

Women and Equalities Committee

Oral evidence: Gender Recognition Reform (Scotland) Bill and Equality Act 2010, HC 1098

Tuesday 31 January 2023

Ordered by the House of Commons to be published on 31 January 2023.

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Members present: Caroline Nokes (Chair); Elliot Colburn; Caroline Dinenage; Rachel Maclean; Kate Osborne; Ms Anum Qaisar.

Questions 1 - 55

Witnesses

I: Naomi Cunningham, Barrister, Outer Temple Chambers; Lord Falconer of Thoroton, KC; Dr Michael Foran, Lecturer in Public Law, University of Glasgow; and Robin Moira White, Barrister, Old Square Chambers.

Written evidence from witnesses:

Examination of witnesses

Witnesses: Naomi Cunningham, Lord Falconer of Thoroton, Dr Michael Foran and Robin Moira White.

Chair: Good afternoon and welcome to this afternoon's Women and Equalities Committee and our one-off session looking at the Gender Recognition Reform (Scotland) Bill and the interplay with the Equality Act 2010.

Can I thank our witnesses for attending this afternoon to give evidence? We have Naomi Cunningham, Dr Michael Foran, Robin White, and Lord Falconer. As you would expect, Members of the Committee will ask you questions in turn. They will usually indicate which witness they would like to respond, but it may well be that they come to all of you with a question in turn.

Q1 Ms Qaisar: Thank you so much for joining us today. Lord Falconer, I am going to come to you first, if possible. I am looking to tease out the legal differences between section 33 and 35.

Lord Falconer of Thoroton: Section 33 covers a situation where the Scottish Parliament passes a Bill or an Act which is outside its competence, because it is a reserved matter. Over simply, they passed an Act that purported to deal with UK national benefits. That would have no impact. Section 35, on the other hand, deals with the situation where it passes a Bill, which is within its competence, and nobody disputes it is within its competence to determine the conditions for a gender recognition certificate.

First of all, in the opinion of the Secretary of State, the way that operates on reserved law causes harm. Nobody in this debate disputes that equalities—as defined by the Equality Act 2010—whether you are applying them in Scotland or England, is a reserved matter. Therefore, in order for a section 35 certificate to be given by the central UK Government, it is not enough that it is outside the competence, because it is plainly within the competence. You have to say it affects the application of equality law in some way, and in the opinion of the Secretary of State, the way it affects it is bad.

Q2 Ms Qaisar: Okay. You think that is the reasoning why the UK Government chose to go down the route of a section 35 at this point?

Lord Falconer of Thoroton: They could not go down the route of a section 33, because it was within the competence of the Scottish Parliament. In my view, wrongly, in Michael's view, rightly, and I think Naomi and Robin have different views in relation to it. They have exercised their power into section 35 in a way that they cannot. Michael thinks it is okay. I do not think it is okay, but I think maybe, in a way, the way one gets to the conclusion on that is by looking at what is the practical effect of what the Scottish Government have done.



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Q3 Ms Qaisar: I want to tease this out a little bit more. You have, quite rightly, had an overview on how section 35 works, yet when I am looking to talk to you about the engagement and the process of engagement between the two different legislators, it is my understanding that at no point did the UK Government ask the Scottish Government to change the Bill. They did not participate in the public consultations, they did not write to the Equalities Committee in the Scottish Parliament, and they did not raise the concerns in writing or in meetings with Shona Robison, the Cabinet Secretary, before December 2022. Is that normal practice?

Lord Falconer of Thoroton: I have no idea what the engagement between the Scottish Government and the UK Government would be. It was made explicit by the Minister proposing the provision and the UK Government when passing section 35 that the impact of using section 35 would be so serious that we would expect Whitehall and Holyrood to engage and reach solutions.

I have no idea what the factual position is between Holyrood and Whitehall in relation to this particular Bill, but if the UK Government was thinking of using section 35—and obviously they would be, following the Bill going through Parliament—you would have expected them to engage with the Scottish Government to work out what the solution was.

Q4 Ms Qaisar: Good. The 2023 memorandum of understanding between devolved administrations and the UK Government states, “If formal intervention should become necessary, the UK Government will whenever practicable inform the devolved administration of its intentions in sufficient time to enable that administration to make any representations it wishes or take any remedial action.”

It also says—and you have kind of alluded to this before—that powers such as section 35 order should be seen, and I quote, “As a matter of last resort.” Is it fair to say that in this case the UK Government have not used section 35 as a last resort, and have essentially just pressed the nuclear button?

Lord Falconer of Thoroton: They have exercised section 35 at the point that Mr Alister Jack, the Secretary of State, exercised section 35. He said he was willing to listen to discussions to try and change the Bill; I assume that is what he was referring to. There must be scope for there to be further discussions between the UK Executive that used the power and the Scottish Parliament to try to reach some agreement on what changes could save the Bill. It is not too late.

Q5 Ms Qaisar: Can you talk to me about what good practice is around section 35? Most people out there would not have heard of section 35 or 33. What is good practice in regard to it?

Lord Falconer of Thoroton: I do know that section 35 has never been used before. I do not know whether or not section 35 has ever been contemplated before, so I would imagine practice was either non-existent or a bit rusty in relation to it. As far as my experience in the Government



is concerned, between 1999 when the Bill came into force and 2007, there was never any question of section 35 being used. Overall, if there is any chance of section 35 being used, the practice should be intense engagement between the two in order to try to work out a way whereby it does not have to be used, because the use of section 35 is not good for devolution.

Actually, there is a broader point. Both, as it were, women and transgender people expect politicians to reach a solution in relation to a difficult issue like this, and we politicians have manifestly failed to reach a solution.

Q6 Ms Qaisar: Thank you for that. According to the fact that you have spoken for a while, I will give someone else a chance.

Michael, may I come to you, please? There is a quote that is used quite often on a day-to-day basis—you see it in protest rallies, or people post it on social media—and it is quite simple, “Are trans rights human rights?” Would you agree with that?

Dr Foran: There is a difficulty with that, in the sense that the identification of a trans person does not appear anywhere in UK law, with the exception of something like gender reassignment. The status that we would associate here, in terms of anti-discrimination rights on the basis of a protected characteristic of gender reassignment, those anti-discrimination rights could be a catchall term for trans rights. The other rights that we would be talking about would require us to look more directly at the nature of the rights themselves, to see whether they would be within the ambit or scope of human rights provisions as they exist within particular regimes like the ECHR or the UN or something like that.

Ms Qaisar: I was expecting a yes or no answer, but you gave a politician’s answer.

Dr Foran: A lawyer’s as well. Yes.

Q7 Ms Qaisar: Yes, a lawyer’s answer as well. Let us tease out a little bit. In 2017/18, former Prime Minister Theresa May pledged reform, and she said transgender people across the UK found the process of legally changing their gender overly bureaucratic and invasive. She then added that she wanted to see the process, and I quote, “More streamlined and de-medicalised, because being trans should never be treated as an illness.” Would you agree with that statement?

Dr Foran: That being trans should never be seen as—

Ms Qaisar: As an illness, and that there should be more streamlining in terms of reforms.

Dr Foran: Again, this comes down to the definition of being trans. Someone who suffers from gender dysphoria has a medical condition. Beyond that, the legal conditions or the legal tests that might be



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associated with this will change depending on how legislation or regulation is brought in. The current UK system does have a medicalised process that says you can change your legal sex if and only if you have been diagnosed with gender dysphoria.

Q8 Ms Qaisar: Looking at the UK Government, this is obviously previous commitments from a former Prime Minister. I cannot count how many Prime Ministers we are on, three or four Prime Ministers since Theresa May? Do you think this is something that the UK Government should be pursuing, a reform over GRR?

Dr Foran: I am not sure if that is something that I would be able to comment on in a legal capacity.

Q9 Ms Qaisar: I read your paper that you recently published, "The Scottish Gender Recognition Reform Bill: The Case for a Section 35 Order". It was published on Policy Exchange, which, interestingly, is a think tank that has been hailed by *The Daily Telegraph* as the largest but also the most influential think tank on the right, founded by Michael Gove. The crux of your argument in your article—bearing in mind the Bill had passed on a cross-party basis in Holyrood—is that it merits a section 35 order.

You and others have raised concerns over the Equality Act 2010, and one of the concerns that people discuss is over single sex associations being required to admit people with a GRC. But that already exists and precedes the GRR Bill: this has not just come into force over the last month or so. If these issues already exist, could it not be argued that the Equality Act 2010 is not being modified?

Dr Foran: The provisions of the Equality Act 2010 are not being modified, and I do not think anybody has argued that the provisions are being modified. That is not the test that is needed for section 35; it is the operation of the Act that matters here.

In terms of what the reasons are that would justify a section 35 order, some of those reasons will be related to things that currently operate under the GRR Bill already that might be considered to be problems if they were changed substantively. Others will be new concerns. There will be legal concerns in relation to schools that are just very, very unlikely to arise in contexts where you do not have minors changing their legal sex. The main provision, or the main concern here in terms of the justification for the use of section 35 order, will come to both practical effects and legal effects. Altering the substantive nature of those who can change their legal sex, removing certain requirements, removing all third-party requirements to validate or ensure that the procedure is not being abused, could result in certain problems.

Q10 Ms Qaisar: You have spoken now about the process being abused, but would you not also agree that the numbers are interesting? Lord Falconer referred to it in his Twitter thread—I do not know how often Twitter threads are referred to in Committee sessions—where he spoke about how there is around 30 people in Scotland right now; with the GRR



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reforms that would increase to around 250 to 300. Is there going to be abuse of the system?

Dr Foran: There are two points to make on that. The first point is that some of the numbers analysis that Lord Falconer has done has been challenged separately from a policy group, MurrayBlackburnMackenzie. There might be circumstances where the numbers really do matter; we really do not know at this point what the numbers are going to be, and the fact that we do not know might itself be reasonable grounds for consideration in relation to the section 35 order.

But even separate from that, even if no numbers are dramatically changed, there is still going to be changes to the legal operation here. Those legal changes that are going to be happening, the expansion of the category itself, there are arguments to be made that that itself will have issues. The concern is about ensuring that any third-party verification, so that this will not be abused, will be removed.

Lord Falconer of Thoroton: Could I come in on a little swipe at me on the numbers?

Chair: Have you finished on that numbers point, Mr Foran?

Dr Foran: The numbers point? Absolutely, I finished on that, yes.

Chair: Okay. Lord Falconer.

Lord Falconer of Thoroton: In the Twitter thread, and the base on which I had come to these conclusions, I have used the numbers that were used by the UK Government. The UK Government's numbers were 500 to 550, that was their outer limit per year. The British Government have to have some number in mind, and that is the number that they have, so we should treat that as the outer limit. The way that the UK Government came to that number is they compared the closest country that had self-identification, which I think was Ireland, and on the basis of what had happened in Ireland, that is what they came to. With the greatest of respect to Michael, the attack on the numbers does not get very far.

Dr Foran: I do not think it needs to, either, because the concern is not just about the numbers. The concern is going to be about the change to legal categories, a change to the operation of the Equality Act 2010, the change to the operation of single-sex schools. These are going to change regardless of whether or not it is one person or 500 persons or 25,000, which is the number of trans people in Scotland.

Q11 **Ms Qaisar:** I hear what you are saying. People also need to be mindful that sometimes, with the conversations that are being had, it sounds as if it is going to be thousands upon thousands upon thousands of people that are looking to change their gender. From what I have seen, that does not seem to be the case.



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Sticking to numbers, we seem to have a bit of a theme going on here. Stage 2 of the Bill that went through the Scottish Parliament had a new clause 15A; it was supported by the Scottish Government and brought forward by Labour MSP Pam Duncan-Glancy. She states, "For the avoidance of doubt, nothing in this Act modifies the Equality Act 2010."

Robin, I am going to ask you your thoughts on this, and at the end I will come to you, Naomi, because I know that you have written about this as well.

Robin Moira White: That flows from the difficulty that had occurred between the Scottish Parliament and the UK Parliament over the women on public boards provisions, which had been enacted before and were initially ruled to be without the competence of the Scottish Government. A new set of guidance was then produced which made it very clear that the Scottish Government was not changing definitions that were relevant to the Equality Act 2010. My understanding of 15A is that it was there to emphasise that point relative to the work on the GRR. I do not think there were particular areas that it was focused on; it is a consequence of the public boards legislation fracas that had occurred before. I sat through a lot of the proceedings in Scotland and talked to a number of the legislators in Scotland, and that is my understanding of where 15A comes from.

Q12 **Ms Qaisar:** Lord Falconer, do you have any comments?

Lord Falconer of Thoroton: It is wider than that. It was a Labour amendment adopted by the Scottish Government, and the purpose was to underline the point—because you did not need it, but it underlined the point—that none of this, as Michael is saying, affects the legal tests that apply under the Equality Act 2010.

Dr Foran: I disagree on that.

Lord Falconer of Thoroton: You will have your moment. The key thing is that when you are talking about safe spaces, neither the Gender Recognition Act 2004, nor the Gender Recognition Reform (Scotland) Bill 2023 affects what you have to do to determine whether you can exclude somebody who is a trans woman, but is subject to gender reassignment protection. For example, if you are running the prison or the safe space, you have to make a decision whether or not excluding that person is proportionate to a legitimate aim, which is to protect either her or other people in the safe space. Whether she has a gender recognition certificate makes absolutely no difference to that whatsoever, and the effect of the passage of the Bill in Scotland was not to change the proportionate means to get to a legitimate aim.

Ms Qaisar: Michael, you wanted to jump in.

Dr Foran: Yes. The term "modification" here really matters. If what we mean by "modify" is that no provision in the Equality Act 2010 is repealed or replaced, then that is obvious, it is true, and it is trivial. If modification



speaks to the legal operation of the Equality Act, then there absolutely will be a modification to the Equality Act, because, with relation to the relationship between the Gender Recognition Act 2004 and the Equality Act, you have granted somebody the ability to change their legal sex, if the Lady Haldane judgment is correct, for the purposes of the Equality Act.

An analogy here might be, for example, any of the rights and provisions that are protected within the Equality Act and assigned exclusively to women will remain broadly the same, and the mechanism by which you gain access to those gender recognition certificates will remain broadly the same. Consider that a lock of some kind. The Gender Recognition Reform (Scotland) Bill will give a lot more people keys to that lock, and not just in terms of numbers. It will give access to that status to people who do not have and cannot have access to that under the current UK system—people who do not have a diagnosis of gender dysphoria.

In terms of the single-sex services, spaces and associations, the operation of those tests is going to be altered significantly. The tests themselves will remain the same. The tests for single-sex services say that you can exclude somebody on the basis of either sex or gender reassignment in circumstances where it is justified as a proportionate means of achieving a legitimate aim. The legitimate aim here remains the same for the setting up of these services. The test remains the same. But if you have a gender recognition certificate, that will be a relevant factor to take into account when determining whether or not there has been a proportionate means used to achieve that aim.

If you are legally and biologically male and you want access to a female-only space, you will have certain factors there that would make exclusion easier than if you are a legal woman requiring access to a women-only space. The tests will remain the same--proportionate means of achieving a legitimate aim--but whether or not it is proportionate to exclude a legal woman who has gender reassignment as a protected characteristic is going to be different than whether or not it is proportionate to exclude a legal male.

Again, for associations and schools the tests remain the same, but there is no provision for associations or schools that permit you to discriminate on the basis of gender reassignment. If somebody changes their legal sex to become the legal sex of that school, they will be entitled by right to have access to those associations and schools, because failing to provide them with that access is direct discrimination on the basis of gender reassignment and would be unlawful. Getting access to those certificates—

Q13 Ms Qaisar: You are going to be asked about this by other Members who specifically want to come to these points. I am going to move on to Naomi.

Naomi, you wrote about the new clause 15A in your blog, you examined



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it in regards to the Equality Act 2010. You made reference to that door and lock analogy that others have spoken about and you say, "What the Bill proposes to do, and at least arguably can do, is manufacture thousands of extra keys to the door and hand them out to pretty much anyone who says they would like one." You are talking about numbers in the thousands. Lord Falconer has spoken about hundreds: he has just referred to the fact that he uses data from the UK Government. Can you evidence your claim, please?

Naomi Cunningham: The numbers do not ultimately matter, whether we are talking about hundreds or thousands.

Ms Qaisar: That is what I am asking about. I completely understand, I am asking about specific—

Naomi Cunningham: Yes. I am a lawyer, not a sociologist, so I do not know, the Scottish Government do not know and the UK Government do not know what the numbers are going to be. What we do know for a fact is that the Bill radically changes the eligibility criteria for being given a copy of this key. We do not know how many people, but we do know that there is not going to be any medical requirement, there is not going to be any need to evidence living in the opposite gender, whatever that is supposed to mean. We can predict with some certainty—and events of the last few days should have taught us that—that the profile of the cohort who will get access to these keys will be very different. It will not be the tiny minority. If you look back at Hansard to see the debates around the time of the original Gender Recognition Act 2004, it is emphasised over and over again that what we are doing is making humane provision for a tiny minority of people with a very distressing medical condition.

That was the intention of the GRA. Also, in that intention and in that expectation was a picture of a typical man who identifies as a woman; it is almost always that way around, not women who identify as men, who create the really acute issues here for obvious reasons. All of that debate was predicated on an image of a man who identifies as a woman who passes, who has had all surgery and all the hormone treatments that medical science can provide him with, and who has been for desperately unhappy with his physical body for years and has done everything he possibly can to assimilate as a woman. When that legislation was passed, the mental picture was of someone who would not cause any upset—you know, in a women-only changing room, a women-only toilet, a women-only ward, a women's prison—because everyone would just accept that he was a woman. Everyone would think he was a woman.

Events of the last few days should have made it vivid to everybody that that is not the cohort that we are dealing with now. We are dealing with a radically expanded category. The trans umbrella is now taken to include people who cross-dress for a whole variety of reasons; there is nothing in the provisions of the Bill as drafted that will stop men who cross-dress for erotic purposes, who cross-dress for the purposes of avoiding being sent



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to a men's prison when they have committed horrible crimes and think they will have a nicer time in a women's prison, who simply enjoy the exercise of power they feel by transgressing women's boundaries, from gaining GRCs. There are no controls to stop those people, so we do not know—you do not know, I do not know—what the numbers are going to be.

Q14 Ms Qaisar: I hear what you are saying, but some people would argue that it is not necessarily the case that anyone who is going to go through the process to gain a GRC would be predatory.

Naomi Cunningham: I would not suggest for a moment that everyone who goes through the process is going to be predatory, the problem is the other way up. The problem is not that everyone who wants a GRC is predatory. The problem is that there is nothing in the process proposed to stop predatory men like Isla Bryson from getting a GRC and using it to terrify services that might want to say, "No, this is a women-only space." Michael and I slightly part company here on the legal complexities of how the single-sex exceptions operate, but in any view, it makes it more complex and difficult for service providers—or people like the beauty training course that Isla Bryson went on—to say, "No, this is for women only," or, "No, you are not allowed to partner with a young female classmate in order to apply fake tan to her in the most intimate way," because he has this magic certificate that says, a) he is a woman, and b) nobody is allowed to mention the fact that he is really a man.

Ms Qaisar: We were having a discussion about predatory men and, quite rightly, there has to be provisions in place to protect women and girls. In front of me here, I have—

Naomi Cunningham: They were voted down, though, were they not?

Ms Qaisar: Pardon?

Naomi Cunningham: Those provisions, the amendments to achieve that, were voted down.

Q15 Ms Qaisar: On a cross-party basis it was passed. I have a statement in front of me from 15 different women's organisations. You may have seen it, it is signed by Amnesty International, Back Off Scotland, Close the Gap, Crew, Engender, and a few others, including Scottish Women's Aid, Scottish Women's Convention and Scottish Women's Rights Centre.

There is a particular line that stuck out to me, and during this whole debate over the last few years, something that I remind myself quite often, and I am just quoting from it, "There are currently a number of very real threats to women's rights in Scotland and the UK including but not limited to poverty, the cost of living crisis, cuts to services, rape conviction rates and the experiences of immigrant and refugee women. We find it particularly concerning that so much political and media attention has been devoted to the debate around this Bill in place of tackling these genuine barriers to women's equality." Would you agree



with that statement?

Naomi Cunningham: That is the rhetorical manoeuvre generally known as whataboutery, which is to say you are not allowed to care about this important thing until you have fixed all these other important things too. Of course those things are important, but I also think that it is important that women should have the right to ordinary everyday privacy and dignity. Not just women from particular faith backgrounds where it is especially distressing for them to be expected to undress in the presence of men or use a toilet in the presence of men, not just women who have been traumatised by rape or other sexual violence, but all women are entitled to their own boundaries. I do think that is important, and I am not going to be deterred from saying that is important by saying do you agree that lots of other things are important too. Yes; many, many things are important.

Q16 **Ms Qaisar:** And of course, at the same time, the rights of trans people, immigrant people, people from different marginalised communities, are incredibly important.

Going back right to the start of my original question which was around the numbers—sorry, it just escaped my mind. Were you able to evidence that the thousands of people—

Naomi Cunningham: Which thousands?

Q17 **Ms Qaisar:** When you said what the Bill proposes to do, and at least what it arguably can do, is manufacture thousands of keys to the door and hand them out to pretty much anyone who says they would like one.

Naomi Cunningham: As I said, the specific numbers are not particularly important. I have not done the research. I cannot tell you it is 10,000, it is 50,000, it is 900.

Ms Qaisar: That is what I was just looking for, and you can—

Naomi Cunningham: What matters is the cohort and the profile of the cohort, and the withdrawal of the controls.

Q18 **Ms Qaisar:** Okay. I am going to move on my final question directed to the panel. Robin and Michael, we will come to you first.

Surely it cannot be the case that the UK Government does not agree with what the Scottish Government has passed. They essentially go to press the nuclear button. Section 35, as we have spoken about, should be used as a last resort.

What future steps can UK Government take to ensure that they are respecting the mandate of the Scottish Parliament and the legislators setting up in Edinburgh, because it does not really seem right that that is the case--that is essentially MPs telling MSPs what to do.

Robin Moira White: I have an answer from the consultation. As you will know, there is a Scottish Human Rights Commission, and at the time



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when Theresa May was proposing these changes, the UK Human Rights Commission originally supported the changes but have changed their view. There was a great deal of embarrassment when the UK Human Rights Commission appeared before a similar committee in Scotland and could not explain that change. The Scottish Human Rights Commission were asked that same question by the Scottish legislators, and their position was if there is going to be such an enormous change of position from "it is okay" to "it is not okay," then there should be some explanation. And there never has been.

Chair: I think it is worth noting that the Equality and Human Rights Commission refused to attend today.

Q19 **Ms Qaisar:** Michael, would you like to add anything to that?

Robin Moira White: They did attend in Scotland, but I am afraid to say the Chief Executive, in my view, won the pen twiddling competition of the year when she was asked that question.

Dr Foran: I might start answering this question by setting up my understanding of how section 35 operates, and maybe challenge the contention that this is a nuclear option. Of the two things that are relevant here, the first thing is that the section pauses the Bill from getting Royal Assent; it can be reintroduced at stage 3 at any time. It opens the door for negotiation that would not be possible if section 35 had not been used, because you have that 28-day period that cannot be paused or stopped unless section 35 can be used.

In my view, the reason why there was no cross-governmental discussions over this is partially because the Lady Haldane judgment dropped literally days before the final reading of the Bill, which will have changed the legal assessment that the UK Government would have gone into, and the Bill had 150 amendments to it. They did not have a final version of the Bill up until that very point, so the only option open to them would have been to use section 35 or section 33, but both myself and Lord Falconer agreed that section 33 would have been inappropriate in this context.

Looking at it from that perspective, then moving into, "Okay, what can be done?", the answer to that is going to depend on what the Scottish Government wants to do with regards to this legislation; what are its goals, what are its purposes? If the purpose here is to affect the law for reserved purposes, then it is always going to have difficulties. If it only wants to affect the law for devolved competencies, then it will have an easier time to do that, but the question is whether or not it wants to do one or the other, and I cannot make a judgment on that.

In terms of the idea that section 35 is a nuclear option, I would agree with Lord Hope, who is a former Supreme Court Justice, who, when asked on this, said, "Yes, this is an extraordinary use of a power, but it is also an extraordinary piece of legislation." It is an extraordinary Bill that has come through. Even if you compare self-ID laws that have been brought



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in in the rest of the world, they have never tried to bring it in by hooking onto and amending a piece of legislation that would then have effects for a broader piece of legislation that operates at a jurisdiction that the lawmakers did not have authority to make law over.

The reason why section 35 was used in this context is because of the way that the Gender Recognition Act 2004 affects the Equality Act 2010. Changing or modifying the Gender Recognition Act could have effects on the operation of the Equality Act, and so the organisational decision-making between Governments is first going to have to decide what each Government wants to do in terms of its purposes here, and what it wants to do in terms of the effects that it is willing to have on reserved areas.

- Q20 **Ms Qaisar:** Thank you so much. I have a final question for Lord Falconer because I know other colleagues want to come in. This piece of legislation was, of course, an SNP manifesto commitment but it did gain cross-party support with two thirds of MSPs voting in favour. It was the most widely consulted piece of legislation in the history of the Scottish Parliament. How can it be the case in a democracy—regardless of what your views are on GRR—with a devolution settlement in place, that we are here today in the House of Commons discussing its legitimacy?

Lord Falconer of Thoroton: Section 35 was passed by this Parliament because it envisaged that there could be circumstances where you needed to say no. These circumstances are not the ones to which section 35 was going to apply.

Ms Qaisar: Thank you.

- Q21 **Chair:** Michael, can I just take you back to a comment you made, and indeed a comment Naomi made, where, I think, Naomi, you indicated that the numbers did not matter, and you, Michael, said that there were some circumstances in which they might. Can you expand on which circumstances?

Dr Foran: The numbers are going to matter if they get large enough. In a lot of areas there are going to be some circumstances where even a change in the law will be the legal effect that matters. There will be circumstances where, if many people get these certificates, we are not going to know the profile of those people. We are not going to know whether or not those people are going to be people who have gender dysphoria because we have removed the requirement for that. We are not going to know if the people who get a gender recognition certificate are doing it for fraudulent reasons because we have removed requirements.

Chair: You are suggesting it is profile that matters, not the numbers.

Dr Foran: It is both. If the profile contains a percentage of them that are doing this for fraud and then the numbers shoot up, you are going to have a lot of people doing this for fraud. There are going to be some circumstances where the numbers are not going to matter because the



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legal changes that are happening here in terms of the law in relation to associations, services or schools will be such that it would create such uncertainty for those services that they may adopt policies they might not otherwise adopt in certain circumstances.

There is an issue in terms of IT infrastructure, which I know has been discussed, but it really should not be seen as an issue. If there is a distinction between Scotland and the rest of the United Kingdom in terms of what legal sex you are, for a lot of IT infrastructure there is only one option to do that and if the UK Government requires that it will create a massive bill that will be put on our feet. There are going to be circumstances where they will say, in that context, whether or not we have to foot that bill, it is going to be something that warrants our input at some point.

Q22 Chair: Are we really saying that gender recognition comes down to the cash? Is that what you are saying?

Dr Foran: No. I am saying choices about the cash have to be made by cross-party and cross-governmental decision making.

Naomi Cunningham: Can I possibly come back to that question since you mentioned me in relation to—

Chair: You did say numbers did not matter.

Naomi Cunningham: The specific numbers do not matter. The orders of magnitude do matter. The Scottish Government's estimate of the order of magnitude change brought about by this Bill—if and when this Bill ever comes into force—is that applications and grants of gender recognition certificates may go up tenfold, although we do not know if it is tenfold, fivefold, twentyfold or fiftyfold. We simply do not know. What we do know is that there is likely to be an order of magnitude change. It will be a lot more, but we do not know how many more. We cannot at the moment.

Robin Moira White: I am sorry—

Q23 Chair: Sorry, numbers do not matter but order of magnitude does. Is that what you are saying?

Naomi Cunningham: Specific numbers—

Chair: Administratively?

Naomi Cunningham: Because what you are looking at doing is radically changing the way this piece of legislation operates. It was a piece of legislation that was sold to Parliament in 2004 as directed to a tiny minority. This was said in debate over and over again; it is a tiny minority. It is a tiny minority of people with a very distressing medical condition. What almost everybody thought at the time was it is not going to have much impact on society as a whole. Once in a while, a man who passes as female will use a women's toilet or women's changing room,



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and women in that facility will either pretend politely not to notice or even possibly, in some cases, actually not notice, but it is all going to happen on a tiny scale and it is not really going to matter. The same goes for the effect on statistics. As things stand at the moment, the courts have held that when the census is taken what has to be recorded is legal sex.

Q24 **Chair:** Okay. I think you have made that point. Robin, did you want to come in on that?

Robin Moira White: Yes, the good thing about the recent census is we have started to get some figures, and it would appear from the recent number crunching of the census that there is one trans person in every 704 in the population. It, perhaps, is still an underestimate because people are still reticent, perhaps, of declaring themselves to the state in terms of numbers. That gives us, perhaps, a handle on how rare what we are talking about is. Broadly one in 1,000, one in 700. The rampaging wildebeest implications of trans people does not seem to run from this corner of the bench.

Q25 **Chair:** Can I just take you onto the Haldane judgment? I have a question about timing or maybe I think I mean time. What additional pressure did that place on the UK Government when it came to what I suspect was the Secretary of State feeling that he had no choice but to use section 35? Perhaps you can answer that, Lord Falconer.

Lord Falconer of Thoroton: I do not think it makes any difference to be honest. The Haldane judgment said that where you have a gender recognition certificate, whether it be one under the old law or one under the new law, you are a woman or your acquired gender “for all purposes” except where there are exceptions, and the exceptions still applied. The British Government, in their reasons, do not actually treat the judgment as applying to the whole of the Equality Act. They say that there are bits of the Equality Act where sex may mean biological sex. It is not clear that they are accepting it. Assume that a gender recognition certificate makes you a woman or a man, depending on which gender you have acquired, “for all legal purposes”, it does not make any difference, in my view, to whether or not you should use the section 35 power. Both Kemi Badenoch and Alister Jack said they used it to protect women and girls. They both said that. There is also administrative stuff around the edges but that is the key, which is essentially the safe spaces issue.

The safe spaces issue is not affected by the Scottish Bill. You can see that it is not affected by the Scottish Bill by the way both countries have approached the issue of transgender women in the female prison estate. In October 2022, the Lord Chancellor—I do not know whether it was Brandon Lewis or Dominic Raab, it is very difficult to keep up with these changes—made an announcement saying that from now on transgender women with male genitalia would not go to the female prison estate. There was no mention of GRCs at all in his announcement; it was just a practical announcement. The Ministry of Justice in Scotland made exactly



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the same announcement yesterday. Which estate you go to does not depend upon a GRC.

It was difficult to listen to Naomi and Michael constantly using the key analogy, suggesting that getting a GRC on this lower basis is a key, for example, to a woman's prison for a transgender woman. It is not. It is looked at on a case by case basis. Could I very tentatively suggest a solution to this problem? This may be a fantasy world but suppose the Scottish Government and the UK Government, supported by their Equality and Human Rights Commissions, agreed on what the principles were in protecting safe spaces. For example, they agreed that it is done on a risk assessment, that having a GRC is not, as Michael and Naomi were suggesting, a key to a woman's prison if you are a trans woman; it depends upon the risk to you and the risk to everybody else.

If that was made absolutely clear beyond doubt and certain principles were agreed, then there would be much greater confidence, particularly in a lot of women who will feel genuinely frightened about what may happen in the light of the recent example in Scotland, but that is not caused by the Gender Recognition Reform (Scotland) Bill. It is caused by an ineffective risk assessment process. Make the law clear and get the two Governments to agree on what it is because there is not much disagreement on what the law is. This is the way to protect safe spaces, even if you make it easier to get a gender recognition certificate. All three parties—Labour, Tory, SNP—have agreed that the gender recognition requirements for a gender recognition certificate should be relaxed. This Committee has called for it because the evidence is pretty overwhelming that the way it works is cruel and isolating.

Robin Moira White: Do not forget the Greens.

Lord Falconer of Thoroton: The Greens support this as well. Reduce the requirements and make sure there is the right protection. The right protection comes from what the law is at the moment. You do not need to change it. That is why the section 35 certificate is wrong. Get the two Governments to agree that and there could be a way forward in relation to it.

Naomi Cunningham: Can I come back in?

Q26 **Chair:** Can I just finish with Lord Falconer? This could be a yes or no: would it be helpful if there were a definition of sex in the Equality Act?

Dr Foran: There already is one.

Chair: There is an understanding of it. There is not a specific definition.

Dr Foran: Sex is if you are a man or a woman, and then the definition of man is a male of any age, and the definition of a woman is a female of any age. They have the definition. What they do not have is clarity.

Chair: The Haldane judgment interpreted that differently.



Dr Foran: Yes, it did. The Haldane—

Chair: Following the Haldane judgment, would it be helpful if that were revisited?

Dr Foran: Absolutely. The issue with the Haldane judgment as it arises for all the purposes that we are dealing with here is that up until that point, we were really not sure whether or not sex in the Equality Act, as modified by a GRA, first, does modify the Equality Act for the purposes of the claimant, somebody who has a gender recognition certificate, whether they would be classed as male or female for the purposes of a direct discrimination claim. The Haldane judgment goes further than that because it says, effectively, that the definition of sex in the entire Act becomes legal sex. That means that single sex spaces become single legal sex spaces, and what it then means is your justification for exclusion will hinge partially upon whether or not the person is of the characteristic legally that that space is. The test is the same. It is still a proportionate means of achieving a legitimate aim, but whether or not you are legally the same person of a space or a service that is set up for that legal category, not biological category, will be relevant for determining whether or not exclusion is proportionate. The proportionality—

Q27 **Chair:** Lord Falconer, do you want to comment on that?

Lord Falconer of Thoroton: Michael has made it incredibly complicated. The Gender Recognition Reform (Scotland) Bill does not change the basis on which you make a determination on whether or not—

Dr Foran: No, it changes whether or not you can sue. The policy arguments will not be changed. You could introduce a policy that bans all males from female prisons if you want, but you could be sued for that. You could be sued for gender recognition discrimination. The question about whether or not you have a gender recognition certificate changes the nature of that suit that you make from an indirect discrimination claim to a direct discrimination claim, subject to the same justification test. Is it a proportionate means of achieving a legitimate aim? If you think a court will possibly come to a conclusion that the exclusion of this legal woman who is biologically male and that there is a less onerous way to achieve the legitimate aim of providing security then the policy will be struck down as unlawful. If you want to ensure with absolute certainty that no rapist makes it into a women's jail, you need a blanket ban, and blanket bans can be struck down by courts. You need to legislate to have that ban in place. Policy documents, guidance, will not do it because the legislative framework is as it is and it is hooked on to a proportionality test.

Chair: Elliot, did you have a question you wanted to put?

Lord Falconer of Thoroton: Could I just come back as Michael slightly cut me off.



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Dr Foran: Sorry. I apologise for that.

Lord Falconer of Thoroton: What he said was so misguided. Can I try and make this real? Suppose you were the prison Minister, as I was, in relation to this. You have got to address this on a factual basis. It does not matter whether you have a gender recognition certificate or not. You have to work out whether it is safe for somebody and that is exactly the way the courts will approach it. This idea that the GRC is going to make the difference is complete academic nonsense. The prison Minister has got to address himself to the question of what is the basis upon which I let somebody into the female estate if they are a trans woman. The recent case in Scotland indicates you would never let somebody in those circumstances in, and that is the announcement Brandon Lewis or Dominic Raab made in October. None of this is changed by the Gender Recognition Reform (Scotland) Bill. You have to just look at it on the base of the facts on the ground at a particular time.

Naomi Cunningham: Can I come back in please?

Chair: Yes.

Naomi Cunningham: I am not an academic. I am a practitioner of some horrible number of years' experience in discrimination law, and I completely agree with Michael that the possession of a GRC makes it more complex. Lord Falconer is half right—

Lord Falconer of Thoroton: More complex.

Chair: Can we please be polite to other witnesses? Thank you, Lord Falconer.

Lord Falconer of Thoroton: I apologise. I do apologise.

Naomi Cunningham: Thank you. Lord Falconer is half right in that a gender recognition certificate is not simply an access all areas pass. A gender recognition certificate has not made the difference to the Scottish prisons policy because the exceptions that allow service providers, public authorities, employers, schools, etc, to discriminate on grounds of sex and gender reassignment when it is necessary for them to do so are permissive not compulsory, and it is starting to look as if they ought to be compulsory because they are now coming under so much pressure, but under the Equality Act, as it stands, they are permissive not compulsory. Something like the prison service can perfectly lawfully operate a policy that does not make proper use of those permissive exceptions allowing discrimination.

The problem comes when a service provider or public authority etc tries to and wants to do the right thing and provide a single sex service when it is necessary and is faced with a man who identifies as a woman who says, "That's not lawful. You are discriminating against me." If he does not have a gender recognition certificate, the answer is very plain and



simple. The answer is, "Sorry, you are a man. As far as the law is concerned, you are a man. You do not have a gender recognition certificate. You are legally male. This is a women-only space, a women-only service etc. You cannot come in and that is a flat, simple answer." That is easy for any little service provider to operate.

If that same man has a gender recognition certificate declaring him to be a woman, the situation is very different. At that point, it is no longer sex discrimination—which is, by definition, permitted if it is a lawful single sex space or service—it becomes gender reassignment discrimination and then it has to be specifically justified. We can argue about whether that is necessarily case by case or policy by policy, but it is more complicated. The legal route is more complicated. For a small organisation especially, but we have actually seen for larger organisations, it is pretty daunting. They need to take legal advice. They probably cannot afford it. They do not really understand what the issues are. They may well think, faced with a man saying, "My birth certificate says I'm a woman" that they have just got to give way and let him in even if that means their core users simply self-exclude.

Q28 Elliot Colburn: I want to bring this back to the legal reality which is why we have asked you all in today. Naomi, picking up on the point you have just made, do those legal complexities not already exist? This Committee is trying to understand that if the UK Government is using the effect on a reserved piece of legislation as a reason, if these legal complexities already exist UK-wide, does that not then invalidate the use of that as a section 35 reason? I think that is what we are trying to get down to the heart of here.

Naomi Cunningham: This is a question better directed to Michael, who is the constitutional lawyer, but my short answer is that this is a situation where the whole impact of a gender recognition regime is radically changed by this relaxation of the eligibility criteria. The problems already exist, but they will be made very much worse, not just by what we can reasonably expect to be an order of magnitude change in the numbers affected but by what I talked about, the change in the demographic profile of the kind of individuals and the kind of reasons for which they will apply for gender recognition certificates.

Q29 Elliot Colburn: Again, coming back to the legal reality of the section 35 order, the UK Government said in its statement of reasons it is willing to talk to the Scottish Government to basically find something that would be acceptable. Leaving aside opinions on gender recognition reform, what then, in your opinion, would fall into a legally acceptable category of gender recognition reform or does the Scottish Parliament, in your opinion, simply not have the devolved competencies to actually do anything in the gender recognition space without the UK Government?

Naomi Cunningham: That is a question to be directed to Michael.



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Dr Foran: Just to pick up on the first question, the statement of reasons effectively operates on two broad categories. One is existing problems that will be made worse, and the other is new problems that will be created. Among the new problems that will be created is there is going to be a serious problem for schools. If you have a gender recognition certificate, you are biologically male and you are classed legally as a woman or vice versa, that information becomes protected information which means if somebody comes across that information in an official capacity, it is a crime for them to disclose that. You can see where this could have issues for safeguarding in schools. If a 16-year—

Chair: We have an entire section on 16 and 17-year-olds. I do not think we are ever going to make it there.

Q30 **Elliot Colburn:** Perhaps if I could ask you then the direct question that I was going to ask later on schools, which is if that was removed from the Scottish Bill, would that therefore make it legally acceptable? Leaving aside, again, any opinions on gender recognition reform.

Dr Foran: It would resolve one of the issues in the 13 pages of reasons, but it would not resolve all of them. The question about what can be done is going to be partially determined by what each Government think its purpose is here and what it wants to achieve. The statement of reasons is set out the way it is because the issues the UK Government take issue with are only those that hook onto reserved matters. If there was a clear statement within a Bill that says none of this will affect the operation or effect of the laws that applies to reserved matters, that could be an issue, but it could cause political concerns because that might not be what the Scottish Government want to achieve. The question comes down to what they want to achieve. It is entirely possible for you to produce a Bill that will be capable of withstanding a section 35 order in this context, but it comes down to what each Government wants to achieve as a part of it, particularly what the Scottish Government wants to achieve.

Q31 **Elliot Colburn:** Perhaps, Lord Falconer, if I could come to you. Is one of the reasons we have arrived at this space and are having this discussion because the entire UK legislative framework for gender recognition is simply not fit for this day and age? Leaving aside the Scottish law for one minute, the interaction between the GRA and the Equality Act has been subject of intense debate, a very toxic public debate. Is that not part of the reason we have arrived in this space? Because now we are deciding whether or not a Scottish Bill has the legal ability to pass. I am probably not using my words very well here, but is that not because actually the UK's legislative framework is not fit for purpose at the moment?

Lord Falconer of Thoroton: I think that is right. The reason we are here is, first, under the existing law, there was a lack of confidence in the way safe spaces were operated. People did not quite know how it operated, and there were concerns about it. Secondly, and separately, there was real concern about the inadequacy and cruelty of the process by which you obtained a gender recognition certificate.



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Your first question to Naomi was about the problems in which the way the safe space process works—Michael was right; schools are in a slightly different category—and they apply under the existing law as much as under the new law. In fact, the new law, the Scottish law, which has not yet become law, does not really affect the pressure on that. Thirdly, Brandon Lewis or Dominic Raab's statement in October. He was trying to deal there with the problems about how you operate the existing law. The opinion that it is all going to become harder is not right. You are right when you say the existing framework is not working.

You could make the existing framework work much better if there was a sense of shared acceptance of what the law was—and, in a way, you could get it out of this crisis, because it is a crisis about how the law is operating at the moment, by everybody agreeing what the interrelationship between the law on safe spaces on the one hand and gender recognition certificates on the other. If both Governments agreed what the law was, and they were backed up by their Equality and Human Rights Commissions, that would have a huge impact on it, but I do not dispute your proposition that there is a real problem with the law at the moment.

Robin Moira White: It is crumbling in a different way because nowhere in the paperwork I have seen relative to today's proceedings is there any mention of anything other than gender dysphoria. One of the world organisations has now moved to gender incongruence, and we have a judicial review in Northern Ireland, JR111, which now says that a diagnosis of gender incongruence is good enough to grant a gender recognition certificate. It is becoming increasingly difficult to get a diagnosis of gender dysphoria because the medical world is moving away from that in exactly the same way we recognised homosexuality was not an illness but part of life's rich tapestry. We will shortly be in a position where people will not be able to get that definition.

Elliot Colburn: There is a lot more I would like to go into, but I am conscious we are voting.

Chair: We are running out of time. Kate, do you want to ask some questions?

Q32 **Kate Osborne:** Yes. Thank you, panel, for coming here today. Before I ask a couple of questions to the panel, I just want to say that I think many people, including myself, see the Government and others playing politics with trans lives and the issues around it. The fear mongering and the hostile environment reminds me of the days I was fighting section 28 in the 1980s. I think where we are now is quite regressive and extremely worrying.

If I can ask you, Lord Falconer, please. The EHRC's view—who you heard we invited but declined our invitation—is that if the UK Government were to choose to recognise Scottish GRCs obtained via the reformed system, two systems using different criteria for legal gender recognition will co-



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exist within Britain. Is this correct? Would the Scottish Bill have the practical effect of bestowing one legal sex on a person in Scotland while the same person could have a different sex in a different part of the UK?

Lord Falconer of Thoroton: If the UK Government took steps to say they would recognise a certificate, whether it came from Scotland or whether it came from England, then you would not have two systems. Anybody with a GRC—whether it be on the less strenuous basis in Scotland or the more strenuous basis in England—would all be treated as whatever the certificate said, but that is not the legal position. The position at the moment is that if the Bill in Scotland were to become law, those certificates in Scotland would only be recognised in Scotland. It would need a piece of legislation or some other Act by the UK Government to have them recognised in England.

Robin Moira White: It is not actually a practical difficulty. I do not have a GRC. I transitioned just before the Theresa May period, and was looking forward, like the first same sex marriage people, to being the first person on the steps to get an English GRC under the new system and I waited for that, but I practise under my female name. I pay my taxes under my old gender. There is a practical example of why the IT issue we heard about earlier is nonsense because I have one tax number, and I pay my taxes perfectly happily, but I appear to be two different genders if you look in different places for me in the tax records.

Q33 **Kate Osborne:** Surely that is completely unsatisfactory?

Robin Moira White: The delay in the UK catching up with good practice in the rest of the Western world and the rest of the civilised world is unacceptable.

Q34 **Kate Osborne:** Thank you. Lord Falconer, did you want to come back in there?

Lord Falconer of Thoroton: It is not particularly satisfactory if there are two systems. I rather agree with Robin, and, I think, the Government, that if the only issues were these administrative issues, then the idea that you would stand in the way of Scotland making the change to getting a GRC would be unsustainable. It is slightly administrative—it is not satisfactory, you are right—but as a reason for saying let us exercise section 35, it would be completely unsustainable. Indeed, that is reflected by Mr Jack and Ms Badenoch's statement that their real concern is protecting women and girls which is a different issue simply from administrative difficulties. We should really focus on the threat to women and girls because that is what the central Government have done.

There is one thing that you said which I support strongly. I cannot remember whether it was by Michael or Naomi, but it was said that the effect of the change is that it would allow people who wanted to cross-dress for erotic reasons or wanted to appear to be women for power reasons that would become permissible under the new Bill in Scotland. That is not my understanding of the Bill.



My understanding of the Bill is you have to make a statutory declaration saying that you have lived for three months in your acquired gender and you intend to continue to live in the acquired gender permanently. It is not right to say that that is what the Bill licenses. It does not. If you make a false declaration, then you are liable to a prison sentence up to a maximum of two years. Again, there are a large number of trans people who have said the process is currently terrible from their point of view. One should recognise that the change the Scottish Government have made is one that most people accept is a sensible change. Everybody recognises you have to deal with proper and confidence-inducing protection for women and girls but that is the dilemma. One should not, as it were, use the process as a means of attacking the trans community.

Q35 Kate Osborne: Yes. I will bring you in in a minute, Michael, but I have to say the use of language around crossdressing or crossdressers and people who identify as trans, to me, are completely different things.

Dr Foran: They probably are very different things, but the difference is there is currently no distinction brought out in the Bill as it is proposed. I do not think the issue with the Bill is necessarily with the fact that you have to make a statutory declaration. The issue is that it is the only thing you have to do, and there are no third-party mechanisms for assessing whether or not the claim that is being made is fraudulent.

In addition to that, there is no real standard at this point for identifying what would constitute a fraudulent claim in this context, because the most important part about that declaration, living in the acquired gender, is completely undefined. It is next to impossible for me to see how you could possibly bring a criminal prosecution against someone who you claim has made a false declaration in this context. That is both for rule of law reasons and for human rights reasons relating to the clarity of what a criminal offence constitutes.

The reason why we do not have a definition in this Bill but we do in the GRA is because the GRA, for better or worse, ties living in the acquired gender to a diagnosis of gender dysphoria. We may seek to change that to a different diagnosis, but it also ties it to the requirement to produce evidence before a panel who could then make decisions to determine whether or not an application is fraudulent. The issue with the Bill as it currently stands is there are no mechanisms for assessing whether or not an application is fraudulent, and so the presumption that only trans people will make these declarations and seek to get these certificates may be a political one that we are willing to make, but it is not a legal one that I could make. Legally speaking, there is no limit here except that somebody commits to living in the acquired gender.

If that only means a legal status and if that only means having a gender recognition certificate—which seems to be what Shona Robison indicated, that it would be about changing pronouns and maybe updating particular documents—and if that is all that is required, then, yes, an erotic crossdresser could do that, and they are probably not trans. The issue is



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whether or not people who are not trans might use this system and whether we have any legal mechanisms to prevent that. We do not right now.

Lord Falconer of Thoroton: That is so misleading. Currently, you have to live in the acquired gender for a period of years, and that is judged by a Gender Recognition Panel. That is a legal question the GRP have to resolve. Our current system of law requires this judgment to be made, just as it would have to be made in relation to a statutory declaration. That may be a problem, but it is a problem of the existing law. To say that it is changed by this Bill is misleading.

Robin Moira White: There are no specific requirements placed on the panel. The panel is not limited to anything in particular in judging that.

Q36 **Kate Osborne:** I am going to stop you all there to move on, because my questions are focused around the UK and indeed overseas, so I am going to go back to that. I will direct this one again to you, Lord Falconer. What are the UK-wide implications of the Scottish Bill's proposed automatic recognition of overseas GRC holders? Could it lead, as the Government argues, to overseas citizens in the UK, who are not from the approved list of countries and territories, favouring applying for Scottish GRCs in order to bypass applying to the panel in the UK standards track?

Lord Falconer of Thoroton: I do not think it will make people apply in Scotland for anything more. Your question—I may have misunderstood it—put together the fact that the Scottish Bill indicates there are recognised overseas gender recognition certificates. I cannot see how that is going to make people go to Scotland to get a gender recognition certificate. There may be some problems about, are there countries which have no standards at all, but I do not know of any. In practice, I do not think that is going to be much of a problem.

Q37 **Kate Osborne:** Do you want to come in there, Michael?

Dr Foran: One of the points to make in relation to this is whether or not the UK Government would want to validate or recognise Scottish judiciaries. The point is, that is really for the UK Government to make a decision on. The issue here is, if the Bill as it currently stands is going to create the kinds of pressures that would require them to be alleviated or resolved by the UK Government making a political decision, you could see how that could fall within the purview of a section 35 order, because the effect is on reserved areas rather than areas that are solely devolved to Scotland.

Q38 **Rachel Maclean:** My questions concern the operation of single-sex associations, safe spaces as we have called them, and not just safe spaces but also collection of data. For example, panels. Do we have a gender-balanced panel today? These are the questions I would like to ask the panel. I would like to start with you, Lord Falconer.

Chair: I will suspend the meeting for 15 minutes for the division in the



House. Thank you.

The Committee suspended for a Division in the House of Commons.

Chair: We will now resume.

- Q39 **Rachel Maclean:** I want to ask you Lord Falconer, because you have set out very clearly why you disagree on a legal basis with the UK Government triggering section 35. There are differences of views. One of the things the UK Government has said is they worry there will be a chilling effect, because it is about the operation of the Equality Act; it is not necessarily about any changes to legal rights of trans people. We have all accepted and understood that, but we have also heard very clearly from Naomi and others that there will be greater numbers coming into this cohort of people that could seek to access single-sex spaces, either in Scotland if they are changing their gender, or else they have a gender recognition certificate and they then seek to come to the rest of the United Kingdom with a Scottish GRC. As you have said yourself, there is no longer a requirement to have a medical panel assess that you have gender dysphoria. There is a risk profile there; I think we have all accepted that.

Given all of that, do you completely disagree with the statement that there could be a chilling effect on existing and prospective providers? Not just of prisons—

Lord Falconer of Thoroton: Yes, sure.

Rachel Maclean: That is a big organisation with lots of people who are highly paid, lawyers, big processes and administrative staff. We are talking about small services. It could just be a very small voluntary service like the ones around the country I visited when I was Safeguarding Minister. Are they wrong to say there is a chilling effect on how they operate their spaces?

Lord Falconer of Thoroton: First of all, I completely agree that the circumstances of the change make it easier to get a GRC certificate under Scottish law if that Bill becomes law. There might be more fraud as a result. Whether it has a chilling effect will very much depend upon the way the law is transmitted and the way it is operated. If it is absolutely clear—and it would not be difficult to make this clear—that if somebody comes with a Scottish certificate you can treat that as much less protection against the risks in relation to a safe space, then I do not think it will have a chilling effect.

- Q40 **Rachel Maclean:** How can you do that? Surely that is completely against what the Scottish Government has sought to do. A gender recognition certificate is a gender recognition certificate, is it not? That is what they want to achieve with this Bill.

Lord Falconer of Thoroton: A gender recognition certificate is one that means that for all purposes you can be treated as a woman, but equality



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law says there are certain things that need special protection. In relation to that special protection, there are rules that say, "Do not worry about whether somebody has a GRC or not; look and see what the risk is." The position of the Scottish Government, with which I agree, is it is matter of how it is put into effect in practice. I am not disagreeing; it might have a chilling effect, because fraud is easier under this new system rather than the old system.

- Q41 **Rachel Maclean:** Are you suggesting it would be legitimate for a service provider to say, "You have a Scottish GRC. That has lower safeguards in it, so I am going to exclude you from my small service. Whereas you, from England, have an English one, so it is fine, you can come in because we think there are not as many risks"? Do you think that would really stand up in a court of law?

Lord Falconer of Thoroton: Yes, I do think it would stand up in a court of law. What is more, the very example you give is what the notes to the Equality Act said in relation to, for example, the counselling service. It might be legitimate for it to say, "We will stop all trans women coming into a counselling session for the victims of sexual violence, because if we let any trans women in, we would not get anybody to turn up." That was the example given. The law is not a fool. The law is sensible people who will take this and make it work. What you are talking about is the law going bonkers and making people feel the fear that quite legitimately would be there.

- Q42 **Rachel Maclean:** With respect, I am not. I am talking about the ambiguities, because there is a lack of definition about what we mean by sex or gender with or without a GRC, which can be interpreted. I want to come to Michael—

Lord Falconer of Thoroton: Can I just answer?

Rachel Maclean: Yes.

Lord Falconer of Thoroton: In a sense, that is where the confusion has come. How the courts would look at this is to ask themselves the question, "Is what is being done here—say ban all trans women from particular single-sex services—a legitimate way of providing adequate protection?" The notes to the original Equality Act make it clear that might be appropriate. The courts will be sensible, and they will be particularly sensible if they get sensible guidance from both Governments and the Equality Commissions.

- Q43 **Rachel Maclean:** I want to ask also Robin whether she thinks it is right that we would ban all trans women from services, but then I want to come back to Michael as well.

Chair: Perhaps Robin can answer the question being directed to Robin, not you Lord Falconer.

Robin Moira White: Sorry, which way around did you want to do that?



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Rachel Maclean: I want to ask you, Robin. Lord Falconer has just suggested one way of helping small service providers would be for the Government to write a guidance document that said, "You should ban all trans women from these services."

Robin Moira White: He did not say "should".

Rachel Maclean: Possibly could.

Robin Moira White: Can, and that is—

Q44 **Rachel Maclean:** Can. Do you think the Government should do that?

Robin Moira White: Forgive me. You are asking me a policy question. Let me take an area in which I am experienced. I represent a number of rape crisis centres who have come to different decisions. The overwhelming position for rape crisis centres in the UK is they are inclusive of trans people, but they are permitted to be exclusive, and they can be if it is a proportionate means of achieving a legitimate aim.

Lord Falconer a moment ago was talking about counselling services. Let us assume there is a level of risk of someone who is a counsellor. One can imagine the circumstances of them being left with a vulnerable person to counsel the vulnerable person. We have systems like DBS checking where the organisation would put—

Rachel Maclean: We are very short of time, but I really want to—

Robin Moira White: Blanket bans are very difficult to apply.

Q45 **Rachel Maclean:** They are, indeed. Michael, you wanted to come in.

Robin Moira White: Not impossible.

Dr Foran: The first thing to note here is that we need to distinguish between the legislative framework and then guidance that is introduced. If the guidance is incompatible with the legislation, it falls every time. The question is not whether or not we could come up with a sensible guidance outcome; the question is whether or not that sensible guidance would withstand legal scrutiny. When it comes to a discrimination case that might be brought by someone who has been excluded, there is nothing in the Equality Act that states it is acceptable to ignore the fact that somebody has a gender recognition certificate. There is nothing there that says it is permissible for a service provider to ignore the legal sex of the person who is requesting access to a service designed for people of that legal sex.

In fact, the idea that a gender recognition certificate will not make any difference in the proportionality test here just would not stand up to water. It is clearly a relevant consideration that would have to be taken into account both by the provider of the service in assessing whether or not they are legally permitted to do this, and also by a court. A court will



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have to look at that to assess whether or not what has been done here is proportionate.

The other point to draw out in terms of blanket bans is that, yes, blanket bans are very unlikely to pass a proportionality test, because there will be some circumstances when a court will decide that the blanket ban is disproportionate. That is why we have legal mechanisms in place for certain things where we think, "If this was to happen, it would be so bad and so awful that we need to have an absolute prohibition." That is why we have an absolute prohibition on cruel and degrading treatment. It is not a proportionality assessment.

Right now, everything we are dealing with here is to do with proportionality assessments, which means you cannot have blanket bans on any of them. If you want a blanket ban that says, "No rapists in female prisons" and if you want to ensure that, and that might say, "No biological males in female prisons"—

Robin Moira White: Michael, I am sorry to intervene, but we do have blanket bans for things like religion, who are entitled, for example, if it is a tenet of the religion, not to have a trans priest.

Dr Foran: Absolutely, but here we are dealing with services, associations and schools. There are no blanket bans. Everything is subject to a proportionality test.

Q46 **Rachel Maclean:** Yes, that is right. That is why I wanted to challenge Lord Falconer, because obviously the UK Government's argument was this would have a chilling effect. We have heard two diametrically opposite arguments just from two legal brains on this panel. We are expecting small services to then navigate through all of this and to be worried about where they are with the courts, and to rely on the courts, which are always sensible, it is claimed.

Dr Foran: I will be quick. The relevant point here is also, if you are dealing with concerns in relation to safeguarding, the point of law that relates to safeguarding is you have to deal with the exceptional case, because if the exceptional case was to happen, it would be so incredibly awful that we need to have a system in place that prevents that from ever happening. If we think that, for example, the rape of a female inmate in a prison is one of those categories, then you need a blanket ban. There is no other way to do it, and you cannot do that under the current legal framework.

Q47 **Rachel Maclean:** No, you cannot do that under the current legal framework. I want to bring in Naomi, please.

Naomi Cunningham: I just want to illustrate or draw out how the disagreements on this panel are illustrative of the chilling effect, especially for small organisations. One might hope that most rape crisis centres in the country would wish to be able to provide single-sex services for traumatised women. Many of them are not doing so. It may



be they are genuinely persuaded that there is no needs for such a thing, or it may be they are frightened of litigation. I suggest there is good reason to suspect the latter is what is going on in many cases.

Michael says a GRC will be relevant to the determination whether it is proportionate to exclude someone from a particular service. I part company on that, so we have yet another disagreement even between two lawyers who are mostly pretty aligned on this. I would say a gender recognition certificate, a certificate making a counterfactual declaration about your sex—which is what it is—has no bearing on anything, especially under the proposed regime in the Bill where such safeguards as there are in the Gender Recognition Act are removed.

In any event, they do not tell us about risk. It does not tell us about bodies, because there is no requirement for surgery. It does not tell us very much, and less under the Bill, about the reason for wanting a gender recognition certificate. It is just a secret certificate that nobody is allowed to ask you about or tell anyone about, which makes a counterfactual declaration about your sex. It is not relevant to the risk you present.

Something I want to come back on is, these debates do tend to get very hung up on risk, and fundamentally many of these questions are not about risk; they are about comfort and dignity and privacy.

Q48 Rachel Maclean: Which is why I opened my session by not talking about the boardroom and gender pay gap and panels, and we have not even got into all the other things, but you are absolutely right. It is not just about the risk, although that is vital.

Naomi Cunningham: It is in there. Fundamentally, it is unimaginable that anyone who has concerns about privacy and dignity is going to have their mind changed by a certificate.

Rachel Maclean: Chair, how are we doing for time?

Chair: We are not doing well for time. The panel indicated they would like to finish by 10 past, although that was not a hard stop. If you have any further questions, can they be snappy?

Rachel Maclean: Did you want to ask any questions, Chair?

Chair: No, I am done. Anum, did you want to ask a further question?

Q49 Rachel Maclean: If Anum would not mind, because she did have quite a long time earlier, may I ask a final question? We did talk about indirect and direct discrimination and the Haldane judgment. There is so much here, but perhaps I could bring it down to one thing. If Lady Haldane is right—this is what our Committee experts have suggested—there might be no way to establish any sex-segregated services at all because the test needed to be met to justify their establishment simply cannot be met. How do we demonstrate that a joint service would be less effective than a separate one if the separate ones include biological males and



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females? That is the thing that I am wrestling with, which I know you will not be able to answer in a minute, but perhaps if you could—

Lord Falconer of Thoroton: If you are saying that the effect of Lady Haldane's judgment is to completely negate all of the proportionality tests in the Equality Act, that is certainly wrong.

Rachel Maclean: I am just asking the question. I am not a lawyer.

Lord Falconer of Thoroton: What is more, Lady Haldane plainly did not intend that. If there was an appeal, that would certainly be made clear.

Robin Moira White: It does nothing to take away the provisions in the Equality Act that allow, if proportionality tests can be made, for there to be exclusion of trans people from a particular service.

Dr Foran: That is right, in the sense that the proportionality tests remain the same and the text broadly remains the same. If Haldane's judgment is correct, that means every reference to sex in the Equality Act—because Haldane does not differentiate within the Equality Act—means legal sex. That means you are not setting up separate services for biological women; you are setting up separate services for legal women, and so the exclusion rules are broadly speaking the same rules. Whether they are met is going to be slightly separate, but if Haldane is correct, there is going to be difficulty in answering the question of whether you can even set up one of these services.

Since we are bringing it up, if Haldane is correct and sex means legal sex, then another difficulty in terms of direct and indirect discrimination is that every single discrimination case that has been decided on the basis of direct discrimination or on the grounds of sexual orientation is wrong, every single one of them, because sexual orientation in the Act is defined by someone who is attracted to a member of the same sex, whatever that means, a member of the opposite sex, whatever that means, or either the same sex or the opposite sex.

Now, I am a gay man. I am not attracted to a legal category; I am attracted to a biological category that may be a subset of a legal category. What that means is if I get fired because of my sexual orientation and seek to sue for direct discrimination, the argument will be, "You do not meet the standard here of direct discrimination. You meet indirect discrimination standards because it is more likely to affect people who are attracted to one biological category." If that is correct, that would be a radical change to how we understand the law in this area.

Robin Moira White: I understand the point, but therefore what you have shown with an erudite and logical argument is that sex does not always mean the same thing section by section through the Act.

Dr Foran: That is just not how statutory interpretation works. There is a definition set out in the Act, and that applies across the entire Act.



Q50 **Rachel Maclean:** Thank you for that. Naomi, if I may ask you.

Naomi Cunningham: A similar point in relation to single-sex services. One of the conditions that makes it lawful to provide a single-sex service is that it is a service that is only needed by one sex. If sex means women plus men with gender recognition certificates declaring them to be women, there is no imaginable service that is only needed by that category, because it is not an actual category at all. Cervical smears are only needed by women, but suddenly that is not sanctioned by—

Chair: Cervical smears might be needed by transgender men.

Robin Moira White: Yes.

Naomi Cunningham: But they are—

Dr Foran: It depends. Let us say a transgender man has a gender recognition certificate. If the Act says they are legally male now, then yes, there will be certain men, legally men, who need cervical smears. It would also mean that person can now no longer sue for pregnancy discrimination, because the Act protects only women who become pregnant.

Robin Moira White: No—

Naomi Cunningham: Fundamentally, the provision that says you can provide this service for women only means you are providing it for women only, so you are not providing it for women who think they are men, even though they need it. You are providing it instead for women who know they are women and men who think they are women who do not need it. You are not providing it for the women who think they are men who do need it. Anyway, the permission to provide a service for one sex only becomes meaningless, because it is women plus something that is not women. There is no service which that category of people all need and nobody else.

Q51 **Rachel Maclean:** There are four of you, and this is so complicated to navigate and so different from all four of you in different and very technical ways. It is really hard to disagree with the statement that there will be a chilling effect on providers of single-sex services.

Naomi Cunningham: Yes, it is difficult.

Lord Falconer of Thoroton: Is that it? We cannot make life more generous for transgender people.

Rachel Maclean: Here with respect, Lord Falconer, we are talking about the legal ramifications.

Lord Falconer of Thoroton: Yes, and that is what I am talking about. I am talking about the legal ramifications.

Rachel Maclean: I am trying to tease out with this particular—



Lord Falconer of Thoroton: Yes, and I am trying—

Q52 **Rachel Maclean:** I agree, we should try and make life better for transgender people, but I also want to make life better for women who need single-sex spaces and need to be safe. I want to balance the two. The two have to happen at the same time. We do not raise up one group by trying to take away rights and protections from another. That is the separate policy question.

Robin Moira White: The Haldane judgment applies to the Equality Act as it is now.

Rachel Maclean: Yes, I know, but if you remember when I started my line of questioning, from my briefing that I have had, one of the reasons of the UK Government was to say it is about the operation of the Equality Act given the new cohort of people that will be coming into it.

Robin Moira White: No, but to justify using section 35, you have to have an adverse effect on the operation—

Q53 **Rachel Maclean:** Do you not think a chilling effect is an adverse effect?

Robin Moira White: Forgive me. What we have done is explore the implications of the Haldane judgment on the Equality Act as it is now.

Rachel Maclean: Yes, I understand.

Robin Moira White: Not with what difference the GRR might make to it. I have practised for 30 years in discrimination and I have watched judges take the Equality Act. I really enjoyed reading Michael's paper, a lot of which sets out some of the difficulties with the Equality Act as it is now. That is his point in some points. I disagree that the GRR makes a difference.

Dr Foran: Makes them worse.

Robin Moira White: What we tried to do in the Equality Act is express ways of balancing. There are other protected characteristics, but we are obviously focused on sex. What we have managed to demonstrate is that sex is not simple, not straightforward. What happens very quickly when we try cases on equal pay is there is one poorly argued judgment on the effect of a trans person on an equal pay claim. It is poorly argued because it was only argued by one side of the case in the EAT. There is effectively no useful case law in that area. There will be, ultimately. Ultimately, we will get to it, but actually what sex is, is complex, and that is what we have shown.

We can try and write good law, and people have tried to write good law. Partly, we have to trust the courts to look sensibly at the particular provision. There is a provision that says, as Michael is saying, a woman has a right to pregnancy rights. Is a pregnant trans man to be treated as a woman if they go to their employer and say they want pregnancy



rights? I would say yes, because they are in an unusual circumstance, but until that occurs in front of a tribunal, we will not know.

Lord Falconer of Thoroton: This is absolutely at the nub of it. The solution the law has adopted in relation to this is we will recognise transgender people in the gender that they choose, but if there is good reason for excluding them from a benefit that for example women and therefore trans women have, then the law will allow that, if there is a good reason for it. You are so right. You cannot be certain that will always come to the right answer, but that is the solution equality law has adopted.

Rachel Maclean: I think we all—

Lord Falconer of Thoroton: Can I just finish the answer, please? As far as the change in Scotland is concerned, that makes it easier to get a certificate, but those people who have to decide whether they exclude trans women or trans men from men's or women's spaces will know that. It will be difficult for some, but there are no easy answers to that. Should we abandon the basic approach that the law has taken, which is you are allowed into a women's space if you are a trans woman and similarly a man, and that does not depend on whether you have a GRC certificate, you are regarded as a trans woman by the law, even if you do not have a GRC certificate? I do not think we can abandon that because there is no alternative.

Q54 **Rachel Maclean:** Naomi wants to come in, but the answer to your question is, no, we should not abandon it. We should find a way through it. You are making two very extreme things—

Lord Falconer of Thoroton: No, I am not.

Rachel Maclean: I am not advocating either of them. Naomi.

Naomi Cunningham: Lord Falconer seemed to be saying, correct me if I am wrong, that there was already a right for men who identify as women to access women-only spaces even if they do not have a gender recognition certificate.

Lord Falconer of Thoroton: You can be a victim of gender reassignment discrimination in a whole variety of ways. You need a GRC to get into women's spaces—

Naomi Cunningham: With exclusion from a women-only space—this is a really important point—gender reassignment is a protected characteristic. You are protected from discrimination on grounds of gender reassignment, but if you are a man who identifies as female and you do not have a gender recognition certificate, you are legally male as well as literally male. Therefore, your exclusion from a women-only space is not a matter of gender reassignment discrimination; it is a matter of sex discrimination.



Lord Falconer of Thoroton: You are allowed to do that.

Naomi Cunningham: You are allowed to do that.

Lord Falconer of Thoroton: Exactly. You are always dealing with the balance between on the one hand, the principle—

Q55 **Chair:** We are going to have to wrap this up very shortly. Michael, did you want to make a final comment?

Dr Foran: The only point I would make is in that context there, the person is being excluded on the grounds of their legal and biological sex. If somebody has a gender recognition certificate, they can no longer bring a claim of sex discrimination, because they are legally of the sex of the service. They can bring a claim of gender reassignment discrimination. That means services will be subject to a proportionality test.

Naomi argues persuasively, although we disagree, that the fact you can set up a single-sex space means there will always be a justification for exclusion. That might be true; it might not be true. What we know for certain is that a gender recognition certificate gets you an automatic right of access to associations and schools, because there are no provisions within the Equality Act that permit associations or schools to discriminate—

Rachel Maclean: Do you mean things like golf clubs or women's book groups?

Dr Foran: Yes, a women-only reading group or a book group, but there could also be a group that is set aside and privately run by women who are victims of assault.

Rachel Maclean: That is a slightly separate thing, is it not?

Dr Foran: The point would be that might not be a service. That could be an association. The service is open to the public. An association could be a private group of women, with numbers over 25, where they regulate their membership. It could be a support group that regulates their membership for people who have been the victims of assault. It is true, right now someone with a gender recognition certificate, in my view, will have a right of access to those associations, and the Gender Recognition Reform (Scotland) Bill gives more people access to those certificates.

With schools, there is no chance right now in any practical sense that there will be someone who is a GRC holder currently going through school, but if you lower that age to 16 that absolutely will happen and they will have a right of access. That is how the law will work on that area.

Rachel Maclean: I understand. Thank you.



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Chair: Thank you.