



OFFICIAL REPORT
AITHISG OIFIGEIL

Culture, Tourism, Europe and External Affairs Committee

Thursday 6 December 2018

Session 5



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CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE
32nd 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:

Professor Rosa Freedman (University of Reading)

Tim Hopkins (Equality Network)

Susan Smith (For Women Scotland)

Vic Valentine (Scottish Trans Alliance)

CLERK TO THE COMMITTEE

Stephen Herbert

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Culture, Tourism, Europe and External Affairs Committee

Thursday 6 December 2018

[The Convener opened the meeting at 09:04]

Census (Amendment) (Scotland) Bill: Stage 1

The Convener (Joan McAlpine): Good morning, and welcome to the 32nd meeting in 2018 of the Culture, Tourism, Europe and External Affairs Committee. I remind members and the public to turn off mobile phones. Any members using electronic devices to access committee papers should please ensure that they are turned to silent.

The first item on the agenda is consideration of the Census (Amendment) (Scotland) Bill at stage 1. This morning, we will take evidence from two panels. I welcome our first panel, who are Rosa Freedman, professor of law, conflict and global development at the University of Reading; and Susan Smith from the organisation For Women Scotland. Thank you for coming to give evidence and for your written submissions.

Before I move to questions, and because the bill has just been introduced, it might be helpful for clarity to make a few remarks about its purpose. The policy memorandum accompanying the bill states that its purpose is to make questions on sexual orientation and gender identity in the 2021 census voluntary. The committee has been told that the wording of the questions, if they are asked, will be proposed at a later date and that the Parliament will be able to deliberate on them then.

The bill also makes a change to the schedule to the Census Act 1920, by inserting the words “including gender identity” after “sex”. Although this is not dealt with in the bill, we understand that consideration is being given to including a third option in the sex question, as well as male and female, which would be in addition to the proposed gender identity question. Several written submissions have pointed out that that conflates the term “sex” with the term “gender identity”, which is problematic. This morning, we have received a letter from the bill team at the National Records of Scotland, which points out that there may be an issue with the drafting of the bill and that the team is happy to consider anything that the committee recommends in the area. I hope that that is all clear.

I have a question for Professor Freedman from a legal point of view on that particular aspect of the bill. In her submission, she states:

“Conflating sex and gender identity will undermine sex as a separate category protected by law.”

I assume that you are concerned about that because it sets a precedent.

Professor Rosa Freedman (University of Reading): Thank you for inviting me.

That is indeed my concern. If we separate sex and gender reassignment—or gender identity, gender presentation or whatever the wording might become—we are keeping two separate protected characteristics, as we have under law. Similarly, we would not conflate race and religion or other protected characteristics. Bringing the idea of a third category—a non-binary gender—into sex, or bringing together gender identity and sex in one question is bringing together two characteristics protected under the Equality Act 2010 and thus, in essence, undermining them both.

The Convener: For people who might be unfamiliar with the subject and who might not be clear about it, can you confirm my understanding that gender identity is not just about people who have had surgery to change their sexual appearance, but is much broader than that?

Professor Freedman: Currently, internationally, at European level and within the United Kingdom, we do not have definitions of gender identity. In Massachusetts, the law says that gender identity is the gender that someone identifies as. In international law, the term is used in a way similar to the way that Stonewall uses it—it is an umbrella term for various individuals, whether that is people who have had gender reassignment, people who are transsexual, who are transvestites, who are cross-dressers and all sorts of other people. There is a long list, but it is not a definition. Protecting gender identity, or putting gender identity into the census without a definition, would lack clarity. Moving forward, a definition would be required in law.

Gender reassignment is currently protected, and what it means is set out in the Gender Recognition Act 2004. It is about a meaningful transition, and there are certain criteria for that. Someone has to live for two years in their preferred sex or the sex that they want to be identified with, and they need to have medical certificates and so on.

From a legal point of view, there is no problem with protecting gender identity, so long as it is defined, but putting the term in a bill now, without a definition, will cause more trouble down the road, not only for the bill but more generally because of the precedent that it will set.

The Convener: I ask both the witnesses what the practical effects of such a change would be.

Susan Smith (For Women Scotland): We are concerned about the users. Obviously, biological sex is immutable. Humans are sexually dimorphic. There are various implications, especially for health providers in considering, for example, how many cervical screening programmes they need to roll out. There are also issues about the public sector equality duty as defined under the Equality Act 2010.

Pay gaps and who does the caring in society are captured by the census but, if the definition of sex is no longer robust and we do not really know what the people who have answered the question understand by that definition, all that data becomes problematic.

From the point of view of the users, it is really important to have a clear definition of biological sex for the provision of services and the protections that people will need under the equality duty. If the additional question about gender identity is to be asked, what that information is needed for and how it can best be utilised need to be worked out with the users. If they say that there is a need for that information, it is important that there is a robust definition and that they have the end goal in sight on what that information will provide. If the terms become conflated and there is confusion about them, both will become meaningless.

The Convener: I see. The written submission from the Scottish trans alliance says that the number of trans people is so small and scattered that there will be no effect on the data.

Professor Freedman: That is why we need to go back to the definitions. The number of people with a gender recognition certificate is very small, and maybe the number of people who would traditionally be known as transsexuals is very small. However, we do not know the numbers of people—particularly young people—who identify as non-binary and who identify within the broader umbrella of gender identity as Stonewall defines it. It might be important to have a gender identity question that is separate from the issue of sex with a very clear definition of what the term “gender identity” means in order to gather data on the numbers of people, because none of us knows that. One of the big issues across all the consultations on self-identification throughout Europe has been that we do not know the numbers.

It is important to keep the issue of sex separate but, in respect of gender identity, we need to know the data on domestic violence and trans-identifying individuals, and on suicides, pay gaps, and people who have been forced into sex work,

because many things are bandied around, and that is a very vulnerable community. Having a separate question would enable us to gather that data and to provide the services that are needed for that community. Keeping the broad term “gender identity” without a definition does not enable any of us to help to protect that group.

Claire Baker (Mid Scotland and Fife) (Lab): As the convener outlined, the bill is about making a set of questions voluntary. At the moment, questions about religion are already in that category and the bill suggests adding to it questions about sexual orientation and gender identity. Are you happy with the answering of those questions being voluntary and with the definitions that are used? Some submissions question the use of the term “gender identity” as the description for the set of voluntary questions. Are you satisfied with that and with the proposed voluntary status of the questions?

Susan Smith: Rosa Freedman has covered a lot of the issues relating to gender identity and how the definition must be nailed down. That is probably important, but it is not really within our remit, which is obviously to look at the impact on women and girls. Clearly, however, there are reasons why people are not comfortable with revealing their sexual orientation or their gender identity, so it is fair that answering those questions should be voluntary.

Professor Freedman: As I said, no one has defined gender identity properly—neither the United Nations nor the European Court of Human Rights has done so. If it is to be included in a census, it needs to be defined so that the people who answer the question can answer it correctly and to the best of their ability.

I am not particularly happy with the definitions that have been set out. If Scotland wants to take the lead on defining gender identity, that would be great, but there needs to be absolute clarity on what the term means so that, when people answer the question, they give the right data.

09:15

Claire Baker: The bill does not address the sex question but, if you have had the chance to look at the bill to that degree, you might want to comment on the drafting. The bill team and the Government argue that the first question, which is a binary question, is already a self-identifying question, and that the guidance that accompanied the 2011 census shows that that is the way in which the question is approached. What is your response to that? Was there any consultation on the guidance in 2011? Were you aware of the guidance that existed in 2011?

Susan Smith: That is an important point. As far as we are aware, women's groups were not consulted on the bill. It slipped in under the radar and perhaps we now have the opportunity to think about it again. Although I am sure that some people will answer any question in a way that they interpret it, the idea that someone can self-define their sex must be supported by evidence. If we are going to change definitions of sex, a body of evidence will need to be provided, including a report from the chief medical officer and one from the chief scientific officer. Currently, there is no scientific basis for arguing that there is any fluidity in sex. There is no third gamete, and there are no human beings who have moved from one sex to another—there is no real-life Tiresias. That is not possible with the human species. As I said, there are also the healthcare implications that someone's biology entails.

Professor Freedman: The law is very clear from the April Ashley case—the Corbett v Corbett case—in 1970. That involved a famous, high-society transsexual, who had married a man, wanting to have the marriage annulled, because she did not want to get divorced. The court looked at whether to annul the marriage on the basis that she was a male, and two males could not get married at that time under the law, or whether to annul the marriage on the basis that they had not consummated the marriage.

The case was quite short and went into quite a lot of detail. The judge was a medical man, and he looked at how we define sex. He said that sex is about biology, and that there are three types: chromosomes, gonads—I am sorry; it is early in the morning for this—and genitalia. Sometimes, a person might have only two of the three. He went into a lot of detail about intersex. Some children are born with internal testes, an external vagina and male chromosomes, which is slightly different to what the average or regular child will be born with. He talked about how one might need to open up the vagina to allow the testes to descend, but that does not stop a person being male, because they would have two of the three.

The judge also talked about psychological sex, which relates to what was referred to at the time as transsexuals—we would now refer to gender identity or trans-identifying individuals. He very clearly distinguished in law between biological sex and what we would now call gender identity. That remains good law.

At international level, the law remains that sex relates to biology. Sex is about chromosomes, gonads and genitalia. Therefore, under international human rights obligations—whether it is the Convention on the Elimination of All Forms of Discrimination against Women or the European convention on human rights—the definition of sex

relates to biology. To suddenly turn the definition around and have male, female and another category, or to define sex as gender, would go against the law. If we want to change the law, the way to do it is not through conflating two things in a bill; we would need to go through the processes of changing the law.

Kenneth Gibson (Cunninghame North) (SNP): The Equality Network and the Scottish trans alliance, which we will hear from in the next session, have given us a submission that says:

“A non-binary person is a person ‘identifying as either having a gender which is in-between or beyond the two categories ‘man’ and ‘woman’, as fluctuating between ‘man’ and ‘woman’ or as having no gender, either permanently or some of the time”.

How do you feel about the accuracy of that? Is that the reality?

Professor Freedman: I think that gender is a social construct and sex is biology. If gender is a social construct, it is about the norms that we expect from one another, which we have been socialised and raised with—the norms that society expects from us and that we learn very early on, because no matter what we are learning at home, we learn from the world around us.

If gender is a social construct, of course people's gender can be fluid or not exist or it can change. Your sex is a fact; it is a biological reality. In the Netherlands, they have three genders available: masculine, feminine and X, or non-binary. I think that many people would choose non-binary. You can have your gender defined as X, or non-binary, but that does not change your sex, because your sex is a biological fact.

From my personal and a legal point of view, there is no issue with how you want to define your gender. Gender is not currently a protected characteristic in law so you can define your gender in any way you want, but your sex remains your protected characteristic in law under the Equality Act 2010 and there remain exemptions for things such as sex-segregated services. It is about moving sex and gender away from one another in order to define them.

Kenneth Gibson: If we do not get this right, do you have concerns that it will undermine safe spaces for women, for example, and allow people who are declared as women but who are biologically male, with no gender reassignment whatsoever—either through surgery or hormones—to be able to go to and participate in all-women events? Is how that might impact on women and girls a concern for you?

Susan Smith: It is a general concern. It is not really within the scope of this bill. It comes back to the gender identity—

Kenneth Gibson: This is the nub of a lot of what we are talking about.

Susan Smith: There is a conflation, as we said, of sex and gender. For a lot of people, it is not an issue; for a lot of women, it is not an issue. However, there are people who need and deserve protections. It is important that those protections remain robust. Sex is a protected characteristic in the Equality Act 2010; recently, we have seen quite a lot of conflation—especially across councils—and this idea that it is about gender rather than sex.

As part of a long-term project, if we are going to start talking about gender and sex, we need to be very clear about where one applies and where the other applies. Otherwise, it will create problems and, unfortunately, it will create problems for girls and young women especially.

Although I understand young women's urges to identify out of sex-based oppression by saying that they are non-binary, unfortunately, I do not think that the world works like that. I do not think that they will benefit from being non-binary; I think that men will benefit from being non-binary. It is really important that, even though women might identify as non-binary, they are still protected on the basis that they will face discrimination and they may well face abuse because they are women.

Kenneth Gibson: Do you feel that there should be voluntary questions on gender and sexual orientation but that the compulsory question—I know that this question does not come under the bill—should be, for example, “What was your sex at birth?” and the answer should be binary—male or female?

Professor Freedman: Yes, but I would not even ask, “What was your sex at birth?” because you cannot change your sex. The question is, “What is your sex?” Particularly when it comes to a bill, the language and the discourse are very important because they will set a precedent. “What is your sex?” is the same question as, “What was your sex at birth?” because you cannot change your sex. Every part of your DNA has chromosomes that are the same chromosomes as when you were born.

Having the mandatory question of, “What is your sex?” with the answer being either male or female would allow for data to be gathered based on biology, and having voluntary questions on gender identity and sexual orientation would allow for data to be gathered on vulnerable groups. We could work out how many ovarian cancer cases there have been and whether they have gone up or down based on the biology data, for example, as well as whether increased provision is needed for refuges and domestic violence services. We could work out whether additional services need to be

provided for people based on the data on gender identity, sexual orientation or ethnicity, because we know that sometimes you need to have very specialist services within that group—

Kenneth Gibson: Sorry, but the reason I was asking about adding “at birth” to the question is to really spell it out. Some people might conflate gender with sex and if we do not make it crystal clear by saying “at birth”, someone might say that they were born male but they consider themselves to be female, for example. They will then mark the wrong box and we will not get the data that you are requesting. It is a question of clarification.

Professor Freedman: That is true. There will always be some people who say, “Even at birth, I was born in the wrong body. I have a different brain”. The terminology is “assigned” as opposed to the medical terminology, which is “determined”. There might need to be a clarification sentence that says, “This is what sex is and this is what gender is”.

We are talking about a small group of people, and there will always be people—I am sorry; I know that I am on the record—who do not tell full truths on a census, and for whom the question might be slightly political. Having a clarification sentence will help the majority of people to realise which questions relate to what. Most people will also realise why it is so important to have the two questions.

Annabelle Ewing (Cowdenbeath) (SNP): I want to pick up on the guidance. As has been said already, under the 2011 census, there is guidance on the mandatory sex question, which, as we have established, is not a part of the bill but is a topic of discussion. The guidance is about self-identification. Mr Gibson has suggested that the guidance could be amended to say “sex at birth”. I hear what Professor Freedman says about that, but to move away from what is in someone's mind to the biology, what about what is on the birth certificate? Would that be an approach?

That would, of course, take into account that there will be a voluntary question on gender identity, however that is phrased. The two things will go in tandem but at different parts.

Professor Freedman: The problem with birth certificates is that everything is still up in the air around self-identification under the Gender Recognition Act 2014. If people can self-identify for the purpose of that act, they can change their birth certificate, which will not reflect the situation accurately. We know that fewer than 5,000 people across the United Kingdom have applied for a gender recognition certificate, and that is approximately the number that was expected in 2004, but it could go up significantly if changes are

made. Using the birth certificate could be a good idea once we know the outcome of that.

Susan Smith: It goes back to numbers and needing to have proper impact assessments. We just do not know what the numbers will be. We have no real research or evidence to suggest how that will pan out.

When the GRA was introduced, one of the arguments about it was that it was about a very small number of people, and the same argument has been made about the bill—when it is such a tiny number of people, it is not going to affect the integrity of the data and it is not going to have a massive impact on society. The argument was made that, if this became more widespread, it would be a problem. We now do not know how widespread it is going to be, which means that we have to be clear on definitions and what we are looking at.

Annabelle Ewing: I hear what you are saying, and we are trying to find a way through some very complex stuff. It might well be, then, that Mr Gibson's suggestion is the best way forward because someone's sex at birth is their sex at birth. The guidance is designed to be helpful to people who might look at a question and think, "I don't know what my answer should be to that." They can look at the guidance, which should clarify the position. It is a normal approach in legislation to have a definitions section. In light of what you are saying, Professor Freedman, that might be a way forward.

Professor Freedman: It would certainly comply with international legal obligations and human rights obligations in terms of sex being a protected characteristic. It would frame the question in a way that people understand.

Susan Smith: That is the other thing. People sometimes struggle with some of these ideas. Some of the definitions around gender identity are so broad that we probably all fall under a trans description of some kind.

Annabelle Ewing: That is interesting; thank you.

09:30

Ross Greer (West Scotland) (Green): Susan Smith, I would like to pick up on a point that you made about non-binary people who you would identify as being women—you were talking about young women specifically. Does that point not essentially boil down to removing their agency by saying that you know who they are better than they do?

Susan Smith: I do not want to get into the question of individual rights and individual choices, because this issue has nothing to do with that; it

has to do with science and, apart from anything else, what the medical needs of those people will be. If you are a woman, you will at some point need to have cervical screening done. Recently, we saw that Cancer Research UK had a campaign that addressed itself to cervix havers or whatever it was. There are people who struggle with that language and with other medical terminology.

I have no issue with people having personal agency—of course not; it is a basic tenet of our civilisation. However, there will be medical issues and, at some point, those people might need recourse to services. I think I am correct in saying that, in Scotland, women are the highest users of public services. There are reasons for that, and those reasons do not go away based on how someone perceives themselves. I think that you are conflating two entirely different issues.

Ross Greer: I do not quite think that that is the case.

Rosa Freedman mentioned intersex people, and I have a specific question about that community that I would like to explore with regard to the question about sex.

Obviously, some intersex people would be comfortable identifying in the census as male or female, while others do not think that that is an accurate reflection of them. Given that the census is about collecting data for use in, for example, the planning of healthcare provision and that we are talking about a community of people who often have quite particular healthcare needs, does asking a sex question that has only male and female options not limit the usefulness of the data that is collected?

Professor Freedman: An intersex person will have either prostate cancer checks or cervical cancer screenings. That is because, in terms of healthcare, an intersex person will be either male or female—they will fall into one of those categories. Every one of us has complex needs, but an intersex person might have certain complex needs. For example, some intersex females produce testosterone but their bodies cannot regulate testosterone at all. That is completely different from all of us in this room, but that does not stop the person being female and needing a cervical cancer screening; it means that they might need some additional healthcare based on that slight difference in their chromosomes and in the way in which their body's balance works. It is a little bit like the way in which my partner with asthma needs additional testing of lung capacity.

The law clearly states that there are male and female categories, and the medical evidence clearly shows that there are male and female categories. Intersex is a slight variation on what might be the average male or the average

female—whatever that means—but it is not a third sex. In fact, many of the intersex awareness groups and campaigners have been extremely clear about the fact that they are not a third sex and that they are being co-opted and used in these debates in order to make political points or to try to promote changes to terminology and understanding that are not true and are not based on medical evidence.

I am not an expert on intersex, I am not intersex and I will not speak for the intersex community. However, I strongly encourage you to read what intersex people are saying, because the voices are not being heard and they are being co-opted and used in a way that they are extremely angry about.

Ross Greer: We have asked the intersex community for further evidence. In fact, we are receiving more written evidence today, and we hope to hear more from that community.

Susan Smith: That is good, because obviously the endocrinology—

Ross Greer: Sorry, Susan, but I want to stick with Rosa Freedman's point for a second.

Professor Freedman, you mentioned particular needs. Do you have an alternative suggestion for how we can collect that data to ensure that the appropriate healthcare provision is in place?

Professor Freedman: There are two countries where intersex issues have been foregrounded and where people have been protected in that their additional needs are considered. One is Germany and the other is Malta. Neither of those countries has said that intersex is another sex category, but there has been awareness raising in relation to intersex needs and also—this is going completely off topic—the rights of children. For a child who is born as intersex, there are issues about the agency of the child and their ability to consent as well as the choice of medical practitioners and of parents. Those are complex human rights issues. The standard practice has always been that the doctors or parents between them—or one or the other—have chosen, but what about the child's right to choose? Can we intervene in that way?

There are all sorts of questions around intersex people that are not being addressed properly and that need to be unpacked across the UK and Europe. However, that issue is not to do with gender identity. A significant proportion of the population are intersex—I think that it is about 1.7 or 1.8 per cent.

Ross Greer: Yes. It is about one in 60.

Susan Smith: It depends on how you define it, obviously.

Professor Freedman: The statistic that I hear bandied around is that, in the UK, more people are born with intersex conditions than with red hair. [*Laughter.*] I am not saying that because of your hair, Mr Greer. There is absolutely a need to think about the human rights of intersex individuals, but we should not think of the issue in terms of gender identity, because it is not about that; it is about medical, chromosomal and biological issues.

Ross Greer: Yes. That is why I asked about the sex question rather than the separate issues of gender identity.

Professor Freedman: You could have a question asking, "What is your sex—male or female?" and then you could ask, "Do you have an intersex condition?" That would be another voluntary question like asking, "What is your gender identity?" or, "What is your sexual orientation?" You could do that if you are worried about data on intersex people, but the issue should not be lumped into the sex question; it ought to be one of the voluntary questions. You should ask, "What is your sex?"—that is about the protected characteristic—and then ask about other intersectional needs relating to things such as sexual orientation, gender identity or chromosomes. Someone might then question why you are not asking about all sorts of other medical needs that people are born with. I do not know how far you want to go with the census in drilling down into the data.

Susan Smith: It boils down to the fact that most intersex conditions are unambiguously male or female. An intersex condition will affect only a male or a female. It is important not to "other" people and to suggest that they are somehow not proper men or women. It borders on difficult and potentially tricky territory if we try to tell people that they are not quite fully formed as human beings. Being intersex is a medical condition of sexual development; it is not an identity question. As Rosa Freedman said, there could be another question if there is a need to collect the data, but that would need to be done carefully so that people do not feel that they are being pushed into a third category that they really should not be in.

Professor Freedman: On data, we know that trans-identifying individuals, sexual orientation minorities and people of ethnic minorities all face more discrimination, even though the law protects them, and that they are more vulnerable than the average straight white man. However, I do not know whether we know that about intersex people. The issue is about medical data and it might be about the impact on health and wellbeing, but if the purpose of having an additional question is the normal one relating to the Equality Act 2010 and how we protect vulnerable groups from marginalisation and discrimination, there is a

question for you, as members of the Parliament, about whether you need the data on intersex people. Certainly, from the point of view of the law, having a third option of intersex goes against everything that the law says on what sex is.

Alexander Stewart (Mid Scotland and Fife)

(Con): At present, the data on gender identity and sexual orientation is used by local authorities and other public bodies to fulfil their equalities duties. That data will continue to be collected but, if there is a change, the implications for those organisations could be massive, depending on how that is progressed. How would that be managed?

Susan Smith: That is really why we come back to the issue of the integrity of the questions. It comes back to what the census is for. The census is a vast undertaking and represents a vast expense for Government, so it has to have a purpose, and that purpose is to provide politicians with the evidence that they need to provide the services that the country needs. If the census becomes meaningless, it is just an expensive exercise in self-validation for the person who is filling it in.

The issue comes down to the data that the users need. We understand that, in a society that is becoming more and more diverse, there will be groups that have additional and different needs, and that all of those needs will need to be considered by providers. However, the issue comes down to the need to ensure that the services are properly targeted. If people can say that they are male or female and there is no guidance on that and it does not matter, you will not be able to capture the biological information and you will also not be able to capture any information that you need to protect trans communities, because you will not know whether, when someone answered the question about being male or female, they were talking about their biological sex or their self-identified gender. It is an incredibly important point.

The Convener: I would like some clarity about some of the answers that we heard earlier, particularly to the questions from Kenneth Gibson and Annabelle Ewing. The issue of birth certificates came up in relation to the sex question and the definition that would apply if there was also a voluntary question about gender identity. If the question asked what someone's birth sex was and there were two options, would that be acceptable provided that the explanatory notes said that that was a biological definition and people got the opportunity elsewhere in the census to answer questions about their gender identity?

Professor Freedman: I think that it is not only appropriate but absolutely necessary that the

guidance notes clearly explain that sex is a matter of biology, with a link to the definition of sex in the law, but then say that there are other opportunities to discuss gender identity, which is about personal agency and social constructs, however you frame that in the language that you use.

It is essential that the guidance notes not only make clear that there are two questions and what they mean but ensure that people understand why we have two separate questions. People must understand that the questions are meant to ensure that we meet the needs of populations—vulnerable and marginalised groups in particular—and that, if the data is not robust, we will not be able to meet those needs or understand the landscape that is before us.

Such questions can become deeply personal and politicised. However, we need to go back a step and say that, if we do not have data on the number of people whose gender identity does not match their biological sex, we will not be able to understand the needs of that group and the issues around pay gaps, discrimination and so on that involve that group. That would depersonalise the issue and make people understand that the purpose of the census is not self-validation but the ability to plan for populations and demographics in order to provide the services that are needed.

Kenneth Gibson: There is an elephant in the room that we are not quite getting to, although I tried to touch on it in my original question: the issue of women's safety and so on. In her submission, Professor Kathleen Stock said that, if we do not get the definition right,

“it will leave room for e.g. late transitioning male trans women, who are heterosexual and have penises, to self-describe as ‘lesbians’”

and that that

“will leave the data not fit for purpose.”

That is the kind of issue that we have seen in the press and media in recent months. Is that a concern that you have? We have not heard whether it is.

Susan Smith: It is not. Obviously, it is a concern, but we want to be clear about the fact that we, as a group, do not believe that that is the main reason why most people have issues around gender identity. Most people's gender identity is deeply held and genuine, and, in many cases, they have no control over it. However, there are concerns about people who will exploit any openings. In this instance, it makes the data not fit for purpose, as Kathleen Stock said.

09:45

The wider concern for society is that, unfortunately, there are individuals who will join

the Catholic church, become youth leaders or do anything to exploit openings. It is tragic and sad, but it is no reflection on the broader trans community, who are just the same as the rest of us in wanting to get on with their lives and live as they wish. We have to be careful that, in protecting one group of people, we are not making another group vulnerable, which is why it has to be got right. We have to make sure that everybody is protected.

Professor Freedman: Having data on both sex and gender identity allows for planning so that prisons or refuges can have services that are sex segregated and that uphold the principles of the Equality Act 2010; services that are gender neutral, in which women and trans-identifying people can come together in the same space if they want to; and appropriate services that uphold everyone's protected characteristics.

Although it takes us slightly away from the topic, there are elephants in the room, which I will address. Do you mind if I veer off topic slightly?

The Convener: No.

Professor Freedman: Being able to self-identify one's gender has been introduced in a number of countries in Europe in recent years. Until about 2012 or 2013, in many countries in Europe, if someone wanted to transition, they were forced to be sterilised. That happened in countries such as Belgium, Croatia, Sweden, Denmark and France, but we did not have forced sterilisation in this country, as it is a grave human rights violation. A lot of the laws on gender self-identification were made to remedy the grave human rights violations that had been going on.

In Denmark, where there are 6 million people and self-identification of gender was introduced in 2014, there are already cases of people who self-identified as women—I am not talking about people whose gender identity genuinely does not match the sex that they were born in—going into what were previously sex-segregated spaces, which are now women's spaces, and raping people. There are already such cases in Denmark and Norway, which have populations of around 6 million people.

Until Ireland brought in self-identification law, it did not force people to be sterilised, as it just did not recognise that there was such a thing as trans. In Ireland, sex segregation remains in prisons and schools, and it is based on biological sex, not gender identification.

In Malta, where self-identification has come in, trans women who go to prison have separate showering and sleeping facilities, and female prison guards can choose whether they wish to search them.

The issues are really complex, and nobody is getting them completely right or fully understanding them.

In order to know what our prison needs are, we need to know how many trans-identifying women there are in the population, and we cannot know that by conflating sex and gender in the census. To know about the needs of refuges, girl guides or whatever, we need to know the numbers of the populations. We need to meet their needs but also those of women and girls.

In England and Wales, two women every week are killed by a current or former partner. We need to think about the needs of women and girls—as a protected characteristic under sex—as much as about the needs of trans individuals under the gender identity question. Very often, conversations focus on trans-identifying individuals, which is important because they are vulnerable, and forget completely the massive vulnerability of 50 per cent of the population, whose sex is a protected characteristic for a reason.

Susan Smith: That takes us back to the prisons question and, as Rosa said, you need the data for prison populations. We know that, unfortunately, men are more likely to commit violent crimes—overwhelmingly so, as 98 per cent of violent crime is committed by men—and we do not see a change in male-pattern violence.

Obviously, that has become an issue with men being placed in women's prisons. They tend to be more violent offenders, and women's prisons are not really equipped to deal with that. Again, that issue has to be considered when looking at data sets. Do we have to build different prisons or different prison wings for the purposes of accommodation? Unless you have the right data, you will not know the answer to that question.

Kenneth Gibson: There is also an issue about the girl guides, for example, allowing in people who self-declare. How do you feel about that?

Professor Freedman: I am not an expert on girl guides, but perhaps I can speak from the point of view of the law. Some people have issues with a male teenager who self-identifies as a teenage girl becoming a girl guide, but I put that to one side. Girlguiding has allowed male-bodied people who self-identify as women to become leaders of guides, and its policy is not to inform the parents of the children who are being led by a self-identified trans woman. That leader might take those children away to do whatever it is girl guides do for a week in forests and youth hostels—

Annabelle Ewing: Camping.

Professor Freedman: Exactly. As I said, I am not an expert on girl guides. However, the organisation is not informing the parents of those

children. It is a safeguarding issue. As a parent, I want to be able to consent to my child being away in a mixed-sex space, whether that be on grounds of safety or religion or simply because they are my child and, because they are under 16, I have the right to be informed. However, such issues become really complex, because, if a trans woman has the right to a private and family life under article 8 of the European convention on human rights, would Girlguiding be breaching its duty towards that trans woman if it informed the parents? I do not know the answer to that question, because we have not had a test case.

The answer to the situation is not to have self-identifying trans women as girl guide leaders. If we are going to think about the proportionate and legitimate aim of having sex-segregated spaces for girl guides, we also need to think about the harms that could be caused to the girls not just as a result of physical violence and other safety issues but as a result of children from religious backgrounds being excluded, because they would not be allowed to join. Keeping the girl guides sex segregated is a proportionate and legitimate aim.

Kenneth Gibson: Going back to the census, do you think that keeping the question simple, straightforward and binary is essential?

Susan Smith: Yes. Any other equality needs can be captured by additional questions.

Professor Freedman: It is not just central to capturing the data; it is required by law.

The Convener: Since we have veered off topic, and given that safeguarding issues have been mentioned, can you tell us whether there is any reliable data on the offending rates of self-identifying trans women in these areas? You have said that the offending rate for violent and sexual crime is much higher among people of the male sex—we know that to be a fact—but is the rate among trans women the same or has it changed to be the same as the offending rate among women?

Professor Freedman: *The Guardian* recently had to retract something that Professor Stephen Whittle wrote as part of an article featuring six legal opinions that we wrote on the Gender Recognition Act 2004 maybe six weeks or two months ago. Professor Whittle had said that trans women have the same offending rate as females, but a Swedish study has shown that trans women have the same offending rate as men. As far as violent offences are concerned, there is no difference between someone who has transitioned—or who self-identifies as trans—and someone who remains a man, having been born male.

That *The Guardian* had to retract that comment—and change it online—is down to Fair

Play for Women, which brought those statistics into the public realm. An element of those statistics might be people self-identifying as women in order to access female spaces and offend, although I am not saying that every trans individual is going to be a violent offender, just as I would not say that every man is a violent offender. We are talking about only a very small minority—it is not all men, and it is not all trans women.

That said, we cannot consider the individual away from the general rule, which is that, overwhelmingly, women are violently attacked by male-bodied people, and violent offenders are overwhelming male-bodied people even if no male-bodied person in this room—I imagine—would ever dream of doing such a thing. We need to protect women from anyone who is male bodied, because of those violent offences.

Claire Baker: I will be brief, as we have veered off the topic. I am not disputing the figures that have been given, but you will recognise that people in the trans community are more often the victims of crime and that a high number of physical assaults are perpetrated against them.

There is a big debate about the Gender Recognition Act 2004 and self-identification, which we are considering today. That is where the debate is focused. Do you agree that that debate detracts from issues relating to violence against transgender people, transphobia and access to medical services—that it detracts from the other issues that affect that community? The focus is very much on self-identification. Is the focus in the right place?

Professor Freedman: That is why we need two separate questions. We do not have the data, and we all want it, because we all—I hope—want to protect every vulnerable and marginalised person in our society. We know that the trans population is a vulnerable and marginalised group in society, but, if we do not have the data on how many trans-identifying individuals there are in our society, we cannot understand the discrimination or the levels of domestic violence, violence in the streets, forced prostitution and suicide. If we conflate the two issues, we will never be able to meet the needs of that very marginalised group.

Without a shadow of doubt, trans individuals face massive discrimination and violence in society. Women also do. I mentioned that two women a week in England and Wales are killed by a current or former partner, because that is not recognised enough. In the United Kingdom, eight trans individuals have been killed in the past 12 years, which is eight too many. We know that statistic from the transgender day of remembrance. We also know that 12 murders have been carried out by trans-identifying

individuals in the same period. Each murder is senseless and not right.

We have only those few tiny figures because we do not have proper census data. We are all grasping around in the dark, trying to work out how to help a very marginalised community, but we do not know the size or the scale of the problems or of the community. That is why the bill could set a very good precedent in allowing us to capture proper, accurate data.

Susan Smith: That data will include whether there are differences within the community. There are many different definitions of what constitutes a trans person, and, within them, there are biological males and biological females. Having robust data would break that down so that we would be able to see which of the groups were at most risk and where that was problematic. It is true that men are most likely to be the victims of violence, because men attack each other. That goes back to the broader societal issue that there is a problem with male violence that we need to solve. However, we will not solve that problem by putting women at greater risk. We need to separate out the issues.

The Convener: Thank you very much. If no other members want to ask a question, I will wrap up.

Annabelle Ewing: I have a brief question. The discussion has been very interesting, but I want to go back to the bill and the voluntary question on gender identity. Some of the submissions suggested that that terminology is not preferred and that the terms “trans status”, “trans history” or “trans status/history” are preferred. Would they capture all that we have talked about, or should there be a subset? We have to look at that issue. Getting back to the bill, we are tasked with doing that.

Professor Freedman: In terms of the protected characteristics and the Equality Act 2010, there ought to be a question on sex and a question on gender reassignment, as they are protected in law. As I have said, gender identity has not been defined. It is not gender reassignment; it is much broader than that. Even Stonewall has not defined it; it has just given us a list of who might fall under that term. The questions on sex and gender reassignment probably need to be mandatory. That is certainly the case for sex, but it also applies to gender reassignment, because it is a protected characteristic. We cannot elevate one protected characteristic to having mandatory status, and leave another one floundering with a voluntary status.

Gender identity is not a protected characteristic. We need to capture data on the issue. That can be done on a voluntary basis, but there needs to be some form of definition or explanation in the

guidance notes that a person’s sex relates to biology, that gender reassignment relates to whether someone has gone through the steps that are required and that gender identity is something wholly different.

10:00

Annabelle Ewing: Indeed. However, some of the submissions have suggested that we should score out the phrase “gender identity” and insert “trans status/history”.

Professor Freedman: We should not do that, because “trans status/history” relates to gender reassignment—it is someone’s trans status. Under the Equality Act 2010, gender reassignment relates to someone’s trans status, whereas gender identity is something that is much broader.

I recognise that, in plenty of submissions, it is said that gender identity should not be included at all. I have made it clear that it is an important question to include, so long as there is a definition. However, the definition cannot be someone’s trans status, because there are people who are non-binary. They do not have a trans status, so that issue should fall under the broad category of gender identity.

Annabelle Ewing: Should we approach the matter by creating a non-exhaustive list?

Professor Freedman: I am afraid that I do not have the answer to how to define gender identity. I am very happy to write to the committee and send various definitions of gender identity from various jurisdictions, including the international level, the intra-America level and the European level. The committee can then decide which parts it wants to adopt.

The question is really tough. The UN independent expert on protection against violence and discrimination based on sexual orientation and gender identity—which is a very long title—published a report in July 2018 that looked at violence and discrimination against gender identity minorities. I know him quite well and he is very good, but he does not define gender identity, so we have not quite got there. It might be that we have a non-exhaustive list or it might be that we have a broad definition, bearing in mind that, by the time of the census, there will be advances in how gender identity is understood. I do not know how easy it would be to then start amending things.

Annabelle Ewing: That is a reasonable point for us to bear in mind for the future.

The Convener: We are running over time. Does Kenny Gibson have a question?

Kenneth Gibson: I have an important question that I should have asked earlier. Professor Freedman said that intersex people are being “co-opted and used”. Who is using them, and why? What is the political agenda?

Professor Freedman: Quite a lot of intersex individuals and medical experts who work on intersex issues have said that, over the past few years, organisations and individuals who are seeking to advance the fundamental rights of trans individuals have started to say that there is no such thing as two sexes, because intersex people are neither male nor female. That is not true, and it is deeply offensive to intersex people, who are male or female. Intersex people can have children and can father children. They have to be male or female to do that—there is not some third space. There has been quite a big push-back on that, with intersex people saying, “We’re not trans.”

Some intersex people might be trans, but they are not trans by virtue of their being intersex. The co-opting of intersex people, in saying that there is no such thing as two sexes by pointing to people who are somewhere in the middle, is undermining the ability of intersex people to advance their needs—this relates to what I said about the human rights of children—that are based around being intersex.

Kenneth Gibson: What would be the purpose of anyone pursuing that agenda?

Professor Freedman: Some experts and groups want to conflate sex and gender. Under the current law, there can be sex-segregated spaces. Even if someone has gender recognition certificates and is trans, they are not allowed to access certain sex-segregated spaces. Those organisations have therefore said, “If we can get rid of the idea of two sexes, we can essentially get rid of that protected characteristic and call everything around gender.” They cannot get rid of sex as understood in law, so, in order to try to get rid of sex, they have used the words “sex” and “gender” interchangeably in policy. For example, the national health service has been advised to use the word “gender” instead of “sex” in some policies, so suddenly we have mixed-sex wards, because they are gender segregated and people are self-identifying. That is causing all sorts of problems.

Such organisations have also been saying that there is no such thing as there being only two sexes, so they have co-opted the intersex community, whose members fall into male or female, and said, “Look—if we have intersex people, sex must be a spectrum and, if sex is a spectrum, we can all fall anywhere we want and we can all walk into any space that we want to.” That is what I meant by “co-opting”.

Kenneth Gibson: Thank you for that clarification.

The Convener: For clarity, I have a specific question about the census questions. There is a proposed third option for the sex question, in addition to the gender identity question. When the Scottish Government or the National Records of Scotland consulted on the issue, certain stakeholders said that, in addition to the gender identity question, there should be a third option for non-binary people in the sex question. When I looked at Stonewall’s definitions of “trans”, I found that non-binary comes under the term “trans umbrella”. Therefore, I take it that it would be acceptable for non-binary people to identify themselves in the gender identity question, which is separate from the sex question. Do you understand what I am saying?

Susan Smith: As we have said, it is clear that sex is dimorphic. Stonewall lists non-binary people under its “trans umbrella”. That is an identity issue, which does not change the fundamentals. There are non-binary women who get pregnant, and there are non-binary men who father children. Such people need the same screening programmes and, if they commit a crime, there needs to be consideration of which prison population they go into. That is not going to change; the non-binary option does not transform their physical being into something else. The non-binary issue definitely falls within the identity umbrella rather than in the sex question.

The Convener: I thank both witnesses for coming to give evidence.

10:07

Meeting suspended.

10:10

On resuming—

The Convener: I welcome our second panel. We are joined by Vic Valentine, the Scottish trans policy officer for the Scottish trans alliance, and Tim Hopkins, the director of the Equality Network. Thank you for coming to give evidence and for your written submissions.

I do not know whether you were here for the earlier evidence session, but I want to ask something relating to that. In the stakeholder exercise that the National Records of Scotland carried out on the census, people were asked about a gender identity question—although I know that the terminology around that is changing—and about the sex question. As well as the proposal to have a voluntary gender identity question, the Scottish trans alliance wants a third option in the

sex question. Will you explain why you argued for that?

Vic Valentine (Scottish Trans Alliance): The guidance on the previous census said that trans people were to answer the sex question in line with their self-identified sex. Therefore, trans men were able to select “Male” regardless of their biological sex characteristics at birth and what is on their birth certificate, and trans women were able to select “Female”. We were really happy with that approach, but it left some trans people—non-binary people—unable to give an answer to the question. In essence, they were unable to answer it truthfully or in line with how they live and identify. For me as a non-binary person, if I were to receive the census and it had only those two options, I would feel really unsure or uncertain of exactly the right way to respond and about which response would be truthful and would provide NRS with useful information about who I am or how I live. I feel that neither of those options would do that.

Back in 2015, we did a survey that involved speaking to about 900 non-binary people across the UK and asking them how they felt about the fact that forms often provide only the two options of “Male” and “Female”. People felt that it reminded them of a lack of inclusion and a lack of recognition by society. Three quarters of people said that they wanted to be able to tell people and complete forms using terms that describe how they actually live and about 68 per cent said that they want that always to include a third option of “Other”.

We feel that, to maintain the data set of the sex question—on which trans people were clearly told that they should respond in line with how they live and identify—we need to add a third option to ensure that it applies not only to trans men and women but to non-binary people.

The Convener: You will have heard me say at the end of the previous evidence session that non-binary falls under the Stonewall definition of the trans umbrella, and the argument was made that non-binary is an identification as opposed to a biological sex. The thing that is different from the 2011 census is that we will have another question about identification, so the sex question can capture biological sex, which is important for health data and so on, and people will have the opportunity to express their identity, whether that is non-binary or whatever, under the voluntary trans question.

10:15

Vic Valentine: The voluntary question that is currently proposed is not designed to ask people about their identity again; it is supposed to ask them about whether they are trans or have a trans

history. All people living and identifying as women would tick the female box at the sex question, including trans women and all other non-trans women. The proposed additional question would ask, “Do you consider yourself to be trans or to have a trans history?”, in response to which all trans women would tick “Yes”. It would not ask people again how they thought of their gender identity and give them male, female and non-binary options; it would ask them whether they considered themselves to be trans or to have a trans history.

The sex question is about what people’s self-identified sex is and how they live and identify, and the trans question, which is called the gender identity question in the bill but is actually about people’s trans status or trans history, will go on to ask people whether they are a trans person. By using those two questions together, it will still be possible to identify clearly which people who say that they are female are trans women and which people who say that they are female are not trans women, but there would be no repetition of a question about identity, if you see what I mean.

The Convener: How do you respond to the argument that it is important to capture data on biological sex? What you propose will not capture 100 per cent accurate data on biological sex.

Vic Valentine: It will capture completely accurate data for biological sex characteristics at birth for probably just over 99 per cent of people because, for almost everybody in Scotland, their biological sex characteristics at birth and their self-identified sex and how they live are totally the same.

Of course, the sex question is massively important for things such as health planning, but sex is only a proxy for making decisions about sex-specific services. Do not get me wrong—it is an extremely useful proxy, but, for example, not all females need cervical screening, because they might have had a hysterectomy. We cannot tell whether someone will automatically need cervical screening just by knowing that they are female.

For trans people, sex is a much less useful proxy. Whether we are asked about our biological sex at birth or how we live and identify, many of us have medical transition treatments and make changes to our bodies, so just asking what our sex characteristics were when we were born does not provide up-to-date information about our health needs. For example, a much larger proportion of trans men will have a hysterectomy as part of gender reassignment treatment, so to insist that they label themselves as female so that they can be counted for cervical screening will not be useful, because many of them will not have the body that might be anticipated if we assume that

all people who select “Female” automatically need cervical screening.

Tim Hopkins (Equality Network): I thank committee members very much for allowing me to come along at the last minute to replace my colleague Hannah Pearson. Unfortunately, her father was taken seriously ill last night, so she was not able to come, but I will do my best to answer the questions.

Vic Valentine has already explained that the data that would be obtained from a question that insisted that people responded according to the sex that they were assumed to be at birth by virtue of their appearance—we can call that biological sex—is not really any different for health planning purposes from the data that was obtained from the question as it was in 2011, which, in effect, was a self-identified sex question. As the committee has heard, in 2011 the 1 per cent of people who are trans were told to answer it according to the sex that they believed themselves to be. In fact, the Office for National Statistics issued guidance for the England and Wales census for 2001 that said the same thing, so this has been going on for two decades. Asking about biological sex does not provide data that is significantly more useful for health planning than doing what we did last time and the time before that.

There is another issue. The committee has heard that biological sex is what is protected by the law, but that is not true. The guidance that the Equality and Human Rights Commission published on the Equality Act 2010 and the sex protected characteristic focuses on legal sex. Legal sex and what the committee has heard called “biological sex” are not the same thing.

One of the previous witnesses referred to a case four decades ago about a trans woman called April Ashley, but the law has changed a lot since then. In the case *Goodwin v the UK* back in 2002, the European Court of Human Rights ruled that it is a human right to have your gender identity as a trans person recognised and that you have the right to change your legal sex to match your gender identity. That is what the Gender Recognition Act 2004, which was brought in as a result of that case, does; it came into force in 2005. The UK was one of the last countries in Europe to do that. Since then, the legal sex of anybody who applied for and got a gender recognition certificate is different from their biological sex, or the sex that they were assumed to be when they were born. It is their legal sex that is protected under the Equality Act 2010.

The Convener: Thank you. Do you think that biological sex is of any relevance whatsoever?

Tim Hopkins: Biological sex characteristics are certainly important for healthcare. If you have a

cervix, you might need to have cervical screening. However, as Vic Valentine has already said, forcing trans men to call themselves women in the census under a biological sex question would not help you with your health services planning, because many trans men have had hysterectomies, so they do not have a cervix.

As Vic Valentine also said, information that you get about sex in the census is useful for broad planning, but you have to take into account individual circumstances. For all sorts of reasons, individuals might or might not need a certain service.

The Convener: I am just trying to pin down your organisation’s general view of sex as a protected characteristic. When the Scottish trans alliance made a submission in 2015 to the Women and Equalities Committee at Westminster that was looking at all these issues, it argued that exemption based on sex should no longer figure in things like hiring people for particular jobs.

Vic Valentine: That is not our position at all. For example, for sex-segregated spaces or jobs that are exempt from the Equality Act 2010’s provisions on sex, the presumption is that a trans person will be treated as the gender in which they live and which they identify as, unless specific exceptions in the 2010 act are invoked. Female sex-only services, for example, are presumed to be inclusive of trans women unless specific exceptions are used.

We do not think that it should be necessary to exclude a trans person exclusively on the basis of their being a trans person. If you take a person-centred approach to service delivery and you think that an individual is genuinely unsuitable for your service, we do not see that there would be an instance where the fact that a person is trans would be the thing that made them unsuitable. We absolutely support the maintenance of women-only spaces and roles that are just for women, when they are important.

The Convener: What I think you are saying is that for those jobs, such as a support worker delivering intimate services for someone who is disabled, people should have the choice to say that they do not want a person who has a male body performing those services. My understanding was that you argued against that in 2015.

Vic Valentine: We think that anyone should have the right to refuse any individual when it comes to something like intimate healthcare if they do not feel as though that person would be able to do that job in a way that felt respectful and useful for them. We see no purpose in forcing somebody to be cared for by someone that they do not feel comfortable with.

The Convener: So why did you argue against sex exemptions in 2015?

Vic Valentine: I suppose the position was more specifically that we did not think that trans people should not be included in line with their identity in absolutely all circumstances, and that there were clearly cases in which trans people would be appropriate for taking those sorts of positions in line with their identity. It was more about it not being invoked as a blanket provision.

The Convener: Thank you. We had better move on.

Claire Baker: The proposal for the census amendment suggests that we put questions on sexual orientation and gender identity into a voluntary category along with questions on religion. Your submissions show that you support that proposal. Do you want to say a bit about why you think that it is important that they go into the voluntary part of the census?

Tim Hopkins: We are still some way from complete equality for lesbian, gay and bisexual people, and rather further away from complete equality for trans people. For that reason, to force somebody on pain of a £1,000 fine to specify to the Government what their sexual orientation is, for example, would not be appropriate at the current time. That is why we think that the question should be voluntary. We often recommend to people who collect sexual orientation data for employment monitoring purposes or whatever that they should include a “prefer not to answer” option. It is equally good to specify that the question is voluntary at the top of the questions, which is what NRS recommends.

Claire Baker: I think that one of the submissions said that if the questions are voluntary and people might not want to answer them—they might not feel comfortable answering them—should we bother asking them at all? Will we receive helpful data?

Tim Hopkins: Yes, definitely. The Scottish Government has been asking a sexual orientation question in its national surveys since 2011. It published data in 2017 based on the 2016 surveys; about 21,000 people were asked questions in 2016 in those surveys and we got some useful data out. We got some information about how many lesbian, gay, bisexual or other sexual orientation people there are and the Government got two statistically significant facts from that sample of 21,000 people. One was that lesbian, gay, bisexual and other sexual orientation people have rather worse health than the general population and the other was to do with their being more likely to live in deprived areas.

However, you cannot get much statistically significant information out of a sample of 21,000

people. The big advantage of asking the questions in the census is that you have a sample of 4 million or so adults, so you get much more useful information.

We know that there will be some underreporting but, for example, you could still compare the number of lesbian, gay and bisexual people living in Glasgow with the number who live in Inverness, and that kind of thing is important for the planning of services. We know that people move around the country. Even though there is a level of underreporting, we will still get really important data from the people who report themselves as, for example, lesbian or gay; we can tell what their health outcomes are like compared with people who report themselves as heterosexual, even though there is some underreporting in the lesbian and gay cohort.

Claire Baker: The bill uses the term “gender identity”. The submission from the Equality Network and the Scottish trans alliance suggested that the question should be called a trans status question rather than a gender identity question. We heard from the previous panel their concerns about the lack of definition around gender identity. Obviously, if we take the bill as it is presented to us, there would be a description of gender identity in the bill. Do you want to say a bit more about your feelings on the use of “gender identity”? Should the term be changed?

Vic Valentine: It is my understanding that, because the bill is mostly about deciding whether to have voluntary questions on sexual orientation and gender identity—or trans status—the questions can be defined in a broad way. Until the regulations about the actual wording of the questions come out, how they are asked will not be determined.

NRS, in its latest round of testing, is testing the question, “Do you consider yourself to be trans or have a trans history?”, but certainly if it would be useful and provide greater clarity to have the bill describe what the wording of the question would be, it could be worth thinking about changing it to include that.

“Gender identity” is broadly used to refer to the strand of equality work that focuses on transgender people, and I believe that that is why there was a decision to use the term. As data needs change, the questions that NRS might want to ask trans people within a census might change and it would not have to revisit Parliament every time in order to request that those questions were voluntary. It is my understanding that the idea was that there will be a question that pertains to transgender equality and it will be called the gender identity question, but the actual question in the 2021 census will be a trans status, trans history question.

Tim Hopkins: We would say that “gender identity” is a very widely used term, including by the United Nations. The UN talks about sexual orientation and gender identity when it is talking about discrimination against lesbian, gay, bisexual and transgender people, so we think that “gender identity” is okay as the headline term for this.

Just as with other subjects in the census, the detailed questions are considered later and there will be statutory instruments on those, so we would be comfortable with the bill staying as it is, although we would prefer the question to be more specific and we would like NRS to continue to do testing to find the best question.

Claire Baker: I have one final, brief question. Your submission describes the trans population as being “so small” and states that

“there is a relatively small number of non-binary people”.

There is an argument that, if people were able to have flexibility around the sex question—if we were to go down a non-binary route—the figures are so small that it would not really impact much on the data.

In the wider debate, there is a discussion around a generational shift, the idea being that the next generation that comes along will have a different attitude to these things from that of my generation. I fall into that category now. Do you think that that would be tracked by the census? It is often emphasised that we are talking about only a small number of people, but the general discussion seems to suggest that there is an increasing number and that the younger generation has a different view. Do you have any views on that? Do you still maintain that there is only a small population and that, to an extent, the data would not be affected?

10:30

Vic Valentine: The estimate of 0.6 per cent comes from a Williams institute paper that drew together a large number of state-level surveys that were conducted across the USA and pooled the figures from them to come to an average across the USA. That study was published relatively recently, and I do not think there has been such an enormous shift that we would anticipate seeing a figure much bigger than that overall.

Claire Baker: Does that 0.6 per cent figure represent people who had transitioned or people who were—

Vic Valentine: Those state-based surveys asked a question that allowed someone to self-identify with regard to how they describe their identity and whether they are trans.

The Convener: Tavish Scott has a question.

Tavish Scott (Shetland Islands) (LD): We now move from one generation to another.

The Convener: How gallant.

Tavish Scott: There is a Roger Daltrey lyric in there somewhere.

I would like to clarify something that Tim Hopkins said to the convener, because I might have misunderstood it. Am I right in understanding that you contradicted the earlier panel about the definition in law? Could you explain that again, please?

Tim Hopkins: The Equality and Human Rights Commission is clear that, when the Equality Act 2010 talks about sex, it is talking primarily about someone's legal sex, which is not the same as someone's biological sex when they were born, because, under the Gender Recognition Act 2004, people can change their legal sex.

There is another important point. When we are talking about discrimination against people, which is what the 2010 act is about, the point is that the protections around protected characteristics protect someone not only if they have that protected characteristic but if people think that they have that protected characteristic. That means that, if somebody discriminates against a person because they think they are gay, even though they are not, that is sexual orientation discrimination.

The same principle applies to sex discrimination. That means that, if a trans woman who does not have a gender recognition certificate—so they are still legally a man—is discriminated against at work because they are seen to be a woman, because they live as and present as a woman, that is sex discrimination, regardless of the fact that they are not legally a woman, and certainly regardless of the fact of what their biological sex at birth was. The definition of sex in the 2010 act is much more complex than even legal sex, and it is certainly not biological sex.

Tavish Scott: Does that matter in the context of the census? What is the import of that to our discussion about the census?

Tim Hopkins: That is a good question, because the data from the census is used for different purposes. One of the purposes that it is used for is as a baseline for data that is collected by other bodies. Generally speaking, when other bodies collect sex data, they collect data about people's lived sex; they do not ask for personal details about people's genitals or their biological sex.

Data is also useful for measuring the amount of discrimination, and I would say that the discrimination that someone faces is faced according to how they live their life, how they

present and how they are believed to be. A trans woman who lives and presents as a woman will be treated as a woman and will face discrimination as a woman. A trans man who lives and presents as a man will not face misogynistic discrimination, because they are treated as a man. In measuring the impact of discrimination, lived gender—self-identified sex, or the sex that someone lives as—is the important thing.

Earlier this year, the Parliament passed the Gender Representation on Public Boards (Scotland) Act 2018, which, as you know, requires public bodies to push the percentage of women on their boards up to 50 per cent. The act defines women as including trans women who are living as women. It would be rather strange, therefore, in terms of baseline data, if the census asked about something different from that. That is what we are aiming for: we want 50 per cent of each of our public boards to be made up of women. The Parliament has already decided that that should include all women who identify and live as women, including trans women, and we believe that the census should use the same definition.

I have one more point to make in answer to your question. Our colleague James Morton, who is the manager of the Scottish trans alliance, is a man. Some of you have met him: he looks like a man, he acts like a man—he is a man. Anybody who has met him would find it ridiculous if he had to fill in the census form and say that his sex was female. However, that is what he will be forced to do if there is a question on biological sex at birth. That would be a very retrograde step, and it has not happened for the past 20 years. When James completed the census in 2011, he filled in his sex as male, and I do not think that he should be forced to, in effect, lie on the census and say that his sex is female.

Tavish Scott: That is very helpful. Your main contention is that we should be consistent.

Tim Hopkins: It is really important to have consistency from census to census, and I think the data will be more consistent if you stick with lived sex.

Annabelle Ewing: A number of important issues have been raised. Picking up on the last point, I suppose that you are saying that the status quo should prevail. I point out that the bill itself is about not the mandatory question but the voluntary aspect, although, obviously, the discussion has gone wider than that. Given what you have said, is it your position that the mandatory question should remain the same, with the options being male and female, and that the guidance should address the self-identification issue?

Tim Hopkins: Not quite. Do you want to go first, Vic?

Vic Valentine: It is almost our position, but we want the third option to be added to allow non-binary people to answer in line with their self-identified sex. We are very happy for the sex question to remain compulsory, because it is massively important for all kinds of planning for, and measuring of, inequality, but I want to be able to answer that question in line with who I am, how I live and how I identify. I want to be given the opportunity to answer that question in the way that all other men and women are able to answer it.

Annabelle Ewing: One suggestion that was made during the discussion with the first panel was that these self-identification issues could be reflected in the voluntary section of the census. We discussed the reasons for doing that at some length with the first panel, covering issues such as gender identities, the social construct, biological sex at birth and the ability to properly capture data and use it to the best possible advantage, including data captured from people answering different questions about self-identification. Would having a mandatory binary sex question and a voluntary gender identity question—however that is defined, which is a question that I will get to in a minute—not capture the data in the best possible way, which is, in fact, the purpose of the census?

Vic Valentine: The approach that we support is to have a mandatory sex question with three options that trans people can answer in line with their self-identified sex—in other words, it would not be a sex-at-birth question—and a gender identity question that would actually be about trans status and history, asking, “Do you consider yourself to be trans or to have a trans history?” That would capture the proportion of people answering the sex question as female who were trans women but were not female at birth and the proportion of people selecting the male option who were trans men. It would also allow non-binary people to tell you that they are neither men nor women, but non-binary. You would then be able to figure out what proportion they make up.

If you were to introduce a mandatory sex-at-birth question with just male and female options and a second question asking, “What is your self-identified gender or sex?” with male, female and non-binary options, you might have a similar output, allowing you to identify which people there was a change between. However, you would also, with that second approach, be forcing people to reveal quite private and personal information about their biology that, as we have already discussed, would not necessarily be relevant to health planning and so on. The principle of trans equality and the movement towards such equality in politics have been about ensuring that how

people live and identify is respected and is more important than reducing them to their biological characteristics at birth.

Annabelle Ewing: I do not think that anybody is trying to reduce anyone to anything; we are just trying to work our way through this. We have heard very strong evidence this morning that sex at birth is a biological condition and fact. How people choose to live their lives is absolutely a matter for them; they should be free to choose. However, from the evidence that we just heard, it is immutable that sex is a biological fact. I hope that we will all seek to get to a position that respects people's rights and identities, including implications that a different approach might have for other groups of people, including women and girls, as was mentioned at the earlier session. In that regard, having the mandatory question remain binary and having a voluntary gender question to capture other self-identifications in order to get the correct data has some rationale to it.

From what Vic Valentine says, it seems that the definition of gender identity has been preordained by the NRS to be to do with trans identification, though it is the Parliament that is looking at the bill so, ultimately, we will have a view on the terminology that is used. That definition might exclude other people. How do you deal with that in the gender identity voluntary bit? If your view is that that is interchangeable with trans status, what about other people who are not in that position and who self-identify in some other way? Should gender identity not involve a wider definitional approach? That is an open question; I am seeking your views.

Vic Valentine: I am not sure that I understand. Are you asking whether there should be more than just three options for people to choose from?

Annabelle Ewing: I am talking about the voluntary part of the census, which, as proposed, would include a question on—I am checking the wording that is used—gender identity. You have made statements to the effect that you feel that what is intended, further to your work with the NRS, is a question about trans identification. Assuming, for the sake of argument, that we have a mandatory binary question on sex, is there not an opportunity in the voluntary question on gender identity to capture other people—non-binary people—as opposed to just trans people?

Vic Valentine: Which other people would you like to capture?

Annabelle Ewing: I am asking you that question. Are there other categories of people, such as non-binary people, who might want to be categorised in that part of the census?

Tim Hopkins: The key point is that this is about protected characteristics. In the Equality Act 2010,

the protected characteristic is called gender reassignment. In some other countries, it is called gender identity. When the 2010 act went through at Westminster, the UK Government said—

Annabelle Ewing: I am sorry to interrupt, but I am conscious of the time. I am not talking about the mandatory part; I am talking just about the voluntary part.

Tim Hopkins: Sorry—that is what I meant. The purpose of the voluntary question is to capture people who are affected by the protected characteristic of gender reassignment, so that all the protected characteristics are covered.

We have done quite a lot of work with trans people, who are the people who have the protected characteristic of gender reassignment, including non-binary people, asking what a suitable question would be, what they would answer and so on. A question including words to the effect of, "Do you identify as trans or have you identified as trans in the past?" would be the best way in which to capture those people who have the protected characteristic of gender reassignment, as it is easier to understand than the question, "Do you have the protected characteristic of gender reassignment?", which is quite legalistic.

We are not totally wedded to the wording that the NRS has proposed. It is all about capturing how many trans people there are—the people who are affected by the protected characteristic of gender reassignment—just as we capture numbers for the other protected characteristics.

Returning to the sex question for a moment, the crucial question is whether it should ask about biological sex, legal sex or the sex that someone lives as. We are absolutely clear that asking about the sex that someone lives as would be consistent with the previous censuses and would give us the most useful information, for the reasons we have already discussed. Further, not to do so would be an invasion of privacy. The European Court of Human Rights has been clear that the reason that trans people have the ability to change their legal gender is to protect their privacy, and asking people about their biological sex characteristics when they were born is a breach of their privacy.

At the very least, the question should ask about legal sex and not biological sex, so that it protects people's privacy in the way that the European court has been very clear that it should be protected. In our view, it would be consistent with other legislation and with the previous two censuses to ask people about how they live their life and their self-identified lived gender—the gender in which they interact with other people.

10:45

The Convener: I have a quick supplementary on that. How do you live as a particular sex?

Tim Hopkins: Vic Valentine is probably the best person to answer that.

Vic Valentine: I want it to be clear that we do not have a stereotype of what it means to live as a woman or as a man. We do not think that, if someone does the things in category A, they must therefore identify as that and vice versa. We know that men and women can live in a huge variety of ways. However, for trans people—I am a trans person—it is about a deep-held sense of discomfort in knowing that other people who you interact with have a different sense of who you are from who you feel yourself to be. You want to take steps and make efforts to make it clear to other people that the assumptions that they might make about you do not line up with your identity. You want people to see that it is meaningful to you that you feel differently about your gender and how you live your life.

The Convener: I am trying to drill down into how one lives as a particular sex, as Tim Hopkins said, without resorting to gender stereotypes.

Tim Hopkins: Most people, when they talk to other people, in some sense present themselves either as a man or as a woman. When I speak to another person, I expect that they will assume that I am a man, and I do not contradict that. I use “he” pronouns about myself and I am comfortable for other people to call me “he” and “him”. If I was a trans woman, I would obviously want other people to call me “she” and “her”, like any other woman does. I am talking about those kinds of interactions. We live in a gendered world and, when we interact with other people, one of the first things that we think about is their gender.

The Convener: So would it be based on things such as clothes, for example.

Tim Hopkins: It does not have to be because, of course, people wear all sorts of clothes and, thank goodness, gone are the days when it was thought strange for a woman to wear a pair of trousers. The fact that somebody wears a pair of trousers does not stop them being a woman and it does not stop a trans woman being a woman.

The Convener: So what does it mean to live in a particular sex then, if it is not about that?

Tim Hopkins: It is about your self-identity and the way you express that to other people. I am a man. I have always known that I was male, and I believed that I was a boy when I was growing up. When I interact with other people, I am happy to discuss the fact that I am a man, if the subject comes up. In fact, I assume that most people will assume that I am a man when they talk to me. As I

say, people will use “he” pronouns for me and I do not find that a problem.

The Convener: It strikes me that we could go down the road of male and female brains, which is anathema for many feminists, who think that, internally, we are all human beings and not male or female.

Vic Valentine: I totally agree. We do not think that gender stereotypes define a person’s gender identity. There was nothing about my interests or my likes or dislikes and my personality that meant that I could not be a woman or grow up and live as a woman, as would have been expected based on what my body looked like when I was born but, actually, to me, the idea of that felt wholly impossible and suffocating, and I just knew that that was not who I was. It is difficult to convey to other people that sense of certainty about that discomfort. I realise that, for the vast majority of people, it is just an automatic thing. However, it is absolutely the case that trans people just know that the cues that other people may pick up on about us do not match up with our sense of who we are, and that is why we do certain things, make changes and ask people to try to work with us to see us differently.

Ross Greer: Much of what I was going to ask about has just been covered, but I have a question that follows on from the conversation that we had with the previous panel. The Equality Network represents the intersex community in Scotland, so I ask Tim Hopkins to expand a little on how the bill might or might not affect that community.

Tim Hopkins: It is very important to say that we do not represent the intersex community. In fact, we do not claim to represent anybody; we just speak up for people’s equality.

Our intersex project is at a very early stage, and we are in the process of speaking with intersex people in Scotland and the rest of the UK to identify what people’s needs are. That is in advance of the Scottish Government consulting on intersex equality next year. We work very closely with Intersex UK, which is one of the UK’s intersex organisations. It has a number of key priorities for change, including one that the previous panel mentioned: the disregard for the bodily autonomy of young intersex people when, for example, they have surgery performed on them when they are too young to consent to it, to make their sex characteristics look more usual. We are supporting Intersex UK on those calls.

Intersex UK is not at the moment calling for the census to include a question about intersex status or what a person’s sex characteristics are, but it is calling for the Equality Act 2010 to be amended so that people are protected from discrimination because they are intersex—because they have

variations of sex characteristics; that is, the chromosomes, gonads, genitals or hormones in their body do not match what is considered to be typical for males or females. We would like the Equality Act 2010 to be amended to protect them from discrimination on that ground. However, that is not currently a protected characteristic, and people are not currently calling for that question to be added into the census as a separate question.

The question would arise if you asked about biological sex rather than about—as has happened for the past 20 years—self-identified sex. You would then need to consult intersex people about exactly how they would want that to be handled. As we have already explained, we think that that would be a retrograde step in any case.

Kenneth Gibson: In its written evidence, For Women Scotland said:

“Human beings are sexually dimorphic, and an individual’s biological sex is an unchangeable characteristic.”

Do you agree or disagree with that?

Tim Hopkins: Some biological sex characteristics, such as hormones and genitals, are obviously not unchangeable. Some trans people have surgery to change some of their sex characteristics. People cannot change their chromosomes, but the matter is not as simple as people being either XX or XY; there are people with XXY chromosomes and people whose bodies have more than one chromosome in them. Therefore, things are not black and white.

Kenneth Gibson: Earlier, you talked about privacy. Surely the three questions that you are looking for would make privacy less likely. If a person was asked whether their sex at birth was male or female, for example, and there was then a voluntary question about gender or trans identity, that would allow people to protect their privacy. Surely if there was a compulsory question that asked whether a person is male, female or other, that would be less likely to allow people to have privacy, because answering it would be compulsory.

Tim Hopkins: If the sex question is going to be compulsory and it asks about a person’s sex at birth, that will be an invasion of privacy, because a person who was living as a trans man or a trans woman would have to answer it with the opposite of the way in which they live. A trans woman would have to answer “male”, and that would be an invasion of her privacy. If the question was about a person’s self-identified sex, a trans woman would be able to answer “woman”, and her privacy would be protected from that point of view.

We think that the question about gender identity should be a voluntary one. However, there is an

overall issue that relates to how to protect people’s privacy in answering even the voluntary questions. That goes to the arrangements for doing the census and the arrangements that need to be put in place so that individuals who share a household can fill in the individual form in a private way. I know that NRS is putting a lot of thought into exactly how that can be done so that people can fill the form in without the people who share the house seeing the answers.

Kenneth Gibson: You have raised an important point. One person per household fills in the form, and that can obviously cause issues and concerns in certain households in which people might not necessarily be open to having a member with a different identity. However, I still think that, if there are three categories, that will make privacy more difficult. We will have to agree to disagree on that.

One of the things that came out in the previous session, although I had to coax it out a wee bit, was that there is clearly an issue among some women’s groups about people being able to self-identify. The previous panel saw that as a potential threat to females. The reason for that is the rapid growth in the trans community in the past decade or two. The number of people who are trans has grown by 700 per cent—I saw that figure, although I do not know whether it is accurate—over the past five years. How would you reassure women who have concerns about safe spaces and so on?

Tim Hopkins: I will give a very quick answer, and then I will let Vic Valentine continue.

Kenneth Gibson: Vic Valentine touched on the home care aspect earlier, but I am talking about wider issues.

Tim Hopkins: My quick answer to that would be that, if the committee has concerns in that area, I strongly urge it to speak to the organisations that are providing women-only services to the most vulnerable women in Scotland. Organisations such as Rape Crisis Scotland and Scottish Women’s Aid now provide services that are trans inclusive—they provide those services to trans women. They have been developing that over many years and have worked through these issues to ensure that they know that they are providing safe services. I am very sure that those organisations, and organisations that work for women generally in Scotland, such as Engender, would be very happy to speak to members of the committee and give further evidence on this.

Kenneth Gibson: I asked the first panel this question, so it is fair to ask you. The submission from the Equality Network and the Scottish trans alliance says:

“A non-binary person is a person ‘identifying as either having a gender which is in-between or beyond the two categories ‘man’ and ‘woman’, as fluctuating between ‘man’

and ‘woman’ or as having no gender, either permanently or some of the time”.

I can understand people having a trans identity, but I am struggling with “some of the time”. How can we have robust census data if people are having an identity some of the time. Could you explain that?

Vic Valentine: Yes, sure. It is a hard definition to say without taking a breath, is it not?

Kenneth Gibson: Indeed.

Vic Valentine: We use the term “non-binary” as a catch-all definition for all trans people who would say that just the word “man” or just the word “woman” does not describe their sense of themselves. The expanded version that you read out gives examples of the various ways in which those people might feel that the words “man” or “woman” do not describe them. Even if somebody has a fluctuating gender identity, or a sense of themselves that shifts, we would characterise that person as being permanently non-binary, because having a gender identity that shifts would make you the sort of person who would not use the words “man” or “woman” all of the time to describe yourself. Does that make sense?

Kenneth Gibson: It does in a way, but are you saying therefore that their identity is a kind of psychological thing rather than something a bit more physical? The key point that was made by the previous panel was about biology and dimorphism, which we talked about. Are you saying that, for those people, their identity is psychological?

Vic Valentine: For some people, some aspects of how they feel about their sex are about how they perceive themselves. It is an aspect of identity, rather than about what their physical body is like.

Annabelle Ewing: I go back to an issue that was raised earlier by the convener. The example was given of a vulnerable woman who wants to have intimate care provided by a woman. We have discussed that, and you say that you do not want a blanket exemption. However, in your view there could be some exemptions if we go down the route that biological sex is no longer to be taken into account in that regard, but self-identification is. Would that not mean that the onus would change and would be on the vulnerable woman to prove that they fall within some exemptions?

At the moment, the woman says that she wants intimate care to be provided by a woman, and it is clear that that intimate care will be provided by a woman who was born as a woman, and not a woman who may, from time to time, psychologically identify as a woman. If, then, the exemption approach is taken and it is not to be a

blanket exemption, the onus is on you or your family to prove that you fall within that exemption. I do not know whether that is really where people want to end up in this important debate. I do not think that that is what you intend.

Vic Valentine: I do not think that the scenario that you have outlined is something that I would propose as being a good outcome to this—

Annabelle Ewing: But how could you exclude that as a result of your approach?

11:00

Vic Valentine: We would not describe a person who did not permanently and constantly identify as a woman as a trans woman and we would not think that that person would be eligible for women-only roles.

Annabelle Ewing: Who would make all those decisions on a moving basis in relation to care? How would all that happen? As a lawyer by trade, I can say that a fundamental approach to definitions is very important, because it makes things clear. A legal approach to definitions has to take into account a whole series of what ifs and to anticipate the many different circumstances that pertain to issues that are impacted on by those definitions, whatever they may be. I see fundamental problems coming down the line.

I see the mandatory question remaining a binary question, with a voluntary gender identity question for people who wish to provide that information voluntarily. I hope that they do so, given that the purpose of the census is to collect data. I see that as a straightforward approach that reflects people’s rights but which also reflects others’ rights to have intimate care, for example, provided by somebody of the same sex. That is how I see it.

Tim Hopkins: Fundamentally, what needs to be decided is whether the compulsory question is going to ask for the three things that I mentioned earlier: biological sex, legal sex or the sex that you live as. That is the fundamental question. If the answer is the third of those—which, we should bear in mind, is what has been done for the past 20 years—we would argue that, in that case, there must be a third option. However, the only reason for putting in the third option is not to ensure that trans people can be counted but to give non-binary people an option that they can truly answer so that they do not have to be dishonest by ticking either the male or the female box. That is the only reason for a change in the compulsory question from 2011—it is not about counting people.

Annabelle Ewing: But there has not yet been a change. That is what we are all discussing.

Tim Hopkins: Well, with regard to what the NRS has proposed—

Annabelle Ewing: I go back to my point that the bill is about not the mandatory element but the voluntary aspect. The NRS has clarified that this morning.

The Convener: I am sorry to interrupt, but Stuart McMillan has indicated that he wants to ask a question. I know that you had to pop out earlier, Stuart, so you can ask your question now.

Stuart McMillan (Greenock and Inverclyde) (SNP): I just want to follow up on Kenneth Gibson's question about what might happen at a given time. The census is about helping to plan services for the future, but what if someone felt that they were a man or a woman at a particular time and then changed their mind later on? Let us say that the information was accurate when the census was completed but becomes inaccurate shortly afterwards. I am trying to understand how that would play out with regard to the service planning that any Government or public body would attempt.

Vic Valentine: I go back again to the idea that, in totality, the sex data is incredibly useful in planning sex-specific services, but an individual's response to the sex question would not allow you to necessarily know absolutely and with full clarity what their sex-specific healthcare needs would be. That would be the case even if they were not a trans person, because it has nothing to do with their gender, with being a trans person or whatever. Therefore, although it is not impossible for some people who have a shifting sense of how they would describe their sex to answer that question one way and then answer it another way if they were asked to complete the census again three weeks later, we cannot foresee that having an impact as far as the broad overall use of the sex data is concerned.

Tim Hopkins: With many other questions on the census, the information changes over time. For example, the census asks about people's employment. That information is also important for planning services, but people's employment status can, of course, change over time.

The Convener: I have a couple of supplementaries to wrap things up, one of which relates to Kenneth Gibson's question about fluid identities. You will be aware of the story of the Credit Suisse director who spends half of the week identifying as a woman, Pippa Bunce, and the other half of the week identifying as a man, Philip Bunce. How would you expect Philip or Pippa to answer the sex question on any particular day?

Vic Valentine: I do not know that I can answer that question. In terms of how we would think of that person's identity, we would probably describe them as a non-binary person, so we would probably say that they would choose the third,

"Other" option in response to the self-identified sex question, but I could not presume to know.

The Convener: He or she identifies as a woman on particular days; indeed, I understand that she won a women's financial award in the City. Would it be acceptable for Pippa or Philip to identify as the sex or gender that they identified as on the day that they happened to fill in the census form?

Vic Valentine: I think that each person who completes the census can select whatever box they want to anyway, regardless of whether they are a trans person. I do not feel able to say which box I think that they would need to tick.

The Convener: That is fine.

I have now found the Scottish trans alliance's submission to the House of Commons Women and Equalities Committee's transgender inquiry. In it, you said that the Equality Act 2010 should be amended to

"Remove the genuine occupational requirement ... allowing some jobs to require applicants must be cisgender"—

that is, not transgender—

"and replace it with a GOR allowing posts delivering trans-specific services to require applicants must be transgender".

That would exclude cisgender people. In other words, you argued that there should be a genuine occupational requirement for trans services but not for services to women. That is what your submission said.

Vic Valentine: No. There are sex genuine occupational requirements and, in the case of trans people, the occupational requirement is reversed. For example, there can be a job for which there is a requirement that the applicant be a woman, but there can also be a job for which there is a requirement that the applicant not be a transsexual—that is the language that the law would use. We were saying that, with the latter of those two requirements, it should no longer be only the case that it can be required that a post not be held by a transsexual, but that, with some posts—for example, in organisations such as mine—it might be required that the postholder be a trans person.

The Convener: Okay. Thanks very much.

Finally, I return to the issue of the Equality and Human Rights Commission's advice, which was raised earlier. The first panel mentioned the fact that *The Guardian* invited a number of people to give legal advice on gender recognition from a variety of points of view. One of those people was Julian Norman, who is a barrister in London. They pointed out that the EHRC advice on single-sex spaces has changed. Although, originally, the

EHRC said that someone who had a gender reassignment characteristic could enter single-sex spaces, it has changed its advice, with the result that it is now more ambiguous. Were you aware of that?

Tim Hopkins: There are two separate issues here, the first of which is what the meaning of sex is in equality law. My understanding is that the EHRC is very clear about that—it talks about legal sex, not biological sex.

The second issue relates to the exemptions. For example, is a single-sex service for women allowed to turn away a trans woman, whether that woman has a gender recognition certificate or not, without that being gender reassignment discrimination? The answer is yes, because that is what the law says. The EHRC has said that a single-sex service can turn away a trans woman, even if she has a gender recognition certificate and is therefore legally a woman, without the service being taken to court for gender reassignment discrimination, because of the exemption for trans. That being said, all the services in Scotland that provide crucial services to women do not turn away those women, but there is the legal ability to do so. That is about gender reassignment discrimination, which is a separate issue from the meaning of the term “sex” in the Equality Act 2010. The commission is very clear that that is about legal sex, not biological sex.

The Convener: Clearly, there is a wider debate here, and things are shifting. Anyone who has read the article in *The Guardian* will know that all the eminent lawyers seem to have different views on the issue. One criticism has been that there is a lack of clarity. The committee has been asked to look at some of the big, fundamental issues, which are crystallised in the Census (Amendment) (Scotland) Bill, at a time when there is some legal uncertainty, even among the experts. Do you agree with that?

Tim Hopkins: As you know, there is certainly a big debate going on about the Gender Recognition Act 2004. Both the UK Government and the Scottish Government have proposals on that, and those proposals will have some impact on the way in which the census is perceived when it happens. Fortunately, the Census (Amendment) (Scotland) Bill does not specify what the sex question should be.

As I understand it, the Scottish Government has promised that the bill to reform the Gender Recognition Act 2004 will be introduced in the 2019-20 Scottish parliamentary year. By the time that the committee—if it is this committee—gets to look at the census order, which specifies the subject matter of each question, and the census regulations, which set out the question paper, the

process of developing the new gender recognition bill will be much further along. That will be the key point at which you should look very closely at the wording of the questions that the Scottish Government is proposing. Once we know the Scottish Government’s proposed reforms, we will be a lot clearer on the future of gender recognition law than we are now. We are nine months away from the Scottish Government announcing in its legislative programme for next year what it will do about the 2004 act.

The Convener: I thank the witnesses for coming in to give evidence.

11:12

Meeting continued in private until 11:35.

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