



National Records of Scotland

By email

2 November 2021

Dear 

SCOTTISH CENSUS 2022: YOUR REF 202100249433

Thank-you for your letter of 1 November on behalf of the Cabinet Secretary for Constitution, External Affairs and Culture. We would like to follow up two points.

Your letter notes that "this guidance is the same as that discussed with the Scottish Parliament when the Census legislation was agreed", and that this observation has also been made to the Director General for Regulation, at the Office for Statistics Regulation. It is our understanding that Parliamentary approval was only required, and therefore sought, for the wording of the census questions; that the guidance itself is purely administrative and therefore was not subject to parliamentary approval; and that its contents had not been formally confirmed when the Census (Scotland) Regulations 2020 were approved by the Scottish Parliament on 16 June 2020. Please can you confirm for the record that all these points are correct.

We note that whether a relevant decision in the English High Court is regarded as being technically legally binding on the Scottish courts is a point distinct from whether an action is lawful. As noted at paragraph 2.8 of the current edition of the Government Legal Department's *The judge over your shoulder - a guide to good decision making*, "Administrative law has developed a series of tests for measuring the lawfulness of an exercise of public law powers", including, "Legality – acting within the scope of any powers and for a proper purpose. To act lawfully, the department must have the legal power to do what it intends to do. If it does not, it will be acting ultra vires, or outside its powers. It will be acting illegally. Where the power does exist, it will usually be found in primary legislation (an Act of Parliament) or subordinate or secondary legislation (a statutory instrument etc)."

We would therefore be grateful to know whether the Scottish Government is satisfied that it is lawful to proceed with the census, at an estimated cost of at least £100m, if it is used to collect data on such a fundamental and widely used variable as sex on the basis it currently proposes, and if so, on what grounds.

Copy goes to the Director General for Regulation, given the reference in your response to your previous correspondence with him.

Yours sincerely,

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