



OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities, Human Rights and Civil Justice Committee

Tuesday 28 June 2022

Session 6



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Tuesday 28 June 2022

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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE

21st 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:

Colin Gilchrist (Scottish Government)

Peter Hope-Jones (Scottish Government)

Shona Robison (Cabinet Secretary for Social Justice, Housing and Local Government (Shona Robison))

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 28 June 2022

[The Convener opened the meeting at 10:00]

Subordinate Legislation

Justice of the Peace Court Fees (Scotland) Order 2022 (SSI 2022/179)

Sheriff Court Fees Order 2022 (SSI 2022/181)

High Court of Justiciary Fees Order 2022 (SSI 2022/182)

Sheriff Appeal Court Fees Order 2022 (SSI 2022/183)

Adults With Incapacity (Public Guardian's Fees) (Scotland) Regulations 2022 (SSI 2022/184)

Court of Session etc Fees Order 2022 (SSI 2022/185)

The Convener (Joe FitzPatrick): Welcome to the 21st meeting of the Equalities, Human Rights and Civil Justice Committee in 2022. Our first agenda item is consideration of six negative instruments. I refer members to paper 1. Do members have comments on any of the instruments?

Pam Duncan-Glancy (Glasgow) (Lab): I am concerned that the instruments will increase the cost of accessing justice by 2 per cent in July and a further 2 per cent next April, at a time when disabled people are facing extreme cost of living increases. Some evidence that was submitted to the consultation on the increases highlighted that the exemptions and disregards for some income, including for disabled people, are not sufficient to ensure access to justice and protect against poverty. Therefore, I am concerned about the increases and note the concerns of organisations including Inclusion Scotland and Citizens Advice Scotland.

Maggie Chapman (North East Scotland) (Green): Can we raise the matter with the Minister for Community Safety when we see her in September—if that is when she is coming—or write a letter? There are two issues: the uplift and the threshold limit. It would be helpful to have

conversations with the minister about those—although obviously not for the July uplift but in advance of April's.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): I would like clarification about the exemption from court fees for people who are in receipt of personal independence payment and adult disability payment with a gross annual income of £20,592. We also need clarification about the impact of inflation. Reference is made to that, but perhaps the inflationary pressure should be considered sooner rather than later.

The Convener: We can discuss those matters in private and agree to write to the minister or ensure that we see her early in September. There is no scope for getting her in front of us today because the negative instruments come into force, but any member who wants to take further action can discuss that with the clerks. There is a parliamentary process for that.

That said and those points having been put on the record, are members content not to make any recommendation to Parliament on the instruments?

Members indicated agreement.

The Convener: That concludes consideration of the Scottish statutory instruments. We will suspend briefly.

10:03

Meeting suspended.

10:06

On resuming—

Gender Recognition Reform (Scotland) Bill: Stage 1

The Convener: The next item agenda is to continue taking evidence on the Gender Recognition Reform (Scotland) Bill. Before we start our formal evidence session, I put on the record our thanks to a number of groups who have engaged with us privately over the past week or so to give us their views on the bill. Anonymised notes of those sessions will be published in due course.

I welcome Shona Robison, the Cabinet Secretary for Social Justice, Housing and Local Government, and her officials from the Scottish Government: Peter Hope-Jones is head of the gender recognition unit and Colin Gilchrist is a solicitor.

I refer members to papers 2 and 3. I invite the cabinet secretary to make a short opening statement.

The Cabinet Secretary for Social Justice, Housing and Local Government (Shona Robison): Good morning, everyone. For nearly two decades, the Gender Recognition Act 2004 has provided a route to legal recognition for trans people. However, evidence shows that the process can be lengthy, invasive and demeaning. Since the act was introduced, the World Health Organization has recategorised gender identity health, and has made it clear that being transgender is not a mental ill health condition and that classifying it as such can cause distress.

Only around 6,000 people—of an estimated half a million trans people in the United Kingdom—have a gender recognition certificate. The aim of the Gender Recognition Reform (Scotland) Bill is to reform the process to bring it more into line with current understanding and international best practice, and to remove barriers to trans people accessing their existing rights.

I know that there are deeply held views on transgender issues, and I appreciate that reservations about the bill are often connected with legitimate concerns about the violence, abuse and harassment that women and girls face in our society. As I have said before, trans people are not responsible for that abuse, and often face it themselves. I am also aware that many people view the reforms as being vital and overdue.

It is important to focus on the reforms that are contained in the bill as introduced, and to be very clear about what the bill does. It will introduce a new process for obtaining a GRC, which is open to

people who were born or adopted in Scotland or are ordinarily resident here. It will remove the requirement for a medical diagnosis of gender dysphoria, reduce the minimum period of living in the acquired gender from two years to three months while introducing a new three-month reflection period, and lower the minimum age for applying from 18 to 16.

The process of obtaining a GRC will remain a serious and substantial undertaking. Applicants will still have to make a statutory declaration that they are currently living in, and intend to live in, their acquired gender for the rest of their lives. Under the bill, offences relating to making a false application carry potential penalties of up to two years in prison.

Based on international comparison, we estimate that the number of Scottish GRCs might rise from around 30 to between 250 and 300 a year. That is what the bill will do.

I know that there has been some misunderstanding about what the bill will not do, and I also want to be very clear on that. The bill will not change the protections that are set out in the Equality Act 2010. It will not change the exceptions in that act that allow single-sex services to exclude trans people where that is a proportionate means of achieving a legitimate aim, including where those trans people hold a GRC.

The bill will not change or remove women's rights. It will not make changes to how toilets and changing rooms operate. It does not redefine what a man or a woman is, and it does not change or expand trans people's rights. The bill will not change the effect of a GRC, which is that the individual is legally recognised in their acquired gender.

The bill will not change the policy or laws of England or any other country; it is for other Governments and Parliaments to decide how GRCs are recognised in their jurisdictions. The bill will not change the way that gender identity healthcare is provided or make changes to public policy, including national health service patient care. It will not alter practices for collecting or processing data, including data relating to crimes. It will not change the way that Scottish prisons accommodate the people in their care, and it will make no changes to women's sport, whether professional, amateur or in schools.

As the committee has already heard, the development of the bill has involved some of the most extensive consultation that has ever been undertaken by the Scottish Government. I have personally met a wide range of interested parties, and I know that the committee has also heard from a wide and varied group of organisations and individuals during its scrutiny sessions.

Some of those people support the bill. Others are opposed to it, and I am aware that I am unlikely to change their minds with anything that I have to say today. However, that does not mean that I have not listened to and considered their views, just as the committee will have. I commend the respectful and considered manner of everyone involved in the process.

I remain of the view that the reforms that are set out in the bill strike an appropriate balance in improving access to important human rights while providing a robust and serious process that is not to be undertaken lightly. Nonetheless, I look forward to hearing the views of the committee at the end of its stage 1 consideration, based on the evidence that it has heard. I am happy to take questions.

Maggie Chapman: Good morning, cabinet secretary. Thank you for joining us and for your opening remarks. I have a few questions around the removal of the diagnosis of gender dysphoria and the gender recognition panel—*[Interruption.]*

10:13

Meeting suspended.

10:13

On resuming—

Maggie Chapman: I will start again. I have a couple of questions around the removal of the diagnosis of gender dysphoria and about the gender recognition panel.

First, on gender dysphoria, you talked in your opening remarks about the shift away from treating being trans as a mental health condition. Where does the importance of that lie in relation to separating legal transition from medical transition?

Shona Robison: That removal, and the separating out of legal and medical elements, are important. The redefinition by the World Health Organization is important and several countries have changed their processes.

We have heard evidence from people who have gone through the current system under the 2004 act that it is very demeaning, that the gender recognition panel is a group of people who are unknown to them, and that it is a difficult and onerous process. Therefore, we believe that the time is right to move to what is seen as international best practice, as many other countries have done.

10:15

I know that the committee has considered practice in several other countries that have changed their position, including Ireland, which is

one of our nearest neighbours. Over the past few days, Spain has announced that it will be moving in that direction. We think that the change is in line with best practice and along the lines that are recommended by international bodies.

Maggie Chapman: We have heard evidence from people who are concerned that removal of the diagnosis potentially opens up the process of applying for a GRC to a wider group of people, including people who might be bad-faith actors. There are also concerns about whether removal of the medical diagnosis takes away from the seriousness of the decision. What are your comments on that?

Shona Robison: Application for a GRC is still a very serious step to take: it is a statutory declaration, in which the person declares that they are going to live the rest of their life in that gender. The international evidence that has emerged shows that there is no evidence of changes in laws being misused by what you described as “bad-faith actors”. The evidence of the Scottish Human Rights Commission is very strong on that: it could find no evidence of the misuse of the process.

There are quite hefty penalties for misuse. As I set out in my opening remarks, someone who makes a false declaration will feel the full force of the law.

Maggie Chapman: Thank you. That is helpful.

The process of self-declaration removes the need for the gender recognition panel. What are the main benefits of removing the panel for trans people who are going through the process?

Shona Robison: The fact that so few people in the trans community—only 6,000 people, compared to the estimated number of up to 500,000 people in the UK who are trans—have obtained the gender recognition certificate confirms the evidence that we have heard about the process, which is that it is really off-putting to people. A process of statutory self-declaration will enable people to gain legal recognition of the way they have been living their lives for many years. Many trans people will have already changed other documentation.

I suspect that the spike that Ireland saw when it changed the process to one of statutory self-declaration probably represents people who had been living in their acquired gender for many years who took the step of gaining legal recognition. The numbers settled down after that spike.

One of the most powerful pieces of evidence that I heard was from an older person who said that the most important thing to come out of it all was that they would be able to have their death certificate record the gender that they had lived

their entire life in. For the tiny number of people whom the change will affect, it could be really important. That evidence highlights that it is a very important and very personal thing. Hearing about the importance of having end-of-life recognition of the gender that a person has lived their life in was very powerful.

Maggie Chapman: We heard similar evidence in a couple of the sessions that we held. I suppose that the reverse of that is that the removal of any form of gatekeeping or formal safeguards is troubling for some people, especially if it makes it easier for some of the kinds of things that we have heard, for example, in relation to prisoners serving sentences for sexual assault. Are there safeguards or gatekeeping measures that we should be considering?

Shona Robison: Prison is an issue that has been raised and the committee heard evidence from the Scottish Prison Service, which said that whether or not someone has a gender recognition certificate does not affect the way that it risk-assesses that person. The Prison Service already places people in the most appropriate estate, whether that is for their own safety or the safety of others, regardless of whether they have a gender recognition certificate.

That is the right approach and it is reassuring in terms of the process. We are talking about a tiny number of people and it is important not to conflate two things. There is no evidence at all that there is a higher number of sex offenders within the trans community; in fact, the overwhelming evidence is that sexual offences are committed mainly by men on women. However, where there are transgender prisoners, whatever their offence, the management of them is down to the Scottish Prison Service and it does that very carefully. It has a review under way at the moment, which will guide it on whether it needs to make any further changes.

Maggie Chapman: My final question is in relation to the role of the registrar general, who will oversee the administration of the process. There is a question around how the Government will ensure that the registrar general is resourced sufficiently to support people who are going through the process on any questions and issues that they may have. However, there is also a question around the regulations that the registrar general will have the powers to make. What are the constraints on or parameters within which you see those regulations being made?

Shona Robison: The registrar general will have an important role, not least in making sure that the guidance is clear and supportive and explains things in clear language. Work on that guidance will obviously involve a number of organisations. For example, the Children and Young People's

Commissioner Scotland gave evidence that the language used in the guidance needs to be clear for 16 and 17-year-olds. There would potentially also be signposting to other organisations that are beyond the registrar general's ambit for providing guidance.

Peter Hope-Jones might want to add something about making any changes to the regulations.

Peter Hope-Jones (Scottish Government): First, Maggie Chapman mentioned costs to National Records of Scotland and the registrar general. We published a financial memorandum that sets out that we do not anticipate huge costs because the numbers are expected to be relatively low, as the cabinet secretary has already said. We have suggested initial costs of £300,000 to £350,000 and on-going annual costs of about £150,000 a year, which would be met by the Scottish Government.

In terms of the power to make regulations, the most important thing to stress is that the powers set out in the bill would allow the registrar general to tweak the process in terms of the specific information provided, but would not allow a change to the basis on which certificates would be issued. For example, they would not allow regulations to be made to reintroduce the requirement for medical evidence in order for certificates to be issued. The bill sets out the process through which those regulations would be made, and if they were to make changes to the legislation they would have to go through an affirmative process in Parliament.

Rachael Hamilton: On that point, will GRCs that are issued by the registrar general have a United Kingdom-wide effect? What do you intend to do in terms of the information that is passed between registers in Scotland and those in England, Wales and Northern Ireland in relation to issuing a revised birth certificate? What happens in that situation?

Shona Robison: First, it will be for the other parts of the UK to decide on their own systems, and the UK Government's recognition of Scottish GRCs will be a matter for it to consider.

Rachael Hamilton: Can I just interrupt? England is not moving to self-declaration, so what happens then?

Shona Robison: There are some fundamental rights that will remain the same—rights that are enshrined under the Equality Act 2010 and apply to people whether or not they have a GRC. Those would be everyday things such as people's rights at work and in any interactions with public bodies. Those remain the same whether someone has a GRC or not, because they are protected under the 2010 act.

I will ask Peter Hope-Jones to pick up on the specifics.

Peter Hope-Jones: The process, as it works at the moment, is that the Scottish registrar general can update Scottish birth certificates and registrar generals in England, Wales and Northern Ireland can update their respective birth registers and certifications. Therefore, as it works at the moment, applications go to the gender recognition panel and, if they are approved, the panel informs the Scottish registrar general who makes the update in Scotland.

We are proposing exactly the same thing: we would issue gender recognition certificates in Scotland, update the birth or adoption register in Scotland, as appropriate, and inform the registrar generals in the respective other Administrations. It would be for those Administrations to decide how to act, based on that information.

Rachael Hamilton: How would you inform them? Are your data systems compatible?

Peter Hope-Jones: Yes. Currently it goes in the other direction, but the registrars general are in touch.

Rachael Hamilton: Okay. Have you had a conversation with the UK Government regarding the effect of the bill on the rest of the UK?

Shona Robison: Yes. It has mainly been at official level—Peter Hope-Jones can say more about that—but there has been on-going engagement all the way through the bill process. Will you say a bit more about the engagement that you have had with officials, Peter?

Peter Hope-Jones: Yes, of course. We regularly meet and talk to officials down south on specific cross-border issues, but also more generally. We have had those initial conversations at official level, but the formal section 104 process and the formal conversations about mutual recognition have not taken place yet. That is quite normal with a bill; we would not enter into a formal section 104 process until near the end of the bill's passage or, indeed, after it has passed.

Rachael Hamilton: Do you see a risk in not considering that you may need a section 104 order before the bill goes through?

Peter Hope-Jones: We are following the routine section 104 process.

Rachael Hamilton: Would you advise the committee to take evidence on that?

Shona Robison: That would be a matter for us around the mechanics of the legislation once the bill has finished its passage through Parliament, rather than being part of the bill as such. There is nothing odd about that; it is just the normal course

of events. It is a technical issue with which we do not envisage there being any issues.

Rachael Hamilton: Do you not see there being any challenges through the Supreme Court?

Shona Robison: No. Whether the UK Government changes its processes is clearly a matter for the UK Government itself, as is whether it recognises Scottish gender recognition certificates. That does not affect our ability to make changes to the law here.

Peter Hope-Jones: I have one thing to add. The UK Government, in considering the recognition of Scottish certificates, will obviously also need to consider how it recognises certificates and gender recognition processes that have been gone through elsewhere in the world. Currently, it has processes in place for that and a list of recognised territories. That has not been updated for at least a decade, but we understood that the UK Government was in the process of reconsidering that list. I imagine that it will want to think about that list alongside recognition of Scottish certificates, which will be quite a challenging and substantial project.

10:30

Pam Gosal (West Scotland) (Con): Good morning, cabinet secretary. Of those who responded to the short survey, 59 per cent were not in favour of the proposed reforms. I have also received numerous pieces of correspondence from individuals who feel that their views have not been represented or heard. This committee's members and, particularly, clerks, have had to make last-ditch attempts to secure witnesses in order to ensure that the scrutiny of the bill is more balanced. They have had to include last-minute private evidence sessions, outwith parliamentary time, to ensure that those who are affected by the bill will be heard from. We have received a large number of additional written submissions in a short period of time and there simply has not been enough time to scrutinise such an important bill.

Cabinet secretary, do you agree that stage 1 has been rushed through and that those who are affected by the bill—as well as the committee members and democracy more generally—would benefit from a more thorough approach and longer timescales for the evidence sessions? Do you believe that it would be beneficial to delay stage 1 of the bill?

Shona Robison: No, I do not agree with that. The bill has been the subject of a lot of consultation: there have been two Scottish consultations and one UK consultation, all of which received high numbers of responses. In those consultations, there was generally more

support than opposition, although I take the point about the responses to the committee.

In addition to that, there have been various polls, such as the BBC poll that found that 60 per cent of the public support reform, with young people and women more likely to support it. More recently, a report from More in Common found that people are perhaps less divided on trans issues than social media would indicate. With more than 30,000 responses in total, the two formal consultations are among the largest that the Scottish Government has ever undertaken. Work has been going on over a number of years to get us to that point.

I have met representatives from organisations that are for and against the bill. During those wide-ranging conversations, suggestions for changes were made from both sides of the debate, and I have considered all of those. Before that, my predecessor, Shirley-Anne Somerville, also met a range of organisations. The subject has been debated, scrutinised and consulted on, and now this committee is looking at the detail. I do not think that it would be appropriate to pause now. It is time for this committee to do its work and for Parliament to make a judgment about the detail of the bill and whether it supports it.

Pam Gosal: Thank you for your response, cabinet secretary. I have two points to make on that. I will go back to your predecessor in a minute but, with regard to what you said about us having had lengthy consultation and about people being heard, I am not the only member of this committee who has been receiving emails about this matter. Why do you think that people are saying that they have not been heard?

My experience is that the process has been very tiring. Last week, three sessions were crammed into one week and, this week, there are two sessions. Cabinet secretary, what would you say to people who are listening to this meeting and feel that they have not been heard? This bill is now at the end of stage 1, so it is going through.

Shona Robison: On the first point, I have been a member of committees that have taken lots and lots of evidence. As committee members, we want to hear as many views as possible, and it is the role and purpose of committees to look at that detail.

It is fair to say that there is a body of opinion and that this is a polarised discussion. I will not pretend otherwise. Members, including you and I, have been contacted by people who are strongly in favour of the bill and people who are strongly opposed to it. Sometimes, the reasons for people's opposition are related not to the provisions of the bill but to wider concerns—some of which we will touch on today and some of which

I tried to outline in my opening remarks—that the bill is not concerned with.

What it all boils down to is that we have to be guided by the evidence. The committee has heard some compelling evidence. Last week, that was led by the Scottish Human Rights Commission, which got to the nub of the issues by giving evidence about countries that have adopted a statutory declaration process. That evidence showed that once those countries have those processes in place, the concerns such as those that have been expressed by the people who are emailing you or me have not come to fruition. The Scottish Human Rights Commission was clear that it could find no body of evidence to show that the things that people were concerned about—such as the threat to women and girls or a major change in society as we know it—had happened in those countries, and I have no reason to believe that Scotland would be any different from that.

However, it is important that we do the annual reporting on the bill. I know that the committee has taken evidence about whether there should be a post-legislative review of the legislation, to make sure that nothing emerges that we had not predicted. I am very sympathetic to that and, if the committee were to recommend that, I would give it due consideration, because I think that it is important that we look at the operation of any piece of legislation.

Pam Gosal: Thank you for that response, cabinet secretary. You mentioned your predecessor, Shirley-Anne Somerville. She announced a delay in June 2019, in order to take account of additional issues that had been raised since the consultation, and sought to build consensus on the way forward. Why did the Scottish Government only agree to hold meetings with those who oppose the bill between January and March 2022, when, arguably, it was too late to influence policy?

In addition, what have you taken forward in response to points or concerns that were raised about that section of the bill?

Shona Robison: I am aware that Shirley-Anne Somerville also undertook consultation and met a number of organisations. Peter Hope-Jones was closer to that process than I was, but I understand that the three-month reflection period was one of the areas that emerged from that. Peter can maybe say more about that in a second.

There has also been ample opportunity for written comments, all of which have been looked at and considered. I undertook a round of engagement once I came into the post and had got my head around the extent and detail of this complex area. I held personal meetings with organisations from both sides of the argument

around the bill. One of the areas that I looked at in a lot of detail was whether the minimum age of applicants should be 18 or 16. I gave that a lot of consideration. I looked at all of the views on that and, as I said in my statement, the reforms are finely balanced because of the differing views. The commitment to annual reporting came directly out of that round of engagement with organisations, because I was being asked how we would know how many GRCs had been issued, whether there had been a spike, and what the pattern was. That was an absolutely fair point, so we agreed to put that in the annual reporting requirement.

The other area that was changed was the cost of applying. Some organisations in favour of the bill said that they thought that having a cost might be prohibitive to people, so we listened to them and we removed the cost on that basis. Those are two examples that came directly out of that round of consultation. Peter is best placed to talk about what happened before that, because obviously I was not in post then.

Pam Gosal: I am just looking to find out whether the concerns that were raised at that time by those people and organisations have been addressed in the bill. It is good that the cabinet secretary mentioned age and a few other concerns, but there are many other concerns that people have raised. Have those concerns been addressed in the bill?

Peter Hope-Jones: It is not the case that Ms Somerville announced the delay to the bill and then there were no meetings with officials. The equality impact assessment sets out the engagement process that we went through.

When Ms Somerville made that announcement, it was to lead in to the second consultation, which was on the full draft bill. Both before that point and during that second consultation, Ms Somerville was having meetings with interested parties. Again, that is set out in the equality impact assessment, so you can see the detail of that there.

After that second consultation, there was a delay and a period during which there were no meetings. That was because Covid hit us and no work at all was being done on the bill.

On the question whether the views of those parties were taken on board, the views expressed in those meetings and in the consultation responses were considered—absolutely—but, as the cabinet secretary has set out, the fundamental core of the bill did not change substantially. However, the cabinet secretary made changes to the bill based on the meetings that she had.

Pam Gosal: I have another question—

The Convener: Before we go back to Pam Gosal, we will go to Karen Adam.

Karen Adam (Banffshire and Buchan Coast) (SNP): Cabinet secretary, we have had a lot of evidence, both written and oral, from people who are in favour of the bill and people who are opposed to the bill. A lot of the concerns of those who have been opposed to the bill have been debunked through the evidence sessions.

Now that we are perhaps having calls to delay the bill, as all else has been addressed, what would be the consequences of delaying the bill?

Shona Robison: We have been a long time getting to this point and any further delay will not necessarily enhance the public discourse around the issues. It has come to the point where, as legislators and parliamentarians, we need to make a decision about the matter. Given all the delays that we have already had, I think that any further delay would not be helpful.

People who are deeply affected by this—I reiterate that it is a tiny number of people for whom it is really important—would have a further delay in being able to bring their legal status and documentation into line with how they live their lives. I do not think that that would be the right thing to do.

Pam Gosal: I have just two more questions, on single-sex spaces and on religion.

The committee has heard concerns—obviously, you have heard them as well—that the system of self-declaration will open up the bill to abuse by bad-faith actors who could invade women's single-sex spaces. What is your response to those concerns and will you be considering provisions such as blocking people convicted of sex crimes from obtaining a GRC through self-declaration? If not, can you tell the committee what the bill does to address the concerns about the safety of women and girls in relation to bad-faith actors who may exploit the bill?

Shona Robison: First, I would point again to the evidence from the Scottish Human Rights Commission. The SHRC was very clear that there is no body of evidence, at least in the countries that now have a system of statutory declaration, that points to bad-faith actors trying to use the process in order to abuse women and girls.

All the evidence points to the abuse of women and girls coming from predatory men, and there is no evidence of such men using a system of statutory declaration for gender recognition in order to abuse women and girls. There is just no evidence of that.

10:45

On access to single-sex spaces, as I said in my opening remarks, the Equality Act 2010 provides for exceptions, including for trans people with a gender recognition certificate, if those exceptions are proportionate. The example that is given under the 2010 act is, I think, a counselling service for rape victims; there could be an exception whereby transgender women would be excluded from that service.

Other spaces, such as toilets and changing rooms, which have had a lot of attention in the discussion in the public domain, do not require and have never required a gender recognition certificate. As people in the trans community go about their daily lives, as they have done forever, they will use or not use those spaces. If that had been an issue, we would probably have been aware of it before we got to the confines of the debate around the bill.

Where single-sex spaces have a reason to exclude trans people, for the reasons that I outlined, that will not change as a result of the bill. That will remain the same, and it is important that it does.

Pam Gosal: Thank you.

I have previously asked how section 22 interferes with freedom of religion—for instance, where it goes against a woman's religious practices to be touched by a man. I have given the example of a woman who goes into a doctor's surgery for a smear test. You can ask for a female doctor in the practice—that is quite normal; my mother does that, as do a lot of my relatives and friends. Given that an individual with a GRC does not have to disclose it, there is the possibility that a woman could end up being seen by a biological male.

I have been made aware of that issue. People have concerns about the existing legislation, and reform of the Gender Recognition Act 2004 means that the issue might become more widespread. Were you aware of the issue before the bill was introduced? How will you seek to address it? It is important to balance trans rights and religious rights, whether we are talking about single-sex spaces or single-sex services, especially when they are required by people with a religious background.

Shona Robison: The issue does not relate directly to the bill—you alluded to that. It is about healthcare, whether we are talking about now or after the bill is passed.

Let me say a couple of things about that. The NHS tries to give a person their wish, where it can, if they want a man or a woman to provide care, whether we are talking about personal care that

social care staff deliver or a smear test or other procedure. If a person specifically requests a doctor or nurse of the same gender, for whatever reason, the NHS will of course try to accommodate their wish as far as possible. Obviously, there are never any guarantees, given the availability of staff with the appropriate skills to manage the patient's condition. I know, for example, that it can be quite difficult when a man requests male social care staff, because the workforce is predominantly female. It can be difficult to grant such wishes.

The patient rights charter sets out the preferences, culture, beliefs, values and level of understanding that will be taken into account and respected when using NHS services, which means that people's wishes will be accommodated where possible. Moreover, the Equality and Human Rights Commission has published statutory codes of practice and guidance to help employers understand the relevant issues including some of the issues that you have raised. There is also the genuine occupational requirement exception, which can provide that a person appointed must not be a trans person where there is an occupational requirement, due to the nature or context of the work. There are a lot of what I guess might be described as safeguards in this area. Finally, the Scottish Human Rights Commission mentioned in its evidence the fair amount of case law that predates the bill and balances religious rights and the right to freedom from discrimination.

In the case of someone who did not disclose, I would have thought that that would be something for the employer to deal with. We are talking about very hypothetical situations here, but I cannot imagine that most people, particularly those in the caring professions, would not want to do anything other than respect the person's wishes. That would be my view. I think that employers, guided by the guidance from the EHRC, have probably been dealing with such issues for many years, and the aim, particularly in the NHS, will have been to ensure that people's wishes are respected as far as possible.

Pam Gosal: Lastly, we heard in private from an organisation that said that this change would drive women, especially from ethnic minority groups, more underground, because they would not go into many single-sex spaces such as changing rooms. Do you believe that if those women cannot have that single-sex space to themselves they will be driven more underground? I welcome the fact that you have said that employers will hopefully have in their employment contracts and guidance that, with regard to a trans person, they will be sensitive on religious grounds, if someone, say, wanted to see a doctor.

Shona Robison: The Scottish Human Rights Commission talked about that when you saw it last week, and it said that, based on international evidence and what has gone on in other countries in a position not dissimilar to our own, there is no evidence of widespread self-exclusion from services. I think that it is a matter of fear and concern rather than actual threat, but that is important in itself because we do not want to people to be concerned and worried. Therefore, we all have a responsibility to be clear with people about what the bill does and, almost more important, what it does not do. None of the protections that are already in place are affected by this in any way whatsoever.

Violence against women and girls emanates from predatory men and there is no evidence that predatory men feel the need to try to obtain a gender recognition certificate in order to be predatory and abusive. Of course, GRCs are not necessary for accessing areas such as toilets, changing rooms and other spaces that are not restricted as they would be for exceptions under the 2010 act. As I said earlier, trans women and trans men will have been using these spaces for many years and, had that been a concern or an issue, I think that we would have heard about it before now.

Having said that, I am sympathetic to post-legislative annual reporting. Also, if the committee feels that having a review that is able to take stock of all these issues is important and recommends doing that, it is something that I would look quite favourably upon.

The Convener: Karen Adam has a brief supplementary.

Karen Adam: Very briefly, convener, I am concerned about some of the language that has been used. Referring to trans women as biologically male has in the past been used as a transphobic dog whistle. We need to be aware of the language that people are using, because we are obviously going to have a high volume of trans people who are interested in what is going on at the committee today.

The Convener: Thank you. I am trying hard not to police language unless it is directed at an individual, but you have made your point.

Pam Duncan-Glancy: This gets to the heart of human rights, and it is ultimately about the human rights of trans people. Of course, trans people's rights are human rights, not because they are trans but because they are human. We have heard in a lot of the evidence sessions about the importance of the human rights of everyone who is involved.

I am deeply disappointed by the public discourse around this particular debate, in which

trans people have seen their rights being debated on opening the papers or watching the news; of course, women have also experienced that debate about rights, but human rights are inalienable, not debateable. I believe that a lot of that discourse is to do with the vacuum that was left by the Government between 2017 and 2019 and I am disappointed by that. What can the Government do to sort out this mess?

Shona Robison: First, I agree that trans rights are human rights. What we are trying to achieve here is about recognising—and I think that this was put across strongly by the Scottish Human Rights Commission—that everybody's human rights are all-important collectively and should not be seen as somehow in opposition to one another. That is an important point.

On the public discourse, we have already had a discussion this morning about whether there should have been more time. I take your point that you feel that there has been too much time. I think that we have probably landed somewhere in the middle. It has been well discussed and well consulted on and we have now got to the position where we can look at the detail and make decisions.

It is very difficult to change the public discourse on social media and in some sections of the mainstream media. In some places, it has perhaps become a wedge issue against a tiny number of people who are extremely vulnerable and really just want to get on with their lives, which is why the bill is important.

In terms of the public discourse going forward, once the legislation is in place, people will see that those it affects are the tiny number of people it directly affects—in other words, those who are going to obtain a gender recognition certificate that can reflect how they have been living their lives anyway. We can see that in practice in the other countries that have done this, which are growing in number—I cited Spain, which is now looking at it as well—none of the concerns, some of which were expressed in those countries as well, have come to fruition. That should give us some confidence that people may be assured by that.

Finally, as I said in earlier, I am not sure that what is in social media really reflects where public opinion is on this matter. The BBC poll that I mentioned showed that young people, who are overwhelmingly more supportive of the trans community in all the polls that are done, and women are more supportive. That is perhaps food for thought. Some of the polling that has been done might show us a different view from the one that social media would have us believe.

We will continue to do this. If there are other things that we as a Government can do to improve

the public discourse, of course we will do them. If the committee has any suggestions in that regard, I am happy to look at them.

11:00

Pam Duncan-Glancy: Thank you, cabinet secretary. Could you set out what changes you have made and what equalities analysis you have done since the equality impact assessment in 2017 to 2019? We have heard concerns that there have not been many changes.

Shona Robison: The equalities impact assessment sets out all the organisations that were met and all the evidence that was looked at. As I said earlier, we have reflected on that evidence. After I had come into post and had the meetings and looked at the evidence, I had some key decisions to make, one of which was on age. I looked at that issue in a lot of detail, and on the basis of the evidence on things such as the age of legal responsibility in Scotland and the evidence that was given by young trans people in particular, I found that 16 was the appropriate age. The areas of annual reporting and costs were also raised during those discussions.

The central premise of the bill has remained the same, and that is that we do not believe in the medical model. The bill uses a simplified, demedicalised model of statutory declaration, and that is very similar to the model that has been taken forward in other countries. We have not moved from that central premise of the bill, but we have listened to evidence that has been set out in relation to areas such as age, cost and reporting.

Peter Hope-Jones: Specifically on the consideration of equalities issues since 2019, it may be worth explaining that the development of the impact assessment was an on-going process that did not finish in 2019. We have gone through quite an unusually detailed and robust process around the impact assessment. In the first consultation, in 2017, we set out the general principles of that process. In the 2019 consultation, we published a full draft impact assessment, and since then we have absolutely continued considering those issues and have updated the impact assessment. It has all been part of a continuous process.

Pam Duncan-Glancy: In the bill, it is set out that there will be regulations on the form and on the information that the registrar general will be able to collect. You have already touched on that—and I will come back to the issue of young people in a moment, if the convener allows it—would you be prepared to publish the regulations for the registrar general ahead of the bill being finished at stage 2?

Peter Hope-Jones: The point of those regulations is to allow scope for things to be tweaked, even after the bill is finished, in relation to the detailed operation of the process. I do not think that that is all that unusual; as the registrar general said when he gave evidence to the committee, he has all sorts of powers to make tweaks through secondary legislation. Currently, there is nothing specific that we anticipate regulations being made around. As I said earlier, they would not involve the fundamental basis on which GRCs are issued.

Pam Duncan-Glancy: My further question around the registrar general touches on the issue of age. The registrar general and the Children and Young People's Commissioner Scotland both spoke of the need for support. The registrar general, I think, said that there had been conversations with the cabinet secretary on the sort of support and on the organisations that would provide it to people, so that they could understand the effect of the gender recognition certificate. Cabinet secretary, can you say what those conversations have been and who you think those organisations might be? You mentioned that it could cost approximately £350,000 to set up the system, with on-going costs of £150,000. For some support, that could be considered quite a small amount. Will you set out the detail on that and on the role that young people will have in developing support and guidance?

Shona Robison: The Children and Young People's Commissioner Scotland was clear in thinking that young people should be involved in the development of the guidance, to ensure that it is clear and straightforward. There is merit in that. The registrar general will have a particular role in ensuring that people understand what is in the guidance. They can offer face-to-face meetings, as I said.

On the role for organisations other than the registrar general, that is about further support for a young person, beyond just support to understand the process. That is where other organisations could have an important role; the registrar general would signpost to those organisations. In the development of the guidance, I envisage that organisations will be part of that signposting.

On the money, the bill sets out what we think the registrar general's operating costs will be, but the door is not closed if it is shown that further resources are needed, either for the registrar general or for other organisations that will support 16 and 17-year-olds to work their way through the process.

There is lots of scope for young people to be involved in developing the guidance. I will be happy to keep the committee informed about progress in that regard, if that would be helpful.

Pam Duncan-Glancy: Yes, that would be helpful. Thank you.

The children's commissioner spoke about the presumption in the children's bill that children and young people have capacity to share their views with the court. Would something similar be helpful in this bill?

Shona Robison: I am sorry, will you explain that to me again?

Pam Duncan-Glancy: In legislation, there is an assumption that a young person has the capacity to make a decision unless a professional says otherwise—on a case-by-case basis. Would that be a useful addition to this bill in order to protect young people?

Shona Robison: I think that that is assumed, given that the Age of Legal Capacity (Scotland) Act 1991 establishes that young people from 16 onwards have the ability to enter into legal contracts. I know that there are various ages for various things—I understand all that—but we have agreed that, from 16 onwards, young people are able and have legal capacity to make such decisions for themselves.

There are issues for the registrar general to do with capacity in general, not just in relation to young people. If the registrar general were concerned about anyone's capacity or about someone having been coerced in any way, they would be able to take steps through the sheriff court and so on.

We think that the approach to young people is very much in line and consistent with the age of legal capacity.

Pam Duncan-Glancy: Thank you.

We heard from people who transitioned and then transitioned again—which is sometimes called detransitioning—that there is a lack of clarity in the bill about the process for that. Will you say what you understand the process to be for someone who transitions and then decides to transition again? How would you protect those people from a criminal process? That is, how can you tell the difference between someone making a false declaration and someone seeking to transition again?

Shona Robison: In those circumstances, the simplest and best way is, in essence, to take the same approach and to submit an application under the same process. The offence is about knowingly making a false statutory declaration. In other words, if at the time of making a statutory declaration, you intended to live permanently in your acquired gender, you would not be committing an offence if, for whatever reason, your intention to do so subsequently changed at some point in your life.

You can draw a comparison with marriage, which involves a lifelong commitment and a certain intention at the time. Sometimes, though, that relationship comes to an end. That does not make the marriage itself false; it is just that someone has reached a different point in their life.

I think that that is the simplest way of enabling someone who changes their view at some point in their life to go through the process. I should say that it does not happen very often; Peter Hope-Jones might have been about to say this, but the evidence from other countries is that a very small number of people do it. We are not talking about lots of people.

Peter Hope-Jones: I just wanted to add a tiny detail. Under the bill, if you want to reverse the process, you just apply again, which is exactly how the current gender recognition process works at the moment. You apply and go through the same process, but that currently involves a two-year period in which you have to provide medical evidence. Our understanding is that providing medical evidence for reversing the decision is a significant barrier, so the process should be much easier under the bill.

Pam Duncan-Glancy: Thank you—that was really helpful.

The other area that I am interested in—

The Convener: I am sorry, but I think that other folk want to come in on those particular areas. Is it okay if I come back to you after?

Pam Duncan-Glancy: Yes. I have some other questions.

The Convener: That is fine. I should say that we are going to have a comfort break in a little while, but I will bring in members who have any supplementary questions on transitioning, detransitioning and retransitioning or young people.

Karen Adam: With regard to lowering the minimum age for obtaining a GRC, I note that some countries have a lower age limit, while others have no age limit at all. By what process did you settle on the policy that the age would be 16?

Shona Robison: As I alluded to earlier, this was probably the area to which I gave most consideration. Clearly, moving away from the current age of 18 for the process to 16 is a significant step, so we looked at international comparisons. In some cases, the age is 16 and in others, 18; in some cases where the age is 16, additional measures are required for 16 and 17-year-olds, while others do not require such measures. We had a range of international examples to look at.

We then brought it back to two other considerations, the first of which was the Scottish legal context. In other words, what have we done in Scotland with regard to other legal responsibilities? In that respect, the Age of Legal Capacity (Scotland) Act 1991 was really important, because it gives legal capacity to 16 and 17-year-olds to enter into any transaction having legal effect. That was, for me, quite an important area of the law, in that it fits in quite well with the ability to make this kind of statutory declaration.

The other consideration was the evidence of young trans people themselves, who were saying that, at 16 and 17, they were at a pivotal point in their lives. After all, they were about to enter college, university or the world of work; they wanted to be able to do that in a way that aligned with how they were living their lives, and they wanted their documentation all aligned instead of differing. I thought that that argument was quite powerful.

Taken in the round, that was why I made that decision.

Karen Adam: Thank you.

Rachael Hamilton: I have three supplementaries to Pam Gosal's questions. First, why was the Scottish Government bill team's first meeting with the committee on 15 March not fully minuted? You probably cannot answer that just now.

Secondly, when you say that we have had plenty of time to scrutinise the bill, how is it that on 17 May, less than 12 hours after the deadline for written submissions—which was midnight on 16 May, with 10,800 short submissions being made—you believed that the committee had had the ability to scrutinise it all? If we look at all the bills that we have passed in the committee, we can see that we have had the most evidence sessions, and probably the most private sessions, on this one, so in response to Karen Adam's question my question would be: what would the consequences be of not delaying the bill?

11:15

Lastly, on the point that you make about the impact on single-sex safe spaces, we heard evidence from Senator Regina Doherty, who said that two women identifying as men had been housed in Limerick prison after they had been arrested and charged. Are you sympathetic to the concerns of vulnerable women who are housed in prison?

The Convener: Before the cabinet secretary responds, there was a point that is more for me than for her. Right at the start, the committee agreed to hear from the bill team in private as an

introduction to the bill. That was the unanimous decision of the committee at the time. Obviously, Ms Hamilton was not a member of the committee at that time, but the correct procedure in Parliament is that a minute is not taken of private sessions. However, a note of that session was published. It was not really fair to put that to the cabinet secretary; it was for us as a committee. We took a decision, albeit prior to Ms Hamilton's attendance.

Shona Robison: I was going to say that how meetings are recorded and how the committee manages its business are not matters for me.

On prisons, the committee received some very detailed evidence from the Scottish Prison Service. How a trans prisoner or anyone else in our prisons is managed is obviously a matter for the Scottish Prison Service. I cannot comment on another country's prison service, but I know that the Scottish Prison Service is already making decisions about how to manage trans prisoners absolutely on the basis of an assessment of the person's risk to themselves and others. It is already the case that trans women may be held in the male or the female estate, depending on that risk assessment, and 75 per cent of trans men are held in the female estate in recognition of the risk to themselves, which has been deemed to be a factor. The Prison Service does that already; that is the current process and it will continue after the bill is passed.

There is a review on-going in which the Prison Service is looking at its gender identity policy and whether any further changes need to be made. The review is looking at evidence gathered from the prison population, service users and stakeholders and the Prison Service is looking to publish an updated policy thereafter, once it has gone through that process.

Rachael Hamilton: It would be useful, convener, if we got sight of what that risk assessment is, because Ireland has basically not turned back anyone who has applied for a GRC. Those individuals were given a GRC and there obviously was a risk because they were violent people, but they still got into the women's prison.

Shona Robison: Let me be very clear: the Scottish Prison Service has made it very clear that whether someone has a gender recognition certificate is not the issue. Someone could have a gender recognition certificate and still be placed in the estate that is not in line with their acquired gender, if that is the risk that is assessed. The Prison Service could not be clearer about that. It is already operating that policy and has done for some time.

Rachael Hamilton: Is that because you believe that a GRC changes a person's sex for the purposes of section 11 of the Equality Act 2010?

Shona Robison: People have been able to change their sex through the 2004 act since it came in. They were already able to do that, so any prisoners we are talking about have already done that through the 2004 act, because this bill is not in place. If any of the people whom we are talking about have a GRC, they will have one through the existing 2004 legislation.

The point that I am making is that, for the Scottish Prison Service, if someone has a GRC it is not a pass for a trans woman into the female estate or for a trans man into the male estate. What matters is the risk assessment of that individual, and not just whether they pose a threat to other people but whether they are at risk themselves. You could clearly see in the case of trans men, in particular, why that might be the case, which is why 75 per cent of trans men are held in the female estate.

Rachael Hamilton: How many is that?

Shona Robison: There are 16 transgender people in custody across the whole estate at the moment.

Rachael Hamilton: Thank you. The last point was about the 12 hours between the written submission deadline and the bill being brought in front of the committee. It was quite a short time in which to digest 10,800 submissions and make a decision on who to bring forward as witnesses.

Shona Robison: That is really a matter for the committee, not me. How the committee operates its business and the time that you allocate for the bill is a matter for yourselves, not me.

Rachael Hamilton: So you would not mind if we took longer.

Shona Robison: I have made clear my views. Because of the process—the consultations on the bill and all that went on around scrutinising it before it even reached the committee—we know what the issues are and I think that everybody has had a chance to give their view. I do not think that any major changes would be made or that there would be any further benefit from delaying it any further. We really need to get on with this—that would be my view.

The Convener: The committee can discuss all those matters in drafting our stage 1 report. On that basis, I will suspend proceedings for 10 minutes for a comfort break. We will reconvene at 25 minutes to 12.

11:22

Meeting suspended.

11:37

On resuming—

The Convener: I reconvene the meeting. We start with a question from Fulton MacGregor.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Thank you, convener. There are a few areas that I want to ask questions on, but first I would like to speak about some of the commentary before the break, which was about the scrutiny of the bill.

I want to put on the record—because I do not think that we have done so yet, particularly not in this meeting—my thanks to the clerking team. They have done an absolutely fantastic job of making sure that we have been able to scrutinise the bill to the level and with the impact that we have.

On other members' lines of questioning, it will be down to each member to decide whether they feel that they have had enough information for making a decision at stage 1. That is an individual thing. However, I certainly feel—I can speak only for myself—that we have had ample information from a wide range of sources about what the bill does and does not do. It is important to put that on the record so that people do not hear just the commentary of one side. As the cabinet secretary has already said, the decisions are for the committee, so I do not expect her to comment on that.

I will start my questions by asking about the provision in the bill to live in the “acquired gender” for three months. I know that you will be aware of all the committee's evidence sessions—you are probably aware that I have been asking questions along these lines, so it will be no surprise to you that I am asking about the provision again.

We have heard concerns across the board that there is not really any justification for the timeframe of three months. What is your response to those concerns? Where did the three months come from? Why was that particular timeframe decided on? Obviously, you will wait for the report, but, going into stage 2, what are the Government's thoughts about removing that provision from the bill?

Shona Robison: The committee will know that applicants are currently required to provide evidence that they have been living in their acquired gender for two years before applying, which we think is unnecessarily long. We have heard a range of views from stakeholders and respondents to the consultation, as has the committee. Some people feel that there is no need for any period of time; others are anxious that it should be longer. We are trying to find a balance.

The three-month period for living in the acquired gender represents our view of what is balanced and proportionate. It provides, on one hand, assurance that the applicant has for a time been living in the acquired gender before applying, without, on the other hand, imposing lengthy barriers.

I know that the committee heard from witnesses that applying for legal gender recognition is often the end of a process in which the person has made other changes, perhaps to documentation including their passport and driving licence. However, in the round, the three-month period helps to demonstrate the applicant's commitment to living in their acquired gender for the rest of their lives. It is also important to note that an applicant who has been living in their acquired gender for at least three months—they might have been living in their acquired gender for many years—can affirm that in their statutory declaration, so there would not be a delay imposed on their application. In essence, they would affirm that they had been living in their acquired gender for three months or longer. I hope that that gives some reassurance that there would not be undue delay.

Fulton MacGregor: I think that it does. However, you have talked about the heated nature of the debate, but it came as a surprise to me—although maybe it did not to other members—that there is a lot of consensus about the matter, regardless of what side of the debate people are on. In essence, it is felt that there is no need for the three-month period.

Although I appreciate that response, I will go back to the last part of my first question. Is the Government open to reviewing the provision in the later stages of the bill, perhaps at stage 2?

Shona Robison: I have set out why I think that the three-month period provides a balanced and proportionate response to concerns that we would go from a period of two years to no time at all. We feel that three months is not unduly onerous. Many people who have been living in their acquired gender for quite some time—that will probably be the vast majority of applicants—will be able simply to affirm that. There will, therefore, be no further delay for those people. Obviously, the Government will reflect on any recommendations that the committee makes, but I feel that it is important to try and keep a balance in the bill.

Peter Hope-Jones: Can I come in on that?

Shona Robison: Yes.

Peter Hope-Jones: We have obviously heard the range of views on that issue as well, and I would be very wary of saying that there is “consensus” on it. Our conclusion is that simply removing that period of living in the acquired

gender would absolutely not be welcomed by a significant number of stakeholders.

Fulton MacGregor: Thank you for that clarity.

In relation to the same provision, you will be aware that concerns have been raised about the language that is used in the bill—the term “acquired gender”. We have heard robust concerns being expressed about that. Do you have any thoughts on those concerns or on the use of language? To be fair, we also heard from witnesses—in particular, academics—a couple of times that they are concerned about the use of language, but that we have to call it something. The committee has taken that on board. What are your thoughts?

11:45

Shona Robison: I understand the concerns, and I understand how important language is. The term “acquired gender” is the language that is used in the 2004 act and other existing legislation to describe legally changing your gender. We have used that language partly to ensure that the provisions that are being inserted in the 2004 act will work with the rest of the act, without the need to change references to acquired gender in provisions that are not being amended, because doing that would clearly be more complicated. Obviously, we will look at the committee's recommendations, but for the purposes of legal clarity and understanding, it is appropriate to use language that is consistent with existing legislation.

I am also not clear—the academics to whom you refer were not clear, either—what alternative language could be used to accurately describe legally changing your gender.

However, it is important to say that we do not generally use the term “acquired gender” more widely to describe the experience of trans people. We will ensure that guidance and descriptions in respect of the process use language that is clear, respectful and inclusive.

Fulton MacGregor: Thank you, cabinet secretary.

Convener, I would like to ask about the three-month reflection period, but I do not know whether colleagues want to come in on the previous issue.

Rachael Hamilton: I have a question on acquired gender, convener. A trans woman raised the definition of acquired gender in committee and put the question back to the female witnesses by asking them what traits they demonstrate that confirm that they are living as women. For the purposes of the bill, and if we are to reform the legislation and make it better, does the

Government consider that there should be a definition of “acquired gender”?

Shona Robison: Living in an acquired gender generally means living your daily life in a gender that is different from your gender as recorded at birth. In the context of the bill, that is the gender in which a person is living when they make an application.

It is important to recognise that living in the acquired gender is an existing requirement under the 2004 act. I do not think that that causes widespread confusion among applicants currently, so we do not envisage that that will be the case with the bill.

It is important to say that the requirement is not about dressing or looking a certain way; it is about the ways in which a person might demonstrate their lived gender to others. Ultimately, interpretation is—

Rachael Hamilton: Can you give us some examples?

Shona Robison: Yes, I can. I was just going to say that examples include consistently using titles and pronouns in line with the acquired gender; updating official documents, such as a driving licence or passport; updating utility bills or bank accounts; updating the gender marker on official documents, such as a driving licence or passport; describing themselves and being described by others, in written or other communication, in line with the acquired gender; and using a name that is associated with the acquired gender. Of course, a change of name is a personal choice and not a requirement, but it is an example.

The gender recognition panel that currently exists—it will no longer, if the bill is passed—advises in its guidance that examples might include a person having changed the gender marker on their passport and driving licence, or that their friends, family and employer know their gender.

I hope that that is—

Rachael Hamilton: Who will make the decision about whether all those things are being done, if the applicant does not have to give any paperwork?

Shona Robison: We will work with National Records of Scotland to provide guidance to applicants on the application process. NRS will look at how it can confirm some documentation, if that is required. It is a statutory declaration process. If NRS has concerns, it can use various methods to check documentation, should that be required.

Do you have anything to add to that, Peter?

Peter Hope-Jones: The individual affirms that through the statutory declaration, but there is a process that can be followed through the sheriff courts to challenge or withdraw an application if there are concerns either about it being fraudulent or about the understanding of the effect of an application.

Rachael Hamilton: Convener, this is a bigger issue than I had envisaged when asking my supplementary question.

Would challenge through the courts be brought by a family member, for example? Is that what you are saying?

Shona Robison: The bill lays out who is able to challenge. That includes a spouse, a child and so on.

Peter Hope-Jones: The bill sets out that a person with a genuine interest can make an application to the sheriff. It will ultimately be for the sheriff to decide who a person with a genuine interest is and how that will be defined, but the explanatory notes give the examples of the registrar general, a spouse, a civil partner or a child. However, they are just examples.

Rachael Hamilton: Thank you.

The Convener: We go back to Fulton MacGregor.

Fulton MacGregor: Thanks, convener. I appreciate that.

The similar provision—or theme—of the reflection period, which I know you have talked about already, came out of the further consultation that you carried out. Again, we have heard in quite a lot of evidence that a reflection period is not necessary, because it is likely that trans people have been living in their acquired gender—to use the language that has been previously discussed—for most of their lives, and have been reflecting on the matter for some time. We also heard evidence that the proposed period is not enough. I know that you will say that the reason for the three-month period is, again, to strike a balance between views, but can you say a wee bit more about the Government’s justification for having a reflection period and, specifically, a period of three months?

Shona Robison: As you have said, there are various views on the matter. We have heard the views of stakeholders and respondents to the consultation who do not support the proposal, which might be for various reasons. Some will say, as you have said, that a person will have already reflected on the issue for their entire life. Some will say that the period of reflection is too short and others will say that it is not required if the applicant is required to live in their acquired gender for a

longer period before applying. Again, I do not think that there is much consensus on the issue.

In our opinion, the reflection period represents a balanced and proportionate time before taking what is an important and life-changing decision. I think that it will provide additional assurance that applicants have considered carefully what they are doing in making a serious lifelong choice. The bill requires applicants not to reconfirm the facts and circumstances that are set out in their application but simply to affirm that they wish to proceed. Some countries—most notably Denmark and Belgium—have reflection periods, and others do not. As I have said, we will look at the committee's recommendations, but it is important that we try, as far as we can, to strike a balance in respect of the range of concerns. The three-month reflection period could be helpful in ensuring that people are absolutely sure that it is what they want to do.

Fulton MacGregor: You or someone else on the panel will perhaps correct me, but I think that Denmark is considering removing its reflection period.

On the reflection period—I hope that I am not standing on any colleagues' toes here, as my question goes into the age issue—some stakeholders and panellists suggested that there might not be as big a debate about the reflection period for those over the age of 18 but that, if we are lowering the age to between 16 and 18, there should be a reflection period for those under 18 from whatever age they are until they turn 18. That was suggested by one specific panel, but you will have to forgive me, as I cannot remember which one. Do you have any thoughts about having a reflection period for the 16 to 18-year-old age group that is different from that for the rest of the population?

Shona Robison: I think that, for consistency and fairness, the reflection period should be the same. From memory, I think that the children's commissioner was probably against having a reflection period at all, but I also think that the commissioner would be quite firmly against having some differential in the reflection period.

If we agree that 16 and 17-year-olds should be able to obtain a gender recognition certificate through statutory declaration, those people should be treated as having the same maturity as everyone else has when it comes to the reflection period. Having said that, there will be the additional guidance and support structure around 16 and 17-year-olds. We think that that is the more appropriate additional support, which someone over the age of 18 might not require.

An issue of which we are mindful is people who are nearing the end of life. In those circumstances, three months could, frankly, be a long time. We

are mindful of the importance for many people of their death certificate reflecting how they have lived their life. If the committee made a recommendation in that regard, I would be completely sympathetic to that.

Peter Hope-Jones: I think that it was the Church of Scotland that recommended a differential reflection period for young people. Any approach that put in place differential barriers to accessing rights would have to be justified quite carefully. In practice, the proposed approach would work quite similarly to the current process. Currently, there is a minimum age of 18 for getting a GRC, but the process of collecting evidence can take two years and applicants can start collecting evidence prior to being 18—they can start collecting evidence from 16 but not actually get their GRC until they are 18. What is proposed would similarly restrict people from getting their GRC until they are 18. Again, we have heard from a number of organisations and trans people that there are particular concerns for young people around getting their documentation right before they go off to university, start a job or whatever, and it would be unfortunate if they were prevented from doing that until they were 18.

Fulton MacGregor: Thank you both for those responses. It goes without saying that members ask questions that do not necessarily reflect their views as individuals. It is important that we put the concerns that we have heard to the Government.

I will move on to questions about the requirement to be ordinarily resident in Scotland—unless someone else wants to come in on the three-month reflection period.

The Convener: If no one wants to do that, please move on to your next area of questioning. Pam Duncan-Glancy also has questions on that.

Fulton MacGregor: The bill provides that only people who were born in Scotland or who are ordinarily resident in Scotland may apply for a GRC. We heard concerns that that might mean that people from the rest of the UK travel to Scotland to apply for a GRC. Are those concerns founded? Is there international evidence to back up or dismiss them? Given the border situation in Ireland, I hoped that the evidence that we heard last week might clear that up. However, when Senator Doherty pointed out the current differences, I realised that that was not the best example. Does the Government have other examples?

Shona Robison: The requirement in the bill is that the applicant must be the subject of a Scottish birth or adoption register entry or ordinarily resident in Scotland, as you said. Applicants will have to make a statutory declaration to that effect. As you will know, "ordinarily resident" means that

the person lives in Scotland with only short periods away. Residence must be voluntary, for settled purposes and lawful. That is a common law concept, which is routinely used in statute; it is not particular to the bill but is understood in many statutes.

It is worth reiterating that, if someone knowingly makes a false statutory declaration that they are ordinarily resident in Scotland, they could be committing a criminal offence. We will work with National Records of Scotland to provide guidance to applicants, to ensure that they fully understand that.

I noted the evidence from the Scottish Human Rights Commission. Your point about cross-border impacts takes us back to the conversation about what a GRC does and does not do, because someone has the same protection under the gender reassignment characteristic whether or not they have a GRC. If they go from Scotland to England, they will have the same protections in relation to their gender reassignment in school, work and medical contexts, whether or not they have a GRC.

For all those reasons, I do not foresee tourism—I think that that is the word you used—being an issue.

12:00

Fulton MacGregor: Thanks, cabinet secretary. Given that other people want to come in, I am happy to leave it for now.

The Convener: I think that Pam Duncan-Glancy was looking to come in on this area.

Pam Duncan-Glancy: I will follow a line of questioning that we heard from a number of witnesses, including JustRight Scotland, indicating concerns about people who reside in Scotland but who are not citizens of Scotland. Is it your intention that the bill will cover those people?

Shona Robison: I know that concerns have been expressed about whether asylum seekers and refugees in Scotland would meet the requirement to be ordinarily resident and therefore eligible to apply for a GRC. I am sympathetic to those concerns. As you know, asylum and immigration are reserved to the UK Parliament and handled by the Home Office. Whereas we have responsibility for things such as access to essential services that enable integration, such as healthcare and education, this area rubs up against devolved versus reserved matters.

Obviously, refugees are in a bit of a different situation compared with asylum seekers in terms of their rights. There would be potential competence issues with the bill legislating for asylum seekers specifically to have access to

gender recognition, as well as practical issues that would need further consideration. Peter Hope-Jones might have something to say about that further consideration.

Peter Hope-Jones: I do not particularly, except to say that we are sympathetic to those concerns but would definitely need to consider the competence issues quite carefully.

Pam Duncan-Glancy: Convener, I have some questions in other areas.

The Convener: We will first go to a couple of other members who have not yet asked their substantive question, and we will come back to you. There is plenty of time.

Rachael Hamilton: This is a supplementary question on the cross-border effect, which I indicated to the convener that I would ask. Cabinet secretary, why has the EHRC said that there are implications for potential divergence from the Equality Act 2010 on services—which you have mentioned a number of—such as cross-border employment and education services and on single-sex exemptions?

Shona Robison: The EHRC has raised a number of issues in relation to its own position on the bill—which, obviously, has changed—and a number of other matters. We have had a significant amount of correspondence with the EHRC as we have tried to understand the nub of its concerns. I am mindful that the Scottish Human Rights Commission has, likewise, had quite an extensive correspondence with the EHRC to understand the evidential and legal basis for some of the concerns that it has raised. The SHRC is continuing to correspond with it, as are we, to understand what lies behind those particular concerns. Peter might want to come in on the specifics.

Peter Hope-Jones: Specifically in relation to its concern about differential operation of the Equality Act 2010, the cabinet secretary has recently written to the EHRC—

Rachael Hamilton: We actually had sight of that last night.

Peter Hope-Jones: On that specific point, it is really not clear what the EHRC's concern is, given that the Equality Act 2010 is obviously UK legislation and is not framed around whether there is possession of a GRC. It is not immediately clear why changing the process for obtaining a GRC would change how the 2010 act operated. It would be helpful for the EHRC to explain that more.

Rachael Hamilton: Are you saying that that is still to be looked at and delved into a little bit more?

Shona Robison: We just need to understand what the EHRC's concern is, because the rights of transgender people across the UK are enshrined in the Equality Act 2010, whether or not someone has a GRC. The fact that we are changing the process for obtaining a GRC does nothing to alter those fundamental rights that are enshrined in the 2010 act, so we do not understand the relevance, really. Those rights exist no matter what process a country has for obtaining a GRC.

Rachael Hamilton: Do you have another opinion on the fact that there will be different systems within that legal gender recognition?

Shona Robison: The different systems are just the processes for obtaining a GRC. The fundamental rights that protect transgender people, which are reserved under the 2010 act, remain the same. They will be the same on the day before the bill becomes legislation and on the day after it becomes legislation—if it does, as I hope it will. There is no change to any of those provisions in the 2010 act. That is why we have written back, asking for clarification of what the EHRC means, because we do not understand what it means.

Rachael Hamilton: Okay. If you do not get clarification and understanding of that before we create our stage 1 report, what will happen at that point? Is it relevant?

Shona Robison: No, I do not think that it is, because the rights are enshrined in the 2010 act, so I would assume that there would have to be a change to the 2010 act. What would be the basis for changing the transgender protections under the 2010 act for one part of the UK? There would probably be no legal basis for doing so, for a start. The act enshrines the same protections for everybody across the UK, whether or not they have a GRC, and that is not going to change.

We are trying to get clarification of what the EHRC thinks the relevance of those protections to the bill is. We do not believe that there is any, and I think that that view is shared by the SHRC. It is not the only thing that we have not been able to get clarification of from the EHRC. We have asked it for clarification of a number of things that do not seem to have particular relevance to the bill, and we wait with interest to see what comes back.

Rachael Hamilton: Okay. Convener, do you want me to ask my other questions?

The Convener: Yes, but it is probably worth flagging up to anyone who is watching that we have had a session with the EHRC, when a lot of those points were put to the EHRC. Folk can watch the recording of that session on Parliament TV and decide for themselves.

Rachael Hamilton: Thanks, convener, although the back-and-forth between the cabinet secretary and the EHRC is obviously still happening, so we need to keep up to date on that.

We have heard a lot about data gathering. We heard from Professor Alice Sullivan, who believes that data gathering is important in ensuring that services are provided as such, and we heard from Senator Regina Doherty, who said a similar thing.

Do you agree with the guidance for public bodies from the chief statistician of Scotland, which advises collecting data on biological sex only in a small number of instances? That would make it impossible to monitor the impacts on women. How do you see that being addressed?

Shona Robison: As you say, in 2021, the chief statistician published guidance for public bodies on the collection of data on sex and gender, and the current chief statistician is continuing to engage with a range of public bodies to support their application of the guidance.

I know that there has been a particular focus on the recording of crime statistics, for example. As you know, crime recording for operational purposes is a matter for the respective body, be that Police Scotland, the Crown Office and Procurator Fiscal Service or the courts.

It is worth noting that we publish the national statistics on criminal proceedings in Scotland every year, and those are derived from data that is held on the criminal history system, which is an operational database maintained by Police Scotland. There are such small numbers involved here that I think the view is that there is not going to be a statistical impact from any changes that the bill will introduce.

Peter Hope-Jones may want to add to that.

Peter Hope-Jones: I will come in on a specific point. I do not think that it is accurate to say that Senator Regina Doherty said the same thing as Professor Alice Sullivan. My understanding of—

Rachael Hamilton: I would agree with that—those were two different views on data collection.

Peter Hope-Jones: Okay, but I just want to clarify that Senator Doherty made it very clear that she thought that the introduction of the gender recognition system in Ireland had had very little impact on data collection. Her specific concerns were around the quality and nuance of the data that is being collected through the census and whether it accurately reflects trans people's lives. Her concerns were very different from Professor Alice Sullivan's.

Rachael Hamilton: We have heard quite a lot about data being collected for the purpose of addressing the gender pay gap. Is there a concern

that, if we do not collect accurate data, women's participation and representation in public life might be affected?

Shona Robison: I do not think that there is evidence to support that. In fact, Close the Gap has provided evidence that does not support such concerns.

The numbers are so small that I do not think that they will have a statistical impact. As for the gender pay gap, the work that is going on through Close the Gap and the work on fair pay that the Scottish Government is leading, I do not think that the bill will have any impact at all on those—or, indeed, on public life. As I said, the number of people we are talking about is very small.

Rachael Hamilton: As this is only my fourth or fifth session with the committee, can you tell me whether the Government has analysed whether there has been any impact on services, resources or the participation of women in public life?

Shona Robison: Do you mean the impact in other countries that have already done this?

Rachael Hamilton: No—in this country. Obviously, lots more people are accessing the services in gender clinics, and we know that the number of people who want to transition has been increasing. Has the Scottish Government done any work on that potential impact, as it were?

Shona Robison: I am happy to talk about gender identity healthcare, which is a whole area in itself. Obviously, such matters do not specifically come under the bill's provisions, which are about obtaining a GRC, but we do not believe that there is evidence of any impact in any other country where a statutory declaration has been introduced. That is where we look for any impact.

The number of people who are going through gender identity healthcare is very small and the issue is not related to the bill. After all, someone does not require a GRC to undertake such healthcare. We are aware of the pressures on those services, and the Cabinet Secretary for Health and Social Care is making further investment to improve the situation, but the two things are really not related. Someone can access that healthcare without ever having to apply for a gender recognition certificate. Similarly, someone can apply for a certificate under the statutory recognition process without ever going anywhere near gender identity healthcare. It goes back to a point that was made earlier: the two issues are really quite different and need to be treated so.

Rachael Hamilton: Thank you.

Karen Adam: Witnesses have expressed their disappointment at non-binary recognition not being in the bill, and we have heard from somebody who transitioned and then transitioned again because

they felt that non-binary was more suitable for them because of how they felt and identified. I understand that the Scottish Government has set up a non-binary working group. Can you tell us a little bit about the group's on-going work? Do you see any possibility of legal gender recognition for non-binary people in the future?

Shona Robison: The first consultation on gender recognition reform discussed legal gender recognition for non-binary people and the extent to which it would require significant changes to devolved areas such as parentage, marriage and registration law and to reserved areas such as the Equality Act 2010, as well as requiring financial and administrative resources for implementation. It would be very complex indeed, and, if it was to be the direction of travel, any such changes would require much further consideration and consultation. We therefore decided not to extend legal gender recognition to non-binary people in the bill.

You rightly point to the working group on non-binary equality that was established. It has very recently made its recommendations to the Scottish Government, which we are considering and will respond to. The report will be published in short order in the near future—by which I mean in the next couple of weeks.

Karen Adam: That is great. Thank you.

12:15

The Convener: I call Pam Duncan-Glancy.

Pam Duncan-Glancy: I have a few questions on a number of topics, convener, but I will be as quick and succinct as I can. Thank you for your patience.

The British Psychological Society has said that medical pathways are not contingent on the GRA, but we have heard concerns about health services for trans people in general and in relation to their transition specifically. For example, there are waiting times of four years in some areas of Scotland; general practitioners could charge fees; and, of course, trans people can have really poor health and mental health outcomes. Cabinet secretary, are you in a position to commit to reviewing health services for trans people? What can you do to ensure that, should they wish to do so, trans people can get timely access to gender identity and support services?

Shona Robison: I alluded earlier to the fact, which I will reiterate now, that applying for and receiving a gender recognition certificate and clinical decisions on gender identity healthcare are entirely separate issues. However, we recognise that referrals to and waiting times for gender identity services for both adults and young people

have increased in recent years, which is why action has already been taken.

Last December, we published the NHS gender identity services strategic action framework, which demonstrates a commitment to wanting to improve matters. We are investing £9 million over three years, with £2 million being allocated this year, to try to make improvements. A reference group has been established to lead on co-ordinating that work. That will take a bit of time, but we acknowledge that waiting times for support are not where we would want them to be, which is why that investment has been made.

Pam Duncan-Glancy: I appreciate that answer, cabinet secretary, and I understand what implications the bill might or might not have for health services. However, we have heard in a number of evidence sessions about the experience of trans people in the round, and I thought that it would be helpful if we put that question to you today. Indeed, it would be remiss of us if we did not do so.

The bill contains a number of reporting mechanisms, and I note that those outlined for the registrar general for Scotland are considerably more restricted than they are for bodies elsewhere in the UK. I am thinking, for example, of the Ministry of Justice. Are you open to looking at further reporting mechanisms and collection of data on people's date of birth, birth status and so on to get a clearer picture of people across Scotland, including on the number of trans people?

Shona Robison: Are you talking about what the NRS would gather or about what we might gather through annual reporting?

Pam Duncan-Glancy: Probably both, but I am specifically asking about annual reporting. Indeed, my next question is about annual reporting and whether you are prepared to commit to carrying out a post-legislative review and, indeed, whether you are prepared to consider the impact of including or not including non-binary gender recognition, perhaps within a year of the bill being passed.

Shona Robison: The whole area of annual reporting was initially driven by concerns—to which we responded—about being able to track and monitor the number of GRCs being issued. That was the starting point, but I am certainly open minded as to whether such reporting would go further. It would have to be proportionate and gather things that could be gathered, so we would have to think about that, but I am certainly open to suggestions about what else might be reported annually. In Ireland, there is annual reporting of the numbers and in a few other areas.

I am also open minded on a post-legislative review, if that is to be a committee recommendation. We would need time for the new system to bed in. There will inevitably be a bit of a spike in the numbers, as there was in Ireland in the first couple of years, as people who were already living in their acquired gender wanted to go forward with their GRCs—it plateaued after that. I suspect that it would probably be the same here, but it would be useful to have the numbers through annual reporting. If a post-legislative review wanted to gather information more broadly, we would need a bit of time to set up systems to gather information on elements that it might be helpful to review.

Peter Hope-Jones: The bill as drafted sets out minimum reporting requirements. The provision of additional detail where possible would be in line with what is in the bill and we absolutely have considered that. We would need to discuss that with NRS, which is particularly conscious that, if we are talking about very small numbers of people, there might be issues to do with publishing granular data. Again, that is picked up in the drafting of the bill.

On the idea that there is the potential for an initial spike in applications and it might be worth leaving a few years before doing a formal review, it is worth looking at what happened following the introduction of the Gender Recognition Act 2004. For the first three years or so, the numbers were very high; it was only after about three or four years that things settled down and we got a more accurate picture of how the system was operating.

Pam Duncan-Glancy: Thank you. In evidence to the committee and through engagement as part of my fact-finding work on the bill, I have heard that there is an obvious difference between capturing population-level data and capturing individual-level data. We have touched on population-level data.

When it comes to individual-level data, there are concerns about people falling off the radar for particular health services. I appreciate that this is not directly related to the bill, but I think that it is important that we consider the issue. I make it clear that I think that trans people absolutely understand their bodies—they are probably more mindful of their physical bodies than other people are, for various reasons. However, what more can the Government do to ensure that trans women and trans men are called for the health service to which they will need to be called, on the basis of biological characteristics that they might retain after getting a gender recognition certificate?

The Scottish Trans Alliance has a mechanism in place to do with community health index—CHI—number changes, which has worked in different

areas. How could we support such an approach to data gathering?

Shona Robison: We would want to pick up that issue with health colleagues. Peter Hope-Jones might want to add some detail. It is a fair point.

Peter Hope-Jones: That absolutely is an operational question for the NHS, and it is one of those issues that are not necessarily directly linked to the bill. The NHS should already have systems in place that can cope with such changes; our understanding is that it broadly has such systems, but they might not work perfectly in every instance. We are grateful for the work of bodies such as the one that you mentioned. The NHS absolutely should be able to cope with that kind of thing.

Pam Duncan-Glancy: My final question is about single-sex spaces. I appreciate that we have had extensive discussions about that today and throughout the committee's evidence sessions.

We have touched on section 22 of the 2004 act and protected information. Has the Government decided that the bill does not impact on the exemptions? Have you considered whether there is need for further exemptions in relation to section 22? What guidance will the Government or others issue on the matter, and in particular on the general occupational requirement exception?

Shona Robison: We are very clear that the bill has no impact whatsoever on the Equality Act 2010 provisions, including the exceptions. Everything that stands now will stand in the same way after the bill is enacted.

Of course, we know that the EHRC has updated its guidance. That guidance, which is for public bodies to use, is on the application of the provisions under the 2010 act and how that works in practice, because there are complexities in that. There are complexities now, and there will be the same complexities after the bill is enacted, so that guidance is important. However, to be clear, there will be absolutely no changes to the exceptions.

Pam Duncan-Glancy: Thank you. My final question on this topic is about the prison service. We have briefly spoken about that and, notwithstanding the comments on the numbers involved, which are small, is it your view that, following the review of Scottish Prison Service guidance, a gender recognition certificate would not be considered as a kind of passport as it has been in other areas of the UK, and that the approach would remain risk based, both to the trans person and to the other people who are living in prison at the time? Would a risk-based approach still take precedence over the relevance of a GRC?

Shona Robison: The Scottish Prison Service is clear at the moment that having a GRC does not give someone any enhanced rights over where they are placed; that is all down to the risk assessment. Again, I cannot comment on other jurisdictions and whether that is different in England—that is obviously not a matter for me—but the Scottish Prison Service's position is very clear. The review is to look at whether there is anything that the SPS should be doing in addition to what it is currently doing around the management of trans gender prisoners. The evidence could not be clearer that the Prison Service already places people where it thinks that it is appropriate for them to be placed, whether or not they have a GRC.

The Convener: We now go to Maggie Chapman.

Maggie Chapman: Thank you for your comments so far, cabinet secretary. My question is around section 22 of the GRA. An issue of potential concern has been put to us about overseas gender recognition and confirmatory GRCs. Although there is no obligation for somebody with overseas gender recognition to obtain a confirmatory GRC, does the lack of a requirement for any evidence to be provided about that give you any cause for concern in relation to people who have a GRC from somewhere else in the world coming to Scotland? How difficult would it be for employers to obtain information that comes under the protected information provisions of section 22? My question is around concerns for employers gaining access to information that they might need in relation to things such as safety for people.

Shona Robison: Given that, as a general principle, a GRC obtained overseas would be recognised in Scotland, confirmatory GRCs should not, in theory, be widely needed. The bill provides for them in cases in which someone is having difficulty obtaining that recognition or wants clear evidence of the legal recognition of their lived gender—that might apply to someone fleeing a war-torn country, for example, where they do not have access to records. It will be a tiny number of cases, but the provision has such things in mind, as I understand it. Is that right, Peter?

Peter Hope-Jones: Yes. Colin Gilchrist can comment on that.

Colin Gilchrist (Scottish Government): The Fukushima nuclear disaster in Japan resulted in various records being destroyed or irretrievable. That was the type of example that was used in considering the confirmatory GRC provisions—complete destruction of the records in a different country.

There is another aspect in relation to section 22 that I will mention. No substantive change is made to section 22 by the schedule to the bill. Protected information still relates to an application for a GRC or a person's acquired gender before the GRC is issued.

12:30

Maggie Chapman: I suppose the concern is that, because that information is protected, some information that we might want to be disclosed, whether that be in terms of public safety or anything else, would not be disclosed. Can you see an instance in which that might happen?

Shona Robison: No. In cases where there might be criminal investigations or concerns about criminality, that information would be disclosed. Those are the kind of circumstances in which there would be disclosure.

Colin Gilchrist: That is correct. Section 22 of the 2004 act says that one of the exceptions to the prohibition concerns disclosure for

“the purpose of preventing or investigating crime”.

Peter Hope-Jones: On the section 22 exceptions, it is probably true that we are generally open to conversations about whether additional exceptions are needed in section 22. However, our view is that this bill would probably not be the best way to do that, given that it is focused on the process for obtaining a GRC, not on the effect of a GRC.

Maggie Chapman: That is helpful.

The Convener: I call Pam Gosal.

Pam Gosal: First, I want to ask a supplementary question on the back of Pam Duncan-Glancy's questions about single-sex spaces.

Cabinet secretary, you have made it clear that single-sex spaces are not affected by the bill. Do you think that the Government or you in particular could have done something different to help people who oppose the bill to better understand what it does and does not do? Have any lessons been learned? There are a lot of concerns out there—people stop me in the streets in my constituency to talk about their concerns. Have you learned lessons that will be helpful if we are not going to suspend the bill at stage 1 and are instead going to press ahead with the passage of the legislation?

Shona Robison: I have tried to speak as much about what this bill does not do as I have spoken about what it does. I have said many times that the bill has no impact on the Equality Act 2010. It could not have, because the 2010 act is reserved,

and we would not want it to, because we think that the exceptions are important.

To be honest, we all have a responsibility to try to set out not only what the bill is about but what it is not about. It is difficult to do that on social media, because their nature means that it is difficult to use them to have a conversation. We have continuously tried to put across key points in terms of our interaction with the mainstream media. When I made the statement about the legislation in Parliament, I tried to say as much about what the bill's purpose was as I said about what its purpose was not.

There are always lessons to be learned when we do anything, and we will always try to ensure that we learn them. However, the discussion around this issue is polarised and, even if you say things over and over again, that does not mean that people will accept what you say. There is not an awful lot that I can do about that, other than to reiterate the case and try to reassure people about it.

Ultimately, I hope that people's concerns will be allayed by what happens in practice after the bill becomes law, as I hope it will. It should also be reassuring for people to see that other countries that have gone down the statutory declaration route have not seen some of the concerns that were expressed in those countries come to fruition.

My hope is that, once people see the legislation working in operation, they can see the tiny numbers that are involved and the fact that it is not working in the way that some people are concerned about, their fears will be allayed.

Pam Gosal: My next question is about the situation in other countries. In previous meetings, a concern was raised about the issue of data collection on the basis of gender as opposed to sex and the potential impact that that could have on issues such as the gender pay gap. I asked Senator Doherty whether Ireland's introduction of the self-identification policy had resulted in anything that might be concerning. She said that that issue was missed at the time and not brought to light but that she felt that it was something that she had to look at now, because there is a gap there. What are your thoughts about the gender pay gap and data collection?

Shona Robison: Earlier, Peter Hope-Jones said that we understand that the senator's concerns related to Ireland's census questions. Is that right?

Peter Hope-Jones: Yes, I would look carefully at what exactly the senator was saying, because I think that it might be possible to misinterpret her. It might be worth clarifying her position, but my understanding of what she was saying is not that

the policy had impacted on the collection of sex and gender-type information but that the census processes and the other processes for collecting data are not fully reflecting the lived experiences of trans people in the nuance of the questioning. That is a different concern.

I would also highlight the evidence that the committee took from Dr Kevin Guyan, who looked at that issue and concluded that that type of information collection has always been done and continues to be done on the basis of sex, but sex that is identified by the individual according to their own interpretation and is not specifically tied to the possession of a GRC.

Pam Gosal: Could you help me and the people who are watching this session understand this a little bit better? In a previous evidence session, there was a conversation about a situation in which—I have to get the terminology right—a person who is a trans person now but who was born as a male was on a higher salary than their women colleagues. How would you balance that out? Obviously, at a certain time in their life, that person could have been being paid as a male—as we know, there is a big gender pay gap between females and males. If colleagues working with a trans woman are on less pay, how do we work that out?

Shona Robison: Obviously, that is not directly related to the bill. A situation such as you describe would come under the existing processes in the 2004 act.

I understand that, in its submission, Close the Gap said that the number of people involved will be so small that it will have no statistical impact. I think that Close the Gap, Engender and people working in the area of fair work are far more concerned about the gender pay gap between men and women that exists across huge areas of employment, and that their view is that the numbers that are involved in the area that we are discussing are so tiny that they would not impact statistically on the figures.

Peter Hope-Jones: I think that that is right. It is also worth reiterating that gender reassignment is a protected characteristic in the Equality Act 2010, so consideration of differential pay or treatment would be a valid concern in that context.

Rachael Hamilton: On self-exclusion by women, possibly for religious reasons, one of the witnesses from whom we took informal evidence in private—the transcript has been published, so I can share this—agreed with you that there has been a lot of polarised debate and raised the concern that there could be a postcode lottery for services. She also cited the issue of shopping centres where there are no segregated male and female changing facilities, and said that she knew

of an individual who had self-excluded from shopping centres because of that. Do you think that the bill should recognise the issue of self-exclusion?

Shona Robison: I will come back to that specific point in a minute. Earlier, I touched on where the evidence is on the matter. The evidence was led by the Scottish Human Rights Commission, which said that there was no evidence from other countries about people self-excluding due to feeling uncomfortable. In countries where there is a statutory declaration process, there was no body of evidence to support that.

On the specific issue, people do not need a gender recognition certificate to go into toilets and changing rooms, so it is not directly related to the bill. However, I saw a piece of evidence that chimed with me about how changing spaces have changed over the years, and have moved away from being communal facilities to being more private spaces, which benefits everybody. I accept that there might be some facilities that are on a journey in that respect, but that is more about how retailers and shopping centres provide facilities. I think that people are keen to have private spaces, such as cubicles, rather than there being one changing room—which, when I was young, was a horrendous experience. We have moved a long way away from that, which is a good thing. The issue is not directly related to the bill; it is more about people's expectations when they access services.

Rachael Hamilton: I suppose that it is about ensuring that the exemptions in the 2010 act allow for inclusion, exemption and modification in that circumstance.

Shona Robison: Obviously, people do not need a gender recognition certificate to access the spaces that we are talking about. The trans community has been accessing spaces that align with their acquired gender probably for as long as we have all been around, and possibly longer. The exceptions and exemptions under the legislation relate to services—for example, services that support victims of sexual assault or rape, which I cited earlier. In that case, as long as doing so is proportionate, it is legitimate to exclude trans women—it could be trans men in other cases—from a service. The 2010 act sets out clearly that there must be a proportionate response, which I think is absolutely right. The bill will change none of that.

Rachael Hamilton: Having listened to a lot of witnesses in the private sessions I think, if I am being honest, that they have come to a private session because they feel scared to speak up. The individual whom I mentioned said that they were aware that the person

“decided to ... shop online after experiencing a male in a shop changing room.”

Therefore, there are people with concerns, which you are recognising in your evidence today. I respect that, and I want to be clear about it because, as you said, there are polarised views. With gender recognition reform there must also be recognition that there is fear. I think that you get that.

Shona Robison: I do. I reiterate that the bill does not change any of that.

Rachael Hamilton: I know—we keep talking about that and repeating it. I have said in evidence a couple of times that I wonder whether the exemptions in the 2010 act are meeting the reform that we are seeing now within Governments.

Shona Robison: I think that they do because the legislation requires a proportionate response so that people are not excluded in a disproportionate way.

12:45

My only other observation is that the private space that the committee has created has been good for allowing people who are concerned about the bill, and people from the trans community who feel excluded and affected deeply by some of the debate that has been going on, to express views. The committee has provided a space for anyone who would rather give their view and opinion in private. I commend the committee for that; it has allowed you to hear evidence that might otherwise not have been heard.

Rachael Hamilton: Finally, I will go back to the criminal offence of making a false statutory declaration. I do not feel as though I have heard enough about that. In the private session with the individual whom Karen Adam spoke about, who had transitioned and then transitioned again, we heard that that person was not aware of the criminal offence. Would that person have been liable to imprisonment or a fine in that case? I just need clarification of that, if you do not mind, convener.

Shona Robison: That would not be the case if, when the person applied for their gender recognition certificate, that was clearly and honestly what they wanted to do. They would not be making a false declaration because, at that point, that was their intention. If, a year down the line, someone changed their mind and wanted to use the process to detransition—for lack of a better word—they would still not be making a false declaration. Clearly, at the time, it was an honest view of where they were in their life—they were not trying to mislead or make a false declaration. Therefore, they would not face a fine or

imprisonment; that would happen only if they make a false declaration.

Rachael Hamilton: Thanks.

The Convener: It is probably worth saying that some of the witnesses from whom we took evidence used the word “transition” in relation to social or medical transition rather than in relation to using GRC processes.

As members have no further questions, I thank the cabinet secretary, Peter and Colin for attending the meeting. That brings the public part of our meeting to a close.

12:47

Meeting continued in private until 12:57.

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