

Census (Amendment) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Census (Amendment) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The objective of the Census (Amendment) (Scotland) Bill is to provide for census questions on sexual orientation and some aspects of gender identity to be asked on a voluntary basis. The Bill amends the Census Act 1920 (the 1920 Act) so as to provide that no person shall be liable to a penalty under subsection (1) of section 8 of the 1920 Act for refusing or neglecting to state any particulars in respect of sexual orientation and of particulars prescribed in an Order in Council with respect to gender identity. The intention for the census in 2021 is to use the power to prescribe those particulars so as to place questions on transgender status and history (as aspects of gender identity) on a voluntary basis.

Rationale for subordinate legislation

4. The Bill contains a new delegated power which is explained in more detail below. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to:

- the need to make proper use of valuable Parliamentary time;
- the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation.

Delegated Power

Section 1 – Particulars about gender identity and sexual orientation may be gathered in census

Power conferred on: Her Majesty in Council

Power exercisable by: Order in Council made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

5. Section 1 of the Bill inserts a new section 8(1A) into the 1920 Act. Paragraph (b) of that subsection contains a new power. That power will allow provision to be made in an Order in Council under section 1 or section 6 of the 1920 Act which will identify some of the particulars for the purpose of altering how the penalty provisions apply to those particulars. The effect of particulars being so identified is to remove them from the scope of the penalty provisions which would otherwise apply to a person refusing or neglecting to answer a question in respect of those particulars. The power is only exercisable in relation to particulars in respect of gender identity, not any other particulars which may be specified in the Order.

Reason for taking power

6. The Schedule to the 1920 Act as amended by the Bill will expressly include gender identity as an aspect of the matter of “sex”. It is intended (subject to further policy development and parliamentary consideration of the necessary subordinate legislation) that the census in 2021 will include a compulsory question on sex (allowing for non-binary responses as well as the binary male and female responses used in previous censuses) as well as a voluntary question on trans status and trans history. There is a potential overlap between the matters covered by those questions. Given that the importance of knowing which questions are voluntary and which are compulsory (including the criminal consequences), it is important that the exception to the section 8 penalties accurately reflects the terms of the particulars which are eventually prescribed in the Order in Council under section 1. The exact terms of those particulars cannot be known in advance of the terms of the trans status/history question being developed and agreed (including parliamentary consideration of the draft Order in Council to be made under section 1 of the 1920 Act before the census). It is therefore necessary to take an enabling power to identify, at that later stage, precisely which particulars relating to gender identity are to be made voluntary (and therefore which remain compulsory).

Choice of procedure

7. It is considered appropriate that the power should be exercised within the relevant Order in Council made under section 1 or 6 of the 1920 Act. This is because such an Order sets out the particulars to be stated in the census returns and if the Order were to set out the particulars without simultaneous exercise of the power, then the provision of those particulars would be compulsory if and until a separate instrument were made. It makes for clearer, more accessible law that the basis upon which the trans question is placed is contained in the same piece of legislation.

8. The Census Order is subject to negative procedure, unless part of the Order prescribes particulars with respect of any of the matters mentioned in paragraph 6 of the Schedule to the 1920 Act, in which case that part of the Order is subject to the affirmative procedure and the parliamentary procedure set out in the proviso to section 1(2) of the 1920 Act. The matters in respect of which this new power will be exercisable do not fall into paragraph 6 of the Schedule. Thus, the specification of any gender identity particulars would itself be subject to the negative procedure. As the two provisions (i.e. listing the particulars as things to be covered in the census return, and specifying them for purposes of excluding them from the penalty provisions) will be contained in the same instrument, they should be subject to the same procedure.

9. In practice, the Census Order will usually be subject to the affirmative procedure because it will contain provision falling within paragraph 6 which will be subject to the affirmative procedure.

Other matters

10. In addition to creating the new enabling power discussed above the Bill has another impact on the existing enabling powers in sections 1 and 6 of the 1920 Act. Adding “sexual orientation” to the Schedule to the 1920 Act as a separate paragraph 5B takes that matter out of the scope of paragraph 6 of the Schedule. Consequently, the provisions of an Order under section 1 or 6 prescribing particulars in respect of sexual orientation will be subject to the negative procedure. Were the Schedule not so amended, then the proviso to section 1(2) of the 1920 Act would apply to those provisions of an Order prescribing particulars about sexual orientation as they would be included by virtue of paragraph 6 of the schedule.

11. The Scottish Government considers that the legislation would be clearer and more accessible if an obvious link were made between the

reference to “gender identity” in the substituted section 8(1A) and the text of paragraph 1 of the Schedule. The same approach is taken with the reference to “sexual orientation” in the substituted section 8(1A) and the text of the new paragraph 5B of the Schedule. This is consistent with the approach taken by the Census Amendment (Scotland) Act 2000 which added paragraph 5A “Religion” to the Schedule to the 1920 Act and amended the section 8 penalties to render census questions on religion voluntary. The effect of the Bill would be to make a readily identifiable link between the matters listed in new section 8(1A) and the matters listed in the Schedule to the 1920 Act.

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