

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

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

**SUBMISSION FROM PROFESSOR ROSEMARY AUCHMUTY AND PROFESSOR ROSA FREEDMAN**

**The Impact of Conflating Sex and Gender Identity**

1. The following submission is in response to the calls for evidence ‘on the proposals contained in the Census (Amendment) (Scotland) Bill including the proposed power in the Bill to provide for questions dealing with “gender identity” and “sexual orientation” to be included in the Census for the first time.’
2. We are Professors of Law at the University of Reading. Professor Auchmuty is a leading expert on law and feminism, and Professor Freedman is a leading expert on international human rights law. Jointly and separately we have authored many publications on women’s rights, including recently on the proposed reforms to the Gender Recognition Act.
3. The Culture, Tourism, Europe and External Affairs Committee is consulting on whether to amend the Census to include gender identity as part of the question about sex. The main issue with doing so is that this will conflate sex and gender identity, which will have far-reaching impacts both on the data collected and on the precedent for how sex and gender identity are treated in law.
4. The consultations on the Census (Amendment) (Scotland) Bill follow wide discussions about the legal implications of self-identification of gender identity in the UK, including specific focus on the Gender Recognition Act, and in particular what this might mean for sex-segregated spaces and how to ensure that human rights are implemented for all individuals. The current legal position established in case law is that sex is defined as chromosomal biology. Gender identity, on the other hand, is undefined in national, regional and international law (although gender reassignment, as a narrow category, is both defined and protected in national law). It is of concern that the Census (Amendment) (Scotland) Bill seeks to conflate gender identity and sex without having defined the former, and without legal precedent to do so.
5. Conflating sex and gender identity will undermine sex as a separate category protected by law. We are concerned with ensuring the retention of (biological) women’s rights in relation to sex-segregated spaces and services, as already protected by the Equality Act in circumstances that are ‘necessary and proportionate’. We envisage at least six areas where sex-segregation should be maintained. Many of these already exist as exemptions in the Equality Act, but a

conflation of gender identity and biological sex is already undermining their existence in reality. Each of these areas requires sex and gender identity to remain separate and distinct from one another. And without accurate data from the census, we are concerned that these will further be eroded or undermined.

6. First, medical treatment and research: there are some conditions and treatments that are sex-specific. Gynaecologists, for example, are not trained to deal with prostate cancer. Of course, additional services and facilities should be provided (as some currently do) for transgender individuals.
7. Second, sex-segregated spaces must remain where women need protection from male bodies, such as in prisons, refuges, and rape crisis centres, regardless of a person's gender identity. That is not to say that rape crisis centres would not assist transgender victims, simply that they should have separate facilities.
8. Third, statistics gathered should ask about both sex and gender, enabling the data to continue to be useful for the purposes of planning and understanding populations and demographic shifts as well as such matters as crime statistics and pay differentials. Counting transwomen as women would distort the figures because many people transition after they have enjoyed the privileges of their sex for a considerable time.
9. Fourth, sports would remain sex-segregated where relevant, thus enabling women to continue to participate in competitive sports without losing out to bigger, stronger male physiques, and ensuring that equal funding (a long battle, still not won) is given to sports for both sexes.
10. Fifth, protections would continue for religion, a protected characteristic under the Equality Act, taking into account the needs of certain religious groups to have sex-segregated spaces in public institutions and facilities.
11. Sixth, maintaining the legal distinction between gender identity and sex will also ensure that women-only spaces that were set up to compensate for women's long-standing political, social and economic disadvantage remain sex-segregated. These include women's centres, organisations like the Girl Guides that were created because girls were refused entry to the boys' organisations, and ladies' swimming ponds that were set up because women were not allowed to swim in public. In all these cases, there exist parallel men-only and mixed spaces that other people may enjoy. These single-sex 'spaces' should also include metaphorical spaces such as women-only shortlists, schemes to boost women's representation on company boards and as directors, and 'woman of the year' awards in business and STEM sectors that were set up to overcome the long-standing and overwhelming dominance of men.

12. Reforms to law and policy must take into account the needs of all people affected and ensure that the rights of all protected groups really are protected. Many women have been concerned that their rights are being overlooked in the pressure to bring justice and appropriate protections for transgender people. We propose that maintaining the distinction between sex and gender identity, already embedded in law, will allow for self-identification whilst also protecting women's rights. Accurate data is required to ensure appropriate, adequate and accessible facilities and services for all people, including meeting the needs of (biological) women and of gender identity minorities. To that end, we propose having two separate questions in the census, one on sex and one on gender identity.