OFFICIAL REPORT
AITHISG OIFIGEIL

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Equalities, Human Rights and Civil Justice Committee

Tuesday 22 November 2022

Session 6

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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
30th 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:

Claire Baker (Mid Scotland and Fife) (Lab)
Jeremy Balfour (Lothian) (Con)
Sarah Boyack (Lothian) (Lab)
Foysol Choudhury (Lothian) (Lab)
Jamie Greene (West Scotland) (Con)
Daniel Johnson (Edinburgh Southern) (Lab)
Pauline McNeill (Glasgow) (Lab)
Carol Mochan (South Scotland) (Lab)
Shona Robison (Cabinet Secretary for Social Justice, Housing and Local Government)
Tess White (North East Scotland) (Con)
Brian Whittle (South Scotland) (Con)

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 22 November 2022

[The Convener opened the meeting at 09:05]

Gender Recognition Reform (Scotland) Bill: Stage 2

The Convener (Joe FitzPatrick): Good morning, and welcome to the 30th 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 MSP, 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 have a full public gallery. I welcome everyone who is participating in the meeting today and those who are observing, either in the room or online.

We made good progress with our consideration of stage 2 amendments last week, and I hope that we will manage to conclude our consideration today. However, we still have a large number of amendments to dispose of. I intend to allow as much debate as is needed for each amendment but, as with last week, I ask members to be as concise as possible and to keep to points that they are required to make in relation to their amendments. We will take regular comfort breaks throughout the morning as required, as we did last week.

Our sole agenda item today is to continue our stage 2 consideration of the Gender Recognition Reform (Scotland) Bill. Members should have a copy of the marshalled list and groupings of amendments. If votes are required, I will call for yes votes first, then for no votes, and 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 can communicate with the cabinet secretary directly.

After section 13

The Convener: Amendment 21, in the name of Rachael Hamilton, is grouped with amendments 135, 137, 138, 142 and 111.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): Amendment 21 is a probing amendment that makes it clear that a gender recognition certificate does not change the status of a person as a parent under the Gender Recognition Act 2004. Currently, there is no provision regarding the status of parenthood in the bill. Section 12 of the 2004 act states:

> "The fact that a person's gender has become the acquired gender ... does not affect the status of the person as the father or mother of a child."

If GRCs that are issued under the new Scottish system change the definitions in relation to mother and father, that could create confusion on their child's official documents, and it would have cross-border implications.

I hope that the cabinet secretary will tell me that amendment 21 is not necessary and that section 12 of the 2004 act will still apply to GRCs that are issued by the registrar general for Scotland. In that case, I will seek to withdraw it.

I move amendment 21.

Tess White (North East Scotland) (Con): I have two amendments in the group. The main one is amendment 135, which seeks to place a duty on the Scottish ministers to encourage public understanding of not just the act's provisions but its effects more widely. Amendment 142 requires that the Scottish ministers must prepare and publish a report on how that requirement has been fulfilled,

> "no later than 6 months after the day after Royal Assent."

On amendment 142, during stage 1, we heard evidence that raised question marks over what it means to live in an acquired gender; whether name changes will be required; what it means to make a false declaration; whether GRCs will be recognised by other jurisdictions in the United Kingdom and elsewhere; whether there is a pathway to detransition in the bill; what the bill means for the operation of the Equality Act 2010; and what the bill's implications will be for single-sex spaces and women and girls. That is just the tip of the iceberg. The number of amendments that have been lodged at stage 2 is indicative of just how little clarity the bill provides on key provisions. One stakeholder described the Scottish Government's own understanding of the bill as "flawed".

Of course we seek to improve the bill's clarity at stage 2, but it remains the case that the public need to understand what the bill will do and will

not do once it has been passed; how it will affect people, especially women and girls; how people can use the bill; and what the penalties will be for misuse.

Jeremy Balfour (Lothian) (Con): Good morning. Amendments 137 and 138 simply seek to clarify a particular situation. Last week, the cabinet secretary and a number of members told us that the changes proposed in the bill do not affect what happens with regard to the European convention on human rights. As I have said, the amendments seek to clarify that and provide a way forward if the bill becomes an act.

As we will all be aware, article 9 of the ECHR covers all protected characteristics, and amendment 137 simply states what has previously been stated, which is that nothing will change in that regard. I hope that the cabinet secretary can give some clarification on that.

Amendment 138 seeks to look forward to any regulations that will flow from the bill becoming an act by making it clear that there is no contradiction between article 9 of the ECHR and any regulations that are laid before Parliament. It seeks to provide that if regulations are laid that affect article 9, the affirmative procedure will be used to ensure that the committee and the Parliament can scrutinise them.

I hope that the cabinet secretary will be able to clarify whether these amendments are necessary—they are simply to bring clarification, rather than changing anything specific.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning, cabinet secretary and colleagues.

I say at the outset that amendment 111 in my name is a probing amendment. Prisons are clearly an area of concern for many people in respect of the bill. Personally—and I know that other colleagues share this view—I do not believe that prisons are the place for women at all, apart from in the most serious of situations, but that is, of course, a matter for wider discussion. I do appreciate the new women's custody suites that the Scottish Government has put in place. However, it is vital that those who are housed in prisons feel safe.

I want to put on record my grateful thanks to MurrayBlackburnMackenzie for suggesting an initial form of this amendment following the stage 1 debate, in which I spoke about this issue. The initial amendment stated that the possession of a gender recognition certificate was to have no bearing on allocation decisions made in respect of housing in the prison estate, but the legislation clerks got back to me, saying that they felt that that did not fall within the scope of the bill. That is why the amendment before colleagues today is a "For the avoidance of doubt" one.

The amendment simply sets out what the Scottish Prison Service says that it already does and what everyone wants to be the case, which is that trans prisoners are risk assessed to ensure that they are housed in the most appropriate facility for the safety of other inmates and, of course, the trans person themselves. I put on record my thanks to the Equality and Human Rights Commission Scotland, Scottish Trans, the Equality Network and colleagues from across the chamber for their support and for understanding the intention behind my amendment. I am simply attempting, as we bring forward legislation, to make the lives of trans people easier and to provide reassurance in an area where there are genuinely held concerns.

I know from speaking to the Government that "For the avoidance of doubt" amendments are not great, and I know that there are some concerns about them. I know, too, that the Government is keen to hear about a later amendment from Pam Duncan-Glancy that might cover what I intend to achieve with amendment 111. I look forward to hearing about that amendment.

Based on all that, I am not inclined to move the amendment at this time—I want to hear the debate on Pam Duncan-Glancy's amendment—but I encourage the cabinet secretary and the Government to consider further improvements in this area and others ahead of stage 3 to ensure that the bill commands as widespread support as possible in the chamber and with the public.

The Cabinet Secretary for Social Justice, Housing and Local Government (Shona Robison): As others have said, a later group of amendments will deal with the bill's interaction with the Equality Act 2010. Amendments in that group seek to clarify that the bill does not change all or part of that act, and I state now that I propose to support an amendment stating

"For the avoidance of doubt"

that this bill does not modify that act. There are, I believe, specific circumstances that justify such an approach, but, in general, provisions that simply state "for the avoidance of doubt" something that is very clearly the case add nothing of value to legislation.

09:15

On amendment 21, the bill amends specific sections of the 2004 act. It does not amend section 12, which states:

> "The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child."

Because we are clearly not changing that part of the act, amendment 21 is entirely unnecessary and I do not support it.

I do not support Tess White's amendments 135 and 142, which seek to introduce a duty for ministers to take steps to promote understanding of the bill and to report on that within six months of royal assent. The Scottish Government has held two of the largest public consultation exercises ever undertaken for a Scottish bill and we have published impact assessments, explanatory notes and a policy memorandum. Further information is available on our website. The committee has also conducted a public consultation and taken evidence, producing a thorough and very detailed report. We have engaged with stakeholders and will continue to do so as part of our implementation work, should the bill pass, and we will, of course, engage with users in designing the application process. National Records of Scotland will provide guidance on the process for and the effects of obtaining a GRC. Christine Grahame's amendment 71, which was agreed to last week, also ensures that all necessary information will be made available on the National Records of Scotland website.

I also do not support Jeremy Balfour's amendments 137 and 138, which state:

> "For the avoidance of doubt, nothing in this Act alters the effect of Article 9 of the European Convention on Human Rights"

while also requiring regulations on the interaction of the bill with article 9. As the committee knows, acts of this Parliament cannot alter the effect of the convention. The amendment brings ambiguity, not clarity. It is not clear what sort of provision could be made in regulations under amendment 138 or who that provision would be addressed to.

I turn to Fulton MacGregor's amendment 111. As the committee heard in evidence, the Scottish Prison Service already uses comprehensive individualised risk assessments to determine how trans prisoners are managed, whether or not those prisoners have a gender recognition certificate. I am happy to repeat that today, for the sake of the record. Adding provisions to the bill that simply state

> "For the avoidance of doubt"

something that is very clearly the case do not generally add value to our laws. Therefore, I do not support amendment 111, but hope that I have given reassurance by emphasising again the Scottish Prison Service's comprehensive individual risk assessment process.

The Convener: I call Rachael Hamilton to wind up and to press or withdraw amendment 21.

Rachael Hamilton: I seek to withdraw amendment 21. All I will say about the amendments in this group is that I am sympathetic to Fulton MacGregor's amendment 111 on the impact on prisons. It is possible that addressing our concerns through the amendment would have reduced the risk in prisons. The cabinet secretary has indicated that this is dealt with by the Scottish Prison Service, but we still have concerns about the number of individuals seeking to acquire a GRC—a number that will possibly increase tenfold. I am sympathetic to Mr MacGregor's comment that Pam Duncan-Glancy's amendment might address this, but we will have to see how the cabinet secretary responds to that. If that is not the case, we could possibly have a discussion and work together to seek to address the concerns that Fulton MacGregor and I both have.

Amendment 21, by agreement, withdrawn.

Section 14—Offences

Amendments 22 and 99 not moved.

Amendments 72 and 73 moved—[Shona Robison]—and agreed to.

The Convener: Amendment 133, in the name of Jamie Greene, is in a group on its own.

Jamie Greene (West Scotland) (Con): I thank the committee for allowing me to attend this morning.

I watched last week's proceedings from afar, and I want to reflect on some of Michael Marra's comments. Even as someone who supports the general principles of the bill, he eloquently and quite respectfully acknowledged that, although it is already possible to obtain a GRC, the bill changes the process by which that is achieved. It simplifies the process—the whole point of the legislation is to make the process less degrading, humiliating and intrusive. However, he also made a valid point that, whether we like it or not, that simplification removes existing steps that some might see as potential safeguards and as barriers to individuals with malicious intentions, the risk of which, although I hope it remains low, remains nonetheless.

During the stage 1 debate, I made the point that we face a bit of a conundrum: how do we go about such simplification of the process while removing barriers without removing safeguards, be they perceived or actual?

Mr Marra proposed a method that added gravitas to the process of self-declaration, which the committee rejected. I have approached the issue slightly differently. If there is any concern that an individual might use the new simplified process as somehow being an easier way to change their gender, and to do that for all the

wrong reasons—including those that people fear—there clearly remains a need to reassure people that the by-product of the new process is not simply a reduction in safeguards or the removal of deterrence. That is what my amendment seeks to do.

Amendment 133 tries to find a sensible balance—one that acknowledges that, by default, the new process is easier, but which also sends a strong message that abuse of the new system will simply not be tolerated.

The amendment creates an aggravator, which would deliver a harsher punishment and sentence to those who use the GRC process to enable them to commit serious crimes. Effectively, a criminal offence would be aggravated if it was proven that the offence in question was connected to the fact that an individual had fraudulently obtained a gender recognition certificate. However, it would not change sentencing guidelines.

Pauline McNeill (Glasgow) (Lab): Your comprehensive amendment refers to a GRC being "fraudulently obtained". What would need to be shown in court to prove that? You will be aware of the considerable debate around the provisions in the bill that say a GRC is fraudulently obtained if it can be shown that someone has done that for the "wrong reasons", as you mentioned.

I have concerns that the bill does not set out what would be needed to be shown in court, given that self-declaration is a simple process.

The amendment is a good one, but I would be really grateful if you could outline what would need to be shown in court to prove that a GRC had been fraudulently obtained.

Jamie Greene: Ms McNeill makes a good point. My understanding is that it is already an offence to obtain a GRC fraudulently, so a bar has already been set in the eyes of the law and that bar would remain. Perhaps the cabinet secretary will address that, assisted by the team around her. The matter might be clarified through further guidance after the bill passes or, indeed, through further clarification of the amendment itself. As we move to stage 3, I would be very happy to amend the bill further, should amendment 133 be agreed to, in order to clarify the matter.

Pauline McNeill is absolutely right: court cases are all individual. We should be as clear as possible. I am happy to work with the Government and, indeed, any other member, if that would help.

I make it clear that the amendment does not alter in any way the general principles of the bill or the process for obtaining a GRC, and it should not act as a deterrent to anyone who wants to go about that process for good reason. It does not exclude anyone from obtaining a certificate and it does not set any additional preconditions or requirements for obtaining one.

As the committee will know, I also lodged amendment 134—I withdrew it ahead of the deadline—which went into more detail on the types of offences where an aggravator would be suitable, such as offences under the Sexual Offences Act 2003 or human trafficking, abusive behaviour, sexual harm and domestic abuse. I felt that there was some merit in that approach, but I understand that there are some technical difficulties, which the cabinet secretary might want to explain to me. I am happy to work with the Government if the committee feels that the provision could be strengthened to become more specific or if the general approach is good enough in the eyes of the law.

Simple aggravators are commonly used in other pieces of legislation, such as the Domestic Abuse (Scotland) Act 2018. Members may be aware that, more recently, the Fireworks and Pyrotechnic Articles (Scotland) Act 2022, which went through the Criminal Justice Committee, introduced an aggravator for offences of assault against emergency service workers. There is some precedent.

The whole point of an aggravator is to act as a deterrent, which is the intention of my amendment. I ask the committee to support amendment 133. It will introduce a much-needed counterbalance to address some of the concerns about the new process.

I move amendment 133.

Maggie Chapman (North East Scotland) (Green): I will be voting against amendment 133. There is no evidence from other jurisdictions that operate similar gender recognition arrangements that gender recognition is being fraudulently applied for to facilitate the commission of offences. In any courtroom setting, a judge can always take all circumstances into account when deciding on sentencing, so there is no need for the proposed aggravator or any specific aggravating factor to be included in the bill. As Jamie Greene has just said, he hopes that the aggravator would act as a deterrent, which, in my opinion, is not something that it is appropriate to put in the bill.

If a person has fraudulently obtained a GRC, they can already be prosecuted and sentenced for that, in addition to any other offence. I do not believe that the amendment is necessary. Attaching aggravation to the application for and awarding of a gender recognition certificate is deeply problematic.

Shona Robison: Last week, I mentioned that, in principle, I would support the amendment. It is important to emphasise that Jamie Greene's amendment 133 applies to the obtaining of a GRC

fraudulently. As the committee knows, the bill already includes offences of knowingly making a false statutory declaration or including other false information in a GRC application.

Pauline McNeill: It is really important that the Government clarifies this point. We have heard a lot of talk about fraudulently making a declaration, but at no time has the Government set out what would have to be shown in court. Can you give us an example of what would need to be shown, given that the process is already quite a simple one, in that a person just applies and then waits three months? The process can also be reversed.

I am interested in the legality of the position. If something is in the bill—whether people think that it should be or not—it is a matter of law. The Government needs to be clear what would need to be shown in court to prove that the application was fraudulent in the first place.

Shona Robison: It would always depend on the circumstances of the case, but, for example, if it could be shown that the person had no intention of living in the acquired gender and was obtaining a gender recognition certificate in the full knowledge that they had no intention to do so, that evidence could be gathered and presented to the court.

In the very unlikely circumstance that someone had sought to obtain a gender recognition certificate fraudulently, had no intention of living in the acquired gender, and then went on to commit an offence, the aggravator would show the seriousness of that—not just in relation to making a false declaration, but then in going on to commit a crime having obtained a GRC under false pretences. As I said, the circumstances of each individual case might be very different. That is one example of where that evidence would be shown. The court would then have to consider the circumstances of the case and make a decision on that.

Rachael Hamilton: On that basis, would you consider defining “living in an acquired gender”?

09:30

Shona Robison: We discussed that last week, and I gave a number of extensive examples of how someone could show that they were living in their acquired gender. Those already exist under the 2004 act, so we are not changing anything in relation to the various ways in which someone could demonstrate that—they remain the same. We are talking about someone committing an offence and its being shown that they did not live in their acquired gender and had no intention of doing so. Evidence could be led showing the various circumstances of how they lived their life.

In relation to Jamie Green’s amendment, we are talking about an aggravator. The person would be in court because of the crime that they had committed, and if it can be shown that they had falsely obtained a gender recognition certificate in addition to that, the aggravator would be appropriate because of the seriousness of doing that. As Jamie Greene alluded to, the aggravator would send a clear message that that would be a very serious offence.

The Convener: I call Jamie Greene to wind up and press or withdraw amendment 133.

Jamie Greene: I thank members and colleagues for their input on the issue.

I will first address Maggie Chapman’s comments. I am clear that the purpose of the amendment is not to inhibit or deter any trans people from making good use of the new, simplified process, which she will understand I support, although I appreciate that others do not. In no way is the intention of the amendment to inhibit or deter. It is clear that an aggravator would be used only when an offender was rightly in court for having committed other offences. The concept of an aggravator is commonly used in law in Scotland as a deterrent; that is the point, and I want to be clear about that.

The cabinet secretary referred to the seriousness of committing such an act. If someone fraudulently obtains a GRC with the intention of accessing spaces or people that they should not, and goes on to commit further crime—I am interested in a number of crimes that may fit into the amendment—such acts would be viewed very seriously by judges and courts, and offenders will, in effect, be given a harsher punishment. That is the point of an aggravator.

Shona Robison: At the end of my remarks, I should have put on record that there has been some further consideration of the use of the word “connected”, which needs to be clarified. Is Jamie Greene willing to work with us ahead of stage 3 on the final wording, as it may require additional tweaking? Is he happy to do that?

Jamie Greene: Yes; I presume that the cabinet secretary is speaking about proposed new subsection 22B(1). I am not a legal drafter; the amendment was prepared with the kind help of the parliamentary team at very short notice, given our tight deadlines. I prefer to move the amendment and ask committee members to vote on it. Of course, there will be ample opportunity to tidy it up ahead of stage 3, and I am happy to work with the Government on that.

The Convener: The question is, that amendment 133 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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)

Against

Chapman, Maggie (North East Scotland) (Green)

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

Amendment 133 agreed to.

Amendment 14 moved—[Rachael Hamilton].

The Convener: The question is, that amendment 14 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 14 disagreed to.

Section 14, as amended, agreed to.

After section 14

Amendment 135 moved—[Tess White.]

The Convener: The question is, that amendment 135 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 135 disagreed to.

The Convener: Amendment 1, in the name of Brian Whittle, is grouped with amendments 76, 136, 139, 140, 143 to 146, 148, 156, 80, 81 and 155.

Brian Whittle (South Scotland) (Con): Good morning. I thank the committee for allowing me to speak to my amendments to the bill. I want to say at the outset, that, along with every other MSP I know in the Parliament, I am in full agreement that every person should be treated equally, irrespective of colour, creed, religion, sex or gender.

However, I do not think that you can create equality for one section of society by creating inequality in another section of society. What I am looking for—I am sure that this is what we all want—is everybody to have equal and fair access to all aspects of society, including sport. My amendments are on the impact on sport, because, as drafted, the bill's impact on sport will be significant. These issues are already happening in sport, and the bill, as drafted, will accelerate that.

The committee deemed sport important enough to include it in its investigation, but it did not take any evidence from sportswomen. Instead, it decided that trans activists and men would suffice. That speaks to a global issue, because women participants are being warned not to speak out when confronted by the prospect of competing against trans women, which silences those who are most impacted by the issue.

Amendment 1 would insert into the bill a responsibility on the part of the Scottish Government to report on the impact on sport of the eventual act. Amendments in this group would require the Scottish Government or the registrar general to publish information, guidance or reports on the operation or impact of the provisions, once they are implemented.

There is precedent here, and the reason why we need that provision—and the reason why I am worried—is that sport is not set up to deal with this. We do not need to look too far into the past for an example of that. Caster Semenya was the Olympic 800m champion. She is intersex, and sport just did not know how to deal with it—and dealt with it appallingly. Caster Semenya herself was treated appallingly, and that still happens.

The Equality and Human Rights Commission has highlighted several areas in which the effect of the bill's provisions on the operation of the protections from sex discrimination in the Equality Act 2010 is unclear. It has urged that further consideration be given to that before legislative change is made. There would be an additional requirement to publish information and guidance and to publish reports on the impact of the eventual act. Some of the examples that the

EHRC gives relate to the trans community and also to sport. That data could usefully assist in ensuring the effective implementation of the act and monitoring its impact in practice. It recommends that these amendments be considered.

We should look at what currently happens in sport. All I am asking is that we register and understand what the impact would be on the participation of transgender people in sport. Sport already does that: we know how many people participate by age, by sex, and by disability—although, I have to say, I hate that categorisation, but, obviously, there are Paralympic categories. We need to ensure that we protect women, specifically, and trans people.

Sport is trying to look at how to deal with the issue. I notice that, for competitions, there are now three categories: men, women and non-binary. However, there is nowhere for those in the non-binary category to participate. They must still choose whether to compete as men or as women. Therefore, it is hugely important that we continue to do what sport has always done, which is to measure what is happening in the sport to understand the categories, and we need to do that in order to understand what the impact will be. As I said, sport itself is struggling to deal with this. I ask members to vote for amendment 1, for the protection of women and the trans community.

I move amendment 1.

Pam Gosal (West Scotland) (Con): I want to be clear that, while I recognise that improvements to the gender recognition process would be beneficial for trans people, the proposed law is a let-down for women, girls, faith communities and children, who require the protection of the law. I believe that such a balance of interests comes from balanced, well-considered legislation. As it stands, the bill does not get that balance right.

My amendments 76, 80 and 81 seek to address concerns that a self-declaration model may exacerbate existing problems with section 22 of the 2004 act. Amendment 76 creates a requirement on Scottish ministers to

“prepare and publish a report on a review of the impact of this Act on patients where knowledge of the biological sex of a health professional carrying out a medical examination or treatment is required, including on religious grounds.”

Women of faith and faith groups have expressed concern that the proposed legislation could interfere with their religious beliefs. The debate has been polarised, however, and some Islamic scholars and organisations told me that they were too afraid to come to the committee. We should all be extremely disappointed: this Parliament is the people’s Parliament, but people did not feel comfortable expressing themselves here. Hence, today I am the voice for all women and girls.

For many religious women, particularly in the Islamic faith, it is religious law that they shall not let a man touch or see their body. Therefore, they feel more comfortable using the services of female general practitioners, carers and other medical professionals. We must ensure that the bill is truly compatible with those women’s religious rights.

It goes further than women of religion; it affects women and girls more broadly. In my region, parents and women have stopped me in the street, explaining how frightened they are for their children. A constituent of mine raised concerns about what the proposals would mean for an elderly woman in a care home—whether she could be guaranteed a female carer to wash and dress her. Those concerns stem from the expected increase in the number of GRC holders and the lack of clarity surrounding section 22 of the 2004 act.

Jamie Greene: Would the effect of amendment 76, should it be agreed to, be that all healthcare professionals, in any capacity, would have to disclose their trans identity to their patients and to their employer at every opportunity?

Pam Gosal: No. That is protected under the Equality Act 2010. It is about the religion itself. I know this from the case of my own mother. Normally, when somebody goes into a healthcare setting, if we see in front of us a male or female doctor, we can ask to see the female doctor. If one is present at the time, fine; if not, an appointment may be arranged for the next day or the week after, which is acceptable. We are not asking for special attention; we are asking to carry on what goes on right now.

If there are more GRCs out there, how will we know that a trans person is a biological man? There will be more such people in our services and spaces. As of yet, no statistical modelling has been done to forecast the number of GRC applications that we can expect, which means that I have little confidence in the accuracy of the Scottish Government’s prediction of 250 to 300 applications per year. Either way, we know that the loosening of eligibility criteria will result in an influx of applications and a much larger group of GRC holders compared with now. Secondly, we know that service providers are already unclear as to what section 22 of the 2004 act means in practice. Therefore, if the Scottish Government truly wishes to make women with concerns feel safe and to ensure that their rights are respected—I refer here to amendments 80 and 81—I ask it to consider whether the criminal offence of disclosing someone’s status as a GRC holder remains proportionate and whether it

considers that there should be further exceptions to section 22, in light of the bill's provisions.

09:45

I am in favour of amendments 150 and 156, which seek to review the operation of section 22 of the 2004 act and the subsequent reporting requirement. Given the concerns that have been raised with me about the impact of the bill in areas such as health and justice, and on women and girls and children, I lend my support to amendments that seek to review the impact of the eventual act, such as amendments 1, 136, 143, 148, 144 and 155.

In addition, a concern for many parents is the decoupling of legal and medical aspects, so I support amendment 139, in the name of Sarah Boyack, and amendment 140, in the name of Rachael Hamilton, which seek to review gender identity healthcare services. I recognise the need for more medically sound professional care and shorter waiting times. I am also in favour of an impact assessment of the act, as outlined in amendment 146, and a review of the act, as outlined in amendment 145, and I would expect the review to be laid before Parliament.

I sincerely hope that the cabinet secretary will have the empathy and understanding to recognise that, given the new lax rules for obtaining a GRC, it would be unreasonable to suggest that the criminal offence of disclosing someone's status as a GRC holder remains proportionate.

It is also the case that, as the number of GRC holders will rise substantially, that will, without expanding the exceptions under section 22 of the 2004 act, increase the likelihood that a woman will have a medical examination and the like carried out by a biological man. If possible, she should have a choice in that. I would like to hear how the cabinet secretary intends to work with us to address the concerns that women, including women of faith, and girls have raised.

Jamie Greene: This group of amendments is rightly about the impact of the bill on certain groups and in certain places, as has been discussed by Brian Whittle and Pam Gosal, who make some valid and interesting wider points about people's choice and understanding. That is really what a lot of this comes down to.

I note that Fulton MacGregor has lodged amendment 111 on the issue of prisons. We both sit on another committee with a shared interest in that area, and I hope that many colleagues can work together on this issue. The reality is that it remains a fact that there are trans people in our prisons and in the custodial estate. It is hard to say, at any given time, how many there are or where they are, or indeed why they are in custody, because such incidents are often reported simply in media outlets or on social media. In fact, as MSPs, we are often asked to comment on individual cases, and it is difficult to pass judgment on the decisions that are made by the Scottish Prison Service without the full details of the individual concerned or the facts of the case. Nevertheless, it is a reality that in the LGBT community, as in any other minority or community, there are people who commit crime.

The difficulty that we face concerns how and where individuals should be held in custody. I think that people are rightly concerned about the potential impact of the presence of such individuals in places and buildings that have traditionally been same-sex or binary spaces for hundreds of years, through no one's fault at all. The task of performing that juggling act is both the grave responsibility of prison governors themselves and a duty on the Scottish Prison Service, which either operates such institutions itself or contracts out their operation. In my view, that does not, however, mean that there should be no transparency in the practice or the policy—or indeed the guidance, if there is any—around that. With my justice hat on, I seek to gain some clarity around those concerns.

My amendment 136 simply aims to gather information about the impact of the act on Scotland's prison population by requiring the Scottish Government to publish a report on how, if at all, it has impacted on decisions on the placement of transgender people in the prison estate.

As committee members will be aware, the SPS has made it clear that decisions on the housing of transgender prisoners are made on a case-by-case basis and take into account the potential risk with regard to where prisoners should be held. That is, I think, self-explanatory. I cannot imagine that these are easy decisions for governors, but the core of my amendment is to ensure the safety of all prisoners and that they are housed appropriately and, as the SPS has said, according to the needs and security not just of themselves but of those around them.

Daniel Johnson (Edinburgh Southern) (Lab): The member has highlighted a really critical point. Just as it would be wrong to place a prisoner in one estate rather than in another purely on the basis of self-declaration, it would be wrong never to consider which estate they should be in. It is very easy to understand that trans people will be particularly vulnerable in either estate, and the critical point is, as Jamie Greene has pointed out, that prisons have to make what is a nuanced, balanced and individualised assessment in that regard. What we should be seeking to do through this legislation is to ensure that the Prison Service

is enabled and empowered to continue to make such balanced decisions and risk assessments, prisoner by prisoner. Does the member agree with the emphasis that needs to be made in that respect?

Jamie Greene: I do, actually. I know that other committees have given a great deal of thought to what is a complex and difficult issue. The nature of the offences for which some of the individuals are held in custody rightly gives rise to very public concern, and that concern is often shared with us. For that reason, I actually support amendment 111 in the name of Fulton MacGregor. I know that the cabinet secretary has asked the member not to move it, but I think that it would be helpful if he did, because we would be able to build on it ahead of stage 3 to make it clear that, although these are autonomous decisions made by governors and the Prison Service, there is a general feeling that they must be in everyone's interest.

With amendment 136, I am not seeking to put in place any prescriptive measures; I am simply asking for data, because in the past we have frequently tried, with great difficulty, to get clarity on decisions made with regard to policy guidance on where people are housed or, indeed, on who is being housed where. Often the response is that the data is simply not available, for reasons of confidentiality. I have asked the Prison Service a number of written questions as well as questions during Criminal Justice Committee evidence-taking sessions, and information has been far from forthcoming. I do not think that there is any particular cause for concern in that respect, but the fact is that without good information we cannot make good decisions.

I think that what I am trying to do with amendment 136 is to improve transparency in the data, even if the numbers involved are small. I also want to address concerns that others have rightly raised that, if a much greater volume of people starts to come through the system and that has a knock-on effect on the transgender prison population, the Government must have a good grasp of the bigger picture. I understand that the Government is willing to accept a number of amendments that place additional reporting requirements on it, and I think that that is a helpful approach. I think that this amendment will be helpful in that respect, too; it casts no judgment on the policy of where people are housed, nor does it interfere with the independent decision making of governors or the SPS. Instead, it allows ministers and the Parliament to get sight of the bigger picture that, currently, we do not have sight of. If we did have sight of it, we could, I would hope, ask the right questions and have them answered.

Rachael Hamilton: We are all looking at different aspects in this group of amendments. What if the cabinet secretary were to advise that the Government could lodge a catch-all amendment that brought together all these elements with regard to data collection and the reviewing of this particular reform?

Jamie Greene: The format of this amendment, or whatever others may get agreed to at this stage, is not really the point; whatever one's views on the bill's general principles, what we as individual members are trying to do is to improve and strengthen the bill itself. Reporting requirements are extremely important in that respect, but such amendments are often rejected by Government ministers. I am therefore pleased to get the feeling that, in this instance, the Government accepts the need for more data and clarity as the bill progresses.

I would be happy to work with any member, or with the Government, ahead of stage 3, either on individual reporting amendments or on a catch-all requirement, as long as that happens and that the provision is in black and white in the bill—that is the main thing—so that we, or indeed whoever sits in the next Parliament, can question Government ministers on the impact of the legislation, in the hope that that addresses some of the concerns that people are raising about the potential impact. I do not always share the concerns, but I appreciate that they exist, and it is important that we future-proof the bill in that way.

Sarah Boyack (Lothian) (Lab): Amendment 139 would require the Scottish ministers to carry out a review into the impact of the bill on gender identity healthcare. The overarching aim of the amendment is that such a review should have the gravity of the Cass review in England; however, it would also enable the Scottish ministers to consult on its remit. Subsection 3 would require any review to consider how access to and provision of gender identity healthcare could be improved.

Amendment 139 comes on the back of the evidence that the committee heard on the provision of trans healthcare, including the Cass review, which is currently taking place in England. It seeks not to delay the bill—as, I understand, was called for by a minority on the committee—but to strike a balance to ensure that a review happens in line with paragraph 289 of the committee's stage 1 report.

I have spoken to a number of constituents, who shared opinions both for and against elements of the bill. However, I hope that we would get broad support for amendment 139, to ensure that anyone who goes through the GRC process and wants to receive gender identity healthcare is able to do so.

Last week, in discussion of an earlier grouping, I mentioned the waiting times at gender identity

clinics. Currently, trans people experience significant delays in receiving treatment from clinics. The bill could increase the number of people who try to access that service, which would exacerbate the demand on it. That issue needs to be monitored.

Amendment 139 would ensure that, in implementing the bill, the Scottish Government would take steps to ensure that its consequences are fully understood and that services for trans people adapt to meet their needs as those change.

I note that amendment 140 is similar; it is slightly more narrowly focused, I think. I therefore hope that Rachael Hamilton might support my amendment, which I think is more beneficial.

In addition, amendment 139 sits alongside Pam Duncan-Glancy's amendments 145, 146 and 147. It is aimed at ensuring that there is a commitment to having a review of what is important legislation—within two years of royal assent, I have suggested—to make sure that the implications of the bill and the changes that it brings around in society are carefully monitored, and that the strains that are already on support and healthcare are addressed, properly reviewed, monitored and acted on. Amendment 139 leaves to the Scottish Government the capacity to decide on the detail of that, but at least commits it to doing that review.

Rachael Hamilton: During the progress of the bill, there has been much discussion about the relationship between GRCs and healthcare. It is unrealistic to assume that some—perhaps many—of those who receive a GRC will not see that as relevant to what they are entitled to from NHS Scotland. I very much welcome Sarah Boyack's comments and amendments, but my amendment 140 is slightly different, because, currently, no provision in the bill recognises that likelihood or the potential impact on healthcare for trans people. Amendment 140 seeks to do that. Specifically, we call on the Scottish ministers to conduct a review into whether a bespoke healthcare pathway needs to be created for those who apply for a GRC; whether any healthcare issues have arisen in the experience of people who have applied for a GRC; and what further steps could be taken to improve healthcare for trans people.

Amendment 140 could help to address the important issues that Sarah Boyack talked about, such as the long waiting times, which, should the process of obtaining a GRC become easier and be expanded to include a larger segment of the population, can reasonably be expected to increase. Sadly, that is a part of the reform of the legislation that the Scottish National Party has turned a blind eye to.

I accept that there might be other ways of recognising that point. I am open to any proposals from the cabinet secretary for approaching it differently. However, we should not legislate then walk away without making some provision for the potential impact in demands for health services that are already creaking at the seams.

We believe that the publication of the Cass review will offer important insights on improving healthcare for younger trans people, which is why we originally called for the bill to be delayed. We know that it is naive to assume that there will be no spillover effects in demands for healthcare from a greater increase in the number of GRCs. Although the SNP cannot make a silk purse from a sow's ear, I urge the cabinet secretary to support or at least consider my amendment.

10:00

Tess White: I lodged four amendments in the group. Amendment 143 would create a duty on the Scottish ministers to carry out a review of the operation of the act, focusing on three areas in which we know that its provisions will have an impact—educational establishments, the health system and the criminal justice system. There is potential for unintended consequences in the legislation that we might not be able to foresee at this stage, and reports on those areas every two years would help to facilitate post-legislative scrutiny, which the Scottish Parliament needs to do much more of, especially in relation to the operation of the bill.

Amendment 144 would modify section 15 of the bill to include a duty on the registrar general to report the number of applications each year for a GRC

"where the applicant has previously obtained a gender recognition certificate".

The Scottish Government has emphasised that the process for detransitioning under the new system will be the same as the process of self-identification, meaning that individuals who seek to detransition will be caught in the data on the generic numbers of applications and GRCs. However, without a specific pathway to detransition in the bill, the challenge is that it will be difficult to capture figures on the people who chose to detransition under the new system, which will make post-legislative scrutiny more difficult.

Section 15, as drafted, creates a new duty on the registrar general to include information about gender recognition alongside the number of births, deaths and marriages in Scotland each year. That provision was drafted by the Scottish Government and it is clearly information that the Scottish Government wants to capture. Amendment 144 would simply modify section 15 to include in the

report the annual number of applications made to the registrar general

"where the applicant has previously obtained a gender recognition certificate".

Amendment 148, which goes hand in hand with amendment 155, would create a duty on Scottish ministers to transparently consult women and girls on how and how often the Scottish Government should report on the impact of the act on that demographic. It would require that regulations be made that set out the details of such a report. For the avoidance of doubt, it would also include a requirement that any data collected for the purposes of a report

"should record the sex as recorded at birth."

Amendment 148 states that that consultation should take place within six months of royal assent, but the Scottish Government should have started consulting long before the bill becomes law. Women and girls have felt marginalised at every turn during the process. They have been treated as an afterthought; told by Scotland's First Minister that their concerns about the bill's proposals are not valid; and vilified on social media for asking legitimate questions about the operation of the act in relation to single-sex spaces and the safety of women and girls. Just last week at this committee, we saw women's freedom of expression shockingly denied, simply for wearing suffrage colours—the symbol of women's hard-won rights. I make that point because, in 2018, before the introduction of the bill and the start of public discourse surrounding it, female MSPs from all parties stood together on the steps in the garden lobby, proudly draped in the colours of green, white and purple. We already see the unintended impact of the bill on women and girls and it has not even reached stage 3. That is why amendment 148 is so important.

Crucially, amendment 155 would delay the commencement of section 2 until Scottish ministers have made the regulations that are required to set out plans for reporting on the impact of the operation of the act on women and girls.

I regret that the provisions that I have proposed are necessary. The Scottish Government should have managed the process far better. Nevertheless, I urge the committee to support the amendments.

Pam Duncan-Glancy (Glasgow) (Lab): I will support many amendments in this group because review on impact is key. Like my colleague Jamie Greene, I may not always share some of the concerns, but it is incredibly important that we properly scrutinise the impact of the legislation.

I will support the amendment to section 2 in Claire Baker's name because it is rightly more comprehensive than amendment 76. I will abstain on amendments 148 and 143, because I had asked the member to consider that the timescales are quite short after royal assent, and I will vote against amendment 155, because it would delay the act, and trans people have waited a long time for this. Otherwise, I support the amendments in the group.

Amendment 145 aims to ensure that Parliament considers how the process outlined in the bill is working, including in terms of the role of the registrar general and section 22. It also requires ministers to consider whether there should be provisions for non-binary people, as we know that not including them has been a concern for many.

Amendment 146 in my name ensures that we consider properly the impact—unintended or otherwise—of the act. Scottish Labour knows that people have concerns, including on how the act interacts with protections in the Equality Act 2010, the disclosure of protection information and other areas. Some have also raised concerns about the impact on gender identity healthcare, as we have heard, so the amendment requires the Government to look at all of that.

Lastly and importantly, some people are concerned that legal challenges will be brought in relation to the bill and the Equality Act 2010. The amendment seeks to monitor that as well. In short, the amendment is designed to scrutinise many areas of concern in the bill so that, should they come to pass, Parliament can address them.

Claire Baker (Mid Scotland and Fife) (Lab): Both of my amendments—156 in this group and 151 in the next group—focus on the operation of occupational exceptions and the impact of the bill on practice and decision making.

Amendment 156 in this group seeks to ensure that there is clarity over the interaction with section 22 of the Gender Recognition Act 2004, which makes the disclosure of protected information related to an individual's trans status a criminal offence, unless it is to prevent a crime. It is about how that interacts with schedule 9 to the Equality Act 2010, which allows occupational exceptions based on both gender reassignment and sex when it is a proportionate means of achieving a legitimate aim. That supports the provision of same-sex services where it is proportionate and legitimate. That is what the current law facilitates, but the current lack of clarity is leading to confusion over how the law is interpreted. That confusion exists both for providers of such facilities, and for users, who are unclear about what they can or cannot expect, or what they are entitled to ask for under existing equality legislation.

The bill is significantly changing the process by which someone gains a GRC, making it more accessible and less intrusive for individuals. I support reform of the process, but I also believe that we must fully consider its implications. It is expected to increase the number of people who hold a GRC and, by simplifying the process and introducing a process of self-identification, it has the potential to broaden the cohort of people who hold a GRC. At the heart of my amendment is the importance of information sharing where a proportionate and legitimate right to deliver a same-sex service is being exercised.

In the 2019 consultation on the draft bill, the Scottish Government highlighted a situation that requires clarity. The consultation said:

> "some people in an organisation (eg people in its HR department) may know about a person's trans history but those actually taking the decisions on staff deployment (eg line managers) may not."

The consultation went on to say:

> "when there is a legitimate case to use the general occupational requirements exception, the Scottish Government considers that it would be appropriate for information about a person's trans history to be shared in a strictly limited, proportionate and legitimate way."

However, it is not clear how that broad statement can be made in relation to section 22 of the 2004 act, which makes it a criminal offence to share protected information. That has led to confusion among employers and in public bodies. For example, a Scottish health board, in response to a freedom of information request, said:

> "Unless the practitioner consented, to exclude them from carrying out female-only care would be a breach of section 22 of the Gender Recognition Act 2004 and a criminal offence. There are also restrictions under the Equality Act 2010 around requiring staff to disclose their gender identity and staff selection on this basis."

I am not sure where to start on the inaccuracies in that statement. A health board can exclude on the basis of gender assignment, regardless of whether someone holds a GRC. It can exclude someone from delivering female-only care under the Equality Act 2010. The tension is with the lack of clarity on the effect of section 22 of the 2004 act, which is having a chilling effect. That suggests that public bodies believe that section 22 prohibits information to the extent that it prevents them from delivering female-only care. However, the Government consultation from 2019 says that that information can be shared.

The amendment seeks a requirement on Government to review the operation of those interlinked acts in light of the bill that is before us.

Jamie Greene: That touches nicely on the point that Pam Gosal raised about patients' rights and requests in healthcare environments. A valid scenario has been raised that we perhaps had not thought about. However, is not the problem the lack of consistency in guidance and understanding of the rules? Does Claire Baker agree that it would be very beneficial if the Government were to commit to producing and publishing comprehensive guidance for public services—and specifically not just private employers—on what can and cannot be done in the circumstances in which decisions can be made? I think that the lack of consistency is causing issues for some folk.

Claire Baker: I very much agree with Jamie Greene. That is why I lodged amendment 151, which is in the following group and is on guidance. This is specifically about a review to try to get clarity on how the acts interact.

The amendment would require the Government to review the operation of section 22 and consider whether a criminal offence remains relevant and whether further exemptions within devolved powers are necessary to ensure the effective operation of schedule 9 to the Equality Act 2010. As the then Scottish Executive introduced exemptions through the Gender Recognition (Disclosure of Information) (Scotland) Order 2005, I believe that that is within the Scottish Government's powers. I stress that the expectation is that any further exemptions would still apply to only a limited set of circumstances. My amendment also requires the Government to explain the reasons why it is not taking action.

I welcome the discussions about the amendment that I have had with the cabinet secretary. It is a redrafted version of amendment 150 in order to provide a clear and competent amendment, and I hope that it will find support from members.

Shona Robison: I agree with members that it will be important to review and report on the legislation, and I am content that we have a requirement on that in the bill.

Several amendments have been lodged that relate to the operation and impact of the bill across a number of areas. We need to consider carefully the areas in which it is possible and appropriate for information to be gathered and the most suitable timescales in order to ensure the effectiveness of any review.

I am happy to undertake to review the operation and effect of the bill. I consider that the best approach will be to have a single review that covers a range of suitable areas, some of which are covered by amendments that have already been lodged.

I agree with the timescales in some of the amendments. The timescale should be three years after the new system has been established, to allow for the system to bed in and for data to be collected. Therefore, I will seek to coalesce a

number of reporting requirements in some of the amendments that have been lodged into a single provision for post-legislative scrutiny at stage 3. In line with that approach, I can support some of the amendments in the group, with a view to further work being done at stage 3. I do not support other amendments, but I will consider all the issues in developing a proposal for stage 3.

I support Pam Duncan-Glancy's amendment 145 in principle, as it would place a duty on ministers to initiate a review of the act within three years of commencement. That is an appropriate timescale for ensuring an effective review. I will use that as the basis and include other items at stage 3.

However, I cannot support Pam Duncan-Glancy's amendment 146, which would impose too broad a requirement in relation to reporting on the bill's impact on the Equality Act 2010 and healthcare in prisons. As I said at the outset, we need to consider carefully what is possible and appropriate for information to be gathered about and reported on.

Pam Duncan-Glancy: Can the cabinet secretary explain why that information cannot be gathered?

Shona Robison: Some of the information will involve very small numbers, so it would be very difficult to collect. In addition, some of the information in question is just not collected, so it would be disproportionate to set up whole new systems to collect that information. Where possible, we would want to base data on quality information that is already collected.

As I said, I am happy to continue discussions in particular areas, but any such requirement must be proportionate.

10:15

Pam Duncan-Glancy: Thank you for that answer. I take the point about the need for a system that is proportionate. No one wants to publish information about individuals, given that we are talking about small numbers. I appreciate that that is a concern.

However, when we talk about the impact of the bill, particularly in relation to how it interacts with the Equality Act 2010, it is important that we can understand that. There are concerns about the interaction with the Equality Act 2010. If we do not assess the impact, people with concerns will never know whether their concerns have come to pass, and people who think that there is no need for concern will never know whether they were right not to have concerns. It is important that we do all that we can to collect information on that so that the public can have confidence in what the bill is trying to do.

Shona Robison: As I have set out, I want us to try to do all that we can, but our approach must be proportionate, and it must be possible for us to collect the information—it must exist in some form for us to be able to collect it.

I am happy to continue to have discussions about what could be included in an amendment at stage 3 to pull in as much information as possible, if that would be helpful. However, I do not want us to commit to collecting information that we do not think is available.

I also support Jamie Greene's amendment 136, but as I think that what it proposes would be better incorporated into the wider review after three years, I will seek at stage 3 to incorporate its provisions into the requirements for post-legislative review. I hope that Jamie Greene will be minded to be content with that.

Amendment 156, in the name of Claire Baker, would place a duty on ministers to review the operation of section 22 of the 2004 act, including whether the criminal offences remain appropriate and whether any further exemptions are necessary. Under section 22 of the 2004 act, it is a criminal offence for a person who has acquired protected information in an official capacity to disclose the information to any other person. Protected information refers to either a person's application or their gender prior to obtaining a gender recognition certificate. It is vital that a person's right to privacy is protected in that way. We are not amending section 22 of the 2004 act.

There are already several exceptions to the criminal offence in section 22, such as when the disclosure is for the purpose of preventing or investigating crime. We can make further exceptions by way of regulations, but only when an exception relates to devolved matters.

Amendments 80 and 81 in the name of Pam Gosal are similar to those proposed by Claire Baker, but there is no requirement to publish a report of the review or any timescales, so I do not support those amendments. However, as I said, I agree that it is important to review legislation, so I support Claire Baker's amendment 156 in principle, although I would seek to work with the member, given that the way in which the amendment is drafted raises several issues, including in relation to the limits on the power of ministers to make an order under section 22(5) of the 2004 act that does not relate to devolved matters. The addition of the words

"within the legislative competence of the Scottish Parliament"

does not in itself solve that issue. It would therefore need to be further amended at stage 3, if the member is happy to work with us on that.

I turn to Brian Whittle's amendment. To be clear, the bill makes no changes to the rules for the participation of trans people in women's sport, whether that is professional, amateur or in schools. As Brian Whittle is more than aware, governing bodies set their own policies on the participation of trans people under the Equality Act 2010, and many of them have done that. The UK sports councils, including sportscotland, published guidance for transgender inclusion in domestic sport back in September 2021. In addition, it is not clear that the information that he proposes be collected is currently obtainable.

Brian Whittle: Sport is already gathering that information. As I said, in many sports, when someone enters a competition, they must specify whether they are male, female or non-binary. It is actually simple to gather that information, and it is incredibly important.

As I said, across the globe, from sport to sport, people are struggling massively with this issue. I am not sure what is happening with track and field, but at one point cycling accepted trans women in women's competitions, but then that policy was changed, and rowing currently accepts trans women in women's competitions. At the moment, sport does not know how to deal with the issue. Difficulties are faced not only by national governing bodies, which I will talk about later, but also by teachers and coaches across the world and in this country. It is important that, as the bill progresses, we understand the implications for sport.

The Equality and Human Rights Commission says that, as it is currently drafted, the bill impacts on the Equality Act 2010 in certain circumstances. It is important for sport to gather that information so that we can understand how to act on it for the benefit of all.

Shona Robison: As Brian Whittle has rightly said, the policies have to be set by each governing body, because each sport is different and each governing body will take an approach that is appropriate to the sport concerned. We have seen that in some of the announcements that governing bodies have made.

I am not clear that the information that we are talking about is readily obtainable, but I accept that Brian Whittle says otherwise. Therefore, although I will not support amendment 1, I am happy to have further discussions with him about whether there is something that we could capture within the wider review criteria that we will bring forward at stage 3. I hope that he will be content with that.

Amendment 76 would require the Scottish ministers to prepare and publish a report on a review of the impact of the legislation on patients

"where knowledge of the biological sex of health professionals is required, including on religious grounds."

I should say that I met a range of religious leaders and bodies as part of the Faith & Belief Forum as part of the consultation on the bill.

The Scottish Government expects everyone to be treated fairly and equally and with respect when seeking healthcare. National health service staff make every effort to ensure that the privacy and dignity of all patients are maintained in Scottish hospitals and healthcare more widely.

"The Charter of Patient Rights and Responsibilities" says that the patient's

"needs, preferences, culture, beliefs, values and level of understanding will be taken into account and respected when using NHS services"

and that, when considering those preferences, the health board

"must also consider the rights of other patients, medical opinion, and the most efficient way to use NHS resources."

In short, the NHS will try to meet people's needs but, as Pam Gosal herself recognised, it can do so only where possible. We can all think of situations—not least an emergency situation—in which, essentially, it might have to be the presenting doctor who has to intervene.

It is not clear how the information that Pam Gosal sets out in her amendment could be collected or published, or how the bill would impact on that area. Therefore, I do not support her amendment.

The Convener: I am sorry to interrupt, cabinet secretary, but Rachael Hamilton and Pam Gosal would like to make interventions.

Shona Robison: Okay—I apologise.

Rachael Hamilton: Thank you for letting me in, cabinet secretary. My question relates to Pam Duncan-Glancy's amendment 146. The Scottish Conservatives are sympathetic to it, and I think that Pam Duncan-Glancy will have carefully considered its drafting. Therefore, I would like clarity about what data is not currently collected and what could potentially be collected very simply.

Subsection (2)(f) of the new section proposed by amendment 146 asks for information on legal challenges. That is important, because we know that there is confusion around the privacy provisions in section 22 of the 2004 act. It is important that the Government makes good legislation so that it understands the impact of legal challenges.

I am not sure whether Pam Duncan-Glancy will move her amendment, cabinet secretary, but is there any possibility of your having a wider conversation with us about what can and cannot be done under its terms?

Shona Robison: In my earlier response to Pam Duncan-Glancy, I said that I was happy to continue to discuss the art of the possible here, as long as proposals are proportionate and doable. Some of the numbers that we are talking about are tiny, and that is, in fact, one of the issues with regard to information being obtainable. However, as I have said to Pam Duncan-Glancy, I am happy to continue to have those discussions as we try to coalesce the various aspects to which I am sympathetic around a stage 3 amendment.

Rachael Hamilton: Even a tiny number can be impactful in certain circumstances. It is therefore important that we do not put a number on things, because that number—even if it is one—could have significant and severe unintended consequences.

Shona Robison: It is also important that, with such tiny numbers, we do not identify a person.

Rachael Hamilton: I understand that—that is already covered in the protections.

The Convener: Pam Gosal has a question, too.

Pam Gosal: Thank you for your response, cabinet secretary, but I want to clarify what you said about emergency situations. If I were, say, knocked down by a car and the doctor who dealt with me at the time was male rather than female, our religions would allow them to operate on me. However, our religion does not allow that to happen when you walk into a doctor's surgery, because you have a choice and you can ask. Emergency situations are very different.

It is good to hear that you have spoken to these organisations. The same organisations came to me, too; they could not tell you these things, because they were scared of the Parliament, of the Scottish Government and of this bill coming out. I come from that background and I know that the organisations have voiced such concerns; indeed, we had an organisation that came in here in private to voice them, too. Good on it for doing so, but others have been so scared. Just a few days ago, I was speaking to people for the consultation on my proposed member's bill, and they said, "Thank God you have phoned us and are speaking to us, because we feel that, with the legislation that is going through now, our voices have not been heard." Islamic scholars and major organisations have come forward, too.

I am simply putting on record what those organisations have said to me. Emergency situations are very different, and what I am asking for is a very different thing.

Shona Robison: On that point, the NHS will, through the patient rights charter, try to accede to someone's demands and needs. However, in some circumstances—say, with a very small specialty that can be carried out by only a very small number of NHS professionals—that will not always be possible. Pam Gosal herself has recognised that the NHS will try to accede to needs and demands, where possible.

On her other point, the discussion that we had with the Faith & Belief Forum, which comprises various religious leaders from various faiths, was very full, frank and open, and no one had any qualms about giving me their views either in favour of or in opposition to the bill. That was absolutely right and proper.

Pam Gosal: You have said that there are practices in place under which a woman can ask for a female doctor, if they are available, and I must thank the NHS for going out of its way to accommodate the diversity of religions. However, can you clarify something for me, cabinet secretary? If my mum walked into a doctor's surgery and did not know that the person was a biological man but saw a female—a trans female, obviously; I have to get that right—she would not ask. She just would not know. How do we protect the rights of trans people but balance that with the rights of people from religious backgrounds? How can you ask for something or how can someone provide something if you do not know anything?

10:30

Shona Robison: It would be for the NHS to manage that situation. I do not believe that NHS professionals would want to put themselves in a position in which they were giving medical support to someone who did not want them to give them that support.

The NHS would, and does, manage such situations. We cannot legislate for something like that situation, so it would be for the NHS to manage it, as it currently does. The NHS currently manages difficult situations in which someone may not want a particular person to manage their care for a whole variety of reasons, whether that is right or wrong. People make demands around their own requirements, and the NHS—as you said yourself—will try to accede to those demands where possible, doable and reasonable. It does so day to day, and we should enable it to continue to do that in the way that it currently does.

I do not support amendments 139 and 140. I said last week, and I reiterate, that applying for and receiving a gender recognition certificate and clinical decisions about gender identity healthcare

are separate issues. The bill is about the process for obtaining a gender recognition certificate. A GRC is not required in order to access gender identity healthcare, and there has never been a requirement for someone to have undergone surgery or any other medical treatment in order to obtain a GRC under the 2004 act.

I am aware that the Cabinet Secretary for Health and Social Care, Humza Yousaf, has written to the committee setting out all the actions that his officials and the NHS are taking in order to address some of the concerns about gender identity healthcare, not least some of the waiting times, which were mentioned earlier. It is for the health service to resolve those issues, rather than addressing them in a bill that is about the process for obtaining a gender recognition certificate.

The Convener: Foysol Choudhury has been waiting to get in, so I will bring him in first.

Foysol Choudhury (Lothian) (Lab): Thank you, convener. I seek clarification on what Pam Gosal asked about. Has the Scottish Government consulted the faith groups? I support what has been described because, much of the time, when a religious person goes into hospital—unless they are in an emergency situation, which anyone can see—they have a choice and they can ask. However, the cabinet secretary did not make it clear in what she said. If faith groups have been consulted, I would like to know who they are.

Shona Robison: As I have said, I met the Faith & Belief Forum, which is a forum of religious leaders across many faiths, and in that discussion, some expressed support for the bill and some expressed the view that they did not support it. It was a free and frank discussion. If the member wants, I can say who was at the forum; if they are happy for the information to be shared, I am happy to say which organisations I met.

On Foysol Choudhury's other point, the matter of choice comes under the charter of patient rights and responsibilities, which says that patients will have a choice. However, that will clearly depend on the availability of a female doctor, and in some specialties, that might not be possible. There is always a "where possible" caveat, for all the reasons that we have talked about.

Foysol Choudhury: I organised a round-table meeting with the faith groups, at which there were people from every faith, and their view was that they had not been consulted. I just wanted to put it on record that more than 60 people from every single religion were there, and they told me that they had not been consulted.

Shona Robison: Okay. As I have said, I met the Faith & Belief Forum, which includes representatives of various faiths. Not every religious leader was at the forum; there were representatives appearing on behalf of religious groups. I am happy to come back to the member with more information about whom I met. It was a while ago now, so I cannot remember off the top of my head, but I can come back with information if the member finds it helpful.

The Convener: I see that Daniel Johnson, Karen Adam and Pam Gosal, among others, want to intervene.

Daniel Johnson: Cabinet secretary, although you are quite correct to say that a person does not currently have to undergo a medical or surgical transition in order to obtain a GRC, and although I note that the bill is looking just at the process, it will—or should—have the practical effect of increasing the number of people in possession of a certificate. A situation or circumstance that is currently rare will become far more likely. It might well be a matter for the NHS, but if the bill is explicitly or implicitly about expanding the number of people in possession of a GRC, there must surely be greater consideration of how that will operate in practice and in the situations that Mr Choudhury and Ms Gosal have set out.

The Convener: Cabinet secretary, I am going to take all members' comments before I let you respond. I hope that is okay.

Karen Adam: Cabinet secretary, do trans people require a gender recognition certificate to work in healthcare?

Pam Gosal: Cabinet secretary, I seek some clarification. As you know, I am a new MSP—which is something that I will probably keep saying that over the five years of the session. From legislation comes policy and from policy comes guidance. I do not understand why it is not within your gift today to agree to work with us on this part of the legislation to ensure that it is watertight and that we are supporting every diverse community and not letting anyone down.

Sarah Boyack: I welcome the cabinet secretary's commitment to discuss my amendments. Will she accept the need for co-ordinated and coherent research and monitoring if the legislation is to be successful and have an impact? Does she accept that we must think through the implications for those who will be affected by it? Whether or not they want to take the opportunity of using the simplified GRC process, there will be more interest in the topic. That puts an onus on the Scottish Government to review, in a couple of years' time, what the impact has been and what further work is needed from the Scottish Government and its agencies, as well as in public life more generally.

Shona Robison: I agree. Pam Duncan-Glancy's amendment 145, which calls for a three-year review, has the right time frame, because it

allows for data to be generated. That leads to the question of what we review and what can be reviewed, based on the information that will be available. Would that monitoring in and of itself be kept under review? I agree with Sarah Boyack, but my question is: what will the review criteria be and what information can or will we gather?

On Karen Adam's question, people will not require a gender recognition certificate to work in healthcare or in any other walk of life. As far as I am aware, that will not be required.

Finally, it is for the Equality and Human Rights Commission to consider the guidance given to public bodies, including the NHS, and it has done so. The commission has already issued public bodies with guidance on the operation of the Equality Act 2010.

Pauline McNeill: I was going to mention this later, cabinet secretary, but I will talk about it now, as you have mentioned it. You will be aware of the briefing that MSPs have received from the Equality and Human Rights Commission, which believes that, because of the significant differences between this bill and the 2004 act, there will be significant issues with regard to the interaction between this bill and the Equality Act 2010.

For completeness, ministers must address what the EHRC has said about that. The commission agrees with you on some points, but as the body responsible for guidance on the 2010 act, it thinks that there are significant issues. It would be wrong of the Scottish Government not to address that before we make decisions.

Shona Robison: Pauline McNeill will be aware of the correspondence that we have had with the Equality and Human Rights Commission, which was one of the main advocates for changing the gender recognition certificate process just a year ago. We have tried to understand some of the concerns that it has raised, as well as the change in position. We are still trying to seek clarity on that, as is the Scottish Human Rights Commission.

I have examined the issues that the Equality and Human Rights Commission has raised, and we have tried to take many of the issues that members have raised on board, including in some of the amendments that I have accepted. Even where the risk is, I think, minuscule, perception is important. Many of the amendments that I have accepted have been in the space of trying to reassure people, and I will continue to do that.

We will bring together a number of the amendments that have been lodged and we will reflect on the discussion around the committee table with regard to the art of the possible and what can be included in that stage 3 amendment. The only caveat is that I am not going to commit to gathering information that it is not possible to gather, simply because it does not exist. If what is proposed can be done and is proportionate, I am content to work with people in advance of lodging that stage 3 amendment to consider what the art of the possible might be in that respect. I hope that people are content with that.

Pam Duncan-Glancy: Forgive me for intervening, cabinet secretary—and convener; I do understand the time constraints—but, on that point, I do not understand why it is not possible to gather certain information. Do you mean that you do not gather it yet? In that case, can you confirm that you would be open to gathering additional or new information?

Shona Robison: We are open to that. People have talked about the increase in the number of people obtaining a gender recognition certificate, which is true; however, the numbers are still really small. In fact, if we break it all down into the various aspects, the numbers are actually so small that it makes the data very difficult to record.

In principle, I would say yes to your question. If there are things that we do not yet gather but which we think we could gather—and if doing so is proportionate and the numbers are not so tiny—I am happy to consider that. We are potentially talking about single figures, however, and it is very difficult to record such data, even in just a practical way.

Tess White's amendment 143 places a duty on ministers to report every two years on the impact of the eventual act on education, health and criminal justice. We think that that is too broad a requirement, and we do not support the proposal. Likewise, with regard to amendment 144, which would require the registrar general to report on the number of certificates issued to people who had previously obtained one, it would likely not be appropriate to publish information about such a tiny group of people. I therefore cannot support the amendment.

Amendment 148, also in the name of Tess White, requires ministers to consult, within six months of royal assent, on how they should report on the impact of the bill on women and girls, to report on that consultation and then to make regulations, setting out their plans for reporting on that impact. The effect of the phrase

"regulations setting out its plans"

is unclear, so I will not be supporting that amendment. Nor will I support amendment 155, which prevents section 2 from being brought into force until after the regulations required under amendment 148 have been made.

I have said, though, that I will work with people on a proportionate, balanced and doable group of areas to be reviewed. I hope that, on the basis of

that, members will not move some of their amendments. I have indicated the ones that I am happy to accept.

10:45

Rachael Hamilton: Cabinet secretary, I am still concerned that you have not reassured my colleague Pam Gosal on the impact of her amendment. I will reiterate what Daniel Johnson has said: moving to a self-declaration model for obtaining a GRC will make the protection of privacy under section 22 of the Gender Recognition Act 2004 more easily available. As a result, that section 22 privacy provision will not guarantee that a female doctor or nurse will treat a person of religious diversity. I understand the protections that are afforded under that provision, but I am not reassured, and I implore the cabinet secretary to come back to Pam Gosal and work with her on the issue. Foysol Choudhury has also raised concerns. If I may say so, there is room to continue the conversation on the matter.

Shona Robison: I am happy to continue the conversation, but it is important to recognise that some of the exceptions, protections and rights that are already the case are not changed at all by the bill. It is important to reiterate that for the record. For the sake of clarity, I am happy to discuss further with Pam Gosal whether anything more can be done on the issue.

Rachael Hamilton: Cabinet secretary, will you please accept that obtaining a GRC through a self-identification process will somewhat change the section 22 privacy protections, because it will be made available to a wider and more diverse group? That probably brings us back to Pam Duncan-Glancy’s amendments and the legal challenges that would come because of them.

Shona Robison: What is important—

The Convener: I am sorry, cabinet secretary, but a number of folk want to come in.

Shona Robison: Can I just reply to that issue before it goes out of my head, convener? The question that Karen Adam asked is really important here, because the fact is that someone who works in the NHS does not require a gender recognition certificate to live their life as a trans man or trans woman. A gender recognition certificate is not required to work in the NHS. We are perhaps focusing on a gender recognition certificate when what is actually important is the day-to-day running of the NHS, its ability to meet people’s specific needs and requirements—as it does day in, day out—and its support for staff in difficult circumstances. It is important to manage that balance. Because each circumstance will be very different, it is difficult to legislate for that, particularly when staff do not require to have a GRC. That is my caveat here.

The Convener: We have other—

Rachael Hamilton: I just want to say one more thing, if I may, convener.

The Convener: Very quickly, because other folk are trying to get in.

Rachael Hamilton: It is just a comment. Cabinet secretary, you are putting the onus on people in the NHS, for example, to interpret the law.

Shona Robison: Well, okay.

The Convener: I will take other folk who want to come in.

Claire Baker: I wonder whether the cabinet secretary can provide clarity on an issue that is linked to the previous discussion. The right to make decisions on exceptions sits with the employer, not with the patient. The patient has the right to ask about who can provide care, but the right to make any decisions under the Equality Act 2010 sits with the employer. I note that the cabinet secretary has said that the employer makes the decision, but can she set out the legal framework upon which they do so?

Shona Robison: Claire Baker is correct: employers take cognisance of employment law and the 2010 act. The employer has a balance of rights to consider with regard to the rights of patients to request whom they want and the rights and protection of staff working in their organisation and, in that respect, they would draw on equality law under the 2010 act and other employment legislation. You could imagine a scenario in which a patient refused to accept care from someone, because they were from a different minority group, and it would then be for the employer to decide what was proportionate and acceptable in the circumstances.

Claire Baker: If an employer dealing with patients decided to use an exception to make a service a single-sex service, would it be helpful for them to set out the basis on which they had made that decision? Should there be more transparency around that? I think that people’s understanding of single-sex services is based on biological sex; indeed, most people will think that, if they are told that something is a single-sex service. Under the 2010 act, sex and gender reassignment would be the exceptions that you would apply.

Shona Robison: Yes, and they can be applied if it is proportionate to do so. If an employer or service provider—you gave the example of the NHS—wanted to use such an exception under the 2010 act, they could do so as long as it was proportionate. The bill changes none of that—

those protections are still there. The Equality and Human Rights Commission's updated guidance clarifies and reiterates to public service providers that they have that exception but that, if they use it, they must show that it has been proportionate to do so.

The Convener: I should say to members that the group that we are discussing is on reviewing the impact of the act and the next group is on the interaction of this legislation with the 2010 act.

I see that Foysol Choudhury wants to come in again.

Foysol Choudhury: Will this not put employers at risk, cabinet secretary? What support will the Scottish Government provide to employers? I think that it opens up a load of arguments for everyone, and it is totally unnecessary. The matter needs to be clarified.

Shona Robison: That is why I have mentioned the Equality and Human Rights Commission's guidance. It is the body that gives guidance on the Equality Act 2010, because it deals with reserved matters.

In recognition of some of the challenges facing employers, the EHRC provided guidance on the existing provisions; that was in advance of any changes that we have made to the 2004 act. We need to bear in mind that not everyone who is living as a trans woman or a trans man, including those working in public services, has a gender recognition certificate, and the guidance covers the whole situation, whether or not they have a GRC. The guidance would still be required, irrespective of whether we had this bill.

The EHRC gives guidance to employers on the balance and proportionality required with having an exception under the 2010 act. The exception is there to use, and the NHS can use it, if it is proportionate to do so. I do not think that any guidance that we could provide would make the position any clearer, to be honest. In any case, the EHRC is the body that provides that guidance to public bodies.

The Convener: I call Brian Whittle to wind up and indicate whether he wishes to press or withdraw amendment 1.

Brian Whittle: Having listened carefully to the cabinet secretary, I will press amendment 1. It has been mentioned that the numbers are small, but we already know what the numbers are. In this year's New York marathon, there were 45 finishers in the non-binary category, three times more than the year before. We must ensure that we collect data. If that trend continues, the non-binary category will grow and grow. That is great, but we need to understand the impact of that, including on other categories.

This is already a live issue in sport, and it must be dealt with. We must collect data. I am not suggesting anything in my amendment that is not already happening in sport.

The Convener: The question is, that amendment 1 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 1 disagreed to.

The Convener: As I said earlier, I will now suspend the meeting for a 15-minute comfort break.

10:54

Meeting suspended.

11:12

On resuming—

The Convener: Amendment 23, in the name of Rachael Hamilton, is grouped with amendments 24, 25, 74, 75, 101, 103, 104, 37, 110, 151 and 152.

Rachael Hamilton: Amendment 23 is along the same lines as Foysol Choudhury's amendment 104. Amendment 24 is similar, but it seeks to clarify more precisely that obtaining a GRC would not impact on the protections offered by the Equality Act 2010 in relation to sport.

Amendment 23 addresses a key concern, which has been expressed by many women, about the effect of the bill on the 2010 act. It is important that the safeguards and protections afforded by the 2010 act are not impacted by the measures in the bill that is before us—measures that would mean that many more GRCs would be issued to a loosely defined and more diverse group. Without passing any judgment on the policy issue at stake, it is absolutely vital that the definitions that we use are clear. Law making must be precise, otherwise it will not be effective. No matter the aim, substance or ideology behind legislation, we should all be able to agree that laws must be clear and that the definitions within them must be plain.

I turn to points that were made earlier. As it stands the bill is too vague. It is not well defined and leaves far too much to subjective interpretation. We should all be agreed on looking to improve the bill. This new law will not be workable for anyone if it is incomprehensible or imprecise. Ultimately, the bill is not clear enough. It is important that the public are reassured that the bill will not harm women's rights.

Amendment 23 simply seeks to take the cabinet secretary at her word, as expressed in previous proceedings, by writing on the face of the bill the fact that the new system of gender recognition that it introduces will not change how the definition of sex in the Equality Act 2010 is interpreted. I note that Foysol Choudhury's amendment 104 is similar but extends that approach to the definitions of "woman" and "man".

Amendment 24 safeguards the rights of sports bodies to include separate sports categories based on biological sex. It seeks to achieve that by stating:

> "For the avoidance of doubt, nothing in this Act affects the protections offered by section 195 of the Equality Act".

11:15

The 2010 act prohibits discrimination against trans people. However, it provides an exemption for sports bodies to be able to require that athletes compete in sports based on their biological sex where that is needed for safety and fairness. The amendment lodged by my colleague Brian Whittle on the reporting duty, which was not supported by the Scottish Government, expanded on the detail of the exceptions that are required to safeguard women and girls in sport.

The committee received evidence that the bill would negatively impact women's sports by changing the group of individuals who can participate in them. Athletes such as Sharron Davies have stated that self-declaration would make it impossible for sports authorities to enforce single-sex sports. In addition, Mara Yamauchi has raised concerns that girls may self-exclude from sports at both grass-roots and elite level because of the bill.

That issue strikes at the heart of fairness for women and girls. How may they fairly compete against athletes who have genetic benefits that they cannot possibly have? How can it be fair to stack the playing field against them, based on inbuilt advantages that they cannot match, through no fault of their own? To me, that would simply be deeply unfair to the young girls who are striving to succeed and will suddenly find that they cannot, and to the world-class athletes who have sacrificed to be the best, only to find that they cannot win.

That goes against every principle of sport and basic fairness. Amendment 24 seeks to assist sporting bodies to make it clear that, in legislating for the new system, the Scottish Parliament has no intention of undermining the use of the protections in section 195 of the 2010 act. Again, I make it clear that the intention of my amendments is to make the bill clearer. Nobody benefits if the bill is not clear; that will only make things more difficult for everybody.

If the cabinet secretary wishes to ensure that sports bodies are able to protect the rights of women who want to compete fairly, the amendments will achieve that. If she does not want to achieve that, and if the bill's intention is to make the playing field unfair for women—I sincerely hope that that is not the case—I hope that those who are seeking to achieve that aim will reconsider. I hope that if that is the intention, the cabinet secretary will say why that is fair for young women or for world-class female athletes.

We should not risk legislating in a way that would make it harder for service providers to use the powers that they currently have under the Equality Act 2010 to respond to women's needs for single-sex provision for reasons of privacy, as discussed previously, and for dignity and safety, in sport and more generally. My amendments are intended to prevent us from making that mistake.

I therefore invite the cabinet secretary to explain how, by broadening the group of people who will be able to obtain legal gender recognition, her proposals do not have significant implications for the operation of the Equality Act 2010 in Scotland. Furthermore, if she believes that GRCs should not be relevant to the operation of the 2010 act, and if she wants to create clear laws without leaving room for vague misinterpretation, why will she not support my amendments?

Finally, if the bill's intention is to change the entry requirements for competition for women and girls in sport, I ask her for a very simple answer to the question of how it is fair to disadvantage women solely because of genetics.

I move amendment 23.

The Convener: I call Daniel Johnson to speak to amendment 25 and other amendments in the group.

Daniel Johnson: I thank the committee for welcoming to the meeting those of us who have lodged amendments. Let me be clear: I am fully convinced that we need reform of the Gender Recognition Act 2004. Ensuring that people have a straightforward, understandable and non-stigmatising way to have what is a fundamental part of their identity recognised in law is really important. In so doing, however, it is vitally important that we understand that we do that

within the context of broader law, and that the laws that we pass have consequences and impacts for policy and practice beyond their immediate scope.

We have to acknowledge—indeed, I think that we have already heard it implicitly acknowledged this morning—that the Equality Act 2010 is robust and has stood up well in the 12 years since it was passed. It has protected the rights of many, partly because it has been able to move and reflect, and to be nuanced, in the way that it is understood.

Fundamental to the 2010 act's ability to do that is the fact that it did not set up protected characteristics as siloed boxes or distinct categories; it set them up as balanced perspectives and sought to balance rights, identities and characteristics in context. Fundamentally, the act recognises nuance and context in the understanding of those aspects and embeds them in the way in which the law is applied. In short, the act works because nuance and context matter—they are at the very heart of the way in which the act operates.

That is what I seek to do through amendment 25, which seeks to require the Government to introduce broadly stated guidance on the

"interaction of this Act with the provisions of the Equality Act 2010."

The previous discussion acknowledged that point. In particular, I note the exchange between Claire Baker and Jamie Greene, which very much focused on that. Carol Mochan's amendment 152—she has been unable to stay at the meeting in order to speak to it—also considers the point.

The Gender Recognition Reform (Scotland) Bill does not and cannot change the Equality Act 2010, but it will change understanding and will lead public bodies to reflect on and revise their policies. Indeed, much of that has already happened. In simplifying the criteria for obtaining a GRC, it will widen the number of people who are likely to get one. I will see it as a sign of success if increased numbers of people do so. That is an important point; it was highlighted by the EHRC and it is important that we acknowledge it today.

My amendment is intended both to act as a probing amendment and to have practical effect. On the first point, it is important that we get clarification from the Government on its intention with regard to aspects that currently can be considered under the 2010 act, whether we want to describe those as physical, biological or genetic characteristics, and how they will continue to be validly considered as a matter of policy.

On the practical point, given the examples in recent years of clumsy—albeit very well-intentioned—decisions that have been made that have had consequences for a great number of people, it is important that there is practical assistance in place, so that we do not leave the people who are tasked with implementing public policy to just make it up. We need clear and robust guidance and assistance from Government so that those people have the clarity that they need to do their jobs.

I will go a little bit further. As I said at the outset, when it comes to identity, nuance and context matter. That is why I accept the right of people to self-identify when it comes to their gender. However, by the same token, if nuance matters, we cannot overlook or ignore nuances just because they are complicated. Someone's chromosomes, anatomy and physiology certainly do not define them, but, if nuance and detail are important, we cannot completely disregard or ignore them.

The contexts in which those things are relevant are incredibly narrow, but where they are relevant, they are incredibly important. When we are talking about situations such as physical examinations, which we have heard about already this morning, or those in which people are required to surrender their bodily privacy to others, we have to understand how and where we can relevantly discuss these matters and make decisions with others about them. It goes beyond the immediate scope of the bill. As well as for those people who can validly obtain a GRC, we already see the practice informing decisions being made by youth groups, sports groups and schools, and in other contexts. Therefore, it is important that we have clarity, provide guidance and understand the interaction between the bill, once it is passed, and the 2010 act.

Like many other members, I have had a huge number of people approach me in my constituency office and at my constituency surgeries. I do not share some of their concerns, but I have found some of them arresting and difficult to explain away. I will give just one example.

About a year ago, a woman came to speak to me and asked me how I would feel if my daughters attended a guides group and the guide leader was a trans woman. I said that I would not care in the slightest, as I do not think that that is relevant—as long as the person had gone through the relevant training and checks, I would not care at all.

Then they asked me how I would feel if I found out that, while doing an outdoor expedition, my daughter had been asked to share a tent with a male-bodied peer. Do I think that there should be an absolutely categorical cast-iron rule in those circumstances? No. Do I think that it should be discussed with me? Probably. Do I think that my daughter should have the ability to discuss that

without being told that she is wrong or bigoted? Absolutely.

It is incredibly important that we have that ability to discuss and that we understand when it is relevant to focus on those elements, whether we describe them as anatomy, biology or physiology; otherwise, we will do a great deal of damage. In fact, we are putting the people responsible for implementing public policy in an invidious position.

I therefore ask the cabinet secretary to clarify whether she thinks that it is relevant to consider those things and, ultimately, to commit to bringing forward clear guidance for the very reasons that were discussed in connection with the previous discussion.

As I said at the beginning, ultimately, nuance and context matter, which is why we need guidance on the interaction between the bill and the Equality Act 2010.

The Convener: I call Pam Gosal to speak to amendment 74 and the other amendments in the group.

Pam Gosal: As I said previously, I recognise that improvements to the gender recognition process would be beneficial for trans people. However, my job here is to ensure that the bill, once enacted, is balanced. As it stands, the bill does not strike a balance and instead puts women, girls and vulnerable individuals in harm's way.

Amendments 74 and 75 protect single-sex spaces. The amendments would require Scottish ministers to publish information on the impact of the legislation on single-sex spaces and services. Throughout this process, some of the concerns raised by stakeholders and witnesses on the issue have been met with accusations of scaremongering. The Scottish Government has repeatedly brushed off those concerns and suggested that there is no data to suggest that abuse of self-ID would take place as a result of the bill. However, there are legitimate concerns that the changes introduced by the bill would make it easier for predatory men to abuse the process.

Written evidence, including evidence from the Women's Rights Network Scotland, has indicated that the absence of a medical diagnosis and a gender recognition panel, as well as the lowering of the waiting period from two years to three months, could lead to predators falsely claiming to be trans in order to gain access to single-sex spaces. That is particularly concerning for vulnerable individuals, such as women in domestic abuse shelters, women in prison, and young children. Those are concerns that we have heard time and time again throughout the process. If the Government really has the courage of its convictions and thinks that those concerns are not valid, it will allow the reviews to take place in order to provide some reassurance.

I will support amendment 110, which will allow for accurate reporting on sex. I will also support amendments 23, 24, 25, 101 and 151, which seek to provide more guidance and clarity—for the avoidance of doubt—on the interaction between the bill, when enacted, with the Equality Act 2010. I also support the Equality Act 2010 in its current form, including the existing definitions that it contains, and therefore I will support amendments 37, 104 and 152.

I really hope that today the cabinet secretary provides a response that will give some reassurance to the women, girls and parents out there who have expressed their concerns by contacting me directly, or in social media, in the media and at the rallies outside Parliament. I hope that she has listened in order to ensure that the bill, once enacted, is fair and balanced for all.

I hope that the cabinet secretary can demonstrate that she has, at the very least, listened to those concerns and that she will support my amendments. Although I do not believe that they alone will provide a safeguard, they would at least offer some reassurance that the impact of the bill on single-sex services and spaces will be reviewed.

The Convener: I call Pauline McNeill to speak to amendment 101 and the other amendments in the group.

11:30

Pauline McNeill: Like Daniel Johnson, I support reform of the Gender Recognition Act 2004. It seems a century ago, but I chaired the committee that considered that legislation at the time. It was a much-needed piece of legislation to protect the rights of trans people.

My amendment 101 would require the Scottish ministers to publish guidance on the effect of having a gender recognition certificate. It seeks to clarify both that effect and the impact that obtaining a GRC will have on rights under the Equality Act 2010.

In his remarks, Daniel Johnson went quite a long way towards making the central argument that I am going to make, which is that, if the Government does not provide clear guidance, public organisations will be unclear about how they may use the 2010 act to, for example, protect single-sex spaces. As far as I am concerned, it would be unacceptable to leave organisations in the dark in that regard.

Although a GRC that was gained under the 2004 act will have the same interaction with the Equality Act 2010, my contention is that the

guidance on exclusions could never be made clear enough. The bill seeks to make significant changes to the process and, with a larger number of individuals being likely to apply for a GRC after its provisions come into effect, it is now pressing to ensure that the guidance is clarified.

A note from MBM says:

"It is ... worth emphasising ... that a GRC is not a sex-invisibility cloak. In court recently, Counsel for the Scottish Government appeared to argue that once someone had changed their birth certificate using a GRC, it would be more or less impossible for organisations to distinguish between those born female and holders of a female GRC."

I asked the cabinet secretary about that at stage 1, because there appears to be a contradiction between what the Government has said to Parliament—we heard that in an exchange between Karen Adam and the cabinet secretary—and what it has argued in court. We have heard that the fact that someone has a GRC will not be a basis on which an exclusion may be made, yet the Government has argued in court that there will be legal significance to having a GRC. We need clarity on what it means by that.

On the 2010 act's functions with regard to the exclusion of men from single-sex spaces, the Equality and Human Rights Commission tells us:

"The Equality Act allows for the provision of separate or single sex services in certain circumstances under 'exceptions' relating to sex."

If that is the case, it is incumbent on the Government to set out how that can be achieved. Again, I asked the cabinet secretary to address that, but I do not think that it was addressed. I hope that the Government will address it.

The Equality and Human Rights Commission says:

"By broadening the group of trans people who will be able to obtain legal gender recognition, the proposals have significant implications for the operation of the Equality Act in Scotland."

The Government cannot ignore the fact that the body that is responsible for telling us how the Equality Act 2010 operates is saying that that could be a problem and that it needs to be resolved.

The EHRC continues:

"Whilst the Equality Act makes provision to treat people with the protected characteristic of gender reassignment differently from others sharing the same legal sex in certain circumstances and where justified (for example, in relation to occupational requirements, separate- and single-sex services, sport and communal accommodation), such provision does not apply in every context contemplated by the Act."

Although sex discrimination cases are a reserved matter, I believe that, given the significant changes to Scottish GRCs, employers need to be aware of the interaction between sex discrimination and Scottish GRCs. For example, women who make equal pay claims will need to know whether they can compare themselves to someone with a GRC or not. I make no comment on that, but we need the Government to make such things clear.

Claire Baker mentioned while we were considering a previous group of amendments that, under the 2010 act, an approach must be a

"a proportionate means of achieving a legitimate aim."

That will depend on the nature of the service and it may be linked to the reason why the single-sex service is needed. We are clear that the 2010 act allows exclusions, but we are unclear about what those exclusions really amount to.

The EHRC guidance gives the following example:

"A group counselling session is provided for female victims of sexual assault. The organisers do not allow trans women to attend as they judge that the clients who attend the group session are likely to be traumatised by the presence of a person who is biologically male."

We need the Government to say whether it believes that such exclusions would be lawful or unlawful and whether its guidance will support them or not.

The same holds for domestic abuse refuges. Some have sought to make exclusions, but they have found themselves at the wrong end of, for example, social media. If exclusions exist, organisations must be allowed to use them, and I would argue that, if the Government is seeking to make significant changes to the 2004 act, it is incumbent on it to say in guidance what the effect of having a Scottish GRC is.

I could give other examples. I note that, in its guidance in 2015 on accessing sports facilities and services by transgender people, Glasgow Life, in a section entitled "Single Sex leisure Provision", said:

"The person is entitled to participate in single sex sessions and cannot be excluded from participation of their chosen gender."

That is legally incorrect. The authority in my own city is saying that you cannot exclude people, but that is plainly wrong, and the Government has to start challenging these things if it believes that we can use the Equality Act 2010 as intended.

I also put on record my concern about a letter that Kevin Stewart, the Minister for Mental Wellbeing and Social Care, has written to all health boards, further confusing Government policy on this matter. I have asked for that letter, but I have had to base what I am about to say on reports that I have read, so I ask the cabinet secretary for some clarity. The minister is reported

as saying that health boards who place trans women in a private room as a way of dealing with single-sex wards may be discriminatory. That is plainly wrong in law if the Government believes that it can prove that these exclusions exist. Scottish Government ministers are not helping themselves or helping people understand how the exclusions can be made.

In summary, the Government has to set out in a more explicit way the rights that women have to set boundaries on single-sex services and the rights that organisations have to use the exclusions. If the cabinet secretary's answer today is that this is a matter for the Equality and Human Rights Commission, I, again, have to cite the fact that it, too, is concerned about this. It is down to the Scottish Government to say what the effect of having a GRC is.

On my other amendment—amendment 110—I think that we are all at one in this Parliament, certainly from the debates that we have had, in saying that violence against women and girls is a significant problem in Scotland and, indeed, across the world. That data must continue to be collected, and I believe that it should be collected on the basis of biological sex. I would like to hear what definition the Government intends to use in that respect, because, as I have said, I do not think that that has been clear from what it has said in court. Indeed, it has not said anything so far in this process that makes things any clearer. I would have thought that there would have been some agreement to continue to collect that data without interfering with the bill's main principle of giving trans people dignity in their lives and of significantly improving the 2004 act to ensure that we make changes that make sense.

I will definitely be moving amendment 101, but I will listen to what the cabinet secretary has to say on amendment 110.

The Convener: I call Brian Whittle to—[*Interruption*.] I suspend the meeting briefly.

11:38

Meeting suspended.

11:39

On resuming—

The Convener: I resume the meeting. I call Brian Whittle to speak to amendment 103 and other amendments in the group.

Brian Whittle: Amendment 103 applies to any governing body or authority that needs to make a decision on the inclusion of trans people in sporting activities, especially with regard to

> "any safety concerns or .... material advantage that may be gained as a result of change of gender resulting from this Act".

As has been said, the Equalities and Human Rights Commission has stated:

> "By broadening the group of trans people who will be able to obtain legal gender recognition, the proposals have significant implications for the operation of the Equality Act in Scotland. Whilst the Equality Act makes provision to treat people with the protected characteristic of gender reassignment differently from others sharing the same legal sex in certain circumstances and where justified"—

sport is one of those—

> "such provision does not apply in every context contemplated by the Act."

The reasons why we must include these amendments in the bill are as follows. First, as I have said, sport, globally, is in turmoil as it tries to deal with the trans community's participation in sport. I have mentioned the mess that sport has made of dealing with the intersex community and its inclusion in sport—to the detriment of that community and to the detriment of sport.

There is variation from sport to sport, from country to country and even, in the US, from state to state. That means that some trans athletes participate as a woman locally but must compete as a man nationally or internationally.

Sports national governing bodies are unsure of the legalities under which they can act. They may leave themselves open to court action on the grounds of prejudice. Conversely, if a trans athlete is injured, or injures a fellow competitor, the sport may be left open to legal action for failing to take appropriate action to protect the safety of participants. In other words, I say to the cabinet secretary, many sports are not taking any action, for fear of making the wrong decision.

Currently, in international sport, the determination of sex involves a swab on the inside of the cheek. That determines a competitor's sex, for life.

It is not just about national governing bodies but about coaches and teachers, and it is subjective. I speak as a coach. I have been a senior coach for 20-odd years. I was the chair of Athletics Coaches Scotland and am a member of the European Athletics Coaches Association. We are in turmoil. We do not know how to deal with the issue, because it is so subjective. Sport does not employ its participants. We are not subject to employment law. The problem is that, if I make a decision that is based on safety, that is subjective, and I am open to legal action.

I was asked by a national governing body whether it would be acting illegally if, on the grounds of safety, it took action to prevent a trans athlete from competing, given that the trans

athlete had a material advantage due to the sex in which they went through puberty. As I have said, it is not just national governing bodies that have to make such decisions in sport; teachers and coaches have exactly the same issue when selecting teams. The fallout from a wrong decision is significant.

If a male and a female athlete are of the same size, the male can generate approximately 160 per cent of the force that the female can generate. A person who was born male and has transitioned to female retains many of the male characteristics that give a huge unfair advantage.

When women go through puberty, the quadriceps angle of the hip changes. Is that important? Absolutely. It is physics—it is about the application of power. A male's bone density, muscle mass and heart and lung size are one third greater than those of a female. Especially, therefore, in sports in which contact is made, we are asking females to compete, potentially, in an arena in which the person opposite them will be able to deliver a much greater force to a much weaker frame. Then there is the issue of menstruation, which was highlighted by Dina Asher-Smith and by Eilish McColgan this year. In any sport in which power and speed are significant elements, there is a significant risk of injury.

When it comes to trans men competing in women's sport, they are likely, if they are transitioning, to be going through hormone replacement therapy. Those hormones are illegal, according to the World Anti-doping Association. In other words, that is tantamount to legalised doping. Currently, most trans men still compete as women, because they cannot be competitive in men's sport.

I will give examples from my sport. The world record for the 400m for women was set in 1985 by an East German by the name of Marita Koch—that was during a time when there was state-sponsored doping. Since 1985, not one woman has got near that performance. However, last year, 10,000 men ran quicker than that. A man could be ranked 1,000th in the world, then transition and all of a sudden be a world record holder.

11:45

Another example is Tori Bowie, one of the greatest sprinters in the world, who has won the Olympics and the world championships. However, last year, men ran quicker than her 15,000 times. It is just an unfair playing field. Surely we cannot have women excluded from sport, as is currently happening, because politicians cannot make decent law and will not take responsibility.

Do not think that this is just happening at elite level, because it is happening across all age groups and abilities in our schools and our sports clubs. I have seen it.

As I said to the cabinet secretary, I think that it is fantastic that the New York marathon and the Boston marathon are taking a stance on the issue by creating a non-binary category. That category tripled in size in one year, which says to me that we are now offering trans athletes the opportunity to participate and they are confident about coming forward. Those numbers will only increase exponentially, and we have to be aware of that.

There are more than 1 million women and girls participating in sport in Scotland. It has been a long fight to try to get equality between men's sport and women's sport, and we have come such a long way in my lifetime with regard to the events that women are now able to participate in and parity of prize money.

In making this legislation, it is imperative that the Government considers the impact of the bill across all of society and does not pass the buck. We have to protect women's rights and we have to protect the trans community—I refer again to what happened to Caster Semenya.

We all want equality across society, but you cannot create equality for one group by creating inequality for another. The Scottish Government cannot hide from the potential safety issues, and those must be dealt with prior to the passing of the bill. We cannot wait until there is an injury before amending the legislation.

Foysol Choudhury: Like Pam Gosal, I am a new MSP, and this is my first time speaking to an amendment, so please be kind to me.

My amendment 104 intends to ensure that there is no contradiction between the provisions in the bill and the Equality Act 2010. It is a compromise. I was advised that the best way to achieve that aim would be to insert an exception into the 2004 act—for example, in section 15 or section 16—to ensure that that legislation would have the same effect as my amendment would in Scotland. Unfortunately, that was ruled out of the scope of the bill; I should say that I do not entirely agree with that. The reasoning was that the bill is to do with the process of getting a GRC in Scotland, not what a GRC does. However, the question of what a GRC does is implicit in the bill. Why else would the question of whether a GRC legally changes one's sex for the purposes of the 2010 act have been raised in our business at all?

When some have made it clear that their view is that a GRC changes one's legal sex, and others have made it clear that that would render the legal protections for single-sex spaces in the 2010 act impossible to maintain, it is important to clarify that

point. I hope that the minister will clarify in her response whether the Scottish Government believes that a GRC that is granted under this legislation would change one's legal sex as well as one's gender. My amendment seeks to clarify that point as far as is allowable within the scope of the bill, in order to ensure that nothing in the bill overrules the existing protections or definitions in the 2010 act.

I appreciate the efforts of Pam Duncan-Glancy and Rachael Hamilton to achieve that aim through similar means. However, my amendment differs in specifically adding clarity on the definitions in the 2010 act.

The EHRC briefing that was circulated to MSPs voiced its support for clarifying the relationship with sections 11 and 212 of the 2020 act, with a view to addressing cross-border complexities. It said:

> "By broadening the group of trans people who will be able to obtain legal gender recognition, the proposals have significant implications for the operation of the Equality Act in Scotland."

In short, if we do not make the matter clear in the bill, we will be inviting legal challenges to clarify contradictions that we as legislators will have created. I do not believe that that is a responsible approach to creating legislation on matters that are so important.

Recently, I held a round-table meeting with people who represented many of Scotland's faith communities. They were unanimous in voicing their concern about the ability to maintain the single-sex spaces that are required for their religious purposes. Participants even noted that there was little support from the Scottish Government when it comes to the practicalities of implementing such law. They said that there is a sense that the rules are handed down from MSPs in ivory towers and that it is left for everyone else to deal with the consequences. In this case, the consequences will include places of worship and low-paid front-line workers having to work out how to police single-sex spaces themselves.

It cannot be right that we invite those legal contradictions and then expect religious organisations and low-paid workers, for example, to navigate the resulting legal minefield. Therefore, there must be clarity in the bill on the relationship with the 2010 act. That is why I lodged my amendment.

Pam Duncan-Glancy: Throughout the process, Scottish Labour has sought to focus on the bill and its drafting and to reject the culture wars that have dominated some of the discussion. Casting trans people as threats or women as bigots is not helpful. What we need is good law and clear guidance, and that is what my party and I are working to achieve.

Although many concerns relate to issues that are not in the bill, we understand that some people, including women, are frightened that they will lose some of their rights, particularly in relation to single-sex services, and we know that they have fought hard for those rights.

Colleagues will know that the Equality Act 2010, which was introduced by the last Labour Government, provides protection from discrimination for women and trans people. It is our view that nothing in the Gender Recognition Reform (Scotland) Bill will or should affect that. In the case of gender reassignment, it is clear that the protection from discrimination exists whether or not a GRC is in place and whether or not the person has undergone medical treatment for transition. The protections in the 2010 act also allow single-sex services, such as women's refuges, to exclude men and trans people in certain circumstances. It is Scottish Labour's view that the 2010 act is reserved and cannot be altered by devolved legislation, so it is our understanding that those protections will and must still apply if the bill is passed. That is a matter of great importance for many people who are concerned about the current reforms, and we recognise the desire for reassurance. That is why I lodged amendment 37.

That protection, which allows for the operation of single-sex spaces, works as an exemption to the right not to be discriminated against on the basis of sex or gender reassignation, but only when that is a proportionate response to meeting a legitimate aim. For example, in the case of a women's single-sex service, a trans woman without a GRC could be excluded on the ground that they are legally a man. A trans woman with a GRC, who is therefore legally a woman, could also be excluded, but on the ground that they have reassigned their gender and sex on their birth certificate.

Both of those exemptions, for the protection and dignity of women who are accessing services, must be protected. That is why we support reform of the Gender Recognition Act 2004 and the continued implementation of the protections and provisions in the Equality Act 2010. Therefore, it should be clear in the bill that nothing in it modifies the protections in the 2010 act. In proposing amendment 37, I seek to ensure that, should the bill pass, it is clear that Parliament believes that the GRA must be considered alongside the 2010 act.

It is also my belief that it is crucial that the Equality Act 2010 is read in as a whole, because it is the interaction of all the schedules in that act that brings its strength. Including only the aspects

of the 2010 act that relate to sex could, at a later date, mean that it could be assumed that we did not give importance to, for example, gender reassignment. That would be a concern in relation to a number of issues, but that element specifically could be key with regard to applying some of the previous exemptions that I spoke about in relation to protecting single-sex services.

That is why I believe that my amendment, which focuses on the 2010 act in its entirety, affords the best and strongest protection for trans people and women and all of us. It covers the protections in sections 11 and 195 of the 2010 act, as other amendments in the group seek to do, and I believe that it will carry the confidence of the public.

On that basis, I will abstain on several amendments in the group that pick out specific sections of the 2010 act and on Jeremy Balfour's amendment on the European convention on human rights, which was discussed previously. My amendment seeks to cover all of those without separating them from the other aspects of the 2010 act, which I believe is what brings its strengths.

I will support amendments that seek guidance on how the two acts would work together. That will be essential if the public are to have confidence in the law and in order that organisations are clear about what they can and cannot do, which my colleagues have spoken about already. Amendment 37 would ensure that, in any future dispute over Parliament's intention in passing the Gender Recognition Reform (Scotland) Bill, it will be clear that each and every protection and provision of the Equality Act 2010 will and must continue to have effect, despite the passage of the bill.

Claire Baker: Amendment 151 complements my previous amendment 156. I have outlined to the committee the rationale and purpose of those amendments in relation to occupational requirement exceptions, and I emphasise that my amendments are about ensuring that rights in the Equality Act 2010 can be exercised.

Although I am pleased that the cabinet secretary has indicated support for amendment 156, notwithstanding the potential for amendment at stage 3, amendment 151 would commit the Government to produce guidance on occupational requirement exceptions that clearly sets out the interaction between the bill, schedule 9 to the 2010 act and, crucially, section 22 of the 2004 act. Although, in the previous discussion, the cabinet secretary set out the basis on which exemptions can happen, I hope that she recognises that section 22 is having a chilling effect on the operation of those exemptions.

Although the Equality and Human Rights Commission has issued guidance on occupational requirement exceptions, the interpretation of that guidance in public bodies across Scotland is leading to confusion, as Pauline McNeill outlined in her contribution. The Government might argue that it is not its role to issue guidance, but it is not unusual for additional guidance to be issued. For example, the Equality and Human Rights Commission provides guidance on discrimination for schools in respect of the 2010 act. Education Scotland says that the guidance

"provides an authoritative, comprehensive and technical guide to the detail of the law"

and

"an overview of the obligations".

It describes the guidance as

"an essential reference which should be used both to develop and review policy."

Furthermore, in a briefing for stage 2, the EHRC said that the UK and Scottish Governments

"must also ensure clarity for employers and service providers on the law."

Therefore, I do not believe that it is outwith the boundaries of the Scottish Government's powers to provide clarity on those issues. I go back to the quotation that I gave from the Government's 2019 consultation: with regard to the scenario of information being held by an HR department, the Government consultation said that it is

"appropriate for information about a person's trans history to be shared in a strictly limited, proportionate and legitimate way."

It would provide much-needed clarity were the Government to set out that assurance in guidance, which employers could use on the occasion that they wished to exercise an occupational exemption, which they are able to do with the support of the 2010 act when it is proportionate for a legitimate aim.

The provision of such guidance would also provide clarity for service users, as it would emphasise the EHRC guidance and would make clear the circumstances in which they could expect an occupational exemption to be considered. That would provide clarity for the provision of single-sex services and, although there might still be questions or challenges, the legal framework in which decisions are taken would be made clear.

12:00

Shona Robison: First, I say that I have been taking notes of the points that have been made by members throughout what has been quite a lengthy discussion. I occasionally consulted with

officials on those points, which I would have thought was an entirely appropriate thing to do.

I turn to the amendments on the bill's interaction with the Equality Act 2010. I support amendment 37. I cannot support any of the other amendments in the group and consider some of them to be outwith legislative competence.

In connection with Pam Duncan-Glancy's amendment 37, it is appropriate that I provide the committee with an explanation of the way in which the bill does not modify the 2010 act and of the way in which, although a GRC can affect the treatment of people in accordance with the 2010 act, the bill does not change the effects of obtaining a GRC.

As I have said before, the bill does not modify the reserved provisions of the 2010 act, which includes not changing the protected characteristics and the single-sex exceptions under the act. In line with that, amendment 37 uses the word "modifies", which has a technical meaning that refers to modifying rules of law by means of a textual amendment, repeal or otherwise.

As I also confirmed in the stage 1 debate, the effect of a GRC on the sex of a person for the purposes of the protected characteristic of sex is not changed by the bill. The effects of a GRC were provided for in the 2004 act, and those effects are not changed by the bill. The effect of a GRC on the protected characteristic of sex is a matter of the application of the rules in the 2010 act, and those are not altered by the bill.

The application of the rules in the 2010 act is not for the Scottish Government to explain or advise on—for very good reason, because, as I have explained previously, the provisions of that act are reserved. The Equality and Human Rights Commission, as a reserved body, and not the Scottish ministers, provides a code of practice—[*Interruption*.]

The Convener: I am sorry to interrupt. Other members want to raise issues, but I will let the cabinet secretary finish covering this area first.

Shona Robison: —and guidance on the effects of the 2010 act. The bill also does not change the provisions on the protected characteristic of gender reassignment that are contained in the 2010 act.

Convener, would you like me to finish?

The Convener: If you could find a place to pause—or do you want to continue your point?

Shona Robison: Maybe I could just finish this point.

I have explained the effect of the bill. However, I have had discussions with members who are keen for the bill to include a provision on interaction with the 2010 act, as they have said when moving their amendments. Amendment 37, in the name of Pam Duncan-Glancy, provides that, for the avoidance of doubt, the bill does not modify the 2010 act. I can support that amendment if the committee chooses to agree to it. It covers the entirety of the 2010 act rather than specifying particular sections or elements of it.

I was going to go on to address amendments 23 and 104, but perhaps I could pause at this point.

The Convener: I will take interventions from Rachael Hamilton, Daniel Johnson and Claire Baker.

Rachael Hamilton: I would like some clarity on the relevance of a GRC under the Equality Act 2010. Does the cabinet secretary believe that a GRC is relevant or irrelevant under that act? Two weeks ago, the Scottish Government argued in court that a GRC changes someone's sex under the 2010 act. Can she explain that?

The Convener: Before you come back in, cabinet secretary, I will take the other folk who suggested—all at roughly the same time—that they wanted to intervene. Let us hear from Daniel Johnson.

Daniel Johnson: I accept what the cabinet secretary has said about the narrow scope of the law, but I wonder whether she would consider the following aspects.

Although the bill does not alter the 2010 act, it deals with very much the same landscape. There are concepts and considerations here that, in terms of the practical implementation of public policy, public bodies will have to think about at the same time as they consider their duties under the 2010 act. Therefore, as a practical—if not a legal—consequence, there is overlap, as there always is in legislation.

I would go further. Regarding other legislation, the Government is on the record as saying that law is not simply the regulation of what can and cannot be prosecuted. Laws are also about communication and wider social impacts. Does the cabinet secretary acknowledge that there are consequences that go beyond the strict scope of the law that will have to be contended with by public bodies? I do not think that the cabinet secretary really answered the point that the EHRC made about the bill having an impact on the application of the 2010 act in Scotland. Does she acknowledge that point? What is the Government's response to it?

The Convener: Claire Baker wants to speak, as do Pauline McNeill, Jamie MacGregor and Fulton—I am sorry—Jamie Greene and Fulton MacGregor.

Jamie Greene: That is quite a mash-up.

Claire Baker: I had not indicated that I wanted to speak. I think that there has been some confusion.

The Convener: I am sorry. I call Pauline McNeill.

Pauline McNeill: I have a simple point to make. Cabinet secretary, you said that the bill does not modify the Equality Act 2010 or the effects of obtaining a GRC. That is fine, but it is confusing that the Government is arguing that legal sex—as opposed to biological sex—includes those who have a GRC. It appears that the Government's definition of sex includes people who have a GRC. That would not be my definition, and many people would disagree with that: it is disputed.

You state that the bill does not modify the effects of the 2010 act, but it does change those effects if your definition of sex is not one of biological sex. I think that you need to clear that up. What is the Government's definition of "sex" for the purposes of the 2010 act?

Jamie Greene: I am far less titled than Mr McGrigor is, but I will do my best.

Cabinet secretary, I believe that you stated that you will support amendment 37. It says:

"For the avoidance of doubt, nothing in this Act"

and so on. It has a very narrow bandwidth. You argued against amendment 111 by saying that amendments that begin

"For the avoidance of doubt"

are completely meaningless, and you asked the member not to move that amendment. Now, for entirely the opposite reason, you are asking members to support amendment 37, which is worded very similarly and therefore should have the same meaningless effect.

I think that what members are saying, by using a series of different amendments, is that the purpose of the bill might not be the same as its effect. We will not know what effect the bill has until after it has been enacted. I believe that there might be a compromise to be had in the catch-all reporting requirement that the Government has indicated that it would be willing to consider. I wonder whether some of the amendments about the interaction between the bill and other legislation might be best dealt with there. If the Government is not willing to support them all, perhaps Pam Duncan-Glancy's amendment 37, which is very limited and narrow in scope, might provide room for constructive work with members ahead of stage 3.

Fulton MacGregor: My question is in a similar vein. Cabinet secretary, I know that the Government is not overly keen on accepting a huge number of

"For the avoidance of doubt"

amendments, but I know that you are considering Pam Duncan-Glancy's amendment 37 in particular because it encompasses a wider remit. When you respond to the interventions, if you are suggesting that the committee should support that amendment, please say whether you think that it captures the intent of my amendment 111, and to what extent it does so.

Brian Whittle: Cabinet secretary, you indicated that you will not support my amendment 1. According to the Equality and Human Rights Commission, by removing some of the safeguards, you are having a significant impact on the operation of the Equality Act 2010 in Scotland.

Here is the reality: we cannot hide from the impact of the bill and not prepare guidance for sporting governing bodies, coaches and teachers. It is not a case of whether women will get injured, or when, because it is already happening.

I have seen that personally. As you know, I have three daughters, one of whom is a young teenager who participates in a combat sport. At one contest, standing opposite her was a trans woman bigger than me. That is the reality in Scotland right now. Thankfully, that trans woman recognised her advantage and restricted herself. That will not happen all the time. Women will get injured if we do not clarify what the rules and regulations are for sporting governing bodies, coaches and teachers.

I am afraid that that is factual, cabinet secretary, because that is happening around the world.

Shona Robison: I will try to come back on all the points and questions that have been raised before making final comments on the other amendments.

On Rachael Hamilton's question, it is worth pointing out that, under the Equality Act 2010, sex and gender reassignment are protected characteristics and that gender reassignment protection applies whether or not someone has a GRC.

On the point about the 2004 act and the effect of obtaining a GRC, the position is as set out in section 9 of the 2004 act. Nothing in the bill changes that. Essentially, that enables people to change their birth certificate to be in line with their acquired gender. That has been the case for 18 years, and that remains the same.

I will not comment on the court case, other than to say that the position of the Scottish Government is exactly the same as the position that the Equality and Human Rights Commission set out in court. We agreed with that position; there is no difference in position.

Rachael Hamilton: That is with regards to gender representation on public boards, which is a devolved matter. What is the EHRC's view on other aspects that are reserved?

Shona Robison: The EHRC's position is on the effect of a gender recognition certificate. As it has stated—I think that its position is on its website—the bill changes none of that.

I will not comment on the court case, other than to say that our position is exactly the same as the EHRC's position, which the member has agreed with on many occasions—

Rachael Hamilton: Sorry, but the rest of the UK is not reforming the law, cabinet secretary. That is the point.

Shona Robison: We are not changing the effect of obtaining a GRC. The effects of that are laid down in the 2004 act. That will not change at all; the effects are exactly the same. That is the position.

In terms of the practical effects to which Daniel Johnson referred, as I have said previously, the guidance is led by the EHRC. If he is asking me whether we intend to or would be prepared to work with the EHRC on whether the guidance needs updating after the passing of the bill, the Government would of course be more than happy to do that. However, such work would have to be led by the EHRC, because it is the lead body in terms of the guidance.

If the member is asking me whether we will work with the EHRC if the guidance needs to be updated in light of the passing of the bill, I gave a commitment that we will do that.

Rachael Hamilton: The point is—

Shona Robison: Can I just deal with the other amendments first?

The explanation that I gave to Rachael Hamilton on the position of the 2004 act answers Pauline McNeill's point. The 2004 act is not changed in terms of the effect of obtaining a gender recognition certificate. Under the Equality Act 2010, the protected characteristics of sex and gender reassignment sit alongside one another.

Finally—I am sorry if I have missed some points—Brian Whittle made a point about the guidance—

Pauline McNeill: Will you take an intervention?

Shona Robison: Okay, and then I will come back to my point.

12:15

Pauline McNeill: Thank you—it is because you touched on my amendment.

I had hoped that you would address the significant question around exclusion. You said that the 2004 act sits alongside the 2010 act. Forgetting for a moment your definition of sex versus my definition, I am interested in how the 2010 act is used for exclusions.

As I said, the Government has a minister who is telling health boards that they cannot exclude people and that if they do so, it might be discriminatory. That is completely unhelpful for the purposes of this debate, and I would like an explanation for that from the Government somewhere along the line.

I go back to the Glasgow Life example. I think that some bodies are either confused or potentially not implementing the section of the 2010 act that allows them to make a "proportionate" decision for a "legitimate" aim. In some cases, they are actually saying that they will not make any exclusions. That is not what the 2010 act says.

Given those examples, surely the Government has to step in and say, "Now hold on a minute—you are allowed to make exclusions under the 2010 act." Do you see my point?

Shona Robison: Yes, I see your point. The exclusions are exactly the same, and the bill makes no change. The updated guidance that the Equality and Human Rights Commission has issued should be followed by public bodies, and that guidance is clear. The EHRC is clear that if a public body deems it proportionate—the EHRC gives some guidance on proportionality in applying those exceptions—to exclude trans women, or trans men for that matter, with or without a gender recognition certificate, it is entirely within the 2010 act for it to be able to do so. I do not think that I can be any clearer than that.

Jamie Greene's point on the use of the phrase "for the avoidance of doubt" just popped back into my head. That is not normally something that we would have in the text of the bill. However, the reason that I felt that it was important, in this case, to have it in the bill relates to the discussions that we have just had. It is—to go back to Pauline McNeill's point—intended to provide absolute clarity; it is stating the obvious, and the facts of the matter. From one point of view, why would we need to do that? It is the absolute law and the facts of the matter, and it cannot change the 2010 act. However, we felt that, because of the importance of the discussion and the need for reassurance, it was important and proportionate to put it in the text of the bill. That is the clearest way of moving forward.

What is not required is for different elements of the 2010 act to be pulled out and also to be included in the text of the bill, because the 2010 act covers all that, and there is no change.

On Brian Whittle's point, I accept the need for sports governing bodies to be clear about what relates to their sport, and each sport is different in relation to the treatment of transgender athletes. We have seen different governing bodies develop and change their guidance in the light of rulings, the evidence that they have taken and the rulings that they have made, and that is entirely appropriate. Sportscotland updated its guidance last year in order to try to help with that.

All governing bodies need to apply the principles of the Equality Act 2010, and—

Brian Whittle: Cabinet secretary—

Shona Robison: Hang on.

We would not try to legislate in this bill for something that governing bodies have already demonstrated that they are doing. They might not have all done it in the same timeframe, or to the satisfaction of Brian Whittle, but many of them have done it on the international stage, and we have seen changes in policy emanating from that. Given the nature of sport and the fact that it differs from one governing body to the next, those bodies are best placed to have these discussions and make such changes—which means, in Scotland, following sportscotland's guidance.

I see that Brian Whittle wants to come back in.

Brian Whittle: I appreciate your letting me in, cabinet secretary. What I am saying to you is that sport is not doing this well; in fact, it is doing it really badly. It has a history of doing it really badly, because it does not know how to apply those rules. Pauline McNeill has given you the example of Glasgow Life as a body that is not applying the Equality Act 2010 properly. That is happening across the board.

It is not a case of these things differing from sport to sport. If a sport requires power and speed, trans women have an advantage. If all those involved in sport—I am talking not just about national governing bodies, but teachers and amateur coaches like me—do not get absolute clarity from the Government about what is happening, women will be put not just at a disadvantage but in danger. I do not for the life of me understand why the Scottish Government does not understand that we need really clear guidance across the whole country.

Shona Robison: The guidance is already provided through the Equality and Human Rights Commission and through governing bodies. Mr Whittle is talking about two slightly different things. On the way in which a public body manages its spaces, there is guidance from the Equality and Human Rights Commission on the proportionality of who would be excluded from certain spaces in sports provision.

If you are talking about competition and athletes competing at whatever level, however, the guidance has to be specific to that sport. That is why we have seen sports governing bodies very publicly making those changes in the light of the evidence that they have gathered and research that they have done. Each sport is very different with regard to the physicality of athletes, so the guidance, as I have said, has to be specific to the sport.

Thinking about the guidance that sportscotland issued last year in Scotland, I cannot see how you can possibly legislate for every scenario and every sport in a bill that is about the process for obtaining a gender recognition certificate. That said, if the Equality and Human Rights Commission believes that guidance requires to be revised again in the light of the bill, we will of course work with it on that. However, the guidance is already there, and sports governing bodies are changing their policy in certain circumstances.

Brian Whittle: I am telling you what is happening out there, cabinet secretary. Sports national governing bodies are not making the right decision, because they are frightened of ending up in court. That is what is happening out there.

I can go through as many power and speed-based sports as you like. Some are making one decision, while others are making a different decision—to the detriment of women. That is happening out there, cabinet secretary. It is not a matter of having a bit of paper telling us what the rules are; if the rules are clear, can you tell me why they are not being applied across the whole of sport? The approach is not working, and something has to be done properly to deal with the situation.

Shona Robison: I cannot speak for all governing bodies, but I am aware of some very public positions that a number of sports governing bodies have changed after looking at their sport and all the issues that Brian Whittle has raised. They have changed their policy in relation to transgender athletes on the back of that. It is right and proper for each sport to look at its rules, because each sport is very different with regard to unfairness and competition among athletes. The issue is not the same for every sport, and I just cannot see how we could legislate across the board when every sport is so different.

It is much better to allow sports governing bodies to do this, as they are doing; indeed, I am sure that members around the table will be aware of some very high-profile policy changes in that respect. Many sports bodies are doing that sort of thing already, and it is for them to lead what is appropriate for their sport, within the law and making sure that they are in line with the 2010 act. It is entirely for them to do that within the existing

rules. I just do not see how we could legislate for a pan-sport position.

The Convener: Cabinet secretary, another couple of members have indicated that they want to come in. I do not know how much you have got left to say.

Shona Robison: I was going to turn to the reasons why I do not support amendments 23 and 104, which is because they single out section 11 of the Equality Act 2010, and the bill cannot change section 11. We have got the catch-all amendment from Pam Duncan-Glancy that I referred to earlier.

I also do not support amendment 24, which singles out section 195 of the 2010 act. The bill does not alter the exceptions in section 195, which provides for certain exceptions from sex and gender reassignment discrimination in relation to sport.

I do not support amendment 110, which focuses on collecting data on sex, because its effect on the interpretation of the bill is unclear, and nor do I support amendment 152, which requires that the functions under the bill must be exercised in accordance with the 2010 act. The requirements of the 2010 act do not impact on who can and cannot obtain a GRC or the process for obtaining a GRC.

Let me turn to amendments in relation to the Equality Act 2010 and guidance. As I have said, it is for the UK Government, or the Equality and Human Rights Commission, as a reserved body, to issue guidance on the Equality Act 2010. The EHRC is a statutory non-departmental public body established by the Equality Act 2006.

In relation to the 2010 act, the EHRC has published guidance for individuals, organisations and the public sector. It published updated guidance earlier this year on protecting people from sex and gender reassignment discrimination in relation to the act. It has also published a statutory code of practice, which assists service providers with understanding the relevant issues in relation to the act. It is the right body to do that. As I said earlier, if the EHRC wants to update its guidance again after the bill has passed, we would welcome that.

On that basis, I cannot support amendments 25, 74, 75, 101, 103 and 151.

The Convener: I will take Rachael Hamilton first, then a further four members.

Rachael Hamilton: Thank you, convener. I am really grateful to be let in.

I want to go back to the points that Pauline McNeill and I made earlier. Cabinet secretary, are you able to set out for the committee the content of the argument that the Scottish Government made in court two weeks ago? What did you go to court to argue? I am sure that you are not protected by legal constraints on that.

My other question relates to the concerns expressed by Brian Whittle and others about the interaction of the GRC with the Equality Act 2010. Does the Scottish Government think that women's rights to manage their boundaries around the opposite sex matter?

The Convener: Pam Duncan-Glancy is next.

Pam Duncan-Glancy: Thank you for allowing me to come back in. I just want to address a couple of issues that have been raised about my amendment 37. I do not share my colleague Jamie Greene's view that the amendment is narrow; it is deliberately broad so that it takes into consideration all aspects of the Equality Act 2010. Every one of us around the table, regardless of the argument that we are pushing forward—such as Brian Whittle's argument around women and trans people in sport—is keen to say that we support all the protected characteristics, including trans people. It is really important for us all to remember that because it sometimes gets a bit lost.

One of the reasons why my amendment is so broad is that I want the whole act to be read in and relevant. I do not think that we can pick it apart, in bits and pieces. It was written to allow groups of people to live in a society where we all have to live with one another. Sometimes, there are situations where we have to ask what one protected characteristic's rights mean for another protected characteristic's rights. We have discussed that a lot today, and I fear that pulling bits out of the act does not allow us to consider it in its entirety. My colleague Daniel Johnson talked earlier about the act's ability to be context specific. That is really important, and it is why amendment 37 is so broad.

On the points about the phrase "for the avoidance of doubt", members will be aware of the Pepper v Hart approach, which means that when a member lodges an amendment, they have the opportunity to provide clarity about why they are doing so. I hope that that is helpful.

The phrase "for the avoidance of doubt" is not without precedent, but it is rare; it was used previously in the Marriage and Civil Partnership (Scotland) Act 2014. I thought that it would be an appropriate mechanism to ensure that the bill is read with the whole Equality Act 2010, representing, understanding and protecting the rights of all people covered by that act, in all the protected characteristics.

I appreciate having been given the opportunity to come back in to give an explanation of that. I hope that members find it helpful.

12:30

Foysol Choudhury: My amendment makes it clear that the Equality Act 2010 needs to be taken into account when considering the final GRR bill. If the bill is passed, can women be absolutely confident that men will not be present in spaces reserved for women, whether that is a single-sex hospital ward, women and girls sporting activities, women's refuges or those spaces reserved for women to practise their religion?

Claire Baker: I appreciate that there are a lot of amendments in the group. On amendment 151, I hear what the cabinet secretary is saying about it being for the EHRC to issue guidance in this area, but public bodies, including Education Scotland, have provided guidance in addition to EHRC guidance around the Equality Act 2010 on discrimination. Education Scotland describes its guidance as a

"reference which should be used both to develop and review policy."

It is a tool. The Government could look at whether that is the approach that it should take to providing more guidance in this area. In a briefing that it sent to members, the EHRC said that it had written to the Scottish Government and the UK Government

"to get clarity for employers and service providers on the law."

The EHRC provides guidance on occupational exemptions, but it has written to the Scottish and UK Governments because it sees a role for Government in providing clarity for employers and service providers.

Cabinet secretary, have you seen the letter and had a chance to respond? I would be interested to know what the difference is with the guidance that Education Scotland has issued on the Equality Act 2010, which comes from 2021 and is described as

"technical guidance"

that provides

"an authoritative, comprehensive and technical guide to the detail of the law."

I will press the amendment. The cabinet secretary might feel that it oversteps in relation to the role of the Scottish Government, but does she recognise that there is a role for the Scottish Government to provide guidance on the operation of the 2010 act in Scotland? Perhaps we could have further discussion before stage 3 in order to reach a shared understanding of what role the Scottish Government has in ensuring that public bodies and employers in Scotland know how to use the law effectively.

Shona Robison: On Rachael Hamilton's question, I will not talk about a live court case, except to state again that the position of the Scottish Government is no different from and is entirely consistent with that of the Equality and Human Rights Commission. That is all that I can say on that.

On the second question, which was about whether I think that exemptions under the 2010 act matter, of course they do. That is why I have said on numerous occasions that those exceptions are important, should remain and are not affected by the bill. Pam Duncan-Glancy's amendment puts that beyond doubt—if there ever was any doubt.

Pam Duncan-Glancy gave a clear account of why her amendment is important, so I do not need to say any more on that.

I can confirm to Foysol Choudhury that single-sex service exemptions apply, but they have to be proportionate. The EHRC guidance sets out the proportionality and gives examples of the types of services that it would envisage could be exempt from allowing trans women, for example, to access them. The guidance talks about what proportionality means for a service provider.

On Claire Baker's contribution, I will need to look at the letter that she referred to, but I am happy to have further discussions with her about the issue. It is about getting the balance right and being very clear about which is the lead organisation in these matters, whether that is employment law, which is reserved, or something else. We would look to the EHRC to lead on that, but that does not mean that we do not have an interest or that we cannot work with the EHRC on further guidance that it may wish to develop and issue. It is about recognising and respecting the lead organisation and its role. I am happy to have further discussions with Claire Baker if there is further thought that we can give to the matter, if that would be helpful.

Foysol Choudhury: EHRC guidance supports my amendments. The EHRC thinks that it is not only relevant but important to clarify the issue for the purpose of cross-border certainty. It said in its briefing:

"By broadening the group of trans people who will be able to obtain legal gender recognition, the proposals have significant implications for the operation of the Equality Act in Scotland."

Those significant implications mean that it is important for us to make the bill as clear as possible.

Shona Robison: The clarity of the bill comes from the overarching "for the avoidance of doubt" amendment in Pam Duncan-Glancy's name. If you start to pick out different parts of the 2010 act, you give more prominence to different elements of it, which creates confusion and opaqueness. Having the whole 2010 act be beyond doubt makes it clear.

As I have said on a number of occasions, the operation of the 2010 act is for the EHRC to lead on. On the cross-border issue that Foysol Choudhury mentioned, we are working with the UK Government on a section 104 order, and we will continue to work with it, as we would on any piece of legislation in relation to any cross-border issue.

Foysol Choudhury: For the record, cabinet secretary, what is your interpretation of the 2010 act?

Shona Robison: What is my interpretation of the 2010 act? Do you mean in its entirety?

Foysol Choudhury: Do you think that it should be more clear? Do you think that removing something to accommodate somebody else is right? Should it not be balanced? Should we not give equal opportunity to everyone and listen to everyone?

Shona Robison: The Equality Act 2010 protects the characteristics of sex and gender reassignment—it protects all those characteristics. It is a rather good piece of legislation and is entirely untouched by the bill. I have said that on a number of occasions, but we are now literally putting that on the face of the bill for the avoidance of any doubt.

Pauline McNeill: For the avoidance of any doubt, I refer to a specific bit of the EHRC briefing—which I do not know whether the cabinet secretary has seen—which Foysol Choudhury mentioned. It says:

> "We have highlighted several areas where the effect of the Bill's provisions on the operation of the protections from sex discrimination in the Equality Act is unclear and have urged further consideration before legislative change is made."

The briefing refers to my amendment 101 and all the amendments in the group, and recommends that "such amendments should be considered." Cabinet secretary, you say that it is a matter for the EHRC, and that you will not support amendment 101, but it is important to get on the record that even the EHRC has said that the amendments should be "considered", because it would welcome that clarity. It seems that the Scottish Government stands alone in saying that it would not accept further clarification.

Daniel Johnson: I echo Pauline McNeill's point, and I would go further. If we accept your logic, cabinet secretary, that, essentially, there is no impact, and that it is open to public bodies, and indeed others, to use the exemptions set out in the Equality Act 2010, will you clarify that it is proportionate and reasonable to do so, such that public bodies and others can distinguish between people on the basis of physical characteristics, if we want to describe it like that, or however we want to capture it—I recognise the issues around the terminology and the differences between legal and commonplace definitions—that it is open for them to do so, and that they should do so where that is fair and proportionate, such as for school trips or shared accommodation? You might not wish to pick out particular examples, but can, or indeed should, public bodies use those distinctions, rather than simply using declared gender identity?

Shona Robison: I can absolutely confirm that, because that is what the Equality Act 2010 says. As I have said quite a few times now, the bill changes none of the protections and exemptions under the 2010 act, so I can absolutely say that. Public bodies should look to the guidance in applying those provisions to their own particular circumstances. That has to be proportionate, as Daniel Johnson has just outlined. All of those provisions are there, and I can confirm, on the point that I think Pauline McNeill made, when asking me a question—

Pauline McNeill: I was referring to the EHRC's briefing, which says that we should consider the relevant amendments.

Shona Robison: We have done so. Let me be absolutely clear: we have considered every single amendment. We have examined them and assessed whether they are required or not required, what their effect would be and any unintended consequences. We have done that for all of them—every single one of them.

For clarity and simplicity, having the protection or the catch-all clarity of Pam Duncan-Glancy's amendment 37 offers the clearest way to say that, for the avoidance of doubt, there is no change to any aspects of the Equality Act 2010. To go further than that would actually introduce a lack of clarity. I hope that I could not have been any clearer in my answer to Daniel Johnson's point regarding the exemptions, which will continue to apply.

Rachael Hamilton: There has been a full discussion on this grouping. On Daniel Johnson's amendment 25, we must address the policy impact of reforming the law. Most members speaking today have said that, while the reform of the legislation is well intentioned, the bill is clumsy. All of us have said that we need clear, robust guidance from the Scottish Government on the interaction with the 2010 act.

My colleague Pam Gosal was correct to point out that the Scottish Government has brushed off concerns from stakeholders. Pauline McNeill was right to say that public organisations should not be left in the dark. Legislation should be clear. We believe—and I hope that the cabinet secretary is hearing what we are saying on behalf of stakeholders, our constituents and others among

the general public—that the proposed new law is not workable and is not clear enough. It is important that the public are reassured that the bill will not harm the rights of women and others, particularly in protection against discrimination—including in pay or in representation on public boards—or in the protection of single-sex spaces, for example in domestic shelters and rape crisis centres. I agree with Foysol Choudhury and Pauline McNeill that it is down to the Scottish Government to tell us what the effect of a GRC is for the purposes of the 2010 act.

Pam Duncan-Glancy says that she wants the Scottish Government to make good law and produce clear guidance. We are all agreed on that: we must give the public clarity. However, I would question what clarity her amendment 37 gives. As the bill stands, the Scottish Government is failing to put a firewall between GRCs and the 2010 act, but at the same time it is making GRCs available to a much larger, wider, more diverse group of people.

Despite the Scottish Government supporting Pam Duncan-Glancy's amendment 37, we still do not have the reassurance that there is clarity for the delivery of services, jobs and sport on the ground. All that the amendment does is support the SNP position, which has still not been explained.

12:45

Pam Duncan-Glancy: I thank Rachael Hamilton for taking an intervention. I appreciate that this is politics, which is why she sought to make that point as clearly as she just did. However, this is not a case of people lining up on a political basis. With amendment 37, I have set out that the Equality Act 2010—which, if we are going to raise politics, was written and brought in by a Labour Government—is relevant for this bill. It is particularly relevant, and we need to say so in this discussion because of the concerns out there in the real world and in the Parliament. That is why we are doing so.

There are a number of areas on which my colleague Rachael Hamilton and I will agree and vote in the same way, but that does not mean that I am lining up to support the Tories on anything—least of all on women's rights. However, I can be absolutely clear that this is not about party-political allegiance, and it is not fair to suggest that. It is about trying to ensure that the rights of everyone in Scotland are protected in the way that was intended when the Labour Government brought in the act in 2010.

Rachael Hamilton: I thank Pam Duncan-Glancy for her intervention. With all due respect, I note that I am on the side of the public and I am not making this political. It is important that we discuss things robustly, and it is a shame that other parties did not reach the position of having a free vote on the bill so that we could be more open and transparent.

Daniel Johnson: That is a bit of a mischaracterisation. This is a small Parliament and every political party in it comes to positions through discussion and agreement. I assure Rachael Hamilton that, in a political group the size of ours, we arrived at our position in that way. It is therefore slightly unhelpful to characterise the position of the Labour Party as having been whipped.

Rachael Hamilton: I thank Daniel Johnson for his intervention. I did not use those words, but he is entitled to his opinion. I am not going to interfere in how his party decides on business management.

Using the example that the cabinet secretary used of the EHRC guidance, what it suits is shallow. The EHRC supports Foysol Choudhury's amendment 104, as do I, so why does the Scottish Government not support it? If the Scottish Government truly wants reform, and if the cabinet secretary wants the bill to be passed as a piece of legislation that provides for groundbreaking reform in Scotland, all the political parties should be brought together. We have discussed the bill in good faith and we want to make good law. That is the point. The catch-all approach that the cabinet secretary has been supportive of in previous groupings of amendments would have been preferable for this grouping.

On that point, I seek to withdraw amendment 23.

Amendment 23, by agreement, withdrawn.

Amendment 24 not moved.

Amendment 25 moved—[Daniel Johnson].

The Convener: The question is, that amendment 25 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 25 disagreed to.

Amendment 74 moved—[Pam Gosal].

The Convener: The question is, that amendment 74 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 74 disagreed to.

Amendment 75 moved—[Pam Gosal].

The Convener: The question is, that amendment 75 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 75 disagreed to.

The Convener: Amendment 76, in the name of Pam Gosal, has already been debated with amendment 1. I call Pam Gosal to move or not move the amendment.

Pam Gosal: Can I say a few words, convener?

The Convener: No—you can move or not move the amendment.

Amendment 76 moved—[Pam Gosal].

The Convener: The question is, that amendment 76 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 76 disagreed to.

Amendment 101 moved—[Pauline McNeill].

The Convener: The question is, that amendment 101 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 101 disagreed to.

Amendment 103 moved—[Brian Whittle].

The Convener: The question is, that amendment 103 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 103 disagreed to.

The Convener: We come to amendment 104, in the name of Foysol Choudhury. I call Foysol Choudhury to move or not move.

Foysol Choudhury: Can I say a few words here?

The Convener: No—you can move or not move the amendment.

Amendment 104 not moved.

Amendment 136 moved—[Jamie Greene].

The Convener: The question is, that amendment 136 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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)

Against

Chapman, Maggie (North East Scotland) (Green)

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

Amendment 136 agreed to.

Amendments 137 and 138 not moved.

Amendment 139 moved—[Sarah Boyack].

The Convener: The question is, that amendment 139 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 139 disagreed to.

Amendment 140 moved—[Rachael Hamilton].

The Convener: The question is, that amendment 140 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 140 disagreed to.

Amendment 141 moved—[Maggie Chapman]—and agreed to.

Before section 15

Amendments 142 and 143 not moved.

Section 15—Registrar General's duty to report

Amendments 144, 105 and 106 not moved.

Amendment 78 moved—[Shona Robison]—and agreed to.

Amendments 107 to 109 and 15 not moved.

Section 15, as amended, agreed to.

After section 15

Amendment 37 moved—[Pam Duncan-Glancy].

The Convener: The question is, that amendment 37 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

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)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)

Abstentions

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

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

Amendment 37 agreed to.

Amendment 110 moved—[Pauline McNeill].

The Convener: The question is, that amendment 110 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 110 disagreed to.

Amendment 145 moved—[Pam Duncan-Glancy]—and agreed to.

Amendment 146 moved—[Pam Duncan-Glancy].

The Convener: The question is, that amendment 146 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 146 disagreed to.

The Convener: Amendment 147, in the name of Pam Duncan-Glancy, is grouped with amendment 149.

Pam Duncan-Glancy: Amendment 147 would require the Government to collect better data on gender recognition certificates and in relation to the legislation. It takes the best practice that I have been able to find from the Irish, Maltese and Victorian legislation and from the Ministry of Justice in relation to UK models, and it will ensure that future policy will be served by better evidence than will be found through the current drafting of the bill. On that basis, I encourage members to vote for amendment 147.

I move amendment 147.

Sarah Boyack: Amendment 149 would require the Scottish ministers to specify narrow areas in which data is able to be, or required to be, collected

"on an individual's acquired gender and gender at birth".

Those areas would be specified in the text of the bill and would initially include only

"access to and provision of healthcare"

and

"the commission of specific offences."

Ministers would be able to modify the list through regulations.

13:00

The committee heard a wealth of evidence on data collection. It is clear that there is no example of best practice and that there are criticisms of all countries that have moved to self-ID laws. Senator Doherty gave evidence on Ireland's experience of self-ID laws, and said that Ireland had

"a long way to go"—[*Official Report, Equalities, Human Rights and Civil Justice Committee,* 22 June 2022; c 16.]

on data. The elements in Pam Duncan-Glancy's amendment are, therefore, crucial.

I will highlight two issues that my amendment 149 addresses. First, it would require Scottish ministers to specify where data must be collected on both

"acquired gender and gender at birth"

in narrow and specific areas. At present, public bodies follow guidance, but the terms "gender" and "sex" are frequently used interchangeably. The initial list of areas would be confined, first, to healthcare, because data plays a significant role in designing services and ensuring that everyone receives appropriate healthcare. The bill is likely to lead to an increase in the number of people who apply for and obtain a GRC, which is likely to lead to a larger cohort of people who might need to access gender-based health services for the opposite sex.

For instance, a trans man might need to access a cervical smear cancer-screening test. It is essential, in order to protect the health and outcomes of trans people, that our NHS has robust data. Historically, we have—rightly—argued for an increasing focus on the importance of research on women's health where there are differences from men's health. One of the issues that came up in conversations that I had with trans constituents during discussions on the bill was a concern that there is no longitudinal research in Scotland that specifically monitors the long-term health of trans men and women to ensure that they get the support that they need throughout their lives. I want to flag up that issue at this stage, because I think that the Scottish Government needs to do the heavy lifting so that when we make it easier for people to transition as a result of

the legislation, they can have confidence that our health service will be there for them.

The second issue that my amendment 149 addresses is about responding to concerns that have been raised with me on the small number of bad actors who might use the bill to exploit women and girls. I wanted to explore how we can, during discussion of the bill in Parliament, send a clear message to bad actors that the bill is not an opportunity for them.

I know that the issue was discussed in relation to an amendment by Russell Findlay earlier in the committee's discussions at stage 2, and in relation to an amendment from Jamie Greene earlier today. To be clear, my intention is absolutely not to ban people who have committed specific offences from transitioning if they meet the criteria in the bill. However, I think that there should be capacity for organisations where vulnerable women need safe spaces to be aware of that.

Today, we have debated several amendments that highlight the need for clear and effective guidance for a range of organisations. We need to be clear that people who want to register as trans specifically in order to abuse women are predators, and I am sure that every MSP will want to ensure that we do everything that we think is necessary to protect women and girls.

A number of concerns have been raised with me using the example of Denmark, where instances of rape and sexual offences rose in the year after self-ID legislation was introduced. The critical issue there is that there is no data available that can prove or disprove whether self-ID legislation or something else was behind the rise, but I strongly believe that we need to explore the issue.

The cabinet secretary said that there is no evidence that we should be worried about that. I repeat that I am not suggesting that people should be prevented from transitioning if they have lived in their new gender, as set out in the bill. I want to be clear that my concerns are not about trans women, but about bad actors. I am concerned that there is a need to send them a clear message, and to ensure that there is accountability for people who commit abuse against women and girls, and who will take any opportunity to carry out their abuse.

My amendment 149 is partly a probing amendment, but I think that it is really important. I am keen to hear from the cabinet secretary what work she has committed to doing to ensure that sex offender notification would be acted on. We have heard from the cabinet secretary that the police would carry out monitoring; I want to get on the record an explanation of the extent to which that would involve prisons, safe spaces for women who have experienced sexual abuse or any other area in which she thinks research is needed. We know that there is new statutory action, as the cabinet secretary outlined, but I would really like more detail on that.

Pam Gosal: We support amendments 147 and 149, because both offer the opportunity for more data collection.

With regard to amendment 147, we especially welcome data being collected on the number of gender recognition certificate applications that are received and the number that are rejected. Should a large number of such applications be rejected, it would be important to know why. We also welcome provisions on the number of applications that are received from prison, because assaults on female inmates by males pretending to be transgender have occurred elsewhere in the UK.

Amendment 147 would also allow us to analyse how the change in the law impacts on the overall number of gender recognition certificates that are granted. The Scottish Government has made estimates of the number of applications that will result from the change; the amendment would allow for those estimates to be measured against reality. I therefore hope that the Scottish Government welcomes amendment 147.

Amendment 149 calls for more data collection on trans healthcare. The waiting times in that respect are long, so it is important that we measure the impact of the legislation on them, especially as the bill opens the window to more people being eligible for a gender recognition certificate. The impact of the legislation needs to be measured for every affected group, and the amendment would help to achieve that.

Shona Robison: As I said in response to group 17, I agree that we should review the bill. In addition, the bill as introduced already includes a provision in section 15 under which annual reporting will be required, including on the number of people who apply for and obtain a GRC. The National Records of Scotland provides annual statistics and reports on other areas of civil registration, including marriages, civil partnerships, births and deaths, and the bill will require it to report annually on the processes around gender recognition certificates.

It is important that we carefully consider what it is possible and appropriate to collect information about. The list in amendment 147 is, I think, overly prescriptive, with the duty put on Scottish ministers rather than the registrar general for Scotland, who will be responsible for the processes. That said, although I would not support amendment 147 ahead of stage 3, I would want to consider whether it would be possible and appropriate to provide anything in it as part of the registrar general's annual reporting duty. If Pam Duncan-

Glancy is content not to press her amendment, I am prepared to work with her on that and, if we can, bring something back at stage 3.

I agree with Sarah Boyack that it is important to collect data and information about the impact of the act to ensure effective reporting, but, again, we need to consider what is possible and appropriate. Amendment 149 is very broad. As I have said, the bill is about reforming the process for obtaining a GRC, and you do not need a GRC to access gender identity healthcare. I am therefore not clear how that would work in practice. I cannot support amendment 149 at this stage, but I am happy to work with Sarah Boyack on some of the issues that she has raised.

The amendments raise some wider issues, too. I have written to Pam Duncan-Glancy, laying out in some detail the multi-agency public protection arrangements—or MAPPA—but if those who manage sex offenders are concerned that someone is trying to obtain a gender recognition certificate fraudulently, they will be able to prevent the certificate from being issued through the registrar general or, if it has already been issued, they can have it revoked. Essentially, the justice secretary will put in place a regulation to require someone on the register who is seeking to obtain a gender recognition certificate to first of all attend a police station and inform the police of their intention. Those are proportionate risk-based assessments. MAPPA works very well at risk assessing offenders, which gives us the assurance that, if there were bad actors, which I think was the phrase that Sarah Boyack used, those protections will help to ensure—

Sarah Boyack: Will the cabinet secretary take an intervention?

Shona Robison: Yes.

Sarah Boyack: There are two parts to your response, as there are two elements of my amendment 149. I am pleased with your comments about MAPPA, and I want to consider that matter in detail after the meeting, because I have not seen the letter to which you referred. However, at least you are reaching out in the direction of specifically addressing the issue of bad actors.

The first element of my amendment is there because, from looking at experiences in other legislatures, it seems that there is a need for support to be in place. I was disappointed that the cabinet secretary did not accept my amendment 139, which was designed to enable people to get the support that they need, given the likelihood that more people will use the opportunity to transition. That goes back to making sure that there is a review to ensure that a variety of support services are in place. I have not been specific on exactly how you do that, with the intention of enabling the Scottish ministers to use their judgment on the issue.

I come back to the point that changes will be made and, from looking at other legislatures, it seems that the Government needs to plan ahead and think about the potential impacts of the legislation once it is passed and people can use it.

Shona Robison: On the point about healthcare, as I said, the Cabinet Secretary for Health and Social Care, Humza Yousaf, has written to the committee to lay out in some detail the actions that are being taken. He has said that any changes that might be made to the delivery of healthcare services for the transgender community will take into account many of the reviews that have happened elsewhere, including the Cass review.

However, someone who goes for gender identity healthcare, for whatever purpose, does not need to have a gender recognition certificate, so we need to be careful that we do not conflate the two issues. I am happy to work further with Sarah Boyack on some of the data collection and information issues that she has raised, if that would be helpful.

On the Scottish Prison Service—

Pauline McNeill: Will the cabinet secretary give way?

Shona Robison: Just one second—let me finish this point while it is still in my head.

The Scottish Prison Service was mentioned. I put it on record that the Scottish Prison Service carries out robust risk assessments. Whether we are talking about a transgender woman or a transgender man, and whether or not they have a gender recognition certificate, the Prison Service will place them in the estate that is risk assessed as best for them and for the other prisoners in that estate. That is how the Prison Service has operated and will continue to operate, whether or not someone has a gender recognition certificate.

Pauline McNeill: Sarah Boyack's amendment raises a number of important issues. I want to address the question of what everyone is calling bad actors. I have dealt with a lot of legislation, as have other members, so I know that it is perfectly normal in legislation to close loopholes, even if you do not think that there actually is a loophole. Although the Government has moved on the question of sex offenders, which I welcome, I do not understand why it is so resistant to closing the loophole.

There does not seem to be anything to prevent someone who wants to misuse the legislation from doing so. We are not talking about a trans person here; we are talking about a man, for example, who could easily acquire a GRC—let us face it, it

will be a simple process. The Government does not seem to think that that is a loophole or that further action is needed to prevent that from happening. I plead with the cabinet secretary to think about the issue for stage 3. As legislators, we are here to look for loopholes in proposed legislation and say, “I’m not sure about this.” I might be wrong, but it looks to me that there is a loophole here. I do not understand why the Government is so resistant to that, because it does not undermine the principles of the bill or what the Government is trying to achieve.

I just point out the reality of life, which is that men have abused their positions in professions, including in the NHS, in relation to women. Why would they not use this as an opportunity, in another way? Therefore, why can we not think about how we could close that loophole, for the purposes of complete closure?

13:15

Shona Robison: We have listened to what people have said, and it is in recognition of that and in an effort to address some of those issues that we have brought forward the MAPPA regulations, which the Cabinet Secretary for Justice and Veterans—for the very reason of recognising the issue—has committed to putting in place before the bill is enacted. When we discussed these amendments, I explained why a blanket ban is not ECHR compliant. I went into that in some detail, for all the reasons that I am sure that Pauline McNeill and others will understand. Therefore, a risk-based assessment is the best way. The MAPPA regulations that the justice secretary is bringing forward are absolutely in recognition of those concerns.

Jamie Greene’s amendment 133, which relates to a false application and aggravation of offence, and which we have accepted, is about sending out a very strong message that, if someone who has falsely obtained a GRC goes on to commit a crime, that should be considered to be an aggravator. In that way, we recognise all those issues. Therefore, it is not fair to say that we do not recognise them. What we are trying to do is address them in a way that is legal and competent, within the bill or through other processes such as MAPPA, which the justice secretary has agreed to address.

The Convener: I call Pam Duncan-Glancy to wind up and to press or withdraw amendment 147.

Pam Duncan-Glancy: On the basis that the Government will consider lodging an amendment, which I hope to support, at stage 3, I will not press amendment 147. However, I expect the Government’s amendment to address as much of the data collection as I have outlined. I do not think that there is any data outlined in amendment 147 that cannot be gathered. I look forward to trying to find an amendment that will be acceptable across the chamber, and, on that basis, I will not press my amendment today.

Amendment 147, by agreement, withdrawn.

Amendment 148 moved—[Tess White].

The Convener: The question is, that amendment 148 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 148 disagreed to.

The Convener: Amendment 149, in the name of Sarah Boyack, has already been debated with amendment 147.

Sarah Boyack: Not moved—[*Inaudible*.]—research considered by the cabinet secretary in order to talk about it.

Amendment 149 not moved.

Section 16—Further modification of enactments

Amendment 16 not moved.

Section 16 agreed to.

After section 16

Amendment 26 moved—[Rachael Hamilton].

The Convener: The question is, that amendment 26 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 26 disagreed to.

Amendment 111 not moved.

Amendment 151 moved—[Claire Baker].

The Convener: The question is, that amendment 151 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 151 disagreed to.

Amendment 152 not moved.

Amendment 156 moved—[Claire Baker]—and agreed to.

Schedule

Amendment 112 not moved.

Amendment 79 moved—[Shona Robison]—and agreed to.

Amendment 80 moved—[Pam Gosal].

The Convener: The question is, that amendment 80 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 80 disagreed to.

Amendment 81 moved—[Pam Gosal].

The Convener: The question is, that amendment 81 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 81 disagreed to.

Amendment 27 not moved.

The Convener: Amendment 153 is in a group on its own. I call Pam Duncan-Glancy to move and speak to amendment 153.

Pam Duncan-Glancy: Amendment 153 would ensure that all future changes to the legislation made by the registrar general under regulations would be subject to the affirmative procedure. We believe that that would give the required scrutiny that is necessary for such changes.

I move amendment 153.

Shona Robison: The bill provides that the registrar general, with the consent of the Scottish ministers, can make regulations about the form and manner in which an application for a GRC is to be made; the form and manner in which a notice of confirmation is to be given; information or evidence to be included in an application for a GRC or a notice of confirmation; and other matters in connection with the making of an application for a GRC.

Regulations made under that section that contain a provision that adds to, replaces or omits any part of the text of an act are subject to the affirmative procedure. Otherwise, regulations made under the section are subject to the negative procedure. I note that the Parliament's Delegated Powers and Law Reform Committee approved the delegated powers in the bill at stage 1.

The form and manner of making an application and of giving a notice of confirmation will be relatively procedural matters. As such, the negative procedure is considered an appropriate

use of the Parliament's time. Making all regulations under the section subject to the affirmative procedure would, in my view, place a disproportionate burden on the committee, with a potential impact on the other work that the committee has to undertake. Of course, even with the negative procedure, the Parliament still has to scrutinise, consider and vote on regulations.

I heard the concerns that were raised with the committee at stage 1 about regulations to make provision for or about further information or evidence that might be included in an application for a GRC or a notice of confirmation. However, the provision will not allow a change to the criteria and grounds that are specified in the bill for a GRC to be granted. For example, the power would not allow regulations to be made to reintroduce a requirement for medical evidence.

The provision is intended to ensure that the smooth running of the process will not be frustrated if, in the light of experience in the future, it transpires that some additional information or evidence should be submitted with an application or a notice of confirmation. Also, of course, just because an instrument is negative, it does not mean that the committee would not still have an opportunity to scrutinise and consider it in the normal manner.

For those reasons, I cannot support amendment 153.

The Convener: I just want to check whether Pam Gosal wants to intervene.

Pam Gosal: No—I am fine now.

The Convener: I call Pam Duncan-Glancy to wind up and to press or withdraw amendment 153.

Pam Duncan-Glancy: I have listened carefully to what the cabinet secretary has said. I understand the various bits of regulation that might come to the committee, and I am under no illusions about the level of work that that could involve. However, in a bill such as this, something like that probably needs to have the level of scrutiny that is afforded by the affirmative procedure, as opposed to the negative procedure, which, in my short time in the Parliament, I have learned does not provide as much opportunity for scrutiny. I do not think that some of those aspects should be left to the negative procedure, so I do, I am afraid, press the amendment.

The Convener: The question is, that amendment 153 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 153 disagreed to.

Amendments 28, 35, 36 and 113 not moved.

Amendment 154 moved—[Pam Duncan-Glancy]—and agreed to.

Amendment 82 moved—[Shona Robison]—and agreed to.

Amendment 17 not moved.

Schedule, as amended, agreed to.

Section 18—Commencement

Amendment 29 not moved.

Amendment 31 moved—[Rachael Hamilton].

The Convener: The question is, that amendment 31 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 31 disagreed to.

Amendment 30 not moved.

Amendment 155 moved—[Tess White].

The Convener: The question is, that amendment 155 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 155 disagreed to.

Section 18 agreed to.

Section 19 agreed to.

Long title agreed to.

The Convener: That completes our stage 2 consideration of the bill. I thank the cabinet secretary and her officials for their attendance, along with all members who have participated. That concludes our meeting.

Meeting closed at 13:28.

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