

**CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE**

**CENSUS (AMENDMENT) (SCOTLAND) BILL**

**SUBMISSION FROM PROFESSOR SHARON COWAN, PROFESSOR OF FEMINIST AND QUEER LEGAL STUDIES, UNIVERSITY OF EDINBURGH**

**First, there is no case law in the UK that lays down a general test for ‘sex’ that would apply in all situations and for all purposes.**

*Corbett v Corbett*, an English case that laid down a biological test for ‘sex’, did so in the context of a question about **marriage**. The cases which followed this - *Bellinger v Bellinger* and *Goodwin and I v UK* - which led the UK government to pass the Gender Recognition Act 2004, also referred to the term ‘sex’ in the context of **marriage**.

Even though the marriage case law has technically not been overturned, people of the same sex who live in England, Wales and Scotland can now get married, by way of The Marriage and Civil Partnership (Scotland) Act 2014 and The Marriage (Same Sex Couples) Act 2013.

**Secondly, there is no statutory definition of ‘sex’.**

The same-sex marriage legislation does not define ‘sex’. However, it does treat same-sex and mixed-sex marriages differently, for the purposes of specifying who can solemnise marriages. To decide whether a marriage is mixed- or same-sex, National Records of Scotland ask people to present their birth certificate. That birth certificate will not necessarily record ‘biological sex’, because the sex recorded on a birth certificate can be changed via the gender recognition process introduced by the 2004 Gender Recognition Act.

Where a trans person has a gender recognition certificate, section 9 of the Gender Recognition Act states that the person must be recognised in this ‘acquired’ gender for all purposes. There is a legal requirement therefore to recognise the person as the sex recorded on their birth certificate and not as ‘biological sex’.

Although sex is a protected characteristic under the Equality Act 2010, the Act does not define sex. Section 212 (1) simply says that a man is a male of any age and a woman is a female of any age. **How male and female are to be interpreted is not stated.**

The Act treats sex as inclusive of all those who are recorded as that sex on their birth certificate, ie both those who are ‘biologically’ that sex, and those who have been designated that sex under the gender recognition process. It also protects those who are *perceived* to be a certain ‘sex’ even if they are not (for example lesbians or trans women who are mistaken for men).

**Therefore, since there is no single definition of 'sex' for all purposes, in practice, legally 'sex' has meant different things, depending on the context in which the term is used.**

For example, sometimes the term 'sex' is used interchangeably with the term 'gender' (as in the Gender Recognition context, where the 'sex' on a person's birth certificate can be changed to reflect the person's 'acquired gender' when they receive a 'Gender' Recognition Certificate). At other times, the terms 'sex' and 'gender' are used to refer to different things.

**This means that the Scottish government is free to interpret and apply the category of 'sex' (or indeed 'gender') in any given context, in a manner that is appropriate to that context, without having to define 'sex', and without having to abide by any previous definition or application of the term 'sex'.**

For the purposes of the Census, the government does not need to define absolutely the category of 'sex', and it certainly does not need to define 'sex' as biological. For the last two Censuses, the government has been collecting information about 'sex' that allows a trans person to categorise themselves according to their lived identity rather than their 'biological sex'. Collecting the information in this way seems to be the most appropriate way to protect trans people's dignity and privacy. There does not seem to me to be any compelling reason to move away from this approach.

If the justification is trying to address health needs, changing the categorisation on the Census does not seem to me to be a good way of achieving this. Every trans person will have had, and also in the future require, a different level of medical intervention and support (both psychological and physical) and so it would be difficult to predict health needs simply from the data resulting from basic census questions that identify someone as a different 'biological sex' from their lived identity. To properly predict health needs, the Census would require a much more intrusive level of questions, which is clearly not justifiable.

Therefore, when weighing in the balance that: there is no one legal definition of sex; the government is free to use the definition of 'sex' that is most appropriate to the context; that the proposed change would not yield sufficiently precise data; that asking trans people to identify their biological sex violates their privacy and dignity; and that the previous Censuses have been able to collect perfectly adequate data without demanding that 'biological sex' be identified, the case for changing the present system does not seem to me to be a convincing one.