

CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE**CENSUS (AMENDMENT) (SCOTLAND) BILL****SUPPLEMENTARY EVIDENCE FROM EQUALITY NETWORK**

17th December 2018

We request that the Committee please consider this supplementary evidence, which responds to issues discussed at the Committee's meeting on 13th December, and in written evidence published since.

Much of that evidence has focussed on whether the compulsory sex question in the Census should ask trans people about their "biological sex" (defined as the sex stated on their original birth certificate), their "legal sex" (defined as current birth certificate sex, which will differ from the original birth certificate for those with a gender recognition certificate), or (as the 2011 Census did) their "lived sex" – the sex the person identifies and lives as. We have previously stated our concerns about the inappropriateness of the first and second of those options for a compulsory sex question, including privacy concerns related to article 8 of the ECHR. We believe that the compulsory sex question should ask trans people their lived sex, and here we have responded to some questions raised about that.

Effect on data quality

For the 99+% of people who are not trans, it makes absolutely no difference which of these options the compulsory sex question asks for. Those people will answer the same in all cases. The difference in the overall male and female sex statistics, between the different versions of the question, will therefore be well under 1%. To put this in perspective, it can be compared to the expected non-response rate for the census. We have not seen figures for Scotland, but recent UK Government information for England and Wales states that the non-response rate is anticipated to be up to 6% across the country, and could be as high as 20% in some individual local authority areas.

It should also be noted that an appropriate voluntary trans status (or gender reassignment) question, that is acceptable to trans people, is likely to be answered by a large proportion of trans people in the census, and so they can be excluded from the sex statistics for the non-trans population. This means that, in practice, the effect on health service and other service planning information for the large majority of people who are not trans, of using a lived sex question rather than a legal sex or biological sex question, will be insignificant.

On December 13th, the Committee heard oral evidence that the proportion of people identifying as trans might soon increase above 1%, as a result of proposed changes to the Gender Recognition Act to allow people to apply for gender recognition on the basis of a statutory declaration that they live in a particular sex and intend to do so for the rest of their lives. However, the evidence from countries that have already

made such a change to their gender recognition law demonstrates otherwise. In Ireland, in the first year since gender recognition has been available on a self-declaration basis, 109 people applied for gender recognition, which is 0.002% of the country's population. In Denmark, the figure averages 289 a year since 2014 – 0.005% of the population each year, and in Norway, 709 over the first 9 months – 0.01% of the population. Based on these figures, it would take many decades for the numbers to rise to a significant proportion of 1%. There is therefore no reason to suppose that the number of trans people in Scotland might rise to over 1% in the 2021 census – it is likely to be much lower.

The Committee also heard that asking trans people for their legal sex or their biological sex at birth would be more useful for trans people's health service planning than asking them about their lived sex. The suggestion is that it is biological sex at birth that primarily determines the sex-related health needs of the small numbers of people who are trans. An example was given that trans men continue to need breast cancer screening (having been biologically female at birth), while trans women do not. However, the reality is different. Many trans men have had mastectomies, significantly reducing their risk of breast cancer, closer to that for men generally. Conversely, many trans women take feminising hormones, significantly increasing their risk of breast cancer, closer to that for women generally. For those people, the risk of breast cancer aligns more closely to their lived sex, not their biological sex at birth or their legal sex. For this reason, the NHS in Scotland offers breast cancer screening to trans women (regardless of their legal sex).

This is an example of the general fact that the sex-related health needs of trans people are complex, and cannot be assumed to correspond to their biological sex at birth or their legal sex. A legal sex (or biological sex) question therefore gives data that is no more useful for health service planning for trans people than a lived sex question does.

Of course for planning the health services for the 99+% who are not trans, the questions work equally well, as they provide identical responses (and, as noted above, with a well-designed separate trans status question, the sex statistics for non-trans people and for trans people can be assessed separately).

Consistency with equality monitoring practice and data

One of the important uses of census data is as a baseline against which equality monitoring by service providers and employers can be compared. In the large majority of cases, service providers and employers treat trans people in their lived sex, not their sex at birth or their legal sex. In other words, they will treat a trans woman who lives as a woman, as a woman, regardless of whether she has a gender recognition certificate. It should be borne in mind that it is currently a requirement of gender recognition that the applicant has lived fully for at least two years in the gender they are applying for. They are protected from gender reassignment discrimination and harassment by employers and service providers, throughout that time.

It can be unlawful gender reassignment harassment for an employer or service provider to refuse to respect the lived sex of a trans person, including where the

person does not have a gender recognition certificate (GRC). If the refusal to respect the person's lived sex has the effect of violating the trans person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them, it can constitute gender reassignment harassment contrary to section 26 of the Equality Act 2010.

In line with this, employers and service providers who include sex in equality monitoring statistics generally support trans people to respond with their lived sex, not their legal (current birth certificate) sex. A lived sex question in the census will therefore provide a more consistent baseline statistic for employers' and service providers' equality monitoring of sex. In particular, where monitoring also includes a trans status question, then this consistency in the sex question used becomes important for sub-analysis, by sex, of the trans cohort.

In addition to considerations around data, consistency of practice is important in itself. Consistency will enhance understanding of the question and of the data. A lived sex question in the census would be consistent with the way that sex is monitored across service provision and employment, and with the way trans people are required to be treated in those contexts.

As noted in our oral evidence, it would also be consistent with the treatment of trans people in the Gender Representation on Public Boards (Scotland) Act 2018. In that Act, consistent with the practice outlined above, trans women who live as women are included in the count of women board members, while trans people who do not live as women (trans men and non-binary people) are not included in that count.

The "other" option

The Committee heard oral evidence from a witness that LGBTQI people had said to her that they objected to the use of an "other" option in questions about sexual orientation or gender identity.

There is now significant experience in using a standardised sexual orientation question, including in the Scottish Government's various annual surveys over several years, and those conducted by the UK Government. That question includes an "other" option for those who do not identify as heterosexual/straight, lesbian, gay or bisexual. We are not aware of any complaints about the provision of the "other" option. We know from using the question ourselves in our many surveys of LGBT people over recent years, that those who identify their sexual orientation using a different term very much value the availability of the "other" option, and of a write-in box for the term they use. In Scottish Government surveys in 2015, 0.4% chose "other" for their sexual orientation.

As regards the acceptability of an "other" option for non-binary people to use in a question on lived sex, the Scottish Trans Alliance conducted research on this in 2015. Only 4% of 867 non-binary respondents to the research said they currently felt able to accurately describe their gender identity when filling in forms to access services. When asked what changes would make this better, 68% suggested an "other" option on sex questions, and 75% suggested a write-in box for their own term

for their gender identity. Only 1.5% of respondents said they did not like the term “other”.

We therefore recommend that the lived sex question include the option “other” (or, even better, “in another way”), together with a write-in box. “Other” options with write-in boxes are already used in a number of the other census questions, for example the religion and ethnicity questions in 2011.

Does the bill need amended?

We agree with NRS’s suggestion, in their letter to the Committee dated 5th December, that using the term “gender identity” in the bill has caused confusion. We would recommend using the term “trans status” to identify the new, voluntary, question which enables trans people to identify themselves. We would suggest adding this to section 1(2)(b) of the bill, so that “trans status” is added as a new paragraph 5C to the schedule to the Census Act 1920. “Trans status” could then be listed in the substituted section 8(1A)(a) of the 1920 Act (set out in section 1(3) of the bill), below “sexual orientation”, to make the question voluntary. “Trans status” is a sufficiently wide term that there is scope to ensure a suitable question wording over the next year.

We would suggest removing section 1(2)(a) of the bill, so that the existing inclusion of a mandatory question on sex is unchanged from 2011. It would be important however to be clear that this would allow the flexibility to make the question about lived sex (as it was in 2011), with or without an “other” option, or to make it something different, following further consultation and, if needed, question testing.

We strongly believe that the bill should not pre-empt such further consultation and question testing. We would expect the consultation to be broad, and in particular to include Scotland’s women’s organisations, as well as data users.

The wording of the census questions is not set out in the Census Act, but in the Census (Scotland) Order, which is due to be considered by the Scottish Parliament in early 2020. NRS should therefore complete consultation on, and any required testing of, question wordings over the next 12 months.