

CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE

CENSUS (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM EQUALITY NETWORK AND SCOTTISH TRANS ALLIANCE

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.

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>

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

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

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 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

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>

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>