



The Scottish Parliament
Pàrlamaid na h-Alba

CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE

AGENDA

32nd Meeting, 2018 (Session 5)

Thursday 6 December 2018

The Committee will meet at 9.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Census (Amendment) (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Rosa Freedman, Professor of Law Conflict and Global Development,
Reading University;

Susan Smith, For Women Scotland;

and then from—

Vic Valentine, Scottish Trans Policy Officer, Scottish Trans Alliance;

Hannah Pearson, Policy Coordinator, Equality Network.

2. **Consideration of evidence heard (in private):** The Committee will consider the evidence heard earlier in the meeting.

Stephen Herbert
Clerk to the Culture, Tourism, Europe and External Affairs Committee
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The papers for this meeting are as follows—

Note by the Clerk

CTEEA/S5/18/32/1

PRIVATE PAPER

CTEEA/S5/18/32/2
(P)

Culture, Tourism, Europe and External Affairs Committee
32nd meeting, 2018 (Session 5) Thursday 6 December 2018
Census (Amendment) (Scotland) Bill

Purpose

1. At this meeting, the Committee will take evidence on the Census (Amendment) (Scotland) Bill in two panels, as detailed below:

Panel 1

- Prof. Rosa Freedman, University of Reading; and
- Susan Smith, For Women Scotland.

Panel 2

- Vic Valentine, Scottish Trans Alliance; and
- Hannah Pearson, The Equality Network.

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. The Committee has received written evidence from the panel members, which is provided in **Annexe A**.

10. A copy of all the published written evidence received can be found on the [Committee's website](#).

Future evidence sessions

11. The Committee will take evidence on the Bill from stakeholders on 13 December 2018. The witnesses for that session will be confirmed in due course. The Committee will then take evidence from the Cabinet Secretary for Culture, Tourism, Europe and External Affairs on 20 December 2018.
12. The Parliament has agreed a Stage 1 deadline for the Bill of 1 March 2019.

Sigrud Robinson
Assistant Clerk
CTEEA Committee

**PROFESSOR ROSEMARY AUCHMUTY AND PROFESSOR ROSA FREEDMAN
WRITTEN SUBMISSION REF NO. CTEEA/S5/18/CB/11**

The Impact of Conflating Sex and Gender Identity

1. The following submission is in response to the calls for evidence 'on the proposals contained in the Census (Amendment) (Scotland) Bill including the proposed power in the Bill to provide for questions dealing with "gender identity" and "sexual orientation" to be included in the Census for the first time.'
2. We are Professors of Law at the University of Reading. Professor Auchmuty is a leading expert on law and feminism, and Professor Freedman is a leading expert on international human rights law. Jointly and separately we have authored many publications on women's rights, including recently on the proposed reforms to the Gender Recognition Act.
3. The Culture, Tourism, Europe and External Affairs Committee is consulting on whether to amend the Census to include gender identity as part of the question about sex. The main issue with doing so is that this will conflate sex and gender identity, which will have far-reaching impacts both on the data collected and on the precedent for how sex and gender identity are treated in law.
4. The consultations on the Census (Amendment) (Scotland) Bill follow wide discussions about the legal implications of self-identification of gender identity in the UK, including specific focus on the Gender Recognition Act, and in particular what this might mean for sex-segregated spaces and how to ensure that human rights are implemented for all individuals. The current legal position established in case law is that sex is defined as chromosomal biology. Gender identity, on the other hand, is undefined in national, regional and international law (although gender reassignment, as a narrow category, is both defined and protected in national law). It is of concern that the Census (Amendment) (Scotland) Bill seeks to conflate gender identity and sex without having defined the former, and without legal precedent to do so.
5. Conflating sex and gender identity will undermine sex as a separate category protected by law. We are concerned with ensuring the retention of (biological) women's rights in relation to sex-segregated spaces and services, as already protected by the Equality Act in circumstances that are 'necessary and proportionate'. We envisage at least six areas where sex-segregation should

be maintained. Many of these already exist as exemptions in the Equality Act, but a conflation of gender identity and biological sex is already undermining their existence in reality. Each of these areas requires sex and gender identity to remain separate and distinct from one another. And without accurate data from the census, we are concerned that these will further be eroded or undermined.

6. First, medical treatment and research: there are some conditions and treatments that are sex-specific. Gynaecologists, for example, are not trained to deal with prostate cancer. Of course, additional services and facilities should be provided (as some currently do) for transgender individuals.
7. Second, sex-segregated spaces must remain where women need protection from male bodies, such as in prisons, refuges, and rape crisis centres, regardless of a person's gender identity. That is not to say that rape crisis centres would not assist transgender victims, simply that they should have separate facilities.
8. Third, statistics gathered should ask about both sex and gender, enabling the data to continue to be useful for the purposes of planning and understanding populations and demographic shifts as well as such matters as crime statistics and pay differentials. Counting transwomen as women would distort the figures because many people transition after they have enjoyed the privileges of their sex for a considerable time.
9. Fourth, sports would remain sex-segregated where relevant, thus enabling women to continue to participate in competitive sports without losing out to bigger, stronger male physiques, and ensuring that equal funding (a long battle, still not won) is given to sports for both sexes.
10. Fifth, protections would continue for religion, a protected characteristic under the Equality Act, taking into account the needs of certain religious groups to have sex-segregated spaces in public institutions and facilities.
11. Sixth, maintaining the legal distinction between gender identity and sex will also ensure that women-only spaces that were set up to compensate for women's long-standing political, social and economic disadvantage remain sex-segregated. These include women's centres, organisations like the Girl Guides that were created because girls were refused entry to the boys' organisations, and ladies' swimming ponds that were set up because women were not allowed to swim in public. In all these cases, there exist parallel men-only and mixed spaces that other people may enjoy. These single-sex 'spaces' should also include metaphorical spaces such as women-only shortlists, schemes to boost women's representation on company boards and

as directors, and 'woman of the year' awards in business and STEM sectors that were set up to overcome the long-standing and overwhelming dominance of men.

12. Reforms to law and policy must take into account the needs of all people affected and ensure that the rights of all protected groups really are protected. Many women have been concerned that their rights are being overlooked in the pressure to bring justice and appropriate protections for transgender people. We propose that maintaining the distinction between sex and gender identity, already embedded in law, will allow for self-identification whilst also protecting women's rights. Accurate data is required to ensure appropriate, adequate and accessible facilities and services for all people, including meeting the needs of (biological) women and of gender identity minorities. To that end, we propose having two separate questions in the census, one on sex and one on gender identity.

FOR WOMEN SCOTLAND

SUBMISSION REF NO. CTEEA/S5/18/CB/10

About Us

Forwomen.scot is grateful for the opportunity to provide evidence on the Census (Amendment) (Scotland) Bill. We are a group of ordinary women from all over Scotland who have come together to protect women's and children's rights.

Comments on the Bill

We welcome the Scottish Government's proposal to include questions of both sexual orientation and gender identity in the 2021 Census. Both sexual orientation and gender reassignment are protected characteristics under the Equality Act 2010. Gathering data on both characteristics will enable:

- local and national government to better design, plan and deliver public services;
- public authorities to fulfil their obligations as part of the Public Sector Equality Duty.

We also support the Government's proposal to make asking questions about sexual orientation and gender identity voluntary. An individual's right to privacy must be upheld and no-one should be forced to respond to these questions unless they choose to.

However, we are of the view that the question on sex should continue to be compulsory. It is important for the planning and delivery of public services that we know how many male and female citizens there are. We are also clear that the questions on sex and gender identity in the 2021 Census must be separate.

Whilst not in the scope of this Bill, we are aware that discussions are already underway about the framing of questions for the 2021 Census and that National Records of Scotland (NRS) are considering adding a third option to the question on sex.

This is something we oppose. Human beings are sexually dimorphic, and an individual's biological sex is an unchangeable characteristic. The question on sex has been asked consistently since the Census begun, which enables data to be compared over time. Other datasets produced by government agencies use Census data as a baseline, so retaining consistent categorisation on sex is vital.

Most importantly, knowing how many male and female citizens there are enables public authorities to properly plan and deliver public services. For instance, there are

a number of sex-specific health screening programmes offered by the NHS. Cervical and breast screening are offered to women to check for early signs of cancer. Abdominal aortic aneurysm screening is offered to men during the year they turn 65. Women also live longer than men so it is valuable information to enable future budgeting for pension provision.

In general, we are concerned about the blurring of 'sex' and 'gender' across a range of governmental documents and more widely. We also hope that NRS will engage women's groups in their ongoing discussion and development of questions for the 2021 Census.

THE EQUALITY NETWORK AND SCOTTISH TRANS ALLIANCE**SUBMISSION REF NO. CTEEA/S5/18/CB/07**

The Equality Network is a national charity working for lesbian, gay, bisexual, trans and intersex (LGBTI) equality in Scotland. Scottish Trans Alliance is the Equality Network project to improve gender identity and gender reassignment equality, rights and inclusion in Scotland.

We welcome the opportunity to submit evidence on this bill – our evidence relates mostly to how the bill might impact on lesbian, gay, bisexual and transgender people by asking about sexual orientation and whether someone is trans for the first time. We will also discuss the importance of adding a third option to the sex question to ensure that non-binary people¹ are able to answer appropriately. We have been working closely with NRS for the last three years in developing each of these three questions, and hope that the 2021 Census can collect and analyse data in a way that will improve LGBT equality.

Sexual orientation question

We welcome the plans to include a question about sexual orientation for the first time in the 2021 Census, as we felt strongly that it should have been included in the 2011 Census. Sexual orientation is one of the protected characteristics in the Equality Act 2010, yet it is one of only two protected characteristics about which questions were not previously included on the Census (the other being gender reassignment – see below). This contributes to the continued stigma around lesbian, gay, bisexual and other non-heterosexual sexual orientations, by implying that it is a somehow unacceptable topic to include, whereas other sensitive aspects of a person's identity that are covered by equality law are acceptable topics.

Asking a question on sexual orientation will allow the Scottish Government to have more robust data on the needs of lesbian, gay and bisexual people, as well as those with other non-heterosexual sexual orientations. Although Scottish Government household surveys have been asking about sexual orientation for several years, increasing as well as demonstrating public acceptability of such questions, because of the sample size in these surveys it becomes difficult to analyse differences in the population by sexual orientation with any degree of statistical significance². Asking the question within the Census will provide a large enough sample size to allow for analysis and outputs based on responses to this question.

It is important to acknowledge that there is likely to be some under-reporting of sexual orientations other than heterosexual. This has been seen and acknowledged in Scottish Government surveys that ask a sexual orientation question, where often there is a much smaller number of older respondents disclosing a lesbian, gay,

¹ 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"

² See for example, discussion on need to pool sexual orientation data in the Scottish Government's Scottish Surveys Core Questions 2016 Equalities Report on page 49: <https://www2.gov.scot/Resource/0053/00534021.pdf>

bisexual or other non-heterosexual sexual orientation than younger respondents³. This may be in part because fewer older people identify as having non-heterosexual sexual orientations. It is also likely to be in part due to older respondents being less used to being asked questions about their sexual orientation, and also because of cumulative lifetime experiences of homophobia or biphobia, which may mean they are less confident about disclosing their sexual orientation. This means it is important to be cautious in assuming that the Census will give a completely accurate count of people who identify as lesbian, gay, or bisexual, or as having other non-heterosexual sexual orientations.

Despite the fact that there will be some under-reporting on sexual orientation, particularly from older people, collecting the data by including a question on the Census will still be incredibly useful. The data will help to identify continuing inequalities for lesbian, gay and bisexual people, as well as those with other non-heterosexual sexual orientations, and will be able to better inform policy development and inclusive service planning. It will also give us information, for example, on the distribution of lesbian, gay and bisexual people, as well as those with other non-heterosexual sexual orientations, across Scotland.

The possibility that some respondents may be uncomfortable or uncertain about disclosing their sexual orientation is why we think that it is appropriate that this is a voluntary question on the Census. This is particularly important given the legal requirement for people to complete the Census. In our equality monitoring guidance, we recommend that questions on sexual orientation always include a 'prefer not to say' option, so that people do not feel obligated to disclose their sexual orientation⁴. Making the question voluntary, but without this option, is an equivalent acceptable solution.

The sexual orientation question will ask about a person's self-identified sexual orientation; that is, it will not ask directly about sexual relationships, or about sexual attraction. It would not be appropriate in the census to ask about sexual behaviour. Equality monitoring (for example in employment or service provision) also asks about self-identified sexual orientation, so the census will provide an appropriate baseline. Discrimination is based on perceived sexual orientation, which is more closely aligned to self-identified sexual orientation than it is to sexual behaviour or attraction.

³ See for example, Scottish Government's Sexual Orientation in 2017: A Summary of the Evidence Base report on page 8: <https://www.gov.scot/publications/sexual-orientation-scotland-2017-summary-evidence-base/pages/2/>

⁴ https://www.scottishtrans.org/wp-content/uploads/2017/06/getting_equalities_monitoring_right.pdf

Trans status question

We welcome the plans to include a question about whether or not respondents are trans for the first time in the 2021 Census. Gender reassignment is one of the protected characteristics in the Equality Act 2010, yet it is one of only two protected characteristics about which questions were not previously included on the Census. This contributes to the continued stigma around transgender people, by implying that it is a somehow unacceptable topic to include, whereas other sensitive aspects of a person's identity that are covered by equality law are acceptable topics.

Although there are no definite numbers on the trans population (largely because so few population-sized data collection exercises have asked questions on trans status) one estimate which is a meta-analysis of various prevalence surveys places this figure at 0.6% of the US population⁵. That makes including a question on the Census particularly important, as the population is so small that it is only in very large surveys that meaningful analysis of trans respondents will be possible.

It is important to acknowledge that there is likely to be under-reporting of trans status. Currently, very few surveys ask questions about whether or not respondents are trans, so it may take time for some trans people to feel comfortable responding. This means it is important to be cautious in assuming that the Census will give a completely accurate count of trans people living in Scotland.

Despite the fact that there will be some under-reporting on trans status, the data will still be incredibly useful. Asking a question on trans status will provide the Scottish Government with some of the only data on trans people in Scotland, and their needs. The data will help to identify continuing inequalities experienced by trans people, and will be able to better inform policy development and inclusive service planning. It will also give us information, for example, on the distribution of trans people across Scotland.

The possibility that some respondents may be uncomfortable or uncertain about disclosing their trans status is why we think that it is appropriate that this is a voluntary question on the Census. This is particularly important given the legal requirement for people to complete the Census. In our equality monitoring guidance, we recommend that questions on trans status always include a 'prefer not to say' option, so that people do not feel obligated to disclose their gender history⁶. Making the question voluntary, but without this option, is an equivalent acceptable solution.

We also recommend that this question is described when in the Census as a 'trans status' question, not a 'gender identity' question. It will be asking whether or not a person is, or has ever considered themselves to be, transgender. This is not a question about how someone identifies their gender (e.g. if they're male, female or

⁵ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>

⁶ https://www.scottishtrans.org/wp-content/uploads/2017/06/getting_equalities_monitoring_right.pdf

non-binary) but about whether or not they are trans. This will provide greatest clarity for respondents.

Sex question

Guidance for the sex question on the 2011 Census from National Records Scotland made it clear that trans people should answer with their self-identified sex (also known as their gender, or gender identity). The guidance read:

“I am transgender or transsexual. Which option should I select?

If you are transgender or transsexual, please select the option for the sex that you identify yourself as. You can select either ‘male’ or ‘female’, whichever you believe is correct, irrespective of the details recorded on your birth certificate. You do not need to have a Gender Recognition Certificate.

If you are answering for someone who is transgender or transsexual then where possible you should ask them how they want to be identified. If they are away, you should select the sex you think they would wish to be identified as. You can select either ‘male’ or ‘female’, irrespective of the details recorded on their birth certificate. You do not need to know if they have a Gender Recognition Certificate.”⁷

This means that trans women were able to select “female”, and trans men were able to select “male”, regardless of whether or not they had received a Gender Recognition Certificate. The sex question recorded how they lived and identified, rather than either their legal sex (the sex on their birth certificate) or details about their physical sex characteristics. We welcomed this as being the appropriate way to apply the question to trans men and women.

There is no change proposed to this, and guidance will continue to be provided to transgender people to complete the sex question in line with how they are living. This will ensure continuity with the previous census, in the data collected within the sex question. Because the trans population is so small, and there is such diversity in their physical sex characteristics and subsequent health needs, this approach to trans inclusion on the sex question has had no impact on using sex data for, for example, health planning. Although there are no definite numbers on the trans population (largely because so few population-sized data collection exercises have asked questions on trans status) one estimate which is a meta-analysis of various prevalence surveys places this figure at 0.6% of the US population⁸.

However, we do think that a change to the sex question is required. We recommend that a third option is added to this question, to ensure that non-binary people are also able to respond in a way that reflects how they live, rather than being limited to two options that do not accurately record this. This will ensure consistency in the

⁷ This was the guidance on the help section of the 2011 Census website. Archived versions of the website can be provided by NRS.

⁸ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>

guidance provided to transgender respondents, and provide non-binary people with the same opportunity to respond in a way that respects and affirms their lived reality, as is currently the case for trans men and trans women. This is particularly important as the sex question is a mandatory question on the Census, and there are no plans to change this. If there continue to be only 'male' and 'female' options, this will mean non-binary people are either forced to give an inaccurate answer, or will be more likely to not complete the Census.

Given that there is a relatively small number of non-binary people, an additional option will have no impact on the ability to analyse or output the Census data by sex. Although there are no definite figures on the non-binary population (largely because so few surveys are designed inclusively at the moment), one estimate from an Equality and Human Rights Commission gender identity scoping exercise put the number at around 0.4% of the population⁹. This would mean that even at local authority level, the addition of a third option would have no impact on using sex data for, for example, health planning. The last Census undertaken in Australia added a third option to their sex question, and this caused no problems for data analysis or use¹⁰.

⁹ https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf

¹⁰

<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Sex%20and%20Gender%20Diversity%20in%20the%202016%20Census~100>