



20 October 2021

Dear Cabinet Secretary,

We noted the announcement from the National Records of Scotland on 31 August indicating that it intends to carry guidance to accompany the sex question in the 2022 census which will advise respondents that they can answer the sex question based on their self-declared gender identity.

As you will be aware, similar guidance proposed by the Office for National Statistics (ONS) for the 2021 census in England and Wales was successfully challenged by Fair Play for Women in the English High Court earlier this year. In an interim ruling, Judge Swift stated that there was a “mismatch” between the Census Act 1920 and the ONS guidance and ordered that “What is your sex” means sex “as recorded on a birth certificate or Gender Recognition Certificate”. Judge Swift also stated he was satisfied that Fair Play for Women was “more likely than not to succeed” in a substantive hearing.

The ONS subsequently conceded that the proper meaning of ‘sex’ in the census means sex as recognised by law. An order signed by the ONS and Fair Play for Women and sealed by the High Court stated:

‘It is hereby declared that “sex”, in paragraph 1 of the Schedule to the Census Act 1920 (as amended by the Census (Return Particulars and Removal of Penalties) Act 2019)), paragraph 8 of Schedule 2 to the Census (England and Wales) Order 2020, and the “What is your sex” question in Schedule 2 to the Census (England) Regulations 2020 means sex as recorded on a birth certificate or Gender Recognition Certificate.’

In recent correspondence with the Director of the Office for Statistics Regulation, NRS Chief Executive Paul Lowe noted however, that the High Court interim ruling was not binding on Scotland:

‘NRS has published the guidance for the sex question in good time, more than 6 months in advance of census day. As stated above, this guidance is the same as that discussed with the Parliament when the census legislation was agreed. The research, stakeholder events and Parliamentary debate in respect of this issue are all in the public domain. The interim conclusion of the High Court of England and Wales was in respect of the census in England and Wales only, and was not binding on Scotland.’ (1 October 2021)

Given that NRS intends to proceed with guidance that advises people that they may answer the sex question on the basis of self-declared gender identity, please can you confirm whether it is the Scottish Government's intention to introduce legislation before March 2022 to amend the Census Act 1920.

Yours sincerely,

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