

# **CENSUS (RETURN PARTICULARS AND REMOVAL OF PENALTIES) BILL**

## **Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee**

### **A. Introduction**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Census (Return Particulars and Removal of Penalties) Bill (“the Bill”). The Bill was introduced in the House of Lords on 1 May 2019. This memorandum identifies the provision of the Bill that modifies existing powers to make delegated legislation. It explains the context, purpose and justification of this modification.

### **B. Purpose and effect of the Bill**

2. The primary purpose of the Bill is to render questions on sexual orientation and gender identity voluntary where they are included in the England and Wales and Northern Ireland censuses. The Bill also clarifies the existing law that such questions may be asked in both censuses.

3. The Bill achieves this in a manner identical to that followed in respect of questions on religion for England and Wales by the Census (Amendment) Act 2000. It does so by:

a. Amending section 8 of the Census Act 1920 (“the 1920 Act”) and section 7 of the Census Act (Northern Ireland) 1969 (“the 1969 Act”) so that no person shall be liable to the penalties provided in those sections for refusing or neglecting to state any particulars in respect of sexual orientation or gender identity; and

b. Adding gender identity and sexual orientation to the Schedule to each Act. Such questions already fall within paragraphs 6 and 8 of the Schedule to the 1920 and 1969 Acts respectively. The effect of this addition is therefore limited to (i) providing clarity and legal certainty as to the scope of the amendments to sections 8 and 7 of the Acts respectively; and (ii) in the case of the 1920 Act only, making questions on these subjects subject to the draft negative rather than draft amendable affirmative procedure.

### **C. Delegated powers**

4. This Bill does not include any new delegated powers.<sup>1</sup>

5. However, it does affect the existing delegated powers (“the delegated powers”) contained in ss.1 and 6 of the 1920 Act, and s.1 of the 1969 Act. In particular, in line with the structure of the powers in the 1920 Act, it will lead to questions concerning sexual orientation and gender identity being subject to the draft negative rather than draft amendable affirmative procedure.

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<sup>1</sup> Compare, with respect to the Census (Amendment) Act 2000, the House of Lords Select Committee on Delegated Powers and Deregulation, 3<sup>rd</sup> Report, Session 1999-2000, HL Paper 23, §20.

6. To summarise the nature of the existing delegated powers:

a. Section 1 of the 1920 Act allows a census to be directed by Order in Council. This power has been exercised every ten years since 1921 save in 1941, when no census took place. The Order must specify *inter alia* the particulars to be stated in a census return. Those particulars must be with respect to the matters listed in the Schedule. These matters are:

- '1. Names, sex, age.
2. Occupation, profession, trade or employment.
3. Nationality, birthplace, race, language.
4. Place of abode and character of dwelling.
5. Condition as to marriage or civil partnership, relation to head of family, issue born in marriage.
- 5A. Religion.
6. Any other matters with respect to which it is desirable to obtain statistical information with a view to ascertaining the social or civil condition of the population.'

Parliament chose to provide a specific structure as to the Parliamentary scrutiny to which this Order is subject. The matters specifically listed in the Schedule (paragraphs 1-5A) are subject to draft negative. Those matters falling in the residual paragraph of the Schedule (paragraph 6) are subject to a draft amendable affirmative procedure.<sup>2</sup>

b. These provisions apply too to local censuses, as provided for and defined in s.6 of the 1920 Act.

c. The power in section 1 of the 1969 Act is materially identical to section 1 of the 1920 Act save that:

(i) the census is directed by Order, not Order in Council;

(ii) the Schedule includes one further specific matter (*6. Education, professional and technical qualifications*) and the wording of its final, residual paragraph is not identical (it refers to 'the social condition', not 'social or civil condition'); and

(iii) the entire Order is subject to the draft affirmative procedure before the Northern Ireland Assembly. The Act draws no distinction between the 'residual' paragraph and the other paragraphs of the Schedule.

7. This Bill renders questions concerning gender identity and sexual orientation voluntary (§§2-3 above). In the interests of legal certainty as to the scope of questions affected by that amendment, it also adds those matters to the Schedules of each Act. This clarifies rather than changing the scope of the delegated powers: those matters already fall within paragraph 6 of the 1920 Act and paragraph 8 of the 1969 Act. It follows that neither of these changes directly modifies the operation of the existing delegated powers.

8. However, one result of these changes is that in the case of the 1920 Act only, questions concerning sexual orientation or gender identity in future Census Orders

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<sup>2</sup> In practice the Order in Council is laid and debated in one document, with the amendable parts in italics. See, for instance, the Census (England and Wales) Order 2009 (S.I. 2009/3210), and the following extract from Hansard (search 'italics'): [https://hansard.parliament.uk/Lords/2009-12-02/debates/09120247000039/Census\(EnglandAndWales\)Order2009#contribution-09120247000015](https://hansard.parliament.uk/Lords/2009-12-02/debates/09120247000039/Census(EnglandAndWales)Order2009#contribution-09120247000015).

or Regulations will be subject to the draft negative rather than draft amendable affirmative procedure. It is this modification of that power that is considered below.

### **Clause 1(2) Particulars about sexual orientation and gender identity [Amending the Schedule to the 1920 Act]**

*Power conferred on:* Her Majesty in Council

*Power exercised by:* Order in Council

*Parliamentary Procedure:* Part draft negative, part draft amendable affirmative. This amendment will render questions on sexual orientation and gender identity subject to the former rather than the latter.

#### Context and Purpose

9. The context and purpose of the affected delegated powers (ss.1 and 6 of the 1920 Act) are set out above at §6. The context and purpose of this clause (which *inter alia* alters the level of Parliamentary scrutiny to which questions on sexual orientation and gender identity in a census ordered under those powers would be subject) is set out above at §§7-8.

#### Justification for the approach taken

10. First, this change flows from the primary purpose of the Bill, which is to render questions on sexual orientation and gender identity voluntary by amending s.8 of the Act. The Cabinet Office considers that a corresponding amendment to the Schedule to the Act is required in the interests of clarity, accessibility and legal certainty. In order for the scope of the exception to s.8 inserted by this Act to be clear to the public and legally certain in the courts, it should be anchored in a specific category of particulars listed in the Schedule. This is particularly so in respect of gender identity, given the need to ensure clarity that the question concerning sex remains mandatory. The importance of the amendment to s.8 being clear, accessible and legally certain is heightened by the fact that it sets a boundary on a criminal offence to which the entire population of England and Wales is potentially exposed.

11. Second, this change respects the scheme established by Parliament in the 1920 Act. By that scheme, matters specifically listed in the Schedule are subject to the draft negative procedure. Only matters which are in the residual paragraph 6 category, and so have not been specifically approved in primary legislation, are subject to the draft amendable affirmative procedure. This clause does not change that scheme. It rather follows it: having been specifically debated and listed by Parliament, these matters will fall on the draft negative side of the structure Parliament established.

12. Third, Parliament will be expressly debating this Bill on the premise that such questions will be included in the next Census Order in England and Wales per clear Government policy.<sup>3</sup> The Government therefore suggests that the procedure be

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<sup>3</sup> This Bill is part of the implementation of a clear policy to include voluntary gender identity and sexual orientation questions in the 2021 Census (see the Cabinet Office White Paper, *Help Shape Our Future: The 2021 Census of Population and Housing in England and Wales* (CM 9745, December 2018)). The position with respect to Northern Ireland is different: there, it is only proposed to include a question on sexual orientation in the 2021 Census. See Northern Ireland Statistics and

negative given the substance of the debate can take place during passage of the Bill. This point dovetails with the previous one: Parliament established a scheme whereby matters which have already been subject to full democratic scrutiny (by being added, via primary legislation, to the Schedule) are subject to the draft negative procedure only.

13. Finally, this approach is consistent with the approach taken previously and elsewhere. This is the case for the approach taken to religion in the Census (Amendment) Act 2000 and the Census (Amendment) (Scotland) Act 2000 (see s.8(1A) of and paragraph 5A of the Schedule to the 1920 Act). It is moreover the case for the amendments, similar to those contained in this Bill, proposed by the Census (Amendment) (Scotland) Bill to the 1920 Act insofar as it extends to Scotland.

#### **D. Conclusion**

14. For the reasons set out above, the effect of clause 1(2) of the Bill on the scrutiny to which questions on gender identity and sexual orientation are subject under ss.1 and 6 of the 1920 Act is appropriate.

**Cabinet Office**  
**May 2019**