OFFICIAL REPORT
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Equalities, Human Rights and Civil Justice Committee

Tuesday 21 June 2022

Session 6

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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
19th 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:

Cathy Asante (Scottish Human Rights Commission)
Barbara Bolton (Scottish Human Rights Commission)
Dr Chris Dietz (University of Leeds)
Ian Duddy (Scottish Human Rights Commission)
Dr Sandra Duffy (University of Bristol)
Dr Peter Dunne (University of Bristol)
Victor Madrigal-Borloz (United Nations Independent Expert on Protection from Violence and Discrimination based on Sexual Orientation and Gender Identity)
Professor Alice Sullivan (University College London Social Research Institute)
Robin White (Old Square Chambers)

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 21 June 2022

[The Convener opened the meeting at 09:30]

Gender Recognition Reform (Scotland) Bill: Stage 1

The Convener (Joe FitzPatrick): Good morning and welcome to the 19th meeting in session 6 of the Equalities, Human Rights and Civil Justice Committee.

The first item is to continue taking evidence on the Gender Recognition Reform (Scotland) Bill. I welcome our first panel: Professor Alice Sullivan, head of research, University College London social research institute, who is joining us virtually; and Robin White, barrister, Old Square Chambers. I refer members to papers 1 and 2, and I invite our witnesses to make short opening statements, starting with Professor Sullivan.

Professor Alice Sullivan (University College London Social Research Institute): Sex is a fundamental demographic variable and a powerful predictor of almost every dimension of social life. Sex is a protected characteristic under the Equality Act 2010 and is essential for equalities monitoring. The act includes a public sector equality duty to monitor and publish data on the protected characteristic of sex.

We need consistent and accurate data on sex to make comparisons over time and between countries, and to evaluate the effect of policy interventions. Sex is not the same thing as gender identity. We need data on both those variables.

I am a quantitative social scientist with more than 20 years of experience in the collection and analysis of population data. Between 2010 and 2020, I was director of the 1970 British cohort study, which is often described as one of the jewels in the crown of British social science.

My views on the importance of sex as a basic variable that needs to be collected in both administrative and survey data are not controversial among quantitative social scientists. In 2019, 80 quantitative social scientists signed a letter, which I co-ordinated, to the United Kingdom census authorities, expressing concern regarding their plans to advise respondents that they might respond to the sex question in the census in terms of their self-identified gender identity. The signatories included demographers, epidemiologists, statisticians, sociologists and economists. They included 10 fellows of the British Academy and several past and present leaders of major datasets.

In 2021, Scotland's chief statistician released draft guidance stating that public bodies should not routinely collect data on sex. Ninety-one eminent quantitative social scientists signed a letter, which I co-ordinated, objecting to that guidance. Those objections were ignored. The final guidance states that data on biological sex should be recorded only in

"a small number of instances".

In contrast to that, the UK Statistics Authority guidance recommends that

"Sex, age and ethnic group should be routinely collected and reported in all administrative data and in-service process data ... clearly distinguishing between concepts such as sex, gender and gender identity".

One might assume that there is no reason why the legislation that we are considering would affect data collection. That would be an understandable assumption, but a mistake. When the Gender Recognition Act 2004 was introduced, it was designed to cater to a tiny number of transsexual people who suffered from severe psychological distress. The act was not intended to raise barriers to the collection of data on sex, yet that has been one of the unintended consequences of the legislation. From the wording of section 9, public bodies have taken the message that people can switch legal sex over their lifetime not just for certain legal purposes but completely, and section 22 has contributed to overcaution on the collection of data on sex.

Legislators must give serious consideration to the likelihood that introducing gender self-declaration in law will reinforce an existing reluctance to ask about sex. Even in small numbers of cases where sex is misclassified, it introduces a substantial error in data analysis, particularly in cases in which sex differentials are large, such as crime statistics.

The number of trans-identified people has risen rapidly, particularly among young people, especially girls. According to a large US study, one in 2,000 female undergraduates identified as transgender in 2008, but that rose to 5 per cent in 2021. The experiences of those young people are important. We need accurate data on sex as well as gender identity to understand the outcomes for those who medically transition and the majority who do not. However, even within the health system, that data is being erased. For example, the wellbeing of children transitioning at the gender identity development service has not been followed up over time because their national health service number changes post-transition.

Where organisations adopt legal sex as an apparently safer category to ask about than sex itself, as happened with the census in England and Wales, larger numbers of people who have gender recognition certificates under self-declaration will imply a larger impact on data collection and analysis.

Finally, without data on sex as well as gender identity, we will not be able to evaluate the impact of the proposed reform. Serious policy evaluation will be rendered unfeasible.

Robin White (Old Square Chambers): Good morning. I am a barrister practising from the Old Square Chambers in London. I am also a trans woman and was the first to transition in practice at the UK discrimination bar. I have split this statement into the professional and the personal. I have also provided a longer form of this statement via administration so that I keep within the two-minute guideline.

As a professional, I practise in employment and discrimination law, and I act across the whole UK, including in the Scottish tribunals. I act for pursuer and defender with approximately equal frequency, and that includes trans cases. In the longer form of my statement, I have given some examples of a couple of cases in each direction. The legal directory Chambers and Partners has described me as the go-to lawyer for trans cases. I write, speak and lecture regularly on trans matters and in May 2021, I published “A Practical Guide to Transgender Law” jointly with my chambers colleague Nicola Newbegin.

In February 2021, I gave evidence to the Westminster Women and Equalities Committee’s investigation into reform of the Gender Recognition Act 2004.

On the personal, it is an honour and a responsibility to be one of the few trans professionals giving evidence to this committee. I would undoubtedly qualify for a gender recognition certificate, but I have not applied for one. Principally, that is because I regard the current process as demeaning. I am who I am, and I need no one else to validate that for me. I would not have the same difficulty with a process that respected my own declaration of who I am.

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

Maggie Chapman (North East Scotland) (Green): Good morning, and thank you both for being with us this morning and for the evidence that you have provided in your opening statements and in writing.

I have a couple of questions to ask, and I will start with Alice Sullivan. I know that other members are going to come on to talk more about data, so I am going to ask questions about the need or the case for change. Alice, in your view, is there a requirement for this reform in the first place? You talked a lot about the implications for data, so do you see there being a need for change if we can get some of the data stuff right? I appreciate that other members will ask about the data in a moment.

Professor Sullivan: I am going to stick to my expertise, which is data. The proposed reform is to reduce the age of eligibility for a GRC to 16 and remove all gatekeeping for one, so that, in effect, the process would be done by self-identification. That means that you would be opening up from a very small group of people suffering particular psychological distress to a potentially much larger and more diverse group of people.

As I said, that has implications for data collection. It decouples sex—biological or natal sex—from legal sex for a larger group of people. We do not know how many people that will be or how they will be distributed in the population. That means that when organisations choose to collect data on legal sex rather than biological sex, the impact will be large, because there will be a much larger group of people for whom those two things are decoupled.

Given the rapid growth of trans identities among youths—

Maggie Chapman: Sorry, can I just come in on that point? You say that the shift to self-ID will remove any gatekeeping. What gatekeeping do you envisage that there should be? Is the only legitimate gatekeeping the current gender recognition panel that assesses the dysphoria diagnosis?

Professor Sullivan: I do not want to comment on that, because that is not my expertise. My expertise is data collection, and I feel that I have been invited here to give you my expertise rather than my opinion. I am not going to comment on exactly what the gatekeeping should look like.

All that I want to say is that if you greatly open out the group of people for whom sex and legal sex are decoupled, that will have implications for data collection, particularly where organisations are already anxious about asking for people’s biological or natal sex—what we would normally just call their sex—as opposed to their legal sex.

The implications regarding the legal age are especially important, particularly when it comes to data on youth. We might think of education, for example, but this applies to any data where you are thinking about youth outcomes. Mental health, for example, is a massive area of policy concern for youths. We know that, both for trans people and for girls, particular young people are having particular mental health problems. We want

accurate data on both gender identity and sex to follow those things up.

It is important that we consider the longitudinal life-course perspective, which is a fundamental principle for social science research that seeks to understand people's lives over time. If we erase natal sex from our data on trans people, we make it impossible to understand their life course and the obstacles that they may face.

We also need to consider the possibility that gender identity might be particularly fluid for this group, which could lead to individuals changing their gender identity back and forth. That is absolutely fine—there is no problem with that—but their sex remains fixed, so we really need data on that.

Maggie Chapman: I am aware that a couple of my colleagues want to drill down into some of the data questions, and you are covering some of that. In handing back over to the convener, I say that there are different processes here: data collection processes versus the process for obtaining a GRC. I am not sure that we necessarily need to conflate them in this way. I will leave it there for now.

The Convener: Thanks. We will go to Pam Duncan-Glancy.

Pam Duncan-Glancy (Glasgow) (Lab): Good morning. Thank you for your answers to the questions so far, Professor Sullivan, and I thank both panellists for the evidence that they have given ahead of today.

My first question is for Professor Sullivan and it is on data. What have you learned from your research colleagues in parts of the world where self-identification has been in place for some years? What impact have they found that there has been on data collection?

Professor Sullivan: The answer to that is that it is impossible to evaluate the impact on data collection when you lose data on sex. We can evaluate and model the impact on data collection only from data sets where we have both. For example, in my opening statement, I referred to a data set that shows that there has been a big increase in trans identities, more among highly educated young women than among highly educated young men. If that data set had not had information on the sex of the student as well as their gender identity, we simply would not be able to say that. Therefore, even modelling the effect on data collection becomes impossible.

That is a vital point. Having accurate data on sex as well as gender identity is essential to monitoring the impact of reform out there in the world, whether it is in sports, prisons or education, and it is also essential to monitoring the data quality. If we lose the data, we cannot even monitor the data quality.

09:45

Pam Duncan-Glancy: My next question is for both witnesses. Professor Sullivan already touched on this when she mentioned section 22 of the 2004 act. What are your views on how the proposed changes would affect single-sex spaces?

Some people have said that our laws are different and not comparable with those in other parts of the world, because of section 22, on protected information. What is your understanding of the impact of the proposed changes on section 22, and how other countries have handled similar situations?

Robin White: I do not have great experience of the legal systems abroad. I can speak about the legal system in the United Kingdom. What I have noted is that, in countries that appear to have moved to self-ID, flames do not seem to have broken out in all directions, in terms of difficulties. Ireland is a jurisdiction that I am able to have some view of, given that I have a friend or two who are Irish lawyers. Since its introduction, self-ID does not seem to have posed great difficulties in Ireland, as far as I can see.

That sort of expresses my view of how it is likely to be in England. Trans people currently access single-sex spaces that conform with their gender identity. Once again—absent the media's desire to pounce on any story that they can find—there does not seem to be a great difficulty in that use, which has been going on for many years without difficulty. Many of those trans people do not have a GRC at the moment, as I do not, and therefore I do not see the change affecting the use of single-sex spaces in any significant way.

Pam Duncan-Glancy: Are you able to comment on section 22 of the 2004 act in particular?

Robin White: In what sense would you like a comment on section 22?

Pam Duncan-Glancy: Will the ability to withhold the fact that someone has a gender recognition certificate, as it is protected information, be affected by the bill?

Robin White: Plainly, I would apply for a gender recognition certificate if I were a Scottish person and you made the change that you are proposing. I would then have the benefit of the certificate. However, the number of times that I bump into officialdom with a need for that is relatively small. Yes, some additional people would achieve that protection, but the extent to which it will affect their interaction with the world around them is, I think, relatively small. There is some protection against

inappropriate action by officialdom, and an ability not to bump into someone who takes a prurient interest in why one of your documents is different from another one. I am a fairly up-front sort of person, so I tend to be able to deal with such circumstances fairly well, but many trans people have been through a traumatic life experience. I am talking about having that degree of protection in relation to proposals such as the proposal to make police forces record the sex of victims, which is floating around at the moment. If you have been burgled, how can it possibly be relevant if your legal sex is different from your gender identity? Having some protection through section 22 would obviously be helpful in such a circumstance.

Pam Duncan-Glancy: Thank you for that. Professor Sullivan, do you have any comment on that aspect?

Professor Sullivan: Yes. Section 22 of the 2004 act is an interesting example of the unintended consequences of the original legislation, because the privacy requirement was meant to apply to what was a very small group of transsexual people who might not be obviously or openly trans. Combining that with self-identification makes a lot less sense. It was never intended to affect data collection. The *Hansard* record of the 2004 legislation as it passed through Parliament shows that data collection was never mentioned, and it is very clear that the legislation was about marriage—enabling people to marry who they wanted, at a time when we had not yet passed the same-sex marriage legislation. Many of the issues that we are considering now in relation to GRA reform did not come up in those discussions. Data collection is one of those.

For a long time, people did not collect data on sex because they believed and had been advised that to do so would violate section 22. That has since been clarified: collecting data on sex does not contravene section 22. However, we went through many years in which we lost data on sex, partly because people had misinterpreted the law.

As legislators, you have to be mindful of that. It is not just about the consequences that you intend from the legislation. You have to think carefully about the unintended consequences.

Pam Duncan-Glancy: Can I just check: did you say that someone would not contravene section 22 by collecting data on sex?

Professor Sullivan: That is right. It was clarified very strongly in the England and Wales census case and is now on record.

Pam Duncan-Glancy: Thank you. Would any proposals in the current draft bill amend section 22 in any way, or would it remain as you have just described?

Professor Sullivan: I cannot comment on the detail of the legislation.

Pam Duncan-Glancy: That is a pity.

Pam Gosal (West Scotland) (Con): Good morning to the panel. Thank you for your opening statements and the information that you have provided. On the back of what my colleague Pam Duncan-Glancy has been talking about, what are your thoughts on the system being open to abuse by bad-faith actors who wish to gain access to single-sex spaces; and what are your thoughts on specific concerns for women of faith?

Robin White: I will take that in two parts, starting with bad-faith actors. If I am a bad-faith actor who wants to access a women's space, it is probably much easier to get a housecoat, a bucket and a mop than to go through a process of approaching officialdom and declaring myself in some way.

I have listened to the bad-faith actor arguments. They seem to be only weakly relevant to what is going to be done. I cannot imagine that any significant number of bad-faith actors would find the current GRC process—or, indeed, an amended GRC process—a useful way of putting them in a position to occupy their bad faith. There are much easier routes by which they could do that.

The second part of your question was about the effect on people of faith. I have a couple of things to say. First, I assume that people of faith represent the general population but have faith. That is the difference that they occupy. We know that, overall, the general population is supportive of trans people and of their integration into society. I am not a statistician, and I have not spent time collecting the data, but I have friends and colleagues of many faiths who are supportive of trans people. One has to be careful to say that what one is dealing with is a proportion of people of faith who have a difficulty with trans identities or, potentially, with the effect of the bill.

The bill does not change the protections that exist, nor does it change the ability to exclude trans people in particular circumstances where there is a proportionate means of achieving a legitimate aim, or the balance between one protected characteristic and another. Therefore, where there is a clash between people of faith and trans people or, to take a parallel, between people of faith and people of different sexualities—there is an equivalent difference in that some people of faith are not supportive of people who live a lifestyle that is based on a different sexuality—the protections for those circumstances are in place and are not being changed by the bill.

Pam Gosal: Professor Sullivan, on that point, do you know whether data on bad-faith actors is

collected elsewhere or whether things have happened elsewhere? What about the concerns in relation to women of faith?

Professor Sullivan: The difficulty is that, if we do not collect data, we do not know. Obviously, we have all read about instances in the NHS, for example, where a woman has been assaulted and is then told that there was no male on the ward, because they are not recorded as male. In data terms, it is very difficult to answer the question. That is an important issue.

I want to come back on Robin White's point about public opinion. Robin is absolutely right that public opinion is very supportive of trans rights in general but, of course, when you ask more specific questions, such as whether an intact male should be allowed into women-only changing rooms, or whether males should be allowed into female sports, you get very different answers. It is important to pay attention to the detail of that.

Obviously, I cannot speak for women of faith. All that I can say is that it is important that we hear their voices, and I think that that set of voices has been excluded. In general, women's voices have been silenced. That is true in academia—I have written about that, so I can talk about it. I do not want to stray away from my expertise and into opinions, but I have talked about the issue of silencing.

It should give the committee pause for thought that it is making legislation in a climate in which people have in general been silenced for wanting to talk about sex and sex-based rights. Particular groups of women—women of faith and women of colour—are often particularly scared to speak out. I have heard that from a number of people. They are scared that they will have not only misogynistic abuse but racist abuse directed at them and they are worried that, if they speak, that will be used against their communities.

I ask the committee, please, to try to hear those voices. Please slow down and try to create an environment in which you actively seek out those voices, and try to feed into a climate where there is space for people to speak. Sometimes, we hear politicians saying quite incendiary things. They need to stop and think about the consequences of silencing this discussion. You will never get good legislation coming out of that kind of chilling climate.

Pam Gosal: I have one last point on that. Do you believe that it is important that we collect data on bad-faith actors and on women of faith to ensure that nobody is excluded from any service or place, such as those in the health system?

Professor Sullivan: Absolutely. Having more data is very important, and it is particularly important for monitoring equalities. That of course includes women of colour and women of faith.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): I hope that I am not repeating anything, but my question is for Professor Sullivan to start off with. The week before last, Dr Guyan told the committee that data collection activities in relation to requirements for the public sector equality duty, gender pay reporting, crime and police records and census data

"follow a self-identification approach".—[*Official Report, Equalities, Human Rights and Civil Justice Committee,* 7 June 2022; c 3.]

However, as you said in your opening statement, senior quantitative social scientists have argued about the importance of retaining data on sex. Will you comment on Dr Guyan's point and on the conflicts among academics?

10:00

Professor Sullivan: Yes. Dr Guyan is a research fellow in theatre, film and television studies. I would say that he is not part of the quantitative social science community. He does not have peer-reviewed publications that use large-scale population data, for example. He said that he had not met quantitative social scientists who disagree with him; perhaps he is not mixing so much with quantitative social scientists because he is not one.

Dr Guyan also referred in evidence to a letter regarding Scotland's census from 300 students and staff, who are largely based in North American universities. He sort of made out that those are quantitative social scientists, too; actually, those individuals appear to work in a range of disciplines, including creative writing and theology. That is not a letter from quantitative social scientists who use population data; it is a letter from activists who happen to be based in universities.

That letter accused advocates for the retention of sex in United Kingdom census data of taking

"abominable moral positions",

which the writers likened to

"slavery, eugenics, forced sterilisation",

and

"the denial of women's suffrage".

That kind of righteous zealotry is not how experts speak, and it is a silencing technique, which has been accompanied by a more general stifling of discussion of sex and gender. I have talked about that.

Accurate data on sex is fundamental to any analysis of the differences between women and men and boys and girls. The drive to undermine sex-based data collection also has to be understood as a form of silencing, which is designed to make certain facts unknowable and unspeakable.

I also want to come back on Kevin Guyan's point that everything is already always self-ID. He was quite disingenuous there, because he tried to make out that, because we ask people their sex, so sex is self-reported, that is the same thing as gender self-ID. That is not the case. We ask people to self-report their age, but we do not tell them that they can make up whatever age they like; we ask them for accurate data. I just want to make that distinction: there is a difference between self-report and self-ID.

Rachael Hamilton: I want to ask about your comments about section 9 having unintended consequences with regard to not collecting both gender and biological sex data. What did you mean, specifically, by that?

Professor Sullivan: By "specifically", do you mean which forms of data collection—

Rachael Hamilton: I will say it again. What did you mean by "unintended consequences" of not specifically collecting data by gender and sex, under section 9, which you mentioned?

Professor Sullivan: Right. The unintended consequences are that you cement the reluctance to collect data on sex that we are seeing across a whole range of areas.

Administrative data is very important, and not just for effective administration. People sometimes do not understand that people use administrative data for research. Particularly if we do not have another census, which is quite likely, admin data will fill that gap. It is hugely important for research.

We are already seeing problems in a range of areas. On the pay gap, we are seeing the Government equalities office guiding employers to exclude non-binary people from gender pay gap data. A distinction between sex and gender is not being made. We cannot test the hypothesis that non-binary people are not affected by their sex in terms of their pay unless we have data on both their gender identity and their sex.

With regard to health, the national health service decides who to call for routine medical screenings based on the gender marker that they have recorded with their general practitioner, which marker can be changed at their request. It is the gender marker that affects which screenings people are called in for—such as screenings for ovarian cancer, prostate cancer and cervical cancer—so if trans people are not called in for screenings, the consequences for them personally are potentially fatal. There are also consequences for health research.

With crime, we know that the situation is patchy. There have been freedom of information requests, and we know that some police services are recording crimes by male suspects as though they were committed by women, if the perpetrator requests that, which can lead to massive bias. It makes it impossible to interpret trends in the data over time. For example, if you have an apparent increase in the number of females who are charged with rape, you do not know whether that is because there have genuinely been more female accomplices charged, or because there has been an increase in males being recorded as females.

As I noted in my opening statement, the wellbeing of children who are transitioning at the GIDS has not been followed up over time, because their NHS number changes post-transition. That is another example of when we cannot evaluate the dramatic changes that are going on because we do not have the data.

Rachael Hamilton: I will ask Robin White a similar question. You used the example of burglary to talk about the collection of sex data. On the basis of what Professor Sullivan just said regarding the unintended consequences, are there other areas in which you might differ in terms of the collection of data and the definition of sex and gender in that regard? Could you also comment on why it would not be right for Police Scotland to collect data on sex when it comes to more serious crimes such as domestic violence, murder, rape and abuse?

Robin White: Let us start with the example that I gave and the current suggested guidance from the Home Office in London, which is to collect sex data on any crime. If a trans person is living successfully in their affirmed gender, and has done for many years, and they are burgled, why should they have to reveal their natal sex to a police officer? Is their natal sex in any way relevant to that crime? I think that the answer is no. If, in that circumstance, data is wholly unnecessarily collected, the unintended consequence might be that an individual is less likely to report a crime and is less likely to be protected as they should be.

There is always an incentive to collect more and more data, but if, in my example, there is a balance between the effect of chilling that person from reporting that crime and the state's need to know the natal sex of someone who is burgled, you will understand where I think that the balance lies. I acknowledge that the balance might be different for different crimes, and I have not analysed which crimes it makes a difference for.

These days, one of the pieces of advice that we get under the general data protection regulation is not to collect, for example, employee data unless you actually need it, because then you have to protect, store and look after it and so on. When I am advising employers on data, I advise them to collect the data only if they really need it, because then they do not have those other obligations. Unless there is a real purpose in collecting something that relates to crime, it should not be collected.

Rachael Hamilton: I will ask one more question. Do you feel that we are ready for this reform? So many people are concerned about the resource, given the number of people who are self-identifying, as stated in the Cass report, and who are seeking help from gender identification clinics. Do you think that we are really ready for this, without the resource to provide support to people?

Robin White: I do not see the two things as linked in any way.

Rachael Hamilton: Can you explain that, because I am finding it difficult to understand?

Robin White: Absolutely. It goes to the question that Ms Chapman asked at the start about the case for reform. We had the Gender Recognition Act in 2004, which was very medicalised. The Equality Act 2010 then took away the medical intervention that there was in the 1999 regulations. More recently, the international classification of diseases has taken away the pathology that was related to being trans. The medical profession is therefore saying that it recognises trans as part of life’s rich tapestry. In exactly the same way, homosexuality was regarded in a pathological way, and we have come to realise that it is just how a proportion of people are.

In my respectful view, in a civilised society, we should recognise people’s ability to define themselves in a way that they are comfortable with, unless there is a very good reason not to, in which case there can be appropriate exceptions and derogations.

I have been through a full gender reassignment process, so no one needs to explain to me how difficult and enormous a change that is in life, and no one should go through that process unless it is right for them. However, the principal person deciding whether it is right for them is them. We live in a free society and people should make choices for themselves, with every piece of advice and help that they should get either from the state or privately. They should be free to be who they are.

Rachael Hamilton: I completely agree with that. Other members need to ask questions, so I shall leave it there.

Karen Adam (Banffshire and Buchan Coast) (SNP): Professor Sullivan, you spoke about health records. Are you saying that a GRC erases those? In what way would a GRC prevent people from accessing medical treatment and routine checks that are pertinent to their bodies?

Professor Sullivan: My point was not specifically about GRCs; it was about the fact that people can change their NHS records on request. That might have unintended consequences. People feel that they want to express their identity in their NHS records, and what we need to explain about data collection relates to what Robin was saying earlier. Robin said that people have their identities and they need to be able to express them, and that is absolutely fine. We in data are not interested in judging people; we are interested just in having accurate information. If the information on your health record is not accurate, that will have unintended consequences and you will not be called in for screening when you should be given that your body is what it is.

There are also implications for research when people are misclassified as the opposite sex when that reflects their identity, which is different from their sex. If we could just explain to people that those are two different things and we should respect them both, things could be a lot less adversarial and we could recognise both those protected characteristics rather than seeing gender identity as having to be in conflict with sex.

Robin White: I am in precisely that circumstance. I am a natal male who transitioned, so I still have a prostate, but I do not have a cervix. I am on the register of people who are not called for cervical smears as a number of women are, depending on their life history. No one needs to tell me what those differences are because I have had to work with them. Equally, I am on a register of people who are called for a prostate exam even though my identity might suggest that I should not be.

The consequence is that when I visit my GP surgery, or the new records person pulls my records or whatever, I am not outed in that way by that person seeing the records giving me an identity that is not mine.

10:15

There is a balance—and I absolutely accept that Professor Sullivan is right to raise the difficulties—but, frankly, trans people are very ready and able to deal with those differences where they impact on us, as I have been ready and able to speak in the privacy of my doctor’s consulting room to make plain what needs to be made plain.

Karen Adam: Thank you.

Professor Sullivan, when it comes to the NHS and data, is that where inclusive language and communication would be helpful, so that we are not binary about these things? For example, when my oldest son went to get his Covid vaccinations, he was asked if he could be pregnant. It is just one question and one answer, but as you said, the discourse around that can be quite heated. Would one question that included everyone be helpful?

Professor Sullivan: Clear communication and accurate communication are really important. That is something that both data collection and medical communication have in common. It is really, really important that everyone understands what you are saying, and it is important that you do not ask questions that make people think that you are making fun of them, or make them think, “What on earth is this person saying?”

We have seen a lot of language that has been criticised as being both unclear and dehumanising, particularly around women. There was the notorious issue of *The Lancet* that talked about “people with vaginas”—I am sure that you agree that that is not necessarily how we want to be referred to.

If you ask people things like, “Do you have a prostate?” or “Do you have a uterus?”, that is not the clearest communication. Whether we are collecting data or communicating with people in other ways, we need to be clear and accurate—and we need to communicate to people that we are not making judgments about them. That takes me back to something that Robin White said. When we collect data it should always be confidential; it is never about outing people. If people understood that data is handled really carefully, that might give them some reassurance.

Karen Adam: When it comes to language, I think it is about context. I am sure that a person would not introduce someone as “a person with a vagina” unless it was in a medical or pertinent context. It is important that such language is used in that context and not more widely, which is not helpful for discourse.

Robin White, are there other key aspects of the bill that you think are fraught with legal or other difficulties?

Robin White: No. I have expressed my view that it is a positive move forward to recognise citizens for who they are.

There has been some comment about age, and I want to comment on that, because that is an area in which the bill widens the ability to apply. Last night, I was looking at ages—and making sure that I would talk about Scotland and not the UK. At 16, you can marry and you can be elected to a community council. You have to wait until you are 17 to give blood. I was interested to learn about the armed forces: the navy will take you at 17 and the Royal Air Force at 17 and six months, but for the army you have to wait until you are 17 and nine months—I do not quite know why, but there you go. You have to wait until you are 18 to be a member of the Scottish Parliament, to be a scrap merchant or to sell alcohol to the public—I am sure that those things are entirely unconnected. I think that you have to be 35 to be President of the United States.

What that illustrates is that society makes choices. There is no line at which a child becomes an adult. In Scotland, there is the Age of Legal Capacity (Scotland) Act 1991, as opposed to the Gillick competency that is used in England, which, as I understand it, sets a presumption at about the age of 16 for most things. Society makes a choice about where those opportunities are made available to people.

I knew as a young teenager who and what I was, and I know what choice I would have made had I been a teenager in Scotland today. I am now 58, and I know that it would have been the right choice for me. It is easy for me to look back on that—and I am not saying that it would be the right choice for everyone, or that everyone would have that same degree of certainty. However, can I say what I think the right age is? No. Is that a choice that, as a society, you should be making? Yes.

Maggie Chapman: I want to come back to a couple of things that have been said. I will come to Robin White first.

You have spoken about age and about self-identification and self-declaration. Should there be any gatekeeping, whether that is medical, such as through the gender recognition panel and the assessment of information about dysphoria and other evidence, or should we completely disentangle the process from gatekeeping? How do you see that element of the bill working?

Robin White: I do not see a purpose for the gender recognition panel. Here, I rely on my personal experience mostly, in that I have known who I was since I was an early teenager, and I do not need anyone to tell me that. I have been through a full gender transition, and it is a really serious process. There is medical gatekeeping in that process—and rightly so, as you need to be very certain that you have the strength to go through the process. Does there need to be gatekeeping on declaring your identity? No, I do not think so. Is it a serious thing? Yes. Should there be a formal declaration, which the bill provides for? Yes. Should there be consequences for making a false declaration? That is not really for me to judge; however, it should be serious thing—and I think that the bill would make it that.

Do people need the three-month waiting period? I do not know. Perhaps we can call on Professor Sullivan's services, should the bill happen to be passed, for her to do a study on who desists over a three-month time period. I suspect that very few people will do that. I also wonder whether a person who has been living in an acquired gender for a long period of time, for example, needs a three-month waiting period.

Maggie Chapman: Thank you for that.

I will come back to Professor Sullivan. You talked earlier about medical records and the need to align medical checks, screening and those kinds of things with the right bodies, essentially. We heard from Robin White that the process of recording that information in medical records can already happen, and that the process for getting a gender recognition certificate actually has nothing to do with those records. I am wondering why you think that that is relevant if the bill that we are considering is about the process for getting a GRC, rather than how medical records are recorded?

Professor Sullivan: Medical screening occurs according to the gender marker in your records. We know that there have been cases of people not receiving appropriate screening because their gender marker reflects their gender identity and not their sex. I want to be really clear about that, because I understand the concerns about confidentiality, but that data should absolutely always be confidential. We need to ensure that those concerns are addressed specifically as concerns about confidentiality rather than about a particular piece of data. Of course, there is all sorts of stuff in your medical records that you would not want all and sundry knowing—things that are far more sensitive than just your sex.

Sex is a systematic variable. It is not a cluster of bits and pieces or about people just needing to know about this or that organ. It is a systematic variable that affects every aspect of your health, and every cell in your body has a sex—it is not just your prostate or your uterus—which means that you can respond differently to different treatments. Of course, some trans people will have undergone treatment that it is also really important for their doctor to know about, but some will not have done—

Maggie Chapman: Professor Sullivan, may I just interrupt you? That is not really the question that I asked. The question that I asked was about the process for getting a GRC, because that is what the bill that we are considering is about. We are not considering how medical records are stored, held or used, or how different lists for different screening processes are managed. Given that there are trans people who do not have a GRC who get—or, possibly, do not get—the medical treatment that they require, why does changing the process of getting a GRC have the impact that you claim that it does?

Professor Sullivan: Again, I want come back to the unintended consequences of creating an environment in which people find it very difficult to acknowledge sex. If it is very easy to replace your sex with your gender identity in law, how can a service provider or a data controller say, "Oh, well, this is acknowledged legally, but we are not going to acknowledge it"? I agree in principle that they could, but you need to think very carefully about how you are going to make really clear not only that they can do that but that you actively want them to.

Maggie Chapman: Thanks. That is helpful.

A moment ago, you talked about the importance of language, how it is used and the need for it to be clear and not dehumanising. I was struck by one of your earlier comments in response to one of Rachael Hamilton's questions on data collection and people answering the sex question based on a process of self-identification or self-declaration. You likened it to the age question, and I think that you said that we do not expect people to

"make up whatever age they like."

Are you saying that people make up whatever gender they like?

Professor Sullivan: No, I am not saying that they make up whatever gender they like. I am saying that they have their gender identity, which is very real—they are not making that up. However, if we tell them to respond to a question on sex with their gender identity, we are asking them to give the wrong information. All I want to establish is that we should ask clearly about sex and ask clearly about gender identity, and ensure that we understand both those things, because both those things are important to people's lives. Everyone has a sex and some people have a gender identity, and the two may well intersect in people's lives. We need to understand both.

I did not mean to imply that it is dishonest to answer a question in the way that you have actually been told to answer it, because, of course, that is not dishonest. I think that it is up to the people who collect the data to say, "Look, these are two separate things. We can collect data on both of them and we can respect both of them." My worry is that, by introducing gender self-identification, often, what we are doing is erasing the category of sex. That has particular implications for women and girls.

The Convener: No one else wants to come in. Alice and Robin, thank you both so much. We have gone slightly over time, but your evidence

has been really helpful to the committee in its deliberations.

I will suspend the meeting for about five minutes.

10:29

Meeting suspended.

10:36

On resuming—

The Convener: Welcome back. I welcome our second panel. Joining us remotely is Victor Madrigal-Borloz, who is the United Nations independent expert on protection against violence and discrimination based on sexual orientation and gender identity, at the Office of the United Nations High Commissioner for Human Rights. We are joined in person by Ian Duddy, the chair of the Scottish Human Rights Commission; Barbara Bolton, who is its head of legal and policy, and Cathy Asante, who is a legal officer. I particularly welcome Ian, who is on his second day in post as chair of the Scottish Human Rights Commission. You are all welcome—especially Ian—and we look forward to working with you on a range of issues.

I invite the witnesses to make short opening statements, beginning with Victor Madrigal-Borloz.

Victor Madrigal-Borloz (United Nations Independent Expert on Protection from Violence and Discrimination based on Sexual Orientation and Gender Identity): I speak to you from the Palais des Nations in Geneva, where last week I presented my report for the current cycle to the Human Rights Council. I am the independent expert for the United Nations dealing with violence and discrimination based on sexual orientation and gender identity. That mandate was created in 2016, with the mission of bringing visibility to the way in which discrimination and violence manifest themselves against lesbian, trans, bisexual, gay and gender diverse persons around the globe.

In the work of gathering evidence about those manifestations of violence, I have paid particular attention to gender identity when it is at the root of discrimination and violence. I have carried out inquiries into the state of recognition of gender identity and its expression in international human rights law, and the requirements for the process of legal recognition of gender identity that stem from international human rights law, and on into issues concerning good practice in data gathering and management, and other things that are crucial to the mandate that I discharge.

Last year, I carried out an inquiry into gender-based frameworks. That was the basis of the reports that I presented to the United Nations Council and to the General Assembly of the United Nations. The reports were entitled “The Law of Inclusion” and “Narratives of Exclusion”. Those reports were an integral part of my research agenda under the United Nations Council resolutions that created my mandate. They included an extensive literature review and a call for inputs, in response to which 529 submission were received, including 42 from member states and 484 from non-state stakeholders, including 202 from organisations and 282 from individuals. That process gathered specific information from all regions in the world, with specific information from 88 United Nations member states. I believe that it covered a significant proportion of the populations, cultures, legal traditions and religions of the world.

As a result of that work, I was able to arrive at three main conclusions. First, legal recognition of gender identity is key to ensuring deconstruction of the institutional and social drivers of discrimination and violence that affect so many people around the world.

Secondly, certain requirements are recommended and dictated by international human rights law in relation to processes of legal recognition, including that processes should be accessible, fast and widely available, along with other requirements on which I would be happy to elaborate.

Finally, gender identity is protected by a robust corpus juris, under international human rights law, as a trait that is protected from discrimination and violence.

I come back to my first conclusion: legal recognition is one of the fundamental elements that ensures the deconstruction of drivers of violence.

I thank this honourable committee for inviting me to render testimony. I will, of course, be honoured and happy to continue the conversation.

The Convener: Thank you. May we hear from Ian Duddy, please?

Ian Duddy (Scottish Human Rights Commission): Thank you for inviting the Scottish Human Rights Commission to provide evidence to the committee on the Gender Recognition Reform (Scotland) Bill. I am the new chair of the commission and took up my post yesterday.

I would like to begin by providing a summary of the commission’s position regarding the bill. The commission welcomes the changes to the process for securing legal recognition of gender identity that are set out in the bill. In particular, we welcome three elements: first, the removal of the requirement for a diagnosis of gender dysphoria; secondly, the abolition of the gender recognition panel; and thirdly, the shortening of the process.

Those three steps will move legal gender recognition in Scotland significantly closer to the standards that are set out in international law in the area.

The commission is Scotland's national human rights institution—NHRI—and is accredited under the United Nations human rights system. As such, the commission acts as a bridge between international human rights law and the national system. We promote full compliance with international and regional human rights standards.

The commission has a statutory duty to promote best practice in human rights. Therefore, the commission's position on the bill is based not only on the European convention on human rights, but on wider international human rights law, guidance and best practice.

It is the commission's analysis that international standards and best practice require that the Gender Recognition Act 2004 be reformed to remove unnecessary barriers to the enjoyment of human rights for transgender people.

At European convention level, gender identity engages the right to respect for private and family life—article 8—for trans people. The most basic convention requirement is that states must provide a process through which a person can change their legal gender. From that starting point, the European Court of Human Rights continues to recognise a broad spectrum of systems within the acceptable range—the so-called margin of appreciation—which include systems of self-identification and systems that require medical diagnosis. It is important to remember that the function of the convention is to set a floor, not a ceiling. What is clear from the European Court of Human Rights and the Council of Europe as a whole is that the system must be quick, transparent and accessible.

When we look beyond the European convention we can see from a range of sources that self-determination has emerged as the necessary human rights standard. We set out those sources in our written evidence; they are the Parliamentary Assembly of the Council of Europe, the United Nations independent expert in this area—Victor Madrigal-Borloz is with us today—and the Yogyakarta principles.

The independent expert and Yogyakarta principles also highlight that the process must not require a medical diagnosis and ought to ensure that minors have access to the process. I am sure that both aspects will be discussed in more detail today.

We have followed the evidence that the committee has heard so far on the bill, and we are very aware of concerns that have been articulated in relation to fulfilment of other human rights. The commission's role covers the spectrum of rights for all people, and we take them very seriously. Having listened to the evidence and analysed concerns through a human-rights lens, we remain strongly of the view that the changes that are set out in the bill will bring Scotland closer to satisfying international legal standards and will not jeopardise the rights of others.

My colleagues Barbara Bolton and Cathy Asante, who are lawyers in our legal and policy team, are with me and will be happy to answer the committee's questions. Given that this is only my second day in this role, I will hand over to them to answer your substantive questions.

10:45

The Convener: Thanks very much, Ian. We now move to questions, starting with Maggie Chapman.

Maggie Chapman: Good morning, panel. Thank you for joining us this morning and for the evidence that you are providing today. I also thank the SHRC for the written evidence that it submitted prior to the meeting.

I have a couple of questions for the SHRC and Victor Madrigal-Borloz. Victor, in your opening remarks, you said that the requirements for a gender identification process include its being accessible, fast and widely available. You then said that there are other requirements that you would be prepared to elaborate on. Can you elaborate on requirements that you see as being necessary and important if we are to get the process right?

Victor Madrigal-Borloz: I am very glad that you have asked that question. I was trying to be very obedient in observing the three minutes that I was allocated, so you have given me a wonderful point of entry. Thank you for that.

The existing body of international human rights law allows for six basic standards to be identified in relation to a legal recognition process. First, it should be based on self-determination by the applicant. Secondly, the process should be a simple administrative one. Thirdly, it should be confidential. Fourthly, it should be based solely on the applicant's free and informed consent without requiring medical and/or psychological or other certification that could be unreasonable or pathologising. Fifthly, it should acknowledge and recognise non-binary identities including gender identities that are neither man nor woman, and it should offer a multiplicity of gender-marker options. Finally, it should be accessible and, to the extent that it is possible, cost free.

Each of those criteria has been examined by several bodies, including global bodies, many

United Nations special procedures bodies, treaties bodies and European and inter-American regional human rights courts that analyse the various bodies of law and have pronounced on these matters. The approach derives from other processes, such as the declassification of gender dysphoria as a pathology—which was effected in 2018 by the World Health Organization—and processes of evidence gathering that have led to the conclusion that medical and psychological certifications are often pathologising and unreasonable. Indeed, in many countries around the world, they are still the source of significant instances of cruel, inhuman and degrading treatment and torture, including sterilisation, genital mutilation and castration.

Maggie Chapman: Thank you very much, Victor. That was helpful.

I want to explore in more detail the connection or otherwise that you see between medical or psychological assessment and, as you have highlighted, the removal of gender dysphoria as a pathology. There has been discussion about whether there should be gatekeeping or medical or psychological assessment in this process. Some witnesses have suggested that some of that should be retained in order to ensure that the mechanism is not open to abuse. Can you comment on that?

Victor Madrigal-Borloz: Of course: I can comment on that from two points of view. First, I will talk about how open the gate is and how much gatekeeping there is in the system. I will also address the question of abuse, which is a significant element in the discussions of the issue.

In my report on legal recognition of gender identity, which I presented to the UN General Assembly in 2019, I took note of the release by the World Health Organization of the "International Statistical Classification of Diseases and Related Health Problems", ICD-11. It was adopted by the World Health Assembly in May 2019; I took note of that instrument in my report.

Trans categories were removed from mental and behavioural disorders, and a new category related to trans identities was created under the chapter "Conditions related to sexual health". The category of transsexualism was removed and replaced with a new category called "gender incongruence of adolescence and adulthood". That was a milestone in the process of depathologisation. It led to the category not being defined in binary terms and not relating to gender stereotypes—it applies after puberty begins and is characterised by a marked and persistent incongruence between an individual's experienced gender and their assigned sex, leading to desires to transition in order to live and be accepted as a person of the experienced gender. It can lead to other considerations under ICD-11.

The recategorisation was intended to be used to facilitate access to gender-affirming treatment. In other words, it means that there is no reason to assign a diagnosis to trans people who do not seek gender-affirming medical treatment or some sort of bodily change. The mandate received in all submissions consistent information to the effect that the changes were considered to be a major step forward in relation to respect for gender identity and diversity. Based on all the evidence that was gathered by the mandate, the process of depathologisation is crucial in promotion of deconstruction of social stigma around trans and non-binary identities. Therefore, I welcome that element of depathologisation.

From that process of acknowledgement of the work of the World Health Organization, you will know that assigning the need for gatekeeping is one thing that this particular way of thinking would not require in order to ensure legal recognition of gender identity.

I believe that there are some countries in which it is still possible for a person to provide particular evidence of having undergone some sort of support, but it is not part of the requirements that are set by the state, and is more part of processes that have taken place in the past.

The other element that I would like to address briefly is risk, which was addressed throughout my work on the issue. My suggested method for management of risk relates to how human rights-based approaches internationally recommend management of risk of abuse of any right—not just concerning legal recognition of gender identity. That involves implementation of risk-management methods including preventative measures, accountability measures and due investigation of abuse.

That is relevant in answering the question because every right is inherently accompanied by the possibility of abuse. Acknowledging evidence in relation to abuse in order to ensure duly preventative measures, for example, is part of a human rights-based approach. What is not part of a human rights-based approach is withdrawal of the human right. I hope that I have answered your question.

Maggie Chapman: Thank you, that answers my question. I will put a similar question to the SHRC. We have heard a lot about the requirement or otherwise to remove the gender dysphoria diagnosis and the gender reassignment assessment panel. I do not know which of you wants to answer this question, which is about the element of risk management that Victor Madrigal-Borloz talked about.

If we accept what I understand is your position, which is that we move to self-declaration and remove the panel and the need for a gender dysphoria diagnosis, how do we best manage in the Scottish context the risks that Victor identified around potential abuse and misunderstanding of what rights are being conferred?

Barbara Bolton (Scottish Human Rights Commission): I will start and Cathy Asante can come in if I forget or miss anything important.

First, we support everything that the independent expert said. We are very glad to join him on the panel.

In relation to the specific bill that is before the Scottish Parliament, the starting point is to very carefully assess what the bill proposes, because we cannot get to an assessment of risk unless we are first very clear as to what it does and does not do.

As we all know, the bill proposes changes for obtaining legal recognition of gender identity, which is a deeply personal matter for the individual. Obtaining a GRC affects highly personal aspects of life such as birth, death, marriage and obtaining benefits. It does not affect the way that an individual goes about their daily life and it therefore does not affect how they access spaces, toilets, changing rooms, showers or gym classes, whether in school, at work or when out shopping. It also does not affect access to single-sex services or separate-sex services and it does not affect the protection that a person has against discrimination on account of their gender identity or gender reassignment; they have the same protection at work, in school and in society at large whether or not they have a GRC.

That has to be our starting point, because once we have accepted that gender identity recognition is legally both a right in relation to somebody's right to private life and a deeply personal matter that impacts on very personal aspects of their life, in order to put barriers up in relation to a person securing legal recognition of their personal identity, we have to be able to justify those barriers and they have to be necessary. We have to show that there is a pressing need for a particular barrier and consider what that barrier is seeking to achieve and whether that particular barrier address the issue that has been identified. It is then about whether it is a proportionate measure—that is, whether it is the least restrictive measure in relation to the rights of trans people in order to address that harm.

In order to apply that human rights test, it is absolutely critical that we set out very clearly and concretely the specific harms that we are saying will occur. In human rights terms, we need to look for objectively evidenced and real and concrete harm that will arise from specific provisions in the bill. When we are talking about concerns, we have to be that concrete; if we are not that concrete, we cannot go on to the next part of the test to find out what is a proportionate response. That is perhaps why, in this discourse, we are often going from very generalised concerns to the suggestion that the bill should not proceed.

We need to identify a very specific harm and accept that it is objectively evidenced. If the committee assesses all the evidence that is put to it and concludes that it thinks that there is evidence that a real and concrete harm to specific people will arise in relation to a specific provision in the bill, the next step is to ask: what is a proportionate response to that? As I said, that proportionate response has to be the least restrictive measure—in this case, in relation to advancing the rights of trans people—that will address the specific harm that has been identified.

We would encourage the committee to approach it in that way and to really consider whether a specific harm has been concretely set out and identified and whether it is therefore able to move to that next step to apply a proportionality test to any measures applied.

As Ian Duddy outlined, the commission's position is that we have now looked at the issue carefully on two occasions. We looked it in 2019-20, taking our mandate very seriously because we cover the rights of all people in Scotland and we always approach human rights assessment with a recognition of the interdependence of human rights; we take very seriously concerns that are raised about possible harmful effects on others—in this case, women and girls in particular. When we looked at it in 2019-20, we were not able to identify any objectively evidenced real and concrete harm that is likely to arise as a result of the reforms that are proposed.

11:00

When the bill came around again, the commission took a conscious decision to look hard at it again. In recognition of the time that had passed and the possibility that concerns had been clarified and that perhaps further evidence had been produced of real and concrete harm that might arise, we made a very conscious decision internally to devote to time to really assess it. We did so, and we have concluded, again, that we cannot identify any objectively evidenced real and concrete harm that is likely to result from the reforms. Indeed, the majority, if not all, of the concerns that have been outlined do not appear to have a relationship with the proposals that are set out in the bill. That is our assessment and that is why we continue to support the bill.

Maggie Chapman: Thank you. I have just one follow-up. We heard something in a previous session that I suppose comes down to that question of harm and what has been described to us as the competing rights of different groups. I think that you both mentioned in your introductory remarks that it is important for us to keep in mind the notion of confidentiality linked to the privacy of trans people. We heard previously that the right to privacy for trans people going through an accessible non-invasive process would come with very serious consequences. Are you saying that your assessment is that those serious consequences are not based in objective evidence at the moment? Does your assessment indicate that there will not actually be serious harm and that no serious consequences would arise if we were to pass the bill?

Barbara Bolton: We find it very difficult to see how changing the process for obtaining a gender recognition certificate will create issues in relation to the matters that have been highlighted—data, sport, access to toilets, access to changing rooms, gym classes and so on. Trans people already go about their daily lives on the basis of self-ID and it is hard to imagine a society in which we could approach things differently while respecting the dignity and autonomy of other individuals. It is hard to imagine a society in which we would have a gatekeeping mechanism to check somebody's birth certificate before they can use a toilet or a gym class.

Whether someone has a gender recognition certificate or not does not affect any of those things. We have heard clear evidence about that through the committee's evidence taking. It does not affect—or determine, certainly—your placement in prison. It does not determine whether you can have access to a particular sport or a particular bathroom. It goes back to the point that the concerns that have been outlined are very generic. They have not been made specific and they do not seem to have been tied to the specific changes that are being proposed.

Maggie Chapman: I will leave it there.

The Convener: Victor Madrigal-Borloz wants to come in briefly on that point.

Victor Madrigal-Borloz: In relation to that question, taking due note of the exceptions that exist in the Scottish context, which I will not address myself, I want to share the fact that the argument about the alleged competition of rights was also present in my inquiry, through some submissions. Of course, I took it very seriously, and I reached a similar conclusion to that reached by the Scottish Human Rights Commission. First, it is not supported by evidence that there is any systemic identifiable pattern or risk in the very nature of the situation that is created by legal recognition based on self-identification.

Secondly, there is already evidence from numerous states that have legal recognition based on self-identification. I am speaking outside of the exceptions in Scotland because I do not know those. Belgium, Denmark, Ireland, Luxembourg, Malta, Portugal and Argentina are examples of states that have implemented systems based on self-identification and eliminated pathologising requirements and where the numbers and outcomes in terms of social inclusion and the decrease in violence against trans and non-binary persons are remarkable. At the other end of the scope of worries, so to speak, the theoretical concerns that were raised in the process of adopting those processes have not materialised.

Maggie Chapman: Thank you, that is really clear.

Pam Gosal: Good morning, panel. Thank you for your opening statements and the evidence that you have provided. I will go a little bit more into what my colleague Maggie Chapman just talked about.

Some of the opposition to the GRA reform has focused on the potential impact on women and girls, particularly in relation to single-sex services and exceptions in the Equality Act 2010. The SHRC submission refers to the "Interdependence of human rights" and states that the rights of women and trans individuals "go hand in hand."

Will you explain further what that means? Is it possible that the GRA reform will cause conflict between the rights of trans individuals and any other groups, such as religious groups?

I will go to Ian Duddy and Barbara Bolton first. They have talked about what the bill would not touch on.

The Convener: It is either Barbara Bolton or Cathy Asante who is answering questions.

Pam Gosal: Okay. Could I hear from Barbara, please?

Barbara Bolton: It is important first to clarify the parameters of our mandate in relation to equalities. We recognise and fully respect the role of the Equalities and Human Rights Commission as the regulator in relation to equalities law and enforcement in relation to discrimination. We have considered the Equality Act 2010 in relation to the bill because it is necessary to take it into account in carrying out a full human rights analysis because the act's provisions already provide important mechanisms under our national law for how we apply the balancing mechanism.

It is not necessarily helpful to talk in terms of competing rights. It is perhaps better to speak in

terms of tensions that can arise between certain rights. That can happen in relation to a range of rights. Most rights—most civil and political rights, certainly—are qualified, not absolute, and you have to apply a balancing mechanism in a range of settings to take into account the fact that we live in society and there are different rights at play in different settings.

We have noted that the Equality Act 2010 provides important coverage in relation to some of the concerns that have been raised. For example, it is possible to exclude trans people from single-sex spaces. It is possible to exclude a trans person from single-sex accommodation, for example.

The test that is applied under the 2010 act is similar to the human rights law test: you need to have a good reason, there needs to be a legitimate aim, the measure applied needs to address that aim and it needs to be proportionate. It is for the service provider to decide whether they will run their service in that way. However, where it is necessary and proportionate, the possibility of excluding somebody on the basis that they are trans is available whether or not the person has a GRC. Therefore, it is not affected by the changes that are proposed in the bill; it is not affected by the process for obtaining a gender recognition certificate.

Similarly, reference has been made to section 22 of the Gender Recognition Act 2004 in recognition of the fact that gender identity is a deeply personal matter. If somebody obtains a GRC, that, likewise, is deeply personal. There are provisions in the Gender Recognition Act 2004 to ensure that officials can disclose the fact that somebody is trans, or has obtained or applied for a GRC, only where necessary. Again, that is appropriate and it mirrors the human rights approach of respecting somebody's privacy unless it is necessary to look behind that and see what their official documentation says.

For example, there is a specific exception in relation to the investigation and prevention of crime, and in relation to sexual offences that can be committed only by people of a certain gender. There is also a specific exception in relation to disclosure to courts and tribunals. We heard from Rape Crisis Scotland that those exceptions are working in its provision of services. Rape Crisis gave evidence that it would still be notified if somebody had a criminal record that was relevant to the provision of its services, whether or not they had a gender recognition certificate.

Therefore, our analysis is that the Equality Act 2010 already provides mechanisms for addressing any relevant concerns in a proportionate way. That of course makes sense, because the Gender Recognition Act 2004 came before the Equality Act 2010, so the impact of gender recognition certificates was fully understood and taken into account in creating the 2010 act, although trans people's protection under gender reassignment does not turn on whether they have a GRC. In our view, the two acts are working well together.

You mentioned the EHRC's position. As we have said publicly on record already, and directly to the EHRC, we have not been able to identify an equalities law analysis or a human rights analysis that underpins its current position. Whereas it had set out in full a human rights and equalities law analysis that stood behind its support for the bill over a number of years, during which period it advocated quite strongly for demedicalisation and the removal of the panel, its current position has been set out in only a handful of letters without any more substantial documentation, reasoning or analysis. We have asked the EHRC to provide further clarification because, if you are a human rights body and you oppose a proposed piece of legislation that would further the rights of a marginalised group, there is a considerable burden on you to set out clearly the basis for that.

I hope that that explains where we are coming from.

Pam Gosal: The committee has heard from many witnesses that they have a worry that the bill will exclude women and girls in minority groups from accessing single-sex services and spaces. What is your view on that, Barbara?

Barbara Bolton: I think that Cathy was going to come in on that point.

Cathy Asante (Scottish Human Rights Commission): I am not certain what the specific concern is in relation to marginalised groups and single-sex spaces. Barbara Bolton has outlined the position generally and our view on single-sex space access. However, I know that there has been quite a lot of discussion on women of faith and difficult situations that they might be put in based on the tenets of their faith. We have given some thought to whether that is related to the bill and what the possible answers might be.

To build on what Barbara Bolton said, our view is that it is not uncommon for a balancing of rights to have to take place in relation to human rights in general. That is well known and is built into the mechanisms of human rights law. Therefore, what is required is an assessment of the actual concrete harm and then there is a question of a proportionate response to that. There is a lot of case law around balancing religious rights against freedom from discrimination, which would be the relevant right in relation to trans people. What needs to be done is to create a policy that upholds the rights of both in so far as possible.

11:15

In some of that case law, we have examples where people of Christian faith are entitled to manifest their religion by wearing a cross, because there is not a sufficient reason to prevent them from doing so, but they are not entitled to manifest their religion in terms of discriminating against same-sex couples in providing counselling.

There is a lot of case law that explores that tension and shows ways to balance those rights. I think that the same thing would apply here. I would imagine that public service providers such as the NHS have been dealing with these issues for many years and they would have policies designed to uphold the rights of both groups in so far as they are able to do so. The key thing for us is that that is related to the design of policy that balances rights; it is not a consequence of this bill specifically. It is not specifically about the holding or not of gender recognition certificates; it is about the day-to-day reality of managing the balancing of rights in the provision of public services.

Pam Gosal: Thank you, Cathy. Victor Madrigal-Borloz spoke about how the bill will bring lead to a process of legal recognition that is quick and widely available.

Do you perceive any ripple effects in the future from having more numbers coming through and having a process that is easier to access? Will it have more of an effect on other groups, whether they are minority religious groups or other groups? Do you forecast anything coming up that will open up more issues or around people sounding off about their concerns in relation to the bill?

Cathy Asante: That is a really important question. The key thing is that most of these concerns are not related to whether a person has a gender recognition certificate. The anticipated change is that more people would hold those certificates. However, the areas of concern that have been raised are in almost no case determined by whether someone holds a gender recognition certificate. Therefore, I do not see that there would be a significant impact from shifting that one legal criterion of the person’s status as opposed to questions that would arise from managing the presence of trans individuals in society in general.

The accommodation of prisoners has been a good example of that. I know that there has been discussion about that as well and about any tensions that might arise but if we look at the Scottish policy and the English policy, which have both been discussed, individual risk assessment is at the core of those policies. A gender recognition certificate plays some role but it is never determinative of the placement of a prisoner.

We heard from the Scottish Prison Service that it did not anticipate that there would be a major impact from the reform. More generally, we will still have to deal with these situations, but we have been dealing with them for many years and we already have policies that are designed to weigh in the balance different people’s rights and to arrive at conclusions that uphold everyone’s human rights. We do not forecast that that would be impacted by having an increased number of people with gender recognition certificates.

Pam Gosal: Thank you, Cathy. Victor—do you have anything to add on that?

Victor Madrigal-Borloz: I have a couple of very quick points. First, a colleague that I work very often and intensely with is the UN special rapporteur on freedom of religion or belief, Dr Ahmed Shaheed of Essex university. I am very pleased to tell you that we have come to the conclusion, in our joint studies and in Dr Shaheed’s reporting and thematic development, that not only is there no real contradiction in human rights analysis between the right to freedom of religion and belief and the right to freedom from violence and discrimination based on gender identity, but rather there is an inextricable connection between the principles that found respect for both rights.

The Human Rights Commission has already mentioned the reality of the right to privacy as a guiding principle and, of course, that includes the protection from overreach by the state by arbitrary mechanisms that show no value—that is precisely relevant to the medical certifications that we have been talking about—and, of course, pathologisation in general. The idea of promoting the freedom of individuals to determine the confines of their existence is very much a common thread in my work and in the work of Dr Shaheed. There is abundant jurisprudence and doctrine about the limits and scope of the right to freedom of religion, and the limits determined by the rights of others. I just wanted to bring in that perspective in human rights analysis.

There is another issue that I very much hoped to mention. I believe that, at the international analysis level, in international human rights law, the argument that is presented by the Scottish Human Rights Commission to the effect of the necessity to apply a non-discrimination methodology of analysis to measures to exclude persons from access is evidently what human rights-based approaches would also support. Those steps that talk about necessity, proportionality and all the other elements that Barbara Bolton mentioned are exactly the way that international human rights law would look at those types of exclusions at the moment.

Pam Duncan-Glancy: Good morning, panel. Thank you for your answers to the questions so far—I had many of those questions on my list, so I will skip them. I also thank you for the hugely helpful evidence that you gave in advance of your appearance before the committee this morning.

My first question is to all of you. How would you characterise Scotland's support—or otherwise—of LGBT people now? How might that change if the bill is passed?

Victor Madrigal-Borloz: Thank you for the question. If I understood you correctly, you are asking me to characterise, in general, the treatment of LGBT persons.

Pam Duncan-Glancy: Yes.

Victor Madrigal-Borloz: I would respectfully have to decline to comment in that connection. I hope that you will forgive me, but I have two reasons for that. The first is that I am not carrying out fact finding in relation to the overall situation; I was very much asked to provide evidence in relation to this issue.

The other reason why I do not feel entirely comfortable answering your question is that it has been confirmed that I will carry out a visit to the United Kingdom very soon, when I will be able to examine and have conversations about the general situation. The committee will definitely be hearing from me in relation to that.

However, there is an element on which I am in a position to issue a statement. I have reviewed the proposed legislation and believe that it takes steps to bring into conformity the process of legal recognition of gender identity with the international standards that I have identified through my research, as presented to the Human Rights Council. I have reviewed the bill and believe that it takes the legislation closer to the fulfilment of the set of requirements that I have mentioned.

Cathy Asante: We have not done comprehensive work specifically on the state of LGBTQ+ rights. If we were to carry out that work, we would defer to groups that represent those people to hear their experiences. That would be the basis of our work.

However, all signs point to the fact that the bill would improve the experience of LGBTQ+ people. We have heard from groups that have appeared before the committee about the impact of the current gender recognition process on their lives and their experience of their rights. That experience would be significantly remedied and improved by the new process.

I have listened to Victor Madrigal-Borloz's comments this morning about countries that have introduced self-ID, and the measurable impact on the enjoyment of rights for trans people. We can only anticipate that the same situation would occur here.

Pam Duncan-Glancy: Thank you both for your answers.

I want to move on to talk about what we have heard already, which is the interdependence of human rights. I wonder if the SHRC could comment. We have heard from some people who have given evidence to the committee that there are women who are self-excluding from services and public spaces, such as toilets and changing rooms. That self-exclusion itself is significant enough to be proportionate and meet the test that you have set to determine that changes may be needed.

Can you tell us about your understanding of that behaviour and how it relates to this particular piece of legislation? I very strongly take the point that we must refer specifically to the legislation that is in front of us, as opposed to anything else.

Barbara Bolton: I can take that question, because it follows on from what I said earlier.

First, the commission has not seen any objective evidence of those matters arising in society. However, if there is objective evidence that women are self-excluding from certain spaces, you would have to look very closely at the specifics and what results from that. If women are self-excluding, that is not going to be affected by whether someone has a gender recognition certificate, because trans people exist in society and move about in society, as is their right and as they must be supported to do.

If there are specific concerns, again, you would need to break it down. What are we saying about toilets or public life? I have considered the question of women avoiding participating in public life and find it hard to see what it is about making gender recognition certificates available that would result in that. If the concern is about numbers—such as being more specific around the numbers of women on public boards—it is difficult to see how a possible increase of 250 to 300 in the number of gender recognition certificates will have a statistically significant impact, in practice, on the numbers of women on public boards. However, you could look at much more detailed analysis of that.

Dr Guyan recommended to the committee that members look at the written evidence from Close the Gap as an example of the analysis that can be done. The figures have been run in different ways and different assumptions have been made, such as moving some people who self-identify as a particular gender over to another gender and seeing how that plays out. You could do the same for women on public boards.

When it comes to spaces such as toilets and changing rooms, society has moved very far from what I remember from many years ago, when a changing room could literally be a room in which everyone changed. I have not seen that for many years. We have moved very far towards finding a way of providing private spaces for every individual. It is much more the default position now to have cubicles. Again, you would have to look at the specifics but, if there is a reasonably spacious communal area, plus individual cubicles, it is difficult to see a major issue. Again, you would have to get down to the specifics but, the more we do that, the further away we are from GRCs and their actual impact.

To go back to what I said before, GRCs affect very deeply personal aspects of our private lives, such as marriage, death, birth and benefits. They do not affect how people move about in society. Again, it is really important that we come back to that and look for a link between any specific concern that is highlighted and the proposals in the bill. We are not able to identify that link.

Cathy Asante: I will add to that point. One of the things that we recommended in our evidence is that there be a post-legislative review of the bill, if it is passed. One of the functions of that would be to identify whether any of those concerns—or evidence to support them—has materialised. The fact that we have not found such evidence so far does not mean that it does not or cannot exist, so we think that there would be an important role for a post-legislative review in considering whether any of those concerns are playing out, or whether it is more, as Victor Madrigal-Borloz said, that they have not actually transpired.

There are other important things that a review could accomplish, such as identifying whether any barriers remain for trans people or whether recognition should be opened up to other groups such as non-binary people. However, looking at any possible unintended consequences of the bill could be an important role for a review.

11:30

Pam Duncan-Glancy: Your point about the impact on trans people is crucial with regard to not only post-legislative scrutiny but how trans people enjoy their human rights. I am particularly pleased to hear about the focus on the bill itself and what it actually does as opposed to other areas.

I have another question that touches on your point about representation. I have seen and am convinced by Close the Gap's evidence, but can you set out for the record your understanding of the recent legal cases on the census and representation on public boards?

Cathy Asante: We understand that there has been concern about the fact that the jurisprudence is continuing to evolve and about the recent Court of Session cases—the public boards case and the census case—being contradictory or confusing. Having looked at the cases in some detail, I have ascertained that they were looking at applying concepts of sex and gender in specific legal context. One was looking at applying the term "sex" with regard to the census and, in relation to the public boards case, the issue was applying the category of women in determining protected characteristics.

I believe that the cases show that the law already has sensitive and careful ways of applying concepts of sex and gender. Where it is necessary for a person's trans status to be taken into account, as in the public boards case, the law is capable of accommodating that and does so. Where it is not relevant, as in the census case, a person's trans status will not be taken into account in law.

Once again, neither case was about whether a person held a gender recognition certificate. The court made it very clear that that was not the determining factor in either of the conclusions that it arrived at. It also made it clear that there was no universal test or application of concepts of sex and gender; the point is that they have to be applied carefully to ensure that they uphold everybody's rights.

Pam Duncan-Glancy: That was helpful—thank you.

I would like to ask one final question, if that is okay, convener.

The Convener: If it is on a different issue, I will go to Karen Adam first and then come back to you. Is that all right?

Pam Duncan-Glancy: That is fine.

Karen Adam: I welcome the panel to the meeting. Has there been any agreement between the EHRC and the SHRC on respective mandates and on looking at this issue from a Scottish perspective? Are there any differences in approach to gender recognition and, if so, why?

Barbara Bolton: I think that I have already touched on that issue, but perhaps I can cover it again for clarification.

The EHRC is the equalities regulator for the whole of Britain. That factor relates to the devolved structure, with equalities law generally reserved to the UK Parliament. That said, although the EHRC is the regulator for England, Wales and Scotland, its mandate in relation to human rights is restricted in Scotland under its legislation. Basically, it is precluded from doing any work on human rights in devolved areas, unless it seeks

and receives consent from the SHRC. That can happen, particularly if the Scottish commission is not able to perform work in an area for reasons of capacity and has to focus on other issues, and there is a memorandum of understanding in place between the commissions that further specifies how that process is put into practice. With the SHRC, its mandate is very broadly to cover all human rights in all devolved areas, which would include the area covered in the bill.

As for the position on this legislation, the EHRC was, as I have mentioned, in favour of it and was, until very recently, promoting it. However, its position then changed.

The EHRC's position, as expressed in letters to the cabinet secretary, is on record and is available. It has referenced concerns that, again, are framed in broad terms and which refer to areas that are familiar from the evidence that has been put to the committee. We have asked for further specification, because, without that, it is difficult to understand its change of position from being in favour of the legislation and highlighting the real need to demedicalise and depathologise, and the real need for the bill to advance the rights of trans people, to a position whereby it is saying, "No, we should not go ahead with this, and we need to wait and see." "Wait and see" is not an appropriate human rights response. As Victor Madrigal-Borloz mentioned, there is the human rights framework that you would apply to assess any policy or legal development, and that is what we have set out fully in our submission.

Karen Adam: The bill provides that only those born in Scotland or ordinarily resident in Scotland may apply for the GRC. There has been some concern that that might mean that trans people from the rest of the UK would travel to Scotland, particularly young people who perhaps do not have supportive families. Can you explain any view that you might have on the requirement to be ordinarily resident?

Barbara Bolton: Yes, certainly. "Ordinarily resident" is a term that is used in various areas of the law. The commission's view is that it is sufficiently specific to rule out what is being referenced as a concern. The requirement to be ordinarily resident rules out somebody coming for a weekend or a longer holiday or for a temporary stay purely to obtain a GRC—the law simply would not cover that. However, we heard and agree with the points that were made by JustRight Scotland about the need to make that sufficiently clear to avoid inadvertently excluding people who you intend to include. Therefore, using the term "ordinarily resident" without providing further detail would not tell us whether we seek to cover those who do not have citizenship but are located in Scotland. They have not chosen to reside here—and perhaps we would not even use the word "reside"—but they are located here while they await the outcome of an official process. Therefore, if we intend that those people should have access to the process—we hope that they would—it would be good to have some clarity on that.

Karen Adam: That is really helpful. Thank you. Victor Madrigal-Borloz, would you like to come in on any of those questions?

Victor Madrigal-Borloz: I want to underline the fact that the concept that has just been explained from the domestic point of view is very consistent with what human rights frameworks would prescribe. "Persons under the jurisdiction of" is the human rights language for the enjoyment of rights. Of course, there is always a certain margin with regard to exactly what that entails in relation to occasional visitors, as has been mentioned. However, the point that is being made about those persons who might not have residence but who are expecting or waiting for the outcome of processes is particularly relevant, given the connection with access to a number of realms of life and legal recognition. Therefore, that is absolutely consistent with a human rights framework analysis.

Rachael Hamilton: Cathy, can you tell me how you pronounce your surname?

Cathy Asante: It is Asante.

Rachael Hamilton: I wanted address you by your full name.

Cathy Asante mentioned that the SHRC recommends a post-legislative review following the reform. However, the Children and Young People's Commissioner Scotland expressed a different view. He expressed concern that more research is needed to ensure that safeguards are in place before the age is reduced from 18 to 16, suggesting that pre-legislative evidence should be taken more seriously by the Scottish Government before the Parliament makes significant changes. Can you comment on his view and explain your reasoning for supporting the lowering of the minimum age? That question could also be for Barbara Bolton or Ian Duddy.

Cathy Asante: We have discussed the bill with the children's commissioner. My understanding of his evidence was that he supported lowering the age limit to 16, but the committee can correct me if I am incorrect.

Rachael Hamilton: [*Inaudible*.]—then, in evidence, suggested that more research needs to be done by the Scottish Government.

Cathy Asante: Areas of his analysis touched on the possible need for additional support for 16 to 18-year-olds, the need for clarity on what

questions might be asked of them in establishing capacity, and what support would surround the process. We support the call for clarity on those areas. That is my understanding of the position that the commissioner offered.

Let me explain our position on under-18s. A core approach of the United Nations Convention on the Rights of the Child is recognition of the evolving capacities of children, balanced with the provision of protection to children, where that is needed. I noted that the children's commissioner highlighted that minimum age requirements need more scrutiny where they act to curb children's freedom as opposed to serving a protective function, as the age requirements in the justice system do.

Excluding young people from access to gender recognition procedures would curb their right to private and family life, so we are not in favour of the imposition of unnecessary minimum age requirements.

We find that the age of 16 is in line with Scots law in terms of the Age of Legal Capacity (Scotland) Act 1991, which permits young people to enter into significant legal transactions. If the bill were to lower the age to 16, it would be in line with existing Scots law, which permits children to make decisions of such a nature.

In addition, international human rights standards point to minors having access to legal gender recognition processes and age not of itself being a barrier. The key aspect in that regard is recognition of the evolving capacities of children and the need to ensure that there is sufficient support for them to exercise those capacities as they get older.

Rachael Hamilton: May I follow up—

The Convener: Rachael, it is probably useful if I say that, following Cathy Asante's comments about her interpretation of what the children's commissioner said, we have checked and she is correct: he was talking about support for young people.

Rachael Hamilton: Yes, and that is relevant to the committee's evidence gathering.

The Convener: Yes, absolutely.

Rachael Hamilton: Cathy Asante, you mentioned the Age of Legal Capacity (Scotland) Act 1991. A long time has passed since 1991. What did you mean by "evolving capacities of children"?

Cathy Asante: The evolving capacities approach recognises that as children grow older and become young people who are moving towards adulthood they gain greater autonomy and evolve greater capacity to understand the nature of important decisions in their lives and to make such decisions. It also recognises that children develop at different rates.

In some cases, you might want to apply a presumption that if a person has reached a certain age they have capacity to do a certain thing—that is what the 1991 act does. In other cases, there might be a need for some assessment of their capacity or some support before you can say that they have capacity to do a certain thing. There are examples of that approach in the 1991 act, whereby children between 12 and 16 can be assessed as having capacity to make a significant decision, for example about medical treatment, and will then be given legal authority to make that decision. That is what I mean by the "evolving capacities approach".

Rachael Hamilton: I am not sure whether that is based on puberty or social capacities, but perhaps the committee could look at that.

I have asked all our witnesses about the Cass review. A lot more young people are accessing gender identity services in England. Should our reforms be paused to take account of the full report of the Cass review, rather than just the interim report?

Barbara Bolton: The short answer is that we do not think that the bill should be paused in relation to the Cass review.

Let me explain our position a bit. As we understand it, the Cass review is reviewing gender identity healthcare for children and young people in England. The group has produced interim findings on data, which we understand are relevant to the provision of gender identity healthcare.

It is not clear to us how that relates to the provisions in the bill. What is clear is that, although the Cass review is specifically about England, when the full report is issued it will be important for relevant bodies in Scotland to review it and see whether there is relevant information that can be applied here. There might well be useful learning in relation to the provision of medical services. There might well be things that prompt Scottish bodies to conduct their own review to understand the position in relation to healthcare provision for children and young people.

11:45

We heard very clearly from the evidence of the National Gender Identity Clinical Network for Scotland that whether or not somebody has a gender recognition certificate is not determinative of access to gender identity health services. The network treats everybody as though they have a GRC, which seems appropriate. It says that a

GRC absolutely is relevant and important, but it does not change the direction of the person's clinical care.

Whether or not we enable greater access to gender recognition, and whether or not we have that additional estimated 250 to 300 GRCs, will not have an impact on healthcare delivery. If we do as the bill proposes to do—

Rachael Hamilton: On that point, we know that waiting times are two to four years. How would there not be an impact on healthcare provision if a greater number of people wanted to access services, in terms of their human rights? The waiting times guarantee in the health service in Scotland is enshrined in law. Does it apply to people who seek to transition?

Barbara Bolton: There absolutely is real concern around the waiting times. I listened to the evidence from David Parker about 4,000 people waiting for their initial appointment, people in Grampian waiting for 15 to 18 months and people in the central belt waiting for three to four years. That is very concerning and raises concerns about the right to health.

Those issues must be looked at, but whether or not someone has a gender recognition certificate does not affect that. A young person who is seeking gender-related healthcare is entitled to seek that healthcare whether or not they have a GRC. David Parker gave very clear evidence that whether they have a GRC or not does not affect whether they are provided with care and does not affect the direction of their care. Again—

Rachael Hamilton: In that sense, is the Cass review relevant, when young people from Scotland access healthcare in England because they cannot get access in Scotland?

Barbara Bolton: I am not aware of the Cass review having said that whether someone has a GRC in England is determinative of their healthcare in England. I do not see that connection to the bill.

What I would say about cross-border impacts—this takes us back to what a GRC does and does not do—is that, because someone has the same protection under the gender reassignment characteristic whether or not they have a GRC, if they go from Scotland to England they will have the same protections in relation to their gender reassignment, in school, in work and in medical contexts, whether or not they have a GRC.

Again, on the concerns that have been mentioned about people travelling from Scotland to England, we really need the issue to be spelled out much more specifically. What is it about the provisions of the bill and making the process less intrusive, burdensome and pathologising to trans people that would have those particular impacts? Again, we just do not see that.

Rachael Hamilton: Do I have time to ask another quick question, convener?

The Convener: We have a couple more questions to ask, but yes.

Rachael Hamilton: I want to go back to something that we discussed earlier. We had a consultation, and 59 per cent of people who spoke about the bill opposed the principles of the bill. It was quite a considerable number.

In relation to the Equality Act 2010 and the women who are concerned about safeguards and opt-outs on a single-sex basis, if the proposed reform happens, do you think—looking through a human rights lens—that those exemptions, as Amnesty International Scotland described them, should be justified on the basis of less stringent criteria? Amnesty did not say that—I will get this right for the convener. It said:

> "those exemptions must be justified on the basis of quite stringent criteria."—[*Official Report*, *Equalities, Human Rights and Civil Justice Committee*, 31 May 2022; c 58.]

From a human rights angle, do you think that, in terms of women's views on safeguards and opt-outs, those should be made simpler in law, so that the exemptions are there and those women feel protected, for the reasons that we are hearing?

Barbara Bolton: I would like to break up that question. First, you mentioned the percentage of support that was expressed for the bill in response to one of the consultations—I think that you were referring to the easy-read version of the committee's consultation. Where society is at as regards its support for a certain measure will always be a relevant factor to take into account. However, approaching an issue on a human rights basis does not involve applying majoritarianism—it is not a case of asking whether the majority is in favour of the measure. It involves asking what everyone's fundamental rights are—the inalienable rights that were set out in the fallout from the horrors of the second world war, when the international community came together to identify some of the fundamental rights that belong to everyone.

Those rights stand regardless of the views of the majority. Indeed, in some cases, they stand against the views of the majority. If the majority wished to override the fundamental rights of some people, those rights would still exist and those people would still be entitled to them. I am not suggesting that that is what is happening here, but I am countering the idea that this is a question of numbers. Fundamental rights are never a question of numbers. It might be useful for Victor Madrigal-Borloz to add to what I have said.

I also want to address the single-sex space reference. I am not sure which part of Amnesty's evidence you were referring to. I listened to Amnesty's evidence and I think that we were in agreement—I think that Amnesty's evidence accords with ours. It might have used slightly different language. The reference to "stringent criteria" might have been another way of describing the human rights test that I have set out, whereby when a bill such as the one that we are considering proposes to advance the rights of a particular marginalised group and address the harms that exist under the current legislation, it is necessary to have objective evidence of a real and concrete harm that will occur to others before the issue would have to be looked at again. Perhaps that is what Amnesty was addressing.

I think that there was a third part to your question, but you will have to remind me what it was.

Rachael Hamilton: It was about my take on the issue. Obviously, everyone has human rights and everyone has concerns about those, regardless of whether they are trying to better trans rights or to protect women's rights. That is how it is, as the committee has heard. Should the exemptions that are set out in the Equality Act 2010 be looked at from the point of view of how we are evolving as a society? Given the different asks of people, the law needs to move on. Do you have an opinion on that?

Barbara Bolton: It is always useful to review legislation, especially after a number of years. However, we have to be very careful to be specific. Given that we are talking about essential measures to further fulfil the rights of a marginalised group, if we are looking at the Equality Act 2010 and saying that we have concerns about the way in which certain exemptions or specifics apply, we need to be very particular about what we mean, which provision we are referring to, in what context and what is not working. Our assessment is that the exemptions that are available appear to work. The evidence that has been given to the committee has shown that they work in prisons, in single-sex services and in special services for people who have suffered gender-based violence. We have not heard evidence that the exemptions are not working.

In principle, of course, it is always good to check that legislation is still—

Rachael Hamilton: I will leave it there but, unfortunately, there are people who are self-excluding because they do not want to come out and say what they are experiencing. As a result, they do not access services because of their fears or concerns. That is just one side of the argument.

Barbara Bolton: I will come back quickly on that by reminding the committee of the evidence from Rape Crisis Scotland, which was that it has been running a trans-inclusive service for 15 years and it does not believe that people are self-excluding.

The Convener: Thank you. Victor Madrigal-Borloz would like to come in on a few of the points that Rachael Hamilton has raised.

Victor Madrigal-Borloz: I will be brief, but I want to make sure that I touch on a couple of things.

Mention has been made of trans rights, but there is no such thing as trans rights or gay rights or lesbian rights; there are human rights of people who are gay, human rights of people who are lesbian and human rights of people who are trans.

That means that the analysis that has been presented by the Scottish Human Rights Commission is that the limitation of those human rights is subject to a series of requirements that is very much part of the regulatory framework that is applicable to Scotland, as it is to many other countries in the world.

Let me give the committee an example. Article 5 of the Convention on the Rights of the Child makes reference to

"the evolving capacities of the child".

It states:

> "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".

The second reference to that is of course in article 14, which articulates the same concept of

"the evolving capacities of the child".

That concept very much has the consequence that children are recognised as subjects in the decisions around the exercise of their rights. That principle stems from the Convention on the Rights of the Child, which was ratified by the United Kingdom in 1991. It allows for the recognition that children in different environments and cultures, and faced with diverse experiences, will acquire competencies at different ages, and that action is needed in law, policy and practice so that the contributions that children make and the capacities that they hold are acknowledged.

Colleagues at the Scottish Human Rights Commission have explained the way in which public policy is being articulated in the specific Scottish context and how it relates to public policy

frameworks in Scotland recognising how age intersects with other elements in relation to identity.

I want to bring into evidence that legal recognition at the age of 16 has already been implemented by several countries; namely, the Netherlands, Ireland and Belgium. Norway also has legal recognition for under-18s with a parent or guardian, and Luxembourg and Argentina are currently identifying similar legislation.

I also want to share with the committee some recent evidence that was provided to my mandate on the impact of inclusive legal recognition of gender identity that follows the requirements that I spoke about. The evidence stems from Argentina and New Zealand, which are two other countries that have adopted legal recognition on the basis of self-identification. A survey carried out with similar parameters at national level in both countries revealed in Argentina a drop from 80 to 30 per cent in self-reported instances of exclusion and discrimination in health, employment and housing two years after the issuance of the law.

As I said, Argentina and New Zealand are both contexts where no evidence has been produced in relation to the materialisation of risks that may have been articulated as part of the discussion beforehand on the basis of views that were hypothetical and not supported by evidence.

Fulton MacGregor (Coatbridge and Chryston) (SNP): My apologies to the convener and to all present for being late today. I was impacted by the rail strikes, as I am sure that the convener has already reflected.

I will ask questions around the provisions in the bill in relation to the three-month period for reflection and the three-month period for living in the “acquired gender”, as it is referred to. I apologise at the outset if any of the panellists have already covered those areas. Although I had access to the session remotely, witnesses will understand that there were certain periods during what was quite a lengthy journey when it was not possible to pay quite as much attention.

Does Barbara Bolton have any thoughts on the provision around living in the acquired gender for three months? We have heard widespread criticism of it from—if you like—both sides of the argument. Do you have any thoughts on where the committee might want to take that particular provision in the bill?

12:00

Barbara Bolton: Yes, I do. The commission’s view is that it has not been made very clear in the policy memorandum accompanying the bill what the purpose of that period is and why it is necessary or proportionate.

Generally, it seems that there has been an effort to shorten the process based on the recognition that two years is far too long and a desire to create a more reasonable expectation. However, from the commission’s view of applying a human rights analysis, that does not approach it in quite the right way.

I will go back to what I said earlier, which Fulton MacGregor will not have heard. If we accept that it is about the fundamental rights of trans people, who need to have legal recognition of their gender, and that GRCs affect very intimate parts of their personal lives such as marriage, death, birth and benefits, any barrier that is put up to their access to that legal recognition needs to be on the basis that it is necessary to achieve a legitimate aim and that it is a proportionate measure to do that.

The question therefore arises: why is there a requirement for a person to demonstrate that they have been living in a gender for three months? We do not feel that that has been adequately explained or reasoned. Obviously, the three-month period creates a delay, which trans people have explained their concerns around. Some of the evidence focused on periods of life when somebody is perhaps taking up a position in a college or university or moving for work and wishes to have their documentation match up, in relation to which three months could potentially be a significant period of delay.

We also have a concern about the requirement for a person to produce evidence that they have been living in a certain way, because it is difficult to see how we can require somebody to produce evidence that they have been living in a certain gender without supporting very harmful gender stereotypes. How does a person demonstrate that they have been living as a woman or as a man? I find it difficult to think of a way to do that without supporting and upholding what have been found to be very harmful stereotypes that affect women and girls as they affect others. We have real concerns about that, and we invite the committee to press the Scottish Government, which is proposing the bill, to look at that provision again.

We are also concerned that the bill has a provision that seems to invite the registrar general to provide more detail on what evidence is required from trans people, which raises the prospect that we may replace the panel with another burdensome and bureaucratic process in which trans people find themselves in correspondence with a third party and being assessed against something that is deeply personal to them. There has to be a good justification for introducing any element of third-party assessment in relation to somebody’s very

personal gender identity, and we are not sure what that is.

I also have thoughts on the three-month reflection period.

Fulton MacGregor: Thank you for that. I heard your earlier comment, but it is particularly important to get on record the concerns that you laid out. Before going to Victor Madrigal-Borloz, I was going to ask you about the three-month reflection period as well. I was also going to give Ian Duddy and Cathy Asante a chance to come in, but if you are best placed to talk about the three-month reflection period, that is fine.

Barbara Bolton: Cathy Asante and I have been sharing out the questions, and that is one of mine.

Our understanding is that the three-month reflection period works as a further delay to somebody securing a gender recognition certificate. Instead of applying for and receiving it in the time that is administratively possible, there is a requirement that they wait three months and that, at the end of that three months, they reaffirm their request to obtain a GRC. It is a further burden on trans people, and again we think that there needs to be a very clear justification for it. What is the legitimate aim and purpose of that requirement?

Reference has been made, including by the registrar general, to introducing a process of alerting or signposting people to relevant helpful support. That sounds appropriate and useful, as long as it is done well, but it is not clear whether that would necessitate a three-month delay. If it is deemed necessary to achieve some aim, I wonder whether it would be more proportionate for the trans person applying to be able to withdraw their application, if they wished to, within those three months, without any burden on them to reapply or reaffirm their application. Again, we think that a bit more thought needs to be given to the exact purpose of the requirement, why it is necessary, whether it will achieve the aim and whether it is proportionate.

Fulton MacGregor: I know that the convener has said that we are tight for time, but I have one final question. Do you have any thoughts on the term “acquired gender”, about which, as you will have heard, there has been quite a lot of discussion in previous evidence sessions?

Barbara Bolton: Yes. We have heard some concerns about that term, but we would generally defer to trans people on the question of how problematic it is for them.

However, we might look at the term differently in the context of whether it is being used more specifically. In that respect, we think that the main intention of the use of the term “acquired gender” in the Gender Recognition Act 2004 is to describe acquiring legal recognition of the gender. We see that there needs to be a word to make the legislation work, which is perhaps why that particular term is required. However, the term has also been used as more of a general description of the experience of trans people, and that is where we think that it might be particularly problematic. Good evidence has been given on people’s individual experiences, and the suggestion that people acquire a gender is a poor reflection of most people’s experience.

In short, if the term is limited specifically to the legal point, we can see why it might be necessary. However, perhaps more care can be taken with how it is used. Getting rid of the three-month requirement will also remove a chunk of the problematic area, because what you will be talking about in the amended act that results from the bill for Scotland will more specifically relate to acquiring legal recognition of your gender.

Fulton MacGregor: Thank you very much. Victor, do you have any comments on the three-month reflection period or the current requirement in the bill to live in one’s acquired gender for three months?

Victor Madrigal-Borloz: On the expression “acquired gender”, I share the Scottish Human Rights Commission’s point of view. If it is an enabling term to ensure that the legislation can function, it works, but if it is meant to refer to the lived experience of trans persons, I would say that the evidence presented to me over time is that that way of describing a person’s deeply felt gender identity is perhaps more conducive to perpetuating stigma and minimising their own self-perception.

As for the three-month reflection period, it makes me think of a number of mechanisms that have been put in place all over the world and which appear to answer to the notion that the person has something to prove beyond what the legislation has established as a necessary and reasonable requirement. I would place it among those requirements that seem neutral but which, when confronted with having to interact with the lived experience of persons, can present significant hindrance.

I would point out that, in recent concluding observations on Australia, the UN Human Rights Committee noted the delays associated with the process of authorisation that was required for hormone treatment and expressed concern that the success of treatment could be compromised because of time. I have received significant inputs on the fact that procedures often take years to be completed and that long waiting lists often contribute to several of the exclusion problems that people face. I therefore think that the question that we should be asking is this: what is a

reflection period meant to do? Is the person meant to be proving something that is beyond what is reasonable in the context? Why is the period three months? Why not, as a speaker in one of the previous panels so eloquently expressed, recognise that persons have the ability to know how they have felt as long as they have lived and that there is therefore no need to interact in a way that abuses their privacy and convictions?

The Convener: Did you want to come back in, Pam?

Pam Duncan-Glancy: No, convener. My question has been covered.

The Convener: In that case, I thank the panel for their very helpful evidence, and I suspend the meeting for five minutes to get the next panel in.

12:10

Meeting suspended.

12:17

On resuming—

The Convener: I welcome our third panel of witnesses: Dr Sandra Duffy, lecturer in law, and Dr Peter Dunne, senior lecturer, both from the University of Bristol law school; and Dr Chris Dietz, lecturer in law and social justice, University of Leeds. Apologies if I mispronounced any of the surnames.

I invite our witnesses to make a short opening statement, starting with Dr Duffy, please.

Dr Sandra Duffy (University of Bristol): Thank you for the opportunity to appear today—I will be brief. I am an international human rights law scholar, specialising in gender identity and the law. On that basis, I fully recommend a self-identification basis for the Gender Recognition Act 2004 reform.

I have worked on global and regional gender recognition law mapping and analysis, I co-wrote three editions of the ILGA World “Trans Legal Mapping Report” and, most recently, I have completed an analysis of gender recognition laws in Europe, to be published next year.

The international movement in gender recognition law is toward depathologisation and self-identification. A non-medical, non-judicial and purely administrative process is the only approach that is endorsed by the United Nations independent expert on sexual orientation and gender identity in his recent reports. Legal gender recognition should be accessible, affordable, and depathologised.

Legal gender recognition on a basis of self-identification has already been enacted in countries as diverse as Malta, Denmark, Argentina, and my home jurisdiction of Ireland. Although highly polarised concerns have been aired in the United Kingdom around the possibility of allowing for self-identification, they have not played out in those countries. There has not been widespread abuse of the process or an unexpectedly large number of applications. There have not been widespread reports of abusive use of the process by cisgender men to access women’s spaces such as changing rooms or bathrooms. There has not been a sea change in the number of cisgender women who are selected for sports teams.

Trans people know their own minds. They do not take the decision to transition, be it legally, socially, or medically, lightly. Young trans people too can be trusted to make their own decisions, especially if they are supported by their families. It is unfair to make them choose between pathologising their nature and respecting their autonomy.

The law needs to respect the human rights to dignity, equality, privacy and autonomy. Scotland needs to respect its trans citizens. On that basis, I recommend that the committee considers self-identification as the best option for legislation.

Dr Peter Dunne (University of Bristol): Hello. I am a senior lecturer at the University of Bristol and an associate member of Garden Court Chambers.

My research focuses on the intersections of law, gender and sexuality, with a particular focus on issues of family law and European law. In recent years, I have had the opportunity to work with a number of public institutions such as the Scottish Government, the UK Government, the European Commission and the Council of Europe. I am particularly interested at looking at questions of law from a comparative perspective, and it is probably from that angle that I will contribute to today’s conversations.

I started working on questions of legal gender recognition about 10 years ago, and in those 10 years, there has been some welcome progress—laws that more respect the lived experience of people across Europe, and a greater understanding across Europe of the reasons why people seek to obtain legal gender recognition. There have also been some less welcome developments—there has been legal stagnation, even legal retreat, and, at times, in public policy debates across Europe, there has been a failure to remember the humanity and the dignity of the people whom these laws affect.

In addition to the specific questions that I am sure that we will discuss today, I come to the conversation with three broad outlines. The first is an acknowledgement that this is an area of

immense complexity and nuance. Legal gender recognition cannot and should not be reduced to pithy quotes of 280 characters. It requires you to engage with, acknowledge and embrace that nuance and complexity.

Secondly, unfortunately, because of the historical invisibility of trans and non-binary communities across Europe, there is perhaps not as much hard law as we might like or expect. However, as Dr Duffy said, and as you have already heard in prior committee meetings, there is a strong body of regional and international consensus around soft law standards and best practices, and I encourage you to allow those standards to both inform and shape your discussions.

Finally, from my research, when we look at those jurisdictions around Europe that we hold up as models of good practice today, yes, they have shaped their legislative debates by looking to international human rights law considerations and the existing domestic rights standards, but they have also considered the lived experience of people in their society. As you consider the draft bill today, which I fully support and which will affect many people in this jurisdiction, I encourage you to remember their lives and experiences.

Dr Chris Dietz (University of Leeds): Thank you for inviting me to join the panel. I am a socio-legal scholar of law, gender and sexuality based at the school of law in the University of Leeds.

I am a cisgender man, so I also emphasise that the experiences of trans people need to be taken into account. Rather than focus on experiences that are not mine, I will try to stick to the research that I conducted on the adoption of self-declaration of legal gender in Denmark in 2014, on which I wrote my PhD and which I have been publishing the findings of since.

In 2014, Denmark became the first European jurisdiction to implement self-declaration, which was timely for me as I was conducting my PhD at the time. I travelled to Denmark on various occasions, but I conducted most of my research over the course of three months in the spring of 2015, interviewing trans people and non-binary people as well as campaigners and officials who were involved in the legislative process there.

Just after that, it looked possible that England and Wales would follow Denmark, but various political shifts have made that not possible. It is quite exciting that Scotland is trying to go ahead with reforming the Gender Recognition Act 2004.

To quickly summarise my findings from my research in Denmark, self-declaration is no panacea—on its own, it had limited effect. I have been sitting here this morning and hearing that it is well understood by the committee that just making it possible for people to access a gender recognition certificate does not change, wholesale, trans people's legal inclusion. However, that can constitute an important first step in the right direction towards improving the everyday lives of trans and gender diverse people. I will leave it there for now.

The Convener: Thanks very much. You have all put the pronunciation of your names on the record, I hope. I will stick with first names going forward in the session.

I will move to questions, starting with Maggie Chapman.

Maggie Chapman: I will stick with first names, too.

I thank all three witnesses for coming to the meeting and for their opening statements. It has been helpful to hear those in relation to some of the other things that we have heard today and prior to today.

I will ask a couple of questions about the case for change and some of the requirements that we would be removing from the gender recognition process if we pass the bill as it is, which are for medical and psychological diagnosis and for the panel of experts to have an important assessment, or gatekeeping, role.

Sandra, you talked about the polarised concerns that we experience in the UK not being manifested elsewhere. Could you say a little more about how the case for reform that we hear, particularly in Scotland, has been different elsewhere? Where did the catalyst for reform come from elsewhere, if it was not borne out of the same kind of debate that we might be having here in Scotland?

Dr Duffy: To clarify what I was saying, it is not that concerns have not been raised in other jurisdictions, and it is not that legislative debate has not happened in other jurisdictions fully. I can speak to Ireland most fully, as that is my jurisdiction and I have conducted some of my research, including my doctoral research, on it.

As Peter Dunne has already said, in Ireland, those debates are happening and they are fully nuanced. They are taking place in legislative chambers and are in the public eye, which was also happening at the time of the passage of the Gender Recognition Act 2015. Although the atmosphere in the UK at the moment is very polarised on the issue, it is not that there has not been debate—and robust public debate—in other jurisdictions; it is just that those jurisdictions have come to the conclusion that reform, or, indeed, new legislation, is the way forward.

From my point of view as a human rights scholar, the case for reform comes out of an understanding of the basic human rights of the

individual. The case for removing a pathologised requirement for diagnosis, be it medical or psychological, and for removing a judicial process such as an expert panel from the process, comes from an understanding of the autonomy and equality of the individual. The individual should not have to choose between their autonomy and respect for their identity. I am borrowing, and slightly adapting, some logic from the European Court of Human Rights.

As my colleague reminded me earlier, that logic comes from a European Court of Human Rights case—AP, Garçon and Nicot v France—which removed sterilisation as a requirement for legal gender recognition in France. As Dr Dunne would tell me, that was meant to be a floor, not a ceiling, so I think that I can use that logic when it comes to depathologisation.

Maggie Chapman: Thank you, that is helpful.

In your view, is depathologisation an integral part of the bill that we are scrutinising?

Dr Duffy: In my view, yes. It is very important.

Maggie Chapman: Peter Dunne, I will come to you.

You talked about the importance of the need to mix international good practice and the human rights standards with the lived experience of trans people and those who are going to be most affected by the legislation. In previous evidence sessions, we have heard about the potential for views about who will be most affected to come into conflict. In your comparative analyses, how have you drawn out any conflicts or competitive notions of impact to come to your view on reform?

12:30

Dr Dunne: When we look at the reasons, in a comparative context, particularly in Europe, why jurisdictions have adopted reform and why those reforms are similar or identical to the reforms that the Scottish Government is proposing—and the committee is adjudicating on—we can see a couple of reasons why that was and we can also see how issues of conflicts of rights have played out.

It is fair to say that jurisdictions such as Denmark, Malta, Ireland and Norway have absolutely been conscious of emerging standards within the Council of Europe, where the Parliamentary Assembly and the Commissioner for Human Rights have, for a significant period, advocated that the existing structures within human rights law require or compel us to remove a diagnosis requirement. As the Scottish Parliament is doing, those jurisdictions have also simply taken evidence from people who are talking about how the diagnosis requirement does not work. That is really important.

In 2018, I did work for the European Union, and I was involved in a second project in 2020, which looked at legal gender recognition laws across the European Union. There was no common reason across all jurisdictions why people advocated for the removal of a diagnosis requirement, but there were some that we could pick out as themes, which I think are really important.

One theme was the lack of accessibility; people could not access the diagnosis that it was necessary to get. That is something that the committee has already heard about.

There were also issues about contraindications and diagnosis. Medical complications across Europe prevent people from being able to access a diagnosis of gender dysphoria, and we have also seen that in the UK context.

Another theme was the symbolism of someone not being able to advocate their gender, and the indignity of having to go to a third party and say, “Actually, you need to tell me who I am.”

If we look at international soft law, one of the common themes is people saying, “Listen, even if we do not agree that there needs to be self-ID, we do need the process to be quick, transparent and accessible.” The diagnosis requirement has been considered across Europe, the European Union and by the Council of Europe as being a major obstacle to that need for quickness and transparency. It takes a huge length of time.

It is very much true that, if we look in jurisdictions such as Spain—or outside of Europe, such as New Zealand—the processes towards self-determination have, in some ways, been delayed because of greater consultation around the potential conflicts of rights. It is interesting that New Zealand, which went through that process, still passed the self-identification law, and Spain, which is going through that process, is still proposing to pass it.

I realise that I am taking up a lot of time, so I will stop talking, but we should consider some differences between the debates. When we talk about policy debate, not just in the United Kingdom but, specifically, here in Scotland, very often, the difference between the debate that we are having around gender and self-ID in this jurisdiction and elsewhere is that, actually, it often seems that, under the guise of opposition to self-ID, we are actually seeing policy debates that are really contrary to the Gender Recognition Act 2004. That is not similar to the type of public or policy conversation that we have seen in jurisdictions such as Ireland, Denmark and even in places such as Germany or Spain. The debate here is more analogous to the kind of anti-gender

analysis, arguments and conversations that happen, for example, in Hungary, which has recently repealed its gender recognition laws, and around the decision of the highest courts in Bulgaria, which have taken a very regressive step back. Therefore, I would be careful about that. We need to focus on self-ID, not on the GRA. I am sorry for quite a long answer.

Maggie Chapman: No—the distinction that you made at the end of it is really helpful.

Chris, I would like to ask you about your detailed analysis and knowledge of the situation in Denmark. It has been suggested that your research has found that there is a desire in Denmark to make access to medical treatment pathways self-declared, too. Can you say a little more about that? From your analysis and research, what is your position on medical gatekeeping in relation to the different stages of transition that people might go through?

Dr Dietz: That is not quite the point that I make in my research. The point that I made previously in a published article in *Feminist Legal Studies*, which was kind of specific to the Danish case, was more to do with the fact that provision of healthcare had been more accessible in the private healthcare sector in Denmark than it had been in the public healthcare sector. Around the time that Denmark enacted self-declaration, it also closed down some of the private provision of healthcare, which was based on an informed consent or shared-decision-making model. In a previous evidence session, David Parker mentioned that that is at least the aspiration for Scottish healthcare for trans people. I also heard about the wait times and so on. Those issues are making things inaccessible for people—there is plenty of room for improvement.

Some of the trans people I interviewed may well favour treatment on demand, based on their self-declared gender, but a lot of them were mainly arguing for a move back towards the shared-decision-making/informed consent model. For several years after the legislation was passed in Denmark, there was only one hospital where you could get a transsexualism diagnosis, which was the diagnosis that was used in Denmark. People talked about a state monopoly, and the clinic had a slightly more old-fashioned approach to trans issues. That was quite specific to Denmark and might not be so applicable in Scotland.

When people get a gender recognition certificate, their experience of everyday life will be improved if they have access to different kinds of protections or different types of recognition, whether that is in the healthcare system, in employment or in access to housing—those kinds of material issues. I think that that stands in a Scottish context, too, but I would not say that there would be any kind of negative reason not to make the reforms, as proposed here, based on the Danish case. As I said before, the reforms are an important first step towards improving trans people's everyday lives.

Maggie Chapman: I want to explore a bit further the issue of depathologising. I appreciate that the context of private versus state healthcare in Denmark is different, and that we have issues around waiting times that we have well explored. Did that depathologising come across as a really significant shift in the experiences of the trans people you interviewed?

Dr Dietz: Yes and no. It did in terms of the legal change. For the people who had access to healthcare and had reached levels of support in different areas, the fact that they could easily change their legal documentation without going through what was previously a sterilisation process in Denmark was hugely significant.

For the people who were struggling—those whose healthcare had maybe been taken away when the private healthcare provider that they had been going to had been shut down, or who had maybe been rejected or could not go back to the state healthcare system—the question of depathologisation was a bit more muddy. Purely within a legal frame, however, taking a diagnosis such as gender dysphoria out of legislation would have a significant impact on people's inclusion, at least on a symbolic level.

Maggie Chapman: Being mindful of an earlier comment about what the reform that we are scrutinising seeks to do and what it does not do, your remarks are well made.

Rachael Hamilton: I want to ask about your experience of different international models. Obviously, jurisdictions across the world are very different.

Can you talk us through how you see the differences between Scotland and other jurisdictions? For example, you said that in some of the countries that now have self-ID, medical documentation might have to be produced. There is not a standardised approach. How can we learn from the various examples? Do you have a favoured country that has taken an approach that you agree with? On what principle has that been established?

Dr Duffy: That was an interesting and quite broad question—that is good; it gives us an avenue to explore.

You are absolutely correct to say that there is no standardised approach. There are basic minimum human rights standards that we need to follow, according to our international obligations. For example, the European Court of Human Rights

removed sterilisation as a legal requirement for gender recognition, so that applies to nation states of the Council of Europe. The introduction, after the Goodwin case, of legal gender recognition as a human right under article 8 of the European convention on human rights is another basic human rights standard that we now have.

You asked about different approaches in different countries. In countries where there is self-identification, medical documents do not need to be produced. That is a standard. Self-identification works on the autonomy of the person themselves, as opposed to the authority of doctors or judges.

Personally, I find the Maltese system to be of a high standard when it comes to human rights. The Danish system, on which Dr Dietz can obviously give more information, is a good one. Iceland has recently adopted a very good gender recognition law, which is based on self-identification; I believe that it has provisions for some minors, with parental support, and for non-binary recognition, which is not a reform that we are discussing today but which has come up in quite a few jurisdictions.

There is also older legislation, such as Ireland's Gender Recognition Act 2015. There was robust legislative debate in Ireland, as I said, but the process that emerged was quite simple: there is payment of a nominal fee and the applicant makes a declaration to the Registrar General in Ireland to have their legal gender updated. That is probably the most human-rights-compliant system. Self-declaration, in general, is the most human-rights-compliant system, with the depathologisation that my colleagues have discussed.

Rachael Hamilton: Thank you for that. On the requirement for documentation in countries such as Croatia, Finland and Germany, why did those countries come to that decision, unlike the examples that you have given, where no medical documentation is required?

Dr Duffy: Again, that is quite a big question. That would have come about through the legislative process and taking evidence, as you are doing in this Parliament. Although it is accepted as a human rights standard that depathologisation is the gold standard for legal gender recognition, there is currently no legal requirement to depathologise one's legislation. If elements in a country's Parliament and in the legislative debate come to the conclusion that they want to keep medical documentation as part of their legislation, it is of course the right of that country to do so. However, I submit that it is far more in tune with human rights standards and the development of the discourse around gender identity in human rights law to depathologise the process and remove the judicial and medical requirements in that regard.

12:45

Dr Dunne: When we think about the development of such laws—the first such law was developed in Sweden in 1972—we must understand the legislative context, which was inherently linked to a medical context. Therefore, our only understanding of trans identities was through a medical lens. In the Council of Europe, that extended well into the 1990s and, indeed, into the 21st century. You mentioned Finland. As far as I am aware, Finland adopted its law in 2002, when the notion of a trans identity being inherently medicalised would still have pervaded a lot of the legislative understanding.

You ask why the countries that you mentioned adopted that medicalised model. They did so because that was the standard of the day. When many of the jurisdictions in question, such as Germany and Italy, adopted their original rules, that was the understanding.

What is really important in that context is that we look at what has happened post Goodwin and post Argentina's adopting a law in 2012. The majority of jurisdictions across Europe that have changed their laws more recently have opted for a non-medicalised standard, because our understanding as a society has changed and our understanding of human rights norms has changed.

Of course, there are differences, because there are common-law jurisdictions, Roman law jurisdictions, civil law jurisdictions and mixed law jurisdictions, such as Scotland. Therefore, how the law plays out will be different in all those countries. However, with regard to medicalisation, some jurisdictions have specifically put into their law that the process will not be medicalised. The really good example is Malta, which makes that strong, affirmative statement. That is not something that you have to put in, but as somebody who is conscious of human rights standards, I would say that it might be something that you would put in.

What is really interesting about Rachael Hamilton's point is that we can see some differences between different self-determination models. For example, Malta has a waiting period, which you are thinking about adopting and which we might talk about later. That is human rights compliant, to the extent that I do not think that there is any rule of international human rights law that says that you cannot have that, but I would ask what it is doing. Is it just an arbitrary waiting period or is it serving a purpose?

The key issue is around young people. If somebody is planning to ask a question about young people, I am happy to leave it there for now, and we can consider the differences.

Rachael Hamilton: Convener, I do not know whether anybody is planning to ask about the

issue of age. It came up in the previous evidence session, with regard to evolving capacity.

The Convener: Is that your question, Karen?

Karen Adam: No, not specifically, but I could ask that. I was going to sweep up by asking any questions that had not been covered.

Dr Dunne: I will also say that I am conscious that I have just spoken for about five minutes.

Rachael Hamilton: Can I ask Chris to answer my question before we talk about age?

Dr Dietz: In Denmark, it was part of the coalition agreement of the Government that came into power in 2011 that it would look at how gender was registered by the state. I know from people who were involved in the Government and some of the campaigners who were involved in lobbying that the discussion about why it became the first European country to adopt self-declaration was mainly to do with the fact that they felt that that was the direction in which things were moving. In time, they have been proven to be correct, given all the jurisdictions in Europe and elsewhere that have followed that route. Argentina was the first country to do that.

There was also a sense that they wanted to ensure that the legislation would be fireproof later in terms of human rights standards. They did not want to enact something that would then fall below international human rights standards. At the consultation stage, there were proposals for lots of different models, but they went with self-declaration because they felt that it was the most accessible and the best model from a human rights point of view. Other considerations included the fact that it is cheap and easy to implement when you do not have a lot of bodies, organisations and panels involved. The responsibility lies with the individual.

Rachael Hamilton: This morning, the Scottish Human Rights Commission suggested that we should have a post-legislative review. Has that happened anywhere else? Are there any international comparisons?

Dr Duffy: Yes. In Ireland, in 2018—three years after the Gender Recognition Act 2015 was brought in—a review was conducted that included legislative scrutiny, committee hearings and public consultation.

Dr Dunne: That worked quite well and was used for the subsequent legislation on abortion. It was deemed to have worked well as a process and was therefore deemed to be an appropriate process for the abortion legislation.

The Convener: Peter Dunne started to address the issue of waiting periods. Fulton MacGregor wants to probe that a bit more.

Fulton MacGregor: Good afternoon, and thank you for your input so far.

I want to ask the panel the questions that I asked the previous panel, which is the same line of questioning that I have pursued in previous weeks. If you managed to watch any of the session with the previous panel, you will know that I am going to ask about the provisions in the bill on living in the “acquired gender”, as it is termed, for three months and the three-month reflection period. Do you have any views on the requirement that an applicant must live in the acquired gender for three months prior to submitting an application? Do you have any views on the term “acquired gender”? We have heard quite widespread criticism of that provision.

Dr Duffy: There were two parts to your question, the first of which was about the term “acquired gender”. When I write about this form of legislation, I tend to use “true gender” or “lived gender” as opposed to “acquired gender”, to reflect the fact that trans people do not suddenly acquire a new identity but have always had that identity; it is just that they might not have been living out in that identity. I tend not to use the term “acquired”, and I think that my colleagues would probably agree on that.

With regard to waiting periods, my personal opinion is that they do not seem to serve much of a purpose. As Dr Dunne pointed out—I am sure that he will pick up on this—the question is why have a waiting period. Why do we introduce an aspect of temporality into such legislation? Why do we require permanence? Why do we require waiting periods?

The answer that is given is that we do so to provide legal stability. However, if—as is envisioned by the bill—legal gender recognition is an administrative or depathologised process, I do not see why it is necessary to have a waiting period in the bill. I would also say that the two-year waiting period in the Gender Recognition Act 2004 is very much out of line with international standards on the issue.

I will hand over to Peter Dunne.

Dr Dunne: I have nothing substantive to add.

Fulton MacGregor: Thank you. I turn to the three-month reflection period. I will start with Dr Dietz this time, in case the same happens again. What are your thoughts on that?

Dr Dietz: In Denmark, a six-month reflection period was introduced, which works in a similar way to what is proposed in the bill. A person would make an application and then have to confirm that themselves. If they did not confirm that, the application would fall away.

The trans people whom I interviewed who had applied or would consider applying for recognition found that requirement a bit patronising and were not sure what they were supposed to be reflecting on, based on the understanding that, when someone applies for legal gender recognition, in a lot of cases they will do so many years into a process of reflecting on their gender and gender identity.

The authorities that I interviewed said there were some practical reasons for a reflection period. In Denmark, it is possible for someone to change their gender back if they realise that it was not the right thing for them. I think that the reflection period was put in to stop people doing that constantly. I do not know whether that would be a significant consideration in Scotland.

Fulton MacGregor: Dr Dunne, do you have any thoughts on the matter?

Dr Dunne: I do not think that there is any prohibition on the implementation of one of those periods. For example, it is certainly not a violation of article 8 of the European convention on human rights; we have not seen anyone trying to bring a case or to make that argument in Denmark. When we think about international soft law norms, there might be a significant number of actors, in both the Council of Europe system and the UN human rights system, who say that it is not necessary or that it is not compatible with the idea of self-identification and potentially raises questions in relation to the speed and the length of the process.

I would also very much echo what Dr Dietz has said. When there was a Europe-wide survey in 2019 and 2020, there was an acknowledgment that such periods existed, but there was not a huge amount of consideration of the period in the survey results. I think that some people said it might have been a bit excessive but it was not one of the major concerns that people were talking about in terms of accessing legal gender recognition.

Dr Duffy: As I mentioned in my opening statement, trans people know their own minds; this is not something that people come to lightly. As Dr Dietz has said, this is something that people think about—for many years, often—before they enter the legal process.

What we are trying to do here and what I believe most of the reforms that are proposed in the bill are aimed at doing is to return the agency and the autonomy over their own legal status to trans people. It seems to be an interposition of yet another standard of authority if we impose a waiting period on them as well—it is as though we are saying, “You don’t know your own mind—you need to think about it for another three months.” That is not in keeping with the spirit of some of the other proposed reforms. Personally, I would recommend against implementing a waiting period.

The Convener: We will go back to Karen Adam to pick up on the question about age.

Karen Adam: I am going to ask quite a general question; if you want to comment on the age aspect in your answers, that is perfectly fine.

The purpose of the bill is to make life that bit fairer and more dignified for trans people, to acknowledge their human rights and to put that into legislation. With that in mind, looking at the key aspects of the bill, are there any parts that you feel could be improved upon to meet that goal?

Dr Duffy: I will give the floor to Peter Dunne to talk about the age aspect.

If we had not already spoken about it, I would have singled out the waiting period as something to keep in mind. As regards age, I think that my colleague could probably speak more to that.

I would add that the bill does not seem to consider non-binary recognition, which has been picked up by several European jurisdictions recently. That would be something that would render the bill, in my view, more human rights compliant. We could talk about that aspect later, if you would prefer.

Dr Dunne: I know that the Scottish Government has very clearly said that non-binary gender recognition will not form part of this process and I also appreciate that I am part of the Scottish Government’s non-binary working group, so I make it very clear that I am expressing my own personal opinion, not the opinion of the group.

I think that there is space, not necessarily as a matter of human rights law requirements but more as a matter of good policy reform, to consider further the ways in which life can be made easier for non-binary individuals, if not through the bill certainly through the way in which the law operates in other spheres. As I said, that is a personal opinion.

When we think about young people, it is very welcome that the legislation provides for 16 and 17-year-olds. Other jurisdictions that have adopted self-determination or have taken out the diagnosis requirement have also considered the age aspect—in the Netherlands, for example, they have extended legal gender recognition in some way to those who are under the age of 18. There has been no standard way in which that has been done. Some jurisdictions, such as Malta, Norway and the Netherlands, have taken out a diagnosis requirement and provided one system for all people over the age of 16.

13:00

In Ireland, Portugal and Belgium, they have made it slightly more difficult—in some jurisdictions, a lot more difficult—for young people who are 16 or 17 to access legal gender recognition. Some jurisdictions have left it at 16—Scotland is choosing to do that—and other jurisdictions have not. Places such as Malta and Norway have allowed for children under the age of 16 to access legal gender recognition but have done it with a much more conservative process that involves parents and sometimes courts.

I admit to being slightly more conservative. I think that, for young people under the age of 16, having parental consent and the involvement of other actors is a good thing, but a lot of human rights actors would say that it is not.

There was a question, which I will answer. I think that there potentially could be space for children under the age of 16 to be provided the possibility in a quite supervised process. If we are thinking of, as we talked about, the best interest of the child and the evolving capacity of the child, that absolute bright line of 16 presents issues.

Finally, let us not just think about legal gender recognition when it comes to young people. Young people's lives rely on the Government providing adequate advice and schools respecting their identities in key ways. In fact, on-the-ground policy and legislative reforms through, for example, non-discrimination law will be more important for some young people than having legal gender recognition.

Dr Dietz: Is the question only specifically around age?

Karen Adam: No. It is about any key aspect of the bill that you feel is relevant to take up.

Dr Dietz: In Denmark, there is also a threat of penal sanction included in the offence of making a false declaration, as has been included in the bill. If we are talking about the spirit of the bill being one of inclusion, that sort of threat of potential imprisonment is at least interesting, from an academic perspective. The Danish trans people who I spoke to spoke about a level of suspicion from the state that that kind of threat of penal sanction would come with. I do not know whether that issue has been mentioned previously, but it was something that looked—I am not sure how to describe it—heavy handed in the bill and that would perhaps be subject to criticism.

Dr Dunne: On that, I suppose the question is how it would operate. What does it mean to live in your gender? What would it mean to give a false declaration? Will we, after somebody obtains a gender recognition certificate, require them to engage in a very stereotypical, performative expression of their gender identity, and if they do not, have they committed fraud? It would be interesting for the committee to at least consider more how that would apply in operation.

Dr Dietz: I interviewed some non-binary people in Denmark who present as quite masculine or feminine and therefore chose to make use of the ability to change their legal gender, within the confines of the legal binary that has been offered. You might find that it is also possible in Scotland that somebody who identifies as non-binary but looks more masculine and was assigned female gender at birth might prefer to have a male legal gender, even if that does not reflect their true gender identity—they would choose it just for practical purposes. Would that case constitute a false declaration, if they declare that they plan to live in the acquired gender for the rest of their life, when on a personal level they do not? As I said, the threat of criminalisation seems to me a little heavy handed.

Dr Duffy: To note as well, gender identity is often for the individual not a fixed quantity. Gender can be fluid. As Dr Dietz says, perhaps a non-binary person feels more masculine or perhaps they feel more feminine. Perhaps they feel outside the gender binary altogether. How do we equate that lived experience?

The current human rights standard for sexual orientation and gender identity that is set by the Yogyakarta principles and the Yogyakarta principles plus 10 considers gender identity to be an internally felt thing and an innate attribute of the individual. That does not really correlate to something that has carceral terms and very standardised and—as I mentioned in my answer to Mr MacGregor—temporalised terms as well.

Gender identity can be a lot more fluid and a lot more changing. Although it is fixed for a lot of people, that is not the case for everybody.

Pam Gosal: Good afternoon, panel, and thank you for your opening statements. My questions are about the potential for these reforms to allow bad-faith actors to obtain GRCs more easily. The self-ID-based gender recognition system in Victoria, Australia, includes additional checks and safeguards for applicants such as registered sex offenders and prisoners. Are you aware of any other international examples of such additional checks? Do you believe that those additional checks would provide an important additional safeguard?

Dr Duffy: I am personally not aware of other jurisdictions, especially in the European context, that have such limitations. That is not to say that there are not any, but simply that I have not encountered any through my research.

As regards the situation of people who are incarcerated, obviously, there are some points at which rights apply differentially. However, so far, we have not seen a diminution of, say, one's article 8 ECHR right to legal gender recognition when it comes to people in incarceration. Similarly, with regard to registered sex offenders, we need to consider exactly how much we are intruding on people's human rights in an unrelated area, if that makes sense, in relation to the judicial process that they have already gone through.

Personally, I am not a fan of the arguments around bad-faith actors. I tend to believe that bad-faith actors are a problem that stems from cisgender men and not trans women. If you are arguing that a bad-faith actor will try and obtain a GRC in order to gain access to women's spaces—that seems to be the main argument that is made against the bill—that is not a trans person seeking a GRC but an abuser seeking a GRC; and, internationally, that has not seemed to happen. That is possibly because most cases of sexual violence, or anything like that, happen because of the actions of cisgender men. There is no GRC required in order for those people to access women to victimise.

I tend to find that the bad-faith arguments do not play out internationally. I will again speak to the Irish jurisdiction, where there has not been a rush of people seeking gender recognition certificates since self-ID began; it has been very steady. In addition to that, as far as I am aware, there have not been reports of crime happening with regard to people trying to access women's bathrooms or such spaces having obtained a GRC.

GRCs are for trans people to go about their daily lives and to promote the dignity and inclusion of trans people. That is the goal of the bill, which we should not forget because we are worried that cisgender men might potentially abuse it. Again, as I said, that has not played out in what I have seen and in my research.

Dr Dunne: I would say quite similar. I am certainly not aware of jurisdictions in the European context placing limitations on people who are serving custodial sentences being able to access legal gender recognition.

Of course, we have to consider the balancing of rights. When you go into the carceral system, absolutely, you do not have the same enjoyment of all your rights, for example your article 5 right to liberty. However, you do retain some key rights. You retain, for example, the right to private life and personal development which, under the European convention on human rights, is the core of your right to legal gender recognition.

Of course, we have to think about exceptions. A comparative analysis of different jurisdictions in Europe shows that the UK is quite interesting in specifically providing for carve-outs and exceptions where we think that there will be bad-faith actors. As a result, some of the protections that we would want to see in, for example, segregated spaces, sport and prisons already exist, and there is no reason why those protections would not work in this new system. If having a gender recognition certificate does not guarantee you access to a prison or, when you are in prison, does not guarantee your being able to change estate, there is no reason why that case-by-case analysis cannot happen.

I happen to believe that, when we legislate, we have to think not just about what is probable but about what could potentially happen. That is an appropriate way of considering things. However, I slightly worry about the fact that, in the gender recognition conversation, we always start with the image of the trans rapist, the person in the bathroom who is going to mug you or the cisgender man who is going to try to game the social welfare system. Do we start from a position of saying, "We think that there are key policy reasons for adopting this legislative reform, which we think is appropriate and will make people's lives better?" or do we say, "Actually, we're going to start with the potential abuses of the reform, not its merits"? Let us look at the system that exists, see whether we can improve it—as I think that the bill does—and then consider the potential problems and abuses and create appropriate exceptions.

If there is anything that is welcome in this debate, it is that we are finally talking about abuse of women in public spaces, private spaces and prisons. Let us focus more on that and the male perpetrators of violence rather than, I suppose, trying to scapegoat the trans community. Whether or not this legislation is passed, women are still going to experience abuse in the home and public spaces. Let us put our efforts into dealing with that. As a family lawyer, I would very much support that approach.

Pam Gosal: Let me be very clear, Peter—I am in no way saying that it is trans people who are these bad-faith actors. Unfortunately there are such people out there—it is not the trans people. I am focusing on this, because people have asked the question. People might say that they are trans and use that, which is absolutely wrong, and these bad-faith actors might end up thinking that, if they have the GRC, they have something that they can use to go into these places. That is why I am asking about safeguards to ensure that we do not let these people in and that we are fair. In no way am I saying that any trans people are like that.

Dr Dunne: I personally believe that we have to have this conversation about safeguards. There

are good people in academia who might think, “Well, what is the limit of that conversation?” I think that we have to have it, but we have to apply the same legislative standards to this legislation as we would with anyone else. It seems that that is what you are doing, and it is great to see.

Pam Gosal: Is there anything that you want to add, Dr Dietz?

Dr Dietz: Only to say that I am not aware of any evidence of systematic misuse of self-declaration in Denmark or any of the other jurisdictions that have adopted self-declaration legislation.

Pam Gosal: I have one more question. Are there any international comparisons, whether from Europe or outside Europe, that you have made with regard to religious rights? Obviously we have to ensure that we do not take anyone’s rights away, whether they be trans or religious rights, and that we work in a balanced way. Have you experienced or seen anything out there that you can speak about with regard to balancing both sets of rights, whether it be to single-sex spaces or single-sex services?

Dr Duffy: I come at this from the point of view that trans women are women and trans men are men and that a trans woman who accesses a woman’s space is in the correct place. I am not aware of religious exemptions in other laws. However, from my point of view, if a trans woman is in a women’s space, she is a woman and she is allowed in that space.

13:15

Pam Gosal: You say that a trans woman is a woman and a trans man is a man. How do you feel about religious people—minority groups out there—who feel that their religion will be impacted if somebody else is in that space? We heard in one of our private sessions that that would exclude more women and girls from minority groups. I do not know whether you have an example, but it would be good to hear your thoughts on why minority groups would not be affected if a trans woman came into a changing room, space or service.

Dr Duffy: Again, I come at this from the perspective that a trans woman is a woman like me or any other. I appreciate the question, which is quite a difficult one to negotiate without harming either the minorities that you are referring to or the tiny minority in society that is the trans community. Peter Dunne might be able to speak to exemptions and exceptions in equality laws slightly better than I could.

Dr Dunne: I am going to be quite a let-down on that. I would say a couple of things. It might be good to consider the work that the UN special rapporteur on freedom of religion has done, because he has looked at issues of gender and potential conflicts around issues of LGBT rights, gender and freedom of religion and come to quite a nuanced perspective on that. You could certainly look at his reports, but he might also be somebody to consider in evidence.

I am not aware of any legislative build-in. What I would say is that there are jurisdictions around the world—in Asia, Europe, South America and North America—that have adopted self-identification laws. There might be, at the local level, either specific rules or individual practices. I am happy to look at that further if it would be useful to give the committee follow-up information on that.

As somebody who comes from quite a religious background, I am quite sympathetic to the religious perspective. Once again, though, we have to think realistically about how that balancing works, and we have to ask, objectively, “What are the potential rights that are in conflict here?” There is always the possibility of a conflict of rights, and sometimes we have to come to complex compromises. That is not necessarily a bad thing but, once again, I would suggest that we should realistically and objectively assess whether that conflict really exists. Too often, we are quick to see the conflict. However, where it does exist, I absolutely agree that we should have a conversation about balancing people’s rights.

Pam Gosal: If you have any information on how we can balance those rights, it would be great for the committee to see it. It is about having that balance and respecting both sets of rights. From what we have heard, there are people who are feeling that, so we must make sure that we can achieve a balance. If there is anything that you can send to the committee, it would be very welcome.

Rachael Hamilton: I would like some examples of countries that have had impact studies on the issues that Pam Gosal has just explored.

Dr Dunne: I am not sure whether there are such examples, but I am happy to look at that. Off the top of my head, I have not seen anything that specifically looks at that issue, but there may well be, and we can certainly ask our connections.

Pam Duncan-Glancy: Good afternoon to the panel. Thank you for the evidence that you have given so far and the information that you submitted in advance, which we found incredibly helpful.

A lot of my questions have already been covered, with the exception of a couple, so I will focus on them. You have touched on this, but can you tell us, from experience elsewhere, whether there are any countries that have monitored the impact of self-identification on the use of single-sex spaces?

Dr Duffy: I am not aware of research on that in the countries whose laws I am conversant with. If you want to expand on the question, I might be able to give some more information, but I am not aware of research on that.

Pam Duncan-Glancy: People have presented concerns to us about the risks that are associated with self-identification and the risks to women. We heard some very compelling evidence this morning from the SHRC on that matter. However, I am aware that other countries have introduced self-identification and that it has been in place for some time. For example, Argentina introduced it nearly 10 years ago now. Therefore, as a legislator, I am asking you what other legislatures did about that. How did they navigate that issue?

Dr Dietz: I can speak to the Danish case. The issue of access to single-sex spaces came up in the parliamentary debate in Denmark, so it was not a post-legislative review but it was discussed. The minister who was presenting the legislation to the Parliament said that these are not new issues and that they will not be affected by the passing of self-declaration legislation. That seemed to be the view in the previous evidence session, too. Possession of a gender recognition certificate does not necessarily determine whether you can access a single-sex space. In that respect, the approach in Denmark was similar. The minister said that people who run leisure centres deal with these matters, and have dealt with these matters in the past, and that they will come up with solutions. I guess that it is a kind of hands-off approach from the Government, which could be criticised, but I agree with you that this morning's evidence seemed quite compelling about what the effect of the bill would be. It is hard to determine that.

Dr Dunne: I am pretty confident in saying that there is not a significant amount of research on the specific question of monitoring—I would not equivocate on that. However, there are a couple of things to say. First of all, we have seen a review of the legislation. In the two-year review in Ireland, which we have talked about, many issues were raised about the potential difficulties with the legislation in that jurisdiction, but one issue that was not raised was the fear that the legislation was being misused. In the Government report, there did not seem to be any indication of that in Ireland, which is quite a good comparator jurisdiction with regard to the size of population and legal culture—it is quite a good example of what might happen. We have not seen abuse of the legislation in Ireland. I could add to that anecdotally by saying that I have not heard of such abuse.

We did a review with my colleague Dr Marjolein van den Brink in 2017-18, which was interesting. We looked at different laws across the European Union and in certain European Free Trade Association member states, and, as Chris Dietz has said, we were surprised to see that, even in those jurisdictions that adopted self-determination that had specifically provided for that type of legal rule, the process seemed to operate more on the basis of a common social understanding. The one jurisdiction that stood out for having quite a clear regulated framework for who can and cannot access single-sex spaces was the United Kingdom. Therefore, actually, we might think that the framework that we already have in this jurisdiction could be more robust than the framework that exists in other jurisdictions.

Finally, there have been more general studies in the past two years or so of how legal gender recognition operates in the Council of Europe and the European Union. No, those studies have not specifically looked at how single-sex spaces might be affected. Therefore, the relevance of those studies for the question that you have asked must be considered and must be lessened—that is just a fact. However, once again, we do not see massive concerns being raised about the possibility that the legislation has had a material impact with regard to creating unsafe spaces. Once again, I absolutely think that you have to take that into account, but we need to be realistic about the threat. If that potential risk exists, appropriate safeguards should be put in place.

Dr Duffy: I was also going to point to the Irish review and say that—at least with regard to the report by the committee that reviewed the legislation—that did not seem to be a problem or something that was raising concerns. As I have said before, there has not been a rush on gender recognition certificates in Ireland. As I have also said before, in talking about that issue, we are not talking about trans people any more. We are no longer talking about the community that the legislation is aimed at; we are talking about bad-faith actors from another community.

As Dr Dunne has mentioned, the UK has quite a robust framework with regard to who can access which spaces and what exemptions and exceptions apply. I am not sure that the bill that we are debating and adjudicating on here today would impact that much, if that makes sense. We already have a framework for such things. Depathologising Scottish gender recognition law would probably not have such a huge effect on current equalities law for the whole of the UK.

Pam Duncan-Glancy: Thank you. I appreciate that. I also appreciate your important reminder that the bill is about what we can do for trans people.

The Convener: Thanks to all three of our witnesses. It has been a long meeting today—I know that everyone has been watching all the

evidence sessions. Thank you so much for helping us with our stage 1 inquiry. That concludes the public part of our meeting. We will now move into private session for our final agenda item.

13:25

Meeting continued in private until 13:56.

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Official Report
Room T2.20
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Edinburgh
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Email: official.report@parliament.scot
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