



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# **Culture, Tourism, Europe and External Affairs Committee**

**Thursday 20 December 2018**

**Session 5**



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Pàrlamaid na h-Alba

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**CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE**

**34<sup>th</sup> Meeting 2018, Session 5**

**CONVENER**

\*Joan McAlpine (South Scotland) (SNP)

**DEPUTY CONVENER**

\*Claire Baker (Mid Scotland and Fife) (Lab)

**COMMITTEE MEMBERS**

\*Annabelle Ewing (Cowdenbeath) (SNP)

\*Kenneth Gibson (Cunninghame North) (SNP)

\*Jamie Greene (West Scotland) (Con)

Ross Greer (West Scotland) (Green)

\*Stuart McMillan (Greenock and Inverclyde) (SNP)

\*Tavish Scott (Shetland Islands) (LD)

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

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Patrick Harvie (Glasgow) (Green) (Committee Substitute)

Fiona Hyslop (Cabinet Secretary for Culture, Tourism and External Affairs)

Emma Luton (Scottish Government)

Michael Russell (Cabinet Secretary for Government Business and Constitutional Relations)

Amy Wilson (National Records of Scotland)

**CLERK TO THE COMMITTEE**

Stephen Herbert

**LOCATION**

The David Livingstone Room (CR6)



# Scottish Parliament

## Culture, Tourism, Europe and External Affairs Committee

*Thursday 20 December 2018*

*[The Convener opened the meeting at 09:02]*

### Article 50 Negotiations (Withdrawal Agreement)

**The Convener (Joan McAlpine):** Good morning, and welcome to the 34th meeting in 2018 of the Culture, Tourism, Europe and External Affairs Committee. I remind members and the public to switch off their mobile phones. Any members who are using electronic devices to access committee papers should ensure that they are turned to silent, please.

The first item on the agenda is an evidence session on the article 50 withdrawal negotiations. The committee will take evidence this morning from the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell, and Scottish Government officials. Ellen Leaver is head of negotiation strategy and delivery, and Alan Johnston is deputy director, EU exit readiness. I thank you all for coming to the meeting and invite the cabinet secretary to make a short opening statement.

**The Cabinet Secretary for Government Business and Constitutional Relations (Michael Russell):** Thank you very much indeed. I give my apologies in advance: I am not only stuffed with the cold but, as many of you will know, I was in London yesterday, and I am sort of deaf in one ear at the moment as a result of that experience. If I do not hear you, I am sure that you will speak loudly.

I thank the committee for the opportunity to give evidence today. This is my third Christmas as the member of the Government with responsibility for Brexit, and it seems very strange that we are three years in, but things are still so chaotic and difficult to understand—I suppose one might use the word “nebulous” about them. I have come before the committee during various stages of the negotiations, and the attention has turned very much to Westminster in recent weeks. It is very sobering to think that we are now fewer than 100 days from potentially leaving the European Union and we still have no more clarity about what awaits us. We have a false dichotomy in the choice that is being offered by the Prime Minister between her deal, which would be disastrous for Scotland, and a no-deal option, which would also

be disastrous for Scotland. We have rejected that false dichotomy, and I hope that we can talk today about the other options that exist and why we have come to such a pass.

There has been turmoil within the Conservative Party and turmoil remains at Westminster. A sensible Government would prepare for a no-deal scenario, and that is what we have done as a sensible Government, but very much with the hope that we would not have to implement those plans. In addition to the joint ministerial committee plenary meeting in Downing Street yesterday that I attended with the First Minister, I have had meetings with other United Kingdom Government ministers about no-deal issues.

Our preferred outcome from the situation at the moment is a referendum to give people the chance not to have a second thought, but to pass judgment on the chaos of the past two and a half years and to think very carefully about where they see their future lying. That second referendum would offer people the opportunity to make that choice, and there is a clear route to that, which I am happy to talk about.

We have continued to publish information. Most recently, we published our assessment of the Prime Minister’s so-called deal. Committee members will have a copy of that, and I hope that it will inform your discussion.

Even at this very late hour, there is still time to galvanise the political will and to say that what has taken place over the past two years has been a massive mistake that has been undertaken with complete incompetence by a Government that is out of time and out of date. The opportunity exists to do something better, and we would like to see that being remaining within the EU.

**The Convener:** Thank you very much, cabinet secretary.

I will start the discussion by going back to the withdrawal agreement and the political declaration. Obviously, if the withdrawal agreement was ratified, it would be a legally binding document between the EU and the UK. However, the political declaration does not have that status. Can you say a bit more about your view of the political declaration’s content and what it might mean for Scotland in terms of the future UK-EU relationship?

**Michael Russell:** As you know, convener, the political declaration is very vague and aspirational. There are many parts of it in which, in essence, things are sought to happen without there being any indication whether they could happen. Anyone who reads the political declaration will be very much struck by the fact that there is no clarity about what will take place next. That is a crucial issue.

Yesterday, the Prime Minister wished to tell the devolved Administrations that we should listen to the voice of business. That is rather curious, given, for example, the Confederation of British Industry's view of the migration white paper that was published yesterday—we will no doubt want to come on to that. However, business has an expectation and a need for certainty, and the Prime Minister's agreement does not provide certainty in any sense. Indeed, I thought that that was very clear in some of the debate that took place in the House of Commons yesterday.

There is no certainty out of what has happened. There is a legally binding withdrawal agreement that gets us to the starting gate of saying "What will the future relationship be?", but what that future relationship will be will be the subject of the most incredible, complex and detailed negotiations. Moreover, once again, the timescale for those negotiations has been completely misstated by the UK Government. The Prime Minister is clinging to the expectation that the negotiations will be concluded by the end of December 2020. That is utterly impossible. Monsieur Barnier, for example, has indicated that there would be 10 strands of negotiation. What we have been through is meant to be the easy part. There is therefore no certainty in that regard, and there is no certainty of an outcome.

One of the worrying things about that is that the no-deal preparations, which we are—regrettably—deeply engaged with at the moment and which I updated members on in the chamber on Tuesday, will have to be kept on ice for however long the discussions on a future relationship take, because they could be needed at any time. We could find ourselves at the stage of having no agreement. If anybody is backing the Prime Minister's deal simply out of what is, in essence, the scunner factor—I fully understand that—and the feeling that we have just had enough of this and had better just do it and get on with it, they are not even going to have the satisfaction of saying, "Well, at least that's over," because, in fact, it is just about to start.

**The Convener:** What role do you see the Scottish Government having in the negotiations about the future relationship?

**Michael Russell:** I am sure that you will realise that my experience over the past two and half years has made me somewhat cynical; I did not used to be like this, but I have sort of got there. There are constant assertions by the UK Government that things are going to change. The word "intensification" has been used about every second month for the past two and a half years. We are hearing again that, if the Prime Minister's deal gets through, there will be a reset of the negotiations between us and the UK in which our

involvement will be integral, because much of the negotiations will deal with devolved areas of competence. I do not doubt the word of many people who say that but, over the past two and a half years, I have been pretty astonished by the lack of knowledge about, and understanding of, devolution in most UK Government departments.

Although there might be a commitment from one or two people to do things better, I think that it will ground pretty quickly on that lack of knowledge and the inability to understand a key fact of devolution, which I keep banging on about: in devolution, there is no hierarchy of Governments; there is a hierarchy of Parliaments. Essentially, devolution is a set of compromises built around the view of the Westminster Parliament of itself that it is sovereign. I will not go into my view on that, but that is what devolution is; it is not about one Government being able to second-guess or gainsay another Government. What we saw with the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill was an attempt to interpret devolution in that way. That did not succeed, because the Supreme Court would not allow devolution to be interpreted in that way.

Theoretically, there would be a need to do things better, but it would be tied up with the process of the intergovernmental review that is under way—although, as far as I can see, it is not making any progress. One would have hoped that the fact that the JMC is committed to reviewing intergovernmental relations in the light of the experience of devolution would have led to something better. However, I am not hopeful.

**The Convener:** I want to move on to the possibility of a differentiated deal for Northern Ireland. You have indicated in the past that that could put Scotland at an economic disadvantage. Does the Scottish Government plan to do an economic assessment or any modelling of that scenario?

**Michael Russell:** We have done some partial modelling in the sense that the material that we have produced in the various iterations of "Scotland's Place in Europe" indicates what the effect of a differentiated deal would be on us. I think that there is scope to do more on the Northern Ireland situation. Officials will discuss that—indeed, they are discussing it.

There is an extraordinary irony in the present situation. The Democratic Unionist Party, speaking for the people of Northern Ireland—which, of course, it does not do completely—is desperate to oppose the deal, whereas the bulk of political opinion in Northern Ireland is in favour of accepting the deal, on the ground that it gives Northern Ireland a very special status and essentially keeps it within the single market. The opposite remains true in Scotland. The

Conservatives are desperately keen to have the deal but, in reality, the deal as it applies to Scotland is a great deal poorer and would be immensely disadvantageous.

**The Convener:** Thank you very much. We will move on to questions from the deputy convener, Claire Baker.

**Claire Baker (Mid Scotland and Fife) (Lab):** The cabinet secretary described the present situation as a “false dichotomy”. Last week, we had the statement on the ruling by the European Court of Justice on the UK Government’s ability to revoke the article 50 process. In response to questions about that in the chamber, you said that there was no written constitution in the UK that would make it clear what the stages for revoking the article 50 process would be. In the discussions that the committee had when it visited Brussels at the start of the month, it was made clear that, if the UK Government were to request to revoke the article 50 process, it would need to have a substantive basis for doing so—in other words, it could not do so as a tactic.

Can you say more about how that process would happen and, if it were to happen, what the stages after that would be? The UK is still divided over the issue, and there is a question about whether there would be any greater certainty if revocation were to go ahead and where that would lead us.

**Michael Russell:** It is undoubtedly the case that the divisions that exist are great and profound, but I do not accept the argument that we should simply accept that those divisions exist, paper over them with the Prime Minister’s deal, and pretend that everything is fine. If we accept that the result in 2016 was bought on a false prospectus, that—as now seems likely—there was a great deal of chicanery involved and that the actions of the UK Government since then have been mind-bogglingly inept, I do not think that just saying “We’ll put all that behind us” will produce any sort of unity. Therefore, I am not convinced by the Prime Minister’s argument for unity.

I do not think that there is any template for what constitutional due process would be. There is likely to be a series of actions that could be taken that would be seen by the EU27 to be constitutional due process. Given the way in which the House of Commons has operated—we should remember that it was a resolution of the House of Commons that invoked article 50; the Prime Minister tried to stop that happening, but she lost, legally—I think that a resolution of the House of Commons would be an effective way of revoking the article 50 process.

It seems to me that the approach would be even more effective if there were to be a referendum on

that basis. It is likely that the article 50 process could be suspended and, of course, the potential for an extension of up to six months exists in the Treaty on European Union. If that were to be requested, I think that it is likely that it would be granted on the basis of an election or a referendum being held. That route is reasonably clear. However, it would be wrong to look for something that is absolutely the right way to do this with the view that there are wrong ways to do it. The House of Commons would have a strong role to play, but we would want to see the democratic will being expressed.

09:15

When I came into my post in August 2016, I was struck early on by the fact that the EU was very focused on constitutional due process as far as Scotland’s position was concerned. I had produced a little booklet on the constitution as it operated in Scotland and the UK. That was because it was difficult for people in the EU to understand that, even if there is no written constitution, there is still an understanding of how the constitution operates and that it is still possible to seek legal judgment about aspects of it, even though we do not have a constitutional court. That was clear from the Supreme Court judgment.

Since last week, I have developed my answer to the point that I now think that there is no single right track. However, if I were to think about what the best track might be, it would be a resolution in the House of Commons; I do not think that it could be just a letter from the Prime Minister. Double locking the resolution with a referendum result might be the right thing to do.

**Claire Baker:** Committee members went over to Brussels for a couple of days. That was interesting; it gave us a better understanding of the EU27’s views on the situation that we are in. Are those involved in the political discussion in Scotland and the UK aware enough of those views?

To go back to the convener’s question on Northern Ireland, the EU27 made it quite clear that Northern Ireland’s set of circumstances was quite unique. The deal was to uphold the Good Friday agreement, and the EU27 was largely opposed to any other regional variations. We discussed what it would mean for the 27 if they were to start to introduce different arrangements in different parts of a member state.

**Michael Russell:** At the start of the process, Monsieur Barnier was clear that, were the UK to come to the negotiating table with a set of arrangements that made differentiation—for example, for Wales or Scotland—what the UK wished to achieve, that would become part of the

process. It was the UK Government that chose not to do that. It is not the place of the EU to do that; it is clear that that would be impossible. The issue goes back to the way in which the UK Government approached the negotiations from the very beginning, which was amateurish and thoughtless. We might also remember the Prime Minister's words to the effect that, as we had entered the EU as one UK, we should leave in the same way. I have regularly described that as constitutional illiteracy. That simply is not the case, because the constitution has changed since the UK joined the EU. There is a different constitution, and that should be recognised. Devolution has taken place since then. The UK Government should have gone into the negotiations recognising the reality of devolution.

I think that it was Ryan Heath who wrote in a very important contribution to the debate last weekend that we could list the things that the Prime Minister has failed to do which have created the present extraordinary mess. We would probably start by saying that, at a very early stage, she should have taken Jeremy Corbyn, the leader of the Liberal Democrats, Nicola Sturgeon and—at that stage—Carwyn Jones, Arlene Foster and Martin McGuinness into a room and asked them, "How can we, together, get this to work?" She could have said, for example, "This is the imperative that we think that we have, but we recognise that Scotland and Northern Ireland have voted against it." At no time did that take place and at no time was there anything other than the Prime Minister saying, "We do it my way, and nobody else matters." That is at the heart and the root of the problem that we presently have. I do not know how anybody can talk about bringing people together when their actions at the very beginning forced people apart.

**Annabelle Ewing (Cowdenbeath) (SNP):** It seems to me that the Prime Minister is engaged in an extraordinary act of brinkmanship. I suppose that her tactic must be to hope that, with fears of no deal, she will get some change of mind in the House of Commons. However, it seems that the House of Commons is hostile to the deal, so in order for her to sway some of her own back benchers she would need to do something different. What could the EU do differently? It has already made it clear that it cannot change the withdrawal agreement, which is a legal document, and the political declaration is linked thereto, so there is limited room for manoeuvre, albeit not in quite the same way as the withdrawal agreement. What do you think that she is holding out to her back benchers to get that through? It is not just a question of political semantics; it is a question of whether we then go into a no-deal situation.

**Michael Russell:** I have no idea. I did not get any indication yesterday of what that was. There

seems to be confidence that there is something there that can be done, but we were given no indication of what that could be.

After my statement on Tuesday, Jamie Greene asked me a question about the EU saying that this is the only deal. It is important to reiterate that this is the only deal because of the red lines that were set in the negotiating process. It is not, in the platonic concept, the best of all possible deals. It is a deal that is dictated by the inputs, and the inputs were the red lines, particularly on the jurisdiction of the ECJ and the end of freedom of movement. It is beyond bizarre that anyone can claim proudly that they have ended freedom of movement; my mind is blown by that concept.

That is what has driven this—the red lines. If you have those red lines, you end up with this deal. That is where we are, and I think that the EU is probably quite proud of itself for being able to create a coherent deal around an incoherent set of red lines. There is a slide from the Barnier task force, which you are familiar with, that shows in a step diagram the possible outcomes that there are depending on what red lines are set. That has been clear from the very beginning. That slide must be 18 months old, so it has been clear from the beginning that this would be the outcome if we started there, and that is what we have ended up with.

The EU will not change that, because it is dictated by the red lines. If you take away the red lines, by taking away the four freedoms and saying, "We will accept freedom of movement"—in Scottish terms we should say that, because we need freedom of movement—you will get a different deal and a different outcome. Continued membership of the single market through the European Economic Area becomes an option in those circumstances, as we have always said, because you observe the four freedoms. If you accept the jurisdiction of the ECJ, something else becomes possible, and eventually you reach a stage at which membership is the right solution. However, because of the red lines, the Prime Minister is where she is, and I have no idea what rabbit she believes she has to pull out of a hat. I think that she may find that the rabbit has chewed its way through the hat and disappeared, but who knows?

**Annabelle Ewing:** We shall see. If we assume that the vote does indeed take place on 14 January, given that the Prime Minister seems to pull votes when she wants to, and the House of Commons does not support the deal, presumably there would be sufficient time—going back to the point that Claire Baker raised—either to seek an extension to article 50 or unilaterally to revoke article 50 per the recent court judgment. We are coming up against the deadline of 29 March, so



that would avoid the worst of outcomes in terms of no deal.

**Michael Russell:** Time is very much of the essence. The Prime Minister says, “We need to get on with it,” but she is the person who withdrew the vote. If she had allowed the vote to take place and had been defeated, we would be into an understood process, which would give the Government 21 days to come back and then seven days to make a proposal. She decided not to do that. If we get to the week beginning 14 January and that takes place, she then has a seven-day period in which to bring back something, and that something is clear. The First Minister made that point forcibly yesterday at the JMC.

Something could be done today; we could tell the EU27, “We want to take advantage of what is in the treaty, which is an extension of the article 50 process, and here is why we want it.” I do not think that we would get it by saying, “I’ve been incompetent in negotiation,” but we would get it on the basis of significant change. Businesses would then feel that progress was being made and, politically, we would be on a route to getting a solution. However, until that vote takes place, that cannot happen, and the Prime Minister is the person who delayed the vote.

**Annabelle Ewing:** Yes, it is all very gloomy. I have questions on a different issue, convener, but perhaps we can let the discussion flow a bit first.

**Tavish Scott (Shetland Islands) (LD):** This is where we depart from commentary and move to some questions. I take your point, cabinet secretary, about bringing all the leaders together, but that would have split the Tory party at the time. That may be a desirable objective from some of our perspectives, but I can see why such a meeting never happened.

Amber Rudd appeared on “Peston” last night and, for the first time, we had a cabinet secretary basically saying that she supported a people’s vote or a second referendum. I thought that that was the most important development yesterday—not what went on in the Commons, but rather the fact that a cabinet secretary is now out there saying that. What are your thoughts on that?

My other point may be rather more important in the longer term. Claire Baker mentioned our visit to Brussels. Scotland house in Brussels does a great job but will we not need to expand that operation, given what is going to happen? Mike Neilson, Ian Campbell and their team are excellent—they have nothing but my admiration—but they are understaffed, given what is likely to happen. Is that not the case?

**Michael Russell:** There are strong arguments for increasing and continuing to increase our

representation not just in Brussels but elsewhere, given the circumstances. Of course, we are constrained financially and we have to recognise that but I agree with you—I think that the whole team does a fantastic job. They are our eyes and ears in Brussels but they are also our ambassadors and they are doing a fantastic job in showing people what Scotland’s view is and how we have taken things forward.

We now have a presence in Paris and in Berlin, and we have a very effective presence in London and in Dublin. We will need to do more, but within the constraints that we have.

Amber Rudd’s contribution is significant but words have to be followed by actions. Who knows how many factions the UK cabinet is in? It is probably split between those who think that they might as well continue to support the Prime Minister on the grounds that they owe their careers to her, those who recognise that the people have to be heard at some stage, and those who are determined to have a no-deal Brexit, including that ludicrous concept of a managed no deal.

If anyone has any doubt about the impossibility of a managed no deal, they should read the document that the European Commission issued yesterday and they will be in no doubt at all. The Commission has thrown up its hands in horror, essentially, and said, “We will do what we need to do to protect ourselves.” That is not a managed no deal; that is saying, “We are not going to be derailed as a result of what is taking place.”

If Amber Rudd were to be followed today by others saying, “Let’s have a people’s vote,” I would be encouraged.

**Tavish Scott:** You mentioned the Commission paper that was published yesterday and gives the Commission’s perspective on no deal. Is Scotland house fully engaged with that?

**Michael Russell:** Yes, it is. It is providing information and making sure that people are aware of our preparations and, of course, we are in detailed discussion with the UK Government, the Welsh Government and the Northern Irish civil service, all of whom I met yesterday.

**Tavish Scott:** I hope that none of this happens—

**Michael Russell:** So do I.

**Tavish Scott:** However, the UK Government has written to 145,000 businesses across the UK with advice; I assume that that includes a lot of businesses in Scotland. Was the Scottish Government involved in that?

**Michael Russell:** No. I made that point to the Prime Minister directly yesterday. We did not see

the letter or the information pack before it was sent.

We launched an online toolkit for businesses in September or October, I think, and it has been very well received. It allows people to work out what they are going to do. If you have not seen it, I would be happy to circulate information on it. It has been helpful.

However, there have been communications that have not been checked with us; we have issues with that. Yesterday, the Welsh Government raised the point that the Department of Health and Social Care has been saying things in Wales and asking people to contact a Whitehall number, whereas in actual fact, there is devolved health administration in Wales. We have to guard against such things.

To be fair—and I want to be fair—where difficulties have arisen, we have raised them, and an attempt has been made to solve them. The situation on no deal has improved over the past few weeks and months, but it needs to continue to improve because this is desperately serious stuff.

09:30

**Alexander Stewart (Mid Scotland and Fife) (Con):** You have identified—and we are aware of it—that many businesses in commerce and industry, and many sectors, are putting in place contingency plans in case of a no-deal scenario. You also touched on the Scottish Government's toolkit. What other guidance is there and will the Scottish Government publish it so that we can see what preparations it is making?

**Michael Russell:** We gave a comprehensive outline of that in the chamber on Tuesday. I undertook to write to members, and I will make sure that all members get those further details, including financial details.

What we have done for businesses, we have done publicly. The material in the toolkit has been provided on websites and in further information. The financial aid that is available to businesses has been well publicised. All that material is out there.

I am not going to publish more documents about no deal. I do not want there to be no deal. If there is, I want the focus to be on ensuring that we can mitigate as much as possible. That is where we are and, to be honest, that is where the UK Government is.

There needs to be a co-ordination of message—I am addressing that with the UK Government—so that, whatever the message is, it gets through.

I made this point yesterday and I make it again today. In preparation for no deal, one of the key

issues for Scotland is that we are at the end of the supply chain, so remote and rural parts of Scotland are particularly at risk. The effect of no deal would be particularly damaging to those who are most vulnerable in society in terms of their rurality, geography and demography. We have to be ready for that, and we are feeding that into the system.

We will continue to report to members on preparations for no deal. I also said on Tuesday that I am happy to commit to briefing party leaders and spokespeople on that. I am, of course, happy to brief committee conveners and committees as we go on.

I am very keen to get on with things. If there is no deal, the task will be enormous. The civil service is reallocating time and space so we will be absolutely transparent, but I am not going to spend a lot of time polishing documents.

**Alexander Stewart:** As you have already indicated, ensuring that contingency plans are in place, should they be needed, will be a mammoth task. I firmly believe that a deal will happen, but contingency plans have to be in place because of the rurality of Scotland, as you mentioned; more vulnerable individuals will be at risk and support mechanisms will be needed to protect them during the process.

The UK has issued about 105 technical notices. Will the numbers be similar here in Scotland?

**Michael Russell:** At the very last moment, we were able to inject into a number of technical notices information that was of particular relevance to Scotland, or to indicate where the information was not relevant to Scotland, or to indicate where Scots law differed or the information differed. I would not therefore see the technical notices as specifically UK Government notices. We had no control over their origins or editorialising, but when we were able to, we made sure that they were relevant to Scotland.

There have been occasions on which information has been provided to organisations by the UK that we believe we should have known about or could have done better, but we are not in a war of information on this. Public information campaigns, if they happen, will have to be nested. I have made that very clear. There will need to be a distinctive and relevant Scottish campaign, and work is well under way on that. There will be a distinct and clear Scottish web presence and information will be made available to us, but it will be nested within the message from the UK Government so that there is no contradiction. There will be a complementary approach—I have had that conversation at a high level—and we will continue to take that approach.

However, on this occasion, I do not want to get into using effort to make distinctions when we have to just get on and do things. That is a two-way street and the other side of it is that the UK Government has to recognise that we need to do things—again, there is no hierarchy of Governments—in our way with the people for whom we work. So far, that is being recognised, and it will need to continue to be recognised.

**Jamie Greene (West Scotland) (Con):** Good morning, Mr Russell—I hope you get better soon. The committee has spent a lot of time considering the status quo in the context of the withdrawal agreement. This is a genuine question to you, Mr Russell. Am I right in understanding that you have less of a problem with the withdrawal agreement—which we have been told sets out the parameters for exit of the EU, guarantees EU citizens' rights, offers short-term transition, with continuity of the status quo for business, and protects peace on the island of Ireland—but you are less happy with the terms of the political declaration? Do you foresee a circumstance in which, if the direction of travel in the political declaration changed, you could support the basic terms of the withdrawal agreement itself, which would allow us to move into the transition period and thus avoid the cliff edge that people are talking about?

**Michael Russell:** That is an interesting question, which I will treat seriously. It is fair to say that there are things in the withdrawal agreement that would have to be in a legal text of 500-and-something pages to which we did not take any great exception, and there are things that we thought were useful. However, the fact that the four freedoms will not continue and the migration issues that that will cause is a particular worry for us, because that just does not work for Scotland. A range of other areas also worry us. There cannot be a renegotiation of the withdrawal agreement, given the red lines, and we cannot support it as it is drafted—there would have to be changes to it to make it acceptable to us.

However, I will widen that out, because you raise a particularly interesting point. You asked whether there is a way that we can go from here to get to a different state in which we have a serious conversation about what happens next and avoid the cliff edge. There is a way of doing that, but it is not by trying to get the withdrawal agreement and political declaration voted on, saying, "That's what we have, now let's renegotiate or change it"—that is the Michael Gove position. What you need to say is, "This does not work. We need something different." That is the product of the red lines. You can do that only if you invoke the suspension of article 50.

**Jamie Greene:** It would be very easy for me to sit here and say, "There's a deal on the table, why

won't you back it?" That would be a pointless question, and I think that I would know the answer to it. What I am trying to tease out, given your involvement in the process, is practical steps to take next—taking some of the politics out of it.

The withdrawal agreement as it stands offers very little room for manoeuvre in terms of change. This committee and others have been told explicitly by the EU27 that the agreement is very much what is on offer and that any extension to article 50 would be very short term. What do you think would be a practical way forward through all this? There is a real risk that we could leave on 29 March with no deal. I do not think that there is a huge appetite for that, but, on a technical level, it could happen. If everyone is so keen to avoid that—knowing what we know—how could we avoid it?

**Michael Russell:** The route is very clear. I am concerned about leaving without a deal, which you talked about. I, like Mr Stewart, hope against it—I hope that we get some progress. The progress that we need to see is this. First, the Prime Minister accepts that she needs to have at the very least an extension of article 50 and, therefore, asks for it. Secondly, there is either an election or a referendum. I think that a referendum is more likely to pass the House of Commons than an election. I do not want to second guess it, but that is my expectation. The referendum process is then completed within the period of the suspension, which can be only six months at present. If it were to be started in January, it would have to be done in June. That fits in with the timetable for the European elections—just.

I would have thought that that is what needs to be done. That is the point that the First Minister put to the Prime Minister. It is the position in which we find ourselves now and it reflects the reality of the situation. Are there other options? Your colleague Donald Cameron has indicated his support for the Norway-plus model, which is helpful. I do not reject the Norway-plus model, but at present it is not a short-term solution; it would require a considerable period of time.

If the Norway-plus model were to be followed, I think that it would require the Prime Minister to revoke article 50 and say to the EU that we want to move forward on that basis, which would be an EEA and European Free Trade Association-type arrangement. Determining whether we would be a member of EFTA—when the Norwegians have, perhaps understandably, indicated some nervousness about having the UK within that tent—or a special third pillar of EFTA, which has been discussed, would take considerable time.

Given the seriousness of the present situation and the considerable costs and worry involved, the

best way to do this is to seek an extension of article 50 and have a referendum. That is my view.

**Jamie Greene:** Okay. You have previously expressed the Scottish Government's official position, which I understood to be, first, not to leave the EU at all, and if we were going to leave the EU it would be to remain a member of the single market and customs union. At no point was the option of the referendum mentioned. However, in your opening statement you said that your first preference is for a referendum. Therefore, can I confirm that that is your official position, which has changed from what you previously expressed? If there is to be another referendum, what should the question be?

**Michael Russell:** Okay. I am tempted to quote Keynes; I am sure that members are aware of my fondness for a quote.

"When the facts change, I change my mind. What do you do, sir?"

The reality is that the facts have changed in recent weeks. We now have something on the table. Our preference all along has been not to get to the stage of having an appallingly bad deal or no deal as the choice. That was the Prime Minister's doing, not ours. In the circumstances of today, faced with what we are faced with, we believe that the right next move is the revocation or suspension of article 50 and a referendum. That is where we are, today—that is what we are arguing for in the circumstances.

**Jamie Greene:** What are we asking people?

**Michael Russell:** Let me finish. I have taken the issue of EFTA and the EEA, and the issue of the single market and customs union, through endless discussions with the UK Government. We put that compromise on the table in December 2016. If only the Prime Minister had taken it, we would not be in this mess.

**Jamie Greene:** You have not answered my question. What is the referendum on? What are we asking people?

**Michael Russell:** I am sorry. The question in the referendum has to include remain and we would have to discuss what remain is set against. Given that the only thing that exists to set against it is the Prime Minister's deal, I suppose that the likely outcome of a discussion in the House of Commons about the question would be the options of the Prime Minister's deal or remain. It is inconceivable that we could have a referendum without remain as an option.

**Jamie Greene:** So, it would be a rerun of the last referendum.

**Michael Russell:** No, it would not be a rerun because there was no specified leave option last

time. If you remember, the option last time was very nebulous, if I may use that term again. I am happy to share with you a leaflet that I have somewhere from the leave campaign, which is about all the powers that this Parliament would gain if people voted to leave. That campaign was run very strongly in Scotland, but we have gained none of the powers; it was run on a false prospectus. We would have to have a remain option, and we would probably have to have the fruits of the Prime Minister's work over two and a half years, such as they are.

**Stuart McMillan (Greenock and Inverclyde) (SNP):** Good morning, cabinet secretary. You were at the JMC meeting yesterday. Did anything positive come from it?

**Michael Russell:** I seem to remember that we wished each other a happy Christmas. I am not sure that I can think of anything else positive that came out of it.

The communiqué was clear. The meeting discussed the withdrawal agreement and the current state of play. It discussed the no-deal scenario and, inter alia, the immigration white paper, which had been issued without any indication of when it was going to come out.

It is interesting to note that, at the last JMC meeting before Christmas last year, I pressed Brandon Lewis—who was then the immigration minister; he is now the chair of the Conservative Party—on when the white paper would come out. He would not say, but he said that it could come out before Christmas. He meant last Christmas, so this has been going on for ever.

We had no indication until late on Tuesday evening that the white paper was going to come out on Wednesday. That came into the discussion and we also discussed the intergovernmental review, such as it is. Points were made on both sides of the table.

I will be fair about one thing. I pointed out that there were significant difficulties in a couple of areas in terms of liaison on no deal, and there was a very quick resolution that involved ministers and officials because they recognised how important it was to resolve that. I therefore think that, on the workaday level of liaison on no deal, there was something positive; in terms of the mega picture, there was not.

09:45

**Stuart McMillan:** You mentioned discussing the immigration white paper yesterday. You also said in your opening statement that the white paper would not be positive for Scotland. Can you elaborate on that, please?

**Michael Russell:** I hope that I put it more strongly than that. To say that it would not be positive for Scotland is equivalent to that famous line: "How did you enjoy the play, Mrs Lincoln?" This is an appalling set of circumstances. The white paper estimates an 85 per cent reduction in the number of European Economic Area nationals in the UK. I will provide the committee with our published calculations, which I think estimated the effect on our gross domestic product of a 50 per cent drop, which would be catastrophic. The effect of an 85 per cent reduction would be impossible to imagine, but it would throw the economy into complete chaos.

We can consider the immigration white paper on a number of levels. At the practical, workaday level of the economy what it proposes is impossible. We are not the only ones saying that. The Prime Minister keeps saying that we must listen to business and listen to industry. Well, Tracy Black, director of CBI Scotland, said that the UK Government

"tunes out from the economic damage of draconian blocks on access to vital overseas workers."

The Scottish Tourism Alliance states that there will be "potentially devastating effects". NFU Scotland said that the

"evidence of our sectors has not been heeded."

The policy chairman of the Federation of Small Businesses said:

"These proposals will make it nigh impossible for the vast majority of Scottish firms to access any non-UK labour and the skills they need to grow and sustain their operations."

The Institute of Directors stated that

"it still seems that the government's immigration policy is being driven by the unattainable, distracting and economically illogical net migration target."

Universities Scotland has also commented. In this regard, I declare an interest, as I have an interest in the university sector. It needs to be remembered that Universities Scotland stated:

"We want to be part of a society that is open, richer culturally and financially. We need to be serious about attracting talent to our nation. It's hard to see how this can be achieved with today's white paper."

I have never seen such unanimity of condemnation and that is about the basic economics.

The problem goes further than that, however, because what the white paper proposes is morally wrong. This is a country that should be open, inviting and welcoming. This is a country enriched by migration, both financially and culturally. Many of us take the white paper's proposals as a personal affront in terms of how the world will see us, because we are not like that. We are not

involved in dog-whistle politics. We hate and reject that type of approach. The white paper should make those of us who read it angry about what we have witnessed and determined not to have it happen.

**Stuart McMillan:** On the back of those comments, and given the discussions that you will have in Scotland with the organisations that you mentioned and others, I assume that you would encourage as many people and organisations as possible to make further representations to the UK Government to get their points over to it so that it can change the white paper in the future.

**Michael Russell:** I absolutely encourage them to do so, although I do not think that they need much encouragement, because their economic wellbeing is on the line. However, I am absolutely certain that they will do as you described, as will we. Of course, we are doing so with an alternative in mind.

Clearly, independence is the best alternative, but we have long argued for a devolved approach to migration. I remember having conversations about it with David Davis when he was in office and pointing out to him the great advantage of devolving migration powers, because he could then set whatever targets he wanted in the rest of the UK and we could meet our needs by ensuring that we had the best approach to migration. The devolved approach exists in the Canadian provinces and in parts of Australia. It is not difficult to manage and, given the circumstances, its time has come. The bodies that I mentioned are moving towards it. At the CBI dinner this year, it was interesting that people's objection to such an approach was not an objection in principle, but on its timing, and that was before they saw this appalling white paper.

Putting in place a devolved system of migration would be a short-term solution, prior to independence, but it would be extremely positive. The chief executive of the Scottish Tourism Alliance said:

"I know there is a proposal from the Scottish Government to look at a visa specific to Scotland to allow people to come and work in Scotland, under the threshold of the £30,000 salary band, and hopefully that would enable us to attract people and they would stay with us."

That is really important. I know that tourism businesses in my constituency have already been operating at 10 to 15 per cent below target on staffing this year. The policy in the immigration white paper will make that much worse.

**Stuart McMillan:** In early November, we heard from Professor Manning of the Migration Advisory Council and it was clear that, with regard to how detrimental it would be for Scotland, there had been no analysis of Scotland's economy or of any

of the recommendations that the MAC was going to make.

**Michael Russell:** The MAC has been a constant disappointment. It is a narrowly focused group, without adequate knowledge of or information on the Scottish economy and demography.

I commend our evidence to the MAC, which was professionally and scrupulously prepared. It tells us what the situation is. As you know, we have now set up our own independent expert policy group, which will start reporting in the new year and which includes people who understand and have academic knowledge of the Scottish economy and Scottish demography. That is really important.

**Stuart McMillan:** A few moments ago, you mentioned intergovernmental relations and the review. Will that review continue as negotiations regarding the transition period and the post-Brexit situation take place?

**Michael Russell:** Yes. The IGR, in essence, responds to the point that we made—Carwyn Jones put it well—that devolution cannot bear the weight of Brexit, which is where we find ourselves. So, how does it change? I want it to change by Scotland becoming independent, as that is a far better answer, but, while devolution continues, how does it develop and change? The Welsh published interesting information on that in August 2017, we addressed some of those issues in our first “Scotland’s Place in Europe” paper in December 2016, and there is material on the table.

That is the generality of it. The specific of it is that the sole convention is not operating at the present time, because it has been broken by the UK Government. We need urgency on that, or we will not approve and give legislative consent to Brexit legislation. I have regularly raised that and made proposals to the UK Government on how to take it forward. Yesterday, I again stressed the urgency of it, as did the Welsh.

**The Convener:** We now move to Patrick Harvie. Before you ask your question, Patrick, I welcome you to the committee and ask you to declare any relevant interests.

**Patrick Harvie (Glasgow) (Green):** Thank you, convener. I am happy to be here as a substitute for Ross Greer. I have no interests that I am formally required to declare, but, for clarity, I would like to put it on the record that I am a member or supporter of several organisations that have expressed views that are relevant to today’s business, notably the European Movement in Scotland, as well as the Equality Network and Stonewall Scotland.

I want to ask about some of the environmental aspects of the process—in particular, the European environmental principles and governance. We have already discussed in the chamber, in relation to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, the requirement for both Governments to establish a set of environmental principles. It might be too soon to be able to say exactly what the Scottish Government will do in response to the Supreme Court ruling on that.

As a former environment minister, you will also be aware of the importance of environmental governance. In a period of change—if Brexit goes ahead—there is a reasonable expectation that there might be a number of challenges or contested issues where governance bodies become important.

I have a two-fold question. Is the Scottish Government any further forward in deciding what the environmental governance structures will be that will kick in, or that we will transition to, during the transitional period in respect of our devolved responsibilities in environmental matters if, somehow, the withdrawal agreement is approved by the Westminster Parliament and put into practice?

The flip side of that is that if there is to be a no-deal situation and we are to be marched off a cliff if the withdrawal agreement is voted down, what on earth is the reality as regards the decision-making authority in environmental governance matters, which are currently handled at EU level and would potentially fall into a vacuum at either UK or Scottish level?

**Michael Russell:** As Patrick Harvie will know, neither question is easy to answer at this stage, but I will have a stab at both of them. As Mr Harvie also knows, we have not yet come to a conclusion about what we do next with the continuity bill. He was part of a discussion that took place two nights ago and I do not think that it is a secret that I will see Tavish Scott later today, to seek his input on those matters. In the new year, we will take this forward, and a number of options exist. The environmental issues are some of those that have survived the—I was going to say “deceitful”, but I will not use that word—approach that was taken to the bill in the House of Lords, with a small but important exception. Therefore we still have something in there that we could work on, and there are a number of ways that we could take it forward.

I understand that my colleague Roseanna Cunningham will consult on environmental governance in the new year, so I do not want to gainsay her position, but we recognise that robust and effective environmental governance procedures will need to be in place. I know that

there was an announcement from the UK Government yesterday. I am sorry that I am not across that, but rather a lot of things were happening yesterday. I will get up to speed on it in a few days' time. However, we will not allow issues of environmental governance to be eroded or undermined in this process. We will work very hard, and there are ways for us to take the matter forward.

However, if we come to a no-deal scenario, I presently do not know what we will be able to do. The environmental secondary legislation that we are putting in place will transfer responsibilities, but I am not sure that it will do so in an effective way on which we could totally rely. Therefore, I would want to think about that more carefully. If Mr Harvie would like to take it, I offer the opportunity for him to make representations to me and to Roseanna Cunningham on that once we see what the situation is in the new year. At that point we could do with having a conversation about the cliff-edge scenario, and I would be happy to have such a conversation.

**Patrick Harvie:** That is appreciated. If, in early or mid-January, the withdrawal agreement is rejected by Westminster, notwithstanding the fact that many of us will want to cancel Brexit overall, there will also have to be an acceleration of no-deal preparations, just in case. Your no-deal preparations so far may have featured environmental services, such as the collection of recyclates, for example. Most of those go out of the country quickly and there would be very little storage or management capacity if they were to build up. Are you able to say anything about the planning that has taken place on such issues to date?

**Michael Russell:** We are sighted on that, and it is in the risks and issues register. We know that it will be a concern. Essentially, the system would become blocked very quickly. What we would do with material in such circumstances will have to be considered. It would have to be stored but, as Mr Harvie will know, there are environmental and other problems with that. The issue is there and will have to be addressed alongside others. Whether it would be best to store such material at ports and wait for the opening of circumstances in which it could be transported, or whether there are ways in which it could be processed in Scotland—which is highly doubtful—are matters that are under consideration.

There arises another series of issues on environmental regulation that are the responsibility of Scottish Government agencies such as Marine Scotland, Scottish Natural Heritage and the Scottish Environment Protection Agency. They would all have to continue in operation in the event

of there being no deal and at a time when there would be pressure on resources and insecurity in communities. We are conscious of that.

10:00

**Kenneth Gibson (Cunninghame North) (SNP):** On our visit to Brussels, we had some really interesting discussions, one of which was with the Labour MEP David Martin, who has been an MEP since 1984. One thing that he said that resonated with me was about Scotland's relationship with Europe post-Brexit—assuming that we are still heading in that direction—particularly for business. As the cabinet secretary has done, he talked about the Scottish Government strengthening its support and networks in Paris and Berlin. However, he pointed out that Scotland will not be a member state or part of a member state; it will be a sub-state legislature. Therefore, while Ireland will have direct communication with the Government in France, Germany and other member states, we will not even be outside the door; we will be outside the outside door. In effect, we will be just another lobbying group with minimal influence, which will obviously have an impact on our trade and economy.

Mr Martin suggested that, given that we will be so far out of the loop, the Scottish Government might want to redirect its efforts towards places that are not capitals, such as Munich, Barcelona or Milan, where we might get a hearing from the local regional Governments. That is quite a depressing scenario, but do you think that that is a potential rational way forward once we are through the Brexit mess that we face at present?

**Michael Russell:** I can see where David Martin was coming from on that. My view is that Scotland's aspiration will be to rejoin as a member state at the first and earliest opportunity, and therefore continuing a relationship with the capitals will be essential in order to keep the dialogue going and to ensure that we measure up to the standards of the *acquis*. Therefore, I do not think that the Government will be downgrading our contacts or aspirations. I tend to say to organisations that talk to me about what they should be doing that, rather than weakening their connections in Europe, they should be strengthening those connections. They should be putting in place stronger and more robust relationships that can try to survive the shock of Brexit so that, at the other end, they can build from where they are. That is my view, and that is certainly what we will try to do, although I understand David Martin's point.

We have had and continue to have good relationships with a range of sub-state entities, but

we rightly see ourselves as a nation and we wish to be a nation within Europe.

**Kenneth Gibson:** Obviously, I agree with that, but the issue is whether we will get a hearing, given what we are likely to face.

Moving on, you talked about a general election as a potential way forward. Given the Labour Party's incoherent policy of deliberate ambiguity—as I understand it, although I am not 100 per cent sure, it appears still to be pro-Brexit—what would a general election achieve? Another point that we heard when we were in Brussels was that people in Paris and Berlin fear that a Corbyn Government would be more economically damaging than Brexit. Will you comment on that?

**Michael Russell:** I tend to be of the view that, if we are trying to encourage people to move along with us, we should not necessarily condemn the slowest ships in the convoy; we should perhaps help them to get faster, so I will try to do that.

**Kenneth Gibson:** Are they even in the convoy?

**Michael Russell:** If not, let us seek them out and get them into the convoy. I am disappointed about where we are. I would have liked to have seen a motion of no confidence this week. It is important to have that, but it does not look as if that is going to happen. It is absolutely wrong to allow the Prime Minister to play the situation so that she can present it as being her deal or no deal. I want to try to get everybody doing the same thing. That has been my strategy in the Parliament and it continues to be my strategy. Whatever my opinion is of the individuals, I will continue to ask the Labour Party to consider that, at this absolutely historic juncture—"historic" is a much ill-used word, but this is historic—it should be active like never before in holding the UK Government to account and endeavouring to change it.

**Kenneth Gibson:** That is very diplomatic of you, given the shambolic position that the Labour Party has put forward.

On the possibility of a further referendum, you might have seen Liam Fox on "The Andrew Marr Show" on Sunday saying that, if there is a second referendum, people in his wing of the Conservative Party will go for the best of three. That would be unbelievable, but that is what he is saying. Do you believe that having a second referendum would be anything other than kicking the can further down the road? What would it achieve in the short to medium term?

**Michael Russell:** Well, it gives people—

**Kenneth Gibson:** Sorry, I have just one last point. Tavish Scott said that Amber Rudd supported a second referendum. She said on the BBC this morning that she personally does not support it.

**Michael Russell:** If a member of the UK Cabinet says what they think, somebody comes round and says, "You had better not be thinking that" and they are sent out on to television to say that they do not think it. Those circumstances are ludicrous.

With regard to Liam Fox, Attlee's remark springs to mind: "a period of silence" would be in order. He is one of the people who have created this extraordinary mess. To contribute to getting out of it, he has zilch, nada, nothing at all. I do not watch him on those shows because he is part of the problem, not part of the solution. I go back to the point that we should work with people across parties, including elements of the Conservative Party. We should be working to resolve an unprecedented national emergency and trying to get ourselves into the right position.

Mr Greene's question is germane at this particular moment; the right approach is to make sure that we defeat the Prime Minister's deal, reject no deal—the means are absolutely to hand to do that—and then have a second referendum.

**Kenneth Gibson:** Of course, the Prime Minister is being held to ransom by people like that. You said that Liam Fox has nothing to contribute, but he is resonant of many views in Conservative constituencies up and down the country. I have no truck with his views, but they are why we are in this position. The whole situation was created by a civil war in the Conservative Party and David Cameron's badly judged way to resolve it.

**Michael Russell:** Mr Scott's point was right. The choice is whether the Prime Minister splits the Conservative Party or not. She has the Robert Peel choice in front of her: does she split her party in order to create what is, in essence, the right solution for "the nation"? She has proved herself incapable of so doing. She is no Robert Peel.

**The Convener:** I thank the cabinet secretary and his officials for giving evidence. I wish you all a happy Christmas. I suspend the meeting to allow a changeover in witnesses.

10:07

*Meeting suspended.*



10:10

*On resuming—*

## **Census (Amendment) (Scotland) Bill: Stage 1**

**The Convener:** Item 2 is our final evidence session on the Census (Amendment) (Scotland) Bill at stage 1. The committee received a wide variety of views on the bill, before and well after the formal deadline that was attached to our call for views. I have been happy to receive late submissions—indeed, as late as I can allow—but there comes a time when the committee must take stock of all the evidence that it has received. We are well aware of the wide range of views and strong feelings about the issues that are raised in the bill, and we are grateful to everyone who has shared their view at stage 1.

I welcome Fiona Hyslop, the Cabinet Secretary for Culture, Tourism and External Affairs. She is joined by four officials. From the National Records of Scotland, we welcome Amy Wilson, who is the director of statistical and registration services, and Scott McEwen, who is the head of collections and operations for Scotland's census 2021. From the Scottish Government, we welcome Simon Stockwell, who is the head of the family law unit, and Emma Luton, who is a lawyer.

I invite the cabinet secretary to make brief opening remarks.

**The Cabinet Secretary for Culture, Tourism and External Affairs (Fiona Hyslop):** Thank you, convener. I am pleased to be here to talk about the Census (Amendment) (Scotland) Bill, but before I talk about the bill, I will take a moment to speak more generally about the census.

Scotland's census will, subject to approval by Parliament, be taken on Sunday 21 March 2021. This will be the 22nd census to take place and the 17th to be managed independently here in Scotland. In 2021, for the first time, the census will be predominantly conducted online.

For more than 200 years, our country has relied on a census to underpin national and local decision making. The census is the only survey of its kind to ask everyone in Scotland the same questions, at the same time. No other survey provides the richness and range of information that the census provides.

Some basic principles underpin decisions around the census. The key things about the census are that it counts for collective decision making, that it has to be credible, that people have to have confidence in it and that it needs to be consistent for the purposes of comparison.

There must be confidence in the census process from all our citizens in order to ensure that they provide us with their personal information. That confidence is two-fold: first, citizens must trust that we will ensure that their data is kept safely and securely, and secondly, citizens must trust that we will ask the most appropriate questions to reflect our society at the time, and that we will do so sensitively. That trust has delivered more than 200 years' worth of data. It is why we can proudly demonstrate a consistent approach over those years. Some questions have come and gone, but we have always been consistent in our professional approach to the census and in tracking the core data.

I am here today specifically to discuss the bill. As you know, the purpose of the bill is to amend the Census Act 1920 to allow questions on sexual orientation and prescribed aspects of gender identity—that is, on transgender status and history—to be asked on a voluntary basis. The power to ask those questions on a compulsory basis already exists in the 1920 act, and refusing to answer a census question or neglecting to do so is an offence under section 8 of that act. We want to avoid that for individuals who answer the new questions.

The approach in the bill seeks to mitigate concerns about intrusion into private life by making the questions voluntary, as was done with questions on religion when they were included for the first time in the 2001 census. It is important that nobody is, or feels, in any way compelled to answer these important but sensitive questions.

The decision on the need to collect the information has been arrived at through a process of consultation and research. The National Records of Scotland has worked, and continues to work, with stakeholders to understand the needs and concerns of the communities involved. However, the NRS has recognised that more consultation is required—for example, of women's groups—as the questions are developed. The NRS has communicated that to the committee. That consultation is under way as part of the further stakeholder work that is required to ensure that all users' data needs can be understood and considered.

10:15

It is widely recognised that there is limited evidence on the experiences of transgender people in Scotland and currently there is no fully tested question for collecting information. In covering that, the census would take a big step forward to ensure that we can develop the evidence that is needed to support and protect Scotland's transgender population.

Sexual orientation is asked about in most Scottish household surveys; it is proposed that the sexual orientation question for the 2021 census would mirror the question that is used in other surveys in Scotland and elsewhere in the UK. Society will have changed significantly and rapidly in the 10 years since the previous census, so the 2021 census must reflect that.

Although the bill's purpose is to provide for voluntary questions on the two issues, we recognise that many stakeholders are focused on whether the questions should be asked and how they relate to other possible questions. The bill is not about the mandatory sex question, but we are aware that there are strong and often very opposing views on whether a question on sex should be binary or non-binary, whether it should be related to birth certificates or legal sex, and whether it should be more focused on self-identification. The bill does not specifically relate to those issues, but it is clear that stakeholders are concerned about those matters.

To enable an element of future proofing on the legal definition of transgender, the bill uses the term "gender identity" to cover transgender status and history. That also assists in clearly separating questions about sex and transgender, so the question on sex can continue to be mandatory. However, I recognise that that has raised the concern that the bill conflates gender identity and sex. I make it clear that the intention behind the bill has never been to conflate sex and gender identity. It is about asking questions to obtain information; it is not about the law on gender recognition or equalities. I am aware that the NRS has written to the convener to indicate willingness to consider how such matters might be perceived in relation to the census and—importantly—to understand the committee's views.

The census questions that will be asked are a work in progress. The bill is not about agreeing whether the questions will be asked or agreeing the wording of questions. The questions that are to be set will be considered as part of a subordinate legislation process that will happen next year. I assure members that the views and evidence that have been submitted will feed into further consideration of the question that is to be asked on sex in 2021.

On the questions that will be set and their wording, we expect a period of informal engagement with the committee to begin after stage 3, and to continue throughout 2019. As the Economy, Energy and Tourism Committee recommended in relation to the 2011 census, that process is intended to improve on the 2011 census process by ensuring that the committee is given the opportunity to scrutinise the questions for the 2021 census properly before formal

consideration of the subordinate legislation. It is intended that the formal census order and regulations will be brought to Parliament in early 2020, but we would like to agree the legislative timetable with the committee and discuss what the committee would find helpful in order to allow the thorough consideration that will be required.

I draw the committee's attention to a couple of drafting points in relation to the policy memorandum. The first is that it incorrectly includes intersex people under the umbrella term "trans". That was an unfortunate action during drafting in relation to an area that is constantly developing. We recognise that the needs of trans people and of intersex people are different. We will ensure that any future documentation does not include intersex people under the trans umbrella.

The second point is that the policy memorandum says that the 2021 sex question will have a non-binary response option. It should have said that that approach is being considered and tested. The matter will be brought to the committee as part of the subordinate legislation process. I ask the committee to note those two points.

Thank you for the opportunity to speak to the committee today about the bill.

**The Convener:** Thank you for that statement, which clarified a number of matters. I welcome your comment that the evidence that the committee has gathered will form part of the NRS's consultation, because a number of people have come forward for the first time to express their concerns.

I acknowledge your point about the general purpose of the bill's questions on gender identity and sexual orientation being voluntary; in the evidence that we have gathered, that is not seen as controversial in any way. However, with regard to the drafting of the bill, although you have said that the bill is not about the sex question, you will be aware that the drafting suggests that, after "sex" in section 1 of the bill, we should insert the words "(including gender identity)". The NRS has written to the committee to suggest that it is open to looking again at the drafting.

Since it gave evidence, the Equality Network has written to the committee with specific suggestions about how the bill might be redrafted. It suggests changing "gender identity", which it says is not the most appropriate term, to "trans status", to be included in section 1(2)(b) beside "sexual orientation". The issue of gender identity would be removed from section 1(2)(a). That suggestion strikes me as being quite constructive: it will probably be welcomed by a number of the opposing groups. What is your view on that suggestion?

**Fiona Hyslop:** We want to hear what the committee's view is, having taken various evidence. The bill was drafted some time ago, and a lot of issues have become evident now in respect of terms that we use and what they mean.

The bill is about voluntary questions on transgender status and history, so we need to think about how the questions that are currently being looked at would capture both. The gender identity aspect was to have an umbrella term to allow flexibility, but I appreciate the comments and contributions that have been made, which might help to differentiate between "sex" and "gender identity", which is an issue for some women as well as for equality groups, if we accept that the purpose of the bill is to capture transgender status and history. We shall certainly consider the suggestion, and we will look at what the committee suggests and respond to it.

With regard to the point about the phrase "gender identity", I think it is about using the term "including", which is what can be perceived to conflate the terms "sex" and "gender identity". It is a very serious point that we will certainly look at; we appreciate the committee's attention to it, and that people have brought the matter to our attention.

**The Convener:** Thank you very much. If we assume that we will proceed on that basis, as the Equality Network and you have said, the issue of how the questions are going to be asked is for the future, and the committee will have a role in that.

You will be aware that the Office for National Statistics made its views clear on Friday; it does not think that the question of sex should be a self-identification one, or that there should be a third option on the question about sex. Its equality impact assessment, which was published on Friday, reflects a lot of the evidence that the committee has taken—in particular, from data users. The assessment says:

"The question on sex (male or female) is established in the census, and it is essential to the evaluation of inequality related to that protected characteristic. Consideration has been given to amending the question to reflect a wider range of options, given that there is greater recognition than previously of individuals who reject the traditional 'binary' view of sex. Nevertheless, the protected characteristic of sex as defined in the Equality Act 2010, and as relevant for the PSED, is whether a person is a man or a woman. This binary concept of sex is, in turn, fundamental to the Equality Act 2010 definition of sexual orientation and of gender re-assignment, and to the law on marriage and civil partnership and many other matters."

After a lot of consideration, the ONS has concluded that the sex question should remain a binary question and should not be about self-identification. As I said, we heard that a lot of evidence from data users. Will you take into

consideration that there are more diverse views than are in the explanatory notes for the bill?

**Fiona Hyslop:** We will look at what the ONS is doing, and it is looking at what we are doing. I am sure that the ONS will be interested in Parliament's consideration of the issue. I reiterate that you are straying into the next stage of the process, which is when the questions will be considered. I acknowledge that the committee has received quite a bit of evidence on that matter, even though it is not the subject of the bill.

The importance of the sex question is that it is mandatory, and that we have always had that question. In 2011, it was the same question. Ten years ago, some people—trans people in particular—asked how they should answer it. As you are aware, guidance was produced for the 2011 census that said that the question could be filled in on a self-identification basis.

I am not sure that it is absolutely clear what the ONS plans to do. My colleagues might be able to give us a more up-to-date position. Clearly, a self-identified binary sex question is simple—it is the same as it was in 2011. When we try to define sex, whether legal or biological, we start to complicate the question that is in front of us.

This goes back to my basic principles—there has to be simplicity around this issue. Testing of questions is partly to find out which questions will produce the best responses. At the next stage, I am keen for the NRS to share with the committee its experience of testing different questions to see what will give the best response.

I ask my colleague Amy Wilson whether she has the latest information on what the ONS is likely to do in relation to the next stage, and the content of the mandatory sex question.

**Amy Wilson (National Records of Scotland):** My understanding from talking to colleagues at the ONS is that, as the cabinet secretary said, the ONS proposes a binary question in 2021. However, its view is that the question will be consistent with the 2011 census. As far as I am aware, the ONS has not said publicly whether it will be a self-identification question. We will be working more with it on that.

**The Convener:** The guidance that you produced in 2011 was online and most people did not know about it. Did the ONS produce the same guidance for 2011 in England and Wales?

**Amy Wilson:** Yes, it did. In fact, the guidance that we provided was the same guidance that the ONS developed in 2011.

**The Convener:** Thank you. That is very helpful.

Professor Susan McVie from the University of Edinburgh, who is the co-director of the

administrative data research centre in Scotland—I believe that she also sits on the Scottish Government’s board for official statistics—said:

“I think that the General Register Office for Scotland got it wrong when it redesigned the census in 2011 and conflated sex and gender identity into one question.”—*[Official Report, Culture, Tourism, Europe and External Affairs Committee, 13 December 2018; c 4.]*

We went on to discuss how that could affect data in the future, as more people self-identify. We had some clinical evidence on that.

Professor McVie talked about the importance of census data, whereas you are perhaps talking about intersectionality of data and getting down to smaller numbers. Given that people are now able to express their gender identity in another question, Professor McVie thought that this was an opportunity to maintain the integrity of the sex question because of its importance in the Equality Act 2010.

**Fiona Hyslop:** I go back to my principles. Consistency is important, which is why there is an argument for consistency with the 2011 census. However, the census must also be credible, and people must have confidence in it.

On the issue of credibility, the 2011 census was not wrong. Having a voluntary transgender question will help the statistical basis of the census, because it will mean that we can extrapolate projections in relation to population issues and males and females.

10:30

**Claire Baker:** We have heard much evidence that is supportive of the questions being voluntary, which is the purpose of the bill. However, there have been suggestions that because the questions are voluntary and people might not answer them, not enough data might be collected. To be fair to the witnesses we have heard from, most of them did not think that that was a problem.

Are you satisfied with the voluntary status of the questions? You said that there was limited evidence on transgender. Will the proposed approach provide greater evidence and improve policy making?

**Fiona Hyslop:** I think that it will. To return to my earlier point about the important principles of credibility and confidence, it is for the transgender community to ensure that it is confident about filling in the form and therefore important that the questions are drafted in a way that encourages the maximum amount of completion. Stakeholder engagement with transgender and equality groups has informed the types of question that are likely to be asked.

The content of the questions will form the next stage of deliberations on the census, which we will share with the committee. It is about trying to make sure that we maximise the uptake of the census questions. There was real concern that if the questions were compulsory, they would intrude on the privacy of transgender people. However, the voluntary nature of the questions will respect transgender people and, given that we want people to complete the census form, encourage them to fill in the forms.

**Claire Baker:** On the use of the term “gender identity”, which the convener picked up on, we have received further evidence suggesting that you could change that wording. The cabinet secretary and the bill team have described the wording as a way of future proofing. I am interested in how you see that question developing and why referring to it as a trans question would be too limiting. We have had evidence that “gender identity” is not a recognised term and that there is lack of clarity about what comes under it and what it means.

**Fiona Hyslop:** We expect to be asked about such specific aspects. We will share with the committee the actual text of the voluntary questions, which will be about not just transgender status but transgender history. Given that, the view was taken that we should have a broader, umbrella term. I suppose we are in moveable territory where there is not one clear definition of gender identity or, potentially, of transgender identity. That was what informed having the flexible term “gender identity”, but there is an opportunity to be specific in the voluntary questions. We need to say that the questions are voluntary so that people will not be fined or commit an offence if they do not answer. We do not want that, especially in the personal and private area of sexual orientation and transgender. That was the rationale for using the term that we did.

We also used the term to separate out the questions of sex and gender identity. However, if the bill is perceived to conflate those issues, that does not help us. As I said, we need to have clarity in what we are doing, so I would rather that things were quite straightforward and simple. Although the term “gender identity” might be a useful catch-all umbrella term, if it raises questions around what should or should not be in the voluntary questions, which are about specific information, that does not help.

**Claire Baker:** Okay—that is welcome.

My final question is around the guidance that was published for the 2011 census and where future census guidance will head. I had a look at the Gender Representation on Public Boards (Scotland) Act 2018, which has quite a prescriptive transgender definition because it states that the

term “woman” includes someone who has had gender reassignment or is “living as a woman” and intending to undergo gender reassignment. The guidance for the 2011 census was about someone self-identifying as a different gender. I wonder where all that fits with the review of the Gender Recognition Act 2004 that has concluded. I do not know whether we are ahead of ourselves in some areas—or whether that makes sense.

**Fiona Hyslop:** That is an important point, which probably cuts to what a lot of the issue is about. Society has changed hugely in the past 10 years and it continues to change. In part, the census captures where society is at any point in time. Obviously, the guidance for the 2011 census came way before the 2018 act and we do not know what will happen with regard to gender recognition legislation that will follow the Gender Recognition Act 2004. As I said, it is moveable territory, and society and policy have been progressively moving on the issue.

You might argue that the 2011 guidance—as you heard, there was guidance for the rest of the UK and similar guidance in Scotland—was quite progressive when it talked about self-identification. It was also about being inclusive, which is the other point. How do we ensure that we are including people and that they have the opportunity to fill in the form in a way that is true to them? There is a balance to be found in that regard. We cannot retrofit the 2011 guidance—which I was not involved in, as I was not the minister at the time—to fit legislation that was passed subsequently or which is planned in the programme for government. It is not easy.

The census is a point in time. It will capture the information as it is in 2021. It has to reflect society as it is in March 2021, not as it might be in future. That is the point. It is about how we make sure that it is fit for purpose for 2021. Even in the course of the committee’s evidence sessions, various issues have emerged that might not have been obvious in 2011. The self-identified gender issue was perhaps not as politically controversial as it currently is.

Let me speak personally on this: I think that we need to be inclusive and to ensure that citizens of this country can contribute to the census and be part of the collective data. I suppose that we, as the Government of the day, and you, as the parliamentarians of the day, have to determine how we reflect society as it is in 2018—and as it will be in 2021, when the questions will be asked. It is not easy; I am trying to explain why there are differences between what was done in 2011, what was done in the legislation that you mentioned and what might happen in future. If we are trying to future proof our approach, there might be a point

at which we have to draw a line and say, “No. This is where Scotland is just now.”

I am pleased that this country has progressed on the inclusivity agenda in different ways, but we must recognise that millions of people will complete the census, so it must be straightforward for them to fill in. We need to take as inclusive an approach as possible, while ensuring that we get the data that we need. The approach in the bill, which is to make voluntary the sensitive and personal questions about sexual orientation and transgender history and status, is the right one. That is the stage that we are at with the census.

**The Convener:** You will be aware from the evidence that we have taken that there are a number of feminists who do not believe that self-identification is a progressive move. That is perhaps for another discussion.

**Tavish Scott:** Further to Claire Baker’s line of questioning, the objective is to produce data that is helpful for policy makers and service deliverers. I absolutely take the point that was made: if the definitions are not clear, how can we trust the data that is collected?

**Fiona Hyslop:** Well, we have never defined “sex” in the 200 years that we have been doing the census. The simplicity of the question is such that people answer it and we get the data. I think that that is the point. We cannot check whether the form has been filled in incorrectly; we have to respect the anonymity of the individuals who fill in the form.

**Tavish Scott:** That is entirely fair, but on the other side, are you concerned that if the definitions are not precise, as you said to Claire Baker, policy makers will say, “The data is interesting, but how can we be assured that it is accurate?”

**Fiona Hyslop:** That is why we have to test the questions and ensure that they are robust. The next stage of engagement with the committee will involve the sharing of the evidence on successful completion rates in the testing that has been done to date. That will be helpful at the next stage of the census development, when you are looking at the questions.

That takes me back to my point about credibility and confidence, not just for the individual but for the data users, as you said. That is essential, because if there is to be the optimum completion rate, people have to know how important the census is—that relates to what you said about it helping service deliverers, and the comments about the communication and advertising campaigns that will take place around the census—and the census must be credible, for data users as well as individuals.

**The Convener:** Do you have a supplementary question on that point, Jamie?

**Jamie Greene:** Yes, it is on that theme.

**The Convener:** Is it a supplementary? We do not have a lot of time.

**Jamie Greene:** It would be good to ask the question. One of the problems is that what seems to be quite a simple piece of legislation that addresses a technical issue around the cabinet secretary's ability to add voluntary questions has opened up a huge Pandora's box, as part of a much wider social discussion around gender recognition and identification. That is fine, but the committee still has a job to do. It is relevant to what has been said previously.

The sex question in the 2011 census was set out in guidance—albeit not widely promoted guidance—to be based on self-identification, and the question was mandatory and binary. The future census will have voluntary questions around trans history or status and gender identity—whatever the terminology or questions may be. If people answer the mandatory question through the status quo method of self-identification, what difference would that make to the voluntary questions that may be asked? In other words, there has been confusion over how to answer the mandatory sex question, because there were no other options. If there are other options, will that alter the way that people answer the voluntary question?

**Fiona Hyslop:** That is a critical point, which is probably for the next part of the process. Jamie Greene is cutting to the chase of what the issues are. It is about a social discussion—the census is always social. Asking the religious question was controversial the previous time, as was the language question, as some might remember from 2001. The bill and the census are not about recognising the status of any individual—it is not about recognition or identity per se. It is about answering questions for information.

The point about the interplay between the questions is important. My instinct is that simplicity in the questions is helpful. We understand, however, that the voluntary question on trans status and history allows us to be quite clear about what we are asking. Someone might have a history, but recognise themselves currently as in transgender status and as something different from what they were previously. That is what we need to capture. We also think that through the interplay between that question and the mandatory question we will be able to identify numbers; we do not necessarily expect there to be huge numbers, although we do not know, as we have not counted them. The point is to make sure that the statisticians can pull out numbers.

Amy Wilson may have more to add on that critical point.

**Amy Wilson:** Mr Greene makes very important points. That is why the testing and the work that we are doing and have done to date are of prime importance. It is about understanding how people interpret those questions and whether having a new question either immediately following the mandatory question or in a different part of the form changes how someone would answer that question. We want to bring that type of evidence back to the committee as part of the consideration, to make sure that we are clear how any changes might affect people's responses and the consistency of data.

**Jamie Greene:** I have a technical question on the bill process. Why are we using primary legislation to allow the Government to add extra questions on a voluntary basis, and subordinate legislation to get into the nitty-gritty of the provisions? Is it because you need more time on the consultation, or is it easier to do it that way than to have everything on the face of the bill?

**Fiona Hyslop:** That is the way it has always been done. We are being transparent by introducing primary legislation. We could have not had a bill, and asked all the questions on a mandatory basis, but for the reasons that I have stated I do not think that that would have been right or fair. The purpose is to ensure that no fines are involved over people answering questions on sexual orientation and transgender issues. There were 15,000 responses to the original consultation and there is a great deal of interest in the census. We are starting to get into issues that are for the next stage, but clearly those points are critical.

One of the concerns of the committee that looked at the questions for the 2011 census—the substance in the census order—was that, rather than having a fait accompli at the end of the process when the committee might have concerns about changes, the Parliament and the committee should work with the process, so that they can inform it and influence what the questions might be, if there are any problems over their content.

That is why we have what I hope is a new and improved process. The issues will have been front loaded, compared with previous times. We want to be open and co-operative with the committee, because we need the committee's views. To return to Jamie Greene's point, this is about society. If the committee reflects society's views, its advice will be very important.

10:45

**Annabelle Ewing:** For clarity, I will pick up on the issue that was raised earlier. As has been said, the intention of the bill is not about any

mandatory question, including the mandatory sex question. There has therefore been some error in drafting where there is language that would refer to the mandatory question. Presumably, therefore, it is in a schedule—I do not have the bill in front of me. However, the intention is that that would be deleted in section 1(2). That is my understanding. If that is not the intention of the bill, the presence of that language in the bill in front of us is incorrect, because that is not what the bill is intended to do. Therefore, would the intention be either for the Government to bring forward an amendment to delete it, or to accept a relevant amendment that is brought forward by a member of this committee to delete it, or otherwise?

**Fiona Hyslop:** The wording of the bill can be amended at stage 2 and we will obviously consider the advice of the committee on that. The wording in the bill does not affect the mandatory questions at all; it provides for the opportunity for the question on gender identity to be asked. I ask my legal support to correct me if I am wrong, but my understanding is that it could be asked about either in relation to the names, sex, age schedule—schedule 1—or in the schedule that talks about the different things that can be asked. It is therefore an either/or question.

However, with regard to your interpretation that the language is not helpful for those who think that it conflates sex and gender identity, I think that the word “including” is the problem. If it is clearer to have it in another section, we would consider that.

**Annabelle Ewing:** Okay—so the Government would be open to doing that.

The committee has received a lot of evidence and there are very strong views on a number of issues. Turning to the issue of the mandatory question, a consistently clear view from many people who have given evidence—including before the committee—is that sex does not permit a non-binary option. Professor McVie, who has been quoted by the convener already, said in evidence last week:

“Sex is about either biological or legal sex—whichever you decide to use—whereas gender identity has non-binary options. Sex does not have non-binary options.”—[*Official Report, Culture, Tourism, Europe and External Affairs Committee*, 13 December 2018; c 6.]

I understand that the National Records of Scotland is currently testing questions on non-binary options and I therefore wonder what informed that approach. It seems that many people were not even consulted by the National Records of Scotland; people who have expertise as statisticians, data users and a number of women’s organisations were never spoken to. If the National Records of Scotland did not speak to those people, how has it reached the stage of testing non-binary questions? Who has informed

that process thus far and what will change going forward?

Last week, I asked the data users and statisticians whether, if they were now contacted by the National Records of Scotland, they would be willing to work with it. They said that yes, they would be, but they have never been contacted about the matter.

**Fiona Hyslop:** I will bring in the NRS but I make the point that we must make sure that we involve the stakeholders that would have a view on the actual content of the actual mandatory question. Obviously, that is the stage that we are at just now. That would include a lot of the people who have given evidence to the committee. I know that the NRS has communicated to the convener that that is now happening.

**Amy Wilson:** On why we have been testing that question, the consultation on the topics asked for people to come forward with their data needs for 2021, and there was an expression, as part of the consultation, that the question in a binary form may not be inclusive enough for some people to respond to.

Up until this point in time, throughout the process with the bill, we have not been made aware of other concerns around that; we did not have anybody who came forward as part of that consultation. We therefore followed up on the needs that were expressed as part of the consultation. Now that we have been made aware of the concerns, we are getting in contact with people who have expressed views on that issue. You are right: so far, we have been responding to what has been expressed as a data need, but there are new or previously unexpressed needs, and we will follow up on those.

**Fiona Hyslop:** Part of the advice that we will take from the committee is who we should involve. However, as the responsible minister, I will want to make sure that the consultation is as wide as possible.

There is a genuine issue about whether we should refer to binary or non-binary in the mandatory question. To return to Tavish Scott’s point, we have never defined sex. It could be defined as biological sex or relate to legal sex and so on. We have to be aware that anybody who is answering that question may have difficulties in doing so; they also have the right to privacy.

**Annabelle Ewing:** Indeed. However, as I said, the evidence that the committee has received raises significant concerns from many perspectives. A consistent theme in our evidence is that sex does not permit a non-binary option. Therefore, I find it a wee bit surprising that, notwithstanding what would presumably be at least an accepted view in society today among

many people with strong views, including experts, data users and statisticians, it perhaps did not occur to the National Records of Scotland that that might be an issue. Anyway, we are where we are, and it is good to hear that the National Records of Scotland will now speak to a much wider cohort of people who have useful contributions to make to the debate. The committee looks forward to being involved in that process.

Claire Baker mentioned the voluntary nature of the question on gender identity. It has been suggested by at least a couple of witnesses that to simply equate gender identity with trans and trans history would exclude other possible individuals. Therefore, possibly having a non-exhaustive list under that broad category or umbrella might be more helpful, if we recall that the purpose of the census is to collect data that can be useful for planning purposes, including for health and other public services. What thought has been given to that? That view has certainly been expressed to us in evidence.

**Amy Wilson:** When following up the consultation, which raised the issue of gender identity, it was apparent in subsequent conversations with stakeholders that the actual need that was being expressed was to do with collecting information on transgender people, and that is certainly the way that the work has gone so far. However, again, as I said in response to the previous question, other issues have been raised. In our testing so far, a broad question on gender identity has not necessarily tested well; it has been less understood. Again, that probably reflects the issues to do with terminology and definition.

As we start to follow up the issue with more stakeholders, we will try to establish—if we can—what that data need is. There could be a range of needs. We will bring the matter back to the committee, to explain what the need is, any proposals that come back and why we are proposing the questions that we are.

**Annabelle Ewing:** The NRS says in its letter to the committee that it has been testing a non-binary question. Given where we are now with the evidence before the committee, will you consider pausing that? You still have to hear from a host of other people about the efficacy of such an approach.

**Amy Wilson:** We have been testing non-binary questions and binary questions. We will reflect on the evidence to the committee in relation to what needs to be tested. I think that we will continue to test a range of questions. To pick up on a point that was mentioned, the issue is partly to do with the interplay of the questions. Therefore, we need to look at how any proposed question, whether it be binary or non-binary, interplays with other proposed questions.

**Kenneth Gibson:** There is concern that, although you had 15,000 responses to the consultation, the evidence that we have is that a huge number of groups that represent women—and women comprise 52 per cent of Scotland's population—feel that they were not adequately consulted. There is a wee bit of a need to go back to the drawing board; that is important.

Cabinet secretary, you mentioned that sex has never been defined but, in the 200 years of the census, I do not think that it would have occurred to most people that there is anything other than male and female. When I was growing up, I certainly never thought of anybody as being other than male or female. I appreciate that society might have changed in terms of how people self-identify, but the evidence that we have had was fairly conclusive that people are dimorphic and are born either male or female. Therefore, I would think that the first question should ask what sex a person was when they were born and then there could be voluntary questions.

You have talked about consistency with the 2011 census, but I am concerned that two rights do not make a wrong. If it was wrong for the question to ask about self-identification, should we not change the guidance now to make it much more specific so that people know what question they are being asked?

**Fiona Hyslop:** I appreciate your points. That is your view, but other people have different views. I do not think that we can say that the 2011 census was wrong, because I do not think that it was. However, you can have an opinion on whether that should have happened. That is the point of consulting the committee.

On what we do in the future—this goes back to Jamie Greene's point—we have to reflect society as it is. Of course, the issue of transgender people would not have occurred to most people over previous decades—although it might have occurred to transgender people—so there was no understanding of how transgender people might engage with the census. Although that understanding was not there, there would have been transgender people answering such questions over many years. Currently, society more generally is more conscious of the existence of transgender people.

The point is about trying to capture the information as it is in 2021—we are not even there yet—and how society views things. However, we have to make decisions now because the timetable for processing the issues means that we have to have the evidence and so on to produce the regulations that the committee has to scrutinise. That is why we are not defining it and just having a male or female question.



As Kenneth Gibson said, there is biological sex, legal sex and so on and there is not one definition. It is only nowadays that we are starting to identify that. If someone has a gender recognition certificate, their legal sex will be different from their biological sex. Therefore, it is not right to say that we should never consider what male and female are because we do consider it. My instinct is to keep it as simple as possible and be consistent in what we have asked for the past 200 years.

**Kenneth Gibson:** I never said that you should not consider what people feel their sex to be. I said that we should identify people according to the sex that they were at birth. We are talking about the Equality Act 2010 and the protected characteristics of sex. I will quote the briefing:

“The Equality Act 2010 refers to ‘sex’ in binary terms – ‘man’ or ‘woman’ (s.11). It defines ‘woman’ as ‘female of any age’, and ‘man’ as ‘male of any age’ (s.212(1)). The use of ‘sex’ in these definitions is generally understood in the biological sense. However, if a trans woman has obtained a gender recognition certificate, she will receive a new birth certificate stating she is female. This is despite ... being born biologically male.”

The 2011 census seemed to ignore that and people could self-identify. The reason why so many women’s groups have given evidence to us to express their concern about that is that they feel that there is a threat to women in a whole host of areas—we do not have time to go into those, but the evidence that we have taken goes into detail. Their evidence is that self-declaration can threaten women, particularly women who get intimate care from people who may be trans who are self-declaring but who are still biologically male.

**Fiona Hyslop:** I appreciate those points. We cannot retrofit where we were in 2011 and we have to deal with where things are now. The issues that have been brought to the attention of the committee are far more alive and current than they were in 2011. That is where the responsibility of the census is at any point in time. The question is where society stands now and what we can do to capture the information that we need. In public policy, we now have the equality duties in legislation to ensure that public bodies are dealing with equalities issues. We have a different situation now from the one in 2011 in a variety of areas.

This might be straying into the next stage of the consultation, but we also have to ask whether there is an opportunity to keep the clarity and simplicity of the male/female question and have a voluntary transgender status and history question or, if we do not want to conflate gender and sex, whether it is in the interests of some women’s groups to have a non-binary “Other” option for the mandatory question to separate the gender issue from the sex issue. Having a non-binary option might also be in the interests of the equality

groups, as people could then say what their view is and choose “Other”. There are arguments for the non-binary option from the women’s groups’ perspective, because it separates out sex and gender, and from the equalities perspective.

11:00

The problem might come with people saying, “Hang on, you are either male or female, and that’s it, so we shouldn’t have a third option.” All that I am saying is that there are different views from different perspectives in society. Our responsibility, collectively as Parliament and Government, is to steer us on a road that captures enough information to make the data credible and to give confidence that we are counting in a way that is meaningful for those who have to use the data. I am not saying that it is easy. When we come to consider what should be in the mandatory question, we will consider whether we just have a binary question and rely on a voluntary question to give us a perspective on people who have a different gender identity from what their sex is defined as.

**Kenneth Gibson:** With respect, I am not aware of any women’s group that is suggesting that the question should be anything other than binary. If there are such groups, they have not been in touch with the committee. Women’s groups seem to be pretty consistent as far as I am aware.

**Fiona Hyslop:** You have to reflect on the evidence that you have been given. However, as the convener said at the start, the call for evidence to the committee was about the bill, which is about the voluntary questions.

**Kenneth Gibson:** If people have a choice of “Male”, “Female” or “Other”, they might decide to tick “Other” just for a laugh. I am not being facetious. In the 2001 census, more than 400,000 people put their religion as Jedi. If the choice is “Male” or “Female”, we will get a much more accurate figure, and we can then have voluntary questions about orientation and gender, on which I think everyone on the committee agrees.

**Fiona Hyslop:** That is an important point that goes back to the point about credibility and confidence. The testing is really important, because we need to see how people respond and whether there is a temptation for people not to treat the questions as seriously as they should. The census is serious, given the information that it provides us.

**Alexander Stewart:** Is there a danger that adding a third option in the sex question would mean that the census data would not be compatible with the previous data that we have? The whole idea is to ensure that planning processes are in place. We need to have correct

data, because it is used in many sectors, especially the health sector, to provide services.

**Fiona Hyslop:** My point about the need to be consistent is important but, as the committee has heard in evidence from the national health service, it uses the sex information at a very high level. We anticipate that, even with the voluntary transgender question, only a small number of people will fill it in and that will not necessarily affect some of the global data that we need through the sex question. Not being consistent would not necessarily be an issue in that regard.

Again, there is a statistical issue about what can be projected, so Amy Wilson might want to come in.

**Amy Wilson:** One area that we have not talked about yet—partly because, as we have said, it is for the next stage—is about what we would output. If we ask a non-binary question—that is the big if and is obviously something for the committee to take a view on—we do not propose to produce outputs on a non-binary basis. In our conversations with stakeholders, we have always been consistent that it is about allowing people to respond in a way that reflects how they identify but that we will still produce outputs on a male and female basis. We have discussed with stakeholder groups the fact that we would randomly assign people back into the male and female categories because, as the numbers are expected to be very small, that will not affect the statistical distributions. That is seen to be acceptable, as long as we do it randomly and do not try to establish through other information that has been given whether we believe people to be male or female.

We are working on that and we will continue to do so to consider, if that is the question that is asked, how we will deal with that in the outputs.

**Alexander Stewart:** It is vital that you identify that. By doing that, at least you try to tackle the situation. Otherwise, the issue will become much more complicated and you might open up another can of worms in many respects.

**Fiona Hyslop:** That is the crux of the issue—not for the bill but for the next stage. If we are not going to use non-binary data as non-binary data and are just going to use binary information, why ask the question in the first place? The point is that it allows people to respond who might otherwise not feel comfortable about responding. That is the decision that has to be made. To go back to the principles behind this, we are counting people for a purpose in the census. If we are not counting them for a purpose, why do it? It comes back to the societal point—should the census be set up in such a way as to allow responses, even if

we are not necessarily going to use that response information for a data purpose?

Keeping it simple is more reliable and reflects the usage of the data but it does not necessarily reflect how people might want to contribute when filling in the census in the first place. I would welcome the committee's advice on what your priorities are. That will help us with the next stage, which is the mandatory questions.

**Alexander Stewart:** That is quite important.

**Patrick Harvie:** Good morning, cabinet secretary. You have mentioned a couple of times that, even prior to 2011, there has not been a specific, narrow definition of the sex question, whether in relation to a biological characteristic or any other specific characteristic. It is important to draw out the fact that the guidance in 2011 was not a departure or a change but rather a clarification of the way in which the census has always operated.

That being the case, I wonder whether you have seen the evidence that has been submitted by a coalition of national women's equality and violence against women organisations, including prominent, well-respected organisations such as Scottish Women's Aid, Engender and Rape Crisis Scotland. Those organisations say:

"We ... have a long history of deliberation on the interrelationship between trans equality and rights and women's equality and rights."

Quite unlike the earlier suggestion that a huge number of women's organisations were expressing concerns and felt uninvolved in this discussion, they say:

"While we are each engaged with the Census process in our work, our view was and remains that the proposals as consulted upon will have little impact on gendered-data gathering and analysis."

However, they also say:

"we were concerned to hear calls to the Committee to reverse the practice of the Census 2011 and Census 2001, and mandate respondents to describe their 'sex at birth'."

They are concerned about that, saying that they are not aware of any problems with the current approach and that

"trans individuals responding to the question on sex with details of their lived identity"

is appropriate and does not cause problems. They say that

"In most instances, this will accurately reflect how a broad range of public bodies and providers of goods, facilities, and services will understand and treat them",

and that a departure from that approach would cause problems by breaching rights to privacy.

Does the Government agree with that analysis and share that position? In particular, does the

Government agree with the suggestion that, for most trans people, their lived identity is most closely relevant to the way in which most data users of the census will engage with them and treat them in respect of services?

**Fiona Hyslop:** I understand that. I have not read that evidence to the committee, but I will make a point of doing so. It runs somewhat counter to the points that the committee has made about the evidence and representations of some women's groups. That is part of the NRS consultation on the next stage, which is on the mandatory questions.

It comes back to the point about lived experience as opposed to biological or legal sex. That is why the guidance was the way it was in 2011. However, we are not dealing with the 2011 census; we are dealing with the preparations for the next census. The census does not lead public opinion; the census has to reflect society as it is just now and ask questions that maximise the response rate so that the data can be used. It is important for the Government to make sure that that happens.

I appreciate the points that have been made and I think that we will have to get to the nub of those—what are the issues that different organisations, and women's groups in particular, want to get at and how much concern is there about self-identification and what it means? However, the bill is not the place to resolve those issues—they should be resolved somewhere else. That is why we must be clear about what we are doing. We want the census to count people and we want it to be credible and instil confidence. Those are the primary aims. I am not taking a Government view on whether people are right or wrong to say such things, I am saying that we almost have a guardianship of the census and it is my role to make sure that it is credible, that people have confidence in it, that it counts people and that there is a consistency so that we can use the data properly.

**Patrick Harvie:** Indeed. It is a 10-yearly population-level snapshot. It is not about recording individual information as a national identity database would, which I think most of us would oppose on principle. If the Government continues, as I suggest that it should, to stick to the historical situation in which the mandatory sex question is answered by each individual honestly in their own terms, rather than being defined in relation to one characteristic, and the Government also decides not to have an "Other" option, how should a non-binary person answer the binary question? Is there not a fundamental problem that, if we maintain the position that people must answer the question on sex honestly in their own terms but do not include

an "Other" option, we inevitably risk people feeling that they have to give inaccurate information?

**Fiona Hyslop:** That is the point that Alexander Stewart made about allowing responders to respond accurately. As you have said, I think that most people would want to answer the question based on how they live, as opposed to their sex at birth or their legal sex. That is why the extrapolation of the voluntary question on transgender status would allow us to make sure that the information is as accurate as possible. That is the balancing act that we will have to achieve and we have not determined how to do that yet. That is why we are engaging with the committee to get its view and doing so earlier than we did for the 2011 census. There is something to be said for keeping the question as was previously but new issues have been brought to the attention of the committee and we have got to hear the committee's views on that balance, in particular, the convener's point about women's groups. I have not seen the collective evidence that Mr Harvie referred to, but I presume that it was submitted to the committee.

**The Convener:** It is on the committee's page of the website.

**Patrick Harvie:** As far as I understand, the suggestion to change the reference to gender identity and to refer instead to trans status was first made in the letter from the NRS of 5 December. The idea of being open to that change was in that letter. If there is active, on-going consideration of that, would there be any potential problems if amendments were made to the bill that restricted the kind of question that can be asked? Is there a change that has to happen, or do we need to resist making restrictive changes to the bill that would close down that consideration of the options?

**Fiona Hyslop:** That is why we will have to reflect at stage 2 on what changes can be made in order to give clarity, which is what everybody wants. We have always been quite clear that the questions that we want to ask—unless the committee is about to tell us otherwise—are about transgender status and history. If we want to ask voluntary questions about those, we might be able to be explicit about that. That is exactly what we will ask about in respect of the drafting. The amendments at stage 2 could limit things to that. I do not think that that would limit us in any other way.

The irony is that, for the mandatory questions, we can ask anything—there is far more flexibility in their scope. All that we are trying to do is to protect people from committing an offence or being fined when they answer those questions. I do not think that limiting the questions in the way that was suggested earlier by the convener—limiting them

to transgender status and history—would unnecessarily restrict us, unless our lawyers tell me otherwise. However, we may need to respond to the committee on that in writing.

11:15

**Emma Luton (Scottish Government):** We should consider that further down the line. Discussing the effect of specific changes or suggested amendments to the bill is not for this moment in time. We should consider those things going forward into stage 2.

**The Convener:** Just for clarity, in the Equality Network's submission to the committee, it suggested including trans status, but it said that it did not think that that would pin down the question and that the consultation process was open to further developing that question. That did not seem to be a concern for it.

**Fiona Hyslop:** We have the caution of lawyers in the room. However, that is my understanding, as well.

**Stuart McMillan:** Good morning, cabinet secretary. I was on the committee 10 years ago when we went through that process.

**Fiona Hyslop:** Ah!

**Stuart McMillan:** There had to be one.

**Fiona Hyslop:** All will be revealed then.

**Stuart McMillan:** I have found the process to be helpful. Earlier on, you mentioned front loading. I genuinely think that the approach has been helpful. The committee has been teasing out particular issues for the next stage. I simply wanted to make you aware of that.

A number of points have been raised in the evidence. Last week, we heard about issues relating to the guidance that was available for 2011 and directing people to the online guidance. Has any consideration been given to that so that, when we get to the census, there will be an improved process and more people will be made aware of the online guidance?

**Fiona Hyslop:** Different questions come and go, and the guidance is very important for particular groups. You will remember the language issue. A lot of stakeholder groups tried to encourage people to answer the question on that. There was quite a lot of activity around that new question, what it meant and how people should engage. We would also want that on the voluntary question on transgender in particular in order to encourage people to answer the question so that we have that information.

On your point about guidance, the process has identified that, although the bill is straightforward in

a sense because it is about the voluntary aspects, the next stage will be more complicated because it will be about the mandatory questioning. That will be very detailed. The guidance will sit alongside that. The process and the evidence sessions have shown that the 2011 guidance evolved during the process of that census development, but it was clearly very important.

On our transparency and engagement with the committee, it is really important that we ensure that the guidance is given the attention that it deserves and that, in relation to potentially controversial issues or otherwise, the guidance is given as much importance as the questions. Your advice on that is well taken.

**Stuart McMillan:** I have a question on a different aspect. You mentioned that the census will mostly be online. I take it that there will still be paper copies and copies in various other formats, including Braille, for other people in society, particularly those who may have a visual impairment.

**Amy Wilson:** Absolutely. To pick up on that last point, we will continually test things with individuals and groups to ensure that all the information that we provide is accessible and easy to understand. We are working alongside equality groups and groups that represent people with different needs to ensure that what we do is appropriate for them.

**Stuart McMillan:** That is helpful. I posed that question because I chair the cross-party group on visual impairment.

**Fiona Hyslop:** That is very important. Obviously, there are different aspects of the census. We are focusing on particular issues relating to the voluntary questions on sexual orientation and transgender, and we have touched a great deal on the mandatory question on sex. However, there is an awful lot else around the census, so we offer to keep the committee up to date on the whole project.

**The Convener:** I am sure that we would appreciate that.

Have you finished your questions, Stuart?

**Stuart McMillan:** Yes.

**The Convener:** Patrick Harvie mentioned the submission that was made by a number of women's organisations, under the umbrella of Engender, in which they raised concerns about how public bodies collect data on protected characteristics. They believe that there is a lot of confusion about the fact that sex is a protected characteristic. As Kenneth Gibson said, it is defined as such by the Equality Act 2010, as is gender reassignment. In the equality impact assessment for the bill, the NRS dealt with sex

and gender reassignment under the same heading and talked mainly about gender reassignment. That contrasts sharply with the ONS's equality impact assessment, which dealt with those two protected characteristics separately.

Do you acknowledge that there is some work to be done across the Government and in your department to ensure that every area of Government and all public bodies adhere to their obligations under the Equality Act 2010 to deal with sex as a protected characteristic independently of gender reassignment?

**Fiona Hyslop:** The answer to that is yes. Across Government, we can always improve, as the exercise on the bill has identified. However, I would say that the equality impact assessment is about the bill, which is about gender identity, not sex. It is not about the mandatory question on sex; in effect, it is about gender reassignment, gender status and sexual orientation, which will be captured by the voluntary questions. The equality impact assessment relates to the bill that is in front of us; it is not about the census process generally.

**The Convener:** I welcome the fact that you intend to go back to various groups to gather views. You will be aware that there are differences of opinion even within lesbian and gay communities—for example, there are many lesbian and gay people who have concerns about self-identification. There are also women's groups that disagree with some of the comments in the submission that Patrick Harvie mentioned, and they have made their own submissions to the committee. Can you assure us that you will take all those views into account and that you will not go only to what we might call the usual suspects, who are funded by the Government and whose money depends on them taking a particular position on such issues?

**Fiona Hyslop:** I hear what you say. It is important that the consultation that we have when we get to the next stage—the determination of the content of the final questions—is as wide as possible. You are right to say that many people have different views and opinions, but even though we want to take on everyone's views and opinions, we will still need to come to a judgment at some point. I hope that I have given the committee a sense that, as the guardian of the census, I must ensure that the census is credible. There must be confidence that it will count people in a consistent way.

We will not be able to please everybody. The census provides a snapshot in time, and we will need to determine the questions on the basis of where society is at that moment in time. Although, as the minister who is responsible for the census, I will have to make the final decisions, I will need to take on board the committee's advice. The

committee can help me in that task, and I appreciate its consideration.

**The Convener:** Thank you. With that, we move into private session.

11:23

*Meeting continued in private until 11:36.*



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