

CULTURE, TOURISM, EUROPE AND EXTERNAL AFFAIRS COMMITTEE**CENSUS (AMENDMENT) (SCOTLAND) BILL****SUPPLEMENTARY EVIDENCE FROM SCOTTISH TRANS ALLIANCE**

17th December 2018

We are submitting this supplementary evidence in response to issues discussed at the most recent CTEEA oral evidence session on 13th December on the Census (Amendment) (Scotland) Bill, as well as additional supplementary evidence that has been published since that time.

Requiring a legal sex answer

All rights afforded to trans people are underpinned by the idea that how they are treated in society is not determined exclusively by their biological sex characteristics at birth. Some of their rights, but not all, are underpinned by their legal sex. Guidance for the last two Censuses have told trans people to answer the sex question with their lived sex, “irrespective of the details recorded on their birth certificate”. A move to force trans people to disclose either their biological sex characteristics at birth, or their legal sex, indicates a shift back to a viewpoint that either biological sex at birth is the “more important” characteristic, or to the view that only a small number of Gender Recognition Certificate holders are entitled to dignity and respect of their lived sex.

Protection from discrimination provided under the Equality Act 2010 already extends to many trans people without GRCs. The protected characteristic of gender reassignment is held by anyone who is:

“proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.”¹

It is clear that this requires neither **medical** nor **legal** changes for the person to have the protected characteristic. The terminology “other attributes of sex” indicates that social aspects of how a person lives their life is considered to be an attribute of sex, as well as their biological characteristics and legal status.

Trans men and women are able to use men-only and women-only services regardless of whether or not they have a GRC, and for decades have been able to update (without needing a GRC) all of their day-to-day identity documents such as passports, driving licences and medical records. Many trans people without GRCs will have made physical changes to their bodies, while some who hold GRCs may not have. Including a mandatory legal sex question, and subsequently attempting to restrict the ability of trans people to answer the sex question in-line with their lived identity only to GRC holders, would make the Census out of step with long established trans equality practices in Scotland. Whilst trans men and women with

¹ <https://www.legislation.gov.uk/ukpga/2010/15/section/7>

GRCs have both enhanced privacy rights and legal recognition of their lived sex, due to Equality Act protections it is now incredibly unusual for public bodies, services or employers to treat GRC holders and non-GRC holders differently.

Part of the current evidence requirements to be issued with a Gender Recognition Certificate is the requirement to provide two years' worth of evidence of how you have been living. This requires you to demonstrate that you have updated your name and sex/gender on identity documents, and with a range of other agencies that hold details about you, such as with your employer, your pension provider, your GP practice etc.² A change in legal sex is supposed to be recognition of the fact that a trans person has been living in their self-identified sex. It is not intended to be the starting point at which trans people can do so. Insisting on a legal sex question on the Census undermines this principle.

Restricting a sex question to be narrowly about legal sex exclusively impacts on trans people who do not have a gender recognition certificate. This is because for the overwhelming majority of the population, however the sex question is defined they will always give the same answer – whether they think it asks about biological sex characteristics at birth, legal sex or lived sex.

Asking a sex and a gender identity question

There has been a suggestion by some witnesses who have given evidence to the Committee over the two oral sessions, on the 6th and the 13th December, that to include trans people the Census could have a mandatory sex question, that requires legal sex to be recorded, and an additional voluntary gender identity question, that allows trans people to describe their gender. We see several problems with this proposal.

Firstly, it is not clear for what purposes data users think that having the legal sex of a trans person, rather than the lived sex of a trans person, will be more useful. As covered throughout our various evidence submissions, trans people are much more likely to have healthcare and service needs that are atypical for someone with their legal sex. For example, a trans woman may need breast screening due to taking hormone replacement therapy even if she is not a GRC holder, and a trans man who has sexual relationships with men is entitled to use sexual health services aimed at men who have sex with men even if his legal sex is still recorded as female. The suggestion of some witnesses has been that a legal sex question could be compared with the Gender Recognition Register, to “correct” the sex data so it instead reflects biological sex characteristics at birth data for the population. Again, it is not clear for what purposes data users think “correcting” sex data to ensure it reflects biological sex characteristics at birth is required.

Secondly, trans men and trans women are able to use the vast majority of services in-line with their lived sex, in accordance with their rights under the Equality Act 2010. Data linkage to the Census would likely use outputs from the ‘sex’ question rather than any proposed ‘gender identity’ question, as the former would be mandatory, so have a greater rate of response. If resource allocation decisions were

² <https://www.gov.uk/apply-gender-recognition-certificate/documents-you-must-provide>

then made on the basis of legal sex data, it would be inaccurate for trans respondents, who will use the vast majority of services that correspond to their lived sex, not their legal sex. Lived sex is a more useful metric on which to make resource allocation decisions.

Thirdly, NRS have tested a variety of questions for capturing information on sex, gender identity and trans status. They found that a two-step question that asked for sex on a mandatory basis and gender identity on a voluntary basis confused respondents, and led to higher non-response rates³.

Finally, the majority of trans respondents will not be happy to answer a sex question with their legal sex, where this is different from their lived sex, regardless of the wording of the question or guidance provided. Trans women without GRCs who have completely socially transitioned, who have passports, driving licences and medical records that state female, who are known to friends and family as female, and who are able to tick female on all other forms when interacting with government departments and services, will be extremely unlikely to select male on the Census. We think that the guidance provided in previous Census allowing trans people to complete the sex question with their lived sex is a pragmatic way of acknowledging how trans respondents will complete the question. By introducing an additional trans status question in the next Census, this will still allow data users to distinguish between those respondents who selected “female” who are trans or who have a trans history, and those who do not. We support data users doing this where it is useful to distinguish between these groups. However, we feel that any attempt to insist on trans people recording their sex as something other than their lived sex would represent a serious regression in the Scottish Government’s approach to trans people’s rights. It would indicate that the Government considered biological sex characteristics at birth/legal sex as more “accurate” information about a trans person than lived sex.

The use of the term “other”

One witness in the evidence session to the Committee on 13th December questioned whether ‘Other’ was an appropriate term to use on a sex question, saying that members of the LGBTI community find it offensive. In 2015, we ran a survey with non-binary people across the UK. One of the questions we asked about was forms that only provide a male/female option, and how people would like them to be improved. The 829 respondents to this question told us that:

- 75% would like to be allowed to write their own answer to describe themselves
- 68% would like to have a third ‘Other’ tickbox⁴

³ Scotland’s Census 2021: Sex and Gender Identity Topic Report: https://www.scotlandscensus.gov.uk/documents/census2021/Sex_and_Gender_Identity_Topic_Report.pdf

⁴ Non-binary people’s experiences in the UK: <https://www.scottishtrans.org/wp-content/uploads/2016/11/Non-binary-report.pdf>

It is true that some people felt that the term 'other' was not appropriate, with 1.5% of respondents to the question leaving comments indicating this. An example of something people said to us about the use of the term 'other' was:

“Would rather an 'other' than nothing at all, however the word other is quite literally othering! So it's better than nothing but not great. Also if they have to use other, then being given the added option to specify is welcomed.”

Despite these small number of concerns, it was still very clear from our findings that non-binary people would much prefer to have a third option labelled 'other' than to have no options but male/female.

The number of trans people

We are aware that there are some concerns that asking a legal sex question may cause problems in the future, if potential reforms to the Gender Recognition Act mean that Scotland has a system of self-declaration, rather than the current medicalised system. Leaving aside the fact that we strongly feel it is inappropriate to ask a legal sex question, we thought it may be helpful to provide the Committee with some information on the number of trans people who have used systems of legal recognition by self-declaration in other European countries.

Norway: 709 in 9 months, in a population of 5.258 million (0.01%)

Denmark: An average of 289 per year, in a population of 5.77 million (0.005%)

Ireland: 109 people in 2016, in a population of 4.784 million (0.002%)⁵

Evidence shows that fears that large numbers of people will apply for legal recognition because the system is brought in-line with international best practice are unfounded. Even the country with evidence of the highest rate of applications – Norway - has 1 person per every 1000 applying for legal recognition of their sex per nine months. This is less than one hundredth of one percent.

Similarly, we are aware that several witnesses to the Committee have quoted the increase in referrals to Gender Identity Clinics in Scotland as indicating that the trans population may in fact be much larger than previously thought. Although there has been a large increase in the number of referrals, these numbers are now evening out – there was a 61% increase between 2014-2015, but the increase last year was only 23%⁶. Even acknowledging the large increase, there has still only been 1855 referrals to Gender Identity Clinics in Scotland in the last four years⁷. This is 0.009% of the population per year. Although we know that not all trans people will have had a referral to a GIC, it is absolutely clear that it is still a very small population.

⁵ Scottish Government consultation on reforming the Gender Recognition Act, Annex D: https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/supporting_documents/SCT10172517581_Gender_p4%203.pdf

⁶ Scottish Public Health Network (ScotPHN) Health Care Needs Assessment of Gender Identity Services May 2018: https://www.scotphn.net/wp-content/uploads/2017/04/2018_05_16-HCNA-of-Gender-Identity-Services-1.pdf

⁷ Ibid

We also know that some people raised concerns about the third 'other' option being included in the sex question, in case this was selected by a large number of respondents. The last Census in Australia, conducted in 2016, had one non-binary sex question, with the options 'male' 'female' and 'other (please specify)' and 1260 people provide valid 'other (please specify)' responses⁸. This is 0.01% of the population.