

Census (Amendment) (Scotland) Bill

[As Amended at Stage 2]

Revised Explanatory Notes

Introduction

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Census (Amendment) (Scotland) Bill (as amended at Stage 2).
2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

Background

4. The primary legislation that provides for the taking of a census in Scotland is the Census Act 1920 ("the 1920 Act"). Under the provisions of section 1(1) of the 1920 Act an Order in Council may prescribe:
 - the date on which the census is to be taken;
 - the persons by whom and with respect to whom the census returns are to be made; and
 - the particulars to be stated in the returns.
5. Section 6 makes equivalent provision in relation to local censuses.

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6. The Schedule to the 1920 Act authorises the inclusion in the Census Order of specified topics in respect of which particulars may be required. “Particulars” are, essentially, the answers that people give to the questions in the census form. The current Schedule lists the following topics:

- names, sex, age;
- occupation, profession, trade or employment;
- nationality, birthplace, race, language;
- place of abode and character of dwelling;
- condition as to marriage, relation to head of family, issue born in marriage;
- religion; and
- any other matters with respect to which it is desirable to obtain statistical information with a view to ascertaining the social or civil condition of the population.

7. Section 8(1) of the 1920 Act makes it an offence (punishable on summary conviction to a level 3 fine) to refuse or neglect to comply with an Order in Council under section 1 or 6 of the Act. It also makes it an offence for a person required to answer any question in pursuance of such an order, to refuse or neglect to answer or give a false answer to that question. Section 8(1A) provides that a person is not liable for a penalty under section 8(1) in relation to questions on religion.

The Bill

8. The Bill provides 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, transgender status and history.

Commentary on the Bill

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

9. Section 1(2) of the Bill adds express reference to gender identity and transgender status and history and to sexual orientation to the list of matters in the Schedule to the 1920 Act. This provides clarity for the purposes of the provision substituted by section 1(3) (see below). The

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particulars which an Order in Council made in terms of section 1 or 6 of the 1920 Act can validly require to be stated in the census returns are limited to those with respect to such matters as are mentioned in the Schedule.

10. “Sex” already includes the gender with which a person identifies, but this section makes express the inclusion of gender identity within the matters covered by paragraph 1 of the Schedule to the 1920 Act. The term “gender identity” refers to the internal sense of who we are, and how we see ourselves in gender terms, being male, female, or somewhere in between/beyond these identities.

10. This section will set out “transgender status and history” as a separate matter. The term “transgender” refers to a diverse range of people who find their gender identity does not fully correspond with their sex at birth. Transgender people may or may not experience the medical condition of gender dysphoria. They may or may not have completed a process of gender reassignment.

11. “Sexual orientation” is also set out as a separate matter for the first time, removing it from the generality of paragraph 6 of the Schedule to the 1920 Act. The term “sexual orientation” refers to a combination of emotional, romantic, sexual or affectionate attraction or feelings that a person may have towards another person.

12. The inclusion of particulars with respect to transgender status and history and sexual orientation in an Order in Council under section 1 or 6 will therefore not attract the parliamentary procedure set out in the proviso in section 1(2) of the 1920 Act (as read with the Interpretation and Legislative Reform (Scotland) Act 2010, partPart 2). Were the Schedule not amended, then the proviso to section 1(2) of the 1920 Act would apply to the provisions of an Order in Council prescribing particulars about transgender status and history and about sexual orientation as they would be included by virtue of paragraph 6 of the schedule. As such, those provisions would attract the affirmative procedure and be amendable by the Parliament. Adding “transgender status and history” and “sexual orientation” to the Schedule means that the provisions of an Order in Council prescribing particulars in respect of sexual orientationthese matters will be subject to the negative procedure.

13. Section 1(3) substitutes a new subsection for section 8(1A) of the 1920 Act. In doing so it extends the exception from the penalty provision (which exception currently applies only to particulars in respect of religion)

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to particulars in respect of sexual orientation. It also extends it to some particulars with respect to gender identity, transgender status and history. Section 1(3) retains the existing exception from the penalty provisions to particulars in respect of religion.

14. The particulars with respect to gender identity, transgender status and history which are to be so excepted must be identified by being prescribed in an Order in Council under section 1 or 6. The effect is that Her Majesty in Council may, when prescribing particulars in respect of gender identity, transgender status and history as particulars which must be included in a census return, separately provide that some or all of those particulars are identified as being particulars for which no person will be liable to a penalty if that person refuses or neglects to state those particulars. This renders census questions about those particulars voluntary.

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