



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Equalities, Human Rights and Civil Justice Committee

**Tuesday 24 May 2022**

**Session 6**



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Pàrlamaid na h-Alba

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**EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE**  
**15<sup>th</sup> 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)

\*Fulton MacGregor (Coatbridge and Chryston) (SNP)

\*Alexander Stewart (Mid Scotland and Fife) (Con)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Bruce Adamson (Children and Young People's Commissioner Scotland)

Malcolm Dingwall-Smith (sportscotland)

Ellie Gomersall (NUS Scotland and University of the West of Scotland Students Association)

Hugh Torrance (LEAP Sports Scotland)

Tess White (North East Scotland) (Con)

**LOCATION**

The James Clerk Maxwell Room (CR4)



# Scottish Parliament

## Equalities, Human Rights and Civil Justice Committee

Tuesday 24 May 2022

*[The Convener opened the meeting at 10:00]*

### Gender Recognition Reform (Scotland) Bill: Stage 1

**The Convener (Joe FitzPatrick):** Good morning, and welcome to the 15th meeting in 2022 of the Equalities, Human Rights and Civil Justice Committee. No apologies have been received. I welcome Tess White MSP to the meeting. I am aware that a number of other MSPs will be watching live on Scottish Parliament television or on catch-up.

At today's meeting, the committee will continue to take evidence on the Gender Recognition Reform (Scotland) Bill. The responses to the detailed call for views have now been published, as has a summary of the responses to the short survey. Notes about our private informal engagement sessions and the informal briefing session with the bill team will be published shortly. As agreed at our meeting on 15 March, the committee will hear from the cabinet secretary at the conclusion of our evidence taking.

With our first panel, we will focus on children and young people. In addition to this morning's oral evidence, we have received written evidence from a number of other children's and young people's organisations, which can be found on our website.

I am pleased to welcome Bruce Adamson, the Children and Young People's Commissioner Scotland, who joins us virtually, and Ellie Gomersall, the president elect of NUS Scotland and president of the University of the West of Scotland Students Association. You are both very welcome. I refer members to papers 1, 2 and 3.

I invite our witnesses to make short opening statements.

**Bruce Adamson (Children and Young People's Commissioner Scotland):** Thank you, convener. Good morning. We welcome the Scottish Government's aim to simplify the process and mechanism for obtaining a gender recognition certificate in line with international human rights standards and practices. We recognise the evidence from trans people about their negative experiences with the existing processes.

In our latest written evidence, we supplement our previous submissions and highlight three areas in which the bill could be strengthened or clarified. First, there could be clarity on the role of the registrar general for Scotland. Secondly, there could be more detail on the support that will be offered to 16 and 17-year-olds. Thirdly, we have concerns about the introduction of a criminal offence and penalties for under-18s.

Questions of identity go to the core of a person's dignity. In relation to maintaining and respecting gender identity, the European Court of Human Rights has said that gender identity is

"one of the most intimate areas of a person's private life".

In your role as human rights guarantors, the framing of the matter as a rights issue is important.

Article 2 of the United Nations Convention on the Rights of the Child protects against discrimination, including on the basis of gender identity as part of "other status", and it contains a positive duty to actively identify children and groups of children the realisation of whose rights might require special measures and protections.

Article 3 requires that, in all matters concerning a child, their best interests should be a primary consideration.

Article 6 obliges states to

"ensure to the maximum extent possible the survival and development of the child",

and the term "development" is to be interpreted in the broadest possible sense to include the child's physical, mental, spiritual, moral, psychological and social development.

In the context of deciding whether to provide legal recognition of the acquired gender of young people, article 6 requires the states to consider whether that recognition will assist in creating conditions that are conducive to the optimal development of young people. I note that the evidence that the committee has received from young trans people mentions particular barriers to participation in education and the impacts on their physical and mental health.

Articles 8 and 14 cover identity, and thoughts and beliefs, respectively.

Article 12 requires states to provide children with the right to express their views, and to give their views

"due weight in accordance with the age and maturity of the child."

That applies to the discussions that you and the Parliament will be having both about what the system should be and about individuals accessing that system.

Importantly, the UN Committee on the Rights of the Child, in its general comment 20 in 2016, in which it focused on rights during adolescence, identified lesbian, gay, bisexual, transgender and intersex adolescents as a group that requires particular attention in order for the realisation of their rights to occur. In the same general comment, the committee strongly endorsed the right of adolescents to respect for their “emerging autonomy”.

Article 16 of the convention provides the rights to privacy and to home and correspondence. It is analogous to article 17 of the International Covenant on Civil and Political Rights and article 8 of the European convention on human rights, which have played a central role in establishing gender recognition rights across Europe.

Since 1996, the European Court of Human Rights has made it clear that there is a requirement for states to put in place processes for gender recognition. We know that, in 2015, the Parliamentary Assembly of the Council of Europe, in resolution 2048, called on all states to

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

We welcome the work to bring Scotland into line with that recommendation, and we note the work that is happening in other countries on the issue, alongside the necessary work to support services and ensure that support is available for all children and young people under 18.

**Ellie Gomersall (NUS Scotland and University of the West of Scotland Students Association):** The National Union of Students has a long and proud history of standing up for LGBT+ rights and I am pleased to be speaking to the committee in my first appearance in my official capacity as NUS Scotland’s president elect and as the first openly trans person to assume the role of NUS Scotland president. I bring to the committee my personal experiences of being a trans woman in Scotland and the experiences and views of Scotland’s student movement, which strongly supports the reform of the Gender Recognition Act 2004.

The bill is one of the most widely consulted-on pieces of legislation in the history of the Scottish Parliament. We welcome the bill, which will bring Scotland closer to international best practice. In particular, we welcome the proposed removal of the requirement of a diagnosis of dysphoria in order to obtain a gender recognition certificate.

As of the “International Classification of Diseases 11th Revision”, or ICD-11, the World Health Organization no longer recognises gender dysphoria as a mental health condition, but the current process to obtain a gender recognition certificate in Scotland effectively still treats it as

such. That does not match the experiences of most trans people and it only increases stigma. That is just one part of the highly medicalised gender recognition certificate process, which is intrusive, invasive and dehumanising.

The current requirement for a diagnosis of gender dysphoria, as well as invasive medical questions, is made even harder for trans people due to the horrific waiting times for Scotland’s national health service gender identity clinics. Current waiting times for an initial appointment can be more than four years, and the cost of private healthcare and doctors’ letters is simply unaffordable for many trans people, who are disproportionately likely to be experiencing poverty. It is particularly inaccessible for those of us who are also students, as student loans often do not even cover the cost of the roof above our heads, let alone private healthcare.

We also support provisions in the bill to reduce the minimum age for applicants from 18 to 16. From research that was conducted by the NUS in 2014, we know that young trans students can face specific challenges due to their legal documents not matching their lived reality. In particular, that can cause real distress if a trans student is forced to register with their institution in the wrong gender, or where there is incongruence between different legal documents, which can cause confusion and even unnecessary fraud investigations when someone is applying for something such as student finance.

The bill is a hugely important piece of legislation for trans people in Scotland, and it is incredibly important that we get it right. I thank the committee for hearing our views and I am happy to answer any questions that members may have.

**The Convener:** Thank you very much. We will move on to questions from members.

**Maggie Chapman (North East Scotland) (Green):** Good morning. Bruce, in your opening remarks, you highlighted three areas of concern or where you wish there to be greater clarity. Can you give us some more detail on your questions around the role of the registrar general and how you see those issues being dealt with effectively?

**Bruce Adamson:** In our view, there is not yet sufficient clarity around children’s rights to privacy in data protection in terms of what investigative or scrutiny role the registrar general might have in assessing a child’s understanding or capacity. In general, in other areas of children’s lives, that role would only be appropriate for a suitably qualified medical professional. We are interested in what additional resource and support will be put in place for the registrar general in order to ensure that the information that is being assessed is appropriate.

We also want to know what information and evidence would be sought by the registrar general. The Council of Europe child-friendly justice guidelines outline the need for the child to be able to access justice and have a free hearing, but also to be able to obtain independent advice and advocacy in all administrative processes and challenges around those. Therefore, more information is still needed about how the process will work with regard to what questions will be asked, by whom and how, as well as with regard to what support will be provided. We are keen to ensure that there is more identification of what support will be available for young people who go through that process.

The move away from a tribunal to an administrative process is a legitimate aim with regard to removing barriers and unnecessary hurdles in the process of obtaining a gender recognition certificate. That is very much in line with the recognition of the need to ensure the growing autonomy of children. However, for those young people, that autonomy needs to come with protective and supportive processes that are based on their ability to engage with the process.

I will summarise a few key points. We need to reflect again on the obligation to ensure non-discrimination and on the active obligation to take positive action to support young people who might require special measures or protections. There is also an obligation to provide safeguards. Safeguards are provided in other aspects of Scots law where children exercise participation rights. For example, the Age of Legal Capacity (Scotland) Act 1991 sets out issues around capacity, and section 3 of the act provides strong protections to ensure that there is no detriment to or adverse consequences for children. Protections need to be put in place to ensure that such safeguards are included in this legislation, too.

In the policy memorandum, the Scottish Government said that it will

“consider further the need for clear and accessible guidance and support for younger applicants to ensure they understand and have carefully considered their decision.”

That is absolutely essential. Therefore, throughout the process, it would be useful to understand what that guidance will be and what support will be available, particularly for 16 and 17-year-olds, to ensure that they fully understand the implications of legal gender recognition and have the support that they are entitled to.

In the bill’s financial memorandum, the anticipated costs are primarily associated with information technology systems and application forms. However, we would also like to see proper support to ensure that there are processes for additional careful consideration of applications for 16 and 17-year-olds and for the possibility of a

sensitive investigation, which could include face-to-face conversations with the applicants. We need to be clear about how that would be supported, who would do that and where those skills would come from.

Children and young people need to be involved in developing those systems. There is a need to ensure that young people are more involved in developing the systems that will help them to go through that process. That is reflected strongly in article 12, particularly article 12.2, of the UN Convention on the Rights of the Child, which gives additional participation rights in the context of judicial and administrative proceedings. Therefore, that would be covered with regard to the additional obligations on the state to ensure that there is special consideration for 16 and 17-year-olds who go through that administrative process and to ensure that the registrar general is adequately resourced and supported in order to fully respect, protect and fulfil children’s rights in the context of the 16 and 17-year-olds who will be included, that they can understand the respect for a child’s private life and that the administrative process is child friendly.

That all comes back to ensuring that support is provided and links back to the fact that identity is seen and recognised as inherent to someone’s personal dignity. Respecting and maintaining that is vital, particularly for those who are under 18. It would be very useful to have more information about what support will be provided to young people who access that process.

**Maggie Chapman:** Thanks, Bruce. That is helpful. In your opening remarks, you clearly highlighted the positive duty that we have to ensure young people’s access to those rights. You talk about the administrative process and the need for that to be a child-friendly and clear process. Are there any examples from elsewhere of an administrative process for gender recognition that is not adequate or has fallen short in some way?

**Bruce Adamson:** We do not have a lot of information on discussions with other countries. We have been discussing the process with children’s commissioners and ombuds in some of the countries that have systems in place for gender recognition for those under the age of 18, but, at this stage, I could not point to a specific example.

10:15

More generally, however, it is probably useful to note that most administrative or judicial systems are designed by adults, for adults, and that they are usually not particularly child friendly at all. There has been a strong push across judicial and administrative systems—including complaints

systems—to take a much more child-friendly approach.

That is another part of much broader work that needs to be done to involve children and young people in the design of processes that they will be using. Most administrative processes can be very challenging, even for adults. We have to take into account that additional obligation in relation to children, and the best way to do that is to involve young people in the design of the process.

**Maggie Chapman:** Thank you; that is helpful. As you said, if it is a good process for young people, it will be a better process for everybody anyway.

Ellie, do you echo the calls for further information around the role of the registrar general and the resources and support that will be available? Do you have any comments?

**Ellie Gomersall:** I absolutely align myself with what Bruce Adamson said. Support to complete the process is always welcome, not only for young people but for anyone. I often joke that the hardest part about being trans is the admin, but there is a lot of truth in it. The process—for example, for applying for a gender recognition certificate—can be really tricky. As has been said, if we have support in place for young people, it also makes it more accessible for everyone.

**Pam Gosal (West Scotland) (Con):** Good morning to the panel and thank you for your opening statements. Going back to the mechanisms and the process, the commissioner's response to the consultation highlighted that there is no mechanism in the proposed reform for setting out how an individual child's understanding of the process and its consequences would be assessed. Does that concern still stand?

**Bruce Adamson:** There needs to be much more support as well as much more explanation of what support will be available and how any assessment would be made, recognising the additional protection rights that we have for those who are under 18. It is about what support will be available to ensure that understanding, what assessment might be made around assessing that a young person does not understand, and what mechanisms a young person would have for challenging that. Further clarity about the process is still needed.

**Pam Gosal:** The consideration of cost does not explicitly factor in the development of additional careful consideration of applications from children, sensitive investigation, or even face-to-face applications. You also stated in your response that it is unclear whether National Records of Scotland currently has the expertise to undertake such a role, and that it is likely to require additional specialised staffing. Has the provision of support

been hastily thought about, with no real consideration of the potential costs and of the services that will be provided?

**Bruce Adamson:** I would certainly like more explanation of the additional funding that might be required and what that would look like. Again, I would also like to see young people involved in those discussions and them saying, "This is what we think that we would need and this is what would help us with the process".

More information needs to be drawn out through the legislative process, particularly around what support would be available to be put in place for those things. That is not contained in the financial memorandum so more information is needed.

**Pam Gosal:** My next question is for Bruce Adamson and Ellie Gomersall.

Last week, we heard from the Equality and Human Rights Commission that individuals who acquire a GRC can access women's and girls' single-sex spaces such as toilets, changing rooms, refuges and hospital wards, and that the exclusion of individuals with a GRC would be direct discrimination, subject to justification.

There are concerns from those opposed to the bill that the self-declaration aspect could open the bill up to abuse by bad-faith actors. Do you think that certain groups of individuals, such as people who are on the sex offenders register, for example, should be ineligible to apply for a GRC on the basis of self-declaration? If not, are there any other safeguards that you think would be best placed to ensure that the bill has no unintended consequences for children's rights?

**Ellie Gomersall:** It is important that we are absolutely clear on what the bill does. Single-sex spaces are covered under the Equality Act 2010, and having a gender recognition certificate has no impact on anyone's access to things such as toilets and changing rooms. Many trans people who have not obtained a gender recognition certificate will still access single-sex spaces in line with their gender rather than the gender that they were assigned at birth. It is important that we are clear that the bill will not have any impact on access to single-sex spaces. As such, I do not think that there is any category of person who would be excluded from applying for a GRC.

Another important point is that, if a predator wanted to access single-sex spaces to commit crimes, they would not go through the process of making a statutory declaration and obtaining a gender recognition certificate, which is already quite difficult to obtain, in order to do so. People do not check birth certificates as you walk into a toilet. We are talking about crimes—things that are already against the law—so whether someone had



a gender recognition certificate would not make any difference.

**Pam Gosal:** I want to follow that up. You mentioned that the process is pretty rigorous right now but, under the bill, the process will be much easier. If there are no safeguards in place, will that open up the process to such predators?

**Ellie Gomersall:** The safeguard is that, even if we simplify the process, it is still a process of making a statutory declaration. I do not see any reason why anyone would do that unless they were genuinely trans. It is important that we acknowledge the stigma and hostility that unfortunately still come with being trans in society today. I do not think that anyone would put themselves through that in order to commit a crime that they would be able to commit regardless of whether they had the certificate—the certificate has no bearing on the issue.

We have to be really clear about what having a gender recognition certificate does, and enabling access to single-sex spaces is simply something that it does not do.

**Pam Gosal:** Thank you. Commissioner, this is a big concern and a big question that everybody is asking. Can you give me your view on it?

**Bruce Adamson:** I agree with Ellie Gomersall. Addressing the risks that you have identified and that people are concerned about is better done through individual assessments, as is currently done. We certainly should have a lot of discussion about strengthening protections against individuals who are a risk. Rather than imply that a whole category of people poses a risk and restricting their rights, we need to look at how to strengthen protections against individuals who are a risk.

We certainly should not dismiss the concerns more generally. We need to discuss them openly, and we have to be careful that, in meeting the bill's objectives, there are no unintended consequences. However, as Ellie said, we also need to be careful that, in framing those concerns, that does not lead us back to the very thing that we are trying to address and further stigmatises a group whose rights are already at significant risk.

I am not an expert, but I have looked at the issue in detail, and I feel that the concerns that people would use the bill in that way have not been evidenced internationally, partly for the reasons that Ellie set out. I therefore agree with the Government's position. In particular, I point the committee to the analysis that the Scottish Human Rights Commission set out and its point that the process of acquiring a gender recognition certificate, which is what the bill deals with, does not increase those risks or negatively affect those rights.

If real and concrete risks to the rights of others emerged from the progress towards the fulfilment of the human rights of trans people, human rights law actually provides for a balancing mechanism to resolve that. If the manner of the exercise and fulfilment of one person's rights creates a real and concrete prospect of harm to others, there can be a balance to ensure a fair outcome.

It is down to whether there is a real and concrete prospect of harm that would justify interference with the article 8 right—the right to respect for private and family life—of transgender people. We would need to come back to the question of whether there was a prospect of substantial detriment and look to see whether there was a fair balance.

I agree with the Scottish Human Rights Commission that there will not be any change in relation to things such as single-sex services and that the Equality Act 2010 will continue to apply, where there is an objective justification and a proportionate means of achieving that aim, because the GRC is already not determinative. I think that the EHRC recognised that last week in saying that decisions about single-sex services and excluding or providing a different service for trans people need to be justified, regardless of where the individual is.

The risks posed by individuals need to be addressed by strengthening the protections against those risks, rather than by implying that a whole category of people is a risk and risking stigmatising trans people further. We have spoken to colleagues in Malta, Norway and Ireland, which have each legislated to provide legal gender recognition for under-18s in the past 10 years, who report that they have not identified any of the negative impacts that people are concerned about.

Certainly, as we change and do better at recognising the rights of trans people—trans young people, in particular—of course there is a need for more research over time and for very close monitoring to ensure that there are not any unintended consequences or impacts. We need to monitor that closely, but there is no evidence at this stage to suggest that we should create additional barriers on the basis of a risk that is not evidenced.

**Pam Duncan-Glancy (Glasgow) (Lab):** I thank the panel for their answers so far and for their submissions in advance of the meeting; they have been really helpful. I have a question about the time periods. First, I ask Ellie Gomersall to set out the impact that the time periods, both the three-month wait in advance and the three-month reflection period, could have on young people, particularly students. Can you also say a bit about the impact that the current longer period can

have? I would also like Bruce Adamson to talk about the two time periods.

**Ellie Gomersall:** We do not support having the arbitrary time periods that are currently included in the bill. There is no evidence of their benefit. It is really important for us to acknowledge that, as I said in my previous answer, coming out as trans is a big step for people to take, so trans people are likely to have undergone a considerable amount of reflection and thought before they come out.

Currently, there is a two-year waiting period during which you have to prove that you have been living in your acquired gender, as I think it is described, which is quite difficult to prove. I challenge cisgender people to think about how they would prove that they had been living as their gender for any period of time without narrowing that gender down to arbitrary stereotypes. The main way in which someone would prove that, whether it is a three-month or two-month waiting period, is usually through a form of identification such as a driving licence or passport that has their true name and titles on it. That can be really expensive. The cost of getting a driving licence can be significant, especially for young people who are not likely to have spare money in their pocket, and a passport is even more expensive. As a result, that can be a huge barrier.

Having that waiting period during the period when you might have some documents changed or you are living as your true gender without having the documents to back that up can cause difficulties in basic administrative tasks such as applying to college or university. It might mean that during that period, you have to register as the gender that you were assigned at birth, which does not necessarily match the gender that you live and present as, and that can be dehumanising and stigmatising.

10:30

In addition, as I said in my opening remarks, you might have some documents such as a passport or driving licence that have been updated and others such as a birth certificate that have not. Submitting both of those for an application for student finance, for example, can lead to unnecessary investigations into fraud; it can cause real challenges.

One key thing is that whether we are talking about a three-month waiting period or a reflection period, no evidence shows that that would be a benefit to applicants for a gender recognition certificate. As I say, anyone who would be applying for what is a serious thing will already have undergone a significant period of reflection by themselves. Applying for a gender recognition certificate is often one of the last things that a

trans person will do, because it tends to have less of an impact than things such as how you present or how you are known to people.

**Pam Duncan-Glancy:** Bruce Adamson, can you also pick up on that?

**Bruce Adamson:** The committee has already heard directly from trans people, including trans young people, about such challenges. It is key that you hear from them directly about those impacts and challenges.

The bill does not provide any guidance to define what living in an acquired gender means, so there are some questions around how staff dealing with applications would assess a child's understanding of the process that applies to children. That is a singular concern that we have in relation to the person with an interest.

There is a risk around the danger of reinforcing socially constructed gender roles. Of particular relevance there is the work that has been done jointly between the UN Committee on the Rights of the Child and the UN Committee on the Elimination of Discrimination against Women, which issued a joint general comment and recommendation that touched on some of the damage that gender stereotyping can do to women and children's rights and more broadly. There is a question about whether that increases the risk of some of those concerns.

Time periods will always appear arbitrary unless they are linked to the support of provision for everybody, although my concern is obviously for young people. In assessing whether that additional barrier and additional time is necessary and proportionate, I would like to have more explanation of whether it is associated with additional support or access to services.

We have been having that conversation with Irish colleagues, who have been working on the issue for some time. One thing that they have considered in relation to putting in place timeframes or additional barriers that make the system more complicated or longer is that that should happen only if it brings with it the entitlement to access other services that are useful to trans young people.

I am unclear on whether there is any particular additional support that you might get during the prior period or the three-month reflection period. That is not clear, but it seems that allowing people to access additional support services would be the main justification for that, which speaks to the proportionality or purpose of it.

**Karen Adam (Banffshire and Buchan Coast) (SNP):** With regard to the reduction in the minimum age for obtaining a gender recognition certificate from 18 to 16, which we have already

touched on, some quite polarised views have been expressed on the competency of the young person in that respect and whether parental consent should be involved. I would be interested in hearing your views on that.

**Bruce Adamson:** We support the move to lower the age to 16. Protection and participation rights are not mutually exclusive, and we are looking for a process that recognises not only the growing autonomy of young people but the need to support and protect them.

Minimum ages can be very confusing and complicated, but the Convention on the Rights of the Child says very clearly that when you put something in place for protection—say, in relation to the justice system—you will look for a very high age for things such as the age of criminal responsibility. Where a minimum age is necessary to correct for potential abuses in relation to things such as sexual consent, you will need to make sure that children's rights are not damaged in the process. Where age restrictions do not serve a protective purpose and potentially curb children's rights in relation to their development and their freedoms, minimum ages should be avoided. Where there is tension between protection and autonomy, which is something that comes up a lot in relation to, for example, medical treatments, we should be looking at capacity as the deciding factor.

Probably the kindest thing to say is that Scots law has developed in an ad hoc manner. As a result, we have a very confusing range of age thresholds for children. Indeed, children and young people often express concern and confusion about the confusing and inconsistent landscape of age thresholds, which often appear to be arbitrary to children themselves. For example, the age of criminal responsibility in Scotland is 12, which is two years below the international minimum. We imprison older children, but they still cannot vote in Scottish Parliament and local government elections until they are 16 or in UK elections and referenda until they are 18.

The convention requires that all children, including the 16 and 17-year-olds who are catered for in the bill, be treated as children in all circumstances. That covers not only the protection and support element that I was talking about before but a strong recognition of children's growing, evolving capacities as they transition into adulthood. That does not mean that they lose their right to protection and support—those things have to be in place—but the level of responsibility needs to be recognised, too.

As I have said, protection and participation are not mutually exclusive. The bill's recognition of the autonomy of young people is very welcome, but that does not obviate the need to provide support

and protection. For example—and this goes back to my earlier point—there is nothing in the bill that sets out how an individual child's understanding of the process and the consequences will be assessed. As a result, there needs to be more discussion around what support will be in place, and we can look to other parts of Scots law in relation to that.

The Scottish Government has talked about the need for further guidance to ensure understanding and consideration of any decision and ensure that National Records of Scotland routinely gives careful consideration to other issues. However, the Government will also need to make sure that there is a supportive process and clarity on if and when it will be necessary to undertake the sensitive investigations that have been set out, which apparently could include face-to-face conversations. The intention of ensuring that every 16 or 17-year-old will be offered or encouraged to take up the option of a conversation in order to talk through the process is welcome; however, more information is needed, because at this stage, there is quite limited information on what that approach would look like and how it would play out. Again, it goes back to the issue of making sure that funding is in place for specialist support.

In relation to parental consent, some other countries require such consent for under-18s, but none of those examples is directly analogous to the Scottish proposals. That situation reflects something that goes through children's rights; in many of those countries, parental consent is needed for a lot more things, particularly in relation to accessing health services and other services. We have done a lot of work on that previously. With regard to recognising the autonomy of children and young people, Scotland takes a different approach; some other countries take a much more paternalistic approach, with parental involvement often happening throughout childhood, which does not properly recognise the rights under the Convention on the Rights of the Child.

We would certainly not want a more paternalistic approach to be taken. We strongly recognise the important role for and primary responsibility of parents to provide guidance and support to their children and we recognise the state's responsibility to support parents in that role, but we would not want that to impinge on the growing autonomy of children and young people. That would not be consistent with the usual approach in Scotland.

**The Convener:** I must ask Bruce Adamson in particular to give slightly sharper answers—I cannot send him signals as he is appearing remotely—because quite a lot of questions have still to come through.

**Karen Adam:** I am really interested in seeing and taking note of how support and guidance for young people will develop. Ellie, do you want to respond to the same question?

**Ellie Gomersall:** We support the provisions to lower the minimum age to 16. A lot of the students whom we represent in further education are 16 or 17; many are 17 when they start university, while those applying for further or higher education places are likely to be 16, 17 or even younger.

For some of the reasons that I have outlined, it is really important for those students to be able to obtain a gender recognition certificate without parental consent. Difficulties can arise if someone has had to register for their institution in the wrong gender—that can cause complications. On top of what I have mentioned, there can be challenges and complications if someone graduates with a name or gender that is different from what they had registered with their institution. That can make it difficult for people to obtain their qualification in such a way that they are not outed any time that they present it.

Distress can arise from attending college or university after having been recorded incorrectly. In 2017, the TransEDU Scotland study by Dr Stephanie Mckendry and Dr Matson Lawrence found that 86 per cent of respondents across further and higher education in Scotland experienced barriers to their learning or work as a result of their trans or gender identity.

We also know from young trans people who took part in LGBT Youth Scotland's life in Scotland for LGBT young people research that they face considerable mental health issues. For example, suicidal thoughts were experienced by 66 per cent of trans participants, which was almost double the rate of 34 per cent for cisgender participants. We can see some of the distress caused to trans young people in Scotland, and allowing them to obtain a gender recognition certificate and be recognised as their true identity will remove a lot of the barriers and a lot of the distress that they currently face.

**The Convener:** I call Pam Duncan-Glancy.

**Pam Duncan-Glancy:** I just want to follow up one of Bruce Adamson's responses, if that is okay.

Bruce, you talked about the need to balance the rights to protection and to participation and autonomy. Can you tell us a bit more about how we ensure that the bill achieves that? Could amendments be made to the process for statutory declarations to balance participation and protection appropriately? Will you talk a bit about the presumption under the convention that children have capacity with regard to the courts when they reach the age of 16? That is the kind of early assumption that has been made. Should that

approach be applied here? How could we address the bill's differences from other legislation?

10:45

**Bruce Adamson:** Noting the convener's instruction on brevity, I would say that this is partly about the guidance, support and training making clear what will happen instead of necessarily being about the need for amendments to the bill. That would answer some of the unanswered questions about what that would look like, and it would also address the issue of young people not seeming to have been involved in developing and considering the process. I do not have any specific recommendations to make about amendments to the bill, but I would like to see more explanation from the Government about how it intends to ensure that support will be put in place and how young people will be involved in that.

**The Convener:** I call Alexander Stewart.

**Alexander Stewart (Mid Scotland and Fife) (Con):** Good morning, panel. The bill also covers the issue of residency and provides that those born or "ordinarily resident in" Scotland will have the opportunity to apply for a gender recognition certificate. Concerns have been expressed that that might mean that trans people from other parts of the United Kingdom might choose to come to Scotland to apply for a certificate, either because of family circumstances or because they do not have a supportive network at home.

My question, which is for Bruce Adamson first and then Ellie Gomersall, is: do you believe that that is a potential concern? Please also give us your view on the requirement for residency as it relates to 16 and 17-year-olds.

**Bruce Adamson:** We have not looked at that issue in detail, but I hope that people will want to move to any country that has put a progressive human rights approach in place. We would have to ensure that the idea of being "ordinarily resident" in the country was properly interpreted. The idea of people coming as tourists for that specific purpose has not come up in the discussions that we have had with our international colleagues—they have not raised it with us.

**Ellie Gomersall:** Like Bruce Adamson, I have not looked into that. I was born and raised in England. When I was deciding to come to university and looking at the different institutions that I might go to, I was keen to move to a Scottish university, because of the more progressive politics and the approach that Scotland was taking to equality. I hope that Scotland would attract people not only from the rest of the UK but from anywhere who want to live here because of that progressive approach.

There was a fear that people might come to Scotland to take advantage of free tuition. I pay a fee of £9,250 a year to study in Scotland, because I am English. The NUS position is that a more progressive approach that attracts people to move to Scotland should be welcomed, and that is reflected in our attitude both to tuition fees and to gender recognition certificates.

**Alexander Stewart:** Bruce Adamson, you talked about the support mechanisms required to ensure a dignified, friendly and respectful approach to managing and progressing the process for a 16 or 17-year-old. Do you believe that we have that at present? Does the bill ensure that someone who is 16 or 17 will be well treated in the process?

**Bruce Adamson:** That is a great question to ask 16 and 17-year-olds. More information is needed about what that will look like and about the process for which it would be developed. I am not necessarily saying that that needs to change in the bill, but I would like to see more information on that as the bill passes through Parliament.

**Alexander Stewart:** Ellie Gomersall, do you also believe that there needs to be a better and more respectful approach and that the process will contain that and manage to challenge what there is at present?

**Ellie Gomersall:** Yes—absolutely.

**Fulton MacGregor (Coatbridge and Chryston) (SNP):** Good morning. I have two broad areas of questioning. The first is on the evidence that the committee has heard in support of the removal of the requirement for a gender dysphoria diagnosis. Ellie Gomersall, we have already heard your opening statement, in which you made your views and those of your organisation quite clear. Before I come to Bruce Adamson, do you wish to put any other views on that requirement on the record, for the benefit of committee members?

**Ellie Gomersall:** I covered most of that aspect in my opening statement. We are seeing that, in international best practice, there is no requirement for such a diagnosis. However, that does not match the experiences of many trans people, and it is important that we acknowledge that it does not necessarily fit into our experiences. Equally, though, requiring such a diagnosis is the reason why I have not yet sought a gender recognition certificate for myself. I have been sitting on the waiting list for the Sandyford clinic's gender identity service in Glasgow for just under four years now, and I still have no sight of when my initial appointment will be. I stress that that wait is just for an initial appointment, at which nothing will necessarily happen. I do not have the money to be able to afford to go down the private healthcare

route, which would involve getting doctors' letters and so on, and paying significant costs. That can be a real barrier to trans people.

In answering Pam Duncan-Glancy's earlier question on waiting periods, I said a little about how those cause significant distress and harm to trans people. Having the requirement for a gender dysphoria diagnosis essentially imposes another huge waiting period—often of around four years, as I have said—because of the requirement to go down the medical route.

The medicalisation of the process is also quite arbitrary. Not all trans people will have a desire to transition medically, so the requirement to follow any sort of medicalised process does not fit in with our experiences, and requiring us to be diagnosed with a mental health condition in order to obtain a gender recognition certificate can cause stigma and be a little bit dehumanising.

**Fulton MacGregor:** Thanks very much for that and for taking the opportunity to reinforce your earlier point. Bruce Adamson, do you have any thoughts on that area?

**Bruce Adamson:** Other witnesses have covered that aspect very well. Internationally, there is a clear move away from pathologicalisation—regarding being transgender as a mental health disorder—as we can see from the approaches of the World Health Organization and other international health bodies, allied with strong calls from international human rights bodies on the need for reform. The work of the UN independent expert on protection against violence based on sexual orientation and gender identity goes into that in detail. At the Council of Europe level there are strong recommendations to Governments to take such an approach. There is also growing consensus on that, to the extent that the margin of appreciation—or the discretion—allowed to take a medicalised approach is certainly narrowing. That is very much the direction of travel. I am supportive of Scotland's following that international trend and the calls from international human rights bodies.

**Fulton MacGregor:** Thanks for that, Bruce. My second area of questioning is on the provision that would make it a criminal offence to make a false statutory declaration or application. I will come to Bruce Adamson first on that, as in his opening remarks he spoke about his worry about the impact that that could have, especially on 16 and 17-year-olds. Could he expand on that and let me know what his concerns are?

I note that in a previous answer Ellie Gomersall spoke about the age of legal responsibility, albeit in another context. I was a member of the committee that took through the bill that became the Age of Criminal Responsibility (Scotland) Act

2019. Given where the country is perhaps trying to go on the criminalisation of children, where does the provision in the bill fit in with that?

**Bruce Adamson:** You are really challenging me on keeping to the instruction to be brief. You, members of the former committee and, I hope, members of the current committee are very well aware of my position on the criminalisation of children. The fact that we criminalise children at 12, which is two years below the international minimum set by the UN and the Council of Europe, is a breach of our obligations. That has serious impacts on individuals, and it sends a worrying message. We imprison children, and that often has tragic consequences. Those things really stand out as significant breaches of our commitment to children and young people.

There is a risk that, by including a criminal penalty for making a false statutory declaration, children will be unnecessarily criminalised. The children's rights and wellbeing impact assessment does not evidence any assessment at all of the potentially negative impact of that. There does not seem to be any consideration of the fact that children are entitled to extra protection, as set out in article 40 of the United Nations Convention on the Rights of the Child, which the United Nations Committee on the Rights of the Child has recently issued comprehensive guidance on through a general comment. It is for the Government to show why it is necessary to criminalise children in those circumstances, but it has not done that.

I understand that others have pointed to that as a safeguard and have underlined the importance of the decision. It is seen as a protective measure against abuse. However, if that is to apply to children, I would like to see an explanation of what alternative measures the Government has explored to achieve the aim of safeguarding against abuse and in looking at what the other approaches to fulfil that legitimate aim are.

As you have said, there is a much wider discussion about the age of criminal responsibility and the imprisonment of children. I ask the committee to address that as a matter of urgency, but I recognise that this evidence session is probably not the place for that wider discussion.

**Fulton MacGregor:** Thank you for being as brief as you can be about an issue that I know you are passionate about.

I turn to Ellie Gomersall. Can you answer the question in two parts? First, will you look at the criminal offence in terms of the 16 to 18-year-olds whom you represent? Do you have any concerns there? Secondly, will you talk about the wider implications for over-18s? I know that your organisation also represents them.

**Ellie Gomersall:** We oppose the creation of a new criminal offence for 16 to 18-year-olds and over-18s for pretty much the same reasons. However, the implications are potentially stronger for 16 and 17-year-olds.

Currently, it is already an offence to make a false statutory declaration under the Criminal Law (Consolidation) (Scotland) Act 1995. Adding a new criminal offence to that would probably act as a bit of a deterrent to trans people who would want to apply for a gender recognition certificate and would potentially put people off applying who otherwise would. Coming out as trans can be quite a scary time already. As I said earlier, mental health conditions and anxiety, for example, can come up. Having that additional offence could really worry people.

It is fair to say that one of the main criticisms of the bill as it currently stands is the lack of recognition for non-binary people. We certainly hope to see that improved over the coming years. As the bill currently stands, non-binary people would not be able to be recognised as non-binary by going through the gender recognition certificate process. However, some non-binary people might still want to go through the gender recognition certificate process because they feel that their gender aligns more closely with one of the two binary genders. There would be a real concern that having the offence of making a false declaration would inadvertently criminalise some non-binary people who would potentially get a gender recognition certificate to align them more closely with one of the binary genders that does not necessarily match their identity but more closely aligns with it.

11:00

Finally, we have to acknowledge the hostility in the current debate—I say that in quote marks—around trans people and the bill, and the fact that trans people still face quite a horrific amount of transphobia in society. There may be malicious individuals or groups who would misuse that provision to make accusations or allegations to cause harassment. Again, I strongly oppose the provision.

A lot of the impacts that I just described in relation to fear and being deterred from going through the process would apply to anyone, regardless of age, but they would potentially be felt even more strongly by 16 and 17-year-olds.

**Fulton MacGregor:** I appreciate that response. You touched on the fact that although there is a great deal of support for the bill, there is also a great deal of worry about it, which the committee is obviously hearing about.

The committee as a whole is keen to bring in legislation that makes it as easy as possible for people to live the lives that they want to lead. Do you not feel that the provisions on the criminal offence provide some reassurance to those who are opposed to the bill based on the concerns that have been raised? We have heard from you and other witnesses that anybody who applies for a gender recognition certificate will have already been living as trans for quite some time, so it is a decision that will have been taken a long time ago. Do you not feel that making it a criminal offence for somebody to make a false declaration will provide reassurance to those who have concerns about the bill?

**Ellie Gomersall:** As I said, making a false declaration is already a criminal offence under the 1995 act, and I hope that that in itself would reassure those who have concerns. I do not think that a further criminal offence would be necessary. It would make no significant difference in terms of whether some things are legal or not. What it would create a difference in is perception. It would create fear on the part of trans people, which would be a deterrent and an additional barrier that would put some people off applying, despite the fact that the provision would not make any difference regarding the criminality of making a false declaration.

I hope that those people would be reassured by the fact that making a false declaration is already criminalised. If we add an additional law on top of that, non-binary people would be much more likely be targeted by such a law.

**Maggie Chapman:** This question follows on from what you were saying a moment ago. The bill also provides for a person who has an interest to ask the sheriff to revoke a GRC. What is NUS Scotland's position on that? Does that give you concerns? I will come to Bruce Adamson after Ellie Gomersall.

**Ellie Gomersall:** We have some concerns around that provision, because, again, it could potentially be used with malice of intent.

There is a lot of interest in the bill. A trans person could come out and obtain a gender recognition certificate and someone defined as a person with interest could be opposed to that for any of a variety of reasons. That could potentially create a hostile and dangerous environment for that trans person. It is really important that the approach is focused on the trans person themselves.

It is also important for us to acknowledge what the bill does and what having a gender recognition certificate does. It can make administrative tasks, such as making applications, a little bit easier and it changes how someone is recorded on their

death certificate after they have passed away. Those are issues that will only affect the trans person.

The other thing that it does is around marriage certificates and how people are recorded after getting married. That is the only instance in which it might affect someone else. We support people being able to divorce or separate for any reason. Revoking someone's gender recognition certificate would not be the solution if someone was unhappy with the fact that their partner had changed their legal gender—the solution would be divorce. There is no reason why we would support revoking the certificate in those circumstances.

**Maggie Chapman:** That is helpful.

Bruce Adamson, your submission mentions potential concern for care-experienced young people in relation to the provision. Can you say a little more about that?

**Bruce Adamson:** I will keep my remarks very focused. There are concerns that the children's rights and wellbeing impact assessment accompanying the bill does not explicitly consider the situation of care-experienced children and young people, who may be legally looked after. That legal status puts additional obligations on the state as the corporate parent throughout childhood and into early adulthood.

There are some practical questions about who would have the ability, as the person with interest, to make such a request. There is potential for various local authority staff to be involved in the care of the young person. More detail is needed around the specific concern in relation to care-experienced young people and the potential for there to be a much larger pool of those who would be captured under the definition of a person with interest.

**The Convener:** Thank you. Pam, do you have a final question?

**Pam Duncan-Glancy:** I do. My questions are on the international experience, some of which Bruce Adamson has already shared. Can you set out briefly your understanding of how self-declaration has worked in other countries and what the impact has been—positive or negative—on the rights of young people? You said that human rights has a mechanism to balance rights where there is an interplay between two groups of rights. Can you also talk briefly about the international experience of that and how the issue has been resolved elsewhere?

**Bruce Adamson:** You want me to do that briefly? Okay.

We have been in contact with ombudspople on the issue. It is not something that everyone has worked on. We have had discussions with

colleagues in Norway and Ireland on the issue because both those jurisdictions have legislated to provide legal gender recognition for under 18s. Looking at the evidence and research, we are taking a very similar position to that of the ombudsman in Ireland, which, in simple terms, is that 16 and 17-year-olds should be able to apply for gender recognition in the same way as people aged over 18, with a strong focus on ensuring that suitable support is available for those children under 18.

There is also a broader issue of support for those younger children who are not included in the proposal. That goes back to gender identity being at the core of a person's dignity and the need to be able to engage with such matters in a very safe environment.

The Ombudsman for Children's Office in Ireland has undertaken extensive work on the issue. It has provided written evidence to a number of consultations dating back many years. The committee might therefore wish to seek its view directly because it has probably the best evidence of experience, process and direction of travel.

The Norwegian ombudsperson's office has also provided us with a summary of its work on gender recognition. It is positive about the benefits of including those who are over 16 without parental consent. That is a feature of some parts of the Norwegian system and it is based on the fact that the age of medical and sexual maturity in Norway is 16. The Norwegian ombudsperson is therefore arguing that children in Norway who are under the age of 16 should be included in the same possibility, based on the rights-based legal framework that I set out earlier. It is now looking at recognition for the six-to-16 age group and what parental consents would be involved.

More broadly, all this speaks to the fact that the area is evolving and there needs to be on-going research and close and on-going monitoring. At the heart of that, there needs to be the lived experience of young trans people and the experience of other children, and it all needs to be linked to the expert research that is being done. Again, we are also seeing that in other parts of the UK.

It is important that we recognise that there are challenges and evidence gaps, so we need to continue to gather evidence and to monitor the situation. We also need to be open and mature enough to challenge ourselves on where we go next and how we ensure that we are further respecting, protecting and fulfilling people's rights.

At the risk of upsetting you, convener, I need to say that the bill that the Scottish Parliament passed last year to incorporate the United Nations Convention on the Rights of the Child is still not in

force seven-and-a-half months after the Supreme Court judgment. I note that there is a ministerial statement on that this afternoon, and it is absolutely essential that it gives us some clarity and progress. I am very much looking forward to hearing that because it also cuts right to the heart of what we are discussing. We need to put children's voices, experiences and rights at the heart of decision making, and we need to recognise that, in evolving areas of rights, there will always be more questions to ask.

**The Convener:** Ellie Gomersall, do you want to comment?

**Ellie Gomersall:** I do not think that there is anything for me to add.

**The Convener:** Thank you. That concludes our questions. I thank Ellie Gomersall and Bruce Adamson for their evidence.

11:12

*Meeting suspended.*

11:17

*On resuming—*

**The Convener:** I welcome our second panel of witnesses: Hugh Torrance, executive director, LEAP Sports Scotland, and Malcolm Dingwall-Smith, strategic partnerships manager, sportscotland. I invite our witnesses to make short opening statements.

**Hugh Torrance (LEAP Sports Scotland):** I thank the committee for inviting me.

When the Gender Recognition Bill was being drafted, there was specific and considered consultation on the topic of sport. There was a proposal for a specific exemption for sports competition that would mean that sports bodies would be able to make decisions about the inclusion or exclusion of transgender people, regardless of legal gender recognition. In other words, if the sport's governing body assessed it as appropriate, transgender people could be restricted from participating in competitions within that sport.

When the Gender Recognition Act 2004 was passed, it therefore included section 19, which enabled that exemption. That allowed sports governing bodies to create and implement policies that restricted access to transgender people. When sports bodies enacted those restrictions, it did not matter how someone identified or whether they had a gender recognition certificate. It was clearly the intention of the lawmakers to recognise that such restrictions were necessary and to ensure a legal mechanism for that.



Section 19 of the Gender Recognition Act 2004 was repealed with the introduction of the Equality Act 2010. The process of drafting the 2010 act also specifically looked at sport, and it was considered necessary to ensure a continuation of that specific exemption for sports competitions, irrespective of the provisions in the 2010 act with regard to the protected characteristic of gender reassignment. Those provisions were incorporated as section 195 of the 2010 act.

That directly and clearly addressed concerns that the 2010 act could in any way override the ability of sports governing bodies to restrict transgender people. Again, that means that, if a sports body enacts such restrictions, it does not matter how someone identifies or whether they have a gender recognition certificate. Clearly, it was the intention of the lawmakers to recognise that the continuation of such restrictions on transgender people was necessary and to ensure a continued legal mechanism for that.

It is also the case that gender recognition certificates are not used in sports' eligibility processes, regardless of whether or not section 195 of the Equality Act 2010 is being used. The exclusion that I have described still stands. It is enabled by section 195 of the 2010 act, which continues to apply. None of the current gender recognition reform proposals changes anything in the 2010 act, which is not up for review.

Trans people's participation in sport received specific and detailed attention throughout the creation of the Gender Recognition Act 2004 and then the Equality Act 2010. That demonstrates how important the issue has been seen to be, and the intention of lawmakers in the area is clear.

Our conclusion is therefore that the proposals in the bill will not change the situation of trans people's participation in sport and that the practice of sport will not be affected by any of the proposals in the bill.

Those who campaign against gender recognition reform continue to raise sport frequently, despite the many reassurances from sports bodies and LGBTIQ+ organisations that the proposals do not change the legal position in relation to sport.

As for the bill more widely, LEAP Sports Scotland is supportive of the current proposals on the basis of the significant improvements that we believe they will make to the lives and experiences of trans people in Scotland.

I look forward to answering the committee's questions.

**Malcolm Dingwall-Smith (sportscotland):** Thank you for inviting sportscotland to give evidence today. As the national agency for sport,

our vision is of an active Scotland where everyone benefits from sport, and we have a clear commitment to inclusion underpinning everything that we do.

Legislative provision currently exists to allow sports bodies to place restrictions on trans people participating in sport in certain specified circumstances if that is necessary to uphold fair competition or the safety of competitors. Those provisions are set out in section 195 of the Equality Act 2010 and they will not be impacted by the Gender Recognition Reform (Scotland) Bill. Our view is therefore that the bill in its current form would not impact significantly on sport.

Looking beyond the provisions in the bill to transgender inclusion in domestic sport in general, we want sport to be a place where everyone can be themselves, everyone can take part and everyone is treated with kindness, dignity and respect. We recognise that there are still too many barriers to transgender people participating in sport.

We also recognise that more practical advice and support is required at every level for sport to be able to maximise opportunities for inclusion and accessibility. With that in mind, we came together with the other home country sports councils to develop new guidance for transgender inclusion in domestic sport. Following extensive consultation and review of the evidence base, our guidance concludes that retained physical differences mean that it will not always be possible to balance transgender inclusion, competitive fairness and participant safety. We also conclude that there can be no one-size-fits-all approach across all sports.

We are now encouraging and supporting Scottish governing bodies to use the guidance to develop sport-specific policies. Our recommendations encourage our national governing bodies to think in innovative and creative ways to ensure that nobody is left out. We now want to see meaningful and respectful consultation on the development of those sport-specific approaches, which we hope will facilitate increased transgender participation and help sport to become more inclusive and diverse.

**The Convener:** Thank you. We move on to questions, starting with Pam Gosal.

**Pam Gosal:** Thank you for your opening statements. You have touched on this, but will you go into a little more depth on how you see the self-ID policy working across sports, from the grass roots to the competitive elite levels? What evidence base is there on the impact of testosterone on performance?

**Hugh Torrance:** It is important to start off by clarifying that many sports already have regulation policies that are enabled by section 195 of the

Equality Act 2010. It is not the case that a trans person can self-identify into any sport at any given point. That means that, for many trans people, taking part in sport already involves interpreting and adhering to those eligibility guidelines before they are able to play. That is one of the reasons for the poor participation rates in sport and physical activity of trans people that Malcolm Dingwall-Smith mentioned. Because the Equality Act 2010 is not up for review, and there are no moves for it to be up for review, the situation is highly unlikely to change.

On the second part of your question—forgive me for a second while I find my notes—the vast majority of trans people and folks in our network have been taking part in sport for many years without the need for a gender recognition certificate, and they have been welcomed by other participants and their team members. We see that happening all around Scotland on a week-to-week and day-to-day basis. The majority of people are supportive of the situation.

We recognise the wider concerns, but we also recognise that many people are supportive when it comes to participation in grass-roots sport.

**Pam Gosal:** Malcolm, do you want to add anything?

**Malcolm Dingwall-Smith:** Am I right in thinking that your question was about testosterone levels?

**Pam Gosal:** Yes.

**Malcolm Dingwall-Smith:** As part of the work that was done across the four home countries' sports councils, we looked at the available scientific evidence. Scientific evidence in the area continues to emerge and it is a moving picture, but at the present time, we believe that the emerging evidence does not support the view that testosterone suppression for 12 months will achieve parity of strength, stamina and physique for transgender women compared with females. That is the rationale for our position in the guidance that we cannot necessarily at all times balance safety, inclusion and competitive fairness.

**Maggie Chapman:** Good morning, both, and thank you for joining us this morning.

Can you describe some of the issues that are being faced by different sports that try to balance trans inclusion with fairness and safety? What issues do they have to wrangle with? How do different sports come to their decisions?

I will start with Malcolm Dingwall-Smith and then come to Hugh Torrance.

**Malcolm Dingwall-Smith:** Effectively, there is a concern that allowing transgender women in particular to compete in female sports creates an unlevel playing field as a result of those retained

physical differences. A lot of people in sport had hoped that the use of testosterone suppression would provide a mechanism for levelling up that playing field and allowing people to compete on the same basis. Unfortunately, that is not where the evidence appears to be at this time. As a result, particularly at the higher level, that is the policy that a lot of federations have used on testosterone levels and suppression.

We are working with sports on their policies and the structures of their sport. We suggest that they use a decision-making framework to ask questions, such as: where has gender affected the nature of the sport; where do they want to put the emphasis on inclusion; and where do they want to put the emphasis on competitive fairness? Those things might be different within one sport. It is not necessarily the case that a sport federation would adopt a one-size or one-policy approach across the whole sport. It might use a different policy at grass-roots or community club level from the policy that it uses at national championship level, for example.

We are also encouraging sports to think about other forms of their sport that they might wish to introduce or which might already exist and which can be put alongside the sport's more traditional forms to provide opportunities for everyone to compete.

**Hugh Torrance:** Against the current backdrop of change, quite a number of sports bodies are consulting with trans people on what inclusion and fairness might look like for our community moving forward.

It is important to recognise that sports governing bodies have worked on such issues for many years and that many of them have found very successful ways of improving inclusion, at grass-roots level and throughout the competitive sports pathway. Although discussion is taking place about the emerging scientific evidence, the practice of trans people accessing and playing sport continues, as does the consultation around that.

11:30

**Pam Duncan-Glancy:** Good morning. Thank you for your submissions and the answers that you have given so far.

I am keen to explore what happens now in relation to gender recognition certificates and trans people's access to sport. Could you tell us about the use that is made of a gender recognition certificate in any determination as to whether someone is able to participate in a given sport? What happens now? If the changes were to go through, what would happen in the future?

**Hugh Torrance:** As things stand at the moment, gender recognition certificates are not used for any part of the process of participating in sport, applying to take part in sport or evidencing anything in relation to participation in sport. At the moment, none of that happens, and there is nothing in the proposals that would change that in any way.

**Pam Duncan-Glancy:** What factors are considered when a trans person is looking to participate in a particular sport?

**Hugh Torrance:** Are you asking what is considered by the sport's governing body?

**Pam Duncan-Glancy:** Yes.

**Hugh Torrance:** Usually, as things stand at the moment, a person's participation starts off with them making a self-declaration on their gender. That is how we would identify which category that person would enter. At no point in the process thereafter would a gender recognition certificate be requested in order to verify that.

As regards criteria other than a gender recognition certificate, those would be whatever the sports body in question had outlined. As Malcolm Dingwall-Smith has pointed out, under the current regulations, those criteria might include some kind of documentation around testosterone levels or physique, but they would not include requirements related to gender recognition certificates.

**Malcolm Dingwall-Smith:** I echo the point that, in general, gender recognition certificates are not used by sports as part of their process. I am not aware of any sport that uses gender recognition certificates or that intends to use them in the new circumstances.

Hugh Torrance is absolutely right. The self-declaration process involves a person making a declaration that their participation is in line with the sport's policy. In that sense, it is slightly different from a self-identification process.

**Pam Duncan-Glancy:** What is your understanding of what that difference is?

**Malcolm Dingwall-Smith:** The self-declaration process involves the person declaring that their participation is in line with the policy of the sport, as opposed to a self-ID process. If it was the sport's policy that a person should go through a self-ID process, the two things would be the same. If the policy was that transgender people were not permitted to participate in the gender that aligned with their identity, the person would be making a statement that their participation was in line with that policy.

**Pam Duncan-Glancy:** Could I ask a further follow-up question?

**The Convener:** Is it in the same area?

**Pam Duncan-Glancy:** Yes.

**The Convener:** Okay.

**Pam Duncan-Glancy:** It is about section 195 of the Equality Act 2010, which both of you have mentioned. Do you think that the bill will have an impact on that section?

**Hugh Torrance:** We cannot see any way in which the bill will have an impact on section 195 of the 2010 act.

**Malcolm Dingwall-Smith:** The understanding of sportscotland is that the bill will not impact on section 195 of the 2010 act.

**Alexander Stewart:** Malcolm, in your opening remarks, you said that it might not always be possible to balance the various aspects, that creative ways of ensuring that no one is left out needed to be found and that consultation on the issue should be meaningful and respectful.

Last year, sportscotland—jointly with the other UK sporting councils—issued guidance. There were found to be two polarising issues. On one side, there was a view that trans people should be included in sport and that there should not be any restriction, whereas others saw that trans inclusion should be subject to regulation to ensure fair sporting competition. The UK sporting councils advised that there should be some kind of balance, but they also indicated that bodies should define their own rules, using a framework to interpret the guidance, which would help to support outcomes for each sport. How are sporting bodies in Scotland being supported to ensure that trans inclusion in sport is balanced with the requirements for fairness and safety?

**Malcolm Dingwall-Smith:** To be clear, the two polarising viewpoints that have been referred to were viewpoints that people expressed during the consultation. The way in which the governing bodies look at the issue will vary sport by sport. We encourage the governing bodies to work through the process. They have to consider things such as how gender affected their sports are and in what ways. They have to make decisions on different elements of the sport, potentially different levels of the sport and whether they want to take a different approach to that balance. They also have to consider whether there are different forms of the sport. Many governing bodies cover different disciplines and have modified versions of sports in various forms that have emerged over a number of years. Those are not necessarily just about promoting trans inclusion; they might be about generally improving inclusion overall.

The safety element probably relates to a small number of sports—it is about safety on the field of play, particularly in collision and combat sports,

where the difference in physique can potentially create safety issues that need to be considered. Again, that has to be done on a sport-by-sport basis, depending on the scientific evidence that is available.

**Alexander Stewart:** Hugh, do you have any comments on that balance? Malcolm has given examples of types of sport that might have a different attitude or might have to go a different way, because of the nature of the sport or the competition that is involved.

**Hugh Torrance:** I first reiterate that many sports already achieve that balance very successfully and have done so for quite some time. Some sports bodies make decisions about restrictions that are based on the level of competition, and others make decisions based on things such as access to clubs and facilities.

Our practical experience is that the kind of queries that we get, whether they come through training, advocacy or general queries, are significantly more likely to be questions about how to support trans people to get the best out of the sport, rather than about particular challenges in achieving that balance per se.

Although today we are focusing on the legal mechanisms around the restriction of trans people in sport, I will just underline how important it is to see access to sport and physical activity as a rights and fairness issue for trans people as well. It is also worth remembering that trans people are already playing sport and have been doing so—it is not a new or recent thing. We definitely continue to engage with and support sports bodies on the issue of striking that balance. The issue has been on-going for many years.

**Fulton MacGregor:** My question broadly follows on from Alexander Stewart's line of questioning. You talked about responses to the consultation on the joint guidance that was published. What sort of response have you had since the guidance was published? Have the trends been the same, with the two trains of thought that you have spoken about, or have you had further responses that have given you cause for consideration?

**Malcolm Dingwall-Smith:** I think that, unsurprisingly, the guidance does not make everyone happy. It takes the view that sports will have to come up with and work on their own positions, so it is not a final statement on what the outcomes will be on a sport-by-sport basis. However, we were never expecting everyone to be happy. The guidance sits on either side of the debate in order to simplify things.

What we have been really pleased with is the response from the governing bodies of sport. They are probably our key stakeholders in this, and they

are who the guidance is designed to support. Sports bodies have been really willing to engage in thinking about this issue and about how they can open up their sport to make it more accessible to transgender people, and not just in relation to the guidance. It is important that there is guidance around eligibility but, once sports are comfortable that they can come to a decision on that, they can look at other things around the sport, such as culture, that are actually bigger barriers to transgender participation than the eligibility regulations.

**Fulton MacGregor:** Do the bodies for different sports across the country come to you to seek advice on this issue?

**Malcolm Dingwall-Smith:** Yes, absolutely. There was previous home countries guidance from 2015. Part of the reason for updating the guidance was that sports were speaking to us about the issue and saying that they needed more practical guidance to support them in making decisions.

**Fulton MacGregor:** Do you feel that that has increased as there has been a debate around the issue, or have you always been asked for advice on it?

**Malcolm Dingwall-Smith:** I agree with Hugh Torrance that this issue is not new to sport; it is something that sports have had to consider for a number of years. LEAP Sports is one of the bodies that sports go to when they have those questions, so it might be better to ask Hugh about the level of inquiries that he is getting on specific issues.

On the overall issue, sports know that they need a policy in place on it and that they need to come to some kind of clear decisions on it, and then they need to work to improve accessibility. That has not really changed over the years.

**Fulton MacGregor:** Thanks, Malcolm. I nudge Hugh to answer that as well.

**Hugh Torrance:** First of all, there has definitely been an uptick in interest in this topic over the past couple of years, alongside the time that the bill has been consulted on. Part of the reason for that has been some continued, and often quite deliberately misleading, campaigning against trans people's participation in sport. That has continued throughout the lengthy delays that we have had as the bill has progressed.

It is also fair to say that the new guidance, as Malcolm described, looks at two sides of the debate, and that is not a position that we have always recognised in relation to sport. We work with sports bodies somewhere in the middle of all of that. This topic is usually presented as either "trans people currently have unrestricted access to all participation categories in sport and that must stop", or "the current proposals will create a

position where trans people will have unrestricted access to all categories in sport". Both of those descriptions are clearly and demonstrably untrue.

In relation to the release of the new guidance, the vast majority of trans people and athletes who we hear from have not welcomed it. They believe that the approach and the tone that it takes are hostile to their inclusion in sport. To some degree, that is not necessarily just about the guidance, but about the context and the time within which the guidance has emerged, throughout the process of consultation on the bill.

Specific concerns that trans people have about the guidance are that it will lead to an increase in unwanted attention, hostility and harassment in sport. There are also fears that some sports bodies that they previously would have described as having their back when it comes to participation in sport will come under increased pressure to review their policies and will become more restrictive in the process of doing so.

Sadly, from an advocacy point of view, we are already seeing evidence that upholds some of those concerns. There are some immediate concerns and there are a lot of longer-term impacts that we need to consider in relation to how the guidance is implemented in sport.

11:45

**Fulton MacGregor:** This is more of a remark that does not have anything to do with the legislation, as you have been quite clear that the legislation does not really impact on sport. However, it sounds as though trans people have an unpredictable future in sport, because all that it would take would be a change in organisational structure, the people at the top of the organisation, or in the standing orders for there to be a significant change in their participation. That is more of a remark than anything else, convener.

**Karen Adam:** Good morning. You have given full and comprehensive answers to a lot of the questions; however, I will pick up on a point that follows on from some of the answers that you have given.

Do you consult with experts and other third sector organisations when you develop and shape your policies? You spoke about performance measures and said that testosterone levels are perhaps not the way to go. Some cisgender women take testosterone for medical reasons, so those kinds of measures are not pertinent to what you are looking at. What medical experts and third sector organisations do the bodies that you represent consult with?

**Malcolm Dingwall-Smith:** We consulted around 300 people from about 175 organisations

around the world, as well as individual participants in sport, when we produced the guidance. For the scientific evidence, we looked at peer-reviewed papers and at what published evidence said. We invited organisations to the consultation that held dramatically different views on transgender participation in sport, because we tried to get as wide a range of views as possible. That included LGBT representative organisations, and organisations that have raised concerns about transgender participation in sport.

**Hugh Torrance:** As a charitable organisation that is working in the advocacy space, we do not conduct any research activities about the science of sport ourselves. However, we regularly work with sports governing bodies in Scotland, UK-wide, and internationally. In Scotland, since the publication of the "Out for Sport" research in 2012, it has been important for us to come together as a sports sector, given some of the particular areas of interest the research raised. That has led to the creation of the national LGBTI sports group, which meets on a quarterly basis and includes sportscotland, many other sports governing bodies, the Scottish Government, our organisation and some of the other equality organisations. Through that group, we look at emerging evidence, guidance, practice, and so on, and we also share good practice across the sector.

**Karen Adam:** That is great. Thank you. As I have said, your answers have been full and comprehensive, but perhaps some of them have been outwith the scope of what the committee is scrutinising.

I will reiterate and re-emphasise this question: what, if any, impact will the bill and the simplification process for a GRC have on sports organisations?

**Hugh Torrance:** To reiterate, from our point of view, we have been through the bill in some detail and have consulted with sports bodies and trans people. We not been able to find any direct impact that those reforms—specifically, the current proposals—will have on sport.

**Malcolm Dingwall-Smith:** We share that analysis. The bill will have no impact on sport, so sportscotland does not take a position on any of the features of the bill. For that reason, although we regularly provide evidence and submissions to calls for evidence from committees, in this case, we did not, because we were clear that the bill would have no impact on sport.

**Pam Gosal:** I want to go back to talk about how the bill would affect other countries. I am interested in hearing a bit more on the effect that reform of the GRA could have on participation in cross-border sporting competitions. Do you expect that moving to a system of self-declaration would

conflict with the guidance set out in other countries, either in the UK or abroad? How would that work? We have talked a lot about Scotland but how do you see a reformed GRA working within the UK and other countries?

**Malcolm Dingwall-Smith:** Our view would be the same as we take in Scotland. GRCs are not used as part of the process that sports undertake either at the Scottish level or at the UK level, so we do not see them having any impact on cross-border sports.

**Hugh Torrance:** I support that position. As things currently stand in Scotland, any of the eligibility criteria within the player pathway that would take someone from a national level competition to international level are done through that sport-specific criteria that is enabled by section 195 of the Equality Act 2010 and not in any way by the GRA.

**The Convener:** Pam Duncan-Glancy, have you covered everything that you intended to?

**Pam Duncan-Glancy:** I have covered everything that I intended to, but it be great if I could have another question.

**The Convener:** Okay.

**Pam Duncan-Glancy:** Thank you, convener. Hugh, could you tell us a little bit about trans people's participation in sport, why it is important, and how trans people are interacting right now with other women and men in sport?

**Hugh Torrance:** Thank you for the question. Sport is not only for the privileged. The Covid-19 pandemic brought sharply into focus the importance of sport and physical activity to our mental health and wellbeing, and that is absolutely no different for trans people. Also, it can be a really important tool for trans people to be able to access sport and physical activity while in the process of preparing for a transition or, indeed, while going through transition. Sport can be used for everything from potentially preparing your body for surgery to being a way of achieving the body that you want to have. Sport is a really important tool for us all in that regard, but it is particularly so for trans people.

On the question about how trans people interact with men and women on their teams as things stand, we find that, on the whole, sports clubs and people within those sports clubs are incredibly supportive of their teammates. In many cases, they will go the extra length to advocate on their behalf or to stand up for the inclusion of someone within their team. We see that regularly, not only during pride month or on particular days of the year, but right throughout the year. Although, again, we recognise that there are some people

with concerns, the vast majority of people take a very supportive view.

**Malcolm Dingwall-Smith:** Because our consultation has been touched on a couple of times, it is important to say that it showed that there is widespread support for the view that sport should be accessible to all, including to transgender people. The questions or concerns that emerged from some people were about how that was achieved and not about whether it should be achieved. As I think that I said earlier, there is a lot of work still to do around the cultural and other barriers that are not about eligibility criteria, as well as thinking about those eligibility criteria. Making sport accessible to all is something that sportscotland is committed to.

**The Convener:** Thanks, everyone. That concludes the questions for this morning. I thank Hugh Torrance and Malcolm Dingwall-Smith. That concludes the public part of the meeting. We now move into private for the final item on our agenda.

11:54

*Meeting continued in private until 12:06.*

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Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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