

CENSUS (AMENDMENT) (SCOTLAND) ACT 2019

EXPLANATORY NOTES

COMMENTARY ON THE ACT

Section 1 – Particulars about transgender status and history and sexual orientation may be gathered in census

8. **Section 1(2)** of the Act adds express reference to transgender status and history and to sexual orientation to the list of matters in the Schedule to the 1920 Act. This provides clarity for the purposes of the provision substituted by section 1(3) (see below). The particulars which an Order in Council made in terms of section 1 or 6 of the 1920 Act can validly require to be stated in the census returns are limited to those with respect to such matters as are mentioned in the Schedule.
9. This section will set out “transgender status and history” as a separate matter. The term “transgender” refers to a diverse range of people who find their gender identity does not fully correspond with their sex at birth. Transgender people may or may not experience the medical condition of gender dysphoria. They may or may not have completed a process of gender reassignment.
10. “Sexual orientation” is also set out as a separate matter for the first time, removing it from the generality of paragraph 6 of the Schedule to the 1920 Act. The term “sexual orientation” refers to a combination of emotional, romantic, sexual or affectionate attraction or feelings that a person may have towards another person.
11. The inclusion of particulars with respect to transgender status and history and sexual orientation in an Order in Council under section 1 or 6 will therefore not attract the parliamentary procedure set out in the proviso in section 1(2) of the 1920 Act (as read with the Interpretation and Legislative Reform (Scotland) Act 2010, Part 2). Were the Schedule not amended, then the proviso to section 1(2) of the 1920 Act would apply to the provisions of an Order in Council prescribing particulars about transgender status and history and about sexual orientation as they would be included by virtue of paragraph 6 of the schedule. As such, those provisions would attract the affirmative procedure and be amendable by the Parliament. Adding “transgender status and history” and “sexual orientation” to the Schedule means that the provisions of an Order in Council prescribing particulars in respect of these matters will be subject to the negative procedure.
12. **Section 1(3)** substitutes a new subsection for section 8(1A) of the 1920 Act. In doing so it extends the exception from the penalty provision (which exception currently applies only to particulars in respect of religion) to particulars in respect of sexual orientation. It also extends it to some particulars with respect to transgender status and history. Section 1(3) retains the existing exception from the penalty provisions to particulars in respect of religion.
13. The particulars with respect to transgender status and history which are to be so excepted must be identified by being prescribed in an Order in Council under section 1 or 6. The effect is that Her Majesty in Council may, when prescribing particulars in respect of transgender status and history as particulars which must be included in a

*These notes relate to the Census (Amendment) (Scotland) Act
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census return, separately provide that some or all of those particulars are identified as being particulars for which no person will be liable to a penalty if that person refuses or neglects to state those particulars. This renders census questions about those particulars voluntary.