

# CENSUS (RETURN PARTICULARS AND REMOVAL OF PENALTIES) BILL [HL]

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Census (Return Particulars and Removal of Penalties) Bill [HL] as introduced in the House of Lords on 1 May 2019 (HL Bill 175).

- These Explanatory Notes have been prepared by the Cabinet Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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## Overview of the Bill

- 1 The Census (Return Particulars and Removal of Penalties) Bill provides for voluntary questions on sexual orientation and gender identity to be asked in the England and Wales and Northern Ireland censuses. It does this by removing the criminal penalty for not responding to questions on these matters. It also clarifies the existing law that such questions may be asked. In the case of England and Wales only, this will lead to any such questions being subject to the draft negative Parliamentary procedure in future Census Orders.

## Policy background

- 2 The twenty-second national census will take place in March 2021 across the United Kingdom, subject to Parliamentary approval. The census is a devolved matter. The three census offices of the United Kingdom (Scotland, Northern Ireland, and England and Wales) work closely to ensure the three censuses together provide comparable statistics on the UK population.
- 3 The information the census provides on the population, including their characteristics, education, religion, ethnicity, working life, housing and health, gives decision-makers in national and local government, community groups, charities and businesses the opportunity to better serve communities and individuals in the United Kingdom. Information derived from the census helps to inform policy, plan services, and distribute resources effectively to local and health authorities and enable these resources to be directed to where they are needed.
- 4 Completion of the census is mandatory across the United Kingdom. With the exception of questions on religion or (in Northern Ireland) religious profession, refusal to answer census questions is a criminal offence and subject to a penalty.
- 5 This Bill makes amendments to the Census Act 1920 and Census (Northern Ireland) Act 1969 to remove the criminal penalty for refusing or neglecting to respond to any census questions on sexual orientation and gender identity in the England and Wales and Northern Ireland censuses. This will ensure that if these questions are asked in future censuses (by inclusion in future Census Orders, which will be subject to separate Parliamentary scrutiny) they are voluntary. In particular, anyone who does not wish to provide information on their sexual orientation and gender identity in future censuses in England and Wales and/or Northern Ireland would not thereby be committing a criminal offence by refusing or neglecting to answer these questions.
- 6 In the interests of clarity, accessibility and legal certainty, the Bill also adds both matters to the Schedules of each Act as specific matters on which census questions may be asked. In England and Wales only, matters individually listed in the Schedule are subject to a different Parliamentary procedure to those which are not listed individually. Those not listed fall under the general category in paragraph 6 of the Schedule. This amendment will change the applicable procedure, such that the approval of any questions relating to sexual orientation and gender identity in future Census Orders will be subject only to the draft negative procedure. The secondary legislation, needed to enable a census to take place, will follow later in the year and will set out the full proposed content of the 2021 Census.

## The Census in England and Wales

- 7 The UK Statistics Authority has statutory responsibility for carrying out the census in England and Wales. The Government published a White Paper, *Help Shape our Future: The 2021 Census*

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*of Population and Housing in England and Wales*<sup>1</sup> in December 2018 ('the White Paper'), setting out the UK Statistics Authority's detailed proposals for the census in England and Wales.

- 8 The UK Statistics Authority's proposals for the 2021 Census follow a programme of public consultation, stakeholder engagement, and research and testing. As a result of this consultation and testing, the UK Statistics Authority recommends new questions on sexual orientation and gender identity are asked in the 2021 Census for England and Wales to meet the need for better quality information for equality monitoring and public service provision. Further detail on the consultation and testing that informed the proposal to include new questions on sexual orientation and gender identity in the next England and Wales census can be found in the White Paper in paragraphs 3.34 – 3.54.
- 9 Due to the sensitive nature of these questions, both the UK Statistics Authority and Government believe they should be voluntary, ensuring that no-one is required to answer these questions if they do not wish to. The White Paper therefore stated that the Government and UK Statistics Authority would consider how to ensure this was the case (paragraphs 3.45 and 3.54). This Bill seeks to achieve this by amending the principal census legislation for England and Wales to remove the criminal penalty for not responding to census questions on sexual orientation and gender identity.
- 10 A binary, mandatory 'sex' question will continue to be included in the England and Wales census (What is your sex? Female/Male). A primary focus of the UK Statistics Authority's testing of the inclusion of a gender identity question has been to ensure there is no risk to the quality of data collected about a person's sex (male or female) in order to meet user needs for this data and to preserve data continuity. Further detail can be found in section 3.34 – 3.45 of the White Paper.

## The Census in Northern Ireland

- 11 The Registrar General for Northern Ireland has statutory responsibility for carrying out the census in Northern Ireland. The Northern Ireland Statistics and Research Agency published its proposals for the Northern Ireland census in April 2019 ('the Northern Ireland Proposals').<sup>2</sup> This followed a programme of public consultation, stakeholder engagement and testing, the details of which can be found in section 2 of the Northern Ireland Proposals.
- 12 The Northern Ireland Statistics and Research Agency propose to ask a question on sexual orientation in the 2021 Census to inform policy development and enable organisations to meet and monitor their statutory equality obligations stemming from Section 75 of the Northern Ireland Act 1998 and other relevant legislation. Section 3.6.2 of the Northern Ireland Proposals sets out the consideration process informing this proposal in more detail.
- 13 Without an amendment to the census primary legislation for Northern Ireland, a question on sexual orientation would remain subject to a criminal penalty for non-response. In the absence of a Northern Ireland Executive and sitting Assembly, the UK Government has decided, following consultations with the Northern Ireland Office and Northern Ireland Statistics and Research Agency, to extend this Bill's proposed amendments to the England and Wales legislation to Northern Ireland legislation. It has in particular decided to mirror the amendments rather than excluding gender identity from the amendments, notably because this does not require future Northern Ireland censuses to include such a question and ensures

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<sup>1</sup> Cm 9745, available at: <https://www.gov.uk/government/publications/the-2021-census-of-population-and-housing-in-england-and-wales>

<sup>2</sup> 2021 Census Northern Ireland Proposals Document (April 2019), Available at: <https://www.nisra.gov.uk/publications/2021-census-proposals-document>

people in Northern Ireland are afforded the same level of protection as people in England and Wales. This accords with the UK Government's ordinary approach in this context.

## The Census in Scotland

- 14 The Registrar General for Scotland has statutory responsibility to carry out the census in Scotland. National Records of Scotland published its plans for the 2021 Census in Scotland in September 2018 ("Plans for Scotland's Census 2021").<sup>3</sup> These plans include asking new questions on sexual orientation and gender identity. The Scottish Government has introduced a Bill to the Scottish Parliament (the Census (Amendment) (Scotland) Bill) to enable census particulars about gender identity and sexual orientation to be gathered voluntarily.

## Legal background

- 15 This Bill amends existing legislation. The primary legislation that provides for the taking of a census in England and Wales (and in Scotland) is the Census Act 1920 ("the 1920 Act"). Under the provisions of section 1(1) of the 1920 Act, an Order in Council may prescribe:
- The date on which the census is to be taken;
  - The persons by whom and with respect to whom the census returns are to be made; and
  - The particulars to be stated in the returns.
- 16 The matters in respect of which particulars may be required are in turn listed in the Schedule to the 1920 Act. This specifies the following matters:
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.
- 17 Before Parliament, the Order in Council is subject to the draft negative resolution procedure for all of these matters except those falling in paragraph 6. The latter are subject to the draft amendable affirmative procedure.
- 18 Section 8 of the 1920 Act provides a number of criminal offences in respect of the census. It also provides an exception in section 8(1A) whereby 'no person shall be liable to a penalty under subsection (1) for refusing or neglecting to state any particulars in respect of religion'.
- 19 Section 8(1A) and paragraph 5A of the Schedule were inserted by the Census (Amendment) Act 2000 (insofar as the 1920 Act extends to England and Wales). Those amendments are similar to those proposed in this Bill.

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<sup>3</sup> Plans for Scotland's Census 2021 (September 2018) Available at: [https://www.scotlandscensus.gov.uk/documents/census2021/Plans\\_for\\_Scotlands\\_Census\\_2021.pdf](https://www.scotlandscensus.gov.uk/documents/census2021/Plans_for_Scotlands_Census_2021.pdf)

- 20 Finally, the above provisions also apply in the case of a local census ordered under section 6 of the 1920 Act.
- 21 In Northern Ireland, the primary census legislation is the Census Act (Northern Ireland) 1969 (“the 1969 Act”). The only relevant difference of this legislation from the 1920 Act is that its Census Order is subject to the draft affirmative procedure in its entirety.
- 22 Sexual orientation and gender identity already fall within the Schedules to the 1920 and 1969 Acts, as both constitute ‘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’. However, any such questions would at present be compulsory and refusing or neglecting to answer would be subject to criminal penalty.

## Territorial extent and application

- 23 Clause 3 sets out the territorial extent of the Bill, that is, the jurisdictions which the Bill forms part of the law of. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect. Clause 1 extends to and applies in England and Wales. Clause 2 extends to and applies in Northern Ireland.
- 24 The matters to which this Bill relates, namely amendment of the Census Act 1920 and Census Act (Northern Ireland) 1969, fall within the legislative competence of the National Assembly for Wales and the Northern Ireland Assembly.
- 25 There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned.
- 26 The Government is seeking the consent of the Welsh Assembly Government with a view to the National Assembly for Wales passing a Legislative Consent Motion.
- 27 In relation to Northern Ireland, in the absence of the Executive and a sitting Assembly, it is not possible to seek a Legislative Consent Motion at this time. Given the public interest in ensuring the same level of protection for people in Northern Ireland who do not wish to answer these questions, the Government is satisfied that the circumstances of this Bill come within the exception allowed by the convention.
- 28 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions and matters relevant to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

# Commentary on provisions of Bill

## Clause 1: Amendment of the Census Act 1920

- 29 This clause amends the Census Act 1920 insofar as it extends to England and Wales to enable the asking of voluntary census questions on sexual orientation and gender identity.
- 30 Subsection (2) adds sexual orientation and gender identity to the Schedule of the 1920 Act. This means they are specified as matters in respect of which census questions may be asked in England and Wales and any such questions will be subject to the draft negative procedure.
- 31 Questions on sexual orientation and gender identity could already be asked in the England and Wales census under paragraph 6 of the Schedule to the 1920 Act. Adding these matters is intended to clarify this existing law and to make clear to which matters the removal of penalties in subsection (3) relates. As a consequence of the statutory scheme, this amendment means that the Parliamentary procedure to which such questions are subject will change from draft amendable affirmative to draft negative. This amendment does not require questions on these matters to be asked in future censuses.
- 32 Subsection (3) amends section 8(1A) of the 1920 Act such that no person shall be liable to a penalty under section 8(1) of that Act for refusing or neglecting to state any particulars in respect of sexual orientation or gender identity – effectively making any such questions voluntary.

## Clause 2: Amendment of the Census Act (Northern Ireland) 1969

- 33 This clause amends the 1969 Act to enable the asking of voluntary questions on sexual orientation and gender identity in Northern Ireland.
- 34 Subsection (2) adds sexual orientation and gender identity to the Schedule to the 1969 Act. This means they are specified as matters in respect of which census questions may be asked in Northern Ireland.
- 35 Questions on sexual orientation and gender identity could already be asked in the Northern Ireland census under paragraph 8 of the Schedule to the 1969 Act. Adding these matters is intended to clarify this existing law and to make clear the matters to which the removal of penalties in subsection (3) relate. It does not require questions on these matters to be asked in future censuses.
- 36 Subsection (3) amends section 7(3) of the 1969 Act such that no person shall be liable to a penalty under section 8(1) of that Act for refusing or neglecting to state any particulars in respect of sexual orientation or gender identity – effectively making any such questions voluntary.

## Clause 3: Extent, commencement and short title

- 37 This clause specifies the territorial extent of the Bill and when its provisions come into force. See 'Commencement' and Annex A for further details.

# Commencement

- 38 The provisions of this Bill come into force the day the Act is passed.

## Financial implications of the Bill

39 This Bill has no financial implications.

## Parliamentary approval for financial costs or for charges imposed

40 This section will be completed when the Bill transfers to the House of Commons.

## Compatibility with the European Convention on Human Rights

41 Lord Young of Cookham has made a statement that, in his view, the provisions of this Bill are compatible with the Convention Rights (within the meaning of section 19 of the Human Rights Act 1998). The issues arising in this respect are set out in a separate European Convention on Human Rights Memorandum published alongside these Explanatory Notes.

## Related documents

42 The following documents are relevant to the Bill and are published alongside these Explanatory Notes on the Bill webpage:

- Delegated Powers Memorandum; and
- European Convention on Human Rights Memorandum.

## Annex A – Territorial extent and application in the United Kingdom

43 In the view of the UK Government:

- Clause 1 (amendment of the Census Act 1920) forms part of the law of, and applies to, England and Wales. It would be within the legislative competence of the Scottish Parliament and Northern Ireland Assembly.
- Clause 2 (amendment of the Census Act (Northern Ireland) 1969) forms part of the law of, and applies to, Northern Ireland.
- Clause 3 (extent, commencement and short title) forms part of the law of, and applies to, England and Wales and Northern Ireland.
- No provision of the Bill has a minor or consequential effect.<sup>4</sup>

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 1	Yes	Yes	No	No	Yes	Yes	Yes	Yes (W)
Clause 2	No	No	No	Yes	N/A	N/A	N/A	No <sup>5</sup>
Clause 3	Yes	Yes	No	Yes	N/A	N/A	N/A	Yes (W)

## Subject matter and legislative competence of devolved legislatures

44 The subject matter of the Bill, namely amendments to the Census Act 1920 and Census Act (Northern Ireland) 1969, is not reserved under the Government of Wales Act 2006 (Schedule 7A) or the Scotland Act 1998 (Schedule 5). Nor is it a reserved or excepted matter under the Northern Ireland Act 1998 (Schedules 2 and 3).

45 In Wales, the principal legislation governing the census is the Census Act 1920. The National Assembly for Wales has not passed any legislation amending this Act insofar as it extends to and applies in Wales. Under the National Assembly for Wales (Transfer of Functions) (No. 2) Order 2006 (S.I. 2006/3334), the Welsh Assembly must be consulted prior to the making of an Order in Council under section 1 of the 1920 Act.

<sup>4</sup> References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

<sup>5</sup> See, for the position with respect to Northern Ireland, paragraphs 24–25 and 27 of the body of these Explanatory Notes. The same position applies with respect to clause 3.

- 46 In Scotland, the principal legislation is the Census Act 1920. This was amended insofar as it extended to and applied in Scotland by the Census (Amendment) (Scotland) Act 2000, an Act which was materially identical to the Census (Amendment) Act 2000. A Bill similar to this is currently before the Scottish Parliament: the Census (Amendment) (Scotland) Bill.<sup>6</sup>
- 47 In Northern Ireland, the principal legislation is the Census Act (Northern Ireland) 1969.

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<sup>6</sup> Available at: <https://www.parliament.scot/parliamentarybusiness/Bills/109595.aspx>.

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