

CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE

CENSUS (AMENDMENT) (SCOTLAND) BILL

SUBMISSION FROM VIC VALENTINE, SCOTTISH TRANS ALLIANCE

Thank you again to the Committee for inviting me to give evidence on Thursday 6th December. Scottish Trans Alliance welcomes the respectful and nuanced discussion between different viewpoints that the Committee is facilitating.

The Committee asked our view on potentially changing the census sex question instructions to start requiring trans people to answer with their “biological sex at birth”. We would request to submit this short supplementary evidence in additional answer to this issue:

We mentioned that the privacy of trans people’s gender history is a right protected under article 8 of the ECHR (as established in *Goodwin and I v. UK* for example). Asking a compulsory “biological sex at birth” question would breach that privacy because it would require trans people to reveal their gender reassignment history against their wishes. If the sex question were to ask trans people to reveal their “biological sex at birth” then it would need to change from compulsory to voluntary. The negative implications of making the sex question voluntary would be likely to have a much larger effect on the reliability of the statistics than any effects due to the responses of the small number of people who are trans.

Trans people have always been allowed to answer the census sex question by giving the sex in which they live and identify. This has not caused any problems for the use of the census data and there is no evidence to suggest that continuing to afford trans people this vital dignity will have a negative impact on future census data use. Attempting to force trans people to answer with their “biological sex at birth” in contradiction to their lived identity risks reducing the quality of the census data because many trans people will simply refuse to comply with that demand. It would be viewed by many trans people as a harmful roll-back of their existing rights so many will either answer with their lived identity anyway, or will leave the sex question blank in protest or, at worst, may refuse to complete the census at all.

It is our view that the already established ability of trans people to answer the census compulsory sex question with their lived identity should remain in place, whether or not a third non-binary answer option is added, and the information that a respondent is trans should be collected via a voluntary trans status question. This is what NRS research and testing has found to be the most easily understood, publicly acceptable and reliable way of gathering sex and gender identity data. NRS has conducted extensive research and testing in order to find questions that help avoid non-completion and data uncertainty problems. The NRS proposals are a pragmatic and effective way of ensuring that the most useful and accurate census data is collected with as minimal harm, fear and distress to minority groups as possible.

The European Court of Human Rights judgement in Goodwin and I v. UK stated when deciding that trans people must have the right to change their legal sex:

“The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance... No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”

Being able to record their lived identity in the sex field/question on government forms and records is essential to trans people’s ability to “live in dignity and worth” as established in Goodwin and I v. UK. A small fraction of a percent uncertainty in statistical sex data (which can be substantially resolved by also asking a voluntary trans status question) is not a major inconvenience for society.

We appreciate that for the vast majority of people the sex they state on their census form will be very useful in predicting their likely use of health services. It is understandable that people may therefore think that asking a trans person their “biological sex at birth” would also be very useful in predicting their use of health services. However, many trans people undergo various hormonal and surgical interventions that can significantly change their healthcare needs and health risks. For example, trans women who undergo hormone treatment will need breast cancer screening, despite the fact that their biological sex characteristics at birth would have been described as male. It is simply not possible to use the census data to accurately predict the diverse healthcare needs of trans people, regardless of how they are asked to complete the sex question. NHS Scotland already has its own systems that include trans people’s health needs appropriately within their screening services while allowing trans people to have the sex in which they live and identify recorded on their medical records rather than their “biological sex at birth”.

Allowing trans people the dignity of stating their lived identity as their sex and giving them the option to also say that they are trans, is the way in which public bodies, including the NHS and single-sex services, already collect data. It is working well and allows data analysts to take account of the fact that the biological characteristics of those who state they are trans will be atypical to some degree for their answer to any sex question.

We are not trying to claim that trans people can change all aspects of their biological sex characteristics. Rather, we are saying that when recording sex on government systems, such as birth certificates, passports and census data, trans inclusion must be done in a way that upholds trans people's dignity and privacy. It is not solely about chromosomes or genitals. Trans people are already allowed to change their sex markers on all their government records to match their lived identity. Case law has already upheld that it is gender reassignment discrimination to deny a trans person the ability to record their lived identity as their sex on documents such as employment records. It is vital that the census continues to uphold the same level of dignity and privacy to trans people.