

**Culture, Tourism, Europe and External Affairs Committee****Census (Amendment) (Scotland) Bill****Summary of written evidence****Introduction**

The [Census \(Amendment\) \(Scotland\) Bill](#) (the Bill) was introduced by the Cabinet Secretary for Culture, Tourism and External Affairs, Fiona Hyslop MSP, on 2 October 2018.

The Bill aims to ensure that when questions are added to the census on prescribed aspects of gender identity, and on sexual orientation, answering them will be **voluntary**.

It is proposed that the prescribed aspect for gender identity will be trans status/history, and that this would be asked following a non-binary sex question, eg, male, female or other. The most recently tested questions were:

- What is your sex? Female, Male, Other, please write in
- Do you consider yourself to be trans, or have a trans history? Yes, No, Prefer not to say

These questions are still subject to further consultation and testing, and finally, the approval of the Scottish Parliament.

The sex question in the census has always been a binary question – male or female. However, in Census 2011 the binary sex question was based on self-identification. This provided an opportunity for trans people to choose the sex they identified with. There was guidance which stated:

“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.”

Scottish Government bills usually follow an open consultation period with the public and interested parties before their introduction. However, the census undergoes extensive consultation to respond to user needs and develop new questions. This includes a consultation document, a range of stakeholder events, surveys and question testing.

Despite the extensive consultation, the introduction of the Bill is the first time that some people have seen the proposals. The Committee’s call for evidence is also the first opportunity for people to comment on the proposals.

### **Call for evidence**

The [call for evidence](#) was issued on 11 October 2018. The closing date for submissions was Friday 23 November 2018.

The Committee received 27 responses at the time of writing, 14 from individuals, including academics, and 13 from organisations including local authorities and third sector/equality organisations. A copy of the published written submissions can be found on the [Committee’s website](#).

### **Overview**

Broadly speaking, the responses fall into two main categories:

- Those who support the Bill and explain the reasons why
- Those who are concerned that the terms ‘sex’ and ‘gender’ have been conflated or confused, but who suggest that:
  - there should be a question on sex, most of whom state this should remain a binary question, and
  - there should be an additional question covering gender identity.

There are four responses that show no support for the need to collect data on sexual orientation or gender identity.

Two of the responses did not comment on the Bill’s proposals. They proposed that the Census question, which asks about languages spoken at home, is amended.

### **Support for the Bill**

Several organisations welcomed the Bill’s aim to make questions on sexual orientation and prescribed aspects of gender identity voluntary (Advance HE, East Ayrshire Council, Falkirk Council, Stirling Council, Law Society of Scotland, Aberdeenshire Council). The main reasons relate to:

- the ability to understand different communities better, and to be able to plan appropriate services
- to be able to fulfil equality duties

Advance HE said that having national data would allow comparisons to be made and demonstrate a need for positive action for these groups

A further benefit of the Bill is that it provides an opportunity to develop a question on gender identity that can be consistently used (Advance HE). Currently, many public authorities use different questions to try and capture gender identity.

Falkirk Council said that having the sexual orientation and gender identity questions on the census might encourage people to fill out the same information on other forms.

Stirling Council noted the importance of the questions being voluntary:

“The voluntary nature of the questions concerned and the absence of any penalty for not answering these recognises their potential sensitivity and possible issues arising from responsibility for completing the Census resting with the ‘Head of Household’”.

On the other hand, Glasgow City Council suggested that the voluntary nature of the questions might be over cautious and that questions on sexual orientation are more acceptable now.

Aberdeenshire Council mentioned privacy concerns:

“it is vital that respondents’ rights to privacy and consent are respected. Making questions voluntary or supplying individual forms does not fully address the issues that may arise when a person needs assistance with completion of the form, for example, people with a Learning Disability, visual impairment, elderly people, BSL users or other community members for whom English is not their first language”.

The Equality Network and Scottish Trans Alliance, LGBT Youth Scotland and Stonewall Scotland all support the aims of the Bill, and that it is appropriate that questions on sexual orientation and gender identity are voluntary. The Equality Network and Scottish Trans Alliance said that not having a trans question or a sexual orientation question contributes to continued stigma.

Stonewall Scotland and LGBT Youth Scotland referred to research that shows how LGBT people have poor experiences with public services. LGBT Youth Scotland said:

“The data will send a strong message to services regarding the obligation to meet the needs of Scotland’s LGBT populations. As a

result it will be expected that services will take steps to be more inclusive of LGBT people”

It is suggested that there may be under-reporting in the Census 2021, because it takes time for people to feel comfortable in responding, but that it is still important to collect the data for the reasons stated above (Stonewall Scotland).

## **Sex and Gender**

### ***Conflation of sex and gender***

Several of the responses expressed concern that the Scottish Government is conflating sex and gender. It is argued that sex is biological and binary, whereas gender or gender identity is a social construct that has not been clearly defined in law.

It is also noted that ‘sex’ and ‘gender reassignment’ are protected characteristics in the Equality Act 2010, but gender or gender identity are not.

Some examples of the comments on this are:

“Gender identity is a contested term, with no well-established meaning (I note it is not defined by the census either). It is best understood as either a) one’s strong sense of how ‘masculine’ or ‘feminine’ one is; or b) one’s strong belief about whether one is a man or woman or non-binary. Neither a) nor b) are reducible to biological sex. A masculine female is still a female. A feminine man is still a man. A transwoman who strongly believes she is a woman is still biologically male; a non-binary person is still either male or female, depending on the case”. (Dr Kathleen Stock)

“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”. (Professor Rosa Freedman and Professor Rosemary Auchmuty).

“Before you begin to attempt to enshrine this in law do you not think you should be clear on what questions you are going to ask and how you define sex and gender identity? Sex and gender identity are not the same thing. Sex should be defined straightforwardly, as it is in the Equality Act 2010 - biological and legal sex. One may identify with a gender; however, one cannot self-identify one’s sex. Sex is immutable; it is wrong to conflate the two. It is bad enough that sex and gender are conflated much of the time, but to conflate sex with gender *identity* is alarming”. (A1)

ForWomen.Scot said they were concerned about the blurring of sex and gender across government documents and more widely.

### ***The sex question – self-identification***

As stated in the introduction, there has always been a binary sex question in the census. For Census 2011 guidance was provided to allow people to choose the sex they identify with (referred to in the introduction above).

Dr Kathleen Stock said that self-identified sex would be a profoundly misplaced move (although, as stated it was included in Census 2011), because sex is a protected characteristic to protect females from sex-based discrimination and sex-based violence:

“It is implausible to think that this discrimination and violence is exhibited towards females on the basis of their ‘self-identified sex’. Late transitioning trans women, socialised as males, do not become subject to sex-based discrimination; what discrimination they receive has another cause. Transitioning female transmen do not opt out of sex-based discrimination because they identify as men. Having accurate information about actual sex class is extremely important for tracking all sorts of related statistics to do with discrimination, which will be lost if this move goes ahead”.

The Equality Network and Scottish Trans Alliance welcomed the self-identification question in the Census 2011:

“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”.

### ***Non-binary sex question***

The Scottish Government is considering whether to make the sex question non-binary. This is to ensure that non-binary people can respond to the self-identified sex question. This is not a provision in the Bill, but could be proposed in subordinate legislation.

Dr Kath Murray was concerned that if ‘other’ is added to the sex question, “the Scottish Government may lack the robust data required to support its public sector duties.” Further, that the longitudinal analysis on sex could be undermined by changes to the sex question.

Dr Kathleen Stock said that if the sex question is non-binary to cover intersex, this is a mistaken application:

“Due to our best understanding of the categories, intersex females are still female; intersex males are still male”.

ForWomen.Scot support the Bill's proposal to make questions on sexual orientation and gender identity voluntary, but oppose a non-binary sex question:

“Human beings are sexually dimorphic, and an individual’s biological sex is an unchangeable characteristic. The question on sex has been asked consistently since the Census begun, which enables data to be compared over time. Other datasets produced by government agencies use Census data as a baseline, so retaining consistent categorisation on sex is vital”.

However, LGBT Youth Scotland, Stonewall Scotland and the Equality Network and Scottish Trans Alliance support a non-binary sex question. This will allow non-binary people to respond in a way that reflects how they live. The Equality Network and Scottish Trans Alliance said:

“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”.

#### ***A question on gender identity – trans status/history***

Several submissions, that had concerns about the conflation of sex and gender, suggested that there should be two questions in the census, one on sex and one on gender identity. It is the Scottish Government’s aim to have a question that collects data on sex, and a question that collects data about gender identity. It is unclear if the submissions thought:

- a gender identity question was replacing the sex question, or
- whether the self-identified sex question is viewed as a gender identity question already, or
- whether having a non-binary self-identified sex question is viewed as a gender identity question.

For example:

“my recommendation is the use of two separate questions: the first to ask about biological sex, with two possible answers (male or female); and a second, separate and optional, question about gender identity, with either several tick boxes with the most common gender identities and a write-in option, or a simple write-in option. This would allow data to be collected about both biological fact and social views on sex and gender identity, providing valuable information for service provision and social demography”. (A2)

“As a vehicle for public policy, the census needs to be unequivocal on the difference between sex and gender. Any question pertaining to gender identity should be voluntary and asked separately” (Dr Kath Murray)

An anonymous submission said there should not be a gender identity question on its own, but a binary sex question, followed by gender identity in a

separate question and said that gathering data on gender identity 'seems like a reasonable thing to do' (A1).

The Equality Network and Scottish Trans Alliance said:

“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”.

### **Data collection**

The Equality Network and Scottish Trans Alliance said that prevalence surveys of the US population estimate that 0.6% of the population are trans:

“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”.

They also said:

“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”

Some have raised concerns about the impact on the quality of data as result of introducing questions on sexual orientation and gender identity.

For example, Dr Sophie Allen is concerned that most people have no conception of their gender identity, and said that:

“from a data-collection point of view, gender identity is not useful data to collect. Respondents will report according to their own individual prejudices about what a masculine or a feminine stereotype is. In addition, there will be a lot of people who do not answer this question who do not correspond to the stereotype associated with their sex. Thus the data collected will be arbitrary and incomplete, and as such it is not worth collecting.”

The sections above referred to concerns about the quality of data in terms of using a self-identified sex question (Dr Kathleen Stock) and about data from a non-binary sex question (Dr Kath Murray).

In response to concerns that a self-identification sex question may obscure results, the Equality Network and Scottish Trans Alliance said:

“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”.

In response to concerns about data from a non-binary sex question, the Equality Network and Scottish Trans Alliance said:

“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”.

### **Sexual orientation**

There were far fewer comments regarding making a question on sexual orientation voluntary.

The Equality Network and Scottish Trans Alliance welcome this proposal and felt strongly that such a question should have been included in the last census. By not including this question they state:

“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”.

They continued that robust data on LGB people is needed. Although the Scottish Government has household surveys:

“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 significance. 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”.

However, they do caution, that there is likely to be under-reporting and it should not be assumed that the census will give an accurate count of LGB people.

### **Data collection**

Two respondents raised concern about the data results when the sex, gender identity and sexual orientation questions are read together:

“I would also like to register my concern about the poor quality of data that will be gathered in relation to sexual orientation with regards to gender identity. For example, if a trans man chooses “lesbian/gay” in this question, is this with reference to biological sex or according to gender identity?” (A2)



Dr Kathleen Stock, in reference to the sexual orientation definition in the Policy Memorandum said it is:

“a useless definition which misses out the only important fact in characterizing whether an orientation is heterosexual, homosexual, or bisexual – whether the attraction is to the same (biological) sex, opposite (biological) sex) or both. If this is not specified, then it will leave room for e.g. late transitioning male trans women, who are heterosexual and have penises, to self-describe as ‘lesbians’ (and on present evidence many will). This will leave the data not fit for purpose”.

### **Engagement with women groups**

Four of the responses suggested that further development on these questions should include women’s groups.

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