

**Joan McAlpine, MSP**  
**The Convenor**  
**Culture, Tourism, Europe and External Affairs Committee**  
**Scottish Parliament**

**5 December 2018**

Dear Convenor

Thank you for the helpful discussion we had on 29 November on the Census (Amendment) (Scotland) Bill. As agreed at the meeting, I am following up to confirm matters on the points raised on the purpose of the Bill, the consultation we have carried out and the legislative process.

### **Aim of the Bill and legislative process**

The purpose of the Census (Amendment) (Scotland) Bill is to make answering census questions on sexual orientation, and certain aspects of transgender status and history, voluntary. The Bill does not set the specific questions. The particulars to be sought and the text of the questions are considered as part of the Census Order and Census Regulations procedure set out in the Census Act 1920.

The effect of the Bill, if passed as currently drafted, would be to make a question on sexual orientation voluntary and to give a power to enable transgender status and history questions to be voluntary in each census.

In our view, the power to ask these questions already exists in the Census Act 1920 as transgender status and history would be regarded as being covered by the existing powers to ask questions about sex and other matters. However, in recognition of the sensitive nature of these questions, the Bill proposes to put these questions on a voluntary basis, in the same way that the religion question was placed on a voluntary basis by the Census (Amendment) (Scotland) Act 2000. The census questions are otherwise compulsory.

The Bill currently uses the term “gender identity” to cover transgender status and history to enable an element of future proofing in relation to the legal definitions of transgender status and history. The term “gender identity” was also used to enable the questions about sex and transgender status and history to be clearly separated so that the current question about a person’s sex would continue to be asked on a compulsory basis. However, we recognise that this has raised concerns that the Bill conflates gender identity and sex.

The Census Act 1920 gives the power for (enables) the calling of the census, the census arrangements and the census questions. Each census may have slightly different arrangements and questions, as census research practice develops. The 1920 Act directs that the detail of each census will be made into law by a Census Order and Census Regulations. These are usually scrutinised by Parliament in the year before the census. As the Bill seeks to amend the enabling powers in the 1920 Act, this requires to be given legal effect before the new powers can be used in the Census Order and the Census Regulations.

The Census Order and Census Regulations are the pieces of secondary legislation which govern the running of each census. The Scottish Government will provide the committee the opportunity to see

the Census Order in draft form along with the full text of the census questions in order that it can feed back its views in advance of the formal laying of the Census Order.

The full set of questions will then be set out in the forms set by the Census Regulations. In terms of timing, we expect the informal engagement with the Committee to begin after Stage 3 of the Bill and continue throughout 2019 (so around June to end of 2019). The formal Census Order and Regulations will be taken to the Committee in early 2020.

Please be assured that the Committee will be given the opportunity, both in terms of timing and information, to fully scrutinise our proposed approach and questions for the Census in 2021 – we will shortly agree a timetable for the full legislative process with you.

Recognising some of the discussion we had on 29 November and the responses to the call for evidence on the Bill, I would stress that the intention behind the Census Bill was not to conflate the matters of sex and gender identity. In recognition of the concern expressed by the Committee that the current drafting of the Bill appears to confuse these two matters, we will reconsider this matter (including considering whether omitting reference to gender identity and referring instead to trans status) This would focus the Bill on the policy we would like to achieve, which is making a trans question in the census voluntary. The detailed drafting of this would be a matter for consideration at Stage 2. We would welcome the Committee's views on this as a potential approach to the Bill.

We are currently considering whether or not to have a non-binary response option for the sex question, but it is too early to say if this will be the final proposal as testing and consultation continues. We will keep you informed as this work progresses and we will also want to take the advice of the committee. I would note that the census has never defined what we are measuring in relation to sex in previous censuses and therefore are not changing any definitions used. In 2011 we added guidance online for transgender people to advise that they were not required to have a gender recognition certificate in order to be able to tick a box; they could respond in terms of the sex with which they identified. It is our current intention to continue to seek to ask the sex question on a mandatory basis and as a self-identified question as in 2011.

The rights and duties that flow from the Equality Act 2010 are not affected by the Census Bill. The Census Bill simply seeks to enable the asking of certain voluntary questions in the census. If the Census Bill is passed, sex will remain a protected characteristic in terms of the Equalities Act.

## **Consultation**

The consultation we have already carried out on sex, gender identity and transgender status has directed us on our proposals for the 2021 Census. Whilst this engagement continues, including at consultation events this week, I have attached an overview for you at Annex A.

Please be assured that protecting this confidential information is of the strictest importance to NRS. This includes ensuring that all outputs of data will be carefully anonymised and no personal information is published until after 100 years has passed. Census data is also excluded from release under the Freedom of Information (Scotland) Act until 100 years has passed.

The security and confidentiality arrangements for the census will also be independently reviewed to ensure they are appropriate, and this will be shared with the Scottish Parliament. We will meet our

obligations under the Data Protection Act and it is also an offence under the Census Act to disclose any personal information.

I hope you find this response helpful.

**Amy Wilson**  
**Director of Scotland's 2021 Census**  
**National Records of Scotland**

## Scotland's Census 2021 – Consultation for Sex, Gender Identity and Transgender Status

### Timeline

Date	Event	
Oct 2015 – Jan 2016	Topic Consultation	NRS invited views on the topics under consideration for collection in the census in 2021.
Aug 2016	Topic Report	Consultation provided evidence for a well-established user need for information on sex – but also highlighted the need for information on gender identity. The report of the consultation notes that it was not clear what specifically was required in relation to gender identity and that more work needed to be carried out to understand the user need.
Jan 2017 – March 2017	Public acceptability testing of a gender identity question in collaboration with Office for National Statistics (ONS) and Northern Ireland Statistics and Research Agency (NISRA).	Public acceptability testing identified that the majority of the general public in Scotland considered it acceptable for a gender identity question to be asked on the next census.
Jan 2017	Sexual Orientation and Gender Identity Stakeholder Event	Attendees noted that the sex question from the 2011 Census does not allow non-binary people to respond accurately. In addition a need for data on transgender population was discussed and stakeholders preferred that this information was collected via a trans status question.

June 2017 – August 2017	Quantitative testing of binary sex, non-binary sex and a sex and gender identity question set in collaboration with ONS and NISRA	<p>Inclusion of an 'Other, write in' response option did not change the level of item non-response in comparison to the binary sex question.</p> <p>The proportion of people who did not respond to the questions was higher when both a sex and gender identity was asked compared to either a binary or a non-binary sex question on its own.</p>
Sept 2017	Meeting with Scottish Trans Alliance (STA) policy group	<p>NRS updated the group on question development and testing.</p> <p>The policy group had no preference as to whether the question was voluntary or included a prefer not to say response option but the question should have an option not to declare.</p>
Aug 2017 – Sept 2017	Cognitive testing of questions on sex, gender identity and trans status in Scotland only	Result of testing supported taking forward a non-binary sex question followed by a trans status question.
Nov 2017 – Dec 2017	Quantitative testing of a non-binary sex question and trans status question in Scotland only	<p>97% of respondents provided a valid response to the non-binary sex question and 94% of respondents provided a valid response to the trans status question.</p> <p>2% of respondents stated finding the trans status question difficult to answer.</p>
Sept 2018	Further cognitive testing of wording and guidance for non-binary sex and trans status questions	<p>Additional guidance in the non-binary question did not improve respondents understanding of how to answer the question.</p> <p>The trans status question received a positive response and including a definition of the term 'trans' made the question easier to answer.</p>

## 1. Scotland's Census 2021 – Topic Consultation

National Records of Scotland (NRS) invited views on Scotland's Census 2021 Topic Consultation between 8 October 2015 and 15 January 2016. The consultation was a key step towards understanding what information users needed from the census in 2021, and helped to build strong cases to justify the inclusion of topics. The focus of the consultation was on information required at topic-level, not the detail of the questions that should be asked on the questionnaire.

[Scotland's Census 2021 - Topic Consultation Report - August 2016](#)

The topic consultation provided evidence that there continues to be a well-established user need for the key demographic variable sex. It is a vital input to population estimates and household projections which are used by central and local government to inform resource allocation, target investment, and carry out service planning and delivery. Sex is a protected characteristics in the Equality Act 2010 and the data are widely used to inform equality impact assessments. They are also essential for analysis and research conducted by a wide range of users, including public bodies and third and private sector organisations.

Some responses in the basic demographics section of the consultation also highlighted gender identity and transgender as topics that the 2021 Census should consider. For example:

“Further information on all the protected characteristics listed under the Equality Act 2010 (e.g. gender reassignment and sexual orientation) would assist in mapping intersectional disadvantage for minority ethnic individuals.”

“To appropriately address the equalities agenda, the Census needs to cover issues such as transgender.”

“Although distinct from sexual identity, we believe provision should be made in the census for people to identify themselves as trans\* under Gender Identity or Sex.”

As can be seen, the responses used different terms: gender identity, gender assignment and transgender. Of these, only gender reassignment is a protected characteristic as set out in the Equality Act 2010 and a range of organisations told us that data about those individuals was required in relation to fulfilling the duties specified for public bodies in that legislation. In addition, they told us that a reliable data source on the size and locality of the transgender population in Scotland is required to justify policy developments that will reduce inequalities experienced by trans people, and for designing and enhancing public services to meet specific needs, particularly in relation to the provision of health services.

Given that three different terms were used, it was decided that more work was required to understand the specific user need and what data should be collected to meet that need.

## 2. Sexual Orientation and Gender Identity stakeholder meeting

Following on from the consultation, NRS held a stakeholder event at New Register House on 24<sup>th</sup> January 2017. The purpose of the stakeholder event was to provide an opportunity for for users who had expressed a need for data on sexual orientation and users who had expressed a need for data



around gender identity/gender reassignment/transgender to explore these needs further with National Records of Scotland (NRS) and the Scottish Government (SG). The event also provided the opportunity for participants to hear about research and testing plans being developed by NRS and the Office for National Statistics (ONS).

This meeting was attended by representatives from NRS, ONS, NISRA, Scottish Government, Equality Network, Stonewall Scotland and LGBT Health.

At this meeting discussions highlighted a preference for a response in the sex question to allow people who do not identify as male or female to be able to answer a mandatory question in the census. User need for information about the transgender community was also discussed and stakeholders preferred that this information was collected via a trans status question rather than being derived from a combination of questions around sex at birth and current gender.

### **3. Meeting with Scottish Trans Alliance (STA) policy group**

NRS met with representatives of STA, Equality Network and Stonewall Scotland on 6<sup>th</sup> September 2017 to update them on the question development and testing that NRS had taken forward. At this meeting there was support for the inclusion of both the sexual orientation and trans status questions. There was no strong position on whether these questions should be voluntary or have 'prefer not to say' response options but it was essential to ensure that no-one was compelled to answer these questions.

#### **Question Development**

As noted above, following the consultation NRS concluded that further work was required to understand the exact nature of user need and the precise nature of the concepts to be measured. The starting point for development for all questions was the 2011 question. The 2011 Census sex question asked "What is your sex?" with two response options but it did not specify any more details in the question text. The additional guidance provided online for this question in 2011 was:

"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."

It should be stressed that this detailed guidance was only published online and was not part of the instructions on the form. The question 'What is your sex' did not provide any specific definition of what was being measured within the question text itself. There was no opposition in 2011 to the self-identified nature of this question but this may well reflect that fact that many people were not aware of the more detailed guidance. The starting point for 2021 has been that this question will continue to be self-identified.

NRS have consulted with LGBTI groups as further information about the collection of gender status and transgender status was required. No specific consultation with women's groups has been carried out but this is now underway. We would welcome the views from the committee on this and other aspects of the Bill and census process.