OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities, Human Rights and Civil Justice Committee

Tuesday 15 November 2022

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 15 November 2022

CONTENTS

EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
29th 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:

Sarah Boyack (Lothian) (Lab)
Russell Findlay (West Scotland) (Con)
Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)
Michael Marra (North East Scotland) (Lab)
Roz McCall (Mid Scotland and Fife) (Con)
Carol Mochan (South Scotland) (Lab)
Shona Robison (Cabinet Secretary for Social Justice, Housing and Local Government)
Graham Simpson (Central Scotland) (Con)
Sue Webber (Lothian) (Con)
Tess White (North East Scotland) (Con)
Martin Whitfield (South Scotland) (Lab)

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 15 November 2022

[The Convener opened the meeting at 09:02]

Gender Recognition Reform (Scotland) Bill: Stage 2

The Convener (Joe FitzPatrick): Good morning and welcome to the 29th meeting in 2022 of the Equalities, Human Rights and Civil Justice Committee. We have received no apologies this morning.

We are joined today by Shona Robison, the Cabinet Secretary for Social Justice, Housing and Local Government, and Scottish Government officials. We are also joined by a number of MSPs who have lodged stage 2 amendments to the Gender Recognition Reform (Scotland) Bill, and others might join us throughout the meeting. We also have a full public gallery. I welcome everyone who is participating in the meeting today and those who are observing, either in person or online.

We have to consider and dispose of a large number of amendments to the bill. The committee has scheduled two days for that work; I intend to allow as much debate as is needed for each amendment, but I must ask members to be as concise as possible and to keep their points to what the amendments are about.

If we do not make sufficient progress, the committee might require a third day. Should that be the case, I will discuss that with members and, if necessary, will approach the Parliamentary Bureau to request that the stage 2 deadline be extended. We are expecting a long session this morning, so I will pause proceedings to allow for comfort breaks at appropriate points.

Our sole agenda item today is stage 2 consideration of the Gender Recognition Reform (Scotland) Bill. Members should have a copy of the marshalled list and groupings. If votes are required, I will call for yes votes first, then for no votes, then for any abstentions. Members should vote by raising their hand; clerks will collate the votes and pass them to me to read out and confirm the results.

I remind the cabinet secretary's officials that they cannot speak during this stage. However, they are allowed to communicate with the cabinet secretary directly.

Members with amendments in a group will be called in turn. Any other member wishing to speak should indicate as much, and I will make every effort to accommodate them.

Let us make a start.

Section 1 agreed to.

Section 2—Persons who may apply

The Convener: Amendment 18, in the name of Rachael Hamilton, is grouped with amendments 117, 38 to 41, 120, 42, 19, 43, 44, 46, 124 and 31. I draw members' attention to the procedural information that relates to this group and which is set out in the groupings—that is, if amendment 42 is agreed to, I cannot call amendment 19 due to pre-emption.

I call Rachael Hamilton to move amendment 18 and speak to all amendments in the group.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): The bill as drafted will extend the ability to obtain legal gender recognition to 16 and 17-year-olds. My amendments seek to retain the current minimum age required to apply for a gender recognition certificate at 18, based on a statutory declaration and without any form of medical oversight.

My concerns and those of my colleagues relate to lowering the age to below 18 in Scotland. I recognise that 16 is the age of legal capacity in Scotland. However, higher age limits apply to several matters that are of less significance than changing legal sex, such as purchasing alcohol or cigarettes, getting a tattoo and driving a car.

Recently, the Scottish Government sought to incorporate the United Nations Convention on the Rights of the Child into domestic law. The UNCRC defines anyone under the age of 18 as a child. Susan Smith from For Women Scotland said:

"people are not cognitively mature until they are about 25." —[*Official Report*, *Equalities, Human Rights and Civil Justice Committee*, 31 May 2022; c 27.]

Other countries take a more conservative approach to the age limit for applying for a GRC. In Denmark, for example, one must be 18 to legally change gender, while in countries such as Belgium and Argentina, parental consent is required for those under the age of 18.

Furthermore, the Scottish Government is pursuing an inconsistent approach to defining maturity. Scottish sentencing guidelines refer to the sentencing of those under 25, claiming that they are not cognitively developed and

"have a lower level of maturity, and a greater capacity for change".

According to the Equality and Human Rights Commission, the change in the bill

"increases the likelihood that trans pupils with GRCs are present in educational establishments in Scotland. This has implications for the operation of the education provisions of the Equality Act – its specific exceptions to direct discrimination for education providers would not apply in the same way as they do now (because people under the age of 18 currently cannot obtain a GRC).

At present, the law allows schools to take a proportionate approach to balancing the needs of trans pupils with those of other pupils."

It goes on to say that the changes proposed in the bill might require educational establishments in Scotland to

"treat trans young people with a GRC as having their acquired gender for all purposes, including in a single-sex school, leaving the school potentially open to direct discrimination claims if it sought to balance the needs of trans and other pupils."

I would welcome the minister providing clarity on that point about the position for single-sex schools, should the bill be passed unamended.

The Scottish Government has dismissed the findings of Dr Hilary Cass's interim review as not being relevant to Scotland, which is contrary to the stance taken by the First Minister in comparing NHS England with NHS Scotland when answering questions at First Minister's question time. We share the view of stakeholders that it is prudent to wait for the final conclusions and recommendations of the Cass review before moving to make legal recognition of gender available to 16 and 17-year-olds in Scotland.

The Scottish Government fails to recognise that providing a route to a change of status in law is a form of social transition and is therefore not a neutral undertaking. The Scottish Government and the majority of the committee appear determined to deny any risk that affirming a young person's self-declared gender identity might encourage them on to a medicalised pathway in a setting where the evidence base is lacking.

Given the stakes, every law that we make must be supported by robust analysis. We think that there are hard questions to ask about Scotland's gender identity services for young people, especially considering the lack of robust data on clinical outcomes. In the absence of better information about the cohort of 16 and 17-year-olds experiencing gender incongruence, MSPs are being asked to make a very significant decision affecting a vulnerable group, based largely on some young people's strongly—and no doubt genuinely—expressed desires and the amplification of those voices by adults who are strongly committed in principle to an affirmation-based approach.

The basis appears shaky in assuming that decisions here will have no spillover effect on national health service services and that any emerging legal risks can be ignored. It does not appear unreasonable for MSPs to decide that NHS Scotland needs time to consider the final Cass review recommendations before we consider lowering the age for a GRC. The Bayswater Support Group for parents put it like this:

"Our children deserve the same level of care and safeguarding as their English counterparts and it is incumbent on our lawmakers to consider the needs of vulnerable young people when considering this bill."

I urge members of the committee to consider the crystal-clear arguments that I have presented today and to support the retention of the current minimum age of 18 required to apply for a GRC.

I move amendment 18.

The Convener: I call Carol Mochan, who is joining us online, to speak to amendment 117 and the other amendments in the group.

Carol Mochan (South Scotland) (Lab): I have lodged amendment 117 primarily to reflect the numerous expressions of concern that I and many others have heard regarding the bill's content. What I want to say first of all, though, is that, although I agree that many people are in favour of the bill's spirit and intent, I feel that some details regarding practicalities and protections in getting a gender recognition certificate, particularly for younger people, have been overlooked.

Given that the Government has expressed its view that the minimum age for applying for legal gender recognition should be reduced to 16, it is my view that, should the legislation be passed, extra provision must be in place to support 16 and 17-year-olds, and they must be able to request that support, should they make this decision. Many young people will be reaching a time of change in their lives, becoming independent, moving away from home, beginning full-time work or starting university or college courses. For that reason, it would be preferable for a young person who seeks support in obtaining a gender recognition certificate to have guaranteed access to confidential and quality support.

Similarly, many people in that age group, particularly the youngest, are likely to be living at home and might experience difficulty in communicating their decision to direct family, leading to a sense of isolation and helplessness. That is well documented in the evidence that has been collected. Assistance can be provided through free and accessible advice that helps young people understand the practicalities of their decision and their options for the path ahead. It might also give the young person support to work with their family at a stage that is most helpful to them. Where challenges exist, the support could come from a family liaison officer, who could assist with communication. In all cases, wellbeing

support ought to be available from a professional and trusted source to protect the mental health and wellbeing of young people who request such support during the process.

I ask the cabinet secretary to set out the Government's position on the points that I have raised in amendment 117. The support must be universal and confidential if it is to succeed, and I feel that it is absolutely necessary in order to help young people during a period of particular need. Amendment 117 would give reassurance to young people and their families that balanced and universal support would be available if required and that any support would have the young person as its focus.

The Convener: I call Christine Grahame to speak to amendment 38 and other amendments in the group.

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I am not sure whether you want me to move it at the beginning, but—

The Convener: No—move it later.

Christine Grahame: That is me told already.

I was going to say, "I rise to speak to my amendments", but I will not be rising. I will speak to amendments 38 to 44 and 46, all of which are in my name and all of which are supported by Jackson Carlaw.

The intention of the amendments is to ensure that, before applying, 16 and 17-year-olds have made use of the opportunity to take advice or guidance or to receive support in making their decision, including considering the implications of getting a GRC. That also relates to an amendment that I will come to later on what the registrar general for Scotland must publish.

The provision, which would be mandatory but is not overly restrictive, would require the person to confirm to the registrar general that they had discussed the issue, either with an adult whom they knew personally—for example, a supportive family member or friend of the family—or someone who had a role that involved giving guidance, advice or support to young people, such as a teacher, counsellor, doctor, guardian or LGBT youth worker. There is a whole range of people. In order to allow for flexibility in individual circumstances, amendment 39 would not restrict the form of the consultation—I am not setting out a list here.

The cabinet secretary has already undertaken to ensure that 16 and 17-year-olds will be offered and encouraged to take up a conversation with National Records of Scotland about the process and effect of a GRC. It is important that, wherever possible, the confirmation should be part of such a conversation, which would take place during the reflection period. I invite the cabinet secretary to confirm whether she agrees with that approach and, indeed, with my amendment.

The offence in the bill of making a false application does not apply to the proposed confirmation. There is no desire to criminalise 16 and 17-year-olds or require them to provide proof.

Carol Mochan's amendment 117 tries to do much the same thing as my amendments, but it is rather heavy handed. It would put in law a requirement for support services for those applying, but that is unnecessary, as all those services exist just now. In any case, when it came to the registrar general, it would still have to be confirmed that the person had actually taken advice; that would be mandatory, and the onus would be on the person in question. After all, this is a big decision. In short, given that the advice and support are already there—and I hope that Carol Mochan forgives me for saying this—I do not think that amendment 117 is necessary, and I think that mine is better. Of course, I would say that.

The intention behind amendments 42 and 43 is to extend from three to six months the minimum period of living in the acquired gender before an application can be made. I understand Rachael Hamilton's concerns, which is why I am putting in other precautions for this particular age range—specifically, for 16 and 17-year-old applicants. However, the time period that I have set out would be the very least; they might take longer than that, and so might 18-year-olds.

09:15

The amendments would introduce two options into the required statutory declaration: either an applicant must state that they are 18 or over and have lived in their acquired gender for at least three months; or that they are 16 or 17 and have lived in their acquired gender for at least six months. That will provide additional assurance that applicants have had the time to fully understand the change that they are making and that they are confident that they really do want to live the rest of their lives in their acquired gender.

Such a measure will not introduce an additional delay for anyone who has already been living in their acquired gender for at least six months. They will have been doing so, well ahead of turning 16, so they could still apply on their 16th birthday and, after the three-month reflection period—which we must not forget—obtain a GRC.

I will make passing reference to Martin Whitfield's amendments 120 and 124. Amendment 120 is just a consequential amendment, as are my other amendments. I should point out that we are

not in collusion, by the way; we are just sitting next to each other—by mistake. [*Laughter.*]

If I can be modest, my amendments are better, as they put the onus on the young person to specifically confirm that they have discussed and understand their application. It is a big decision for them, so we need to ensure that the onus is on them to have done all that. I believe that that is a better approach than that in Martin Whitfield's amendments, which put the onus on the registrar general to be satisfied that the applicant has the "capacity" to understand. The word "capacity" is difficult in law; for a start, I do not know whether Mr Whitfield means legal capacity or some other kind.

A discussion with the registrar general will take place, whether face to face, online or whatever, and at that time, they can decide whether the person really understands what they are doing. As I have said, the word "capacity" is a difficult word to use in law. Perhaps Martin Whitfield should have said "fully understand what they are proceeding to do", instead. However, he did not, and that is why I do not like his amendment.

I think that I have spoken to all my amendments, have I not?

The Convener: Yes.

Christine Grahame: There are just so many of them.

Karen Adam (Banffshire and Buchan Coast) (SNP): You said that you have received support from Jackson Carlaw for your amendments. What kind of support have you had for them in conversations with other colleagues?

Christine Grahame: Strangely enough, I do not know—I have not gone around lobbying for them. All people in the Parliament are intelligent—I hope—and can see the amendments for themselves. At stage 1, I laid the ground with regard to my intention to propose precautions and support for 16 and 17-year-olds, because I shared concerns that they were being put in the same boat as 18-year-olds. The test is on the committee. You have been listening to the evidence in depth, so I am hopeful that my proposal has hit fertile ground.

The Convener: I call Martin Whitfield to speak to amendment 120 and others in the group.

Martin Whitfield (South Scotland) (Lab): It is always a pleasure to follow Christine Grahame, even when she seeks to insult my poor amendment.

I intend to speak to amendments 124 and 120. As amendment 120 is a technical amendment that allows amendment 124 to fit in, I will deal first with the purposes behind them.

The registrar general will have an important role in the process, if it moves forward. The purpose behind my amendments is to draw out the fact—and I seek the view of the cabinet secretary on this—that our young people who are 16 and 17 already have substantial protections around them. It is a transitional period between childhood and adulthood, in which we seek to allow our young people as much freedom as possible, while still providing a scaffolding of support, should things go wrong or should decisions be contrary, perhaps, to an individual's interests.

In answer to Christine Grahame, I picked the registrar general on whom to place the obligation to ensure that there is some protection, because their office is already under a statutory requirement to undertake assessments of people who present themselves as a result of a variety of legislation. They are therefore well capable of making such decisions.

The protections that are extended in this case are really very narrow. The first two, which are contained in proposed new subsection (2B)(a) in amendment 124, deal with the effect of obtaining the certificate and the importance of a statutory declaration. Anyone who undertakes to hear a statutory declaration needs to assure themselves that there is an understanding of the significance and importance of that document. The reference in the amendment to

"the effect of obtaining the certificate"

is to allow the registrar to ask those questions to satisfy themselves that the person fully understands the consequences of having a GRC.

Proposed new subsection (2B)(b) in amendment 124 is very important, as it ensures that the application has not been made "under coercion". That sort of provision is echoed in a number of other situations; there is, for example, a requirement on a person registering a marriage to ensure that no coercion has taken place.

As for the point that has been made about the use of the word "capacity", I would point out that it has a strict legal definition, and it defines the position of a young person in making such a significant decision about these matters.

Both amendments, particularly amendment 124, seek to remind the registrar general of their existing legal obligations and to allow them, in certain situations, to avail themselves of the ability to say "No"—on the assumption, of course, that the decision would always be "Yes."

I am happy to leave it there, convener, unless I can give any further guidance.

Maggie Chapman (North East Scotland) (Green): I will speak generally about the amendments in the group.

First, it is clear that the age of legal capacity in Scots law is 16. At that age, young people can get married, join the army, work and vote in Scottish Parliament and local elections. It is almost as if we trust them to make big life decisions on their own. I do not see why this situation is different.

Let us also remember that many young people have already transitioned socially—which might include coming out to friends and family—without applying for a GRC. Not having a birth certificate that matches their identity could cause issues when applying for jobs and for further or higher education and, more importantly, could leave them open to a lack of privacy regarding their trans status.

I am vehemently opposed to the time periods currently in the bill, both the time to be spent living in the acquired gender and the reflection period. Those are not based on specific evidence and fall short of international best practice for gender recognition, which has no waiting periods at all. To make the required time period for living in the acquired gender even longer for 16 and 17-year-olds simply increases the length of time for which they would have documents that disclose their gender history, without providing any clear benefit. It also risks creating more opportunities for those who do not agree with a young person's decision to apply for a GRC to go digging through that young person's online presence looking for misgendering, the use of a different name and so on. Young people tend to express themselves with far more gender fluidity than others and the longer time period puts them at greater risk of bad-faith actors.

How many young trans people have the members who lodged these amendments actually spoken to during drafting? If they had done so, I am not sure that we would be here debating them. I will vote against all the amendments in the group.

Pam Duncan-Glancy (Glasgow) (Lab): I thank the members who have lodged amendments. I will speak to a couple of the amendments in the group. In short, there are merits to many of the amendments before us, but I have concerns about some. I hope that we can work on those together, ahead of stage 3.

Carol Mochan's amendment 117, as she has highlighted, seeks to address concerns that some people have. It would require free, confidential and balanced support to be provided, at their request, for 16 and 17-year-olds applying for a GRC. That would be really important for some people. Carol Mochan's amendment seeks to ensure that there is support for people who need it. Amendment 117 would give 16 and 17-year-old applicants the opportunity to access support on their terms. That is a positive way of supporting young trans people to access their rights and is distinct from other amendments in the group, in particular amendment 38, in the name of Christine Grahame. On that basis, if those amendments are pressed, I will have to abstain.

Martin Whitfield's amendment 124 adds the coercion of 16 and 17-year-olds as a factor allowing for the rejection of an application for a GRC, along with a presumption that 16 and 17-year-olds do have the capacity to understand the process. All those elements support capacity and the influence of coercion, as my colleague Martin Whitfield has highlighted. I believe that that could be helpful and should be considered further at stage 3, and I urge the Government to continue working with my colleague to do that.

I cannot support Rachael Hamilton's amendment 31, because it delays the act. Trans people have already waited long enough for reform.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I will be very brief. It is fair to say that we heard quite a lot of evidence on this matter during stage 1. We heard varying views, so I am not surprised by the number of amendments that have been lodged. The two sides of the argument have been quite well expressed and summed up by, on the one side, Rachael Hamilton and, on the other, Maggie Chapman.

During the stage 1 debate, we heard that we want to build consensus on the bill as we go through stages 2 and 3, and we should try to do that on this matter. The cabinet secretary has said that, in taking the bill forward, the decision relating to 16 to 18-year-olds has been one of the most difficult.

Based on what I have heard so far, I am not sure who will press their amendments or take the issue forward to stage 3. However, at this stage, I suggest that Christine Grahame's amendments find the right balance, so I am inclined to vote for them.

The Cabinet Secretary for Social Justice, Housing and Local Government (Shona Robison): In the committee's stage 1 report, the majority of committee members agreed that the age of eligibility for applicants should be 16, and the bill's general principles were supported by members of all parties and were overwhelmingly supported by the Parliament at stage 1.

The committee has heard, as have I, from young trans people that they currently feel excluded from the system, particularly at an age when they want consistent documentation before entering higher or further education or starting their first job. Therefore, I cannot support Rachael Hamilton's amendments, which are contrary to the bill's general principles.

I have heard the views of members across the chamber on the need to ensure that young people receive guidance and support when making an application, but I am unable to support amendment 117, in the name of Carol Mochan. It is unclear to me what the provision of "balanced support" might be in relation to a young person's application for a GRC, nor am I convinced that it would be beneficial to mandate in law the establishment of a wide-ranging support service for young people specifically in relation to making an application for a GRC. I consider that such an approach would be disproportionate, given the very small number of people we anticipate would apply in comparison with the general population.

Support options already exist, and we will ensure that young people are provided with guidance on their application and can access wider support. I note from a number of equalities organisations that, although they understandably and rightly support the general spirit of improving support for young people, they do not think that such provision needs to be in the bill. As such, I ask the committee not to support amendment 117.

However, I believe that the principles of what Carol Mochan is trying to achieve are provided by Christine Grahame's amendments in the group, which take a balanced and proportionate approach to the issue. I support them all. The additional safeguards for young people provide the reassurance that MSPs have said that they want in relation to lowering the minimum age for application. A minimum age of 16 for applying for legal gender recognition aligns with the provisions in the Age of Legal Capacity (Scotland) Act 1991, where, under Scots law,

"a person of or over the age of 16"

generally has

"legal capacity to enter into any transaction"

having legal effect.

However, concerns have been raised with me by MSPs about striking the balance between autonomy and the protection of young people. I am grateful to Christine Grahame for speaking with me about the matter, and I agree that increasing the minimum period of time for applicants aged 16 or 17 from three months to six months would address concerns that have been raised while not placing a disproportionate barrier on young people seeking to apply.

We know that applying for legal gender recognition is often the end of a process whereby people make changes to their gender on official documents. When a young person has already been living in their acquired gender for a minimum of six months, they can affirm that in their statutory declaration, so no additional delay would be involved for them. Increasing the period of time to six months would also give young people greater opportunity to access support, advice or guidance before applying, which they could then confirm to the registrar general.

Although possibly well intentioned, amendments 120 and 124, in the name of Martin Whitfield, put the emphasis on the wrong place. Christine Grahame's amendments place a requirement on the young person seeking to make an application to actively confirm to the registrar general that they have discussed the implications of their application with a suitable third party, and I think that that is a reasonable expectation.

09:30

Martin Whitfield's amendments, however, place the onus on the registrar general to satisfy himself or herself that the applicant has capacity to understand and is not being coerced. As we said in evidence to the committee, it is not for the registrar general to make such determinations, but my amendment 60 gives the registrar general the power to apply to a sheriff in order to refuse an application on the grounds that it was fraudulent or that the applicant is incapable of understanding the effects of obtaining a GRC or of validly making the application. It is appropriate that such decisions be made by a sheriff on the basis of evidence taken by them rather than on the judgment of the registrar general.

For those reasons, I ask the committee not to support Martin Whitfield's amendments and to support all those in the name of Christine Grahame.

I turn to amendment 31, in the name of Rachael Hamilton. I reiterate my position that there is no connection between the outcome of the Cass review of NHS England's services and the bill, which is about the process to obtain legal gender recognition in Scotland. I see no reason why the commencement of the substantive provisions of the bill should be delayed. As the Scottish Government has continued to state, we will closely consider the findings of the Cass review in the context of our work to improve NHS Scotland's services. That was backed up by the evidence that committee members heard during stage 1. Therefore, I urge the committee not to support amendment 31.

For completeness, on Rachael Hamilton's comment on education, the bill does not modify education provisions in the Equality Act 2010 on the requirement for schools not to discriminate in providing education and offering places in schools. Extending the effect of a GRC to 16 and 17-year-olds does not change the education provisions in the 2010 act and the bill does not modify the effect

of a GRC. Protection under the 2010 act will continue to apply to all children and young people and the arrangements for recognising someone's transition will remain the same within schools.

Rachael Hamilton: Although I understand the motive for Carol Mochan's amendment 117—to try to implement a safeguard in the process—we will not support it, as we cannot envisage that NHS or other services will miraculously improve, because the Scottish Government's reforms of self-identification will open up our medical services and the other services included in Carol Mochan's amendment to a wider group of people, therefore putting them under more pressure.

Christine Grahame's amendments are creative but ill thought through. How can we, as elected members in this place, guarantee that young people who are at a vulnerable age generally receive the support that they need? I am disappointed that the Scottish Government is attempting to use young people as collateral damage to water down the bill to appease their own Scottish National Party rebels.

I am disillusioned by the cabinet secretary's sceptical approach. The Cass review is a key piece of work. The cabinet secretary has not taken heed of the interim review. I agree, however, that we should consider what the full review says.

Living in an acquired gender for at least three months is an arbitrary figure, plucked from nowhere, without evidence, like the other three-month figure in the bill.

Martin Whitfield's amendments are flawed, because they presume that the registrar general has the ability to determine capacity, which is something that was never explored in evidence during conversations on the statutory declaration.

On a positive note, I welcome the offer from Fulton MacGregor and Pam Duncan-Glancy to work together in the future.

I press amendment 18.

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 2, Against 4, Abstentions 1.

Amendment 18 disagreed to.

The Convener: Amendment 114, in the name of Russell Findlay, is grouped with amendments 118, 119, 123, 125, 127, 129 and 131. I call Russell Findlay to move amendment 114 and speak to all amendments in the group.

Russell Findlay (West Scotland) (Con): Let us start with what should be a statement of the obvious: my opposition to the bill as it stands has nothing to do with the rights of those who identify as transgender. The eight amendments in my name are not directed towards trans people. They are to do with criminals—male criminals, who use lies, cunning and deception to commit and get away with serious wrongdoing; male criminals who commit serious crimes, especially acts of sexual violence; and male criminals whose victims are almost always women and girls. The overarching purpose of my amendments is to ensure that, if the bill is passed, it will contain vital public safeguards.

I will address my amendments in numerical order. Given the constraints that have been imposed at stage 2, I am mindful of my limited time and intend to be concise.

The eight amendments are grouped under the heading "Applicants with criminal charges or convictions". Lead amendment 114 would prohibit anyone on the sex offenders register from being able to acquire a gender recognition certificate. GRCs on the basis of self-identification should not be available to those who have been convicted of sexual offences of a seriousness requiring their inclusion on the register. As it stands, the bill would allow a registered sex offender to change gender and thereby acquire a new birth certificate that would hide their true identity. That would make it incredibly easy for predators to erase their past. Society would be prohibited from knowing whether a legally defined female was actually a male sex offender. Prisons are full of men who exploit whatever mechanisms or loopholes are available to gain access to women and girls and to commit sexual offences. The bill would be a gift to such predators. It would increase public risk—a risk that is predominantly to women.

Amendment 118 is a consequential amendment to amendment 125, and amendment 119 is a consequential amendment to amendment 124. I will speak about amendments 125 and 124 later. Amendment 123 would require GRC applicants to disclose criminal convictions. It is proper for an applicant's criminal offending history to be taken into consideration, given that the bill does not

contain the safeguard of a medical diagnosis. However, as things stand, and as I understand it, gaps in the bill mean that we do not know how the amendment would work in practice. Specifically, it is not yet known to whom those proposed disclosures would need to be made. Therefore, we need more information from the Government, and I look forward to the cabinet secretary's response. However, I hope that she agrees that those deciding on the granting of GRCs would benefit from being as fully informed as possible. Amendment 123 would help to achieve that.

Amendment 125 is, in some ways, an extension of amendment 123. It would require any GRC applicant to disclose convictions for various crimes, those being sexual offences, violent offences, domestic abuse and fraud. The same requirement would apply to those who are on the children's barred list—the database of those who are unsuitable to work with children. Amendment 125 would also require all such applicants to provide evidence of gender dysphoria in their GRC application. The registrar general for Scotland would not be able to issue a GRC unless the applicant provided authentic evidence.

I am aware that some of the measures in amendments 123 and 125 are not in place under current law, but that is because they are not necessary given the other safeguards that exist. Those include the need for a medical diagnosis when applying for a GRC and the requirement to have lived in your acquired gender for two years. It is in the interests of public safety that extra care be taken and extra scrutiny be given in respect of those with such serious convictions and those who are unfit to work with children. I note that, yesterday, the Equality and Human Rights Commission highlighted a lack of clarity about the use of the phrase "living in the acquired gender" in the bill. The EHRC duly recommends that amendments, including this one, should be considered to improve "precision and workability".

I turn to amendment 127, which would stop a GRC application where an applicant is charged with any crimes that would be prosecuted under solemn proceedings. As it stands, the bill would allow people to change gender after just three months. We know that most, if not all, solemn cases—that is sheriff and jury trials, and High Court trials—typically take much longer than three months to proceed. Therefore, an alleged rapist would be able to seek a GRC before coming to trial. In such circumstances, we would achieve the ludicrous situation where a rape victim may have to refer to her male-bodied rapist in the dock as "she" and "her". It is worth noting that the Sexual Offences (Scotland) Act 2009 states that rape is when someone without consent penetrates another person's vagina, anus or mouth with their penis.

When the Criminal Justice Committee took evidence from the Cabinet Secretary for Justice and Veterans, Keith Brown, and a Police Scotland deputy chief constable on 15 December last year, I asked whether a female rape victim might be required to use the pronouns "she" and "her" in court for a male rapist. The answer was unclear. I asked whether the police would inform a victim if a rapist changed gender before standing trial. The answer was unclear. I also asked whether media reports that Police Scotland already records the sex of criminals based on their self-declaration were accurate. The answer to that appeared to be yes.

Mr Brown told me that he does not control the courts. That may be so, but the courts will be obliged to adhere to this legislation. The consequences will surely be that a male rapist with a penis could legally be a "she". Mr Brown said that

"nothing in the proposed gender recognition reforms should impinge on this area."

I fail to see how that can be. He went on to say that courts, prisons and the police

"are very cognisant of the rights and safety of individuals",—[*Official Report, Criminal Justice Committee*, 15 December 2021; c 31.]

but whose rights prevail? Is it those of a female rape victim or those of a male who can exploit the ease of acquiring a GRC?

That is absurd, and I believe that most reasonable people would agree. It risks making a mockery of the justice system and retraumatising victims of sexual violence. Amendment 127 is therefore as obvious as it is vital.

Amendment 129 would require the registrar general for Scotland to inform Police Scotland whenever anyone with a criminal record is granted a GRC. It would exclude those whose convictions are spent. I believe that it is in the interests of public safety and the police's ability to detect crime for the police to be made aware when GRCs are issued to convicted criminals, as they would have no other way of knowing that under the terms of the bill as drafted. That is especially so with certain types of crime, including sexual offences and fraud. Some sex offenders will almost certainly seek a self-declaratory GRC as a means of re-offending by gaining access to single-sex spaces. More generally, and as I touched on earlier in my comments, it is likely that some will attempt to erase their offending history by acquiring a GRC.

I was surprised and concerned to learn that more than 500 registered sex offenders in Scotland have recently been allowed to change their name. I would rather that it was not the case that they can do that, but that would require a

change in law that can perhaps be discussed another day. However, at least the police must be informed when that happens. It would be logical and consistent for the police also to be informed when offenders are issued with a GRC.

Finally, amendment 131 would allow a sheriff or judge to revoke a GRC of someone who was later convicted of rape or another sex crime. As I stated in relation to amendment 127, the legal definition of the act of rape states that it can only be conducted with male genitalia. If a man commits rape or sexual assault, it would be an affront for the law and an insult to victims to continue to categorise him as female.

Many of my amendments are common sense. We cannot allow Scotland's criminal justice system to be undermined by ill-conceived legislation that has the most profound of consequences. The effects of the bill will ripple through the police, prosecution, prison and court services. Unchecked, it could harm crime victims, enable criminals and skew crime statistics by rendering the recording of a criminal's sex to be in effect meaningless.

The prime purposes of my amendments are public safety and the preservation of the rights of women and girls who might fall victim to sexual violence. I urge members to give my amendments their support.

I move amendment 114.

09:45

Shona Robison: I want to be clear from the start that the real threat to women and girls is predatory and abusive men. Unfortunately, as is the case around the globe, we live in a society in which men in the home and outside it are the perpetrators of violence against women and girls, and that violence must be tackled. There is no evidence, however, that those men would obtain a GRC in order to abuse women, or that that has happened in any other countries that have similar processes.

I recognise that some people have concerns and fears that are genuinely held, and we should seek to address them, but concerns about the behaviour of abusive and predatory men should not mean that we impinge on the rights of trans people. Although I understand people's concerns about abusive men, the bill takes exactly the same approach as the current system, in which none of those restrictions applies to people who have committed certain offences.

This group of amendments would prevent people who have committed certain offences from applying for or receiving a GRC, pause applications for people who are charged with certain offences or introduce reporting requirements relating to certain convictions, and mean that anyone with any criminal convictions at all, no matter what they are, would need to declare them.

Amendment 123 does not exclude spent offences, and it is not clear how that could be checked by the registrar general. Amendments 125 and 118 would reintroduce the need to show gender dysphoria for some offenders.

The Scottish Government considers that amendment 114 is likely to be outwith legislative competence due to its being incompatible with article 8 of the European convention on human rights. A further difficulty is that the ban would depend on when those requirements are imposed. In one case, the requirements could be just about to elapse when an application for a GRC was made; in another, the ban on being able to obtain a GRC could last for a considerable number of years.

Similarly, amendments 127 and 119 would be incompatible with article 8 of the ECHR, and possibly also article 14, because they differentiate between persons based on the procedure attaching to the charge for the offence in a way that cannot be justified. There is also the same difficulty as with amendment 114 in relation to the timing of when the notification requirements are imposed.

The Scottish Government considers that, for similar reasons, amendment 131 is also likely to be outwith legislative competence as it is incompatible with article 8, and possibly article 14, of the ECHR because it differentiates between persons based on the type of offence committed. Again, no such restrictions are part of the current system under the United Kingdom Government, which must also comply with the ECHR.

To be clear, inserting provisions into the bill that are incompatible with the ECHR puts implementation of the bill in jeopardy. It also brings the risk of legal challenge before the new process can be put in place. If successful, such a challenge could prevent implementation until the compatibility issues were resolved through primary legislation.

The bill already provides for

"a person who has an interest"

in a GRC application to apply to a sheriff to revoke a certificate on the ground that the application was fraudulent.

However, we have listened to the concerns that some members have raised about the possibility of sex offenders seeking to take advantage of the proposed processes for gender recognition, and although we think that the processes for sex

offender notification requirements are working well, Scottish ministers have an existing legislative power to vary the information that is provided at notification. Therefore, I can inform the committee today that the Cabinet Secretary for Justice and Veterans will, before the bill is commenced, introduce regulations to amend the sex offender notification requirements so that those who are on the register are required to notify the police with details about whether they have made an application for a gender recognition certificate. That will mean that additional information will be available to identify an individual and inform their subsequent management under the multi-agency public protection arrangements. That will add to the information that those who are on the register are already required to provide to the police, such as name, address and passport, so that the police are fully informed about the information relating to the person's identity.

That does not mean that there is any implied link between trans people who are seeking gender recognition and sex offenders, but it will mean that Police Scotland will be informed of an application by someone on the register. That will allow the police to take action in relation to the application itself, if necessary, or as part of the broader police role in managing the registered sex offender population. If it believes that an application is fraudulent, Police Scotland could apply to a sheriff as a person with an interest for revocation of the GRC and/or work towards criminal prosecution under the offences in the bill.

Under Scottish Government amendment 60, the registrar general, if informed by Police Scotland, could reject such an application following a successful application to the sheriff, meaning that the applicant would be denied a GRC. That means that it is possible to prevent someone who is on the sex offenders register from fraudulently obtaining a GRC.

In addition—I do not want to anticipate discussion of a later group—I note that Jamie Green's amendment 133 is relevant to those issues. I will support the principle of a new statutory aggravation to an offence in connection with fraudulently obtaining a GRC. Taken together, that is the right, proportionate and competent set of measures to put in place in the area. On the basis of the action and the safeguards that I have set out, I urge the committee not to support any amendments in the group.

The Convener: I call Russell Findlay to wind up and press or withdraw amendment 114.

Russell Findlay: I will make a number of points, and it is worth repeating my opening comment, which the cabinet secretary acknowledged: this not about trans people; it is about male offenders—in the main, male sex offenders. I welcome the commitment that has been given today to amend the sex offender notification requirements, which goes some way towards addressing the issue, albeit nowhere near far enough. I do not agree with many of the cabinet secretary's views on the matter. Her statement that there is no evidence of sex offenders having exploited, or being likely to exploit, the GRC process is ill-judged and perhaps even naive; it is not only likely, but inevitable. I am keen to know when the mechanics in her amendment would come into being.

Shona Robison: As I said, the justice secretary will put that into place before the bill is enacted, so it will be in advance.

Russell Findlay: Thank you; that is reassuring.

Fulton MacGregor: Russell Findlay put forward a strong argument for his amendments. We took evidence during committee on the issue, and regardless of whether we think that the scenarios that Russell Findlay mentions are plausible, he has outlined that they could happen. I welcome the cabinet secretary's response on the actions that the Government will take through Keith Brown.

I do not know what Russell Findlay is going to do with his amendments based on what he has heard, but is there any scope for him and the Government to discuss the issue ahead of stage 3? At this point, his amendments are too raw, and we do not know the full implications. As the cabinet secretary suggested, some of the amendments might have human rights implications, and if so, the committee should vote against them, but given that he has raised concerns, perhaps common ground could be reached. Is he considering having further discussions ahead of stage 3, as opposed to pressing the amendments now?

Russell Findlay: I did not hear anything from the cabinet secretary to suggest an interest in discussing common ground, although I may be mistaken. The supposed incompatibility of some of the amendments with human rights legislation is debatable. I therefore think that it is important that I press the amendments.

Before I do that, I will make a final point, which is that what is being proposed is the equivalent of closing the stable door after the horse has bolted. My amendments are preventative. They are about protecting women and protecting the criminal justice system from abuses in quite a commonsense way, so I will press them.

The Convener: The question is, that amendment 114 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Duncan-Glancy, Pam (Glasgow) (Lab)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 114 disagreed to.

The Convener: Amendment 83, in the name of Roz McCall, is grouped with amendments 84 to 86, 90, 92, 56, 32, 93, 57, 58, 33, 34, 94, 98, 99, 105 to 109, 112, 35, 36 and 113.

I draw members' attention to the procedural information relating to the group, as set out in the groupings of amendments. Due to pre-emption, if amendment 32 is agreed to, I will not be able to call amendments 93, 57 and 58; if amendment 93 is agreed to, I will not be able to call amendments 57 to 59, 33 and 34; and if amendment 99 is agreed to, I will not be able to call amendment 72. Members should also note that amendments 36 and 133 are direct alternatives.

Roz McCall (Mid Scotland and Fife) (Con): I clarify to members of the committee that my amendments are probing ones to ascertain from the cabinet secretary her views on the principle of overseas gender certificate recognition, so I do not intend to press them. However, I hope that the cabinet secretary can provide some answers.

The amendments would do different things. One would remove the process of overseas gender recognition entirely. Essentially, that would mean that we would revert to the status quo position in which a person would have to obtain a gender recognition certificate through the process that is outlined in the bill without any bespoke overseas recognition process. That is currently the case across the United Kingdom.

Amendment 93 would, in effect, ensure that somebody moving to Scotland from overseas would not have any more or fewer rights than anybody who currently resides in Scotland. That is the important part.

The intention of the other amendments in the group is to allow "approved countries" to have the process of overseas gender recognition, whereas everyone else would have to go through the process to obtain a gender recognition certificate. That was to outline an alternative to the committee, rather than remove the overseas gender recognition provision from the bill in its entirety. However, as previously mentioned, I do not intend to press the amendments at this stage.

As the bill will introduce a new process for overseas gender recognition, it is important that we get on record the cabinet secretary's view on the need for that provision and the safeguards that are required if it is to proceed into law. I ask the cabinet secretary what the Scottish Government's justification is for introducing the new process of overseas recognition for gender certificates. Does she agree that the bill, as currently drafted, does not include adequate safeguards to prevent bad actors from exploiting the overseas recognition provisions as they currently stand? Is she willing to strengthen the safeguards in that part of the bill? Does she see any merit in the proposed outlines in my amendments that she could support if their technical drafting were improved?

I move amendment 83.

The Convener: I announced that two members voted for amendment 114 and five members voted against it. However, the correct result was that three members voted for it and four members voted against.

Shona Robison: I do not support Roz McCall's amendments in the group, but I am happy to continue to discuss any further concerns that she may have ahead of stage 3.

At present, overseas gender recognition is not recognised automatically in the UK. Persons who have obtained gender recognition overseas and wish to be recognised in the UK have to apply to the gender recognition panel under its overseas track. The overseas track that is operated by the panel is used when a person has obtained gender recognition in an "approved country or territory", as listed in a statutory instrument made by the secretary of state after consulting the Scottish ministers and the department of finance and personnel in Northern Ireland.

10:00

I think that that is the system that Roz McCall wishes to emulate, despite the fact that the list of countries and territories that the UK Government currently maintains has not been updated for 10 years. The list therefore features jurisdictions that have, in that time, changed or updated their systems for gender recognition, several of which are now based on models that are similar to the model that is contained in the bill. Equally, it does not include countries that have since introduced gender recognition systems, including our near neighbour Ireland.

Section 8N(1) of the bill, which these amendments would remove, provides that

"Where a person has obtained overseas gender recognition",

they are

"to be treated ... as if"

they

"had ... been issued with a full gender recognition certificate by the Registrar General for Scotland".

In broad terms, the bill's approach is similar to the approach that is currently taken in Scotland to the validity of marriages that are entered into outwith Scotland, and to the recognition of divorce obtained overseas. It is a more straightforward, and less convoluted, approach than that which is proposed by Roz McCall.

Automatic recognition would, however,

"not apply if it would be manifestly contrary to public policy to"

do so—for example, in a case in which legal gender recognition was obtained overseas at a significantly younger age.

I therefore urge the committee not to support those amendments.

I turn to the amendments in my name. Section 8 of the bill inserts two new sections—sections 8M and 8N—into the Gender Recognition Act 2004, which provide for automatic recognition in Scotland of a gender recognition certificate that has been issued elsewhere in the United Kingdom and of gender recognition that has been obtained overseas.

Amendments 56 and 57 clarify that the automatic recognition ends if the gender recognition that has been obtained elsewhere no longer has effect.

Amendment 58 relates to cases in which someone with overseas gender recognition of their male or female gender goes on to acquire recognition of a non-binary gender in their own country—for example, Denmark or Malta. The amendment provides that, in Scotland, their gender will not revert to being their gender at birth but will continue to be the male or female gender that they had previously acquired.

These amendments are intended to cover specific eventualities in line with the general principles of the bill, and I urge the committee to support them.

The Convener: I ask Roz McCall to wind up and to say whether she wishes to press or withdraw amendment 83.

Roz McCall: I welcome the cabinet secretary's remarks, for which I thank her. I accept the offer to work with her to improve the Government's amendments at stage 3, so I will support her amendments in this group.

I seek to withdraw amendment 83.

Amendment 83, by agreement, withdrawn.

The Convener: Amendment 2, in the name of Sue Webber, is grouped with amendments 3 to 16, 26 and 17.

Sue Webber (Lothian) (Con): Good morning. This group of amendments is on retention of current application process and evidence required in support of applications. The amendments would bring the legislation back to the status quo and—importantly—retain current safeguards. They would mean that all the existing provisions with regard to gender recognition certificates in the 2004 act would be retained, so the 2004 act would operate in the same way that it does now. The only difference would be that an application could be made to the registrar general, but that would, under these amendments, still need the approval of the gender recognition panel, so the effect would be the same.

The aim of keeping the current legislation in place is to protect vulnerable young people when it comes to life-altering decisions, while protecting women and girls from bad-faith actors who might take advantage of the proposed changes in the bill.

Amendment 2 would retain the gender recognition panel specifically, as there is not enough evidence to support its removal. Although Conservative members recognise and acknowledge the issues that some people have had with the panel, we believe that, overall, the panel provides a system of safeguarding and gatekeeping. We also believe that more evidence should be required before it is removed, and that there is currently just not enough evidence to suggest that the registrar general alone should be responsible for the administration of the gender recognition certificates.

Amendment 3 would retain the need for a medical diagnosis. A medical diagnosis of gender dysphoria can distinguish between bad actors. Women's Rights Network Scotland has told us that removing the requirement for a medical diagnosis could lead to an abuse of the system by bad-faith actors, in particular, predatory men, as we have heard from colleagues.

Amendment 4 would retain the need for a person to have lived for two years in the acquired gender and for the applicant to be at least 18 years old. We believe that three months is too little time in which to take such an important decision. Distressed people will be able to make lifelong decisions before medical professionals have had the chance to help them, especially when coupled

with the lack of a gender dysphoria diagnosis. We all know that a lot can happen in two years, particularly when you are young and growing.

The Scottish Government's decision to set a three-month period is entirely arbitrary and lacks evidence. Furthermore, a 16-year-old is too young to obtain a GRC, and allowing them to make a life-altering decision after a short period could have negative consequences that are not accounted for in the bill.

Amendments 5 to 17 are all consequential to the proposed reversion back to the status quo. They seek to remove a long list of sections—sections 5 to 16—and the schedule from the bill. That is necessary because my first three amendments, which would remove sections 2, 3 and 4 from the bill, would mean that all those subsequent sections of the bill would no longer be required. For example, the sections on "Further provision about applications and certificates" are void when the status quo is retained, because those sections change the provisions of the bill that I wish to remove. I hope that that clarifies the position for the committee.

Convener, the amendments reflect a position that is not mine alone. A poll has indicated that only a minority of Scots support removing the safeguards: only 19 per cent of Scots support reducing the age at which someone can obtain a GRC from 18 to 16; 25 per cent support cutting the waiting period from two years to three months; and 26 per cent support removing the requirement for a medical diagnosis. The current safeguards in law are important. Along with the majority of the Scottish public, I recognise that and want those safeguards to be retained. I hope that the committee will agree to the amendments in my name.

I move amendment 2.

The Convener: I call Rachael Hamilton to speak to amendment 26 and other amendments in the group.

Rachael Hamilton: Amendment 26 seeks to retain the requirement to provide evidence to accompany an application for a GRC. It will specifically retain sections from the 2004 act to ensure that legitimate concerns of parents, young people and gender identity experts regarding the removal of safeguards are addressed. The Gender Recognition Reform (Scotland) Bill would remove the requirement for medical evidence and would reduce the period for which applicants must live in their acquired gender before applying for a GRC from two years to three months. The Scottish Government wants to have a system of legal gender recognition that is based on statutory declaration rather than a gender dysphoria diagnosis.

Can the cabinet secretary cite evidence from other countries where the impact of reform has been evident from these emerging policies? Can she comment on the prediction that removing a gender dysphoria diagnosis will not extend GRCs to a much larger and more diverse group, including predatory men? How will vulnerable individuals be supported without medical support? How will undiagnosed conditions be picked up? What evidence does the Scottish Government have that dropping the requirement to provide medical evidence is best for everyone? Surely that stance is entirely subjective.

Finally, why does anyone without gender dysphoria need to change their sex in law? NHS guidance says:

"social transition should only be considered where the approach is necessary for the alleviation of, or prevention of, clinically significant distress or significant impairment in social functioning and the young person is fully able to comprehend the implications of affirming a social transition".

Doctors caring for youngsters who are distressed about their gender have been told that it is not a neutral act to help them to transition socially by using their preferred new names and pronouns. The draft guidelines say that doctors should carefully explore underlying health problems, including mental ill health, amid concerns that the NHS is rushing children on to irreversible puberty blocker medication.

A significant proportion of children and young people who are concerned about or distressed by issues of gender incongruence experience co-existing mental health, neurodevelopmental and/or family or social complexities in their lives. A number of doctors, including Dr Antony Latham, the chair of the Scottish Council on Human Bioethics, Dr Anne Williams, the vice-chair, and Dr Calum MacKellar, the director of research, said:

"Unfortunately, the Stage 1 Report on the Gender Recognition Reform (Scotland) Bill, which was published by the Human Rights and Civil Justice Committee of the Scottish Parliament on the 6 October 2022, has not sufficiently considered the evidence of mental disorders which are often present with gender dysphoria. As a result, the recommendations given by the majority of MSPs preparing the report are unsafe and should be rejected ... In summary, the majority position in the report from the Human Rights and Civil Justice Committee is unworthy of the high expectations of the Scottish Parliament and the Scottish people since it is unreasonable, unprofessional, and does not sufficiently address the biomedical evidence. Moreover, if the Scottish Parliament does accept the majority view of the Committee in removing the requirement of a medical opinion before gender transitioning takes place, this will ... lead to some young persons being harmed".

They also said:

"Moreover, research shows that many children with gender dysphoria have significant psychological and psychosocial vulnerabilities ... Thus, without a medical

appraisal, it is very likely that many young persons may embark on risky life-changing procedures which they do not understand. This is all the more concerning since follow-up studies indicate that, overall, the distress experienced by young people affected by gender dysphoria disappears in about 85% of cases either before or early in puberty though the rates in ... studies vary widely."

With regard to living in the acquired gender, three months is too short a time for such a life-changing decision, especially for 16 to 17-year-olds, who are going through significant changes, such as puberty, and doing exams. Furthermore, living in the acquired gender for just three months without a diagnosis of gender dysphoria might not be enough time for an individual to seek medical help or support with mental health, if needed.

It appears that many stakeholders are concerned that clarity is required on what living in an acquired gender even means. A period of two years provides sufficient safeguarding.

Maggie Chapman: It might surprise colleagues that I want to speak to this group of amendments, but I will be supporting amendment 14.

Taken on its own, amendment 14 removes the specific criminal offence that the bill introduces of making a false declaration in relation to one's trans status. We heard from several people and organisations in evidence sessions, including the Children and Young People's Commissioner Scotland, Amnesty International, JustRight Scotland and Engender, that that offence is unnecessary. It is already a criminal offence under the Criminal Law (Consolidation) (Scotland) Act 1995 to make a false statutory declaration. The introduction of a new offence risks unnecessarily criminalising children.

However, there is another reason not to have the offence: having an offence that names trans people specifically potentially makes an already marginalised and vulnerable group more of a target for litigation.

Therefore, for reasons that are very different from those of Sue Webber, and that come from a very different place of principle and value, I will vote in favour of the removal of section 14 from the bill.

Fulton MacGregor: I want to speak briefly on the amendments that have been lodged by Sue Webber and Rachael Hamilton. As I have said previously, I think that stage 2 will allow us to find a lot of compromise, and I take the opportunity, before he moves his later amendments, to suggest to Russell Findlay that he works with the Government.

With this group of amendments, we are talking about the core of the bill. Some of the evidence that we heard in committee about people needing medical permission for them to be who they are goes against the grain of the bill. I will not go into the whole debate around the three-month period, because I know that time is tight and that those issues have been debated thoroughly. However, with regard to the process for an application, I cannot agree with the amendments in this group. The purpose of the bill is to make life better for trans people, and we must keep that part of the bill.

Although I really want to find compromise as we progress with the bill—I know that the Government does as well—I cannot support the amendments in this group.

Pam Duncan-Glancy: Similarly, I put on record that I will be voting against the amendments in this group, on the basis that they undermine the purpose and the principle of the legislation that we are discussing today. I will be voting against amendments 2, 3 to 17 and 26.

10:15

Shona Robison: Amendments 2 to 17, in the name of Sue Webber, are obviously not in keeping with the general principles of the bill as agreed to at stage 1 by the majority of the committee and by a clear majority in Parliament, including members of all parties.

Amendment 26, in the name of Rachael Hamilton, which presumes that Sue Webber's amendments will be agreed to, would remove the requirement for medical reports submitted to a gender recognition panel to include details of treatment that the applicant has undergone, is undergoing or has had prescribed or planned for them for the purpose of modifying sexual characteristics. The other requirements of the 2004 act that relate to medical reports would remain.

Rachael Hamilton asked a question about international evidence. The committee itself looked at that. One of the people who gave evidence was the United Nations independent expert on protection against violence and discrimination based on sexual orientation and gender identity. The expert gave evidence that some of the theoretical concerns that were raised during the adoption of those processes have not materialised in the numerous countries that have implemented similar systems. The committee's stage 1 report noted that the majority of members recognised that

"when asked about evidence of abuse and concerns, no witness was able to provide concrete examples."

In short, Parliament has shown its support for the principles and purpose of the bill, which, as the long title shows, aims

"to reform the grounds and procedure for obtaining gender recognition; and for connected purposes".

I urge members to vote against these amendments.

The Convener: I invite Sue Webber to wind up and to press or withdraw amendment 2.

Sue Webber: I refer particularly to the comments made by Fulton MacGregor and by the cabinet secretary describing the amendments as being against the principles of the bill. We, too, want to safeguard trans people and to ensure that they can go through the process in as streamlined and secure a way as possible. We do not want to make life more challenging for those people. I make that clear.

As I said, a person can go through a range of life experiences in two years. Those might include changes in schooling or in the family, moving to a different part of the country and puberty, to name but a few. I think that having safeguards in place will ensure that the right decisions are made. We are talking about life-altering decisions, which are not reversible. We must look long and hard at that.

Given the comments that we have heard, and following feedback from discussions with my colleagues, I will press only amendment 2 today.

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 2 disagreed to.

Amendments 84 and 85 not moved.

The Convener: Amendment 115, in the name of Pam Duncan-Glancy, is grouped with amendment 116.

Pam Duncan-Glancy: I have lodged amendment 115 because I do not think that it is fair to exclude asylum seekers from the process. My amendment explicitly adds them to the bill, and I encourage members to vote for it for that reason.

I move amendment 115.

Tess White (North East Scotland) (Con): The Equalities, Human Rights and Civil Justice Committee's stage 1 report highlighted that there is uncertainty among stakeholders about what "ordinarily resident" means in practice. Amendment 116 seeks clarity from the Scottish Government on what it means to be "ordinarily resident in Scotland" for the purpose of obtaining a gender recognition certificate. The intention is to provide both clarity and a safeguard to prevent the potential for GRC tourism.

The explanatory notes to the bill state that

"The term 'ordinarily resident' is not defined by the Bill and thus takes its normal meaning."

That normal meaning is determined largely by case law—specifically, the Shah test.

The policy memorandum for the bill suggests that

"a person is ordinarily resident in a place if they"

have lived

"there on a settled basis, lawfully and voluntarily."

However, it also states that

"Whether a person is ordinarily resident in Scotland will depend on their individual circumstances."

Although the Scottish Government has emphasised that the concept is used in 17 acts of the Scottish Parliament, as well as in UK legislation, it is clear that the term is not understood more widely.

In her evidence to the committee, I note that Jen Ang, a human rights lawyer with JustRight Scotland, which I understand is partly funded by the Scottish Government, emphasised that

"The term 'ordinary residence' is used differently in different parts of legislation, so when it is included in a piece of legislation, it is important to define what it means specifically. It is not even to avoid unintended consequences; it is just to make it clear to everyone who is physically in Scotland whether the procedure is available to them."—[*Official Report, Equalities, Human Rights and Civil Justice Committee,* 31 May 2022; c 72.]

In Ireland, where self-identification has been in place since 2015, "ordinary residence" is also used to determine eligibility for applying for a GRC. However, the definition of "ordinarily resident" in Ireland is that

"you have been living in Ireland for at least a year or you intend to live here for at least one year."

My amendment mirrors that approach and I would be grateful if the minister would indicate whether such an approach was considered when the bill was being drafted.

I further note that the Student Awards Agency Scotland website states that the Scottish Government expects someone who is ordinarily

resident in Scotland to have made their home in Scotland with the intention of staying and living here, not just to undertake a course of study.

I will briefly address Pam Duncan-Glancy's amendment 115, which attempts to clarify the definition of "ordinary residence" in relation to refugees. I know that the committee considered that issue during the evidence that it took on the bill and that it sought further clarity from the Scottish Government. I support Pam Duncan-Glancy's policy intention in the area and urge the committee to consider defining "ordinarily resident" in the bill, so that it is clear from the outset who is able to apply and in order to prevent the potential for misuse.

The concept of "ordinary residence" engages the question of fact and degree, as well as intention. The fact that the Scottish Government chose not to define "ordinary residence" in the bill at the outset does not prevent it from doing so now. I suspect that the Government has pursued the current approach to the concept so that a great deal can go into guidance or its equivalent, which MSPs are unable to scrutinise during the passage of the bill. For that reason, I intend to move amendment 116.

Rachael Hamilton: I thank Pam Duncan-Glancy and Tess White for their constructive amendments. We are happy to support the introduction of asylum seekers to the bill, as asylum seekers can be classified as "ordinarily resident" in Scotland. I also urge members to support my colleague Tess White's amendment, which would strengthen the definition of the term "ordinarily resident" to provide clarity for everyone, including asylum seekers.

Shona Robison: The committee's stage 1 report asked for clarity on the phrase "ordinarily resident in Scotland", and we provided that in our response. For today's purposes, therefore, I reiterate that "ordinarily resident" is an established concept in several areas of law. As Tess White indicated, it is used in at least 17 acts of the Scottish Parliament and in many more UK acts, including section 3C of the Gender Recognition Act 2004, which, in relation to Scotland, enables certain persons to apply under an alternative track for a GRC if they are in a marriage that has been solemnised in Scotland or a civil partnership that is registered in Scotland. One of the conditions for such an application is that the applicant is "ordinarily resident in Scotland".

Amendment 115, in the name of Pam Duncan-Glancy, seeks to include in the definition of "ordinarily resident" a person who is seeking asylum in Scotland. I am, of course, very sympathetic to the concerns that were expressed during stage 1 about the possibility that asylum seekers who live in Scotland might not meet the requirement of being "ordinarily resident". However, an asylum seeker seeks asylum not in Scotland but in the UK, through immigration laws, which are reserved.

As I have just said, "ordinarily resident" is an established concept in law, and it is the case that, under the UK asylum and immigration system, some asylum seekers may not meet that test. Asylum seeker applicants who are not ordinarily resident in Scotland and who were not born in Scotland have a tenuous connection with our jurisdiction, which raises an issue of competence. In addition, case law has confirmed that a failed asylum seeker is not "ordinarily resident", because they do not meet the requirement that their residence is lawful. In correspondence to UK ministers, I have highlighted the committee's comments about asylum seekers, and I await their reply.

However, a route is open to asylum seekers to gain legal recognition. Although they may not meet the residency criteria in our process, they may be able to apply under the 2004 act as it applies in the remainder of the UK, as that does not specify a requirement for someone to be ordinarily resident in the UK.

For those reasons, therefore—unfortunately—I ask the committee not to support amendment 115.

Amendment 116, in the name of Tess White, seeks to strictly define the term "ordinarily resident in Scotland" as being limited to those persons who have been living or who intend to live in Scotland for a minimum period of one year. Having an intention to live in Scotland does not satisfy the test of being "ordinarily resident". Tess White's aim of redefining the term goes beyond the criteria that are established in law, against which an individual's circumstances are assessed to establish whether they are ordinarily resident: namely, that their residence here is voluntary, is for settled purposes and is lawful—without the need to establish a particular period of residence. For those reasons, I urge the committee not to support amendment 116.

The Convener: I call Pam Duncan-Glancy to wind up and to press or withdraw amendment 115.

Pam Duncan-Glancy: I thank the cabinet secretary for her answers, and I note some of the concerns about competency in relation to amendment 115. However, I believe that we need to send a signal that asylum seekers are welcome to apply for the process. I wonder, therefore, whether the cabinet secretary will consider the requirement in Tess White's amendment 116 that the applicant intends to be here for longer than a year. Most asylum seekers, I imagine, would make that declaration and believe it to be true at the

time. On that basis, will the cabinet secretary consider supporting that amendment?

Shona Robison: The issue is less about that and more about the basis on which asylum seekers are here in Scotland—the fact that they are here under immigration legislation. If Pam Duncan-Glancy was minded not to press amendment 115 at this stage, I would be prepared to work further with her, and perhaps to try to elicit a response from the UK Government in advance of stage 3 so that we can discuss it further, to see whether there is anything that we can do on the issue within the competency of the bill.

10:30

Pam Duncan-Glancy: Thank you, cabinet secretary. I appreciate that.

I am tempted to press the amendment, because I want to put on the record the strength of feeling that there is to include asylum seekers in the bill. I would welcome further discussions at stage 3 if the issue is not addressed in the committee today.

I press amendment 115.

The Convener: The question is, that amendment 115 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 115 agreed to.

Amendment 116 moved—[Tess White].

The Convener: The question is, that amendment 116 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Duncan-Glancy, Pam (Glasgow) (Lab)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 116 disagreed to.

Amendment 86 not moved.

Section 2, as amended, agreed to.

After section 2

Amendment 117 not moved.

Section 3—Notice to be given on receipt of application

The Convener: Amendment 87, in the name of Maggie Chapman, is grouped with amendments 88, 89, 91 and 141.

I draw members' attention to the procedural information relating to this group, as set out in the groupings, which points out that if amendment 91 is agreed to, I cannot call amendment 121 due to a pre-emption.

Maggie Chapman: I have made no secret of my opposition to any waiting times for the GRC application process. As we heard repeatedly in evidence, the three-month period of living in the "acquired gender" before an application and the three-month reflection period following an application before it is granted are arbitrary, unnecessary, and unusual.

I will start with the last amendment in the group—amendment 141—as I appreciate that I am unlikely to attract cross-party support for abolishing both the time periods.

Amendment 141 calls for a review of the impacts of the time periods on trans people themselves. If we retain the time periods in any form, we do so knowing that we are going against international best practice and against the advice and guidance of trans people and the organisations that directly support them, so we should put in place a clear mechanism for reviewing the impact of the time periods on trans people particularly, and that is what amendment 141 would do.

The other amendments in the group—amendments 87 to 89 and 91—come from a position of principle: that we should recognise the autonomy of trans people, and that they know their own minds. Changing one's legal gender is not something that one does on a whim. Indeed, the discussions that we have had and will have about ensuring that the gravity of making such a statutory declaration is understood make that even clearer. Changing one's legal gender is not done lightly, and those who get to the point of applying for a GRC will likely have thought about,

considered and reflected on the decision for months, if not years. They are also likely to have completed many other aspects of their transition over the course of several months or years before applying for legal gender recognition.

Dr Mhairi Crawford of LGBT Youth Scotland, who has spoken regularly to young trans people, said in a committee evidence session:

"Young people tell us that, before they come out, they have already done an awful lot of reflection to understand their true gender. Then they come out, usually to a safe group, and they build up from that. By the time they look to apply for a gender recognition certificate, they have been living in their acquired gender for quite some time".—[*Official Report, Equalities, Human Rights and Civil Justice Committee,* 17 May 2022; c 10.]

Only Belgium and Denmark have a reflection period in place. We heard evidence that, in Denmark, where there is a six-month reflection period, people in the trans community consider it patronising and were unsure of what they should be reflecting on. Having listened to trans people, they now have plans in Denmark to remove the reflection period completely.

If the bill is trying to give trans people more agency and autonomy over their legal status, it seems completely counter to that intention to impose another standard of authority by imposing a waiting period on them. We are telling trans people that we do not believe them when they tell us who they are and that they do not know their own minds. We should not be doing that. I urge my committee colleagues to assert that trans people do know their own minds and to support my amendments in the group.

I move amendment 87.

Rachael Hamilton: Given that I have lodged amendments that would increase the period for which someone must live in the acquired gender to the status quo, I believe not only that the current Scottish Government proposal of a three-month period is inadequate but that the absence of any reflection period could lead to young and distressed people rushing into life-changing decisions that they may later regret. That is especially true if it is coupled with medical alterations such as hormone or puberty blockers and surgery. Furthermore, a reflection period could prevent so-called bad-faith actors from taking advantage of the changes and intruding into single-sex spaces.

Weakening the provisions in the bill would make it even worse, so I cannot support amendments 87 to 89. However, I am happy to support amendment 141, because I believe that it is important that the Scottish Government reviews the period for which a trans person is required to live in the acquired gender. I know that Maggie Chapman wishes to reduce the period and I want to increase it, but I think that we can find common ground and agree that reviewing the evidence will allow the Scottish Government to make a more informed decision in future.

Christine Grahame: I say to Maggie Chapman that I agree that the majority of people know their own minds—and I have met some of them. Many people have been living in a different gender for a long time before they ever apply for gender recognition. That is the majority, but there are other people who will be transitional and will need a period of thought. I am looking at the balance. For those who already know and who have already been living in a gender for years, a three-month period will be nothing, because they can demonstrate that they have been doing it for years. The same applies to 16 and 17-year-olds, with regard to the six-month period in advance and the reflection period.

However, there are people for whom I want to have just a little safeguard, and particularly 16 and 17-year-olds. In no way does that take away from the autonomy of the individuals. I have met parents of a child of 10 who knew that they were really a girl—he transitioned to a she in primary school. I have talked to people in both directions about the issue before I lodged my amendments. I want to have something in law that works for as many people as possible and that provides safeguards. That is the reason that I would give to Maggie Chapman. We cannot take away all protections and safeguards.

Shona Robison: I know that the amendments reflect Maggie Chapman's view that the time period for living in the acquired gender as well as the reflection period should be removed, and that she has taken that position throughout the passage of the bill so far and in our discussions on the matter. Of course, I respect that, just as I respect the other views that have been expressed during the passage of the bill, even if I do not agree with them.

There are views that the time period should be longer or should be removed entirely, or that the reflection period should be removed, although usually with an increase in the time period for living in the acquired gender. However, I have not seen an alternative to our proposals that would be accepted and would keep to the principles of reforming the process. I consider the current requirement for applicants to provide evidence that they have been living in their acquired gender for a period of two years before applying to be unnecessarily long. A reduction in the time period to three months followed by the three-month reflection period represents a balanced and proportionate way of improving the system. Obviously, for 16 and 17-year-olds, it will be a period of six months of living in the acquired

gender, if Christine Grahame's amendments on that are accepted.

However, I consider that the reflection period could be a disproportionate barrier to people who are at the end of life, and I appreciate that an important benefit of legally changing your gender is that your death is registered in the gender in which you lived. Therefore, I have lodged an amendment to the bill, so that an applicant at the end of life can apply for a dispensation from the three-month reflection period. That amendment is in a later group of amendments. For those reasons, I cannot support amendments 87 to 89 and 91. However, I agree with Maggie Chapman that it will be important to keep that under review.

Of course, several amendments have been lodged to review and report on the operation and impact of the bill across a number of areas that we will come to later in the stage 2 proceedings. I am happy to support amendment 141 in this group, and I urge the committee to support it. It will be necessary for us to consider carefully what information and data it is possible and appropriate for us to gather, and we can take forward work on the impact of time periods on trans people who go through the application process. Therefore, I support amendment 141 in principle, but I will look to work with Maggie Chapman and other members ahead of stage 3 to ensure that any report and review amendments that are agreed at stage 2 coalesce around the same time frame.

The Convener: I call Maggie Chapman to wind up and to press or withdraw amendment 87.

Maggie Chapman: Rachael Hamilton talked about medical procedures and therapies. To be clear, that has nothing to do with an application for a gender recognition certificate. No medical process is required or expected as part of the gender recognition application process, and no GRC is required to undergo any medical transition. On Christine Grahame's comments, I believe that she is sincere in her endeavours and her position on the issue. However, we fundamentally disagree on how to come at the issue.

Finally, I thank the cabinet secretary for her comments and for the many interesting and helpful conversations that we have had on that and other issues in the bill over the past many months. I acknowledge her comments about the amendment regarding provisions for end of life, which we will come to later, and I thank her for those. I also thank her for her comments about amendment 141. However, I will press the amendments in my name that seek to remove the requirement to live in the acquired gender for three months and the three-month reflection.

The Convener: The question is, that amendment 87 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Chapman, Maggie (North East Scotland) (Green)

Against

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

The Convener: The result of the division is: For 1; Against 6; Abstentions 0

Amendment 87 disagreed to.

Amendment 88 moved—[Maggie Chapman].

The Convener: The question is, that amendment 88 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Chapman, Maggie (North East Scotland) (Green)

Against

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

The Convener: The result of the division is: For 1; Against 6; Abstentions 0

Amendment 88 disagreed to.

Amendment 38 moved—[Christine Grahame].

The Convener: The question is, that amendment 38 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Against

Chapman, Maggie (North East Scotland) (Green)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 3; Against 3; Abstentions 1

I will use my casting vote as convener to vote for the amendment.

Amendment 38 agreed to.

10:45

The Convener: Amendment 89, in the name of Maggie Chapman, has already been debated with amendment 87.

Amendment 89 moved—[Maggie Chapman].

The Convener: The question is, that amendment 89 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Chapman, Maggie (North East Scotland) (Green)

Against

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

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 89 disagreed to.

Amendment 3 not moved.

Section 3, as amended, agreed to.

After section 3

Amendment 39 moved—[Christine Grahame].

The Convener: The question is, that amendment 39 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Against

Chapman, Maggie (North East Scotland) (Green)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 3, Against 3, Abstentions 1.

I use my casting vote in favour of the amendment.

Amendment 39 agreed to.

Section 4—Grounds on which application to be granted

Amendment 40 moved—[Christine Grahame].

The Convener: The question is, that amendment 40 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Against

Chapman, Maggie (North East Scotland) (Green)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 3, Against 3, Abstentions 1.

I use my casting vote to vote for the amendment.

Amendment 40 agreed to.

The Convener: Amendment 41, in the name of Christine Grahame, has already been debated with amendment 18.

Amendment 41 moved—[Christine Grahame].

The Convener: The question is, that amendment 41 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Against

Chapman, Maggie (North East Scotland) (Green)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 3, Against 3, Abstentions 1.

I use my casting vote to vote for the amendment.

Amendment 41 agreed to.

Amendments 118 and 119 not moved.

The Convener: Amendment 120, in the name of Martin Whitfield, has already been debated with amendment 18.

Martin Whitfield: Given the indication from the Government, I will not move amendment 120 at this stage.

Amendment 120 not moved.

The Convener: Amendment 42, in the name of Christine Grahame, has already been debated with amendment 18. I remind members that if amendment 42 is agreed to, I cannot call amendment 19 because of a pre-emption.

Amendment 42 moved—[Christine Grahame].

The Convener: The question is, that amendment 42 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Against

Chapman, Maggie (North East Scotland) (Green)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 3, Against 3, Abstentions 1.

I use my casting vote to vote for the amendment.

Amendment 42 agreed to.

Amendment 90 not moved.

The Convener: Amendment 43, in the name of Christine Grahame, has already been debated with amendment 18.

Amendment 43 moved—[Christine Grahame].

The Convener: The question is, that amendment 43 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Against

Chapman, Maggie (North East Scotland) (Green)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 3, Against 3, Abstentions 1.

I use my casting vote to vote for the amendment.

Amendment 43 agreed to.

The Convener: Amendment 91, in the name of Maggie Chapman, has already been debated with amendment 87.

Amendment 91 moved—[Maggie Chapman].

The Convener: Amendment 91 pre-empts amendment 121, so I will not put the question on amendment 91 until amendment 121 has been debated.

We have come to a natural break—

Russell Findlay: Can I make a point of order?

The Convener: There are no points of order here, but do you want to make a point?

Russell Findlay: Yes, I would appreciate that.

It has been noted on social media that a member of the public who was present was wearing a purple, white and green scarf, and has been asked to either remove the scarf or leave the room. Can I seek some guidance as to why that happened?

The Convener: I will suspend the meeting and we will discuss the matter in private.

10:50

Meeting suspended.

11:11

On resuming—

The Convener: Amendment 121, in the name of Pam Duncan-Glancy, is grouped with amendments 122, 22 and 28.

Pam Duncan-Glancy: My amendment 154, which is yet to come, sets out that, before someone applies to the registrar general, they must make a statutory declaration, which must be signed by a justice of the peace, a solicitor, a notary public, a commissioner for oaths or any other authorised professional, that they are telling the truth and fulfil the criteria that are set out in the act. My amendment 122 states:

> "it is an offence to knowingly make a statutory declaration ... which is false".

I believe that, together with amendment 154, my amendments are crucial to help to build support for the bill.

Statutory declarations are serious legal documents that carry great weight, and the public have confidence in them in other situations. As I

have said on the record in the past, we need reform, with a law that works for trans people, is administrative in nature, and carries the confidence of the public with it. Statutory declarations, which are signed by a respected group of people, are a well-known mechanism in which we trust, and they could help people to understand that the process is serious.

The Government has not made that part of the process, including its seriousness, as clear to the public as is necessary. My amendments seek to address that. Amendments 121 and 122 make it clear that, if at the time that someone made a declaration, they did not intend to comply with the criteria, they would be committing a serious criminal offence.

I move amendment 121.

Graham Simpson (Central Scotland) (Con): I will not be as brief as Pam Duncan-Glancy, but I will try to be as brief as possible.

I have a couple of amendments in the group, which are, in my view, quite straightforward.

The bill proposes that it will be a criminal offence to make a false statutory declaration or a false application. A person who commits such an offence is liable to imprisonment for up to two years and/or a fine. However, what would constitute making a false declaration and what prosecutors would have to prove should a person be accused of doing so are not clear.

It might be said, "Well, it's obvious, isn't it?" If I were to say that I had been living as a woman for three months and I had not, I would not be telling the truth. Of course, it is not clear at all from the bill what living as a woman or a man means legally. We will come to that in discussing later amendments.

If I took something belonging to you, convener, that would constitute theft, and I could be prosecuted. If I had broken the speed limit to get over to Edinburgh, I could face penalty points. If I tried to pin the blame on someone else for that offence, that would be a lie, and I could be done for that. However, if I said that I had been living as a woman, how would anyone prove that I was lying? Given that we do not know what living as a woman means in the bill, it would be pretty difficult to establish whether I was telling the truth.

11:15

The bill creates a serious offence, which is punishable by imprisonment. It is surely incumbent on ministers to set out what would constitute making a false declaration. Amendment 22 would compel them to do that, and it would also compel them to set out what evidence would have to be provided to show that someone had lied. If ministers cannot do any of that, it is difficult to see how an offence could be prosecuted, because we would simply not know what the offence was. If we do not know what constitutes an offence because we do not know how to prove or disprove it, there can be no offence.

I say to those who are in favour of the bill—I think that the majority of the committee are in favour of it—that it needs to be much tighter. If amendment 22 is rejected, there will be legal challenges galore coming along the tracks. If the committee is minded to accept it, amendment 28 would make any regulations that are made as a result subject to the affirmative procedure, which would give an extra layer of parliamentary scrutiny.

Shona Robison: I welcome the conversations that I have had with Pam Duncan-Glancy about amendments that would require the statutory declaration to include confirmation that the applicant understands that making a false statutory declaration is an offence. It might be circular for the declaration about understanding that making a false declaration is an offence to then be subject to the offence provision itself, but I consider that Pam Duncan-Glancy's amendment will be an additional measure in ensuring that the applicant is aware that making a false statutory declaration is an offence, just as the notary public or justice of the peace who is administering the statutory declaration is required to ensure that the person understands the contents of what they are signing. Therefore, I ask the committee to support amendment 122.

It is already an offence to knowingly make a false statutory declaration, with the maximum penalty for the offence being imprisonment for up to two years, an unlimited fine, or both. The offence provision in section 14 of the bill also already provides that an offence is made if the declaration or other information in an application

"is false in a material particular",

and the position is the same for the existing offence.

The amendments that are proposed by Graham Simpson would require ministers to make regulations about what would constitute a false statutory declaration and the evidence that would be required. As the committee will be aware, prosecutorial policy is for the Lord Advocate rather than for ministers. As with any criminal offence, it would for the police and the procurator fiscal to demonstrate, and for the court to determine, whether an offence had been committed in any individual case.

Graham Simpson made reference to living in the acquired gender, but the point here is that there is no change to what living in an acquired gender

means. It is exactly the same as it is under the 2004 act. The requirement is not about looking or dressing a certain way; it is about the ways in which a person might demonstrate their lived gender to others. In that respect, the bill does not change the position under the 2004 act, under which examples of appropriate evidence of living in the acquired gender include updating official documents, such as a driving licence or a passport, utility bills or bank accounts. A number of other examples are given in the 2004 legislation.

With all of that said, I urge the committee not to support amendments 22 and 28.

The Convener: I ask Pam Duncan-Glancy to wind up and to press or seek to withdraw amendment 121.

Pam Duncan-Glancy: I thank the cabinet secretary for her response and for the helpful conversations that we have had about my amendments in the group. I press amendment 121.

The Convener: Before I put the question on that amendment, I will first put the question on amendment 91, in the name of Maggie Chapman, which has already been moved.

The question is, that amendment 91 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Chapman, Maggie (North East Scotland) (Green)

Against

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

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 91 disagreed to.

Amendment 121 agreed to.

Amendment 44 moved—[Christine Grahame].

The Convener: The question is, that amendment 44 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division

For

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Against

Chapman, Maggie (North East Scotland) (Green)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 3, Against 3, Abstentions 1.

I have the casting vote. I will use it to vote for the amendment.

Amendment 44 agreed to.

Amendment 122 moved—[Pam Duncan-Glancy]—and agreed to.

The Convener: Amendment 45, in the name of Michael Marra, is grouped with amendments 48 and 154.

Michael Marra (North East Scotland) (Lab): Amendments 45 and 48 seek to address concerns of the broad public regarding the robustness of the legislation. We are absolutely clear that Scotland requires a better system for trans people. There has already been discussion this morning around bad-faith actors, and I believe that the proposed system could be improved in order to command broader public support across Scotland. The system must be robust for trans people and non-trans people. In particular, it must recognise the very real concerns of women regarding the possibility of abuse of the system.

The bill is not merely an amendment to the 2004 act. Demedicalisation, which Labour supports, is a profound change and opens up the process considerably. The Government recognises that and that is one of the core purposes of the bill. As such, it requires a different kind of safeguard against those who might abuse the legislation. As it stands, a balance must be struck and I believe that more could be done to achieve that.

Amendments 45 and 48 are modelled on the process for obtaining a passport, which is a well-understood and commonly respected process for changing personal details that applies to every one of us. When someone changes that documentation it requires a signature from a person of good standing whom they know. The effect of the amendments would be to ensure that an application is made as part of the community, rather than as a solitary individual.

I thank the cabinet secretary and her officials for engaging on the amendment. The cabinet secretary has indicated that the statutory declaration is a sufficient safeguard. I ask her to put her thinking on that point on the record at this stage. I believe that that reasoning has not featured in any of the discussion of the bill, its

consultation, ministerial correspondence, the stage 1 report or the stage 1 debate. At this point, it would be good to hear the cabinet secretary's rationale.

I have concerns that a statutory declaration on its own could be seen as transactional because it amounts to a small fee being paid to a lawyer to witness a signature and say that current identity documents have been produced—it is not about knowing someone. The broader effect of amendments 45 and 48 would be to raise the bar for bad-faith actors and would increase the confidence for trans people seeking recognition.

I am keen to hear from other members and the cabinet secretary on the sufficiency of the statutory declaration in the bill as it is proposed and on the rationale for a passport-style system being too high a bar for the GRC process yet being appropriate for the process of changing personal details for every member of the public.

I move amendment 45.

Pam Duncan-Glancy: As I said earlier, amendment 154 sets out that before someone applies to the registrar general, they must make a statutory declaration, signed by a justice of the peace, a solicitor, a notary public, a commissioner for oaths or any other authorised professional, that they are telling the truth and are fulfilling the criteria in the Statutory Declarations Act 1835. My amendment 122, in the previous group, set out that it was an offence to knowingly make a statutory declaration that is false.

Pam Gosal (West Scotland) (Con): I am happy to support all the amendments in this group. Amendments 45 and 48 add a new safeguard to the bill that would require a countersignatory process to accompany any new application for a gender recognition certificate, similar to that for applying for a passport.

Although the Scottish Conservatives will be supporting amendments 45 and 48, we make it clear that that safeguard is not enough. However, it is an improvement on the existing provision in the bill, which is why we will support the amendments.

I would prefer existing legal safeguards to be retained, as my colleagues have already set out. We should, in particular, keep the age at which one can apply for a GRC at 18, keep the period in which one must live in an acquired gender at two years, and retain the need for a medical diagnosis when applying for a GRC. However, Michael Marra's amendments improve the bill as drafted, so I am content to support them.

Amendment 154 provides a concrete definition of what a statutory declaration would entail. I put it on record that I do not think that that is enough; applications should also be accompanied by an associated medical diagnosis and a longer period lived in the acquired gender should be required. However, given that the Scottish Government has failed to properly define what a statutory declaration entails, amendment 154 at least provides a definition that already exists in law and that has been used for some time: namely, that provided in the Statutory Declarations Act 1835. I hope that that will bring greater clarity to the bill, which is why I am happy to support amendment 154.

Maggie Chapman: I find Michael Marra's amendments 45 and 48 to be very problematic.

One of the key principles of the bill is that of self-declaration: that trans people should be able to get a gender recognition certificate by a process of self-identification. More than two thirds of us agreed to that in the stage 1 debate a couple of weeks ago. However, amendment 48 would require a person from a listed recognised profession who has known the applicant for at least two years to countersign the trans person's application. That is fundamentally at odds with the idea that the bill is based on—the principle of self-declaration. In addition, it would create additional barriers to legal recognition for some trans people.

I say for the avoidance of doubt that statutory declarations are not something that you can make to a friend or a neighbour on a whim. They are sworn statements made under oath and witnessed by a justice of the peace, local councillor or notary public, and making a false statutory declaration carries a sentence of up to two years in prison. That is already a significant and serious step. In my opinion, the opinion of many who work with and support trans people, and that of trans people themselves, there is no value in requiring an additional step through countersignatories.

Michael Marra compares the matter with the passport application process, but passport applications do not require a statutory declaration; they simply require a witness. It is not appropriate for an outsider to have to confirm a person's gender identity.

It could also be difficult for more socially isolated trans people to find someone in a recognised profession that is listed in amendment 48 who has known them for two years. I do not think that that should prevent them from obtaining legal recognition of who they are.

I strongly urge colleagues to vote against amendments 45 and 48.

Fulton MacGregor: Although they are well intentioned, I am unable to support Michael Marra's amendments 45 and 48. I do not think the comparison with the passport process is a good one. As I mentioned earlier, the core purpose of

the bill is to make the process easier for trans people.

Michael Marra suggested that the amendments would raise the bar for bad-faith actors. We have had a discussion about bad-faith actors. We need to use stages 2 and 3 to further consider the issues, as happened with Pam Duncan-Glancy's amendment in the previous group, and we need to do more on bad-faith actors. However, Michael Marra's amendments raise the bar for all trans people and go against all the principles of the bill, on which the committee has taken a lot of evidence and produced a stage 1 report. I will not support amendments 45 and 48.

11:30

Karen Adam: I will be voting against Michael Marra's amendments 45 and 48. They are really problematic, in that they are very middle-class focused. We have to look at the variety of people who will come forward for a GRC. The amendments are not inclusive of people from various different backgrounds. Sometimes we have to be careful when we say the word "safeguarding" when, in fact, we are talking about gatekeeping. That is what I feel is involved in the amendments. It is certainly gatekeeping, and what is proposed is against all the principles of the bill. The purpose of gender recognition reform is to make the process more progressive and easier for trans people to obtain a gender recognition certificate. I do not believe that the amendments would do that, so I will vote against them.

Shona Robison: I will take a moment to set out the process, as I have done in writing for the committee.

Before making an application to the registrar general for Scotland, a person must first make a statutory declaration. In that statutory declaration, the applicant must declare that they are aged at least 16; were born in, or are ordinarily resident in, Scotland; have lived in their acquired gender for at least the previous three months, or six months for 16 and 17-year-olds; and intend to live permanently in their acquired gender. A statutory declaration is an existing feature of the current process for obtaining legal gender recognition, and a feature that we are maintaining in our system.

A statutory declaration is a serious and significant matter. In Scotland, statutory declarations under the bill will be made in the presence of a notary public or a justice of the peace. Guidance on acting as a notary public is provided to solicitors by the Law Society of Scotland. The notary must be satisfied as to the identity of the applicant, based on evidence if the person is not known to them, and they must be satisfied that the applicant understands the contents of the statutory declaration. That could require photographic identification, such as a passport or a driving licence.

A statutory declaration is like an affidavit. It is a formal statement that something is true to the best of the knowledge of the person who is making the declaration. It is provided for by the long-standing Statutory Declarations Act 1835, and it is an accepted way of establishing facts in numerous official contexts.

It is a criminal offence to knowingly make a false statutory declaration or to provide false information in an application. The maximum penalty for those offences is imprisonment for up to two years or an unlimited fine—or, indeed, both.

Once a person has made the required statutory declaration, they must provide that to the registrar general when they make an application for a GRC, with all the safeguards associated with that stage.

I welcomed the discussion that I had with Michael Marra about his amendments. However, I consider that the statutory declaration is sufficient. Michael Marra's amendments would not materially add to the requirement to make a statutory declaration; indeed, as others have said, they would be further barriers for a person accessing their rights, with a prescriptive list of recognised professions in amendment 48.

I have concerns about the countersigning requirement and how it might work in practice. For example, if an individual has been living in their acquired gender for a long time, that might require them to disclose their trans status to someone whom they have known for years who may be completely unaware of that.

I understand that applying for a passport involves a countersignatory process. However, applying for a passport does not involve making a statutory declaration. As I said, that statutory declaration could well require photographic identification, such as a passport or a driving licence.

Finally, the statutory declaration is clearly a higher threshold, given that criminal offences are associated with it.

Rachael Hamilton: Can you clarify the point that you made about notaries public? I presume that that referred to witnesses of declarations of living in the acquired gender. Who are those notaries public? Do they include city councillors?

Shona Robison: Notaries public are quite often solicitors, and justices of the peace can sometimes be city councillors. They are well established in a number of pieces of legislation, and the Law Society of Scotland provides guidance to solicitors who act as notaries public.

Rachael Hamilton: Thank you, cabinet secretary. So—despite some murmurs from your officials to the side—city councillors can be included in that.

Shona Robison: Justices of the peace sometimes are city councillors, I think.

My officials tell me that that is correct.

Michael Marra: I thank committee members for their feedback and the discussion on my amendments. I take on board in particular the constructive comments from Fulton MacGregor and Karen Adam regarding some of the specific detail.

I disagree, in a broader sense, that the amendment goes against the principles of the bill. The bill as it stands significantly liberalises the process—rightly so, in the demedicalisation that it achieves. Amendment 45 is about putting a further safeguard in place in the bill as it stands, so I do not agree that it goes against its principles.

That being said, I am very keen to look for a sensible centre ground that can command the broadest possible public support. I still think that there is work to be done in this area. Taking on board those comments from colleagues, I ask members to allow me to continue to pursue conversations with colleagues in committee and elsewhere, so at this stage I ask the committee's leave to withdraw amendment 45.

The Convener: Are members agreed?

Karen Adam: No. I ask that the amendment goes to a vote, because I would like to see the committee's conclusion at this stage.

The Convener: In that case, we will go to a vote. The question is, that amendment 45 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 2, Against 4, Abstentions 1.

Amendment 45 disagreed to.

Amendment 46 moved—[Christine Grahame].

The Convener: The question is, that amendment 46 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Against

Chapman, Maggie (North East Scotland) (Green)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 3, Against 3, Abstentions 1.

I therefore have the casting vote, and I use it to vote for the amendment.

Amendment 46 agreed to.

Amendment 123 moved—[Russell Findlay].

The Convener: The question is, that amendment 123 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 123 disagreed to.

The Convener: Amendment 47, in the name of the cabinet secretary, is grouped with amendments 52, 54, 55, 59 to 63 and 66 to 68.

Shona Robison: The first 10 amendments in the group seek to make a change in the bill as introduced. The bill currently requires the registrar general to grant an application for a gender recognition certificate if the applicant meets the requirements in the bill. That means that if the registrar general considers that an application was fraudulent or that the applicant was not able to understand the process, they would, if the applicant otherwise met the requirements, first have to issue the certificate and then apply to the sheriff for the certificate to be revoked.

To avoid that situation, those 10 amendments would allow the registrar general to apply to the sheriff before a certificate is issued. That is much more appropriate than having the registrar general issue the certificate first and then apply to the sheriff for it to be revoked. The court would then determine whether the application should be rejected or should proceed.

Amendment 67 adds to the grounds on which a person with an interest can apply for revocation of a GRC, specifically in the case of a confirmatory GRC, if the overseas gender recognition that was the basis for it has subsequently "ceased to have effect". If the overseas gender recognition has been revoked, for whatever reason, an application for revocation of the confirmatory GRC could be made. That provision is unlikely to be used frequently but, given that overseas gender recognition is the basis for a confirmatory GRC, it is reasonable to provide for that eventuality.

Amendment 68 provides clarity that the standard of proof for an application to a sheriff is that, on the balance of probabilities, the GRC application was fraudulent. That is consistent with the usual standard of proof in a civil case, rather than the criminal standard of something being beyond reasonable doubt. That is appropriate, given that, in this case, the sheriff's decision is on whether the GRC should be revoked, not on whether something is a criminal offence.

I move amendment 47.

Amendment 47 agreed to.

Amendment 124 not moved.

The Convener: Amendment 20, in the name of Graham Simpson, is grouped with amendments 27, 29 and 30. I call Graham Simpson to move amendment 20 and to speak to all the amendments in the group.

Graham Simpson: The meaning of the phrase "living in the acquired gender" is fundamental to the bill. I have searched high and low for an explanation of what has to happen if, for example, a man was to say that they were a woman; surely, the bill does not allow for a man simply to say, "I am a woman", get a certificate to say so without providing evidence of anything, and then have that legally recognised through a change to their birth certificate—or am I missing something? I do not think so.

The bill says that I would have to live as a woman for three months. However, if we are to bring in a bill that is as fundamental to people's lives as this one, we need to be clear on what is meant by it. The bill is woolly at best, and that is not good enough. If we are going to allow people to make declarations that they have changed gender, surely the law should say what is meant by that. The bill does not do that; indeed, it does not say anything about it, which is particularly concerning if we are moving towards a model of self-identification. Surely, something has to have changed in order for someone to say, "I was a man but now I am a woman" or vice versa.

Amendment 20 is another attempt by me to tighten up a bill that is full of holes. It does two things. It says that ministers must say in regulations, first, what they mean by the phrase "living in the acquired gender" and, secondly,

"what changes would be considered evidence that a new gender had been acquired."

It is not for me to say what such changes should be—just that there should be some. Otherwise, we will be left with a situation in which it is easier for predatory men to prey on women by pretending to be women, because of having a certificate without any of the current safeguards that exist in law—a piece of paper that, as the bill is currently drafted, proves precisely nothing.

Amendment 27 makes those regulations subject to the affirmative procedure, and amendments 29 and 30 are technical and consequential.

I move amendment 20.

Shona Robison: To say that someone is "living in the acquired gender" means that they are living their daily life in a gender that is different from that which was recorded at birth. In the context of the bill, that is the gender that they are living in when they make an application.

Applicants will have to make a statutory declaration that they have lived in their acquired gender for a minimum of three months—six months for 16 and 17-year-olds—before applying, and that they intend to do so for the rest of their lives.

The aim of the bill is to improve the process for those who apply for legal gender recognition, as the current system can have an adverse impact on applicants due, in part, to the burdensome evidence requirements. The bill establishes a more straightforward process that is based on statutory declaration.

As I indicated earlier, the requirement is not about looking or dressing in a certain way but about the ways in which a person may demonstrate their lived gender to others.

In that respect, the bill does not change the position in the 2004 act, in which examples of appropriate evidence of living in the acquired gender include updating official documents such as a driving licence, passport, utility bill or bank account. Numerous other examples are provided within the guidance on the 2004 act, which has now been in place for 18 years.

11:45

Graham Simpson: Cabinet secretary, I am interested in what you are saying. Can you spell out some of the "numerous" other examples?

Shona Robison: The guidance to the 2004 act uses examples that include consistently using titles and pronouns in line with the acquired gender, updating gender-marker official documents such as a driving licence or passport, updating utility bills or bank accounts, describing themselves and being described by others in written or other communication in line with their acquired gender and using a name that is associated with the acquired gender.

Those are examples of what could constitute living in the acquired gender. The bill does not change the position in the 2004 act.

I do not consider that amendments requiring applicants to provide evidence that they have been living in their acquired gender, beyond any evidence that is required for statutory declaration, are in keeping with the general principles of the bill, as supported by Parliament at stage 1. Such amendments would introduce another set of barriers. For that reason, I ask the committee to reject Graham Simpson's amendments.

The Convener: Rachael Hamilton has a question.

Rachael Hamilton: My question is on a point of clarification. On 6 October, the committee agreed that interpretations of whether someone was living in the acquired gender could lead to reinforcement of gender stereotypes and that it would be unacceptable to enshrine that in law. Do you agree with that?

Shona Robison: That is why I have said that the requirement is not about looking or dressing a certain way but about the ways in which a person may demonstrate their lived gender to others. I have given examples of how that might be done with documentation that might provide evidence about how people are living their lives. National Records of Scotland will provide guidance for applicants on how to make an application and will be able to refer to examples based on the guidance to the 2004 act.

Rachael Hamilton: To clarify, will that be in the guidance for the registrar general? Will there be a definition of what it means to live in an acquired gender?

Shona Robison: We will try to provide as much information as possible, but that will be based on what is already in the 2004 act and on those examples. We want to provide people with as much clarity and information as possible. The registrar general's website will have all of that information.

The Convener: I invite Graham Simpson to wind up and to press or withdraw amendment 20.

Graham Simpson: I always think that it is useful during stages 2 and 3 of a bill to listen to what is being said by people one might assume one disagrees with. I think that there is probably some common ground between me and the cabinet secretary. She may not realise that, but I think that there is. She can intervene on me at any point.

Amendment 20 simply seeks to get the Government to spell out what we mean by "acquired gender" because I have seen nothing about that until today. The cabinet secretary listed a few things. I would be happy to work with the cabinet secretary ahead of stage 3 to see if we can insert something into the bill, based on what she has said, that will help to clarify matters, if she is prepared to do that. I invite her to respond to that.

Shona Robison: My approach has always been to keep an open door and I have spoken to people from all political parties about all these matters.

My principle is not to move beyond the examples given for the 2004 act, because I think that they provide clarity. We will want to ensure that people are aware of those. I take Graham Simpson's point about the need to make people aware of the information. For example, the registrar general's website, where every bit of information about the whole process can be put in one place, would be able to include those examples.

I would be reluctant to put anything into the bill that goes beyond the 2004 act, but if you think that it would be helpful to have further information on the website or in guidance, I will be happy to have that conversation. I am happy to speak to Graham Simpson further anyway, but I cannot guarantee that I would go beyond the 2004 act.

Graham Simpson: That is helpful. I can see that you are struggling to agree with me. I will help you: I will engage with you and not press amendment 20. I think that we can find common ground ahead of stage 3. I hope that we can, because that would be helpful to everyone. As experienced members know—certainly those of us who have served on the Delegated Powers and Law Reform Committee—it is very difficult, not just for MSPs but for members of the public, to jump between pieces of legislation, so it is useful to have everything in one place.

I will not press amendment 20, on the basis that I think that we can work on an amendment for stage 3.

Amendment 20, by agreement, withdrawn.

Amendment 4 not moved.

Section 4, as amended, agreed to.

After section 4

Amendment 48 not moved.

Amendment 92 not moved.

Amendment 125 moved—[Russell Findlay].

The Convener: The question is, that amendment 125 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 125 disagreed to.

The Convener: Amendment 126, in the name of Pam Duncan-Glancy, is grouped with amendments 49, 50, 51, 72 and 73. I call Pam Duncan-Glancy so move amendment 126 and speak to all the amendments in the group.

Pam Duncan-Glancy: Thank you—give me a second to get to the correct page in my notes.

The intention behind amendment 126 is to ensure that someone who is nearing the end of their life does not have to wait unnecessarily to have their gender recognised in legislation. I lodged the amendment because I think that the reflection period should be waived for people in that situation.

I recognise that the Government has lodged amendment 49 on the matter and I welcome its agreement to work on it before stage 3.

In amendment 126, I use the definition of "terminally ill" that is used in social security legislation in Scotland, which I think is a good definition. I do not intend to press amendment 126, but I would welcome the Government agreeing to work with us to ensure that someone who is at the end of their life can get a gender recognition certificate as quickly as possible and to consider using the definition from social security legislation.

I move amendment 126.

Shona Robison: Although there was no specific recommendation in the stage 1 report, the committee highlighted differing views on the reflection period and invited me to consider it further. I noted the stage 1 evidence that the reflection period could present a disproportionate barrier to an applicant who is nearing the end of their life because of illness.

As I said in the context of an earlier group of amendments, we remain of the view that the reduction in the minimum period of living in the acquired gender to three months, or six months for 16 and 17-year-olds, combined with the introduction of a three-month reflection period, represents a balanced and proportionate way of reducing the length of the overall process.

However, in the response to the committee's stage 1 report, I undertook to lodge amendments to create a dispensation to allow the waiving of the three-month reflection period in cases where the applicant is nearing the end of their life.

My amendments in this group create that dispensation. They have been developed in consultation with National Records of Scotland and reflect the process and provisions with similar dispensations applying to marriage under the Marriage (Scotland) Act 1977. They would require the registrar general to be satisfied that the applicant is

"gravely ill and not expected to recover."

In practice, that would be established through a letter from the applicant's doctor confirming it, and the detail would be set out in guidance. Again, that reflects the equivalent process with marriage applications.

Amendment 73 ensures that a fraudulent application for dispensation would be included in the offence created by the bill.

Pam Duncan-Glancy's amendment 126 seems to have a similar goal, but it takes a different and, in my view, narrower approach. It disapplies the requirement for notification after the reflection period where the applicant is terminally ill, rather than empowering the registrar general to waive it. I understand why that approach might seem more attractive, but in practice the registrar general in either version would need to establish that the individual is indeed near the end of life.

We are not seeking to provide a definition of an end-of-life illness, such as amendment 126 does, as we recognise that someone could be gravely ill and at the end of life due to old age, for example, not just through a terminal illness due to a progressive disease, as outlined in Pam Duncan-Glancy's amendment 126. Although that approach is appropriate in the Social Security (Scotland) Act 2018, in which a definition is needed with regard to accessing disability benefits at a higher rate and on a fast track, I do not believe that it is

appropriate here, where we are waiving a reflection period for someone at the end of life due to illness or old age.

The use of the wording

"gravely ill and not expected to recover"

in my amendments matches the wording in the 1977 act and the registrar general is already familiar with making dispensations on that basis. It is preferable to align the provision with that for marriage, rather than with the provisions for social security, because it is a more closely comparable situation. The provision is designed for cases where there is a high risk that the applicant will die before an important change to their legal status can be made—one that it is important to accurately record before death.

I ask the committee to reject Pam Duncan-Glancy's amendment 126 and accept the amendments in my name. I am, of course, happy to continue discussions with Pam Duncan-Glancy, but I have set out to the committee a rationale for why it is more appropriate to align the requirements with those already recognised for marriage, rather than with those in social security legislation.

Rachael Hamilton: On the basis of what Pam Duncan-Glancy said, I am sympathetic to amendment 126, and so is my colleague Pam Gosal. However, I want reassurance from the cabinet secretary. Are you expecting the registrar general to make a clinical judgment on whether a person is terminally ill, rather than a healthcare professional?

Shona Robison: No. That is why I said that, in practice, that would be established through a letter from the applicant's doctor confirming that the person is

"gravely ill and not expected to recover",

and that the detail of that would be set out in guidance. It would not be for the registrar general to decide; the decision would be made on the basis of the clinical information provided to the registrar general.

Rachael Hamilton: But that would not be in the bill.

Shona Robison: It would be in guidance.

Pam Duncan-Glancy: I thank the cabinet secretary for setting out her position on the record. I am satisfied with the way that she has described what she is trying to do. I was seeking to make the provision not narrower, but broader, but I understand the cabinet secretary's rationale, so I will not press amendment 126 and I will vote for her amendments.

Amendment 126, by agreement, withdrawn.

12:00

Amendment 127 moved—[Russell Findlay]

The Convener: The question is, that amendment 127 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Abstentions

Duncan-Glancy, Pam (Glasgow) (Lab)

The Convener: The result of the division is: For 2, Against 4, Abstentions 1.

Amendment 127 disagreed to.

The Convener: Amendment 128, in the name of Sarah Boyack, is grouped with amendment 71.

Sarah Boyack (Lothian) (Lab): Amendment 128 builds on the recommendation in point 278 of the committee's stage 1 report. The aim of the amendment is to require the Scottish ministers to

"take steps to ensure that ... appropriate support and information"

is put in place to support any

"individuals who are considering"

and/or who make

"an application for a gender recognition certificate".

In my opinion, the wording of the amendment gives the flexibility that we need. It would be for Scottish ministers to determine what the appropriate support and information is, but the flexibility will ensure that the information and support that is provided can be tailored to the needs of an individual and can change over time, as required, as a result of experience with the legislation.

The committee recommended in its stage 1 report that the Scottish Government should commit to putting in place "appropriate support and signposting", and I strongly welcome that recommendation. It followed evidence that the committee heard, particularly that from the children's commissioner, who said in oral evidence:

"Protection and participation rights are not mutually exclusive, and we are looking for a process that recognises not only the growing autonomy of young people but the need to support and protect them."—[*Official Report, Equalities, Human Rights and Civil Justice Committee*, 24 May 2022; c 13.]

That evidence reflects the concerns that have been raised with me by constituents across the Lothians who have already gone through the process of obtaining a GRC. They definitely welcome the simplification of the process for the future. However, they have highlighted to me that it would have been much more helpful for them to have signposting, advice and support. They would have welcomed that before they transitioned, so they think that, for the future, particularly given that more people are likely to take the opportunity of applying for a GRC, support must be provided for them.

In some cases, it could be health support and intervention. However, the latest Public Health Scotland data for June 2022 shows that only 70 per cent of children and young people who were referred to child and adolescent mental health services were seen within the 18-week target waiting time. Similarly, the waiting times for gender identity clinics currently range anywhere from one-and-a-half to three years, so there is an issue about ensuring that a range of advice is available for people. I reiterate that it should not be focused solely on medical support and/or intervention, although that is important, but a range of non-medical advice and support, including from the public and voluntary sectors, could be provided to people who are considering going through the GRC process.

We are looking for signposting and a commitment in principle, but I have been careful not to be specific because I am conscious that if the amendment is too specific the cabinet secretary will no doubt immediately rule me out of order. I am trying to frame my amendment in a way that I hope will be helpful and reflect what the committee concluded from the evidence that it heard.

I move amendment 128.

Christine Grahame: Amendment 71 in my name is supported by Jackson Carlaw. It inserts a new section on publication of information about the process, which sets out a mandatory duty on the registrar general for Scotland to publish online information covering, inter alia, "the effect of" and

"how to make an application for a gender recognition certificate, ... the requirement to make a statutory declaration"

before applying, and

"the consequences of making"

a false application. One of my amendments, which was agreed to, has made a change so that that will not be a criminal offence for 16 and 17-year-olds.

There is also a catch-all—those are useful when setting out such measures—that is about other relevant information that the registrar general "considers appropriate". All that will ensure that all applicants can easily access information to inform them about their decision to apply for a GRC.

To address a point that Sarah Boyack raised, I have had clarification from the Scottish Government that it remains the intention that National Records of Scotland would signpost 16 and 17-year-olds to appropriate sources of support. Similarly, NRS would signpost all applicants to information on how to make a statutory declaration.

Sarah Boyack's amendment 128 is, I think, well intentioned, but it is too broad. For example, it says that ministers "must take steps", but I do not know what that means. It says that applicants should

"have access to appropriate support and information."

Is that before the application, during the application process or when transitioning? We need more information on what "appropriate support and information" would be.

Some of that has been dealt with earlier in my amendment 39, certainly in relation to 16 and 17-year-olds getting advice, support and counselling from appropriate people, and of course anybody over that age could do so. That would be mandatory for 16 and 17-year-olds, but not for adults. Amendment 128 is well intentioned, but my amendment 71 is much more specific and links to earlier amendments that were agreed to on support and advice at the point when people make an application. To an extent, that has tightened up the bill.

That is all that I have to say, which was enough.

Shona Robison: I have said throughout the passage of the bill that it is essential that all applicants for a GRC have carefully considered this important legal step, understand the effect of applying and are able to access information and guidance to inform their consideration. I welcome the discussions that I have had with Sarah Boyack, whose amendment 128 would place a legal requirement on the Scottish ministers to take steps to ensure that those who are considering an application

"have access to appropriate support and information."

However, that leaves open a lot of questions about what specifically that "appropriate support and information" would be. For example, it is not clear whether it relates to the process and legal effect of gender recognition or to wider support for people considering transition generally. It also raises the possibility of legal challenge relating to the specific meaning of "appropriate" in this context. I reiterate that NRS will signpost people to other organisations that can provide specialist

support to applicants. For those reasons, I cannot support Sarah Boyack's amendment, and I urge the committee to reject it.

Christine Grahame's amendment 71 is more specific and sets out the information that the registrar general should publish, covering the process of applying, the effect of a GRC, the statutory declaration requirement and the consequences of false application. That is in line with what the registrar general has already committed to do, in evidence to the committee. I therefore ask the committee to support Christine Grahame's amendment.

Rachael Hamilton: Cabinet secretary, I am very supportive of Sarah Boyack's amendment and I am disappointed that you have highlighted its inconsistencies, despite the fact that Sarah Boyack said at the outset that it is a generalised and probing amendment. I think that it could be complemented by giving the Scottish ministers a duty to report on some of the issues that Sarah Boyack is trying to raise. The amendment complements the reporting requirements that Christine Grahame is seeking to introduce, as well as the provisions on data collection. Normally, the Scottish ministers are responsible for data collection.

I therefore ask you to change your mind, cabinet secretary, and to work with the Conservatives and Labour to find something on which we can all agree. Quite frankly, the process has not had much cross-party consensus, but this is one area where I think that we can work together.

Shona Robison: First, let me say that Sarah Boyack's amendment is not really about reporting; it is about the appropriate support and information that would be made available to people. We have to be clear about what that is, who provides it and what it is for. If it is about the process, that will already be provided for. The additional safeguards in Christine Grahame's amendment lay out the process for 16 and 17-year-olds, so that is all there.

On Rachael Hamilton's final point, I have spent a lot of time in meetings with members from across the Parliament, including her and others from the Conservative Party, Pam Duncan-Glancy, Sarah Boyack and other Labour members.

Christine Grahame: I remind Rachael Hamilton that Jackson Carlaw supported my amendment. That is cross-party consideration; we considered the issue and came together on it, so it is unfair to say that there has not been cross-party consideration, certainly on my amendment.

Rachael Hamilton: I remind the member that we had a free vote in our party.

Shona Robison: Christine Grahame makes the important point that there has been cross-party support for aspects of various amendments, which is a good thing. I have said previously, have said today and will say again that my door remains open for further discussions in advance of stage 3. I feel, and I hope that others feel, that I have had constructive discussions, and where I have been able to support and work with people on amendments—

Sarah Boyack: You said that words in my amendment were legally challengeable, and you specified "appropriate support". What would be legally challengeable in that phrase? I kept it so that it is not heavily detailed in order to give you flexibility in defining what would be appropriate—it would be for ministers to judge what was appropriate.

Shona Robison: I say to Sarah Boyack, as I said to Pam Duncan-Glancy when we had this discussion, that the question is what that would mean. Would it mean that Scottish ministers would decide which organisations people should be signposted to? I can see that that would get us into a great deal of difficulty, so I would be very resistant to that. If it is about the process, I absolutely agree with Sarah Boyack; the process needs to be made very clear. However, if it is about the type of support that people should receive, it would not be helpful for Scottish ministers to identify appropriate organisations to provide support.

That is where my concerns lie. I again point to Christine Grahame's amendments, which focus on the process of applying, the effect of the statutory declaration requirement and the consequences of a false application. Having said that, I would be happy to continue to have discussions with Sarah Boyack in advance of stage 3, but for today's purposes I ask that Sarah Boyack's amendments are not supported and that Christine Grahame's amendment is.

Sarah Boyack: It is good to hear people's views on the matter. I have no objection to Christine Grahame's amendment. It is good, because it would provide a formal process for applying for a gender recognition certificate, but there are wider issues to address before someone gets to that stage, when they need information and support.

Having a wider range of support is critical, which is why I was keen for Scottish ministers to be able to decide what the steps are. For example, there is interdepartmental work across different Government departments such as education and health where wider support is needed. We must also think about the range of available support, because the Scottish Government will no doubt fund the provision of support, not only within Government but with third sector organisations

and charities, which the Government does already. I was trying to be helpful in saying that that does not happen at the moment.

12:15

Christine Grahame: Forgive me—you will know this if you were listening to the early part of our proceedings—but amendment 39, which has been agreed to by the committee, is on additional guidance, advice and support for young applicants prior to their making an application. That amendment sets out that the applicant must confirm to the registrar general that they have

"discussed the implications for the applicant of obtaining a gender recognition certificate with an individual who—

(a) has a role which involves giving guidance, advice or support to young people".

Therefore, that is there at the beginning.

Sarah Boyack: I heard that debate.

Christine Grahame: I thought you might have done.

Sarah Boyack: I was listening to it in my office. I totally welcome that provision, but the people who came to me were not young. It is particularly an issue for young people—16, 17 and 18-year-olds—but there are older people who need such advice. I think that the advice that you have recommended in relation to the registrar general is good, but there is other advice that is needed. In particular, a range of mental health support and counselling is needed, as well as wider advice. That advice would be provided by a range of organisations, voluntary and statutory.

Amendment 128 is meant to be a constructive amendment. If the cabinet secretary is saying that the use of the term "appropriate" is what is wrong with my amendment and that she is prepared to discuss that, I would be prepared to seek to withdraw it today and to come back to the issue at stage 3.

I simply wanted to clarify that I do not see amendment 128 as replicating amendment 71 or amendment 39, both of which are good amendments. Amendment 128 takes those provisions further and opens out support to the wider community of people who need it.

The Convener: Are you pressing or withdrawing your amendment?

Sarah Boyack: If the cabinet secretary is prepared to discuss the term "appropriate", I am happy to seek to withdraw amendment 128. Cabinet secretary, are you objecting totally to amendment 128, or are you prepared to discuss the term that you identified in your comments?

Shona Robison: I would be pleased to have further discussions with Sarah Boyack. For the avoidance of doubt, we want to avoid listing organisations that we deem to be appropriate to provide support. I do not think that that would be a wise thing for the Scottish ministers to do.

With that caveat in place, if Sarah Boyack is happy to have further discussions, I am happy to have such discussions.

Sarah Boyack: Absolutely. Those organisations will change over the years. There is no set or perfect list of organisations. I think that the bill will lead to more organisations providing support. The issue is how people know that they exist. That is the issue that I sought to address by lodging amendment 128.

On that basis, I seek to withdraw amendment 128, but I intend to come back to the issue at stage 3, after having had conversations with the cabinet secretary.

Amendment 128, by agreement, withdrawn.

Section 5—Statutory declarations and other evidence in relation to marriage or civil partnership

Amendment 5 not moved.

Section 5 agreed to.

Section 6—Certificate to be issued

Amendment 6 not moved.

Section 6 agreed to.

After section 6

Amendment 49 moved—Shona Robison—and agreed to.

Section 7—Issue of full gender recognition certificate to person with interim certificate

Amendments 50 to 52 moved—Shona Robison—and agreed to.

The Convener: We turn to the next group, "Minor and technical amendments". Amendment 53, in the name of the cabinet secretary, is grouped with amendments 64, 65, 69, 70, 78, 79 and 82.

Shona Robison: As the name of the group suggests, the amendments in this group are of a minor and technical nature. Amendments 53, 64, 65, 69, 70, 78 and 82 have been lodged at the suggestion of the Scottish Courts and Tribunals Service. The bill refers in a number of places to the role of the sheriff, either in giving notice that a certificate has been issued or in giving copies of such certificates to the registrar general. Although that is technically competent, the Scottish Courts

and Tribunals Service has suggested that for the sake of clarity those references should instead be to the sheriff clerk as, in practice, it would be the sheriff clerk who would carry out that function.

Amendment 79 relates to a consequential amendment to the 2004 act, which was inadvertently omitted from the bill as introduced. This amendment repeals subsection (1C) of the 2004 act, which provides that, where a full GRC is issued by the gender recognition panel to a person who is a party to a civil partnership or

"a marriage under the law of Northern Ireland ... the Secretary of State must send a copy of the certificate to the Registrar General for Northern Ireland."

The bill already repeals a similar provision in relation to England and Wales, and amendment 79 does so for Northern Ireland as well.

I move amendment 53.

The Convener: No other member has indicated that they wish to speak, so I ask the cabinet secretary to wind up and say whether she wishes to press or withdraw amendment 53.

Shona Robison: I have nothing else to say. I press the amendment.

Amendment 53 agreed to.

Amendments 54 and 55 moved—[Shona Robison]—and agreed to.

Amendment 7 not moved.

Section 7, as amended, agreed to.

Section 8—Gender recognition obtained outwith Scotland

Amendment 56 moved—[Shona Robison]—and agreed to.

Amendment 32 not moved.

Amendment 93 not moved

Amendments 57 to 59 moved—[Shona Robison]—and agreed to.

Amendments 33 and 34 not moved.

Amendment 8 moved—[Rachael Hamilton].

The Convener: The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 8 disagreed to.

Section 8, as amended, agreed to.

Before section 9

Amendment 60 moved—[Shona Robison]—and agreed to.

Amendment 129 moved—[Russell Findlay].

The Convener: The question is, that amendment 129 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 129 disagreed to.

Section 9—Review and appeal of decisions

Amendments 61 and 62 moved—[Shona Robison]—and agreed to.

Amendment 94 not moved.

Amendments 63 to 65 moved—[Shona Robison]—and agreed to.

The Convener: Amendment 95, in the name of Maggie Chapman, is grouped with amendments 130, 96, 97 and 132.

Maggie Chapman: We heard many of the witnesses express very grave concerns about the provisions in the bill as it stands that will expand the definition of a "person with an interest" who could apply for a GRC to be revoked. That would substantially increase the risk that someone who disapproved of a trans person's gender recognition certificate application would seek to use the courts to have that certificate revoked. Such vexatious or malicious complaints to the sheriff court to revoke a GRC, simply because someone does not accept the trans status of the GRC applicant, should not be enabled. If such applications for revocation ever happen, they

should be viewed as vexatious and/or malicious and treated accordingly.

One mechanism to reduce the opportunity to make vexatious or malicious applications for revocation is to clearly and narrowly define who a person with an interest is. The 2004 act defines a person with an interest quite narrowly as a spouse, the registrar general or the secretary of state. My amendment 97 would replicate that narrower definition to include a spouse, civil partner, the registrar general and the secretary of state. The aim is to limit the likelihood of unsupportive family members, or others who disapprove of a trans person's right to be who they are, using the mechanism to challenge a GRC.

My amendment 95 seeks to put in place a step before any revocation application gets to the sheriff court, by requiring it to go through the registrar general's office first. The registrar general would then determine whether it was appropriate to escalate such a revocation application to the courts. However, I think that Pam Duncan-Glancy's amendment 130 is better than mine, so I will not press my amendment 95 and will instead support hers.

On the penalties for those who seek to revoke a GRC for vexatious or malicious reasons, my amendment 96 is, essentially, a probing amendment in an attempt to have a wider conversation before stage 3 to tighten up that bit of the bill. I will not move amendment 96 as, again, I think that Pam Duncan-Glancy's amendment 132 covers that aspect more effectively. Nonetheless, I consider that we need further conversation to make it absolutely clear that malicious or vexatious attempts to revoke a gender recognition certificate will not be allowed, and will be taken very seriously when they happen.

I move amendment 95.

The Convener: I call Pam Duncan-Glancy to speak to amendment 130 and other amendments in the group.

Pam Duncan-Glancy: I thank Maggie Chapman for her comments on my amendments in the group.

Unfortunately, I will not be able to support amendment 97, because I believe that narrowing the list of persons with an interest could prevent someone who has a genuine interest in someone's GRC application from using the person of interest provisions in good faith, on the grounds of genuine concerns about capacity. However, my amendments 130 and 132—as Maggie Chapman suggested—attempt to add safeguards and proportionality to the process to prevent people from using it maliciously. For that reason, I ask members to support my amendments. I think that Maggie Chapman's amendments 95 and 96, which she has said that she will withdraw and not move respectively, are reasonable but I ask members to support my amendments.

Shona Robison: I know from the evidence that has been provided to the committee, and through the Government's own consultations, that there is concern among members of the trans community about the potential for the misuse of the provision in the bill for a person with an interest to apply to a sheriff for a GRC to be revoked. I can understand that. In our stage 1 response, we set out why that provision is in the bill, and I will state the reasons again briefly.

The bill allows for

"a person who has an interest in a gender recognition certificate"

to

"apply to the sheriff for the revocation of the certificate on the ground that ... the application... was fraudulent",

or that the applicant was

"incapable of understanding the effect"

of it, or that the applicant was

"incapable of validly making the application".

The person seeking to revoke a certificate would need to have a genuine interest in the certificate: it would have to affect them personally or professionally and they would be required to produce evidence of the ground on which the certificate could be revoked. It is a common statutory requirement for a person to have an interest in a particular matter in order to bring proceedings to court, and the courts are used to determining what amounts to a genuine interest.

12:30

Amendments 95 and 130 would give the registrar general a preliminary role in assessing potential applications to a sheriff and refusing permission to apply to the sheriff, based on whether the application was malicious and whether the applicant had a genuine interest. However, we can see no precedent for that type of process, which would considerably expand the role and remit of the registrar general in a way that cannot be supported. It is for a sheriff, who has appropriate expertise, to make judgments on whether a person has a genuine interest and whether their claim is valid. I understand why Maggie Chapman and Pam Duncan-Glancy have lodged amendments 95 and 130, but I do not view the proposed role for the registrar general as reasonable; I therefore urge the committee not to support the amendments.

Amendment 97 would restrict those people who can apply for the revocation to the registrar general, a spouse or civil partner or the secretary

of state, which is presumably intended to echo the current provision in the 2004 act, although it is not clear why the UK secretary of state should be included in relation to GRCs issued under the Scottish system.

The grounds on which an application for revocation of a GRC can be made under the 2004 act refer only to fraudulent applications. The proposals in the bill mean that the grounds on which an application can be made also include incapacity or cases in which the registrar general has issued the wrong type of certificate.

In relation to the committee's recommendation to define who can be a person with an interest, we consider that seeking to list such persons in the bill could lead to the potential omission of an appropriate category of person. Under my amendment 60, the registrar general will be able to apply to a sheriff before issuing a GRC, but it is not the role of the registrar general or his staff to assess the capacity of applicants—the courts will be able to make that determination after considering all the evidence.

It is important to stress that the provision on the capacity of applicants to understand the effect of a GRC is there to protect those applicants, and removing those grounds could have negative impacts for some of them.

Amendments 96 and 132 introduce either a criminal offence or a power for a sheriff to award damages on the basis of a malicious application. I consider that to be disproportionate and I have serious concerns about criminalising applications to a sheriff in any circumstances on access to justice grounds. I am not aware of a precedent for such an offence, and there would be human rights implications to consider. It is important to remember that the courts deal with many applications in many areas, including when issues have arisen among family members. When issues arise in a family in those circumstances, criminalisation would not necessarily be a beneficial outcome for any party.

The power to award damages requires further consideration as it is not quite clear how "malicious" is to be interpreted, since it is not a commonly used term in this context. If a person were to make repeated vexatious applications to revoke a GRC or GRCs, there is an existing scheme under the Courts Reform (Scotland) Act 2014 that would allow the Lord Advocate, in the public interest, to apply to the Court of Session for a vexatious litigation order. That would require the person to get permission from the Court of Session before making a further application—I know that that is not exactly what Pam Duncan-Glancy's amendment proposes, but it provides a safeguard against people abusing the system. For those reasons, I cannot support any of the specific changes that amendments in this group propose.

I reiterate that applicants for revocation would need to demonstrate that they have a genuine interest, and the sheriff would be satisfied of that. They would also need to provide evidence to prove the grounds of their application. Although I am sympathetic to the aims of amendments 96 and 132, I do not currently see what additional provision could be made in the bill to address those concerns without raising wider human rights and access to justice issues.

Obviously, if something could be added to the bill I would be happy to work with both members ahead of stage 3, but I ask the committee not to support amendments 96 and 132 at this time.

The Convener: I call Maggie Chapman to wind up, and press or withdraw amendment 95.

Maggie Chapman: I have nothing further to add, and I will withdraw amendment 95.

Amendment 95, by agreement, withdrawn.

The Convener: Amendment 130, in the name of Pam Duncan-Glancy, has already been debated with amendment 95.

Amendment 130 moved—[Pam Duncan-Glancy].

The Convener: The question is, that amendment 130 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 130 disagreed to.

The Convener: Amendment 131, in the name of Russell Findlay, has already been debated with amendment 114.

Amendment 131 moved—[Russell Findlay].

The Convener: The question is, that amendment 131 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Duncan-Glancy, Pam (Glasgow) (Lab)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 131 disagreed to.

Amendments 66 to 70 moved—[Shona Robison]—and agreed to.

The Convener: Amendment 96, in the name of Maggie Chapman, has already been debated with amendment 95.

Amendment 96 not moved.

The Convener: Amendment 97, in the name of Maggie Chapman, has already been debated with amendment 95.

Amendment 97 moved—[Maggie Chapman].

The Convener: The question is, that amendment 97 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Chapman, Maggie (North East Scotland) (Green)

Against

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

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 97 disagreed to.

The Convener: Amendment 132, in the name of Pam Duncan-Glancy, has already been debated with amendment 95.

Amendment 132 moved—[Pam Duncan-Glancy].

The Convener: The question is, that amendment 132 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 132 disagreed to.

The Convener: Amendment 9, in the name of Sue Webber, has already been debated with amendment 2.

Amendment 9 moved—[Rachael Hamilton].

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 9 disagreed to.

Section 9, as amended, agreed to.

Section 10—Correction of error in certificate

The Convener: Amendment 10, in the name of Sue Webber, has already been debated with amendment 2.

Amendment 10 moved—[Rachael Hamilton].

The Convener: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 10 disagreed to.

Section 10 agreed to.

Section 11—Further provision about applications

The Convener: Amendment 98, in the name of Roz McCall, has already been debated with amendment 83.

Amendment 98 not moved.

The Convener: Amendment 11, in the name of Sue Webber, has already been debated with amendment 2.

Amendment 11 moved—[Rachael Hamilton].

The Convener: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 11 disagreed to.

Section 11 agreed to.

After section 11

Amendment 71 moved—[Christine Grahame].

The Convener: The question is, that amendment 71 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

The result of the division is: For 4, Against 3, Abstentions 0.

Rachael Hamilton: Could I withdraw my vote on amendment 71? It was meant to be a yes. Is that possible? If not, I will just state that I supported it and that will be recorded in the *Official Report*. Sorry about that.

Maggie Chapman: We are all losing the plot! [*Laughter.*]

The Convener: We have not gone past the vote on amendment 71, so let us run the division again. The question is, that amendment 71 be agreed to.

For

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 7, Against 0, Abstentions 0.

Amendment 71 is agreed unanimously.

Amendment 71 agreed to.

Section 12—Copies of certificates to be given to other Registrars General

Amendment 12 moved—[Rachael Hamilton].

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 12 disagreed to.

Section 12 agreed to.

Section 13—Continuity of marriage or civil partnership

Amendment 13 moved—[Rachael Hamilton].

The Convener: The question is, that amendment 13 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Gosal, Pam (West Scotland) (Con)
Hamilton, Rachael (Ettrick, Roxburgh and Berwickshire) (Con)

Against

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
Duncan-Glancy, Pam (Glasgow) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 13 disagreed to.

Section 13 agreed to.

The Convener: We have made good progress. This seems like a good place for us to break for the day, so that completes our first day of stage 2 consideration of the bill. We will continue our consideration at our meeting next week.

I thank the cabinet secretary and her officials for their attendance.

Meeting closed at 12:43.

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