservative members. I thank Alexander Stewart for his valuable contribution to the committee's work over this parliamentary year and his contribution to the work of the predecessor Equalities and Human Rights Committee. We look forward to working with Rachael.

Our first agenda item is to ask Rachael Hamilton to make a declaration of interests.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): Thank you, convener. I have no interests to declare.

Gender Recognition Reform (Scotland) Bill: Stage 1

09:31

The Convener: Our next item is to continue taking evidence on the Gender Recognition Reform (Scotland) Bill.

I welcome to the meeting our first panel. Lucy Hunter Blackburn is from MurrayBlackburnMackenzie; Susan Smith is co-director of For Women Scotland; Dr Kate Coleman is director of Keep Prisons Single Sex; and Malcolm Clark is head of research at the LGB Alliance.

I refer members to papers 1 and 2.

I invite Lucy Hunter Blackburn to make a short opening statement.

Lucy Hunter Blackburn (MurrayBlackburnMackenzie): Thank you for having me here. Good morning.

Last year, in the High Court of Northern Ireland, Mr Justice Scoffield described a gender recognition certificate as conferring on someone

"a significant and formal change in their status with potentially far-reaching consequences for them and for others, including the State."

Those far-reaching consequences flow mainly from two sections of the Gender Recognition Act 2004, which have not been mentioned by name in the committee's sessions so far. Section 9 sets out the effect of a GRC. It provides that a person's acquired gender "becomes for all purposes" in law—except in the two defined circumstances—their sex.

Section 22 puts in place a stringent privacy protection. It creates criminal offences for disclosing any information about a person's past identity or current status as a GRC holder, if that knowledge is gained in an official capacity—again, with limited exceptions.

A key question for the committee is how the two sections interact with the Equality Act 2010. We and others sent in a joint briefing to you about that, following comments that were made in your first public meeting on the bill. We highlighted that the legal position here is unsettled and that several influential organisations believe that the GRC changes somebody's sex under the 2010 act, which has implications for how organisations can practically provide single-sex services in line with the law.

I will mention one example from our briefing. In 2017, a Scottish Government email recorded a member of the Equality Network's staff telling civil

servants that the use of sex and gender "interchangeably" in section 9 was "intentional" and should be retained. The wording's purpose was to make sure that GRC holders would not be prevented from accessing services based on their acquired gender. In a further internal note, a civil servant recorded that the Government was keeping the wording of section 9 "for policy reasons".

It is clear, therefore, that in developing the bill, the Scottish Government and the Equality Network have viewed GRCs as much more than

"just a piece of paper".

That was in 2017.

More recently, the Scottish Government has demonstrated its belief that a GRC changes someone's sex for the purpose of the 2010 act, and Susan Smith will say more about that.

In public, the Government and its supporters may maintain that GRA reform, as proposed in the bill, will not affect the operation of the 2010 act, but the committee needs to dig much deeper into that.

We are, of course, at a disadvantage here, because the minutes of the committee's private briefing with civil servants in March do not record what they said to you about this. Think of it this way. If a GRC is a sort of key, and you are going to hand out lots more copies to a more diverse group, the first job of legislators is to be really clear about what that key could unlock.

Meanwhile, there is no dispute that all GRC holders and, in the future, all those who claim that they have already obtained gender recognition overseas, will benefit from section 22. The committee therefore needs to consider what it means to extend such strong protection to a much larger and more diverse group, including young people who are still in school, based purely on self-declaration. Three years ago, the Scottish Government said that it would tighten section 22; instead, the bill extends its reach.

Our written evidence discusses those points and others, including cross-border effects, the far-reaching provisions for overseas gender recognition, and—very importantly—how the Government has handled its assessment of the potential impacts on women.

Mr Justice Scoffield said that a GRC is a

"major change in the status of the individual in the eyes of the law."

Understanding fully the nature of that change, and anything about it that is uncertain, should be the committee's starting point.

I speak based on 20 years in policy making—most of that time was in what is now the Scottish Government, and in the years since I have been researching public policy—so I am serious when I say that the process leading to the introduction of the bill has been exceptionally poor and is a recipe for bad law. I hope that the committee will now correct rather than repeat those mistakes.

Susan Smith (For Women Scotland): Despite a legal fiction that was enacted 18 years ago, outwith science fiction people cannot change biological sex. The Scottish Government claims to understand the difference between sex and gender, but it has used legislation and policy to erase sex or to conflate it with gender.

For Women Scotland recently won a case in the highest court in Scotland over the definition of "woman" in the Gender Representation on Public Boards (Scotland) Act 2018. In the ruling, the judges said that

"provisions in favour of women ... by definition exclude those who are biologically male."

It was determined that the definition in the statutory guidance based on self-identification should be struck out. However, the Scottish Government's proposed correction is to define "woman" on the basis of section 212 of the Equality Act 2010 plus those who are in possession of a GRC who have changed their legal sex to female. In short, while ministers and civil servants may swear blind to the committee that a GRC does not change a person's sex under the Equality Act 2010, that act suggests that they do not really believe it.

As Lucy Hunter Blackburn said, the GRC conflates sex and gender. Meanwhile, confusion and co-ordinated campaigns have undermined how single-sex spaces operate. That is reflected in submissions that the committee has received, in policy documents and in workplace guidance. Many people have the law hopelessly tangled. While the Scottish Government is not prepared to defend women's rights, reform will make things immeasurably worse. Another bad law will, like others before it, end in the courts.

By doing away with all eligibility criteria, the bill, in effect, opens up the process to everyone. There is a frankly naive expectation that nobody will act dishonestly and that solemn declarations are the most binding of magic. Although much has been made of the vulnerability of trans-identified people, there has been little recognition that the people who will suffer under the loss of single-sex spaces—which providers will find increasingly difficult to operate—are genuinely some of the most marginalised and abused people in Scotland today.

While the committee recently took private evidence from selected individuals, some of which related to experience rather than to application of the law, I listened to heart-rending accounts of women who have self-excluded from women's services, and evidence of how trauma has ripped their lives apart. Those women have then been demonised, sometimes by the very organisations that were supposed to protect them, and they have been betrayed by those who should have supported them. If lived experience matters to the committee, theirs should, too.

Front-line workers and board members have told us that the women at the top of the funded organisations did not consult independent centres before declaring for self-ID. Many try to maintain a de facto single-sex policy in spite of that.

We are concerned that the committee set the schedule for witnesses before studying the evidence, and that there have been gaps in previous panels. For example, there was no mention of the Cass review or detransition during the panel about young people.

I am sure that the committee will reference international best practice. We would like to understand what it thinks that means. We know that previous witnesses referred to "The Yogyakarta Principles"—a document that signally fails to consider women—in their submissions. Human rights lawyer Professor Robert Wintemute was a co-signatory to the principles. He has written to the committee offering to give evidence, but has not been called. If the committee really wishes to understand the matter, that seems to me to be a shocking omission.

There has been much talk of misinformation and abuse. We agree that there has been, but it does not come from the people who are sitting in front of the committee now. Sadly, some misdirection has come from Government-funded organisations that enjoy privileged access to ministers. Abuse of our organisations has come from people who work in Parliament, from members of cross-party groups, and was even published last week on the Scottish Parliament website. Disgracefully, one of the organisations that is on the next panel put out a hugely inappropriate comment about this session in its newsletter last week. Meanwhile, ordinary women who are shut out of the process have to protest outside Parliament in order to be noticed.

The committee has much work to do, and biased or partial evidence collection will not make a febrile situation better. Women still suffer disproportionately from domestic violence. We are overlooked in medical trials. Our health conditions are taken less seriously. We are paid less and take on more caring responsibilities. Our sex, not our clothing preference or our pronouns, is a factor in that. By erasing and confusing sex in law and policy, the Scottish Government will not resolve any of those inequalities, but will make it considerably harder to monitor injustice and to fight for change.

Dr Kate Coleman (Keep Prisons Single Sex): Keep Prisons Single Sex campaigns for the sex-based rights of women in prison to single-sex accommodation and same-sex searching. We also campaign for data throughout the criminal justice system to be collected on sex registered at birth. We work closely with current and former female offenders throughout the United Kingdom, which informs our work.

We are opposed to the bill and have concerns regarding many of its proposals. My focus today is the likely impact of the bill on women in prison and on data collection. The bill makes bold substantive changes to the operation of the Gender Recognition Act 2004, to the intended function that a gender recognition certificate should serve and to the criteria that applicants must fulfil. The impact will be seen across the UK, beyond the borders of Scotland. This is not merely a matter of administration.

Earlier this year, Lady Dorrian observed that the protected characteristics in the Equality Act 2010 operate in parallel, and that the protected characteristic of gender reassignment, as a single category with no subdivision according to sex or to acquired gender, is distinct from the protected characteristic of sex. She also affirmed the importance of separate legal protection for biological women under the Equality Act 2010. However, the direction of movement for prisons policy is to treat a transgender prisoner with a GRC differently from a transgender prisoner without one—that is to say, as a prisoner of the sex corresponding to their acquired gender. That is certainly the position of the Ministry of Justice.

The Scottish Prison Service's "Gender Identity and Gender Reassignment Policy" is currently under review and may well be revised to also give priority status, as it were, to GRC holders. Policy decisions that refuse to allocate and manage GRC holders on the basis of their acquired gender might be subject to challenge, including in the courts. We have certainly seen that south of the border, in the English courts.

A system of self-ID removes any variable differentiation of trans women with a GRC from males, aside from their having completed a legal process. That is particularly relevant for prison allocation and management. We work with partner organisations across a number of jurisdictions, including Ireland, the USA and Canada. Wherever allocation is on the basis of self-ID it is, frankly, disastrous for women in prison. When prison services privilege GRC status, the possibility is

dramatically reduced of case-by-case flexibility in management of decisions that can be made for prisoners.

At this point, I note that the gender recognition panel already conducts no risk assessment when considering an application, nor is there any requirement for medical treatment or surgical reassignment. This past weekend's media reports of management of a prisoner with intact male genitalia who was able to have sex with a female prisoner at HMP Bronzefield in the female estate is one such example.

Sex registered at birth is fundamental to understanding offending and to service provision in the criminal justice system. The importance of sex registered at birth as an explanatory variable, and the difference in rates of offending for males and females, mean that the allocation of even one or two cases of male offending to the female subgroup on the basis of the suspects' acquired gender can have a significant impact on the data.

I note that there is no evidence at all that the rate of offending for trans women conforms to the rate of offending for females. Rather, the evidence indicates that the male rates of offending persist.

09:45

The bill will have a substantive cross-border effect on policy and practice, and there are urgent questions to be asked about the status of confirmatory GRCs throughout the United Kingdom, and the limits of automatic recognition of overseas GRCs.

Consideration must also be given to the legal implications of creating what will be a two-tier system in prisons in England and Wales. Prisoners who are Scotland-born and are housed in the prison estate in England and Wales will be able to obtain a GRC with relative ease by meeting criteria that are set at a considerably reduced threshold compared to those that apply to people born in other regions of the UK, who will have to complete a more lengthy, involved and arduous process in order to obtain a GRC and to be managed as a prisoner of the sex that corresponds to their acquired gender. Arguably, that will change the operation of the Ministry of Justice's prisons policy by introducing differential treatment on the basis of place of birth. The possibility of legal challenges by non-Scotland-born prisoners must be considered.

We do not agree that, in respect of data collection or service provision, sex registered at birth should be overwritten by legal gender, gender reassignment or self-declared gender identity. Those are questions of fundamental and far-reaching importance. We cannot shy away from them or from using the language that is required to make clear the enduring importance of sex in these areas for fear of accusations of transphobia.

I welcome the opportunity to answer questions and to discuss the matter further.

Malcolm Clark (LGB Alliance): Many people are surprised when they hear that a group that represents lesbians, gays and bisexuals is opposed to the bill. That is because they have been told that laws that enshrine gender identity are just the latest front line in the battle for gay rights. The tragedy is that nothing could be further from the truth. The bill sends a message that the biological sex that we are matters less than the gender identity that we feel. However, lesbians and gays are defined as—and legally protected as—people who are same-sex attracted. If you replace the fixed definable reality of sex with the indefinable, fluid and vague concept of gender identity, the rights that we fought for for decades will be erased. If sex does not matter, gays do not matter.

This is not a philosophical debate. Leading trans activists already argue that the whole idea of homosexuality no longer makes any sense in a world that believes in the gender spectrum. We are here because we beg to differ.

The practical everyday effect of that erasure of reality is to tell gay men that they are attracted to people with female bodies as well as male bodies. On lesbian dating sites, women who insist that they do not want to be contacted by trans women—that is, people with male bodies—are ejected from the site. It has been estimated that 40 per cent of people on some lesbian dating sites are males who say that they are women. This bill amplifies that pressure, that bullying and that homophobic denial of the reality of gay people's lives.

It is bad enough for adult lesbians and gays, so imagine what it is like for a teenager coming to terms with their sexuality. Imagine what it is like to be told, as a young lesbian, that you are equally attracted to women with male bodies as female bodies, or to be told, as a gay boy, that some gay men have vaginas, and you will be attracted equally to female bodies as male bodies. That is what is being taught in Scottish schools. No wonder there are soaring numbers of children who are so confused and troubled that they are being referred to gender identity clinics with gender dysphoria—there has been a 4,400 per cent increase in such referrals in 10 years, among girls in particular.

The sad thing is that we know that the majority of kids with dysphoria eventually grow out of it. We also know that the vast majority, if left alone, will grow up to be happy young lesbians, gays and

bisexuals. That is why we have a particular concern about lowering the age at which somebody can get a GRC to 16. If the state steps in to validate the confused feelings of a 16-year-old girl who thinks that she is a boy, it risks crystallising an identity that is just temporary. It also makes it harder for her to revert to feeling like a girl, now that she has been told by the state that she really is a boy.

More than 50 females under 18 were approved for double mastectomies in Scotland in the past decade. If you give girls aged 16 certificates saying that they are boys, how many more teenage mastectomies will be approved? The lowering of age combined with the removal of any medical oversight means that we will now be taking away the chance for young people to be questioned by doctors about their decision and to have their gender dysphoria explored.

Gender identity was a concept that was popularised by the discredited psychologist John Money in the late 1950s. He provided no proof for it and as yet, despite more than five decades of research, no convincing scientific evidence has been produced to support the idea. Self-ID in the bill is the ultimate validation and normalisation of the notion of gender identity, but it was only seven years ago that Stonewall and other LGBTQ+ organisations began to press for the change and for self-ID. Surely the bill represents an unseemly rush to legislate, not least because it would overturn the common sense of millennia that there are two sexes—male and female—and that that is hard wired into human beings as our shared simplest understanding of our human nature.

What is worse is that the bill is not the end of the gender identity lobby's campaign. The lobby will need more issues to raise funds for in the future, and it will have more demands to make a fuss about in order to justify its existence. I therefore just say to the committee: beware. The insertion of self-identification into our laws is just the beginning. It will be used to trigger a whole new series of ever stranger demands that will chip away at gay rights, the interests of women, children's mental health and the public's tolerance. Yet here we are, preparing to enshrine this contested, controversial and unproven notion in the laws of Scotland—the land of the enlightenment.

The Convener: Thank you, Malcolm. We will now move to questions, starting with Maggie Chapman.

Maggie Chapman (North East Scotland) (Green): Good morning, panel, and thank you for joining us. Thank you, too, for your opening statements and the evidence that you submitted in advance.

I am interested in exploring a couple of areas, but I want first to pick up on the issue of gender dysphoria and the bill's removal of the requirement for such a diagnosis. With regard to the discussion on whether gender dysphoria is a mental illness—the World Health Organization and the United Nations have made it quite clear that it is not—can you say a little bit about the evidence or, in your view, the lack of evidence on gender dysphoria?

I ask Lucy Hunter Blackburn to start.

Lucy Hunter Blackburn: Let me just take a step back. When we met civil servants, we asked them what options analysis there had been, when they were looking at the bill, of alternatives to taking out the diagnosis of gender dysphoria, and we were surprised to learn that they had not looked at any alternatives that retained any form of medical gatekeeping. Instead, they had gone straight to the self-ID model. It bothered me, as a former civil servant, that, over the period, there had been no options appraisal of the different ways of approaching the matter.

There are various issues to discuss with regard to medical gatekeeping, but we should talk about the relationship between the two tracks that Malcolm Clark pointed out—the medical world and the legal world—and the idea that the two are quite separate. On the original Gender Recognition Act 2004 act, Mr Justice Scoffield said:

"the requirement for a diagnosis and more especially the requirement"

for

"a medical member"

of the panel

"demonstrates that Parliament"

in 2004

"considered it proper to have some read-across between the two processes"

in the

"way of professional clinical involvement in each."

I looked at some interesting stuff from Denmark, which we can send to the committee—this picks up on Malcolm Clark's point about what happens when you start to decouple the two things. In 2018, Dietz—who writes, I should say, very much from the perspective of someone who supports self-declaration—argues that in Denmark there has been a problem: people feel that the approach has not worked well because of the decoupling. In Denmark, there is now a desire to make access to the medical treatment pathways self-declared, too. As you know, at the moment, access to the national health service depends on a diagnosis. On the decoupling of law and diagnosis, Malcolm is exactly right: the committee needs to watch the

idea of having two parallel systems that work together. Denmark is really interesting; we will send you the material.

From our point of view, the medical gatekeeping connects the two and avoids that dislocation. It also creates oversight. If you have some medical oversight—as you still have for passports, of course—then you bring in an external third party. That deals with an awful lot of the concerns about self-declaration that people are raising.

I will pass over to other panel members.

Maggie Chapman: Susan Smith, in your opening remarks you spoke about the eligibility criteria more broadly—that is, not only those that are associated with gender dysphoria. Will you say more about the criteria that you consider to be legitimate and not legitimate, and why?

Susan Smith: To an extent, that is not really for us to say. We are not here to determine what the eligibility criteria should be; we are here to say that you should not remove them in their entirety, which is what the bill does, in effect.

You picked up on what the WHO has said. It is interesting that the WHO has slightly decoupled from the American "Diagnostic and Statistical Manual of Mental Disorders", which still links gender dysphoria to a mental health condition. Usually, the two groups work together, so there is a tension in that regard. The WHO's 11th revision of the International Classification of Diseases—ICD-11—moves gender incongruence from the heading of behavioural disorders but keeps it as a condition—in this case, a condition related to sexual health. The authors of a paper who sat on the working group stressed that a diagnosis of gender incongruence must be maintained in order to preserve access to health services for those who need them. That takes us back to the potential decoupling of medical services. It is important that even the people who are for taking it out—the WHO—really think that the diagnosis is important.

That was borne out in a case that was heard recently in the European Court of Human Rights, which decided that a requirement for a diagnosis was

"aimed at safeguarding the interests of"

the person applying a gender change,

"to ensure that they do not embark unadvisedly in the process of legally changing their identity",

and that the proportionality test should be applied, to ensure that rights granted to a particular group would not interfere with the rights of wider society.

Maggie Chapman: You talk about the shift from mental disorder to sexual health condition—I think that that is the language that the WHO uses. Why, then, would there be a psychiatric assessment? Why would it be problematic to remove the psychiatric assessment element?

Susan Smith: Because even the people who have moved it are saying that you need to maintain that diagnosis.

Maggie Chapman: But sexual health is different from mental disorder.

Susan Smith: Yes, of course.

Lucy Hunter Blackburn: It is important—

Maggie Chapman: Sorry, but I want Susan to answer the question, given that she raised the issue in her evidence.

Lucy Hunter Blackburn: My letter to the committee points out that the GRA does not describe gender dysphoria as a psychiatric diagnosis. That is the only point that I wanted to make. Nothing in the GRA, as drafted, ties it to being a psychiatric diagnosis—although there is an issue about a definition as a "disorder" in section 25, which Mr Justice Scoffield criticised. I just want to make that point. We are here to talk about the GRA, and there is nothing in the act that requires gender dysphoria to be regarded or conceptualised as a psychiatric diagnosis. That is the only reason I wanted to intervene.

Susan Smith: That is the crucial point. It does not matter what heading the diagnosis is under—the diagnosis has to remain.

10:00

Maggie Chapman: Kate Coleman, you mentioned in your opening statement that the requirement of gender dysphoria should remain. Is your view aligned with what Lucy Blackburn Hunter and Susan Smith have just said?

Dr Coleman: I defer to their knowledge of how things currently operate.

The policy question of the appropriate management of cohorts of prisoners who have a diagnosis of gender dysphoria, or who have gender dysphoria but have not obtained a formal diagnosis, and the particular vulnerabilities that they may be experiencing in the prison estate is urgent but it is entirely separate from the question of which cohorts of prisoners have a legitimate entitlement to be housed in the female prison estate and to be managed in accordance with the risk assessment processes and search protocols that are in place for female prisoners. I agree that there is an urgent issue regarding the vulnerability of prisoners, which we know extends beyond those cohorts, unfortunately. However, I am focusing on legitimate entitlement and the impact on the female prison estate.

I can give an example. Someone who is now a prisoner in Ireland was refused a diagnosis of gender dysphoria at a clinic in England and so was unable to pursue a GRC through that route, but they then, on the basis of self-ID, were able to obtain a GRC in Ireland, and the impact of the management of that prisoner in the female estate has been catastrophic for women in prison.

Maggie Chapman: Malcolm Clark, you also mentioned the need to retain the concept of gender dysphoria.

Malcolm Clark: I understand that the 2004 act included the need for a gender dysphoria diagnosis and various barriers to giving a GRC in order to protect the public. It was sold to the public as an assurance that not just anybody could get a GRC.

I agree with my colleagues in the meeting. The Parliament is considering giving GRCs to 16 to 18-year-olds, so I would have thought that some sort of medical or psychological barrier would be helpful. I have never heard anyone say that getting the medical diagnoses that have been provided up to now in the GRC process is really traumatic, dreadful or intrusive. As I understand it, it is based on answering simple questions. I would have thought that, at the very least, something needs to be retained for 16 to 18-year-olds, such as asking them whether they are sure and to explore why they feel as they do. If gender dysphoria is an issue, it should be explored in a therapeutic and caring way.

Maggie Chapman: Can I just clarify that you do not consider the current process to be demeaning and intrusive?

Malcolm Clark: The people I have spoken to—I know many transsexual and transgender supporters of LGB Alliance—guffaw at the nonsense that it is “demeaning”. No one ever puts any flesh on the term “demeaning”. What is the process? A couple of questions. Given that you are about to change one of the most fundamental legal definitions of an individual in society, are we not allowed to ask a couple of questions?

Maggie Chapman: My final point links something that Malcolm Clark has just said to something that Lucy Hunter Blackburn said in her opening statement. Malcolm, you just said that the proposals under the Gender Recognition Reform (Scotland) Bill would mean that anyone could get a GRC. Lucy, in your opening remarks, you talked about opening it up to a more diverse or wider group. What do you mean by a wider group?

Lucy Hunter Blackburn: That is a very important question. The larger, more diverse group is one of the issues presented by the bill.

It is being presented as though we are changing the admin for a set group, but, when we look back to 2004, we see that the group that was legislated for was expected to be the 5,000 or so people that it defined. As I have said, Justice Scoffield went through the background to the 2004 act in his interesting judgment, setting out how the legislation was very much intended for that very tightly defined group. The EHRC has made the same point.

Once you drop the threshold, one of the problems with removing any medical oversight, however you construct that, is that you open things up to anyone who is willing to make the declaration. That is a problem for your safety threshold—actually, it is not a safety threshold, because some people might be entirely genuine, so it is not just about saying that that can be abused.

Literally, you are writing a piece of law—because the law is what is on the page; it is not what is in anyone’s head at the time. All that is required—

Maggie Chapman: Sorry, but can I just ask what you mean when you talk about the wider group?

Lucy Hunter Blackburn: I am talking about the wider group of people who are not dysphoric and who, at the moment, are not able to acquire a GRC because they would not be able to—

Maggie Chapman: Meet the criteria.

Lucy Hunter Blackburn: —get a diagnosis.

The committee has a serious decision to make. At this point, a very helpful question to have in mind is: what is the act for? The 2004 act is being repurposed to do a different job. When you read the *Hansards*, it is very clear that the legislation was originally designed for a small, targeted group of people who were envisaged as being long-time transitioners, having made quite major changes and needing extremely acute privacy protections. However, what you are hearing about and what is being laid out in front of you—I have read the evidence to the committee and I have listened to your sessions with great interest—is a really different conceptualisation of the population of interest to politicians, and it covers a much broader group of people.

You have received written evidence in which people say that they do not think that there should be the acquired gender period, because people might not be able to live in their acquired gender. People are saying that they should be able to apply for a GRC regardless of whether they have made changes. That point is in the Scottish Parliament information centre briefing, but people make the same points in some of the written

evidence that you have received. I think that Ellie Gomersall made the same points, too. The trans umbrella population that is being talked about now is radically different in its composition—it is bigger and more diverse. That is where we are.

Malcolm Clark: One of the problems that I have always found when debating the issue in Scotland is that the law creates a giant loophole, which I call the Alex Drummond problem. You might know that Alex Drummond is a 6 foot 2 Welsh lesbian with a beard who looks like a man. He says that he is queering the idea of gender by the fact that he knows that he looks like a guy and he has a big beard. I always say that, once you have opened GRC to a wider population and the public know that you have done that and that that wider population might include 6 foot 2 blokes—people who look like blokes with big beards—how are the public supposed to know, when a 6-foot-2 person with a beard, who looks like a guy, walks into a girls changing room, whether that person has a GRC and whether they identify as trans? There is a huge loophole, and it would be great if, after four years of the bill being talked about, politicians would finally consider how they could close that loophole.

Maggie Chapman: Thanks. I will leave that there.

The Convener: We need to watch the time. A couple of folk want to ask a quick supplementary question. I ask that you try to keep things tight, because we need to ask the rest of the questions.

Rachael Hamilton: Am I right in saying that Lucy Hunter Blackburn said that no alternatives to self-declaration had been explored?

Lucy Hunter Blackburn: That is correct. That is what civil servants told us.

Rachael Hamilton: What do you believe could be an alternative? Do you have a view on that, other than your black-and-white position on the removal of the requirement to provide medical evidence?

Lucy Hunter Blackburn: In looking at the issue as a policy process, I would have looked at the complaints about the process. It is important to put on record that, if you have had a piece of legislation in place since 2004, it is completely normal to come back to that legislation, look at how it is functioning and talk to the groups who are using it. However, that did not happen. I would look at the issues and I would start picking them off one by one. When we first started looking at the issues, we looked at complaints about the fee and we were the first people that we know of who pointed out that there are regulatory powers to drop the fee, which the Westminster Government then did.

There are things that you can do to reduce the amount of medical evidence that is needed. For example—I perhaps disagree with Malcolm Clark here—section 3(3) of the 2004 act requires a person, even if they have not had any medical treatments, which they are not required to have under the act, to submit very detailed medical evidence of what treatment they have had or might have. That looks very difficult to justify, and I can see why people might find that intrusive.

There are things that you could do to streamline the act. You could answer some of the concerns that people have without jumping to a solution. The Government jumped to a solution—it started with an answer and worked back from it; it did not start with the problem and work towards a solution. You could also look at different options. Passports, for example, still require a doctor's letter, and one of the curious things about this law is that it jumps past the passport system. No one ever discusses that point, yet everyone is happy with the passport system, which involves medical oversight. A lot of territory has gone unexplored because the Government jumped forward just after it started the process. All the middle ground that one might consider, around how one might reform or simplify the process, is missing.

Rachael Hamilton: I have a comment, convener—

The Convener: I think that we will have to stop there, but there will be time for you to come back in.

Rachael Hamilton: Okay.

The Convener: Pam Duncan-Glancy is next.

Pam Duncan-Glancy (Glasgow) (Lab): I thank the witnesses for their contributions so far.

I have a small supplementary on what was said earlier about the decoupling of law and diagnosis and medical treatment. In particular, Lucy Hunter Blackburn said that in Denmark people were moving to self-declaration for medical treatment. What is the system of medical care in that country in comparison to here? I cannot imagine a situation here in which someone could approach a medical professional and ask them to do something, and they would just do it.

Lucy Hunter Blackburn: It is not so much about what is happening on the ground but about where the discussion and the politics are going. The description of the decoupling is a really interesting piece, and I will send it to the committee. It basically talks about a decoupling of the embodied and the mind. The law has done the head, but the medical system is still asking for a diagnosis for the body, and the complaint is that those are now out of sync. When we consider

where the law is going, there is a pressure for the medical system to lead.

In our evidence, we have cited the evidence that Dr Richard Byng gave to the previous committee hearings on a different topic. There are GPs and medical practitioners, who we urge you to speak to as part of your inquiry, who are very worried about the almost reverse pressure that you would create for people, and young people in particular, to turn up for treatment, saying, "I have this piece of paper."

Susan Smith: As Lucy Hunter Blackburn has said, some of the medics—and, in fact, Greater Glasgow and Clyde NHS Board—pointed out that they were worried that giving people a piece of paper that legally showed the other sex would increase pressure on services, and the last thing that anybody wants to do is to increase the pressure on NHS services. I know that some of the medics who had worked at the Tavistock clinic had many concerns about that, so they would be good people to explore that point with further.

Pam Duncan-Glancy: Forgive me, convener. I am slightly confused because, on one hand, Malcolm Clark in particular seems to be saying that it is important for young people to have medical input and therapy, but on the other hand, you feel a bit concerned about pushing people towards medical intervention. Which is it?

Malcolm Clark: There is a theme, whether in the conversion therapy ban, which is now being promoted through the Conversion Therapy (Prohibition) Bill, or here in this bill, of chipping away at the authority of the medical profession. I know that it is a different bill, but if the Conversion Therapy (Prohibition) Bill were to go through, you would essentially have self-diagnosis—the whole point of the conversion therapy ban is that any child or person can go to a doctor and say, "I am X," and the doctor must affirm it.

The strange thing is that this bill is erasing gender dysphoria, which is a huge, and growing, mental health crisis in the country. We think that resources should be poured into it and that there should be more doctors, psychiatrists and therapeutic care. The bill is removing an opportunity to insert that.

Pam Duncan-Glancy: I have to say that I think that there should be more support. However, on Lucy Hunter Blackburn's point, and considering what is in the bill specifically, which part of the bill erases gender dysphoria?

Malcolm Clark: The fact that there is no medical—

Pam Duncan-Glancy: The bill does not erase gender dysphoria but just takes out the process—

Malcolm Clark: Almost everybody who supports this bill—any of the organisations, such as Stonewall Scotland—wants to decouple gender identity and gender dysphoria. They might not say it here, but that is what they say elsewhere and in public. The idea now is that gender identity has nothing to do with gender dysphoria, even though the two were originally linked. In essence, the bill will take away the opportunity for a diagnosis of gender dysphoria, although I think that that would be useful for people.

The Convener: I have to move on to the next questioner, who is Pam Gosal.

10:15

Pam Gosal (West Scotland) (Con): I thank the panel members for their opening statements and their written evidence. I will touch on something that youse have all mentioned, which is single-sex spaces. Two weeks ago, we heard from the EHRC that individuals who acquire a GRC can access single-sex spaces for women and girls such as toilets, changing rooms, refuges, hospital wards and many more places. We also heard that the exclusion of such individuals with a GRC would be direct discrimination, which would have to be subject to justification.

Opponents of the bill have expressed concern—we have also heard concern from today's witnesses—that self-declaration will open up the process to abuse from bad-faith actors. Malcolm Clark gave a good example when he talked about the 6 foot 2 person. What concerns do the rest of you have? Will you go into a bit more detail about what the provisions could mean? What are your concerns about people who access single-sex spaces?

Susan Smith: That is a key point, which comes back to what Lucy Hunter Blackburn said about the provisions in the GRA on secrecy and non-disclosure. It is incredibly difficult—it is impossible—to find out whether someone has a GRC, unless they volunteer that information.

Providers rely on honesty on the part of a person who turns up. The issue goes back slightly to the point about opening out. Previous witnesses have talked about how people do not need to have had any medical intervention and so on to get a GRC, but people do not want to be outed. That seems slightly self-contradictory. There is a huge elephant in the room when we are talking about people who are clearly one sex or the other but who have legal documentation that says that they are the opposite sex. It is impossible for anybody to point that out without risking some kind of legal sanction.

Single-sex service providers can impose blanket bans. There have been discussions about

operating case by case, but the 2010 act says that a service can impose a blanket ban. What is not being looked at is how a service can do that in practice. We have tracked back through conversations, and we know that organisations argued when the then Equality Bill was being considered in 2009 and at later Westminster committee meetings in 2015 that single-sex exemptions and the genuine occupational requirement were discriminatory and should be taken out of the legislation, because those organisations wanted everything to be on the basis of gender identity and saw no need for sex provisions.

That change did not happen, and it is interesting to see that the argument subsequently changed—people went from saying, "These exceptions are awful because they're excluding people whose gender identity is different from their sex," to arguing that the exceptions make no difference in practice. That was an interesting and revealing turnaround.

We now see in NHS policies and even in the Scottish Women's Aid policy the argument that a GRC changes someone's sex for the purposes of the genuine occupational requirement. We would say that that is wrong, but that is out there in policy documents.

That is why it is critical, before you change any of this, to work out exactly where the exceptions can be applied, what they mean and, crucially, how an employer that is recruiting somebody for a female role, perhaps to provide intimate care, can ensure that a person really is a woman. Otherwise, you are, unfortunately, opening up this situation. NHS Lothian actually said a couple of years ago that, because of the conflict between the two acts, it could not guarantee that people would get female carers.

Pam Gosal: I have a supplementary question on that, before I come back to Lucy Hunter Blackburn. I want to talk a bit about religion. You just mentioned carers. There is an issue that deeply concerns me as someone from an Indian religion. I will have to word this in the right way in order not to offend anybody here. For example, if my mother goes to the doctor, she will ask for a woman. She is old-fashioned—she does not know any different. She will ask for a woman doctor. If she did not ask, she might get a doctor who was trans and she would not know, which would break a lot of religions, especially the Muslim religion. Many Muslims and Indians have voiced questions to me about what the position would be with regard to single-sex spaces. Do we change our religions in that case? What are your feelings about that, Susan?

Susan Smith: That is a very important point. Very sadly, and disgracefully, it is one that has been completely overlooked. Obviously, religion is also a protected characteristic.

Shonagh Dillon, the chief executive of Aurora New Dawn, which is a centre down south that aims to tackle violence against women, did a big piece of work with Muslim women. She spoke to a lot of them and found that there are real fears and real concerns. We have heard similar concerns from women in Glasgow who have started self-excluding from the gym. Those women went to check whether the gym could guarantee that the women-only sessions would be women-only sessions and they were told that the sessions were held on the basis of self-identification. People say that it is a remote possibility, and it probably is—it might not happen. However, the fact that it could happen has meant that those women have started to self-exclude. They are being pushed out of the public sphere. The saddest thing about all that, as I keep coming back to, is that it hurts the most vulnerable women. It hurts women from ethnic minorities, women who have been victims of abuse and working-class women the most, because they are the women who will suffer when all of that is removed.

Those Muslim women have said that they are frightened of speaking up because they see the abuse that women get anyway, which is compounded by the fact that people tell them that their religion is, in and of itself, a bigoted religion. I have seen that. I have seen it recently with the very brave author, Onjali Raúf, who stands up for refugees and who has stood up to say that single-sex spaces are important for Muslim women. The abuse that she has received has been sexist, Islamophobic and racist. It is appalling that that has been allowed under the cover of this movement. Those horrific abuses have been almost encouraged, frankly. Yes, it is a big issue.

Pam Gosal: Thank you, Susan. It does break your religion—I can tell you that. It breaks your religion completely, because women would not be allowed to be seen by a doctor of the male sex at all—or by a trans person, although whether we could be seen by a trans doctor is not actually in any of our scriptures. Therefore, it is good that you have covered that. It is something that people have been asking about. Lucy, do you have any views on that?

Lucy Hunter Blackburn: I suppose that it is about bringing the discussion back to the legal puzzle and how you fix that in the bill. We are here to try to help to make good law. It is important to say that.

The two issues are how the bill changes your sex in law, which then gives you rights—we have sent in a briefing—and section 22, which goes back to the point about discrimination and changing your sex. If you have a change of sex in

law, you can bring direct discrimination cases, which changes things. That changes your abilities—it is much easier to bring a direct discrimination case, and providers will take that into account. Providers look at the risk analysis of how they are going to set their policy. They will look at what represents the bigger risk—a direct discrimination case brought by a trans person who now has a female GRC or an indirect discrimination case brought by, say, some Muslim women who were being discriminated against or women in general saying that they will not be able to use the space. Providers will always worry more about the direct discrimination case.

That is the first point about the GRC—if it has that effect on the Equality Act 2010, which it is important to say is a contested point. The committee is hearing from people who disagree with us who are telling you that there is no effect. It is a very messy situation, and it is very unsatisfactory that you are being asked to legislate in that context.

That is the first bit of the jigsaw puzzle. The other bit is, as Susan Smith said, section 22, which was designed for a very small group—people sometimes use the analogy of a witness protection programme, and it is like that. We know that there are circumstances in which, if someone has a GRC, their files are kept in a locked cabinet with those of people who are on the witness protection programme; it is not just an analogy.

The puzzle that the committee needs to solve is how to construct a bill that, in some way, modernises the system and deals with some of the complaints and concerns, but also deals with this jaggy edge and asks whether we can do things that protect single-sex spaces in law and in practice, because section 22 is a bit of a headache there. Clever law can do all kinds of things.

I am conscious that there has not been much discussion of section 22 in the committee's meetings and I do not know what you are planning to do about that. It is a huge bit of the bill, and we will come back to it when we talk about the international stuff.

Somewhere in the mix, we need to clarify the law and the issues of what happens on the ground, what the right decision is in any particular context, and how we manage spaces so that everybody can use them, because that matters. Should we have sessions some of which are definitely single-sex women ones and some of which are done on identity? All kinds of thing are possible in the world if we think cleverly and compassionately about what everyone needs.

The risk here is that the bill is a bit of a blunt instrument. The old GRA was designed for one particular purpose. If you want to open it out and use it for something a bit different, you have to think quite hard about how you get those bits and pull them back into something tidy.

Pam Gosal: Kate and Malcolm, is there anything that you want to add?

Dr Coleman: Yes. First, I thank you for raising the issue of religion. As an Orthodox Jewish woman, I see that women in my community are going to be unprotected, so thank you for raising that.

I would like to discuss allocation to prisons based on the policy. I am going to defer to the analysis of Lucy Hunter Blackburn and Susan Smith of the legal situation. When we look at what is happening in prisons in England and Wales, we can see that 94 per cent of trans women—male prisoners—are held in the male estate, but we have to break that down into the two different cohorts of those who have a GRC and those who do not.

There is only one prisoner who does not have a GRC, and that represents less than 1 per cent of that total population. Less than 1 per cent of those without a GRC are held in women's prisons.

Of those who have a GRC, 90 per cent are held in women's prisons. Although a GRC does not automatically guarantee allocation to the female estate, how the policy operates and what the policy objectives are mean that it drastically increases someone's chances of a request to transfer being successful.

I hope that the committee will appreciate that I cannot share this information in a public setting, but I am happy to share it in a private setting, off camera. Looking at the difference between those cohorts and the information that I know, it can be seen that the allocation decisions are made purely on the basis of GRC status. We know that there are prisoners with a GRC who have been convicted of the most serious violent and sexual offences against women and who have intact male genitalia. They pose a real risk.

There is the question of allocation, and then there is the question of management and the fact that, when a policy privileges GR status in that way, any ability for the Prison Service to conduct case-by-case assessments and use flexibility in how it manages that cohort of prisoners is drastically reduced.

We can look at the example that was reported in the media last weekend of a male-bodied trans woman prisoner with a GRC, with intact male genitalia, who, it was reported, had consensual sex with a very young female prisoner. If that prisoner had not had a GRC, they would probably not have been in the female estate to start with, because things such as anatomy are taken into

consideration when making those decisions. Now, where is that prisoner to be moved to? If that prisoner had not had a GRC, they would have been moved back to the male estate as clearly posing an unmanageable risk that puts women who are in prison at risk of pregnancy, for a start. However, because that prisoner has a GRC, they cannot be moved from the estate. They have to be managed in the female estate, so that prisoner has been moved to another women's prison to temporarily be housed in the unit known as E wing, which is the transgender unit—I say "transgender unit" in quote marks. That is where male prisoners—trans women with a GRC—who pose a level of risk that cannot be managed in the main population of the female estate are held temporarily, before being assisted in progressing back to the general population in the female prison estate.

10:30

The reason for that is that this group of prisoners—trans women with a GRC; male prisoners—are risk assessed as women. They are risk assessed against the standards that are in place for female prisoners, using the comparator that is in place for female prisoners. That means two things. First, it means that the set of risk assessment tools that can be used for them is only that which can be used for female prisoners, which is particularly relevant when we look at sexual offenders. Secondly, it means that one of those prisoners can be transferred to the male estate only if that self-same decision would also be made for a woman. That does not happen. We know that that does not happen.

I will outline some of the things that women in prison, who I speak with on an almost daily basis, have told me. There have been instances of flashing and sexual exhibitionism, publicly describing masturbatory fantasies and intent, grooming of young and vulnerable women and engaging in sexual relations, threats of physical violence, and sexual assault and threats of rape. If a woman—a female prisoner—did any of those things, yes, she would be treated appropriately. She would be sanctioned, she might be placed in segregation and she might be moved to another prison in the female estate, but she would never be moved to the male estate. Because we are treating this cohort of prisoners as if they are literally women, we cannot make that decision to move them to the male estate.

On the language around this issue, trans women are not women when it comes to this. They have male rates of offending. They very often have intact male genitalia. They have the strength of a man. They have the appearance of a man to these vulnerable women in prison. When it comes to policy decisions, having a GRC really seems to matter, and women suffer.

Lucy Hunter Blackburn: Could I say something about the Scottish situation, which is different?

The Convener: Karen Adam has a question, so maybe you could come in on that. I am conscious that there are still a fair number of areas that we are hoping to cover.

Karen Adam (Banffshire and Buchan Coast) (SNP): Dr Coleman, you spoke about sexual activity in prison. Do you believe that it is unusual to have consensual sex in prison?

Dr Coleman: I think that the power relations and the climate of what goes on in prisons would make it difficult to be able to distinguish consensual sex from coerced sex. I think that we would all be naive if we did not think that sexual relations go on between prisoners, but, clearly, when a male-bodied prisoner, with intact male genitalia, has any form of sex—consensual, coerced or outright violent rape—there is an additional risk, which is the risk of pregnancy, and the strength differential that persists between males and females will factor into that, so I think that we are talking about something different.

A female prisoner who has sex with another female prisoner is not going to be moved to the male estate, so that same decision ends up being made for a trans woman prisoner with a GRC. That prisoner can also not be moved to the male estate, because they have to be managed in the same way, even though the nature of the activity will inherently be different.

Karen Adam: You are speaking about safeguarding and you believe that the bigger risk is from a person with a penis. How does that come into play when there are safeguards for any kind of violent or threatening behaviour? I have met people in a prison in my constituency, and there is safeguarding in place there for anyone, regardless of gender. That would come into play anyway.

What about the risks to trans women in male prisons?

Dr Coleman: My experience is that those with a GRC are treated very differently from those without a GRC in relation to safeguarding, risk assessment and allocation, and that those decisions leave women in prison at risk.

Karen Adam: Are they treated differently because they have a GRC?

Dr Coleman: They are treated differently if they have a GRC; if they have a GRC, they are treated as if they are women in every single respect.

Karen Adam: Where is that evidence? Is it anecdotal? Do you have that evidence?

Dr Coleman: No; that is in the MOJ policy.

Karen Adam: Okay.

Dr Coleman: The Scottish Prison Service policy operates on the basis of the gender in which the prisoner currently lives. No preferential status, as it were, is given to those with a gender recognition certificate. However, this is the first policy revision since 2014, when the policy came into place. During that period of time, there have been three policy revisions south of the border by the MOJ, and the direction of movement is away from allocation on the basis of self-declared gender identity and towards making decisions that treat those with a gender recognition certificate as if they are of the sex that corresponds to their acquired gender, but to have—

Karen Adam: That is the point of a GRC.

Dr Coleman: But there is no flexibility within that. The ability to make flexible case-by-case decisions, which the Scottish Prison Service claims to be able to do, is removed when you privilege GRC status, and that presents a risk, as we can see from the situation south of the border.

The Convener: Seamlessly, I will bring in Lucy Hunter Blackburn, who has been keen to come in. A lot of the work that Dr Coleman has talked about is in relation to the estate in England, and Lucy wants to talk about the Scottish Prison Service. Please be brief, because we are short on time.

Lucy Hunter Blackburn: Yes; I am conscious that we put a lot in our evidence. At the moment, the SPS does not deal with GRC holders differently. Dr Coleman is right to say that the MOJ has a policy that, on paper and in practice, is very GRC focused, and that is based on its reading of the law.

The SPS is reviewing its policy. We met it recently and it has not really thought about the issue. At the moment, the SPS policy is GRC blind. That is true, and that is what you will hear from your colleagues locally—I know that. I suspect that the SPS would like to go on being GRC blind, and we would all like it to have a GRC-blind policy, so that when decisions are made, the fact that a prisoner has gone through a legal process is not part of the picture and all that is looked at is the risk for everybody and the compassionate care of all prisoners. You will know that, because you deal with all the prisoners in your constituency.

One issue here is that although the SPS may revise its policy and try to keep itself GRC blind, it remains vulnerable to a legal challenge as the number of people with GRCs increases. There is data from down south, where there is better data on the issue, that shows that there is a disproportionate number of prisoners who say that they are trans. As you will know, there is a lot going on in prisons, and there are all kinds of reasons why prisoners might claim that, so we should look at that data very carefully and be very wary of it.

Karen Adam: Do you have that data? Could you share it with us?

Lucy Hunter Blackburn: Yes; we can send it to you. My point is that that data does not tell us anything about the trans population, but it might tell us something about the prison population.

The prison system has to be wary once it is possible for prisoners to get a GRC; at the moment, it is quite hard to get a GRC when you are in custody, for reasons that will be obvious to the committee from considering the bill and the current law. Once it is possible to self-declare, it looks as though it would be very easy for prisoners to get GRCs. Falsifying that would be very hard to do.

We are really worried. The SPS told us that it has never had a GRC holder that it knew of. In other words, the issue has never come up, which is fine, and it has been able to operate its policy. If the threshold is dropped, we all think that one of the subpopulations that will apply for GRCs more quickly are people who are in prison. They will see it as leverage, and it will be hard for the Prison Service to say, “You can’t have one.” That is our worry, but that is fixable in the bill.

Karen Adam: We trust the people who run the prisons and the governors to have—

Lucy Hunter Blackburn: We do—

Karen Adam: They have a lot of experience of providing safeguards.

Lucy Hunter Blackburn: We want their experience to drive this, but the problem is that, once you bring in the legal piece of paper and the change of status, all that experience can be overwritten by one court hearing. However, that is one of the easiest things in the bill to fix.

Karen Adam: Where would that legal challenge come from?

Lucy Hunter Blackburn: It would come from a prisoner. As a general group, prisoners are very litigious—there is a lot of litigation from prisoners.

Karen Adam: Has that happened?

Dr Coleman: We have seen that south of the border.

Lucy Hunter Blackburn: Yes, south of the border it has been very important.

Dr Coleman: We have seen a lot of cases.

Karen Adam: It has not happened in Scotland.

Susan Smith: It has happened in Ireland.

Dr Coleman: The point is that it will happen, once you have a GRC—

The Convener: I am sorry to interrupt, but there are too many people talking at once.

Lucy Hunter Blackburn: The point is that, at the moment, it is not an issue because the threshold for a GRC is high, so to get a GRC, prisoners have to have a diagnosis, but once the process is one of self-declaration, it will be much more accessible. The committee can fix that; it is one of the easiest things to fix. The bill could be amended to say that a GRC is not effective in prison allocation decisions. That would leave things back where we want them to be—in the hands of the people who make those decisions. It is a relatively fixable part of the bill.

The Convener: Okay. We have covered that issue. It was a useful discussion. That was in response to a supplementary question; I invite Karen Adam to ask her substantive question.

Karen Adam: When the Children and Young People's Commissioner Scotland gave evidence, he talked about the importance of autonomy for 16 and 17-year-olds. It is clear from your evidence and your opening statements that you are concerned about that. Do you believe that 16 and 17-year-olds know what gender they are?

Susan Smith: The problem with putting ages on anything is that it can be quite arbitrary. We know that there are areas where we allow 16-year-olds to do things, and there are other areas where we have more concerns. For example, a 16-year-old cannot get a tattoo, because that is considered quite a major decision. It seems slightly odd to say that they cannot get a tattoo but they can change their sex.

The crucial thing here, which I know that the children's commissioner pointed to, is the work that has been done around criminal responsibility and the idea that people are not cognitively mature until they are about 25. From a psychological and physiological perspective, puberty has great effects on people as they mature—it affects brain development.

You ask whether children know what gender they are. The point is that one of the things that the committee has to bottom out is what is meant by "gender". There are no definitions of gender—the Scottish Government does not have a definition of gender.

I have noted down some of the definitions that were floating around at the time of the 2009 debate, which are still available on some websites. Those definitions talk about

"cultural meanings and patterns of behaviour, experience and personality labelled masculine or feminine"

and

"clothing, hairstyles, mannerisms, speech patterns and social interactions".

I have a great problem with putting those things into law, because those things are fundamentally sexist. They are saying that there are certain ways of thinking, behaving and feeling that make you a man or a woman. Most people experience sex and sexism on the basis of their bodies.

What we have seen with the increase in young girls being referred to the gender services is that many of them have suffered abuse and many of them are deeply uncomfortable with their bodies. We know from what has happened in the past that young girls are the cohort who are likely to self-harm and to have anorexia. In a highly sexist world, I do not blame young girls for wanting to escape from that, but—this goes back to the idea of diagnosis—we need to think about that.

There are a lot of people who have persistent and on-going gender dysphoria. If that persists into adulthood, it is a different cohort. However, what we are seeing in countries such as the US, which is ahead of the curve on this, is a growing number of detransitioners. We ought to be really worried about that. Some of those girls have had irreversible treatments, which have left them sterile and without sexual function. As you can read in the submissions that the committee has received, many people—especially young people—think that getting a GRC will be a route into medicalisation. You need to be really careful with that cohort.

10:45

Karen Adam: I agree that we have to be very careful. I also agree with what you said about gender stereotypes; after all, we have already talked about 6 foot 2 people with beards, and I know cisgendered women who are 6 foot 2 and cisgendered women who have facial hair—

Malcolm Clark: Not as much as Alex Drummond has, I suspect.

Karen Adam: We need to be careful with stereotypes and what we assume—

The Convener: Mr Clark, can I just say that I do not know who the person you are talking about is, so we should probably not be using their name.

Malcolm Clark: I mentioned him earlier.

Karen Adam: I agree that, if we start pushing such stereotypes on young people in this position, that could be hurtful.

I would like to ask Lucy Hunter Blackburn about the issue of autonomy with regard to 16 and 17-year-olds.

Lucy Hunter Blackburn: First, I want to put on the record that I do not use the term "cisgendered". I find it difficult, because I think that it implies—

Karen Adam: It was just to differentiate between trans people and cis people.

Lucy Hunter Blackburn: I understand—I just wanted to put my position on that.

There is a lot to get through, but I just want to put a marker on a few things. With regard to the age range and what we allow at different ages, the situation is very messy and inconsistent, and I think that the children's commissioner said as much in his evidence to the Scottish Government.

What we are talking about is a process; people grow over time, as we all know, having been and knowing teenagers. In order to change the sex marker on your passport, you will still require parental consent. As for marriage and divorce, which have been picked up in the discussion, you can get married at 16 in Scotland, but big moves have been made down south to raise the minimum age of marriage to 18, because people are very worried about young girls, in particular, being coerced into marriage. That issue might well come to the Parliament at some point.

The Scottish Sentencing Council guidelines, which Susan Smith has mentioned, ask people to consider the maturation of an individual's brain into their 20s. In Norway, which the committee will be aware is one of the few places that allow this below the age of 16, concerns are beginning to emerge. Indeed, we have an article about that, but it is in Norwegian—we can see whether we can find a way of getting it translated to send to the committee. Again, though, concerns are emerging about the degree with regard to children.

This is what I ask the committee to do: these are important questions, and there are people other than us whom you need to speak to. That is my main point. Please talk to parents of young people who have been through this—the Bayswater Support Group would be one that I would mention—and please talk to detransitioners and to medical practitioners who deal with younger people in the system. This is a really important group, and what you do here will be very important and resonant, so you should ensure that you take evidence from people beyond us.

I hope that that was helpful. I am conscious of the time.

Karen Adam: Yes, that was fine.

Malcolm Clark: Lots of 16-year-olds are certain about lots of things, and they are equally certain about the very opposite when they are 18. It is incumbent on us, before we hand out certificates crystallising what young people thought they were certain about at 16, to ensure that we are not making it difficult for them to go back on that at the age of 18. That is my concern about lowering the age to 16.

We also have to be cognisant of the culture that young people are growing up in. As we all know, loads of celebrities are coming out as non-binary or queer—I have no idea what "queer" or "non-binary" means, so I have no idea how a 16-year-old is supposed to know. Only a year ago, the BBC withdrew, partly through our pressure, an educational video telling children as young as eight that there are 100 genders—in fact, maybe even an infinite number. There is a culture through celebrities, peer pressure and loads of social media nonsense that kids are receiving that is likely to confuse them, and all that we are asking is that we are aware of the confusion in young people's minds.

We have asked the Government—the equalities minister—to speak to Sinéad Watson, who is a very brave detransitioner. She says that she knows hundreds of other detransitioners; in the case of Sinéad, she was very sure at the age of 19, but there are other girls and boys to whom she speaks who were sure at the age of 18 what gender they were and then had to undo everything that they had done to become the sex that they always were.

Karen Adam: I am quite curious about that, and a question comes to my mind. When you are talking, it sounds similar to the rhetoric that I used to hear back in the 1980s that people were influenced by celebrity and the music industry. With regard to section 28, there was a fear that, if we educated our children on LGBT issues, that would make them gay. I do not know, but I assume that you agree that that is not possible, and that people are who they are. Can you see the similarities in your arguments?

Malcolm Clark: You remind me of a phrase that is used in a book that I can recommend by Abigail Shrier called "Irreversible Damage", in which she looks at the terrible effects of gender identity theory on girls throughout America. She says that, in the past, gay activists were desperate to tell their parents what they were, whereas trans activists, or trans kids, are desperate to tell their parents what they are not, and that is a very different thing. If you identify as something that you are, you could win acceptance and describe what that positive aspect of you is. However, if you are saying what you are not, that is a very different sort of process, and that is what these kids are

doing—they are saying, “I am not male,” or, “I am not female.”

I do not see any comparison. I was there during the debate on section 28 and I fought against it. All the people in the LGB Alliance management team and the trustees fought against it. There is no comparison. The people from Stonewall who now compare the current situation to the battle against section 28 are using the good name of the gay rights movement to try to make this new set of demands respectable. The two are completely different. There is nothing similar between sexual orientation and gender identity, and there is nothing similar between those two campaigns.

Karen Adam: Would you agree that it is anecdotal to say that trans people talk about what they are not instead of what they are? That is not my experience.

Malcolm Clark: I was quoting from Abigail Shrier, and it is a very—

Karen Adam: I am sure that gay people have said that they are not heterosexual.

Malcolm Clark: Possibly.

The point is made that most of the kids who are turning up at gender identity clinics are desperate to tell people what they are not. We know what they are—they are male or female—and they are going to gender identity clinics usually to try to change their bodies. That is why I say that it is about something that you are not, because you are trying to change your body. If we are encouraging young people at the age of 16, and in fact encouraging young people at the age of 12 and 13 to take puberty blockers, because they know what they are not—

Karen Adam: Sorry, but can I ask who is encouraging? When you say “we are encouraging”, who is “we”?

Malcolm Clark: It is any of the LGBT charities that are advocating for a conversion therapy ban or—

Karen Adam: They are forcing people—

Malcolm Clark: I did not say that they are forcing; I said that they are encouraging.

Karen Adam: They are encouraging.

Malcolm Clark: Yes, they are encouraging. They are advocating puberty blockers, which are very dangerous experimental drugs that have unknown impacts on 12, 13 and 14-year-olds. A 12-year-old who takes puberty blockers up to the age of 16 and then takes cross-sex hormones for a few years stands a very good chance of being infertile. I think that it is a disgrace that LGBT charities are encouraging medical experimentation on young people. I would definitely use the word “encouraging”.

Karen Adam: Thank you for that evidence.

Dr Coleman, with regard to 16 and 17-year-olds—

Dr Coleman: I do not have anything to say about that, but I would like to make a comment following up on something that you said, if that is okay.

Karen Adam: Yes, absolutely—go ahead.

Dr Coleman: I think that we are just pretending when we say that we are unable to differentiate between a 6 foot 2 inch male person with facial hair and a 6 foot 2 inch female person with facial hair. I think that we can. Certainly, women in prison can, and they experience trans women very viscerally as male and as presenting a male risk to them.

I would like to say one last thing, which is about trans men in the male estate, which we have not touched on. I consider that to be a live experiment that is not just unevidenced but contrary to established evidence that has informed prison practice for very good reason.

In respect of one of those prisoners who is held in one of the male prisons in Scotland, I am in correspondence with someone else who is housed there, and that prisoner tells me that the trans man’s sex was very rapidly and correctly identified in the prison population as being female, which is a massive risk to that individual.

Karen Adam: How would the GRC process that we are looking at in the bill change what you are saying? How does it relate to prisons?

Lucy Hunter Blackburn: Our concern is that a prisoner with a GRC at the moment could bring a legal case—that has not happened yet but, if there are more of them, it will—and pull the Scottish system to become a mirror of the English system, whereby the GRC overrides a lot of what has been done.

I cannot say enough, however, that that is an easy thing to fix in the bill. There are various things that GRCs cannot do. They cannot be used for the peerage or the priesthood; there is a range of exemptions in the 2004 act that explicitly relate to a GRC. A very easy way to close down concerns about the relationship between the bill and prison policy would be to exempt prison placements. I suspect that you would find that there was quite a consensus about that, because most of the people who advocate on this are advocating for a policy that is GRC blind.

Karen Adam: For clarity, can I ask whether that would mean that trans men would go into female

prisons and trans women would go into male prisons?

Lucy Hunter Blackburn: It would separate out the policy decision on the bill and the policy decisions about what we do in the prison estate. The bill would no longer have any impact on prison policy. There is still a separate discussion to be had about the handling of prisoners and what is compassionate, fair and right for everybody, but it would take out of the equation anything that was related to GRCs. You would just remove GRCs from the equation.

Karen Adam: Would that not just leave us with the policy that we already have, which is about consideration on an individual basis?

Lucy Hunter Blackburn: By putting a fireguard or protective ring around the issue, it would remove a risk that you are introducing. Risk would be introduced if a legal case were brought to the courts.

Karen Adam: So it is the diagnosis of—

Lucy Hunter Blackburn: No, it is the GRC.

Karen Adam: What is the main risk?

Lucy Hunter Blackburn: The risk is of a prisoner with a GRC taking the Scottish Government to court and saying that a policy that does not give a GRC extra weight, which is the current situation, is illegal and unlawful, and that the policy should mirror English policy, because a GRC has changed their sex in law and it should override all those assessments.

Karen Adam: Would that be a risk because of the reforms that we are considering just now or is it a risk with the GRC at the moment?

Lucy Hunter Blackburn: At the moment, it is a tiny risk because GRC holders are very small in number and because the criteria for a GRC are very hard to meet when in the prison system. However, if you move to self-declaration, the risk becomes immeasurably higher.

I am conscious of time, convener, so, if it would be helpful, we would be very happy to write to the committee to explain that point.

Dr Coleman: As I said at the beginning of the meeting, SPS policy on this is currently under review and we do not know what the reviewed policy will be. It might well be to more closely or exactly mirror what is done south of the border under the MOJ policy, which will see GRC status as not guaranteeing allocation to the prison estate that matches the sex that corresponds to a prisoner's acquired gender, but making that far more likely.

Karen Adam: Is there evidence of that or is it anecdotal?

Dr Coleman: Is what anecdotal? That it operates like that south of the border?

Karen Adam: Yes.

Dr Coleman: I can give you evidence of that in a follow-up email. However, we do not know what the Scottish Prison Service will do.

The Convener: We are approaching the end of the time that we had allocated for the session, but I have taken the decision to extend it by half an hour. I hope that folk are okay with that.

Maggie Chapman has a very quick supplementary question on the point that has just been made.

Maggie Chapman: Actually, my question is on 16 and 17-year-olds. Susan Smith and Lucy Hunter Blackburn, you both referred to the Scottish sentencing guidelines, in which there is a distinction for under-25s. Are you therefore suggesting that the age for obtaining a GRC should be raised to 25? Please give a yes-or-no answer, because of time.

Susan Smith: I do not think that that is a decision that—[*Interruption*.].

Maggie Chapman: I just wondered why you raised the Scottish sentencing guidelines.

11:00

Susan Smith: It is about brain maturity and the cognitive process. It is about how young people make decisions—that is the crucial thing.

What is not being said, and what needs to be said, is that a really important piece of work has happened in the form of the Cass review. I think that the committee needs to have a session with Dr Hilary Cass on her findings about how young people are being treated within the system and their understanding of it. The committee really needs to get on to that, because that should provide a lot more answers than we can do in a yes or no answer.

The Convener: To close on this question, I call Pam Duncan-Glancy. Please be very quick, and say who you want to answer.

Pam Duncan-Glancy: It is a follow-up question in relation to 16 and 17-year-olds.

Some panellists, including yourselves, have concerns around the lack of capacity assessment in the bill for 16 and 17-year-olds. Would you support an amendment to the bill that would create an assumption that all 16 and 17-year-olds have capacity to understand the process and its legal implications, as is the case in other law in Scotland, unless in specific circumstances an assessment would find that not to be the case?

Lucy Hunter Blackburn: I think that I would like you, as a committee, to talk to more people about that. I do not feel that I want to give a yes-or-no answer to such a question. I am encouraged by the sense in committee that 16 and 17-year-olds require a lot of attention. All that I can really do is say that the committee should talk to more people and get a sense for itself of what it thinks the safeguards and protections should be if we are going to drop to 16—and I think that an "if" needs to stay in there. It is a big issue that the committee probably needs more evidence or sessions on. That is my feeling.

Malcolm Clark: What has changed in relation to 16 to 18-year-olds in the past decade or 20 years such that we suddenly need a change? I do not think that there is any evidence that 16-year-olds have changed cognitively since 2004, and I therefore do not see why we should change the law.

The Convener: I will move on to Rachael Hamilton.

Rachael Hamilton: That is quite timely. I think that I need a lie down. Susan Smith mentioned the Cass review, and it looks like there is a suggestion that some of today's panel members would say, "Look at the Cass review and pause GRA reform here in Scotland."

I have looked at the Cass review. It highlights the lack of routine and consistent data collection, which means that it is not possible to track outcomes for children and young people. Malcolm Clark specifically mentioned making sure that there is more therapeutic care and defining that service model, and—I suppose—the workforce implications.

I invite anyone to expand on that. You have all had your fair share of speaking, but who would like to kick off? Perhaps Susan Smith will, as she mentioned it.

Susan Smith: It has been a bit moveable. Such a new thing has happened in relation to the number of young people seeking help from gender identity clinics, which has increased exponentially. It is good that the Cass review has finally taken place, because, for a while, people were simply ignoring that that was happening. Normally when you have that kind of vast social change very suddenly, you want to understand what is going on. Obviously, the review that has come out is the interim one; we still do not have the full report.

Rachael Hamilton rightly raised the issue of tracking data, which is—in fact—much worse in Scotland. The situation in relation to long-term monitoring is better in England than in Scotland. At the moment, we are not even recording the sex of the children who present at the Sandyford. We have done a lot of FOIs on the Sandyford over the years and it is incredibly difficult to get information. Sometimes you have to go to individual health boards. Although it has been difficult to get information on ages, we know that children as young as four are being referred there, and that there is a cohort of children around the age of 10 or 11 and so on.

Very little—in fact no—work is being done to find out what the long-term outcomes are for those children. Any studies that have been done have happened in other countries. We are now finding that countries such as Sweden are putting the brakes on because they are finding that the long-term outcomes for children are very negative.

Rachael Hamilton: Lucy Hunter Blackburn, you suggested that we should hear from someone from the Cass review.

Lucy Hunter Blackburn: Hilary Cass would be a very good witness because she can tell you about the work that she has done on young people. It would be for her to tell you, and not for me to prejudge, where she feels that the review interacts with the bill.

It is worth talking to parents, detransitioners and others who have been through this. There is at least one very articulate detransitioner in Scotland who has been extremely willing to speak. You might want a private session with some of those people, because a lot of them might be much happier talking to you in a private session.

Everyone here cares about those kids. There is no disagreement between anybody about the fact that those children and their wellbeing matter. What matters is that policy and law support those young people's wellbeing and that laws are made with an understanding of the broader context. You cannot make law as if the world is not out there and as if the law is going to be hermetically sealed. You are dropping a stone in a pond and it will ripple.

I cannot emphasise enough that your evidence base feels to us to be very thin and that we are worried that you have had one session on this. That feels inadequate to us.

Rachael Hamilton: I am horrified to learn that we are not conducting data collection so that we can give the best services to children and young people. If the reforms are accepted by Parliament, we are, as you say, putting the cart before the horse. How can workforce implications be taken into account and services be provided if we do not have the evidence and do not know how many people there are and what circumstances they are experiencing?

Convener, I am really shocked that the committee has not had the opportunity to get into the detail of that.

The Convener: We have several more sessions to come. We are not even halfway through the sessions. I know that you are new to the committee, but the committee has agreed on a range of future evidence sessions, which we can discuss in private.

Rachael Hamilton: Would Malcolm Clark like to come in?

Malcolm Clark: I want to go back to a couple of things. Karen Adam caught me out. People compare this debate to the one about section 28, but it is not the same because, after gay rights were given, the percentage of gay people in the population did not go up at all; it remained exactly the same. However, in the past 10 years, the number of kids who say that they are trans, non-binary or queer is soaring. Something else is happening here. We should look at that.

Karen Adam: Because you mentioned my name, I will say that that may be because we are creating a safer society and it was not safe to come out back in the 1980s.

Malcolm Clark: Why has the gay population not gone up? It is so much safer for gay people than it was when I was a kid.

Karen Adam: It has gone up.

Malcolm Clark: The percentage of the population saying that they are lesbian or gay has not gone up; the percentage of people who say that they are queer, non-binary or LGBTQ—whatever that means—has soared, but not the percentage who identify as lesbian or gay.

Karen Adam: That is fine.

Malcolm Clark: That is by the by.

One thing that has come out of this session is the intimate link between the Cass review, what is happening in gender identity clinics, the pressure on young people and the way in which the bill is being described as a tidying-up exercise to give certificates. Those things combine and have a cultural impact.

I make the point that puberty blockers are a huge problem for us. The fact that we give 12, 13, 14 or 15-year-olds drugs that stop their natural physical and mental development is a medical scandal, and will be seen as that in the future.

One of the reasons that we worry about the bill is that it creates a sort of graduation—a coming out—at the age of 16. We all know that, as 15 and 16-year-olds, we were desperate to be seen as adult. People look forward to going to a pub, getting a driving licence or whatever. The bill creates a certificate that is given by the Government—by the state—and which says, "You are an adult." That will put pressure on a lot of 12, 13, 14 and 15-year-olds to look forward to the moment at which they will get their certificate, and it will increase the desire to take puberty blockers—and the desire of parents to encourage their kids to take puberty blockers. Those two things are intimately connected: the medicalisation of children—a 12, 13 or 14-year-old person is a child—and the Government certificate.

Rachael Hamilton: So do you believe that the process should be paused until we consider the Cass review, when that is published?

Malcolm Clark: Absolutely.

Rachael Hamilton: Kate Coleman, if there is anything that you want to add, I give you the opportunity.

Dr Coleman: Thank you, but I am okay.

Pam Duncan-Glancy: It has been quite the session, and I appreciate the length of time that the witnesses have been here. It has been broad ranging.

I am concerned about a number of the things that you have raised—particularly, Dr Coleman, the experiences that you have shared about what has happened in prisons. However, I am interested to note that those have happened within the current gender recognition certificate process and that people have still been able to be bad actors within that system—which is, of course, unacceptable.

I also note that we have heard a lot about puberty blockers and data on healthcare. I share my colleague Rachael Hamilton's concerns on data in healthcare—in all healthcare; if we were a nation that properly delivered healthcare on the basis of data, we would all be in a very different circumstance. There is a lot to do on that.

However, I struggle a wee bit to see how that relates directly to the bill that is in front of us. Lucy Hunter Blackburn, I come back to the point that you made earlier, which was excellently put: we have to focus on the bill that is in front of us. The examples in prisons and the examples of puberty blockers are part of a discussion but are probably not directly related to the bill in front of us. I therefore want to move on to talk about bits of the bill itself.

My first question is on the time period. Lucy, you have suggested that there is perhaps a way to change to a single six-month period from application to issue, and that that could help with data collection. I am keen to hear how.

Lucy Hunter Blackburn: One of the things that we are concerned about, more generally, is data collection and the impact of GRCs. I do not want to delay the committee. There is a lot to say about the potential loss of data on sex and the risks of that.

This relates to the previous discussion. There has been some debate in previous sessions about the cooling-off periods—the three months and so on. This is a process in which it would make sense to have some kind of space; what we call it depends on what it is there for. It does not need to be a cooling-off period. It is that, when someone goes in and makes their declaration, they do not just walk out of the door; there needs to be a gap, which could be used for various things.

For example, we have not talked about the statutory declaration, although I imagine that we will. As an alternative to what we think is an impossibly non-falsifiable declaration, with all kinds of problem attached, someone could make their declaration and declare that, over the next six months, they will make sure that all their other documents align, so that they have a complete set of matching documents—for example, that they will do all the documentary change to their passport or driving licence—because those can be falsified. It would mean that somebody walks in and does a declaration, then goes through a process of aligning all their identity documents over six months. We have suggested that there are strong reasons not to issue those documents to people who are on the sex offenders register. That gives a period for checking that or doing any other kinds of check that might be wanted.

I have talked about section 22. Its provisions are very heavy-duty privacy protections—witness protection-type stuff—which should not be handed out lightly. Leaving aside anything to do with bad actors or sex offenders, I am extremely worried that we are looking at a state identity-protection scheme that people can get by walking in and swearing a declaration. The kind of people that I am worried about are not going to be very put off by the criminal offence.

I come back to the idea of its being a bad Government process. There seems to have been no analysis and no risk assessment of what it means to make the degree of privacy protection that that gap provides available to people who are just prepared to say something—and that is it.

I am not sure whether the question picked up on data protection. That is a big issue that we would like the committee to think about very hard.

11:15

Pam Duncan-Glancy: I have a follow-up question. Who are the people whom you are really worried about? Will you share examples that you have seen from international evidence? I know that you have collected a lot of that.

Lucy Hunter Blackburn: International evidence is really hard—

Pam Duncan-Glancy: The reason for my asking is that it is only such evidence that demonstrates the experience of self-declaration.

Lucy Hunter Blackburn: Yes. When we make law there is an issue about international evidence. I am making a note for myself on that, because there is a lot to say about it and I want to get it right.

The international evidence says, first, that it depends on the legal framework. It is important to note that not every country that offers a GRC will give section 22-type protections or will have overlaps with, say, prison rules or single-sex services; those will vary. I am pretty sure—I will have to check—that we asked the Scottish Government whether it was able to provide information on how such aspects were dealt with in Denmark and Norway, for example. What is the bigger legal framework within which gender recognition certificates sit in those countries? As far as we can see, no analysis of that is available—nothing at all. That is the first point about international comparisons. We do not know what a given approach dovetails with—it can be difficult to say.

Secondly, nowhere that has done self-declaration has put any monitoring in place, and the Scottish Government has told us that it knows that. Then we get into the issue of abusive behaviour around sex, which I will come back to.

Looking at international comparisons therefore presents a fundamental problem. The committee should not latch on to the assumption that an absence of evidence means that there is evidence of absence. That is an extremely insecure way to legislate. You should go back to first principles, which are about people. Committee members are politicians, you know about people and you deal with the law in lots of different contexts. When you make law for Scotland, you will think about the background. For example, we know that the sex-offending population is extremely manipulative. That is one of the critical characteristics—perhaps not of all sex offenders but of many of them. Evidence of that exists in the many cases of people who have gone through such experiences in settings such as sport, education and the priesthood. The committee should not need persuading of the idea that the sex-offending population is manipulative and deceptive. People who commit fraud also tend to be persuasive, unreliable, dishonest and deceptive. Those are the elements of the population that I am worried about. We must ask ourselves why someone might find it attractive to have, over here, an identity that is extremely well protected in law and another identity in another place. I give the examples of bankruptcies and frauds. We

encourage the committee to think closely about such aspects.

Pam Duncan-Glancy: Please help me to understand. Have we not already, in the 2004 act, identified who would be protected under that section? Have we not also set out, in that act, what the effect of having a GRC would be? Which parts of the new act would change those aspects?

Lucy Hunter Blackburn: It is the expansion. What changes is the criterion of access. On one side, we have a legal instrument that has the particular effect of making something available. If we think of the idea of having a lock and a key, it is as though we would be handing out keys to a much larger group of people who are more diverse and are also not defined in the same way. At the moment, the definition is someone who can demonstrate a diagnosis of gender dysphoria and can provide the panel with evidence of their having lived in their acquired gender. That is a pretty limited evidence base. It consists of just a few documents about showing a name change—nevertheless, it is an evidence base. However, the medical diagnosis requirement is the real gatekeeper. The new population will be defined as people who are willing to walk into someone's office and swear an oath that they will live in their acquired gender for life.

Pam Duncan-Glancy: Do you believe that that will predominantly be trans people?

Lucy Hunter Blackburn: I believe that it could be anybody who is willing to do it. That is a problem for you, as a committee, I imagine. We do not know who will take advantage of it.

Malcolm Clark: No adult can just walk into a school; they have to go through very careful criminal checks. That is not because we think that every adult is an abuser, but because we know that there is a tiny minority of adults who are abusers. We have to talk about such things because they were not considered in the writing of the bill. Therefore, we have to raise them, but, as I am sure that everyone here agrees, we do not want to leave the impression that we think that the small, vulnerable community of genuine trans people are any more likely to offend than anyone else.

The problem is that you are creating a process that is, in effect, the same as taking away all the restrictions on adults walking into schools. There have to be restrictions and it is up to the Government to find a way to solve the problem. There is a tiny minority of people being protected, who need to be protected, but there is also a group of people who may abuse those protections, who are not genuine trans people.

Pam Duncan-Glancy: What is your understanding of how trans people access single-sex spaces such as toilets or changing rooms now?

Malcolm Clark: I will defer to the experts.

Lucy Hunter Blackburn: The bill and access are two different issues. It important to say that there is a big debate, which is a bit of an elephant in the room so I will name it. It is about who should be allowed into particular spaces, when and under what rules. The debate about who is vulnerable and who is not is a big one. What we are asking the committee to do is to take GRCs out of that debate.

Pam Duncan-Glancy: I understand that, but I am trying to get to the point where we can do our job as legislators, which is to make sure that the bill is the best possible piece of legislation that it can be to provide trans people with validation, destigmatisation and so on, as you said earlier. Therefore, we need to be really specific. At what point, now, do gender recognition certificates come in? Do people have to provide them in order to use toilets, changing rooms and single-sex spaces?

Lucy Hunter Blackburn: No, it is how it affects policy, so what happens with single-sex spaces—

Pam Duncan-Glancy: Okay—

Lucy Hunter Blackburn: It is the feed-through into decisions made by providers.

Pam Duncan-Glancy: So it is not the law that is in front of us—

Lucy Hunter Blackburn: Well, it is.

Pam Duncan-Glancy: —but the policy that already exists.

Lucy Hunter Blackburn: It is how the law in front of you influences providers. It is how they make decisions. The MOJ down south is a really good example. It is crystal clear that the MOJ looked at the law, looked at GRCs and said, "Our policy needs to treat GRC holders differently because of their stronger legal rights." It is that effect, plus section 22, that policy makers need to consider.

Susan Smith mentioned the NHS Lothian case. NHS Lothian said that it was the law that was doing that—it was probably a reading of the law—and that section 22 could be improved and clarified so that no healthcare provider thinks that they cannot say that a member of staff is a GRC holder. It is the ability, in particular contexts, to recognise sex and respond to sex.

At the moment, GRCs crash through that in a way that flows into policy and practice. The more that you can pull GRCs back, the better, so that they do not do that. There are really sensitive debates—which are not properly had in this

committee; I know that this is not the place—about who goes in where and when. The GRC comes through that and affects how people make their decisions and policies. What we are trying to convey to you is that you cannot ignore that that is the case.

Pam Duncan-Glancy: So is it the effect of a GRC or the process of accessing a GRC that you think needs to change?

Lucy Hunter Blackburn: It is the two things, I would say. One is that you need to look critically at the effect of a GRC in this bill. That is obviously something that you can do. Once you know what the effect of a GRC is, you can look at whether the process is appropriate for the effect that it is going to have. That is where we end up.

Susan Smith: What you said about the bill is very important, because it is a bolt-on to the old act—the 2004 act—and there are problems with that, as Lucy Hunter Blackburn said.

There are problems with section 22 and there are other issues because of the conflation of sex and gender, which has affected policy. We have seen that in prisons and, as I said, we have seen it with some health boards' policies talking about genuine occupational requirements. Those problems have existed. They are problems with what is already there, but if it is expanded, they will become worse. That is the critical aspect to take away. Many people have said to us, "Well, these are already problems." That is true, but if they are already problems, they should really be sorted out before this is widened and the problems are compounded. They are existing issues with the old act.

There are probably grounds for going right back to the beginning with the GRA and starting again, and for finding out exactly what is wanted, because it comes through strongly from the submissions that a lot of the people who are advocating for it are looking for something different. They are not really looking for something that is about sex; they are looking for something that is about their identity.

I think that gender identity ideas are inherently sexist. I believe that my experiences are based on my sex rather than my gender identity, but I know that some people believe that they have a gender identity. Therefore, there is an argument as to whether this is a separate thing. Gender reassignment is a separate protected characteristic. Should this not also be a separate thing, in addition to sex? Rather than changing sex, people would then have the opportunity to put whichever one of the myriad other things they want on there as well. However, we should not rub out sex, because that is the problem: it is the idea that this supersedes sex.

There are occasions—they are defined in the act—when single-sex spaces are critically important. In most of our day-to-day life, we do not sit in single-sex spaces. We do not go off and talk only to members of our own sex or exclude people from meeting rooms based on their sex, but there are times when people really need that. The critical thing is that everybody should have provision. I think that that is included in the new EHRC guidance: that everybody should have the dignity of being provided for and looked after. You should not remove women's dignity or their ability to operate those spaces.

There are women who work on the front line in the violence against women sector who have said that they would be prepared to come to committee, along with some other, incredibly brave women who have spoken out who have had real issues with accessing services. In that context, I would suggest that you give them a private session. Women and Girls in Scotland said in its huge report on self-exclusion that those issues really need to be looked at. That is about policy and how it is affected by the interaction of the GRA and the Equality Act 2010.

We have also spoken to Isabelle Kerr, who was the manager of Glasgow and Clyde Rape Crisis for 15 years and has advised internationally on violence against women and trauma. She would be a really important person to hear from.

The Convener: We are going to have to move on—

Pam Duncan-Glancy: I have one more question, convener.

The Convener: Can I bring in Fulton MacGregor first? He has not been in yet and we are really pushed for time. Is that okay or is your question a follow-up?

Pam Duncan-Glancy: It is a completely different question.

The Convener: In that case, I will bring Fulton in first, because he has been waiting patiently. We have another panel coming in and we need to be respectful of their time, too.

Fulton MacGregor (Coatbridge and Chryston) (SNP): One of the difficulties with going last is that a lot has already been covered. It has been a really good evidence session this morning, so thank you for that. I have a few areas to ask about, convener, but I will try to streamline them.

On the first area, I might make a comment rather than asking a question. It relates to the discussion about prisons that we had earlier. I thank Dr Kate Coleman for her evidence. A lot of good points have been raised on the subject. I checked earlier with one of the clerks to make sure that I was right in thinking that the Scottish

Prison Service will be coming in soon to give evidence. We have a range of questions for it, which I think will tie in to Pam Duncan-Glancy's point as well, because we can ask it how things are working just now, under the current system, and what it feels is likely to change.

I also thank Lucy Hunter Blackburn for her suggestions because I think that the debate, particularly on social media but elsewhere as well, is sometimes painted as being about a choice between having the bill or not having the bill, with very little in between. As Pam Duncan-Glancy noted, you have made suggestions about how to improve the bill or alleviate some people's concerns, which was really good to hear.

11:30

We have not talked a lot about sport today, although it has been mentioned briefly. The committee has previously had various discussions about it. Last week, we heard evidence from sportscotland that it does not feel that the bill will change anything about how sport operates. We got the impression that it is down to the governing bodies to manage the issue; they sometimes go to sportscotland for advice and guidance. Sportscotland felt that the bill will not impact sport. Will you comment on that?

Susan Smith: I will try to be brief. As with much else, this comes back to section 22 of the GRA. Once somebody has that level of protection, it is hard to prove what sex they are. In a recent Tweedlove e-bike category race, the women's section was won by somebody who is biologically male. The entry criteria said specifically that participants had to be biologically female. It was only because the situation was found out that the organisers could say, "You won in the wrong category."

You are relying on honesty. That is less of an issue in elite sport, because more testing is done there, but it is an issue in local clubs and grass-roots clubs. If girls do not have the same access, that especially affects them at the start of their sporting career.

It is something that can be taken out, but people need to be able to check the genuine biological status of people who are entering sports. Fulton MacGregor said that the decisions are up to sporting bodies, but that is another weakness, which permeates through all this.

There is a societal change, and the bill signals part of the societal change—that we accept self-ID. The message comes from the top—from the Government. As parliamentarians, you have an enormous responsibility to society to set the tone. If you say to people that you believe that the only criterion for saying whether someone is a man or a woman is self-identity, it becomes increasingly hard for individual organisations to have a policy that opposes that. We have seen that.

The reality becomes that the person who makes the decisions is often, say, a low-paid receptionist at a sports centre who tries to tell somebody that they cannot go into a women-only session. Such people are not sure of their protections or of the law and they really need clarity. As Lucy Hunter Blackburn said, the area is so contested and confused, and people do not have clarity. The practical implications will affect areas such as sport, even though it is possible to carve out exceptions under the 2010 act.

Fulton MacGregor: Why do you think that we heard such strong evidence from sports organisations and others? I had an idea of where their evidence last week might go, but I was quite surprised by how clear they were—

Susan Smith: Because—

Fulton MacGregor: Sorry, just a wee second. Why did those organisations take that view? Last week, they told us that there are a lot of examples of trans people playing sports and being valued members of their sporting communities. What will the bill change?

Susan Smith: As I said, the social process is making the situation harder; the issue also relates to the level of secrecy.

The sporting bodies have set their own independent guidelines. With sport—and sport is one of the clearest areas in the world—all the scientific evidence is that there are physical differences between males and females. Ultimately, that is probably why sport has more or less come down on the side of saying that sex categories need to remain distinct. It is probably the biggest area that people can look at. They can look at the recent US college swimming events, and they can see the physical difference between a male swimmer and a female swimmer. It is self-evident. This permeates through everything. Sport has been useful in that regard, but the problem is that, once you make it harder to work out who has a GRC and who is genuinely male or female, you make it harder to prevent people from accessing those sports.

Malcolm Clark: I will just say one thing quickly. What would have happened to that sporting body if it had said the opposite? It might well genuinely believe what it says—let us assume that it does—but every single institution, organisation or sporting body that said the opposite would have been trolled, bullied and called transphobic. That is one of the problems that the entire process faces—organisations cannot be honest about their real concerns about risks.

Fulton MacGregor: I guess that that is part of the reason why we take evidence.

The Convener: We are really running over time, so can you keep your next question brief, please?

Fulton MacGregor: I will bring in Lucy, but before I do, I was saying that I guess that that is why we take evidence. As committee members, we do not control what people say to us.

Lucy Hunter Blackburn: We know that there are female athletes who would be really happy to speak to the committee; we encourage you to talk to them about how it is for them.

In relation to the evidence session that you mentioned, I was listening, and what struck me was that, all the way through, there was not a single reference to section 22 of the 2004 act. It is exactly right that you have one of the clearest 2010 act carve-outs in section 195, which is useful. However, it seems to me to be deficient in the evidence that you were given that, at no point, was the section 22 effect discussed. That is the problem with that evidence session, which is something for the committee to think about.

Fulton MacGregor: Thank you for those answers.

I have one more line of questioning. I can see the convener's eyes burning through me, and I have already been chastised, so I will join my questions together. There has already been a bit of discussion about this, but would any of the witnesses like to put on record their views on the provisions in the bill around living in the acquired gender for three months and the three-month reflection period? There has been some light discussion on those issues already, but does anybody want to comment?

Susan Smith: One aspect that has been missed is that the reason for having a two-year period in the 2004 act was that we were talking about a tightly defined group, most of whom would have been transsexuals. They were people who were presumed to be going through a medical and surgical process. The two-year period was there as a safeguard for them, because taking such a decision is a massive step.

I believe that it remains important for people to be safeguarded against making a hasty decision—you might find that you would change your mind if it was just a day. The real issue is that the time period is not the critical thing; the definition—who you are allowing to access this—is the critical thing. If there was a way to ensure that you were still allowing the same tightly defined group of people to access it, time is not the big factor; the big factor is who you let get the certificate.

Malcolm Clark: What is living in your acquired gender? What does that mean? We have a provision that is indefinable and vague, and no one will check up on it. Is someone going to phone the person and ask, "Are you living in your acquired gender?", and the person will say yes or no? It is meaningless. I strongly suspect that it is what is called, in professional terms, a fig leaf, to show that some provision has been put in there.

Lucy Hunter Blackburn: It is one of the few points of agreement that you will hear from witnesses who are on different sides of the debate. You will hear evidence from people who support the bill and from ourselves that the idea of living in an acquired gender is sexist, regressive and reinforces stereotypes—you heard it from Ellie Gomersall and it is in written submissions. It is a really problematic idea to have in legislation. Time periods are a different issue, but the concept of living in an acquired gender is not one for which you will find support—

The Convener: Thank you all very much. That point of consensus across different points of view is perhaps a good place to end, so thank you for that, Lucy.

I thank all the witnesses. The session took longer than you had agreed to, so I thank you for bearing with us. We have covered a huge amount of ground.

I will suspend in order to change witnesses and for a 10-minute comfort break.

11:40

Meeting suspended.

11:49

On resuming—

The Convener: I welcome to the meeting our second panel of witnesses: Catherine Murphy, executive director, Engender; Sandy Brindley, chief executive, Rape Crisis Scotland; Naomi McAuliffe, Scotland programme director, Amnesty International Scotland; and Jen Ang, director of policy and development, JustRight Scotland.

I invite our witnesses to make short opening statements, starting with Catherine Murphy.

Catherine Murphy (Engender): Thank you, convener. Engender welcomes this opportunity to speak to the committee.

We are a feminist policy and advocacy organisation that has worked for 25 years to advance equality between women and men in Scotland. We work across women's economic, social, cultural and political inequality and advocate for changes to law and policy to better realise women's rights.

Reform of the Gender Recognition Act 2004 has not been a primary policy call for Engender, but since 2017, we have been aware of the links that have been made in public debate, the media and elsewhere between gender recognition reform and women's equality and rights. We have subsequently carved out space in the intervening years to understand and consider the issues and engage with the bill's development process.

In addition to our day-to-day work of engaging women across Scotland on their lived experiences and the key areas of unfinished business for women's equality and rights, we have sought to understand the perspectives of those who oppose the bill and specific concerns in relation to its impact on women. We have engaged with women's services, numerous consultations and working groups, and we have commissioned Scotland's leading legal expert on gender equality and human rights to help us to analyse the related issues in more depth.

After several years of extensive consideration of the legislation, our headline finding is that the proposed reforms to the 2004 act will not negatively impact on women's equality and rights. Unfortunately, polarisation and inaccuracies in some areas of public discourse around the bill have led to a perception that the bill and the broader aims of trans inclusion and rights are fundamentally in conflict with the aims of women's equality. Engender does not share or uphold that view. We are confident that reform will not have any adverse effect on the capacity of the Equality Act 2010 and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women to protect women from discrimination and advance women's equality and rights.

We do not believe that trans equality and women's equality are in competition with each other. Instead, we see the paths to equality for women and trans people as deeply interconnected and dependent on shared efforts to dismantle patriarchal intersecting systems of oppression that impose barriers to full equality. Furthermore, as advocates for equality, we are invested in and will always seek to support efforts by Government to adhere to international best practice in inclusive law and policy making and human rights standards. We therefore broadly support and welcome the provisions in the bill.

Sandy Brindley (Rape Crisis Scotland): We at Rape Crisis Scotland believe that anyone who has experienced sexual violence should be able to access support at the point of need. We run a daily helpline for anyone affected by sexual violence and support the work of 17 autonomous rape crisis centres across Scotland from Shetland to Dumfries and Galloway in providing life-saving support to survivors of sexual violence.

The majority of rape crisis services across Scotland provide support to women, to men and to non-binary people. No service in Scotland requires a gender recognition certificate to access support. Where services are women only, we do not require documentation or proof. All rape crisis services in Scotland are inclusive of trans women; that has been the case for 15 years and, in all that time, there has been no single incident of anyone abusing that. The bill's provisions will have no impact on how rape crisis services in Scotland are delivered.

Naomi McAuliffe (Amnesty International Scotland): I thank the committee for inviting us to give evidence on the bill.

Amnesty International has been consistent in its support for the introduction of progressive reforms to the process of obtaining legal gender recognition in multiple countries and jurisdictions around the world, including Scotland and at Westminster. We have been disappointed with the slow progress being made down south, and we really commend the Scottish Government and parliamentarians across the political spectrum for showing leadership on this matter.

Scotland must align with international standards and best practice in upholding rights related to gender recognition. As we addressed in our joint submission with JustRight Scotland, the Gender Recognition Act 2004 was a positive step. However, nearly 20 years later, best practice has moved on and the GRA has been shown not to be working for trans people.

Making the necessary changes to the process of obtaining a gender recognition certificate is in line with the leadership that Scotland has taken on a number of human rights fronts, especially children's rights, responses to violence against women and girls and the upcoming legislation to incorporate further international human rights treaties, following the incorporation of the UN Convention on the Rights of the Child into Scots law.

Lastly, I want to comment on the solidarity and consistency of approach across human rights and equalities groups in Scotland. As has been demonstrated to the committee, despite the fact that trans people make up a small percentage of Scotland's population, there has been clear and committed support for the reforms from different sectors of civil society that represent the rights of women and girls, children's rights and human rights more broadly. I welcome any questions.

Jen Ang (JustRight Scotland): In our joint written submission with Amnesty International Scotland, JustRight Scotland has welcomed the

introduction of the bill on the basis that it brings Scotland closer in line with international best practice on legal gender recognition processes, importantly, by supporting the removal of the requirement for medical diagnosis of gender dysphoria as well as the need to include intrusive and detailed medical reports about choices that people have made with their bodies.

We provide direct legal advice and representation to people who face discrimination across Scotland, including people who face discrimination on account of their trans identity. We believe that reforming the process in line with international best practice is essential to upholding trans people's rights to identity and dignity and to reducing discrimination against trans people in Scotland over time. To put it most simply, that is about improving the process for ensuring that trans people have equal access to what other people take for granted here—an identity document that reflects who we are and how we live our lives.

With respect to the extension of the process to children aged 16 and 17, we noted in our written submission that, if steps are taken to do that, the process might have to differ from that for people over 18 and will have to take into account the principle of the evolving capacities of young people, as set out by the Convention on the Rights of the Child and corresponding appropriate protections. We refer to the evidence given to the committee by Bruce Adamson, the Children and Young People's Commissioner Scotland. He pointed out that such processes must recognise the growing autonomy of young people at these ages as well as the need to continue to protect and support them.

Finally, we support further discussion of the definition of ordinary residence as a criterion for eligibility if a person is not subject to a birth register entry. Specifically, we are concerned that the definition could exclude people who have chosen to make Scotland their home but are not yet ordinarily resident with regard to their migration status. I think that that is different to the point that has been raised at other times in these evidence sessions. We see that criterion as unnecessary and potentially discriminatory, so we advocate for an amendment or guidance that either requires simple residence or specifically includes certain categories of people with some form of leave. Our evidence contains a note about refugees and asylum seekers, but that might be a wider discussion.

Thank you for the opportunity to give evidence to the committee. We look forward to answering further questions that you might have about our submissions.

The Convener: Thank you all. We will now move to questions. Maggie Chapman is first.

Maggie Chapman: Thank you for being with us this morning and for the evidence that you have given us in your opening statement and in writing. Also, thank you for waiting—the first evidence session went on for longer than we had anticipated. I will come to Jen Ang first. In your initial comments, you spoke about your support for the removal of the need for a gender dysphoria diagnosis. Will you say a bit more about why that is so significant and important? Earlier this morning, we heard about the need to retain medical gatekeeping. Will you comment on that? I will come to the other witnesses in a moment.

Jen Ang: Yes, absolutely. International best practice has moved on significantly from the position in 2000, as we outlined in our evidence and as has been thoroughly covered in the evidence from the Scottish Human Rights Commission and Scottish Trans.

Specifically, in its 2015 parliamentary resolution, the Council of Europe spoke about the need for

"quick, transparent and accessible processes"

for legal gender recognition that are "based on self-determination". More recently, in 2021, the United Nations independent expert on protection against violence and discrimination based on sexual orientation and gender identity has pointed out that best practice for states is to look at systems that are "based on self-determination" and "a simple administrative process" and that are not connected with the need for things such as medical certification, surgery and treatment.

12:00

As has been covered in other evidence to the committee, increasingly, a number of other European Union member states and other states have implemented legal gender recognition systems that are similar to the proposals that the committee is considering. It is to Scotland's advantage to look at the issue now, because it is open to the committee to take evidence on the history and practice of those systems, which in some cases have been in place for a number of years.

On the evidence, it is clear that international standards have moved on and that this is a positive and progressive move and is appropriate for consideration at a time when we are looking to reform the 2004 act.

Maggie Chapman: Naomi, in relation to some of the issues around gender dysphoria, is there any need for the kind of medical gatekeeping that we heard about this morning?

Naomi McAuliffe: No. As Jen Ang said, there have been changes in international best practice on the issue. Medical gatekeeping puts the power in the hands of medical professionals, who are obviously there in a support capacity and to meet the needs of individuals. That approach says that individuals are not able to define their own trans status, which is at odds with bodily autonomy and the protection of the rights of individuals. As Jen said, there are plenty of examples, including from Denmark, Malta, Ireland and Portugal, of where self-ID has been introduced. That is the direction of travel that Scotland and the rest of the UK are catching up with.

The Yogyakarta principles are a set of international principles on LGBT equality. The preamble to the principles talks about the need to

"rely on the current state of international human rights law",

and says that the principles

"will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time".

It is a key human rights principle of many treaties or declarations that they are living instruments and that they develop over time. Whereas the GRA served its purpose at that time and place, we are now seeing a change in practice, and the bill is about keeping up with that.

Maggie Chapman: Catherine, we have heard from previous witnesses that not all trans people will have gender dysphoria and that it is not a feature of all trans people's experiences of their identity. In Engender's policy and advocacy work, have there been discussions or have you engaged with people who have had a clear problematic relationship with medicalisation and with maintaining such a diagnosis and the psychiatric assessments that go along with it in any gender identity process?

Catherine Murphy: I certainly support the points that Naomi McAuliffe and Jen Ang have made on that. From Engender's point of view, it is hard for us to see the justification for the continued inclusion of a psychiatric diagnosis, given the well-documented decision by the WHO and others and the evolving human rights standards. As advocates for women's rights, we are acutely aware of the long and unfortunate history of the pathologisation of LGBT identities and bodies and of women's behaviour and bodies, and we are acutely aware of the harm of unnecessary medical barriers that are put in place, particularly around deeply personal decision making.

We are aware of that and Engender certainly wants to see the removal of those kinds of damaging precedents that use pathologisation and medicalisation as a form of social control. We do not see any justification for the continuation of that. There is certainly no medical justification, and we think that it is a manifestation of a broader trend that we want to see the end of.

Maggie Chapman: Sandy, your statement was very clearly along the same lines as those of Rape Crisis Scotland's member organisations. The network has been trans-inclusive for 15 years and is operating without an issue. Can you say a bit more about how you have dealt with the medicalisation of trans identity if it has come up in services that either you or Rape Crisis Scotland network members have experienced?

Sandy Brindley: I am not sure that I can speak to that point from a Rape Crisis Scotland perspective.

Maggie Chapman: That is fine, thank you.

I have another question. Catherine, can I come back to you? We heard those people who are not supportive of reform of the GRA speak about its widening the group of people who might be eligible to apply for a GRC. We heard that point this morning and we have seen it in evidence elsewhere.

What is your view on the argument that the reform that we are considering would open up the GRC process to a wider group of people? Do you think that we need to think about any safeguarding or mitigation measures as we consider the bill?

Catherine Murphy: Beyond the very obvious points that the current process can be quite obstructive for trans people and that the purpose of the bill is to make the lives of trans people easier by making it easier for them to secure documents, which might potentially lead to some uptick, we do not see any evidence that a broader or wider group of people would seek a GRC, and we do not see that the bill, as it is written, substantially changes some of the current issues around the protection of women's equality.

From our perspective, we have not seen any evidence that the bill would lead to an enormous widening of the group of people who would want to seek a GRC.

Maggie Chapman: Naomi, could I come to you on a similar point? Some of the concerns were that with the removal of any medical or psychiatric diagnosis, anybody who wanted a GRC could apply for one. Do you see that as problematic?

Naomi McAuliffe: Considering the evidence that we have seen from other countries, that has not come to pass. As Catherine has said, very few trans people and people who are recognised to be trans people in Scotland have a GRC. It has already been identified that there are barriers to that happening, so there would be a widening of the group of people in that those people who do

not currently have a GRC might want to get one if they need to change documentation.

Ireland, for example, has an equivalent population to Scotland of around five million people, and it had fewer than 900 applications when self-ID was introduced, which is commensurate with the population of trans people that we would expect.

Maggie Chapman: Jen, do you want to come in on that point about the concerns around opening the application process up to anybody?

Jen Ang: Absolutely. To be clear, we are looking at reforming a process that has been described as a breach of people's individual rights and unnecessarily difficult to succeed in. I have spoken previously about the fact that we provide direct legal representation and advice to trans people. Many of our clients, like many trans people in the population, do not have GRCs and the reason that they do not have them is the barriers that they face in obtaining one.

It is right to say that, in seeking to change the eligibility criteria, we are seeking to remove barriers that are seen to be harmful or to have been obstructive for people who are trying to achieve their rights. Should it be easier for people who want to obtain a GRC to obtain one after the reform bill? Absolutely. Is it a problem? It should not be, because that is the purpose of the reform.

There has been concern and discussion about whether a much larger group than those who are intended to benefit from the reform might be eligible under the bill. My response is that there are clear safeguards in place already. The offence that would be in place for fraudulent statutory declaration, for example, is one of the clearest examples of a place in which we have considered and dealt with that difficulty.

Maggie Chapman: Okay. Thank you. I will leave it there for now.

The Convener: Rachael Hamilton has a brief supplementary question.

Rachael Hamilton: It is my main question, and it links to the point that Jen Ang made.

Do you believe that there would be unintended consequences of not having a medical diagnosis, in that, as some people have highlighted, that might shield a criminal and provide them with an invisible cloak when it comes to their past, removing safeguards for vulnerable women?

Jen Ang: You are asking whether I believe that removing the requirement for a medical diagnosis creates an unintended consequence of shielding a criminal.

Here is the thing. As I said before, we have a law on the books that has been identified as being out of step with international best practice, and the processes that we have for legal gender recognition are directly causing harm to a group of people. The focus of the reform of the legislation is to redress that issue. It has been proposed, among other things, that we require the creation of a criminal offence or rely on the existing criminal offence of making a false statutory declaration. In my view, although it is open to the committee to look at alternatives, as I said, I do not see that there is sufficient concern to stop the reform that is proposed.

Rachael Hamilton: Does any other panel member have a view on that? Let me expand the question and ask what evidence you have seen, during this process, that a false declaration would be effective?

Sandy Brindley: If someone changes their gender using a gender recognition certificate, it will not enable them to escape a criminal past or criminal record. At Rape Crisis Scotland, for example, we have clear safeguarding procedures in place in relation to the protection of vulnerable groups. If somebody has committed a rape, that will still be indicated to us, even if they have changed their gender. I am not sure that there is a risk there, in terms of safeguarding.

Rachael Hamilton: To be clear, are you talking about someone who has been convicted of rape and has a criminal record—

Sandy Brindley: Yes.

Rachael Hamilton: Therefore, there might be an unintended consequence in relation to someone who does not have a criminal conviction—I suppose that you might just say that that is life. How are vulnerable women protected in that circumstance? I am new to the committee today, but I have seen no evidence whatever that the false declaration issue has been looked at in the process.

Sandy Brindley: What I can say is that we have been trans inclusive on the basis of self-ID for 15 years and we have no experience of reports of anyone abusing the system. When the committee heard from the Equality and Human Rights Commission the other week, the commission was specifically asked if it had international examples of people abusing the system in countries where self-ID has been introduced, and it was not able to give examples.

It is absolutely right to be cautious about unintended consequences of legal reform, but certainly from what I have seen, there is no evidence of people using systems of self-ID to abuse, for example, women in rape crisis services.

Rachael Hamilton: If no one else wants to comment, that is fine.

The Convener: Thank you. I call Pam Duncan-Glancy.

Pam Duncan-Glancy: Good afternoon, panel. Thank you for joining us and for providing submissions in advance.

I want to ask, first, about the international evidence. Naomi McAuliffe, will you say a little bit about your understanding of the international evidence of potential positive or negative impacts of self-ID in countries that have brought it in?

Naomi McAuliffe: Yes. We have looked into that. I am sure that you have heard this already, but at the moment six European Union states have adopted a self-determination approach. Denmark was the first, back in 2015. It is worth flagging that Denmark took the Argentinian approach; indeed, it is an approach that actually stems from elsewhere in the world. Denmark was quickly followed by Malta and Ireland. Since then, Belgium, Luxembourg and Portugal have adopted the approach. Those are the EU countries that have done so; Iceland and Norway have made similar amendments.

We have not found a negative impact in any of the surveys that we have done; if anything, we found evidence that reforms could have gone further. For example, there has been criticism of the waiting times that have been built into some of the processes.

I know that others have brought up individual cases. However, we do not take evidence from newspaper reports or blogs; our evidence is independently verified, and we have not found self-ID to be a huge problem. We already have seven years' worth of evidence from those other countries, and what I have heard from talking to colleagues from those countries suggests that this does not seem to be a huge problem. We will continue to monitor the situation.

As Jen Ang has said, it is important to balance the harm that the current process causes individuals with the potential harm that self-ID might bring in. At the moment, we do not see that as comparable with the actual harm done to trans people who are not able to obtain a gender recognition certificate through a self-ID process.

12:15

Pam Duncan-Glancy: It is interesting to hear where the evidence about the balance of harm lies.

How have other countries dealt with some of the issues that we have heard about regarding single-sex spaces? I have a specific question for Sandy Brindley that I will come to in a moment, but how have other countries struck a balance and dealt with the conflict that people have put to us?

Naomi McAuliffe: The circumstances are similar to those in Scotland and the UK. We live in a society in which most of our processes are already based on self-ID. People are not asked for a gender recognition certificate to access most services, to go into toilets or changing rooms or to access various other single-sex spaces.

As I have said, the international picture is similar to that in the UK. There are already safeguards and opt-outs in law on a single-sex basis, but those exemptions must be justified on the basis of quite stringent criteria. We already have that approach in the UK, and the experience in other countries has been similar.

Pam Duncan-Glancy: I have a question for Sandy Brindley. How does your service provide support to the women who come to you? How do you protect single-sex spaces and would having a gender recognition certificate be material to that?

Sandy Brindley: I will start with the last part of your question. As far as I am aware, it has never been the case that any single-sex service in Scotland—and definitely no rape crisis service—has ever required a gender recognition certificate or asked someone to provide any proof of their gender.

We deliver our services with survivors at their heart. We provide a very individual service. People are sometimes worried about attending a rape crisis centre, but I can reassure people that the service is very private and confidential. They will not have to mix with lots of different people in a waiting room; indeed, it is unlikely that they will see anyone except for their counsellor or support worker. Any support that we offer someone begins with a needs assessment and a risk assessment to work out what they need and to ensure that the service that we deliver is tailored to those needs.

We have been supporting survivors of sexual crime in Scotland since 1976, when our first service was set up. Survivors tell us that our service is lifesaving. When we deliver services, we have a responsibility to be inclusive of anyone who needs them. We know that particular groups of women face barriers to accessing our services and we believe that it is our responsibility as an organisation to proactively make our services feel safe and welcoming for everyone who might need them. That includes the trans community, who are at risk of sexual violence, as are all women and all members of the community. To us, there is no conflict in providing services in that way.

I noted a point made in the previous evidence session about religion and ensuring that services are provided sensitively. There is really good practice from specialist organisations that work with Muslim women in Scotland on how to provide culturally sensitive services that meet the needs of

as wide a range of women as possible. It is absolutely possible to do that by looking at and thinking really carefully about how services are delivered.

Crucially, those discussions are not impacted by a gender recognition certificate. The bill that the committee is considering will have no impact on decisions made by service providers about how they ensure that their services are provided sensitively to all women who need them.

Pam Duncan-Glancy: I have a final question on that. We heard earlier that some women are opting out of attending single-sex spaces and services for women such as rape crisis centres. Are you aware of that? If so, what is your response?

Sandy Brindley: Our services have been trans inclusive for 15 years, and this issue has come up very recently, probably triggered by the debate around the bill. The number of survivors and women who use our services increases every week—there has definitely been no reduction in demand.

If anyone has any concerns about accessing our services, I ask them to get in contact with their local service, because we will do everything that we can to talk through their concerns. We want to ensure that anyone who needs our services feels comfortable and able to use them.

Pam Gosal: Good afternoon and thank you for your opening statements and the evidence that you have provided. I want to go back to the issue that Pam Duncan-Glancy has just asked about and probe it a little bit more.

Sandy Brindley, you have talked about single-sex spaces and service providers, and you have said that the bill will not impact the services that are provided or the single-sex spaces that we can go into. Can you help me to understand how the bill will work in that respect? If someone from the Muslim faith or the Indian faiths uses a single-sex space—or their daughter, mother, auntie or whoever goes into such a place—they will not know who is in the bathroom, say, when they go in to use that space. When they look around, see a person and think that they are female, that is it—it is okay. However, if they saw something different in there, how would you work around that to make it safe for them? How can you say to the Muslim community or most of the Asian community that they are safe to go into bathrooms, when the bill opens up the possibility for a lot more people to have a GRC?

I raised the issue of doctors with the earlier panel of witnesses. A couple of weeks ago, I asked some witnesses whether, if a doctor is trans, they have to tell an Asian—or any—female that they are, and I was told that they do not have to. The doctor would therefore be breaking the woman's religion, because the woman would not see or know that—unknowingly, her religion would be broken. Can you help me understand how the practicalities of the bill would work in that respect?

Sandy Brindley: I can quickly respond to the point about toilets. In general, there is, as you will know, currently no policing of who uses female toilets. I do not see how it would be possible or desirable to police who uses public toilets, and the bill will certainly not change or affect who uses them.

We hear more and more about, in particular, lesbian women who do not present as stereotypically feminine being challenged when they use public toilets. The policing of how women look and appear really worries me with regard to what that says about where we are as a society. Who has the right to say to a woman that she does not look like a woman and should not be using a female toilet? We hear really heartbreaking stories about people in the trans community—trans women, in particular, but trans men, too—being scared to leave the house because, if they need the toilet, they might be challenged when using a public toilet. I do not think that that level of policing is what we want in Scotland.

Fundamentally, the bill will not change who uses which toilet and, as a committee, I think that it is the bill that you are concerned with.

Pam Gosal: On that point, Sandy, how do restaurants and bars that have single-sex toilets police them and keep bad-faith actors from accessing them?

Sandy Brindley: I cannot speak for the restaurant industry on that point.

Pam Gosal: I am talking about any public toilets or any public space.

Sandy Brindley: They are very much self-determining, are they not? I do not know any institution or private company that polices who uses the toilet. How would they do that?

Pam Gosal: That is what I am asking you. If the bill was passed, would it not make things harder for providers with regard to the justification that people would have to give? I am not for or against this—I am just asking how that would work.

Your answer was fine. Is anybody able to answer the medical side of the question?

Catherine Murphy: I would just reinforce the fact that the bill would not substantively change how people access public spaces, toilets and so on, and it would not create an additional duty for owners or proprietors to do any more policing of those single-sex spaces than currently exists. Any

incident of a woman being attacked in toilets by any individual would be an issue for the police, and the bill would not in any way change the status quo with regard to accessing those spaces.

Could you repeat the specific question about doctors? I will see if I can add anything.

Pam Gosal: I asked witnesses who attended the committee a while back a question about an Asian female going to a doctor. My mum, for example, would normally see whether the doctor was a man or a woman, or she would ask, but if people do not know, they would just see a female. Sandy Brindley was right; sometimes, it is all about appearance, whether that is right or wrong. My mum is an older lady and does not know any better—she would just see what it was. Is it up to the doctor to say what they are? What if that breaks the faith of someone who is Muslim or Indian, which says that they cannot be touched by somebody who is trans, because the religion does not understand it? It is not that the religion does not accept it—it is just not understood. How do you work around those religious groups?

Catherine Murphy: First, that is the current situation with regard to accessing doctors, and it will not change if the bill progresses. That is not to suggest that more work cannot be done on the issue. Across the board in all our public services, we need to work to ensure that we have more inclusive sensitive public services that meet the needs of a wide range of minoritised groups. However, the point that I want to underline is that that is the current situation in relation to accessing doctors, and it will not substantively change if the bill passes.

Pam Gosal: I am sorry—I probably need to make my question clearer. If a woman going to a doctor can see that the doctor is either male or female, they will be fine—I am just using my mum's analysis here when she goes in. However, what if the doctor was trans and they knew that they were seeing an Asian woman? Would that trans person be able to say that they are trans? When I asked that question, I was told that it would not be up to them to say so. That means that the Asian woman would not know that the doctor was trans, and religious people would not understand that. There needs to be a bit more awareness of the issue, so that people understand it and everybody can get that service.

Catherine Murphy: Trans people have a right to privacy in law, and that will not change as part of the bill, nor should it. Things can be done to make sure that there is provision of sensitive services, but we would not want to move to a situation of requiring one's deeply personal identity to be disclosed, a birth certificate to be shown or anything like that. I do not know whether anyone else wants to add anything.

Pam Gosal: I just think that that situation would break the woman's religion. I am sorry, convener, but I need to break this down, because it is important. If a trans person who was male before and is now trans examined that Muslim lady, but the lady did not know that, that would break her religion, because her religion states that only a female can examine her.

The Convener: I think that the answer that we have had is that the situation will not change, because people are not asked for a GRC right now. However, Jen Ang may wish to say a little bit more.

12:30

Jen Ang: I feel that I can maybe help a bit here, if that is okay. I will add a few thoughts, because I do understand the question that Pam Gosal is asking.

There are a couple of things to say. The question was about a conflict of rights or balancing competing rights, and I definitely want to come to that. However, I also want to underscore what my colleague said, which is that we are not talking about removing the gender recognition reform legislation here—we already have a procedure in place. What you describe could therefore already occur in law or in practice, because one of the key things about the gender recognition certificate is that the person who has it is entitled to privacy around its being obtained.

However, your question is a good one. This is an area where it is important for people to have full and frank discussions with regard to changes in the law. It would also be good for the public to have a wider understanding of how legal gender recognition works and our mainstream expectations in that respect. The health service could definitely bring that up. In fact, it does really well in trying to tailor its services and deliver them not only in culturally and religiously appropriate ways but in age-appropriate ways and in ways that take account of who we all are in ourselves. It feels like this is a stream of work that NHS Scotland has already looked at.

It is also really important to know that having our rights in certain areas protected does not give us absolute rights over other things. Just to be really stark, I would point out that if my mother, for example, were to say to me, "I only want a Chinese doctor", that would not necessarily be an expectation that could be met. There are some areas where we give people consideration, because we have to think carefully about things such as access to medical care, appropriateness, competing rights and so on. However, there are other areas where the national health service

makes a decision about the processes that are in place and which are, in fact, clear and transparent.

However, I want to come back to your question about what if we inadvertently breach a person's rights with regard to religious practice or expression in the course of maintaining the current system. As was outlined earlier—and I would invite Naomi McAuliffe to speak to this, too—we know that that sort of thing falls within the operation of our current human rights frameworks and the Equality Act 2010. Both frameworks provide really well-understood mechanisms for balancing rights and, indeed, the Scottish Human Rights Commission has stated that it does not see a clear risk to the rights of others in this area.

However, if there were to be such a case, we would look at whether there was a real and concrete risk—that is, whether the exercising of a particular right caused a real and concrete prospect of harm. If so, we would then need to think about whether the balancing mechanism needed to come into play and, if so, we would look at the most minimal intervention and at issues such as proportionality and the impact on society.

I reassure Pam Gosal that, fortunately, this is a conversation that can and should be had. However, we also need to have some faith in the decades of case law that we have, where the issue has been looked at in other areas.

Naomi McAuliffe: As Jen Ang has said, human rights law and frameworks and human rights-based approaches give us the tools and mechanisms to judge those individual cases where there is perceived to be a conflict between a certain group's rights and faith groups and to look at effective remedies in that respect.

There is, as Jen said, a huge amount of case law on people feeling that their faith-based rights have been interfered with by, for example, wider LGBT rights. There have, for example, been cases of registrars not prepared to perform same-sex marriages, and there have also been examples of people not being able to demonstrate their faith through what they wear or other kinds of jewellery or adornment, because it has been proscribed by their place of work. There are lots of cases in which there seems to have been a clash of rights, and there are mechanisms for dealing with that.

It is probably best to ask health professional organisations about the issue. I know that health professionals have to deal on a daily basis with people who have certain views that affect who they want to be treated by. The right to freedom of faith is also about freedom of thought, so, for example, someone with racist views might not want to be seen by a doctor of colour. The national health service will have procedures in place for such situations, because I am sure that—unfortunately—they happen far too regularly.

There will be everyday examples of health professionals requiring their own rights to be protected while, as has been said before, sympathetic health systems and healthcare are delivered for people, regardless of their views, whether those views be faith-based or otherwise ideologically held with regard to whom they receive healthcare from.

Karen Adam: I want to ask about the person of interest provision, which we have heard that there is some concern about. A person of interest might be able to apply to a sheriff to have someone's GRC revoked; the person of interest could be a parent, a spouse or even a child. There are concerns that that might be used in a malicious or abusive way. The children's commissioner had concerns about that with regard to care-experienced children and young people, in particular. What do you think about that?

Naomi McAuliffe: Yes, we agree that that part of the bill is too widely drawn. We would like there to be some specifics on who a person of interest would be. The registrar general would certainly be a person of interest, and a current spouse or partner could potentially be one, too. Anyone else should have to apply to the registrar general, who would then decide whether to intervene.

At the moment, as you say, the provision is far too wide, and it could lead to vexatious claims, including by ex-partners or other people who have a particular emotional attachment to the case or problems with it. We would like that to be tightened up.

Jen Ang: I agree with Naomi McAuliffe; we addressed that point in our joint submission. With new legislation, as a matter of good drafting, it should be asked whether there is a reason for taking a different approach. If there is not and there is an unknown risk in relation to how that provision will be used, it is probably sensible to have clear guidance or to take a simpler and clearer approach. I understand that the original intention was to have a relatively narrow exemption in order to facilitate certain kinds of actions.

Another issue that was raised was that there is a broadening of the venue for such action—it would move to the sheriff court, rather than the Court of Session. As a lawyer, from an administrative justice point of view, I would point out that that is a different cohort of people who would be taking decisions, which suggests that there might be a larger volume of cases. It is worth having more of a discussion about whether that is necessary and the thinking behind it.

Sandy Brindley: I have no comment to make.

Fulton MacGregor: Thank you for your evidence this morning—and this afternoon, given that we have crossed the midday line.

I have two questions on the provisions in the bill about living in the acquired gender for three months and the three-month reflection period. To start with the first provision, the committee has heard evidence that there is no need for such a three-month period, because people who make such decisions tend to have been living as trans for some time. Another issue that has been raised—including by witnesses this morning—is that of what an acquired gender would look like. I think that we finished our session with the previous panel on a point of consensus. Does anyone want to come in on that?

Naomi McAuliffe: I would be happy to come in. It is a blessed area of consensus. The three-month period before and after seems to be a very arbitrary time limit. There is no evidence on why it should be three months and not two months or six weeks or whatever.

As has been said, unfortunately, the experience of trans people is that accessing trans healthcare can take years, especially since the pandemic. Therefore, the proposed period seems to be a very arbitrary time limit, and there does not seem to be much reason or evidence for bringing it in.

Similarly, we would agree that living in an acquired gender is, of itself, very hard to evidence without there first being a gender recognition certificate, which people can use as evidence to change names and documentation, and without resorting to stereotypes and various other avenues to prove that.

Therefore, we do not see the justification for the waiting time. As I mentioned briefly before, there has also been criticism of the process in Denmark, where there is a similar six-month waiting period. The criticism is that there does not seem to be a justification for that. Since self-ID was brought in there, there have been moves to remove the waiting period.

Fulton MacGregor: Does Jen Ang want to come in on that?

Jen Ang: I agree with what Naomi McAuliffe said. There does not seem to be a clear indication of why that period would be required. I go back to international best practice, which exhorts us to think about a model of self-determination that is a simple administrative process. Something that the lived experience of our colleagues has told us is that, in effect, that period of time makes little difference, given the amount of time that people take to think about going through the process.

On top that, as a matter of good law, if there is no evidence or compelling reason to show that the time period achieves anything in particular, it would be worth considering proceeding without it.

Fulton MacGregor: Do you have any thoughts on the term “acquired gender”? Do you want to comment on that?

Jen Ang: No.

Fulton MacGregor: I will move on to the question about the three-month reflection period, which Naomi McAuliffe also touched on. The bill provides a mandatory three-month reflection period, with a requirement for the applicant to confirm at the end of that period that they wish to proceed. Again, we have heard some strong evidence that that is unnecessary and perhaps even derogatory.

Does the panel have any thoughts on that? I see that Naomi McAuliffe is nodding her head again, but I wonder whether Catherine Murphy or Sandy Brindley wants to come in. If not, that is okay.

Catherine Murphy: To build on the points that Naomi made about the three-month lead-in time, the reflection time also seems to be a somewhat arbitrary number that has been arrived at. There does not seem to be a clear justification as to why that period of time has been chosen. We are also concerned that some of the requirements would rely too heavily on gender stereotypes, certain behaviours and so on. We have a genuine question about what it would look like to prove that you had lived in your acquired gender for three months and had had three months of reflection.

Finally, we are quite clear that a statutory declaration under the threat of criminal penalties is a very serious undertaking. We do not think that people will enter into that lightly, so including those additional time periods, which add up to six months, seems to us almost to defeat the purpose of the bill in making things easier. We see no great justification for their inclusion.

Fulton MacGregor: Naomi, do you want to comment?

Naomi McAuliffe: No, other than to say that I agree with that. Including those time periods and asserting that it is a very big decision on which people might change their mind is quite patronising and really undermines people’s bodily autonomy. My mind automatically goes to the moves to bring in waiting times for women before they can access reproductive services, in particular. Again, that comes from a very paternalistic point of view that women cannot possibly make up their own mind about such things. As has been said before, from the point of view of the concepts of bodily autonomy and protecting the rights of individuals, it is really for individuals to make such decisions for themselves.

12:45

Rachael Hamilton: When I asked the members of the previous panel about the Cass review, which is now in its interim stage, they suggested that we invite Hilary Cass to give evidence on the lack of routine and consistent data collection, which means that it is not possible to accurately track outcomes for children and young people, or to define the service models and workforce needs that are required for a more dignified approach to service delivery.

Should the GRA reform that we are considering be paused until we hear such evidence, get those views and receive the review's full report? As far as I can see, we have not looked at data gathering in relation to the bill and the implications of not having that sort of data collection in Scotland. Catherine, would you like to start?

Catherine Murphy: The comment that I would offer is that there is an enormous global body of research and work on the provision of sexual and reproductive rights and healthcare services to young people, and there is a huge body of reference points around concepts such as evolving capacities and the autonomy of young people. I do not see why this particular consideration should be different from all of that or divorced from the learning that is out there. There is a lot that can be used from different arenas such as healthcare to ensure that young people are able to make decisions and have autonomy in line with their evolving capacities. Those standards are well established in human rights and healthcare.

Rachael Hamilton: Would it be possible to reference for the committee the international comparisons that you have looked at with regard to sexual and reproductive rights, and to give details of how they cross over with the Cass review on children and young people? Were you talking specifically about education in Scotland or were you referencing an international comparison?

Catherine Murphy: I was speaking more broadly about the broader concepts that have emerged from, for example, the Convention on the Rights of the Child and the standards on the provision of services, working with young people and young people's decision making.

Rachael Hamilton: My question, which was for the panel in general and not Catherine Murphy specifically, was about delivering better services. The issue that I am interested in is not specifically about sexual and reproductive rights and the education of children; it is about how we gather data so that we can provide a really good service, and the workforce implications that might come from that.

Naomi McAuliffe: In general, data collection should always be improved. We have brought up in multiple different avenues the need in Scotland for better and more rigorous data that can be disaggregated along lots of different lines. That should be done as standard.

We have also had the experience of the census legislation—the Census (Amendment) (Scotland) Bill and then the Census (Amendment) (Scotland) Act 2019—which was judicially reviewed and which looked at collecting data around trans statuses. It allowed for the fact that people self-ID. The asking of a supplementary question on whether they are trans makes it possible to disaggregate from responses to the sex question those who identify as trans. There are perfect ways of collecting good and rigorous data that have absolutely nothing to do with the gender recognition certificate. It is very much to do with how people self-ID in and of themselves.

As for young people, I refer the committee to the evidence of the Children and Young People's Commissioner Scotland, who, as has been mentioned, talked about international concepts of evolving capacities and how they fit with other laws in Scotland. Young people—16 and 17-year-olds—are now making very adult decisions on, for example, voting, marrying and giving consent for surgical and other procedures. It would therefore make sense for the bill to be in line with our current framework for 16 and 17-year-olds.

Rachael Hamilton: I am not sure that that is a good comparison. A member of the previous panel mentioned the age at which you can get a tattoo. In addition, the census is not really providing the data that we need, because 10 per cent of the population have not managed to fill in the survey.

Naomi McAuliffe: That would be a data collection problem, rather than a problem with the questions and how people do the census. Data collection will always need to be improved on but, again, that has nothing to do with the gender recognition certificate.

Rachael Hamilton: Jen, would you like to come in on this?

Jen Ang: Would you repeat the question?

Rachael Hamilton: It is really about the interim Cass report. The previous panel suggested that the committee should hear from Dr Hilary Cass, because her review has highlighted that there are issues around consistent and routine data collection, which have workforce and service delivery implications. Do you agree that the GRA reform should be paused so that we can take the report of that review into account when it is published?

Jen Ang: I understand—we watched the evidence session with the previous panel. The issue for me is that I am struggling to understand

the connection between reform of the gender recognition process as it stands and the evidence from that report. As Naomi McAuliffe said, it is important that—and I am keen that—data collection improves and that we collect across a wider range of variables. It is imperative that we get better at monitoring equalities and unequal impacts across our services.

When we are thinking about what data can tell us, it is important to consider whether we are conflating that with what this process does. Again, the data might tell us that we need to be better here or that we need to resource something more widely there, but I am not sure that the reform that we are looking at would be informed by a backwards-looking piece of work that tells us how we got here. Does that make sense? Maybe you could explain a bit—

Rachael Hamilton: I can explain. The review examines the increase in the number of referrals of children and young people to gender identity services in England. My question is specifically related to how, if that increase is reflected in Scotland, those services can be delivered in the right way and we have the workforce to deliver them. Sandy, would you like to come in?

Sandy Brindley: I do not have anything to add.

Maggie Chapman: I have a couple of additional questions. Jen Ang and Naomi McAuliffe were talking about capacity, cognitive development and the range of ages at which certain decisions are allowable or enabled. In previous sessions and at some of the informal private sessions that we have had with trans people themselves, we have heard that some people under the age of 10 are clear that there is something that makes them feel that the expression of their identity does not match with the binary world that they are forced to inhabit, and that binary world comes from a clearly patriarchal system. Are there things that we should be considering along the lines of reforming the GRA in the way that the bill does, or more broadly, around supporting people under the age of 16 who might have questions and be thinking about transitioning but do not have the legal right or other support that would enable them to?

Naomi McAuliffe: Again, I think that we would always refer to the young people who you were talking to and to those organisations that work directly with young people on how best to design services. When we are thinking about protections for young people, we think about protecting them from others rather than protecting their rights to autonomy, to access information, and to be properly supported through the processes that they want to go through.

It is probably worth looking at the way in which this has been delivered by health professionals. When we look at things such as the Gillick principle, which is about young people being able to consent to medical procedures, we can see that there is a long case history on the development of the principle that those within the profession are able to work with the young person to assess their capacity and capability to give informed consent to whatever process or procedure they are going through.

Given that we are talking about an administrative system, we need to ensure that people who would be supporting a young person through getting a gender recognition certificate at 16 or 17 have the appropriate competencies and training to be able to support them through that process. However, I would very much defer to young people to build that process together with the service providers.

Jen Ang: For the sake of time, I will not add a great deal to that, other than to endorse what Naomi McAuliffe has said and to point out that Bruce Adamson's evidence was fulsome on that point. He raised the important point that, depending on when the bill goes through, we will also be looking at things such as ensuring that the delivery of the services in which UNCRC rights are embedded takes into account the provisions of the bill.

Maggie Chapman: I have question on a different topic. We have had some discussion today and previously about the criminal offences elements. Engender's submission makes specific reference to trying to ensure in the bill that making a false declaration is a criminal offence, as with other statutory self-declarations. That law already exists.

Engender's submission also expresses concern about criminalising people who choose to detransition. Will Catherine Murphy say a little more about that and about how we can ensure that we are not unintentionally criminalising people who take a decision that turns out to be the wrong one further down the line?

Catherine Murphy: Sure. It is worth saying that we are unclear about why there is the creation of a duplicative criminal offence. We are quite concerned about that, particularly as it will be entirely directed towards an already very marginalised and discriminated against population. That is a concern for us.

Although detransitioning seems to be extremely rare, we recognise that it is a possibility, so we want to ensure that the laws are not used against people who choose to do so. I am not entirely sure what the specific considerations need to be, and I could not go into huge detail on that, but it is worth the committee considering whether a duplicative criminal law is needed and what safeguards can

be built into the act to ensure that it is not used against people who choose to detransition, in the very limited circumstances in which that happens.

Maggie Chapman: I would like to bring in Naomi McAuliffe on that and on whether Amnesty has examples or evidence from elsewhere where self-identification is part of the gender recognition process. Have significant numbers of people detransitioned? What have the support processes been, and what issues do we need to consider, given that, as Catherine Murphy said, the numbers are very small? They are lower than the number of people who choose to get divorced, for example.

Naomi McAuliffe: Absolutely. Similarly, we have looked into that and found very little—if any—evidence from the countries that we considered that that is a significant problem, because it is such a rare occurrence. That said, in developing a new law, there should always be an avenue for a potential outcome. Even if it happens to one person in Scotland, there needs to be a proper process for reapplying for a different gender certificate, voiding one, or whatever to ensure that the individual is protected from any kind of prosecution.

I echo what Catherine Murphy said about duplicating a law that already exists. We already have the Criminal Law (Consolidation) (Scotland) Act 1995, which can cover the matter. Bringing in a duplicate law for a specific minoritised group in Scotland is highly problematic.

Although detransitioning is very rare and we found no significant evidence about it, we should still have a mechanism for it, should it ever arise.

13:00

Pam Duncan-Glancy: I had a follow-up question on the legal position. I note that Jen Ang said she is a lawyer, and I heard my colleague Rachael Hamilton getting to the nub of the Cass review and whether we should hear from Hilary Cass. What in the bill would relate to the Cass review? Why would having a gender recognition certificate lead to a process of medical transition, which is what the Cass review alludes to? Are you aware of any circumstances in which a gender recognition certificate has been used significantly in that process?

Jen Ang: Thank you for that question, but no, I am not, which is perhaps why I was struggling to connect the two things. The implication was that it is the other way around and that, somehow, reforming legal gender recognition will have an impact on whether young people seek medical intervention in their treatment. The important thing about the reform is that it seeks to set apart a decision about any form of medicalisation from the simple legal procedure of applying to change your birth certificate. It was the clarity that we are seeking to divide those two matters rather than conflate them that I struggled with in understanding why we require that evidence.

That evidence is important in other contexts, but I do not see the connection to the impact that the proposed legislation could have.

Pam Duncan-Glancy: That is helpful. I have one further question on border issues, if that is okay, convener.

In your submissions, you talk about the importance of ensuring that refugees and asylum seekers can access the process. Do we need to change the bill to make sure that that is the case? Could the Government provide further clarity and guidance on that if the committee asked for it?

Jen Ang: Thank you again for that helpful question. I suppose that I am quite focused on the idea of “ordinary residence” as a legal term because I have a particular interest in working with migrants and people who do not have British citizenship status in Scotland.

The term “ordinary residence” is used differently in different parts of legislation, so when it is included in a piece of legislation, it is important to define what it means specifically. It is not even to avoid unintended consequences; it is just to make it clear to everyone who is physically in Scotland whether the procedure is available to them. That can be done in the primary legislation or by way of policy and guidance, but I think that a discussion about the intention should be had at the point of making primary legislation.

The reason we talk about asylum seekers and refugees as opposed to other people who might be in Scotland for periods of time is the particular nature of their circumstances. They will be waiting for a decision from our Government, and that is not within their hands. We have looked at students who come to study here and leave again and they are able to control their residence themselves by making decisions. We want to be sure that we are not accidentally locking people out of the process unintentionally for a period of time.

Pam Duncan-Glancy: Have any other countries done it well or badly? Are there any examples that you could use to say, “Do it like this, not like that.”

Jen Ang: In our evidence, we give the example of drafting in Malta, which is one example. We could certainly think about others, but it is important that Scotland thinks about what is right for Scotland. We have shown leadership in areas such as access to the right to vote and almost universal access to our health services. That is exactly the right approach, so it would be consistent to ask the honest question about who we intend to include in the bill.

The Convener: As there are no further questions, I thank all the witnesses for coming along today and for their forbearance before the start of this evidence session.

That concludes the public part of the meeting.

13:03

Meeting continued in private until 13:58.

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