



The Scottish Parliament
Pàrlamaid na h-Alba

CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE

AGENDA

33rd Meeting, 2018 (Session 5)

Thursday 13 December 2018

The Committee will meet at 9.00 am in the Robert Burns Room (CR1).

1. **Census (Amendment) (Scotland) Bill:** The Committee will take evidence at Stage 1, in video-conference, from—

Lucy Hunter Blackburn, Murray Blackburn Mackenzie;

Professor Jackie Cassell, Head of the Department of Primary Care and Public Health and Director of Research and Knowledge Exchange, Brighton and Sussex Medical School;

Michelle Mackie, Research Director, Ipsos MORI;

Gerry McCartney, Head of Public Health Observatory Division, NHS Health Scotland;

Professor Susan McVie, Professor of Quantitative Criminology, University of Edinburgh.

2. **Consideration of evidence heard (in private):** The Committee will consider the evidence heard earlier in the meeting.
3. **Work programme (in private):** The Committee will consider its work programme.

Stephen Herbert
Clerk to the Culture, Tourism, Europe and External Affairs Committee
Room T3.40
The Scottish Parliament
Edinburgh
Tel: 0131 348 5234
Email: stephen.herbert@parliament.scot

The papers for this meeting are as follows—

Note by the Clerk

CTEEA/S5/18/33/1

PRIVATE PAPER

CTEEA/S5/18/33/2
(P)

PRIVATE PAPER

CTEEA/S5/18/33/3
(P)

PRIVATE PAPER

CTEEA/S5/18/33/4
(P)

Culture, Tourism, Europe and External Affairs Committee
33rd meeting, 2018 (Session 5) Thursday 13 December 2018

Census (Amendment) (Scotland) Bill

Note by the Clerk

Purpose

1. At this meeting, the Committee will take evidence on the Census (Amendment) (Scotland) Bill from the following witnesses:
 - Lucy Hunter Blackburn, Murray Blackburn Mackenzie.
 - Professor Jackie Cassell, Head of the Department of Primary Care and Public Health and Director of Research and Knowledge Exchange, Brighton and Sussex Medical School.
 - Michelle Mackie, Research Director, Ipsos MORI;
 - Gerry McCartney, Head of Public Health Observatory Division, NHS Health Scotland;
 - Susan McVie, Professor of Quantitative Criminology, University of Edinburgh;

About the Bill

2. The Culture, Tourism, Europe and External Affairs Committee has been designated as the lead committee on this Bill.
3. The Committee's role during Stage 1 is to take evidence and gathers views on the general principles of the Bill. This evidence will inform its Stage 1 Report to the Parliament in which it will take a view on whether the general principles of the Bill should be approved and whether the Bill should proceed to Stage 2.
4. The Committee expects to report on the Bill early in the New Year.
5. More information about the Parliament's process for considering bills can be found here: <http://www.parliament.scot/visitandlearn/100529.aspx>.

Bill documents and briefings

6. The Bill and its accompanying documents can be found on the Scottish Parliament's website:
<http://www.parliament.scot/parliamentarybusiness/Bills/109595.aspx>.

7. The Scottish Parliament's Information Centre (SPICe) has also produced a Bill briefing, which can be found here: <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2018/12/3/Census--Amendment---Scotland--Bill/SB%2018-81.pdf>.

Written evidence

8. The Committee issued a call for evidence on 11 October 2018. The closing date for submissions was Friday 23 November 2018.
9. SPICe has produced a summary of written evidence, which can be found here: http://www.parliament.scot/S5_European/Inquiries/CTEEA_CensusBill_SPICeSummaryOfEvidence.pdf.
10. Murray Blackburn Mackenzie's written evidence, represented in today's panel by Lucy Hunter Blackburn, is provided in **Annexe A**.

Supplementary evidence arising from the last meeting

11. Following last week's evidence session on the Bill, Professor Rosa Freedman has provided supplementary written evidence, which is in **Annexe B**.
12. For Women Scotland have provided a copy of a report by Dr Nicola Williams of Fair Play for Women, which was mentioned during last week's meeting: https://fairplayforwomen.com/wp-content/uploads/2018/09/FPFW_report_19SEPT2018.pdf
13. A copy of all the published written evidence received can be found on the [Committee's website](#).

Future evidence sessions

14. The Committee will then take evidence from the Cabinet Secretary for Culture, Tourism, Europe and External Affairs on 20 December 2018.
15. The Parliament has agreed a Stage 1 deadline for the Bill of 1 March 2019.

Sigrid Robinson
Assistant Clerk
CTEEA Committee

CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE
CENSUS (AMENDMENT) (SCOTLAND) BILL
SUBMISSION FROM MURRAY BLACKBURN MACKENZIE

CENSUS (AMENDMENT) (SCOTLAND) BILL

Introduction

We are grateful for the opportunity to submit evidence as part of the Committee's Stage 1 considerations of the Census (Amendment) (Scotland) Bill.

The Bill will enable voluntary questions on sexual orientation and gender identity to be added to the 2021 census in a way which will allow the question on sex to be amended to add other options than male or female.

We believe the central issue to keep in mind is the purpose of the census. Questions should only be added or changed when it will improve the quality of the information it provides. For that reason, we hope that the Committee will seek evidence from users of census data, such as local and national government and other public authorities including those which rely on census data to generate other official datasets.

We support the inclusion of the proposed additional voluntary questions. We are however concerned about doing this in a way which would allow changes to the responses available to the question on sex. If implemented, this change will conflate sex and gender identity, *which are entirely separate concepts*. We believe this will undermine the core intellectual principles underpinning the census, and assign to "sex" a new meaning which departs from its conventional legal and scientific use. We also note the changes are inconsistent with understanding of sex set out in the Equality Act 2010.

We also note the Policy Memorandum states that the guidance to the sex question in the 2011 Census was changed, to ask respondents to report self-identified rather than legal/biological sex. We understand the question itself was not changed from previous years. We believe the Scottish Government's decision to change the guidance should be explored further (including the rationale, scope of consultation and decision-making process) although this is not a matter for the face of the Bill.

We are also concerned about the validity of the Equality Impact Assessment (EQIA) on the Census (Amendment) (Scotland) Bill, undertaken by National Records of Scotland (NRS).¹ This considers the two separate protected characteristics of 'sex' and 'gender reassignment' together and makes *no* conclusion about the potential impact of the Bill on those who come under the 'sex' protected characteristic. The EQIA states:

'Cognitive testing with communities of interest has been undertaken to understand more around asking a question on sex or gender identity, in conjunction with a transgender question. Evidence from this testing indicates a non-binary sex

¹

See: https://www.scotlandscensus.gov.uk/documents/census2021/Equality_Impact_Assessment.pdf

question and a transgender question are the more acceptable and understandable question pairing.'

The 'communities of interest' referenced here are two small groups of individuals (23 in total) recruited exclusively via LGBT groups. No participants were recruited via women's groups.

Background to the census

The Economic and Social Research Council (ESRC) states 'UK census data are fundamental to improving the understanding of life in the UK, enabling informed decisions by providing relevant and independent statistics'² The Office of National Statistics (ONS) summarises the purpose of the census as follows:

"Every ten years the census gives us a complete picture of the nation. It allows us to compare different groups of people across the United Kingdom because the same questions are asked, and the information is recorded, in the same way throughout England, Wales, Scotland and Northern Ireland.

The census provides information that government needs to develop policies, plan and run public services, and allocate funding.

Develop policies

Before central or local government can offer services, policies must be based on high quality evidence

Plan and run public services

We all use public services such as schools, health services, roads and libraries. These services need to be planned, and in such a way that they keep pace with fast-changing patterns of modern life. We need accurate information on the numbers of people, including the balance of young and old, what jobs people do, where they live and in what type of housing.

Allocate money to local authorities

An accurate count of the population in each local area helps the Government to calculate the size of grants it allocates each local authority and health authority.

*The data are also widely used by academics, businesses, voluntary organisations and the public.'*³

² See: <https://esrc.ukri.org/news-events-and-publications/impact-case-studies/opening-up-census-data-for-research/> (accessed 30 November 2018)

³ See: <https://www.ons.gov.uk/census/2011census/whywehaveacensus> (accessed 30 November 2018)

Proposed changes to the sex question

Regarding the question on sex, the Scottish Government's Policy Memorandum states:

“There has always been a question on sex with a binary response option (male/female) included in the census. The 2011 Census recognised that society’s understanding of sex has changed and guidance provided explained that the question was being asked in terms of self identified sex. Looking forward to 2021, consultation has identified the need for a more inclusive approach to measuring sex. The sex question being proposed for the 2021 Census will continue to be one of self-identification and will provide non-binary response options. Importantly, the sex question proposed will not seek a declaration of biological or legal sex.”

The proposed changes raise a number of questions relating to: the Scottish Government's understanding of sex; the impact on census data users; and engagement with census data users. We hope the Committee will consider addressing the following issues:

Understanding of sex

- Does the Scottish Government believe that a person can have a **sex** other than male or female?
- Is the Scottish Government confident that any third option in the response on sex would be interpreted in a consistent way across the population, as would be needed for it to provide reliable data?
- In cases where people declare themselves other than female or male, does the Scottish Government believe that they cease to require access to any services which are normally provided specifically for people who are either male or female?
- In these cases, does the Scottish Government believe they cease to be a source of relevant data about any health or other phenomena which have a sex-based pattern in the population?
- If the Scottish Government does believe so, what evidence is it drawing on?

Impact on census data users

- Has the Scottish Government undertaken analysis of the possible impact of introducing an additional response to the sex question on the nature of the data available for any official purposes: including but not only health, education, criminal justice and employment?
- Has the Scottish Government undertaken analysis of the possible impact of introducing an additional response to the sex question on the nature of the data available for meeting public sector equality duties under the Equality Act 2010?

Engagement with census data users

- Did the Scottish Government engage with the Chief Statistician's office, Chief Scientific Adviser and Chief Medical Officer regarding the Census (Amendment) (Scotland) Bill prior to its publication?
- Did the Scottish Government engage with other expert users of census data, for example, in the fields of medicine, population health scientists, local government and academia?

MurrayBlackburnMackenzie is a policy analysis collective, made up of Dr Kath Murray, Lucy Hunter Blackburn and Lisa Mackenzie. We are Edinburgh based, and work in both a voluntary and commissioned capacity.

ANNEXE B

CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE**CENSUS (AMENDMENT) (SCOTLAND) BILL****SUPPLEMENTARY SUBMISSION FROM: PROF. ROSA FREEDMAN,
UNIVERSITY OF READING**

Thank you for inviting me to give evidence on Thursday 6th December.

I am writing to clarify the law on sex, and to address the misrepresentation of the law by Mr Watkins who spoke on the second panel which meant that I did not have an opportunity to raise these issues with him in-person. I am happy for you to forward my email to him if you feel that it is appropriate to do so and/or want to give him the opportunity to reply to my comments. I would also be happy to send more detailed explanations and/or links to further reading if it would be helpful in any way.

The legal definition of sex is contained in the case of *Corbett v Corbett* (the April Ashley case) which can be found here: <http://www.pfc.org.uk/caselaw/Corbett%20v%20Corbett.pdf> That definition remains good law and has not been challenged let alone overturned in any subsequent cases. The law clearly sets out in that case that sex is biological, and that transsexualism (what we would now term transgender) is psychological. As a result, when we use the word 'sex' in law, we are referring to biological sex.

The case of *Goodwin v the UK* did not challenge the definition of sex as being biological. That case came after the UK brought in the Human Rights Act (1998). That Act brings into domestic law the European Convention on Human Rights. Article 8 of the ECHR sets out the right to a private and family life. Goodwin was a transsexual and argued that by not allowing her to change her sex on her birth certificate, her right to a private and family life was violated because her employer would know that she was a transsexual. The European Court ruled that this was a violation in her specific circumstances. The Court did not rule that her biological sex had changed, nor did it challenge the UK definition of sex being about biology. As a direct result of that case, the UK passed the Gender Recognition Act. That Act sets a high bar for people to change the sex on their birth certificate – medical diagnosis of gender dysphoria and living for two years as though a person is of the opposite sex to their biology. If someone meets those criteria they can apply for a Gender Recognition Certificate that allows them to change the sex on their birth certificate. This creates what is known as a 'legal fiction' in that a person will be treated in law as something that they are not in reality (i.e. they will be treated as a member of the sex that is not their biological sex). Legal fictions are not unusual, for example we have a legal fiction that an institution has personhood if we need to take them to court.

It is important to note that fewer than 5,000 people have a Gender Recognition Certificate. It is important also to note that the GRA was absolutely needed to prevent violations of Article 8 in 2004 when same-sex marriage was not permitted,

when there were pensions inequalities, and so on. A GRC allowed a trans-woman to marry a man or to access her state pension at the lower age.

The Equality Act 2010 was brought in to bring together various pieces of legislation about non-discrimination including the Sex Discrimination Act. In the Equality Act the protected characteristics include both sex (biology) and gender reassignment (the legal fiction). There are exemptions in the Equality Act that allow sex-segregated spaces where they are proportionate and legitimate. That also includes in some circumstances excluding trans individuals who hold a GRC. Mr Watkins stated yesterday that the Equalities and Human Rights Commission guidance states that GRC holders are always to be treated as a member of the sex that they have chosen, but this is not true –the EHRC guidance was changed recently to state that GRC holders may be excluded where it is proportionate and legitimate to do so, and this is to be decided on a case-by-case basis.

(Julian Norman -- a human rights barrister -- has written about the relationship between the Equality Act and the Gender Recognition Act:

<https://filia.org.uk/news/2018/8/23/has-everyone-really-got-it-wrong>)

In short, the law is clear that it defines sex as biology. It also creates a legal fiction for individuals who meet very specific requirements for a Gender Recognition Certificate, and even then they are viewed in law as having changed sex not as having done so in fact.