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Fiona Hyslop MSP
Cabinet Secretary for Culture, Tourism and External Affairs
Scottish Government
St Andrew's House
Regent Road
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By email: CabSecCTEA@gov.scot

2nd September 2019

Dear Ms Hyslop,

Census 2021, and the threat to trans equality

We are writing as national LGBTI organisations, about the Census 2021, and in particular, about how trans people will be treated.

We very much welcome the passing of the Census (Amendment) (Scotland) Act 2019, and we thank you for your strong support for the addition of voluntary questions on sexual orientation and trans status and history.

However, we, and trans people across Scotland and beyond, are very concerned at the content of some of the discussion around that Act, in the Parliament and elsewhere. That discussion is continuing now in relation to the forthcoming Census Order and Regulations.

This concern is about proposals by some MSPs and others to change the basis for the sex question, to deny trans people their existing right to answer with their lived sex. As we explain below, making such a change would be likely to lead to a rolling back of trans people's fundamental rights, affecting the daily lives of trans people in many ways, and setting progress on trans equality back decades.

To change the sex question in that way would be the first time that LGBT equality in legislation has gone backwards anywhere in the UK since the introduction of section 28 under Margaret Thatcher in 1988. It would be



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trans people's section 28. Section 28 labelled same-sex relationships as "pretended"; the proposed change to the Census sex question would demonstrate that the state does not consider trans people's lived sex to be real.

To make such a change would place Scotland in a small group of countries where trans equality is being actively rolled back, alongside the US, where Donald Trump's party is for example driving forward attempts to bar trans people from using services such as bathrooms, in their lived sex.

It is vital to be clear that this proposed change to the basis of the sex question is not simply a technical issue about how best to collect data in the Census; it is much more significant than that.

In terms of data collection and use, there is of course no significant need to change the way trans people answer the sex question. Trans people have answered with their lived sex in previous Censuses, and this has worked well, and is consistent with other parts of the UK.

It is clear to us that the proposal to change the basis of the sex question, so that trans people are no longer allowed to answer in their lived sex, as they have long done, but are forced instead to answer with their "biological sex at birth" or their "legal sex", is not a stand-alone technical proposal, but is part of a concerted campaign to establish that it is "biological sex at birth" rather than lived sex, that defines a trans person.

That would roll back trans people's established rights to be recognised as the sex they live as. The European Court of Human Rights has ruled that trans people have the right to legal recognition of their lived sex, and that it is unlawful to require genital surgery as a condition of that recognition.

Quite apart from the issue of legal gender recognition, for decades trans people's lived sex has been recognised in many contexts in Scotland, without the need for medical treatment or for a gender recognition certificate. For example, trans people can get a passport and driving licence in their lived sex, can change their NHS CHI number gender marker, can use facilities such as toilets in their lived sex, can ask



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businesses such as banks to update their name and title, and so on. This has been happening for decades without problem.

A gender recognition certificate (GRC) grants legal recognition of the fact that a trans person is living as a man or a woman. It is not intended to be the point at which living in such a way becomes possible. At the moment, the process of applying for a GRC is demeaning, difficult and time consuming. As such, only a small proportion of eligible trans people have obtained one. Changing the Census from a “lived sex” to a “legal sex” question would set a dangerous precedent, and undermine the rights of many trans people without gender recognition certificates.

If it is established that what matters for the Census is trans people’s “biological sex at birth”, or their “legal sex”, there will without doubt be a concerted campaign to extend this to other areas also. For example, two proponents of changing the Census sex question, Kath Murray and Lucy Hunter Blackburn, recently published a paper about this in *Scottish Affairs* (28.3: 262-289) in which they objected to the recognition of trans people’s lived sex in NHS records, local government equality policies, leisure services, the criminal justice system, women’s services, and education. We are aware that a number of public bodies are already under intense pressure to reverse policies that have respected and recorded trans people’s lived sex, sometimes for several decades.

We are in no doubt that all these areas will be further targeted by the opponents of trans equality, should they succeed in amending the Census sex question to force trans people to answer with their “biological sex at birth” or “legal sex”.

The result would be that trans people’s existing rights to recognition of their lived sex will be fundamentally undermined. Scotland would move from being a leader on LGBT equality, to being a beacon for those around the world who oppose trans equality.

We wanted to write to you in advance of the new Parliamentary year, to explain why this issue is so important. The move to amend the basis of the sex question forms part of a concerted campaign against trans equality that is causing huge distress to trans people in Scotland.



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We welcome that the current proposal, set out in your letter to the CTEEA Committee on 7th August, is to continue with the self-identification basis of response. We urge the Scottish Government to remain strong on its commitment to this and ensure that the Census Order and Regulations are passed without the rights of trans people in Scotland being compromised. We hope that we can rely on the Scottish Government to continue the steady forward progress on LGBT equality since 1999.

With best wishes,

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Manager, Scottish Trans Alliance

Maruska Greenwood
Director, LGBT Health and
Wellbeing

Colin Macfarlane
Director, Stonewall Scotland

Tim Hopkins
Director, Equality Network

Cc: Nicola Sturgeon MSP, First Minister
Shirley-Anne Somerville MSP, Cabinet Secretary for Social
Security and Older People
Christina McKelvie MSP, Minister for Older People and Equalities