

CENSUS (AMENDMENT) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament’s Standing Orders, this Policy Memorandum is published to accompany the Census (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 2 October 2018.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 40–EN);
 - a Financial Memorandum (SP Bill 40–FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 40–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government’s policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

POLICY OBJECTIVES OF THE BILL

4. The principal purpose of the Bill is to make answering census questions about prescribed aspects of gender identity, and about sexual orientation, voluntary. The Bill makes two, linked amendments of the Census Act 1920 (“the 1920 Act”). It adds references to “gender identity” and to “sexual orientation” to the schedule of matters about which particulars may be required to be given in a census. “Particulars” are, essentially, the answers that people give to the questions in the census form. Particulars are specified in the Census Order which is made in terms of section 1 of the 1920 Act. The forms used in the census are prescribed in regulations under section 3 of the 1920 Act. This is where the census questions, as they will be seen by individuals completing the forms, are set out in legislation. The census questions must, of course, solicit the particulars set out in the Census Order. The Bill also amends section 8(1A) of the 1920 Act to put particulars about sexual orientation, and enable some particulars about gender identity to be put, into the same category as particulars about religion so that no one can be fined under section 8(1) for failing or neglecting to answer questions about these matters. The default position for all census questions is that they are compulsory unless otherwise stated.
5. The Scottish Government regards “gender identity” as already being covered by the reference to “sex” in paragraph 1 of the schedule to the 1920 Act and a census could ask

questions about gender identity without the amendment of that paragraph being made. Likewise, the Scottish Government regards paragraph 6 of the schedule as providing authority to ask questions about sexual orientation. The main policy aim of the Bill is not, therefore, to facilitate the asking of questions about gender identity and sexual orientation but to make answering those questions effectively voluntary. The policy recognises both the importance and sensitivity of the new questions and seeks to mitigate concerns about intrusion into private life by placing the questions on a voluntary basis.

6. There is an additional reason for amending paragraph 1 of the schedule to add reference to gender identity. The issues of sex and of gender identity are linked, especially if the sex question asked is a non-binary sex question (for example “Are you male, female, other?”). The precise form of the question is still to be considered by Parliament during its scrutiny of the Census Order and regulations. The “sex” question will remain compulsory. For that reason, the Bill does not hard-wire provision that would make answering questions about gender identity voluntary (that might catch the sex question) and, instead, provides a power to prescribe aspects of gender identity (such as trans/trans history) for the purpose of making questions about those aspects voluntary.

Policy background and development

7. The census in Scotland is carried out every 10 years on behalf of the Registrar General for Scotland, with the next census taking place in March 2021.

8. Government, local authorities, health services, the education and academic communities, the third sector, commercial businesses, and others need reliable information on the number and characteristics of people and households if they are to conduct many of their activities effectively. This need is currently best met by conducting a census every 10 years, covering the whole of the population, and by updating the population estimates each year with the preceding census as the benchmark.

9. Census information is especially important where there is no other reliable source of the information, where the ability to cross-reference different characteristics of people or households is crucial, or where it is the only source of information about small areas and sub-groups of the population.

10. Changes to questions are regularly made between censuses to produce more relevant, reliable and accurate data. Society can change significantly in the 10 years between censuses and the questions have to keep pace. For example, for the last census in 2011 five new questions were introduced, including for national identity and long term health condition, and five were removed, including for bath/ shower and toilet access and religion of upbringing. Revisions were also made to some questions including on ethnic group, marital status, and to include same sex civil partnership options. Special attention was also given to the topic of ethnicity for 2011, to identify the best question not only for the census but also for use in other government surveys. A question on sexual orientation was considered for inclusion in the 2011 census. However, the level of public acceptance of the question was not considered sufficient to merit its inclusion in that census.

11. Extensive research and consultation has been carried out since the last census, which clearly identified a user need for data on sexual orientation and gender identity, especially transgender status/history. National Records of Scotland (NRS) invited views in the Scotland's Census 2021 Topic Consultation between 8 October 2015 and 15 January 2016. The consultation was a key step towards understanding what information users need from the census in 2021, and helped to build strong cases to justify the inclusion of topics. The focus of the consultation was on information required at topic-level, not the detail of the questions that should be asked on the questionnaire.

12. There continues to be an iterative and comprehensive process of user consultation, evaluation and prioritisation of user requirements and qualitative and quantitative question testing to inform decisions on the questions to be recommended for inclusion in the 2021 Census.

13. The main requirement for the inclusion of the sexual orientation and trans status/history questions (discussed below) is in connection with the Public Sector Equality Duty in terms of the Equality Act 2010 (the elimination of unlawful discrimination, the advancement of equality of opportunity and the fostering of good relations) and for use in informing policies and practices. In addition, the information would be widely used by service providers. For example, information on the size and geographic spread of the transgender population is essential for the planning of gender dysphoria services.

14. The Equality Act 2010 harmonised existing equality legislation and includes a public sector duty which requires public authorities to pay due regard to the need to: eliminate discrimination, harassment, victimisation or any other prohibited conduct; advance equality of opportunity; and foster good relations between different groups - by tackling prejudice and promoting understanding. This will include providing information to the public regarding the safeguards which are in place to help ensure that the data collected is protected and treated in strict confidence.

Question development

Sex

15. 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.

Sexual orientation

16. A question on sexual orientation was introduced in 2011 in other major surveys as one of the Scottish Government's core questions. All major Scottish Government household surveys and UK surveys such as the Annual Population Survey (APS) and Labour Force Survey (LFS) use the same question to allow direct comparison of the findings. Sexual orientation is a

combination of emotional, romantic, sexual or affectionate attraction or feelings towards another person. How a person determines their sexual orientation can be based on any combination of the above attractions, feelings or behaviours. It can change over time and a person may not know what their sexual orientation is. The proposed sexual orientation question in the 2021 Census will mirror the question already used in surveys in Scotland and elsewhere in the UK.

Gender identity: trans status/history

17. It is widely recognised that there is limited evidence on the experiences of transgender people in Scotland. Currently, there is no fully tested question with which to collect information on gender identity in surveys or other data sources. Therefore, the transgender question is a new development for the census. The question is not asked in any other major surveys and thus population-wide data is simply not available in any form. The non-binary sex question may identify some of the transgender population, but would not identify all.

18. The wording of the proposed transgender question is still being developed in conjunction with stakeholders. NRS will undertake further testing and development of the question before the wording of the relevant “particulars” are settled for inclusion in the Census Order which will be considered by the Parliament in due course. (The question as it will appear on the census form must reflect the wording of those particulars.) The term “trans” in the proposed question refers to a diverse range of people who find their gender identity does not fully correspond with the sex they were assigned at birth. Transgender people may or may not experience the medical condition of gender dysphoria/dissonance. They may or may not have completed a process of gender reassignment. The umbrella term “trans” can include trans women, trans men, non-binary gender people, people who cross-dress and intersex people. Consultation with stakeholders supported the use of “trans” in the actual question rather than “transgender”. This question falls with gender identity, which 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.

ALTERNATIVE APPROACHES

19. An alternative approach considered to achieve the objective set out above was to permit a ‘prefer not to say’ option for answering each of those questions. This would not require amendment of the 1920 Act. Failing to provide any response would still be an offence (a response would be compulsory in that sense) but a person could avoid disclosing sexual orientation or transgender status particulars by choosing the “prefer not to say” response option. Whilst this approach could be taken forward using the existing enabling powers in the 1920 Act, it was not considered acceptable to compel individuals to specifically answer these sensitive questions. The ‘prefer not to say’ option was not considered to provide enough clarity on the voluntary nature of these questions that the policy intends. Compelling individuals to respond in some way would not achieve the policy aim.

20. Another approach which was explored was to set out on the face of the primary legislation the scope of the exception which would apply to particulars about transgender status/history. However, this was rejected because of the stage of development of the census questions and because this could have unnecessarily restricted how those questions could be developed.

21. Consideration was also given to amending section 8(1A) of the 1920 Act without making any amendments to the Schedule to the 1920 Act. The matter of “sex” included in paragraph 1 of the Schedule would be wide enough to cover the particulars in respect of gender identity (specifically transgender status/history) about which it is proposed a question be asked in the 2021 census. It was considered, however, that the legislation would be clearer and more accessible if a more 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. Without amendment of the Schedule to insert “sexual orientation” as paragraph 5B, particulars with respect to sexual orientation would have to be specified in the Census Order in reliance on paragraph 6 of the Schedule (and the provision in the Census Order specifying such particulars would have attracted the parliamentary procedure set out in the proviso to section 1(2) of the 1920 Act). It was considered that including an express reference to “sexual orientation” would make the legislation clearer and more accessible.

CONSULTATION

22. NRS has carried out extensive research and consultation since the last census and identified a user need for data on sexual orientation and gender identity, including transgender status/history. NRS invited views in the Scotland’s Census 2021 Topic Consultation between 8 October 2015 and 15 January 2016. The consultation was a key step towards understanding what information users need from the census in 2021, and helped to build strong cases to justify the inclusion of topics. Considerable user demand was identified via the consultation for the collection of information on sexual orientation and a need for information on gender identity to be included in the 2021 Census. Further discussions with relevant stakeholders have led to the proposed question on trans status to capture the required elements of gender identity.

23. Even though the topic consultation did not specifically ask about it, a need for information on gender identity was identified. Gender reassignment is a protected characteristic as set out in the Equality Act 2010 and a range of organisations told us that data about those individuals was required in relation to fulfilling the duties specified for public bodies in that legislation. They told us that a reliable data source on the size and locality of the trans population in Scotland is required to justify policy developments that will reduce inequalities experienced by trans people, and for designing and enhancing public services to meet specific needs, particularly in relation to the provision of health services. Because Scotland’s trans population is small and distributed widely across the country, the census was suggested as the source which would be comprehensive enough to provide accurate information on that population.

24. Since then there has been an iterative and comprehensive process of user consultation, evaluation and prioritisation of user requirements and qualitative and quantitative question testing to inform decisions on the questions for inclusion in the 2021 Census.

25. Considerable user demand has been identified for the collection of information on sexual orientation and a need for information on gender identity to be included in the 2021 Census. Further discussions with relevant stakeholders led to the transgender status question to capture the required elements of gender identity. For example, NRS have worked closely with the Equality Network, the Scottish Transgender Alliance, Stonewall Scotland and Scottish

Government Equality Unit to understand the needs and concerns of these communities and they are reflected in the Bill. Extensive question testing is on-going.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal Opportunities

26. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website <http://www.scotland.gov.uk/Publications/Recent> and the Scotland's Census website <http://www.scotlandscensus.gov.uk>.

27. The main requirement for information on sexual orientation and transgender status/history is in connection with the Public Sector Equality Duty in terms of the Equality Act 2010 (the elimination of unlawful discrimination, the advancement of equality of opportunity and the fostering of good relations) and for use in informing policies and practices, and the funding of services. It is considered that none of the provisions will give rise to the possibility of those affected being treated less favourably due to their protected characteristics.

28. The Scottish Government view is that the Bill provisions create the conditions to enable the inclusion of voluntary census questions on sexual orientation and transgender status/history, which will affect future decisions around the exact questions to be recommended for inclusion in the census. Subordinate legislation will reflect those decisions. Inclusion of such questions, whether or not voluntary, is anticipated to have a positive effect on inclusivity, by affording all individuals the opportunity to identify and express themselves in a way which more accurately represents how they feel, compared to previous censuses. This, in turn, should give rise to more accurate responses from individuals.

29. A Children's Rights and Wellbeing Impact Assessment has been published as part of the EQIA on the Scottish Government website. This highlights the effects of the Bill provisions on children and young people up to the age of 18. Considerations of which age groups to ask these questions of are on-going.

Human Rights

30. The Scottish Government has considered the effect of the Bill on human rights.

31. The Bill itself does not require that questions on sexual orientation, transgender status or any other aspect of gender identity be included in the census. Nor does it add these to the matters about which questions may be asked (as these are already covered by paragraphs 1 and 6 of the schedule of the 1920 Act). The Bill will, in the case of any question in respect of sexual orientation, ensure that there is no penalty applicable for refusing or neglecting to answer the question. In the case of a question in respect of gender identity, in terms of transgender status/history being specified, the Bill will similarly ensure that no such penalty applies. The Bill will therefore allow questions on these matters to be asked in a way which should not adversely impact upon the right to a private and family life under Article 8 of the European Convention on

Human Rights (ECHR). However, the Bill on its own does not have any direct effects on human rights.

32. The particulars to be included in a census return have to be prescribed in an Order in Council under section 1 of the 1920 Act. The impact of such an Order on the human rights of persons affected by it (most significantly those in respect of whom particulars are required to be included in census returns) will be assessed separately at the point when such an Order is being prepared, scrutinised and made. Any such assessment would have to consider the impact of including the specific particulars in respect of sex (including gender identity) and sexual orientation which are prescribed in that Order, having regard to the precise terms in which they are expressed, the arrangements which are put in place (such as the availability of confidential individual hard copy and online returns, which can be used regardless of whether the individual is included in a household return, and the process for reconciling information given on individual forms and household forms), and the protections in place which restrict the access to and use of the data gathered in the census. It would also have to consider whether those impacts amounted to interferences with rights (such as Article 8, ECHR right to private and family life), and whether any such interference was justified by reference to legitimate aims (such as protecting the rights and freedoms of others) and was done in a proportionate manner.

Island Communities

33. The Bill has no differential impact upon island communities. The provisions of the Bill apply equally to all communities in Scotland.

Local Government

34. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities. The taking of the Census is a central process by the Scottish Administration and carried out by the National Records of Scotland.

Sustainable Development

35. The Bill will have no negative impact on sustainable development. The Bill provisions support the principles of sustainable development by helping to ensure a strong, healthy and just society, meeting the diverse needs of all people in existing and future communities, promoting personal well-being, social cohesion and inclusion, and creating equal opportunity for all. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is, therefore, exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

This document relates to the Census (Amendment) (Scotland) Bill (SP Bill 40) as introduced in the Scottish Parliament on 2 October 2018

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