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Equalities, Human Rights and Civil Justice Committee

Tuesday 14 June 2022

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 14 June 2022

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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
18th 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:

Professor Sharon Cowan (University of Edinburgh)
Naomi Cunningham (Outer Temple Chambers and Sex Matters)
Karon Monaghan QC (Matrix Chambers)
David Parker (National Gender Identity Clinical Network for Scotland)
Emma Roddick (Highlands and Islands) (SNP) (Committee Substitute)

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 14 June 2022

[The Convener opened the meeting at 09:33]

Gender Recognition Reform (Scotland) Bill: Stage 1

The Convener (Joe FitzPatrick): Good morning, and welcome to the 18th meeting in session 6 of the Equalities, Human Rights and Civil Justice Committee. We have received apologies from Karen Adam, and Emma Roddick is attending as a substitute. As usual, I ask Emma Roddick to declare any relevant interests.

Emma Roddick (Highlands and Islands) (SNP): I have no relevant interests.

The Convener: Thank you.

Before we start, I will make a short statement on some relevant developments in order to update members and people who follow our work. Today, we will hear from two expert panels as part of our stage 1 evidence on the Gender Recognition Reform (Scotland) Bill. The committee had hoped to hear evidence from Professor Alice Sullivan in today's first panel. Although she is not able to join us today, I am pleased that she has accepted our invitation and should be with us on Tuesday 21 June.

We had also hoped to hear from Dr Hilary Cass in today's second panel, but she has declined the committee's invitation. She said that she has published her interim report and referred us to that and other published statements that she has made.

The committee had also invited a number of respected associations representing medical professionals to give evidence, but several have declined the committee's invitation to attend in person today. Some have agreed to give written evidence, which the committee will be able to consider as part of our stage 1 inquiry.

Last week, the committee heard from witnesses representing faith groups and secular society. Ahead of that session, as committee members are aware, the committee had approached a range of faith groups but, for a variety of reasons, some declined our invitation to attend last week. I hope that that provides clarity for people who are following the committee's work.

As has been agreed by the committee, the clerks are working with a variety of parents groups to organise an informal evidence session in order that we can hear from parents whose children have transgender identity. The clerks are also trying to arrange for the committee to hear informally from people who have transitioned but who have thereafter chosen to reverse that process. The clerks will publish details on those sessions in due course.

I hope that that information helps to clarify some of the queries about the committee's agreed approach to oral evidence sessions.

Under our first agenda item, we will continue to take evidence on the Gender Recognition Reform (Scotland) Bill. I welcome our first panel: Professor Sharon Cowan is professor of feminist and queer legal studies in the University of Edinburgh's school of law; Naomi Cunningham is a barrister at Outer Temple Chambers, and chair of Sex Matters; and Karon Monaghan QC is a barrister at Matrix Chambers. I refer members to papers 1 and 2.

I invite each witness to make a short opening statement.

Professor Sharon Cowan (University of Edinburgh): I thank the committee for inviting me to give evidence today. I am a professor of feminist and queer legal studies in the University of Edinburgh's school of law. My research focuses on three main areas of study: criminal law, particularly in the area of sexual offences and violence against women; asylum and refugee law and policy; and LGBTQ rights, particularly those of trans people. I have been working on those issues for more than 25 years.

Most recently, I have worked on a project that asks trans people about their understanding and experiences of equality law in Scotland, Canada and the US. I have also worked alongside the Scottish Trans Alliance, and I am on the advisory board of the Scottish just law centre, which, I think, the committee heard from in a previous session.

Focusing on the Scottish context, I note that when I interviewed trans people in 2016 and 2017 it was striking how many of them said that they were proud to live in Scotland because it was leading the way on many issues concerning LGBTQ communities, including equality and hate crime laws. One of my participants said that Scotland was

"the best place on the planet"

to be trans.

However, as the committee has heard from many others, it has been recognised that the current system of gender recognition, which was introduced in 2004, is no longer fit for purpose in

many ways, not least because of its outdated reliance on the diagnosis of gender dysphoria. Replacing the current process with one that reflects international human rights standards and standards of good practice, as outlined by the Scottish Human Rights Commission in its submission, is now an urgent matter, because Scotland lags behind other jurisdictions in affording legal rights of recognition to its transgender and, I might add, non-binary residents.

If the Scottish Government chooses to introduce a system of self-declaration of gender, it will not be setting an international precedent. On the contrary, it will be following the lead of countries including Argentina, Denmark, Malta, Norway, Ireland, Belgium, Colombia, Brazil, Portugal, Luxembourg and Pakistan, which have introduced such a system without any problems being reported. The Scottish Government will also be complying with the Parliamentary Assembly of the Council of Europe's call in 2015 to

"develop quick, transparent and accessible procedures, based on self-determination".

Rather than being a front runner, Scotland is at risk, as it was with the Gender Recognition Act 2004, of being one of the last to reform its law in this area.

I look forward to answering the committee's questions and helping Parliament to create a bill that reflects the dynamic and progressive community that we know Scotland is and can continue to be.

Naomi Cunningham (Outer Temple Chambers and Sex Matters): It is a peculiarity of the debate that at least some people, on both sides, maintain that the grant of gender recognition certificates does not affect the operation of the Equality Act 2010—in particular, the single-sex exceptions in that act. My position is that, as a matter of law, whether someone has a gender recognition certificate should make no difference to the single-sex exceptions under the 2010 act. However, we cannot be sure of that. In practice, it is more difficult for organisations that seek to maintain single-sex services or spaces to deal with individuals who have gender recognition certificates.

Where a person is on that question depends, in part, on what they think the concept of "sex" means in the 2010 act. Some people say that "sex" already means self-identified sex. If they are right, getting a gender recognition certificate does not change a person's sex for the purposes of the 2010 act, because their sex is already whatever the person says it is. I think that, legally, that position is untenable.

Some people say that "sex" means legal sex—biological sex, except when modified by a gender recognition certificate. If those people are right, a gender recognition certificate undoubtedly changes the legal analysis of the way in which the single-sex exceptions operate. However, in my view, it is difficult to imagine real circumstances in which it would change the outcome of that analysis; it changes the route but it will never, or almost never, change the destination. The reason why is that the single-sex exceptions in the 2010 act are justified or not justified as a matter of practical impact, rather than certification.

I will make that concrete, because it is important to think about the consequences of proposed legislation in concrete terms. If I, as a woman, look up while drying myself in the women's open-plan changing room at the swimming pool, and meet the eye of a naked male person, my feelings are going to be a mixture of surprise, embarrassment, anger and fear. Whether or not that male person has a secret certificate in a drawer at home is not going to make any difference to that mix of feelings in me.

Most of the exceptions are variations on that theme. They are conditioned by recognition of the needs and feelings of the general user of single-sex spaces. Bodies—not identities or certificates—affect those needs and feelings.

To pick from those three possible interpretations of what "sex" means in the 2010 act, my view is that it simply means biological sex. The consequence is that nothing about the way in which the sex discrimination provisions work is affected by whether someone has a gender recognition certificate. For those purposes, they remain their biological sex.

However, we have yet to learn which of those three views is right. There are tangled and difficult questions on which reasonable people—even reasonable lawyers—can disagree. I believe that, to start with, Karon Monaghan and I disagree on that specific point; she, Sharon Cowan and I probably have three different views on the questions.

Recently, I have changed my mind on what "sex" means in the 2010 act. Until a few days ago, I was in the legal sex camp—biological sex as modified by a gender recognition certificate. However, I have thought deeply about it, and re-reading the Equality Act 2010—particularly the provisions on single-sex exceptions, with a view to their practical consequences—has persuaded me that "sex" must mean biological sex.

Even more vexed questions arise from the bill about the cross-border effects of Scottish gender recognition certificates, such as on the legal status of a Scotland-born 16 or 17-year-old with a

Scottish GRC who attends a school in England, and on how the school is to manage those legal and practical problems.

Finally, I point out that the law is not just about what courts ultimately decide the term means; it is also about what people think it means. Often, in practice, that is the most important thing. A folk understanding, if you like, of the law can operate in practice for years before anyone brings a test case about it and finds out that that understanding is wrong. That affects what happens on the ground.

If you enact amendments to the Gender Recognition Act 2004 that would change both the size and the profile of the group of people who can be granted a gender recognition certificate, what you will do in practice is create a class of people—which will be of unknown size and unknown characteristics—who have an expectation that, because the law recognises them as the opposite sex, they are entitled to be treated as the opposite sex by everyone around them, in all circumstances.

09:45

When they learn that that is not the case—that it is a wholly unrealistic expectation and is not going to happen—they are going to be disappointed and angry. The proposed change, which has—I am sure—been proposed with the very best of intentions, is capable of having, for the very people whom it is intended to help, consequences that are, in fact, positively cruel.

Karon Monaghan QC (Matrix Chambers): Thank you for inviting me. First, I will say something about myself: I am a barrister practising in the sphere of equality law and have been for just over 30 years. I will say something about the scheme of the Equality Act 2010 and the impact of the changes that are anticipated in the bill, in so far as the 2010 act is concerned. My first point relates to the meaning of the two key concepts under the act: sex and gender reassignment.

Under the 2010 act, "sex" means biological sex. We know that for two reasons—in fact, three reasons. First, "sex" is defined in the 2010 act as being

"a man or ... a woman".

Secondly, "man" and "woman" are defined as being "male" and "female", as the case may be; "male" and "female", as a matter of dictionary definition, correspond to biological sex. Thirdly, case law indicates that "sex", under the Equality Act 2010, means biological sex. Biological sex ordinarily corresponds to legal sex—I will come to the importance of that in a moment—which is what "sex" means under the 2010 act.

The concept of gender reassignment is a characteristic of transsexual people. I will use the term "transsexual" people only once, because that is the language in the act; I will use "trans" hereafter.

Gender reassignment is a characteristic of trans people. It is given a very wide meaning indeed, for good reasons, so it means a person who

"is proposing to undergo, is undergoing or has undergone"

a process of reassigning their sex. One need not even have started the process of transitioning in order to be protected by the provisions that address gender reassignment. That is a very positive thing, because it means that a person who goes into work and says to their employer, "I'm proposing to undergo gender reassignment" cannot be dismissed, or if they are, they will at least be able to claim discrimination. What it does not do is change a person's legal sex.

As to provision of single-sex services, which is one of the key areas of controversy, that is a positive action measure. It ensures that women—I use "women" here because that seems to be the area of controversy—or females can access spaces from which they might otherwise be excluded for reasons of privacy, trauma and so on.

Single-sex services are services that are targeted at only one legal sex. A women's single-sex service will be targeted at, and open to, only people who are legally female. That means that a trans woman without a GRC who attends a women-only single-sex service can be excluded, because they are legally male. That is not so if they have a GRC—I will come to that.

There are exceptions to that, where it would be indirect discrimination to exclude them—where it would be a rule that disadvantages trans people. However, given the wide meaning that is given to the concept of gender reassignment, that is by no means inevitable.

If a trans woman without a GRC seeks to access a female-only service, the starting point is that they can be excluded because they are legally male. If a person has a gender recognition certificate, as the committee knows, they are to be treated for all relevant purposes as being of the legal sex that is recorded on their gender recognition certificate. If a trans woman with a GRC seeks to access a women-only service, they cannot be excluded, because they are legally female, unless their exclusion—or a policy excluding trans women—can be justified. That requires that a proportionate and legitimate aim be shown. The starting point is that, if you do not have a GRC, you can be lawfully excluded. If you do have a GRC, you cannot be excluded unless it is justified.

When the Parliament in Westminster enacted the Equality Act 2010, it would have had it very much in mind that there were few trans women—a cohort of about 300 a year—with gender recognition certificates, and that there would have been an objective assessment by an independent panel as to entitlement to a GRC. The bill's proposals apply to people who are entitled to a gender recognition certificate and therefore—save where it is justified that they cannot—can access women-only spaces. That cohort of people is, we assume, very much larger than Parliament intended when it enacted the 2010 act.

Those are my opening observations. It is safe to say that the European convention on human rights does not require a scheme of that sort. Whether or not the bill is enacted, the 2010 act model does not need to be changed. It is just that the committee needs to be mindful of the impact of making the scheme more liberal.

I hope that those observations are of assistance.

The Convener: Thank you very much for that. All three contributions have been useful. We move to questions from members, starting with Maggie Chapman.

Maggie Chapman (North East Scotland) (Green): Good morning and thank you to the witnesses for joining us and for your opening statements and the other information that some of you provided.

I will explore two areas: first, the case for change or the need for gender recognition reform at all; and, secondly, questions around gender dysphoria diagnosis and the panel that has been associated with that process.

Sharon Cowan, I will come to you first. In your opening remarks, you talked about the views among the trans people that you speak to shifting, in the past five years, from Scotland being a great place to live to that not being the case. How do you see that as being linked—or otherwise—not so much to the discussions around this bill, on which there have already been two consultations, but to the need for change and for something that is within the current GRA to be different?

Professor Cowan: It is notable that the people whom I spoke to in my research before this more recent—in the past five years—move towards change were more positive in their reflections on how it was to live in Scotland under the equality regime at that time, as well as all the other elements of law that affected trans people. That is partly for the reasons that have been mentioned about the way that this conversation has evolved, but also because there is now an acceptance that the need for a diagnosis of gender dysphoria is problematic. I know that the committee has heard from many people on that particular issue, not only from a health perspective but in relation to accessing a diagnosis, which can take years and delay the whole process of gender recognition. It is also about the way that people access healthcare according to their other individual needs that intersect with their gender identity, such as disability, race, religion or living in a rural rather than an urban part of Scotland.

That is primarily the move that has been seen across the international terrain through the World Health Organization, the World Professional Association for Transgender Health and all the international organisations that have made that move. From my perspective and from working alongside Scottish Trans, that is the number 1 thing that trans people would say is difficult for them about the current gender recognition process. There are other aspects too, but that is primarily the problem that they face.

Maggie Chapman: Thank you; that is helpful. You said in your opening statement that the need for a gender dysphoria diagnosis is viewed internationally as outdated. That point links closely with the current process of having a panel of medical experts assessing information. Can you comment on the appropriateness of that process, based on what you have heard from the trans people to whom you have spoken and from your analysis of that process?

Professor Cowan: I have worked with people in the community but also with organisations that deal directly on the front line with trans people. The work of the gender recognition panel is not like that of another tribunal where you can go in and watch the proceedings, which you can do with many courtrooms and tribunals. I would not say that the work of the gender recognition panel is secret, because that sounds a bit insidious, but it is private, for many good reasons. That means that it is difficult to assess how the decisions are made.

The information on which we assess how the decisions are made usually comes from the correspondence between the tribunal and the people who are applying for a gender recognition certificate. From my understanding, that correspondence is not always very helpful in that it asks more and more questions in repeated attempts to gain intrusive bits of information about what kinds of medical intervention people have had and so on. That process potentially puts off a large group of people from even applying for a gender recognition certificate in the first place.

Maggie Chapman: Thank you; that is helpful.

Naomi Cunningham, I have a similar question about your views on the case for change, if you view that there is one. In your opening comments,

you talked about that larger group of people being potentially eligible. What is your view on whether reform is necessary?

Naomi Cunningham: It seems to me that the two biggest, most important changes that are proposed in the bill are the reduction in the minimum age to 16 and self-identification—the removal of medical gatekeeping. Taking the second of those first, I do not think that the case is made for the change that is proposed. The removal of any sort of medical gatekeeping and of a requirement for diagnosis of gender dysphoria opens up the process and the availability of a gender recognition certificate to a group of unknown size and characteristics. We simply do not know who will apply for gender recognition certificates if all that they have to do is declare that they intend to live permanently in their desired sex. We do not know what the characteristics of that group will be.

The Gender Recognition Act 2004 was originally passed to meet the needs of what was at the time perceived, and repeatedly stated, to be a tiny minority of individuals with the distressing condition of a gender dysphoria so severe that it was assumed that they felt the need to take medical steps to modify their bodies to look as much as possible like the sex that they wished they were. Self-ID blows that wide open to a group of wholly unknown nature but potentially including those who choose to cross-dress for erotic purposes.

There is nothing in the proposed legislation that would prevent erotic cross-dressers from simply applying for a gender recognition certificate in order to make it easier for them to access single-sex spaces. They might not mean any more harm than finding their satisfaction from being seen in public as women and treated in all respects as women. Nevertheless, women are entitled to male-free spaces when they are naked, vulnerable, asleep or undressing and they are particularly entitled—it ought to be particularly obvious—to have privacy from males who desire to be seen as the opposite sex for erotic purposes. I am particularly troubled by that.

10:00

Maggie Chapman: I will come back on a couple of things. In a lot of what we have heard, the assumption is that we are always talking about trans women; we must recognise that trans men exist, too, and Sharon Cowan mentioned non-binary people in her opening remarks. In relation to what you say about gender dysphoria and the medicalisation of it, given that the World Health Organization has reclassified it and there is increasing evidence that not all trans people experience gender dysphoria, how can we retain a restriction that excludes trans people from getting a GRC?

Naomi Cunningham: I will put that question back to you, if I may. You say that not all trans people experience gender dysphoria, but if that is the case, I am not sure that I understand what you mean by a trans person.

Maggie Chapman: The evidence is increasingly clear that there is substantial published research based on direct engagement with trans people that that is not always the case. I would not want to prescribe what being a woman has to mean—the idea that you have to look, dress and act a certain way is sexism, and I would not do that—and I would not want to do that to trans people, either.

Naomi Cunningham: If you define a trans person simply as anybody who defines themselves as a trans person, you have a hopelessly circular definition, and you cannot make any useful generalisations about the characteristics of that group.

The consequences of gender recognition certificates are extreme: they make substantial demands on the rest of society; they threaten those who know about the existence in an official capacity of the person with the gender recognition certificate under their previous gender identity with criminal penalties for disclosure of that information; and they at least open up questions about access to single-sex spaces and services. They make a lot of demands on other people.

It does not seem unreasonable to say that a gender recognition certificate is a serious and elaborate accommodation, which may need to be made for a small number of people if they prove their need for it, but it should not just be given out to anyone who says, “I would like one, please.”

Maggie Chapman: One issue in relation to the panel requiring evidence to be submitted to prove that you are who you say you are is that the process is intrusive. Surely trans people deserve privacy, too.

Naomi Cunningham: A lot of the point of the Gender Recognition Act 2004 is to give transsexuals, as defined, privacy, provided that they meet the qualifying conditions, but it is privacy with serious consequences. For example, it creates an opportunity for what we at Sex Matters referred to in our submission as “identity laundering”—it makes that easy.

Simply to say that anyone who asks for it without any sort of proof that they have the real need of it that the 2004 act was passed to provide for seems to be radically rewiring the nature of the task that the 2004 act does. It was passed in response to the Christine Goodwin v the United Kingdom case in the European Court of Human

Rights and the recognition in that case that there were people who had taken every possible step that medical science could provide them with to transition, and that they were in a difficult position because they might well pass—some of them might pass, anyway. The 2004 act recognised that they had taken difficult, painful and frightening steps to change their identity, and that the state should recognise and accommodate that by allowing them to marry and so on. That original purpose is clear, but the change to self-ID threatens to blow that wide open into something completely different and make the act do something completely different.

Before I finish on your question, I want to talk about age, which is the other worrying aspect.

Maggie Chapman: I know that another member wants to ask about age later on, so I will leave that to them.

Naomi Cunningham: You asked a question, so I would like to finish my answer to it.

The other, particular difficulty with the proposed changes is the reduction in the age limit to 16. What you need to have very clearly in mind on that point is what Hilary Cass has said about the serious intervention that social transition is, given that legal transition must be a step even further. If you crystallize a child's legal identity as the opposite sex at the age of 16 or 17, how difficult will it be for that child, as they mature—I believe that human brains do not mature fully until the age of 25—to say that they got it wrong?

Maggie Chapman: I know that my colleagues around the table will come back on certain points that you made in that answer.

I will turn to Karon Monaghan. I listened to your opening remarks and I am interested in your thoughts on the medicalisation process. Do you agree that medicalisation of gender dysphoria is problematic and do you see the shift away from requiring that diagnosis as necessary?

Karon Monaghan: I am somewhere between Sharon Cowan and Naomi Cunningham on that. I recognise that the diagnosis of gender dysphoria is one that is increasingly challenged or not recognised, both internationally and domestically. I understand that. However, for the reasons that I have given, I have a concern about the size of the group that might qualify for a gender recognition certificate if the bill is enacted. I am concerned about the absence of any meaningful gatekeeping—to use Naomi Cunningham's description. There is very little way to check whether a person meets the requirements to satisfy the gender recognition certificate.

You made the observation that we need to move away from the idea of gender stereotyping. If we do not have a medical diagnosis—I completely see the reasons why that is problematic—what do we mean by living in the opposite gender? How does one tell whether someone is living in the opposite gender? I am concerned by the absence of any objective assessment—or gatekeeping.

I am also concerned about that for reasons of legal certainty. How do we know whether a person is meaningfully trans without any objective assessment? Although I completely understand what Sharon Cowan says and I do not in any way suggest that she is wrong—I completely accept that concern about a diagnosis of gender dysphoria—I am worried that there does not appear to be any objective threshold for determining whether a person ought to be entitled to a gender recognition certificate.

Maggie Chapman: I note the evidence that you gave in Westminster in February 2021 when you said very similar things. When you talk about gatekeeping and safeguards, what kinds of things do you have in mind?

Karon Monaghan: That is the difficulty. At the moment we have gender dysphoria, so everyone knows that an assessment can be made. It may be controversial, but there is a gender recognition panel. Under the current bill, there is no means of testing permanence, besides the declaration. However, there could be a panel that makes some objective assessment, determines whether it is real permanence and whether there is a meaningful dysphoria—even if it cannot be characterised as a medical condition. We could have some form of gatekeeping.

As I said, it also problematic in terms of legal certainty. The model of the Equality Act 2010 means that the starting point is that there is no need for justification—there may need to be some justification in certain circumstances. Under the Equality Act 2010, you do not need to justify the exclusion of a trans woman—I will use the example of a trans woman as that seems to be the area of controversy—without a GRC from a women-only service, because they are legally male. However, you need to justify that exclusion if that person is legally female. How does one determine whether the person is meaningfully legally female when all that you have is self-declaration? What does that mean? How does one live as a woman without any gatekeeping or objective assessment of permanence and some form of dysphoria? How does one slot that in? As I said, the issue is not the model; it is the slotting in of a gender recognition certificate without an objective assessment.

Maggie Chapman: I suppose that there are no other identities that we may have as human beings and that are currently recognised by the

Equality Act 2010 that require gatekeeping in that way.

Karon Monaghan: That is not so—there is nationality and citizenship, and there may be a requirement to show heritage. If a service is targeted at Irish Travellers because of particular health difficulties in the Traveller community, people might have to show some evidence that—

Maggie Chapman: There are protections for that accordingly.

Karon Monaghan: Of course.

Maggie Chapman: I suppose that, on the issue of the wider group and what characteristics might be included in that wider group, there are questions about why that has the legal significance that two of the panel members seem to be giving it. However, I realise that we probably need to move on, convener, so I will leave it there for now.

The Convener: Thank you—you are reading my mind. We need to be conscious of time, because members want to cover a good number of areas. However, we covered more than we expected there, so thank you for that.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning to the panel, and thank you for your opening statements and responses so far.

I have questions on two areas that I have explored with previous panels, which are the requirement to live in the acquired gender for three months and the three-month reflection period. I will start with the former issue. From all the previous panels so far, I have picked up that, in what is quite a controversial bill, this seems to be an area of broad agreement, although perhaps not for exactly the same reasons.

We have heard from those who support the bill that the requirement to live in the acquired gender for three months could be seen as demeaning, because it is likely that the individual will have been living that way for quite some time. Those who have concerns about the bill—I will say that rather than that they are opposed to it—think that the time period is not long enough. That perhaps relates to the concerns that Naomi Cunningham mentioned about the bill perhaps increasing the number of people going through the process by more than the Scottish Government thinks that it will.

I will start with Sharon Cowan. What are your views on that? Obviously, we have also heard from across the board that there is a concern about the use of the term “acquired gender” and what it might mean. Do you have any views on that?

Professor Cowan: Unsurprisingly, perhaps, I am sceptical about the need for the requirement to live in the acquired gender for three months. That is for the reasons that you and previous witnesses have stated, which is that many trans people have been thinking about this not just for months but for years and in some cases decades. The requirement to live in the acquired gender for three months seems an unnecessary delay to the process.

There are a range of ways of approaching the issue. Internationally, jurisdictions have taken different views on whether there should be a time delay. Some have very similar requirements to the ones that are proposed in the bill, but others, such as Malta, have a 30-day registration and administrative process that does not take long.

My experience of talking to and working with trans people is that they see the provision in the bill as unnecessary and as delaying the process of registration in an unhelpful way.

Do you want me to address the part of your question about the term “acquired gender”?

Fulton MacGregor: Yes, if that is okay.

10:15

Professor Cowan: I am not quite sure what the question is getting at. Are you asking whether I think that “acquired gender” is a problematic term?

Fulton MacGregor: That is what we have been told by previous witnesses. There are worries about the term.

Professor Cowan: My personal view—I cannot speak for anyone else on this—is that it is a very odd phrase. I have always said that, since the GRA was introduced in 2004. I have written about that, so it is on record that I think that the use of the word “acquired” is very strange. It makes it sound like something that you have picked up out of the cupboard or somehow come across—as though it has just landed in your lap, or come out of the back of a lorry as you might acquire a second-hand washing machine or something. It is a very odd phrase.

The difficulty, which is something that we might all agree about, is that the language in this area is really difficult. Trying to capture what we mean by all the terms—sex, gender, acquired gender, woman, man—which in human experience can be very complicated and dynamic, in a statutory form for the purposes of the law is nigh on impossible. We have to do it, because we want some standards and rules, and norms to live by, but it is a very difficult process.

I am not comfortable with the phrase "acquired gender", but we could have a two-hour session on what an alternative phrase might be.

Karon Monaghan: My greater concern is about the absence of gatekeeping, as I have described. I can see the purpose of the question that is asked three months after the application. However, as Sharon Cowan said, the likelihood is that—although not in all cases—people will have spent some time considering whether to apply for a gender recognition certificate at all. Also, why is it three months? Why not six months, a year or anything at all? My main concern is less about the delay and more about the threshold for qualification at all, which is living in the gender that someone wants to transition to or to acquire.

I, too, have problems with the language, but they are perhaps different from what was identified by Sharon Cowan. I think that the language that was adopted by the Equality Act 2010 is clear and certain. We know what "sex" means, and for the avoidance of doubt it is defined, so there is no ambiguity about that. The difficulty comes with introducing the concept of gender, which, as you know, generally refers to social attributes, and then descending into the sorts of sex or gender stereotyping that your colleague referred to. How does one live in the gender that one wants to acquire? What does that mean, without a medical assessment?

I reiterate that I see the concerns about a medical diagnosis, but it concerns me that there are no real tests for determining gender and for establishing that someone is living in the gender to which they wish to assign. I am particularly concerned about gatekeeping. I think that the 2010 act gets it right but that, whether or not this bill is passed, the GRA uses language that is difficult and complex.

Naomi Cunningham: I do not have much to add. I do not have any particular problem with the expression "acquired gender". As Sharon Cowan suggests, you could spend a very long time trying to find a better expression that was more acceptable to all parties without getting any further forward. We are talking about a transition from one legal status, at least, to another, so something that reflects that seems to make sense.

For myself, I do not really understand what it is to live in the acquired gender. It is very hard to imagine what that could mean, other than conformity to the stereotypes that are expected of the opposite sex, so I do not feel strongly about those provisions.

Fulton MacGregor: I move on to my second area of questioning, which concerns the three-month reflection period. I will go to the witnesses in the opposite order this time, as Naomi Cunningham came in at the end on the previous question, when the points had already been covered.

We have heard some concerns about the proposed three-month reflection period. I wonder whether you have any views on that. As with the first area, we have heard concerns from those on both sides of the argument but, for different reasons, the concerns are probably more profound in this regard. Naomi, do you have any views on the reflection period?

Naomi Cunningham: Again, I have no strong views, except perhaps in the case of children if the amendment to reduce the minimum age goes forward. I think that anything that gives children who are considering making such a fundamental change to their legal status a little bit more pause for thought, and a little bit more time to mature and consider all the ramifications of that decision, has to be a good thing. Beyond that, however, I do not have much to say on that.

Karon Monaghan: Similarly, I do not have any observations to make on that aspect, except to note that the committee will no doubt want to consider the particular position of children. For adults, however, I have no observations to make in that regard.

Professor Cowan: Similar to what I said previously, the number of months is arbitrary. We often make big decisions for ourselves that we are not asked to reflect on—some of them, such as getting married, involve a statutory declaration.

Again, from talking with trans people and working alongside them, I think that the three-month reflection period is not a helpful framework. If you were really worried that this was a life-changing decision that people might want to reflect on and you wanted to stress that for some reason, three months would actually seem like a very short period of time. In a sense, most trans people have thought about it in advance for long periods of time—decades, years or months. A three-month reflection period does not seem to be particularly helpful.

Fulton MacGregor: I highlight to Naomi Cunningham and Karon Monaghan that we heard quite strong views on the issue of age from those on previous panels. As Maggie Chapman mentioned, other members will explore that area, which is why I have no follow-up questions. I thank all three of you for your answers.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): I want to develop the questioning around reducing the age from 18 to 16 and open a discussion on whether you believe that people aged 16 are mature enough to make such decisions. We have heard a lot of examples—as you will know from following the committee

evidence, the discussion is very polarised. At 16, someone can get married or join the Army, and at 18, they can buy fireworks, have a tattoo, buy alcohol and all the rest of it. There are very different settings within those two years.

I am interested in Karon Monaghan's point that the European convention on human rights does not require such a scheme. I would like you to develop that point and say whether it relates to the age difference. How does that sit with the specific safeguarding concerns that some people may have in this area, and with the European convention? Do you think that parental consent should be required? What are your views? Naomi Cunningham can start.

Naomi Cunningham: In so far as parental consent is concerned, I would say that yes, it should be required. In general, the people who know a child best and who can be best trusted to keep that child's interest at the forefront of their minds will be the child's parents, so the default position should be parental consent.

However, that seems to me to be a very unfortunate and inadequate safeguard in itself against the invitation to children to make life-changing decisions that they may subsequently regret or which may set them on a path to harm. A reduction in the age limit with parental consent does not seem to me to meet the need. There should not be a reduction in the age at all. This is not something that any child—anyone who is not yet an adult—should be able to do.

I am not sure that I have much more to say than what I said in answer to a previous question about the importance of having in mind Hilary Cass's concerns about social transition. I suggest that legal transition is social transition with a great deal more besides. To any child, it is bound to feel like a very solemn and serious step. It is a permanent declaration of intent with legal effects. As you just said, children under the age of 18 cannot get tattoos—this is a much more serious and life-changing step for a child to take than getting a tattoo is, but the adults around a child think it their duty to protect a child from taking such a step, at least without parental consent.

Rachael Hamilton: I will ask you a bit more about the Cass review in a minute, but would you like to come in, Karon?

Karon Monaghan: In relation to age, I probably cannot help you very much. Intuitively, I feel that 16 years old is very young indeed, but it has been a long time since I had a child, and I am not a children's expert; therefore, intuition would not be a good enough basis for me to make a contribution to the committee. I would reserve that for somebody who has the relevant expertise.

Article 8, which I am more qualified to speak about—I hope so, anyway—requires a system under which the state recognises a change in sex. There must be a system, but it does not require a particular system. The European Court of Human Rights has said that there is a margin of discretion—that is how it describes it—so each state is entitled to determine what its own scheme might be. There must be a scheme, but it does not require a scheme like the one that is proposed.

It is an important context to note, which Naomi Cunningham alluded to, that all the cases that have been determined so far under article 8, and indeed cases that have been decided by the European Court of Justice in terms of European Union law, have been cases concerning "transsexuals", as they have been described, being people who have undergone a process of medical diagnosis and surgical transition. I am not for a moment suggesting that surgical transition ought to be required—I am not suggesting that—but it is of note that, in all those cases in which the European Court of Human Rights said that there must be a system of recognition, there has been very significant physical change and medical oversight.

Rachael Hamilton: I will pick you up on that point. Does that mean that if a scheme, to use your word, was insufficient, inadequate or had an absence of procedural safeguards, it would infringe article 8 of the European convention on human rights?

Karon Monaghan: It may do. Let us take an extreme example. If there was a scheme that said that you had to have intrusive medical intervention or surgery, plus you had to wait 10 years and then pay £5,000, in my view, the European Court of Human Rights would inevitably say that that was not a meaningful scheme, because it would preclude many people who can properly be described as trans, either under a medical diagnosis or against some other objective threshold. That would not be a meaningful scheme. I am reassured, because I can see Sharon Cowan nodding away next to me. That would be the position in my view.

Professor Cowan: I understood your question slightly differently. Forgive me if I have misinterpreted it, but I thought that you were asking whether, if we tried to introduce a scheme that did not have safeguards to protect young people from transitioning at too early an age, that would contravene article 8. Is that what you were asking?

Rachael Hamilton: Yes.

Professor Cowan: I hope that Karon Monaghan agrees with this, because she works more closely with article 8 on a daily basis than I

do, but that is not how article 8 would work. It would be the opposite way round. If a child felt that they were not getting access to proper treatment through a system that recognises their identity, they could make an article 8 claim.

10:30

I agree with Karon Monaghan that, at the moment, the way in which the European Court of Human Rights has interpreted the need to have some system for recognition still allows some margin of appreciation to the UK and other states, because there is no broad consensus on what a model of gender recognition should look like and there are lots of different models across Europe and the rest of the world.

However, I draw the committee's attention to the fact that that was also the case before 2004—before the Gender Recognition Act 2004—when the UK was in the company of Ireland, Andorra and Albania as the only European nations that did not have a proper system of gender recognition. Until that time, the European Court of Human Rights had also given the UK a margin of appreciation but, eventually, it was such an outlier that it was said to be in breach of human rights law, which is why we got the Gender Recognition Act 2004 in the first place.

Although we have a margin of appreciation, does Scotland want to lag around at the edge of the threshold, doing what is necessary in a minimalist way, or do we want to be a leader in coming up with a system that is reflective of all those international and national changes on gender dysphoria, age and so on?

On the age question that you asked, neither am I a specialist in that area. I know that you have heard from the Children and Young People's Commissioner and various other people, who are such specialists. I will just draw the committee's attention to the Age of Legal Capacity (Scotland) Act 1991, which says that a young person aged 16 or over can consent to lots of things, including life-changing medical treatment—not just a document that changes your sex or gender but life-saving treatment such as a heart transplant—which is a lot more serious than a tattoo at the age of 18.

Rachael Hamilton: In the committee's work, it is important that we are able to understand the legal implications from the point of view of someone who has the specialist ability to comment on that. I do not expect you to be able to do that, but perhaps it is something that we should consider. Accessing life-saving clinical treatment may be slightly different from accessing puberty blockers. Perhaps we should develop that with an expert on specific case law—

Professor Cowan: I think that that is right, but the bill says nothing about puberty blockers. I understand that there is disagreement—and on-going research and discussion—about the place of puberty blockers in treatment for the trans people who want that sort of treatment. However, the bill before us does not discuss that.

Karon Monaghan: May I respond very briefly to something that Sharon Cowan said?

I spoke about the need for a system under article 8, whatever that system might look like. Sharon, if I understood her correctly, said that that would not address a situation in which a child had received recognition. In other words, would that engage article 8?

In my view, there might be circumstances in which granting a gender recognition certificate to a child, with all the consequences that might flow from that, might violate article 8, because it intrudes on their sense of identity and personality, and, without proper procedural safeguards, may have longer-term consequences, such as which school they go to and how they identify.

Again, I see that Sharon is nodding, so I am reassured by that.

Professor Cowan: It was not so much that I was agreeing internally with your point as that I could see the argument that you were making.

Naomi Cunningham: I have just two very short additional points, which are about the Cass review. Dr Hilary Cass has been commissioned to undertake a thorough review of the treatment of gender dysphoria in children. That is not just about medical treatment in the shape of puberty blockers. She is also considering, and has already mentioned in her interim report, the consequences of social transition and the fact that that is a serious intervention.

The main thing that I will say on the Cass review is that we should wait, because she has not finished her job yet, and she needs to be able to do so. Before any radical changes ought to be made to allow children to change their legal sex, we need to understand the implications of that review for children's needs and the treatment of children who present with gender dysphoria.

I strongly endorse what Rachael Hamilton said about the importance of the committee hearing from a lawyer who specialises in child protection, because none of us here has the expertise to explore some of the issues that need to be explored.

Rachael Hamilton: I want to pick up on what you said in your opening statement about the legal status of a Scotland-born 16-year-old affecting their ability to access services in England. What

do you mean by that? Is that specifically about education?

Naomi Cunningham: It is not specifically about education. In my mind, one of the areas of greatest difficulty in the bill is the whole question of cross-border effects. Those who will be entitled to apply for a GRC are those whose birth was registered in Scotland—Scotland-born children—and those who are resident in Scotland, although I do not think that we know for exactly how long someone needs to be resident here before they are entitled to apply.

However, if the bill is passed, it will certainly be the case that children with a Scottish GRC could be resident in England, Wales or elsewhere in the UK and going to school there, and they will need to be accommodated for and dealt with. We—or certainly I—simply do not fully understand the consequences of the legal status that they will have. I suggest that that issue needs to be very carefully bottomed out.

Will Scottish GRCs be portable? Will they have full effect in the rest of the UK? If they do not, what are the consequences of that? Is this an alternative route, or can someone have a rest-of-UK GRC and a Scottish GRC in parallel? If Scottish GRCs are to have effect in the rest of the UK, will that require action on the part of the Westminster Government? Will action under section 104 of the Scotland Act 1998 be required? Those are all difficult questions that do not seem to have been bottomed out, and I suggest that they urgently need to be.

Rachael Hamilton: In fairness, it is important that I ask the other witnesses whether they have any opinions about the interim Cass review. Should the bill be paused until the review has been published?

Karon Monaghan: Absolutely. The review is a major piece of work that is looking at the impact on children, and it would be very unfortunate if the bill were to be enacted without the benefit of having the outcome of the final report.

Professor Cowan: My understanding is that there has already been a children's rights and wellbeing impact assessment for the bill. Is that correct? In other jurisdictions where there has been such reform, it has been shown that there have not been negative effects on young persons aged 16 or over—I will not refer to a 16-year-old as a child necessarily—so there is already evidence in that respect that the committee can consider.

The Convener: I will pick up on a couple of points. We invited Dr Cass to give evidence, but she declined and referred us to her interim report. It is worth noting that Dr Cass's remit specifically relates to NHS England. Obviously, anyone can look at her report.

Rachael Hamilton and Naomi Cunningham made a point about taking specialist evidence on children, and Naomi Cunningham talked about lawyers. I suggest to anyone who is watching that they look at our evidence session with the Children and Young People's Commissioner Scotland. Obviously, he is not a lawyer, but he had access to lawyers in answering the committee's questions.

Rachael Hamilton: I was not a member of the committee at that point, so it is important to get that on the public record.

The Convener: That is why I am saying that anyone who wants to see the evidence that was given can go to the Scottish Parliament website, and they can obviously read the *Official Report*, too.

Pam Duncan-Glancy (Glasgow) (Lab): Good morning to the panel. Thank you for the answers that you have given so far and for setting out in your opening statements some pretty clear bits of advice, including on the legal definitions of sex and gender reassignment. I found that particularly helpful, so I thank you for that. I thank you also for the written evidence that you submitted in advance of the meeting, which has been very useful.

I want to explore a bit more the impact of a gender recognition certificate and single-sex spaces. We have spent quite a bit of time talking about the effect of a gender recognition certificate in that regard. For example, Karon Monaghan described the effect of a GRC and what it means for the exclusion of trans people from single-sex spaces. You were quite clear about that, Karon.

As far as I can understand it, what appears to be the issue is the cohort of people who will be able to access a GRC, regardless of the effect of it, if that makes sense. There is a legal effect—it does not appear that that will change as a result of the bill, but more people will have access to that legal route. That is my understanding of what you said; if I have misunderstood it, please correct me.

Could you tell us a bit about who you think the cohort of people will be? We have heard some evidence that it is unlikely to be a group of new trans people, and that it is, in fact, likely to be an existing group of trans people who have not yet considered accessing a gender recognition certificate because of the troubles with accessing one.

My understanding, from the evidence that we have had already, is that those people who do not have a gender recognition certificate are currently accessing single-sex spaces—Women's Aid and others have given evidence on how they operate

those spaces—and that some of the people whom we are talking about do not have gender dysphoria but would still like legal recognition of their sex. Could you talk a bit about the cohort of people, who you think they are and how you think their rights to access single-sex spaces will be changed?

Naomi Cunningham: Is that question addressed to me first?

Pam Duncan-Glancy: Yes—it is probably for all three of you, but feel free to go first.

Naomi Cunningham: Thank you. My view on what the legal effect is is a bit complicated. My view, ultimately, is that, in the Sex Discrimination Act—I am sorry; that dates me. I mean the Equality Act 2010. In that act, "sex" means biological sex, so a gender recognition certificate does not change it. That means that, in formal terms, if I am right—we just do not know whether or not I am right on this—the granting of a gender recognition certificate will make no difference at all to legal entitlement.

I do not think that I can talk usefully about legal entitlement to access single-sex spaces. It is much more likely to be the other way round, with regard to the legal ability of those running such spaces to exclude. My view is that if a space or service falls within the single-sex exceptions in the Equality Act 2010, that means that, because "sex" in the 2010 act means biological sex, if a service has permission to exclude all male people, it means all male people, including those who self-identify as women, and including those who have a gender recognition certificate defining them as female.

However, that is not the end of the answer by any means, which is the cause of my particular caution. I fear that the proposed change may operate in quite a cruel way towards the group that it is intended to help, because it will create an expectation. There is already a widespread belief that, because people with the protected characteristic of gender reassignment are entitled not to suffer discrimination on that ground, it follows that they must be entitled to access all single-sex spaces that are provided for the opposite sex, or that they must be entitled to be treated, for all purposes, as if they were the opposite sex.

Of course, that is not the case. The entitlement not to suffer discrimination on the ground of gender reassignment means, for example, that someone cannot be excluded from the men's toilets if they are a trans-identifying male, because they cannot be told, "No, you cannot come in here because you're trans." However, someone can be told, "No, you can't come into this female-only space, because you're not female. Even if you feel female, identify as female and have a gender recognition certificate that says you are female, this is still a female-only space." That is sex discrimination, however; it is not gender reassignment discrimination.

10:45

Therefore, quite importantly, the protection from gender reassignment discrimination does not provide protection from exclusion from services and spaces that are provided for the opposite sex. The problem that we have is that it is very widely believed that it does. There is a wide belief that, if you are trans at all, you are entitled to use spaces and services that are provided for the opposite sex, and there is probably an even wider belief that, if you have a gender recognition certificate, that entitlement is even stronger, and the world has to treat you as if you were the sex that you wish you were.

I think that that is legally wrong, but that expectation will be created and then, to the best of my belief, it is going to be disappointed. There will be bitterly fought litigation on these questions, and my expectation is that the final outcome of that litigation will be that all those people who have been given a gender recognition certificate—it will be a much wider cohort—and who had something that they very much wanted and that they thought was promised to them will ultimately be disappointed. That is a worry.

Pam Duncan-Glancy: I want to press you on that point. Do you think that people who access a gender recognition certificate do that for the main purpose of accessing single-sex spaces? If that is the case, what you have said may be the case—I am not sure whether the international evidence bears that out, but I can see how it would be the case. However, a number of trans people have said that a gender recognition certificate is not about access to single-sex spaces, and some have even said that they recognise that that could be difficult in some circumstances. In fact, it is about being recognised in the gender that they live in when they go for a job or go to university, or when they die. Do you have evidence to suggest that people are accessing gender recognition certificates for those other purposes?

Naomi Cunningham: I do not think that we have any evidence at all; we simply do not know. We already do not really know why people are accessing gender recognition certificates, and we certainly have very little way of guessing about those motivations. No doubt, there will be a wide range of motivations and background circumstances behind people's access to the new self-identification gender recognition certificates. One of the most troubling things about the bill is that it creates a much greater level of uncertainty, both as to the nature of the new class of gender

recognition certificate holders—we simply do not know who they will be—and the size of that group, because we do not know how many there will be.

Pam Duncan-Glancy: Various bits of research have been done to identify people who are trans but who do not yet have a GRC. Do you therefore think that people are missing from that? If so, who are those people who you think will come forward for a gender recognition certificate and who are not yet known to any services or organisations?

Naomi Cunningham: I do not see how we can know the answer to that question. If you are saying that people can have a gender recognition certificate on the basis of self-identification, you make it very easy for anyone who wants one for any purpose. I would be very surprised if that purpose was not sometimes identity laundering, and that is a particular worry.

Pam Duncan-Glancy: You yourself called the process of accessing a gender recognition certificate "solemn and serious". If that is the case, do you think that people will use it for those purposes?

Naomi Cunningham: Yes, I do. I think that some people have very strong reasons for wanting to launder their identities. There are criminals as well as good, well-meaning people in the world, and we need to have laws that are robust and can deal with people with bad intentions. We cannot make law on the assumption that everyone who might possibly use it will do so with the best of intentions. Laws have to be robust to deal with bad intentions, and there are a range of bad intentions that could be facilitated by the changes in the bill.

Pam Duncan-Glancy: I have one more question for you, and then I will move on. I agree that there will be some people who want to harm women, but do you think that those bad actors feel that they need a gender recognition certificate to do that?

Naomi Cunningham: No. The problem with making gender recognition certificates much easier to obtain is that it will create a greater sense of entitlement—a larger class of people will have that secret certificate in their filing cabinets that nobody dares ask them about because of the potential criminal penalties for disclosing what you know.

I am sorry; I have lost track of the question.

Pam Duncan-Glancy: Recognising the fact that there will be people who seek to harm women, as there have been forever, do you think that those people will need a gender recognition certificate to do so?

Naomi Cunningham: We are seeing a steady erosion of the ability to protect single-sex spaces on the basis that they are simply and obviously single sex. If you say that anyone who identifies as a woman can have a gender recognition certificate and give the impression—and the impression will be widely given—that especially anyone with a gender certification certificate is entitled to access any single-sex service and that nobody can deny them that, then you create a situation in which it is impossible ever to challenge someone who ought not to be there.

You might see someone who looks like a man, but you do not know whether he identifies as a woman or whether he might have a gender recognition certificate. He might be dressed as a woman but you do not know whether he is an erotic cross-dresser, a trans person with gender dysphoria but no gender recognition certificate, or somebody who is fully medically transitioned with a gender recognition certificate. Although you do not know what his status is, you ought to be able to say, "These are my boundaries. I have consented to take my clothes off"—or whatever it is—"in this space that I have been told is a women-only space." It is the impact on the general user of that space that matters.

That takes me back to a point about indirect discrimination and justification. It has been suggested that excluding males from women-only spaces across the board might amount to indirect discrimination on grounds of gender reassignment. In purely numerical terms, that is highly possible and maybe probable.

With regard to justification, as soon as you have admitted one male person to a space where women want to take their clothes off for example, you have spoilt it for all the women and it is no longer a women-only space; it is not a single-sex space—it is mixed. When you consider the proportionality and the justification of maintaining single-sex spaces, it seems to me pretty inevitable that you will always come to the same conclusion. As soon as you admit one man or one male person who identifies as female, it is no longer a single-sex space but a mixed space, which has lost all its purpose—no woman can be confident that it is a single-sex space—so justification is all that will be in place.

I am sorry—I might have drifted a little from your question but I think that I answered it at the start.

Pam Duncan-Glancy: Thank you; that is no problem at all. It seems to be the case with a lot of the discussion on this issue. Karon, do you have anything further to add?

Karon Monaghan: Because of your observation about Women's Aid, I will clarify a couple of things and then talk about the cohort.

First, the provisions in relation to single-sex services are permissive. Nobody has to set up a single-sex service. In other words, if you are a

counselling service—a sexual violence counselling service, let us say—you plainly do not have to become single sex.

Secondly, when you provide a single-sex service, the starting point is that those people without a GRC can be excluded if they are not of the sex that the service is serving—a trans woman without a GRC can be excluded from a female-only service. Just for clarity, there might be circumstances where justification is required. However, the issue is complex and the starting point is that someone can be excluded but, because the provisions are permissive, they do not have to be. Therefore, it is permissible for Women's Aid to say, "We want to be a single-sex service but we want to be trans inclusive." Similarly, a service might say, "We're a single-sex service and we want to, and lawfully can, exclude trans women without a GRC."

I have one small point on the cohort. We do not know who the cohort will be. We know that, now, a small number of people obtain a GRC—300 or so a year. If the bill is enacted, we do not know who will be in the cohort or what size it will be, but we can assume that it will be much larger because one of the complaints about the present system is that people cannot access a GRC when they want one. We do not know who those people will be, because there is no gatekeeping, threshold, medical intervention or objective assessment. As I have already said, the requirement to live as a woman gives rise to the sorts of stereotyping that we have spoken about. What does "living as a woman" mean? I do not know.

Finally—and this is slightly off the point, but I will just say it in case I forget it—we must not lose track of women from minority communities, who may be especially impacted by liberal rules in relation to GRCs. They are often the most vulnerable women, who access services through other services that gatekeep, if you like, such as health and so on. I invite the committee to be extremely mindful of that.

Naomi Cunningham: I would like to come back in and second that, bearing in mind that standards of modesty for different communities are widely varying—

Pam Duncan-Glancy: I am sorry to interrupt but I am conscious of the time and keen to hear from Karon Monaghan. I have one other question. We have heard from people who are trans but who do not have gender dysphoria. What could we do to allow them to access a gender recognition certificate, which is incredibly important for them?

Karon Monaghan: As I indicated at the beginning of the meeting, if we accept that gender dysphoria is not really a medical condition and ought not to be recognised as such—I have heard Sharon Cowan on that—how do we identify who is trans? That is problematic. Living as a woman cannot be the threshold. I do not know what that means. Do I live as a woman? I wear trousers, have short hair and might be said to be gender non-conforming in a broad sense.

With respect, the committee needs to be careful about setting an objective standard that is capable of being determined within a legal scheme. There has to be a degree of legal certainty, so if the committee is moving away from gender dysphoria, I would invite members to consider how we know what a trans person is and how they meet the threshold.

Pam Duncan-Glancy: Is there an example in international law that you could suggest to us?

Karon Monaghan: No, but Sharon Cowan may be able to suggest one. Certainly, within the context of the Equality Act 2010, which is my area of expertise, I would be very concerned if there were not an objective threshold. That would mean that there would be a wide cohort of uncertain people accessing women's spaces, which might disadvantage some of the most vulnerable women—victims of sexual violence, for example, and women from minority groups.

Pam Duncan-Glancy: Thank you. Finally, Sharon Cowan—

Naomi Cunningham: Just coming in very briefly on that—

The Convener: I have to be mindful of time. I am sorry, but Pam Duncan-Glancy wanted to hear from Sharon Cowan now.

Pam Duncan-Glancy: I am sorry, Naomi. Does Sharon Cowan have anything to add on the particular point?

Professor Cowan: There is so much in your question to talk about; I will try to be brief and to the point.

The first part of your question was about who is in the cohort of people who might want to access a GRC and are currently not doing so. It is true that we do not know, exactly, but we can look to other jurisdictions that have introduced systems of more accessible GRCs. There might be an initial uptick in the number of people going forward with the GRC process because it is going to be easier for them and, as we know and as you have heard from other people, the current system puts people off. However, there is no evidence from other jurisdictions that there is a sudden mad rush of thousands of people to get GRCs. Therefore, although we do not know and I cannot say for sure, the evidence that we have from other jurisdictions points in the direction I have just outlined.

I do not want to get into this in a lot of detail because it would take a long time and it is a super complex area of law, but my understanding of the equality legislation actually differs quite markedly from the understandings that have already been presented to you. My understanding is that it does not matter whether someone has a GRC; they can still be excluded from a single-sex space, because it does not say in the Equality Act 2010 that someone must have or not have a GRC in order to be excluded. The current law allows somebody to be excluded from a single-sex or sex-segregated space, whether or not they have a GRC, if the correct legal threshold is met, which, as I am sure that committee members know, is about proportionality, legitimacy and so on.

11:00

On whether people could still be excluded if the proposed system is introduced, that part of the law will remain unchanged. People can still be excluded, whether or not they have a GRC. If there are more people with GRCs, potentially more people could be excluded, but, again, the bar for exclusion is high.

What does it mean to live as a woman? I often spend an entire semester talking to my students about that. It is an incredibly complicated question. I am as suspicious and sceptical of gender stereotypes as much as anyone is, but being a woman cannot simply be to do with the reproductive bits that someone has. Feminists have argued for decades that we should not reduce what it means to be a woman to our reproductive organs, our bodily autonomy and so on.

What it means to live as a woman is complex, nuanced and maybe not something that we can capture in a bill. From my perspective and that of much feminist research, it cannot be about just biological elements.

Pam Duncan-Glancy: Thank you.

The Convener: Naomi Cunningham wants to come back in. Please be very brief, as I need to bring in two more members, who might want to cover the area that you want to raise—please do not widen the discussion too much.

Naomi Cunningham: The point that I want to make is that sensitivities to women who have suffered sexual violence are necessary and must not be confined to services that are specifically for those women. The problem is that no one knows which women who use the swimming pool, the gym, the public toilets, the library or wherever have suffered sexual violence and carry trauma from male violence. Those women need to be able to use those services freely, without making a declaration about their past. A traumatised woman who has suffered sexual violence should be able to use the loo at the library, for example, without having those traumas triggered. That is an important point to bear in mind. The needs of sexual abuse survivors are not confined to specific services for those groups.

The Convener: I will bring in Sharon Cowan quickly before we move on to questions from Pam Gosal.

Professor Cowan: I do not disagree with any of that. It is right to say that we do not know about the experience of sexual abuse of people in the community more generally. That needs to be taken into account.

I point the committee to a piece of research that was done at the University of California to test whether opening up laws to protect trans people has an impact on the rates of reported violence in toilets, changing rooms, bathrooms and so on. The first research into the issue found that the passage of non-discrimination law is not related to the number and frequency of criminal incidents in public spaces—and it was a massive piece of research.

Reports of violations in bathrooms and locker rooms are exceedingly rare. As a feminist researcher who does work on sexual violence, I know that a lot of violence goes unreported. That study looked only at reported violence. However, it indicates that there is no connection between opening up anti-discrimination laws and reports of violence in those spaces.

Pam Gosal (West Scotland) (Con): Good morning, panel. Thank you for your opening remarks and for the information that you have provided. In particular, Karon Monaghan was very knowledgeable in breaking down where a GRC applies and does not apply and the relationship between gender and sex.

My question follows Pam Duncan-Glancy's point. We have heard, from people who are opposed to the bill, many concerns about self-exclusion from single-sex services. The witnesses have talked a bit about female representation on public boards and in sport, and you have heard the arguments about fairness in sport and a level playing field. Karon Monaghan and Naomi Cunningham also touched on the impact on minority groups and women of faith. May we hear a little more detail on those issues? What is the solution, especially when it comes to sport and women of faith? We must be mindful of not excluding anyone; we must ensure that no one out there feels excluded by the bill's provisions.

Karon Monaghan: First, in relation to sport, there is already an exclusion that allows for trans women, with or without a gender recognition certificate, to be excluded from or not allowed to

participate in women's teams, for example. The reason for that is to do with bodily strength and so on. There is an exception in place, which does not depend on whether someone has a GRC: a person can be excluded from competitive sports where their body is such that participation would be unfair—running, for example. That exception applies whether or not a person has a GRC.

The representation issue seems to me to be very important, along with equal pay—I do not know whether the committee has spoken about that. On representation, there are positive action measures in the Equality Act 2010 that allow positive action to address a lack of participation or the overcoming of disadvantage. The more likely it is that a person has a GRC, the more likely it is, inevitably, that there will be a larger cohort of trans women—I use the example of trans women only because that is the controversy, but of course I mean it the other way, too—who are able to identify as female and take advantage of positive action measures, including those that are directed at females because of historical disadvantage.

Trans women might well have experienced historical disadvantage, but for different reasons. Females or biological women who have lived as women for their whole lives will have gone through the education system as girls and experienced the disadvantage that girls often experience, such as being routed into different courses, non-science subjects and so on. There might be positive action measures that are directed at those women, to which trans women with GRCs will become entitled because they fall within the cohort of women to whom the provisions are addressed, even though they might not be the disadvantaged group.

Let me talk quickly about equal pay, which I do not think has been mentioned—I see the time; I will take two minutes. A person with a gender recognition certificate—and I will again use the example of a trans woman—will be treated as female for the purposes of determining whether there are disparities in pay. If you have a trans woman and three women who appear to have lower pay than a man, and if the trans woman has gone through their career as a male and has comparable pay to the male, that might obscure inequality in pay. I am not sure that I expressed that well, but committee members will know what I mean: if we are looking at average pay, the example of a trans woman who has gone through their career as a male and has higher pay might conceal disparities between men's and women's pay. I am thinking of the sorts of issue that you have had in Scotland with local authority pay disparities and so on. The committee should be alive to that issue and should perhaps think about it.

Pam Gosal: Will you also say a little about minority groups?

Karon Monaghan: Sorry, that was the other area that you mentioned. As I said, where a trans woman has a gender recognition certificate, they cannot be excluded from a female space unless that space is able to meet the threshold of justification.

I am thinking about, for example, a small organisation such as a sexual counselling service, or a swimming facility that is used commonly by minority women; those women might not be able to use that facility if trans women are admitted. There is no point in saying that they ought not to think that, or that it ought not to happen, because that is the reality. Those are often the most marginalised communities, particularly in some areas, and they may be excluded from certain services if trans women are permitted access.

As I have said, trans women, even those with a GRC, can be excluded where there is a justification for that, but there is a threshold that must be met. It seems to me that great care must be taken to ensure that all members of the community—all women—are not excluded from services. I invite the committee to consider that.

Pam Gosal: Naomi Cunningham, can you touch on women of faith and on religion? You probably know that the committee has discussed that. How do we ensure that those women do not feel excluded, for example in a swimming pool changing room? Are we going backwards? Please stop me if I am not allowed to say this, but we heard in a private session that people may not want to go into changing rooms and may decide just to shop online in case someone else is there. How do we ensure that everyone is included and not excluded? Can you say a little about that?

Naomi Cunningham: I think that is a huge problem that has so far been insufficiently examined. If you make all single-sex spaces and services in effect mixed spaces, when looked at from the point of view of women with particular beliefs and women from particular faith groups, you are liable to create a situation in which women from those groups are effectively excluded from all sorts of aspects of public life that may be necessary to their inclusion in society as full members of a democracy.

They may be denied access to the library because they cannot go far from home without using the loo and they cannot be confident that the toilet is a single-sex space. They might not use the gym, which is important to their health, because they attend a women-only swimming session and without that they might not feel comfortable or might not even have permission from their families to attend the swimming pool. They might find a

trans-identifying male in that swimming session and might leave and never come back.

We will not necessarily know about those effects; we will just create a gradual chilling effect such that women from certain sections of society simply self-exclude. Possibly the worst example of that would be self-exclusion from rape crisis and domestic violence services, which piles disadvantage on disadvantage. If an abused or sexually traumatised woman cannot access the services that she needs because she does not have the comfort of knowing that when they say they are single sex they mean it, and that they mean what she means by "single sex", she is excluded. That may affect whole populations.

We need to think about proportions, which takes me on to positive action measures, where a similar issue can arise. It makes sense to have positive action that seeks to equalise the representation of men and women in various contexts and in various public functions. Provisions for single-sex shortlists are an example of that. That makes sense because the population is divided into two roughly equal halves: men and women. You could not have any comparable provision to ensure proportionate representation of trans people in those circumstances—it would make no sense because the numbers are far too small. You can see that from the fact that we have those provisions only in relation to men and women. If you allow individuals who have self-identified as women to take the places that have been reserved on shortlists or on public boards for women, you reduce the opportunities for women and undermine the very purpose for which those provisions were made, and you do so in a way that is fundamentally unfair.

11:15

Pam Gosal: Convener, may we also hear from Sharon Cowan?

The Convener: Okay, and Pam Duncan-Glancy wants to make a brief point, as does Rachael Hamilton.

Pam Gosal: We heard a lot from Naomi Cunningham and Karon Monaghan and I want to know whether Sharon Cowan thinks that there is a solution to the issue. Is there a happy medium that means that we do not exclude anyone? Can we ensure that everyone is included?

Professor Cowan: It is a really complex question. Intersecting categories of human experience such as race, religion, disability, nationality and citizenship are important and we need to pay attention to how they work together to compound different forms of discrimination and so on.

The attempt to finely balance those issues is often best left to the people who provide the services. I do not know whether the committee has heard from Shakti Women's Aid; I would defer to Shakti and other organisations that provide services for women of colour or a particular religion—some of whom might be trans, too; someone might be Indian, Muslim and trans. When it comes to how we deal with important, culturally sensitive issues, we should probably talk to organisations that manage those kinds of issue all the time.

Pam Gosal: We heard privately from one such organisation. I was thinking about the religious side of things—not just services but what happens when people use places and come outside. How do we make sure that everyone is included?

Professor Cowan: Maybe the guidance from those organisations in those contexts could be broadened and used more generally. We could learn from it in the context of a more public environment, through local government and so on. The solutions that such organisations come up with should not be confined to the women's sector; there are lessons that we can learn more generally in society.

Pam Gosal: Thank you. It is very important that we hear from those organisations to ensure that the bill includes and represents everyone in Scotland.

Professor Cowan: Definitely.

Proportionate representation of smaller groups has come up. I understand all the arguments for all-woman shortlists, 50:50 representation and so on. From my perspective, it is problematic to say that it is not possible to have proportionate representation of smaller groups. If that were the case, we would not be able to think about race, religion and other protected characteristics that are represented in a much smaller percentage of the community. We would not be able to think of imaginative ways of protecting such people if we did not think more broadly about proportionately trying to represent smaller groups.

Pam Duncan-Glancy: I want to reflect briefly on Naomi Cunningham's point about women wondering whether there is a toilet that they can access safely. Let me say that, as a disabled woman, I experience that, and it is horrible to worry about whether you will be able to access a toilet. We need to get this right. I imagine that trans women and trans men, too, go through a similar experience when they leave the house, in that they wonder whether they will be able to access a toilet or changing room. Do you agree that part of the solution will be to have inclusive and private spaces?

Naomi Cunningham: Yes, absolutely. It really should not be hard to provide fully private toilet facilities for everyone, in which case sex simply does not arise, or to provide unisex facilities as well as single-sex facilities, for anyone who does not feel comfortable using the men's or women's facility. Once there is a third space and full privacy, the problem is solved.

Pam Duncan-Glancy: I am not sure that I suggested a third space, but I take the point about privacy. Thank you.

Rachael Hamilton: I respect the differences between the positions of Naomi Cunningham and Sharon Cowan—I think that Karon Monaghan is somewhere in the middle. For clarification, I want to ask about the legislative competence of expansion of the legal definition of "woman". We cannot do that, can we, in the context of gender representation and the examples that Karon gave? Sharon Cowan talked about not reducing the definition to biological sex, but I do not understand how that can be interpreted in law.

Professor Cowan: I can perhaps give a useful answer to that. I think the case that you are referring to is the judicial review of the Gender Representation on Public Boards (Scotland) Act 2018.

Rachael Hamilton: You are using the gender representation example.

Professor Cowan: In that case, the court was clear in saying that it would have been open to the Scottish Government to protect trans people by making provision for them to be represented on public boards, but that that would have to have been done under the heading of gender reassignment and not under the heading of sex. I am saying that we can protect people, whether that is on the basis of religion, race or gender reassignment, even if those are small populations. We can think of imaginative ways to protect them and involve them in public life. The court case did not say that we cannot do that; it was saying that the way in which the Government had tried to do it was wrong, because, in changing the definition of "women", it had gone beyond its legislative competence.

Rachael Hamilton: Naomi Cunningham, do you have any further comments?

Naomi Cunningham: I do not have a concluded view about whether what is proposed is within the legislative competence of the Scottish Parliament—that is an extraordinarily difficult and complicated question—but I certainly think that it is far from clear that the answer is yes. The worry is that, in legislating in the way that is proposed, you will make law that is open to challenge, either from Westminster or by way of third-party challenge. That will be bad for certainty and undesirable in all kinds of ways. It is certainly not clear.

Rachael Hamilton: I asked for clarification but it ended up growing arms and legs. I could go on.

The Convener: Folk were pretty brief; thank you for that.

We move to questions from Emma Roddick.

Emma Roddick: A lot of my questions have been gone through in great detail, so I will try to avoid retreading.

My question is for Naomi Cunningham. We have heard comments about self-ID and concerns that that could mean expanding the group of people who would be able to obtain a GRC. I am aware that previous witnesses at the committee have described the current process as discriminatory. If there are barriers for people who do not have a lot of money or who live somewhere without easy access to gender identity services, is it not incumbent on us to do exactly that—to expand the group of people who are able to obtain a GRC?

Naomi Cunningham: Regarding money, I think that I am right in recalling that the fee has now come down to £5, and that even that fee can be remitted on proof of hardship, although I may not be exactly right about that. I do not think that financial hardship is likely to be a significant concern.

My answer is simply that there should be clear criteria. We need to know what conditions justify the grant of a gender recognition certificate, because it has far-reaching effects and consequences. If a certificate is effectively available on request, I think that that is capable of having some very damaging effects.

That is not about discriminating against any particular group; it is just about gatekeeping in the best sense. Before you provide benefits to people, they should show that they need them or are entitled to them. It is reasonable to expect quite serious proof of entitlement to this particular sort of benefit, which is the state recognition of a new, official and legal sex. That is true of many things; I do not think that it is peculiar to trans people.

Emma Roddick: To be clear about the financial side, the current gatekeeping includes the need to access services, which can be financially prohibitive. There can also be fees associated with seeking medical proof of what a person has been through. There are lots of recognised costs to going through the process as it currently exists, besides applying for a GRC and paying the £5. That is what I was referring to.

If trans people are coming forward to say that barriers exist for them, do we not have a duty to take those barriers down? After Naomi

Cunningham, I invite Karon Monaghan to respond to that.

Naomi Cunningham: This is moving a bit beyond my expertise, but my understanding is that the Scottish national health service is still the envy of us south of border. Accessing a diagnosis of gender dysphoria should not involve expense. It is tempting to say that it would be nice to remove barriers so that people can have whatever they want, but if whatever they want has consequences for other people—you have heard that a gender recognition certificate can have such consequences—we cannot simply remove all barriers. We need to know that people are entitled.

Karon Monaghan: I repeat what I have already said. I completely accept that there are difficulties with the GRA as it is presently drafted. There are difficulties with the concept of a diagnosis of gender dysphoria, so I am not suggesting that there is no room for improvement. What concerns me is the absence of any objective assessment of who might be trans and, therefore, who might be entitled to a gender recognition certificate; there being no gatekeeping, as we have described it; and the impact on the Equality Act 2010 and the cohort of people who might be able to access single-sex services.

Naomi Cunningham: If you sweep away the requirement for medical diagnosis, it is very difficult to see what you are left with. What else could it be? What is it to be trans?

Emma Roddick: I will move on to that. There have been quite a few comments on the need for a standard to be met or for proof to be standardised. However, the experience of trans people is as diverse as that of cisgender people. Is it possible, while also respecting trans people's right to privacy and dignity, to prescribe an experience that they must go through or prove that they have experienced in order to have their identity recognised by the state?

Naomi Cunningham: That takes me back to my difficulty with what trans means. Unless we have a clear definition of that, it is hard to make sense of statements such as, "Trans people are a diverse group," because we do not know what criteria someone has to meet to be in that group. I struggle with that.

Emma Roddick: I suppose that that is my point. The only connecting theme for trans people is that they have changed their gender, so we cannot say, "Well, you must have done this as well."

I will move on to other issues. Naomi Cunningham commented on the long-term effects on the lives of children who transition and change gender. Do you have any reflections on the long-term effects of 16 to 18-year-olds moving on to a new life at university or somewhere else and having to start that life while living in a gender that is not theirs?

Naomi Cunningham: The question does rather assume an answer or premise that I do not necessarily accept. You ask me to think about the effects for a child of having to start a new life at university or away from home in a gender that is not theirs, but I ask that you think very hard about what you mean by that and about whether a 16 or 17-year-old is sufficiently mature and adult to know that they want to take that step. You talk of a gender that is not theirs, but they have a body that is necessarily either male or female, and we are certainly talking about adopting a gender expression or identity that does not conform to their body, so they are moving away from the default position, if you like. That is what I say is the radical step.

Strictly speaking, we are moving off my legal expertise, so I am not sure that I should go on at length about this. The default position is that people are the sex that they are and, if they want to be legally recognised as a different sex, that is a radical step that is even more radical than the social transition that worries Hilary Cass as a serious intervention for children and young people.

Emma Roddick: I want to pin down what you have said. Do you believe that a 16-year-old can be trans?

11:30

Naomi Cunningham: I certainly believe that a 16-year-old can suffer gender dysphoria. That is clearly the case.

Emma Roddick: Okay. Thank you. That is me, convener.

The Convener: I thank all three of our witnesses. We have gone a little over the time that we had indicated to you that we had, so I thank you for giving us your time and evidence. Perhaps this evidence session is one of those that would have been better as a round-table discussion; I got the feeling that we were getting into that territory.

I suspend the meeting for around five minutes.

11:30

Meeting suspended.

11:40

On resuming—

The Convener: I welcome to the meeting David Parker, who is lead clinician at the National Gender Identity Clinical Network for Scotland. I invite David to make a short opening statement.

David Parker (National Gender Identity Clinical Network for Scotland): Good morning. Thank you for the invitation to speak at committee today.

NGICNS was established in 2014 to support implementation of the 2012 gender reassignment protocol. It aims to improve access to NHS Scotland trans healthcare services. We are a dynamic group of people representing clinicians, people with lived experience and the administrative aspects of trans healthcare in Scotland.

Last year, we were invited by the chief medical officer to provide expert support to review the protocol and deliver an updated Scottish pathway for trans healthcare based on a human rights and person-centred approach that aligns with international standards. That work is well under way.

I would like to speak to the experience of people who are accessing trans healthcare today in Scotland. Waiting times are considerable, with some now at four years for an initial appointment. Evidence that is due to be published shows that a third of people who are waiting are already accessing medical interventions, including sourcing hormones or surgeries from independent or other providers. Adverse mental health outcomes are a significant concern, and support for people who are waiting to be seen is critical.

I want to be very clear today: our position is that trans and non-binary people are the experts in their own experience. We support the uncoupling of medical diagnosis from legal gender recognition. We have been grateful for the engagement with Scottish Government representatives in updating and informing us about the proposals for gender recognition and for the bill, which we see as a legal and administrative process.

The current process to obtain a GRC is seen by many people as being a complex system to navigate in order for them to be properly recognised as their authentic selves. We welcome the proposals to make the process more accessible; I cannot overstate the positive impact that that will have on the wellbeing and esteem of, and the sense of equality for, trans people.

I am happy to take questions.

The Convener: Thank you very much, David. We will start with Maggie Chapman.

Maggie Chapman: Good morning, and thank you for joining us. I have a couple of questions. First, will you give us a flavour of the support for trans people and others that the clinics provide, so that we know what you do?

David Parker: Yes, of course. People who come to trans healthcare services in Scotland are, more than likely, already accessing medical treatments, and a lot of their exploration will already be well under way. The services that we provide are to offer assessment support, to help people to understand their experience, to give them as much space and time as they need to determine the interventions that might be appropriate for them, and to support them in accessing and exploring those interventions.

We offer predominantly trans-healthcare specific support. We are not a mental health service, but there are elements of mental health support throughout the service. A lot of the input that trans people get will be from mainstream mental health services and third sector organisations, which do excellent work.

Maggie Chapman: Thank you; that was helpful.

In earlier remarks there was mention of support for the World Health Organization's reclassification of gender dysphoria. Will you say a bit more about that and why your network has come to the position that it is in on the issue?

David Parker: Absolutely. We first became sighted on that several years ago, when the scientific process was under way to look at classification of gender incongruence and transsexualism—as it would have been then—in the 10th revision of the international classification of diseases, or ICD-10, and what it might become in ICD-11. Scientific papers were consistently pointing towards it certainly not being a mental health condition or, arguably, a health condition, and were questioning whether it should be in the ICD—which generally defines disease and illness—at all, or should come out for ICD-11. The reason why it has remained is predominantly that, in some healthcare systems, a diagnosis is required in order to access medical interventions, so it will be essential to help people with gender incongruence. That was the rationale for keeping it in the ICD, but it was moved from the mental health chapter to the sexual health chapter.

11:45

Maggie Chapman: I accept that you might not be able to answer this, but I am curious to know about the relationship that trans people whom the clinic supports have with the process of medicalisation that diagnosis determines or requires. Does that come up in your conversations?

David Parker: It does, and there are differences in how people see the matter. For a lot of people, the conversation about diagnosis and coding is an uncomfortable one, when we are ostensibly talking aspirationally about things that they are trying to

understand and big decisions that they are making. Pathologising the condition is fundamentally wrong; it reinforces stigma and makes things ever more difficult.

In some situations, people actively seek a diagnosis. I am thinking, for example, of people who were not born in Scotland and are looking to change documents elsewhere. There are some legal processes that currently require a diagnosis—of course, the GRC is one of those. The conversation comes up in different ways.

Maggie Chapman: In previous sessions, a parallel was drawn with the inclusion of homosexuality in the DSM—the "Diagnostic and Statistical Manual of Mental Disorders". Do you agree that there is a parallel? If you do not want to comment on that, that is fine. I appreciate that the subject is difficult.

David Parker: I am happy to answer. I was not going to bring that up, because I do not ever want to link the two things. There is, of course, a similarity. Homosexuality was removed from the DSM—in 1992, I think—because the evidence suggested that it is not a condition or an illness that should be treated in a medical way. I agree that the comparison is reasonable.

Maggie Chapman: Thank you.

Fulton MacGregor: Good morning and thank you for your opening remarks.

Can you provide up-to-date information on current waiting times for initial appointments at a gender identity clinic? How many people are waiting for an initial appointment? Waiting times have been raised with us in previous meetings.

David Parker: I have figures to the end of the final quarter of 2021-22: that is, to the end of March this year. Just over 4,000 people were waiting for an initial appointment in Scotland, of whom 1,037 were young people.

People wait for different times in different parts of Scotland. The most optimistic wait is in NHS Grampian, where people wait for 15 to 18 months. In the central belt, the waiting time is between three and four years, given current provision.

Fulton MacGregor: Those are significant waiting times, which is what we have heard. How does the 4,000 figure compare with previous years and over time? Is the figure fairly static or has it been increasing?

David Parker: I am sorry; I am struggling to read the small print on my sheet of paper. If I am reading this correctly—it looks right, from the size of the graphic—the number of people who are waiting has about doubled since the same period two years ago.

Fulton MacGregor: Once the person is receiving support from a gender identity clinic, for how long, on average, will they receive support? I know that that will vary, as everything does, but is there an average length of time for which you support people?

David Parker: I guess so, although everyone's journey is different. There is often an active initial phase, with lots of discussion about what a treatment plan might look like and the things that people might want to access. Sometimes people are ready to move forward at that stage; sometimes they do not move forward—there are lots of different possible outcomes.

When someone starts hormone treatment, there is about a 12-month period of intensive work with them; we will see them maybe three or four times over that year to support them, ensure that they are meeting their treatment goals and ensure that their safety is well maintained.

People might approach other interventions, such as surgery, in the future. They might come to that when they come to the end of the hormone treatment phase, or they might come back to it many years later.

We therefore often have people who are actively starting some elements of treatment and might get to a point at which they decide to continue or come back to it in the future. We expect, therefore, that the door will always be open to people, should they want to come back in the future. That said, it is not the case that people need lifelong specialist care; the interventions do not require that.

Fulton MacGregor: In one of your earlier answers, you talked about the proportion of young people who are seeking appointments, and the number was quite high. Will you expand on the numbers that we are talking about? Have you seen an increase in the number of young people who are seeking appointments?

David Parker: We have, but the increase that we have seen in the past couple of years is quite difficult to interpret because of the pandemic, which initially greatly reduced the numbers who were being referred to services. Certainly, during the past six months or so, the numbers who are being referred to all aspects of the service, including the young people service, have increased quite sharply. Those numbers were not increasing so sharply prior to the pandemic, so I wonder whether that might just correct itself as the number of people who are coming forward now starts to level off slightly. Data from the gender identity development service—GIDS—in London, from several years ago, certainly suggested that the increase was starting to plateau somewhat.

Numbers are still increasing and our planning has been for year-on-year increases of about 20 per cent. That has been our working position.

Fulton MacGregor: The interim Cass review, which today's earlier panel and previous panels have referred to, has reported an increase in the number of young people who are seeking appointments at gender identity clinics. I accept that the review was primarily about what is happening south of the border; are you saying that that is possibly also an outcome of the Covid pandemic in Scotland?

David Parker: During the pandemic, there was a disturbance in the flow of people being referred so I wonder whether the very sharp increase that we have seen during the past few months is almost the catching up of people who did not seek referral during the pandemic. We certainly hear in the clinic about people not wanting to access their general practitioner and being careful about how they choose to access healthcare, so I guess that people might be coming forward who would otherwise have come forward a bit sooner.

Pam Gosal: Good morning, David, and thank you for your opening statement. The Royal College of General Practitioners in Scotland submitted written evidence in which it talked about

"current IT systems which do not accommodate for transgender and non-binary patients in relation to referrals and screening. For example, a trans male cannot be referred for a cervical smear or to a gynaecology clinic if they are recorded as male in the practice database, despite still having female reproductive organs."

With an anticipated inflation in the number of GRC applications, do you have any concerns about decoupling of the legal and medical aspects of gender reassignment?

David Parker: The main CHI, or community health index, system is the starting point for most patient records, wherever they ultimately end up being kept. That includes a gender designator, which is currently "male" or "female"; there are no other options, at the moment. Since 2015, people who are changing that designation would stay in the system for cervical smears. For people who changed prior to that, a workaround might need to be found.

I am uncertain about the situation with gynaecology, but I would be happy to look into it and come back to you with a written answer. I expect that a trans male with a male CHI number would be eligible to be referred to gynaecology services.

Pam Gosal: You have said that more work needs to be done. Is that in line with the bill being introduced?

David Parker: Sorry, but could you rephrase the question?

Pam Gosal: Basically, more work has to be done. With the bill having been introduced, has that been identified? I have mentioned that there could be more people coming forward, so we have to ensure the readiness of our systems and databases for that.

David Parker: Specifically on whether people can be referred to gynaecology, that is a quick thing for me to check. I work in a service with a gynaecology aspect, but it has never been brought to my attention that that is a problem, so I want to understand that a little bit better.

On the situation regarding CHI records, hospital records are contained in many different computer systems, so that is a big piece of work that will take a long time to harmonise. However, changing a CHI number is already not dependent on somebody having a gender recognition certificate. People get to a point in their transition when they make the decision that the time is right to change their CHI number with their general practice. I do not think that the bill will make a significant difference in that respect.

Pam Gosal: The Cass review on gender identity services in England and Wales is on-going, but its interim report says:

"There has not been routine and consistent data collection ... which means it is not possible to accurately track the outcomes and pathways that children and young people take through the service."

Given that it is the state's duty to protect and safeguard children's wellbeing, should a similar inquiry be conducted in Scotland, followed by more detailed data collection, to ensure that the bill will not have any unintended consequences?

David Parker: I was grateful to see the *Official Reports* of the earlier evidence sessions in order to understand the comments that have been made about data, which is a big area. Data is certainly collected in Scotland. I do not accept the suggestion that no data is collected here.

In Scotland, the number of young people who move forward to treatment is extremely small. That possibly causes a problem sometimes when requests are made for data. It might be impossible to give the data because of how small the numbers are. I will give an example. The average number of young people who have moved on to puberty blockers in the past seven or eight years has been about seven a year. In some years, the numbers are at such a level that none of the data can be reported, let alone be reported by sex, gender or health board. I wonder whether some requests for data are frustrated by the data set being quite limited.

Pam Gosal: Do you think that the numbers will increase with more GRCs coming through?

David Parker: It is a really good question. A GRC is clearly important. If someone has a GRC, they have taken a substantial action that is relevant to discussions that they will have with their clinicians in a gender identity clinic. However, it is one of a multitude of different aspects that we look at and think about. I have given it a lot of thought and I cannot think of a situation in which that would even swing something, let alone passport something, if I can describe it in that way. A GRC is absolutely relevant and important for a person, but it will not change the direction of their clinical care.

Pam Duncan-Glancy: Thank you for the evidence that you gave us in advance on the work that you have done in the area, and for your answers to our questions so far this morning. I want to ask you about the interaction between the service and the gender recognition certificate.

Greater Glasgow and Clyde NHS Board submitted information to the committee, and it has said that it is important to highlight

"the separation between successful application for a GRC and ... robust governance standards for gender identity treatment."

For clarity, will you set out what that separation is, whether there is an interaction and, if so, where that is? I note that you touched on that a moment ago in your answer to my colleague Pam Gosal. Will you also set out where, if at all, a gender recognition certificate comes into play or is relevant in the gender reassignment protocol?

David Parker: Will you repeat the first part of that question for me? It is the part about the interaction between the gender recognition certificate and something else.

12:00

Pam Duncan-Glancy: Sorry. I will try to remind myself. I may be corrected by the *Official Report*, but I think that I asked about the point that Greater Glasgow and Clyde NHS Board made that it is important to clarify and highlight

"the separation between successful application for a GRC and ... robust governance standards for gender identity treatment."

A lot of the evidence that the committee has had has been about both aspects of a trans person's life. I want to get your view on the separation between the certificate and the gender identity treatment in the NHS.

David Parker: Thank you. It is a very well made point that the robust care that we offer people as part of their gender identity healthcare is not affected by their decision to apply for a gender recognition certificate or their having applied for and received one. Like anything that people do administratively, it is important and is a significant factor in their transition and it will be relevant to the discussions. However, if we think, for example, about the criteria for someone who is thinking about hormone treatment, all of that discussion will be about their needs, their aspirations and their personal goals and about, technically, whether what is proposed is feasible for them and is likely to have the outcome that they expect. I therefore see the two as being very separated.

At the moment, people will usually not be able to obtain a GRC until their formal diagnosis has happened. Clearly, we will see a shift in that people will probably come to the clinic with a GRC.

One thing that has always been important and which was touched on in one of the committee's earlier evidence sessions is privacy regarding gender identity, which is covered in section 22 of the Gender Recognition Act 2004. My colleagues in the network and I have always taken the position that we treat everybody as if they have a GRC, because that affords people the right amount of privacy. For me, that means that, in practice, if I am talking to somebody about writing a letter about them or talking to somebody else about them, I am talking about getting their consent for that. People are fully aware of what is happening and can fully participate in those discussions and, if they wish things to be done differently, they can say so.

There are certainly some intersections, but I see the two things as being very separate, and they will continue to be so. I might be corrected, but I cannot recall in the current gender reassignment protocol a specific meaningful discussion of gender recognition certificates. The issue will have been touched on in some of the work in the current gender reassignment protocol review, but it has not been a key discussion that we have had.

Pam Duncan-Glancy: That is helpful.

We heard in previous evidence that, in Denmark, there was a move from self-ID for accessing a gender recognition certificate to self-ID for accessing medicalised processes such as gender identity treatment. Could you imagine that happening here, and has it been considered?

David Parker: In the current review, which is on-going, there has been a lot of discussion about the access point for treatment for people seeking trans healthcare, and the access point if they are coming back to it rather than being at the first stage. The review is moving forward with principles of realistic medicine, so we are thinking about shared collaborative decision making. People absolutely need to be fully informed and able to consent to their treatment, but it is a much

bigger process than that; it is about working carefully with a person to try to help them to access the treatment that is right for them.

I do not see that approach in Denmark as something that we are heading towards in Scotland. In the discussions, which have included a wide range of stakeholders, there has been support for a more accessible way forward, but one that is based on realistic medicine principles.

Pam Duncan-Glancy: That is also helpful.

My final question probably goes over ground that you have already gone over, but I want to be absolutely clear about this. What impact do you believe getting a gender recognition certificate would have on a person's ability to receive medical treatment?

David Parker: I cannot see it making a significant difference. As I say, it is not irrelevant, because it is an absolutely important part of a person's journey, but it will not make a significant difference to their ability to receive treatment.

People are very considered in how they approach transition. They think so carefully about coming out and will often have thought about those things for many years. They will tell people slowly and carefully and will decide at what point they are going to change their name or their pronouns and at what point they are going to do things formally. People do not rush into those things. The impact of having the autonomy to make the change at the time that they think is right is huge and will be really positive.

Emma Roddick: How much does a lack of awareness of the different experiences that trans people have at gender identity clinics and of the different choices that they can legitimately make about their journey have an impact on the public view of what the process for a GRC should be?

David Parker: Gosh—I do not know. I do not think that I have enough awareness of the public's understanding to answer that. Even within health, there is often not a great understanding of what is actually happening. Some of the questions that we are asked when people make general requests for information show that there is a misunderstanding.

People do not always understand that transition is a very deliberative and considered process. It is not something that people rush into. It is important to say that, although people sometimes say that they are really frustrated about the time for which they have to wait and that they want to get things moving, that stops when they arrive. People want to be really careful about what transition means for them and what they want to do.

It would be nice for people to be much more open about what happens at clinics. Lots of different things happen, but they are person centred and needs led. There is certainly no prescriptive process.

Emma Roddick: It is interesting that you used the word "prescriptive", because the previous panel talked about whether there is a standard of proof—either gender dysphoria or something that takes the place of that—that trans people could meet, which would prove that they are trans before they get a GRC. Is there, in your view, anything that might apply to everyone who is trans in order for them to get a GRC?

David Parker: I have never been able to think of a situation that is analogous to experiencing gender incongruence. Only very rarely do people have significant other comorbidities that interfere with their sense of who they are. People might be uncertain and might be thinking about how they can get a better understanding of themselves and their experiences—that is not uncommon. Other people have gone past that point and their assigned sex at birth is clearly mismatched with their experienced gender.

I cannot think of an analogous situation that people would mistake for that one. People talk about the process of getting to where they are and of realising that something was not quite right, or that they were different. They will talk eloquently about how they may have tried to test different things. The first thing that they might notice is that they have particular feelings about a certain part of their body or that something psychological is happening to them. They work those ideas through to the point where they can say that they are certain of what it is. It is a very considered thing.

Emma Roddick: I will move on to ask specifically about services. As a representative for the Highlands and Islands, I am very aware that all the current clinics are based in cities. Do you deal with many people who come from rural and island locations? Do people come up against real or perceived barriers when they access your services?

David Parker: One of the key changes that happened at the start of the pandemic was a quick move in places where it had not already happened—the Highlands and Islands were probably ahead of the game—to thinking about how virtual healthcare could be delivered and done well. That is now common in gender identity clinics. We are doing a lot of video working and a lot of thinking about other ways of doing this. We are thinking beyond the structured sense that a person has to have an appointment for this, that or something else; there are other ways to gain information and keep in contact with somebody throughout their healthcare.

The approach is definitely changing, which has a huge benefit for people in more rural areas and for people who are busy, because an appointment interrupts their day. Virtual working kind of normalises things a bit better for people.

Emma Roddick: Absolutely—thank you. Those are all my questions.

Rachael Hamilton: I have a succession of quick-fire questions. How many people who use your services seek to obtain a GRC? Do you keep that data?

David Parker: I do not have that data to hand and I do not know that we keep it.

Rachael Hamilton: If somebody came to seek medical treatment to obtain a GRC, you would keep that data, but if they sought medical treatment and did not obtain a GRC, you would not keep that data—or do you not keep such data in either case?

David Parker: To get a GRC, a person requires two medical reports—one comes from their GP and the other usually comes from a gender specialist, which is the psychiatrist's report. The GP report is usually straightforward, although some practices might charge a cost for obtaining it. The psychiatrist's report is often for people who have had surgery or a psychiatry appointment during their episode of care—people use the letter from such an appointment as part of their GRC application.

For that reason, I might not know that somebody had applied for a GRC. They would have evidence that they could use, but they would not necessarily have approached us for that purpose. People could already have the evidence for making a GRC application, so we would not be able to record that, if that makes sense.

Rachael Hamilton: If fewer trans people seek medical treatment to obtain a GRC by self-declaration, how will you know what your service provision should be in the future?

David Parker: I apologise if I misunderstood your first question. Very few people access a gender identity clinic solely for the purpose of getting a gender recognition certificate. That is very rare—I can think of that happening on only a handful of occasions.

Rachael Hamilton: That is helpful. Do you have a minimum age for service provision in your clinics?

David Parker: The clinics do. The adult clinics have a minimum age of 17 or 18—that depends on the clinic. I do not know whether the young people's service has a formal minimum age.

Rachael Hamilton: Has there been any analysis of the service provision need, given that the waiting list is long? What would happen if a 16-year-old required your services? How do you know what the future holds for waiting lists? The whole objective of reform is to ensure that trans people can access services and have a more dignified experience.

David Parker: Absolutely. The reason why we have got to where we are is a combination of services not always having the most secure funding and demand increasing considerably for services. They are both factors in how we have arrived at today's situation.

There are plans under the Scottish Government's strategic action framework and funding, which were announced last year. I understand that all the clinics are well in the process of putting together cases that will be applications for funding for this year and thinking about what the needs might be in future years. There is also interest in thinking about new services that might be possible in Scotland, whether that is in a health board area that does not have a gender identity clinic or whether it is a primary care-based service that might want to apply to be developed and funded. That is similar to successful pilots that are happening down in England. Work is under way and, as part of that, all the services have done modelling to understand the resources that are required and the extent of their waiting times.

12:15

Rachael Hamilton: You do not need to answer this question. Do you believe that the service provision should have been put in place before the reform?

David Parker: I am not sure that I quite know how to answer that question; I do not think that it—

Rachael Hamilton: It was slightly unfair, because it was a wide question and invited quite a subjective response.

I will move on to another tricky and challenging area. Some witnesses who oppose the bill have expressed concern that, given that there is medical oversight in the GRC process, there is a chance that mental health issues, for example, could be overlooked. In a submission to the committee, the RCGP talked about the vulnerabilities of young people and the heightened risk of self-harm and suicide. Do you have concerns about those challenges?

David Parker: I absolutely have concerns about those things. The proposal to reform services is not simply about providing more clinic appointments and enabling pathways forward for people on the waiting list; it is also for people who will never join the waiting list, so that community

support is available for people, who might be looking for all kinds of intervention. You are absolutely right: if the numbers of people on the waiting list are increasing, that need is increasing, too.

Rachael Hamilton: Might fewer trans people seek medical treatment if they are able to obtain a GRC through self-declaration? Could that have unintended consequences, in view of what we just talked about?

David Parker: Based on the very small numbers of people who currently seek GIC referral just for the purpose of getting a GRC, I think that, although what you said is undoubtedly true, the numbers will be very small.

Rachael Hamilton: How would one go about getting a GRC and all the paperwork without seeking the services of the GIC? What are the normal routes in that regard?

David Parker: I think that, currently, the only way that someone would be able to achieve that would be by commissioning an independent report. The person would go to a private provider, who would provide a report that was suitable for the gender recognition panel.

Rachael Hamilton: The national health service in Scotland is not the real route to getting a certificate, then.

David Parker: It absolutely is a route for people if they want to follow that route. What I said was based on examples that I know of: people who have been able to do that have seen it as the easier option.

Rachael Hamilton: Is there any way that I can get those figures, if data is not collected?

David Parker: If I understand you correctly, you are asking how many people get a GRC through private providers. It is possible that the gender recognition panel has data on who provides the reports; that might be one way of getting the figures. The NHS would not know about those people, so we would not have that data.

Rachael Hamilton: Thank you.

The Convener: I do not think that there are any more questions for David Parker. Thank you very much; this session has been really helpful.

12:18

Meeting continued in private until 12:42.

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