



The Scottish Parliament
Pàrlamaid na h-Alba

Published 4 March 2020
SP Paper 691
1st Report, 2020 (Session 5)

**Culture, Tourism, Europe and External Affairs
Committee**
**Comataidh Cultar, Turasachd, na h-Eòrpa agus
Gnothaichean a-muigh**

**Census (Scotland) Order 2020 (SSI
2020/draft)**



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish
Parliament website at:
[http://www.parliament.scot/abouttheparliament/
91279.aspx](http://www.parliament.scot/abouttheparliament/91279.aspx)

For information on the Scottish Parliament contact
Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction	1
Committee consideration	2
Meetings	2
Motion	2
Recommendation to the Parliament	3
Annexe A: Process of 'informal scrutiny'	4
Annexe B: Correspondence	6
Annexe C: Membership changes	8
Annexe D: Legislation Briefing Paper	9
Census Legislation Briefing Paper	9

Culture, Tourism, Europe and External Affairs Committee

Remit: To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) proposals for European Union legislation;
- (b) the implementation of European Communities and European Union legislation;
- (c) any European Communities or European Union issue;
- (d) the development and implementation of the Scottish Administration's links with countries and territories outside Scotland, the European Union (and its institutions) and other international organisations; and
- (e) co-ordination of the international activities of the Scottish Administration.
- (f) culture matters falling within the responsibility of the Cabinet Secretary for Economy, Fair Work and Culture; tourism matters falling within the responsibility of the Cabinet Secretary for the Rural Economy and Tourism, and migration matters falling within the responsibility of the Minister for Public Finance and Migration.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/european-committee.aspx>



europe@parliament.scot



0131 348 5234

Committee Membership



Convener
Joan McAlpine
Scottish National Party



Deputy Convener
Claire Baker
Scottish Labour



Annabelle Ewing
Scottish National Party



Kenneth Gibson
Scottish National Party



Ross Greer
Scottish Green Party



Gordon Lindhurst
Scottish Conservative
and Unionist Party



Stuart McMillan
Scottish National Party



Oliver Mundell
Scottish Conservative
and Unionist Party



Beatrice Wishart
Scottish Liberal
Democrats

Introduction

1. The Census (Scotland) Order 2020 (SSI 2020/draft) was laid in the Scottish Parliament on 23 January 2020.
2. The parent act for this draft subordinate legislation is the Census Act 1920. The accompanying policy note explains that the purpose of this draft instrument is to provide for—
 - ” 1. the date on which the census is to be taken and authorise the Registrar General for Scotland to take it;
 - 2. the people that information is to be collected for;
 - 3. who must, and who can, make census returns within a household or communal establishment (such as hotels, hospitals etc.);
 - 4. the information that is to be collected for the census. ¹
3. The draft Census (Scotland) Order 2010 is a highly unusual instrument in that it contains provisions that are subject to both negative and affirmative procedures. Additionally, certain parts of the draft Order can be modified by the Parliament during the passage of the statutory instrument.
4. The National Records of Scotland provided the Culture, Tourism, Europe and External Affairs Committee ('the Committee') with a briefing that sets out the Scottish Government's interpretation of the procedure that applies to the Parliament's scrutiny of the draft Order, as follows—
 - ” The Scottish Government has produced a draft Census Order that draws on paragraph 6 and other paragraphs of the schedule to the 1920 Act, as well as prescribing certain provisions under section 8(1A) of the 1920 Act. As that will include a mix of provisions subject to negative and affirmative procedure the Scottish Government proposes that these be combined so that the affirmative procedure is used for the whole instrument. This will in effect mirror what was done in practice on previous occasions. ²
5. A copy of the National Records of Scotland's briefing paper is provided in Annexe D to this report for ease of reference.
6. The Delegated Powers and Law Reform Committee had no points to raise when it reported on the Census (Scotland) Order 2020 (SSI 2020/draft) on 4 February 2020. ³

Committee consideration

Meetings

7. The Committee formally considered the draft Order at the following meetings—

4th Meeting, Thursday 30 January 2020

- [Papers for meeting 30 January 2020 \(602KB pdf\)](#)
- [Official Report of Meeting 30 January 2020 \(646KB pdf\)](#)
- [Minute of proceedings of meeting 30 January 2020 \(60KB pdf\)](#)

7th Meeting, Thursday 27 February 2020

- [Papers for meeting 27 February 2020 \(421KB pdf\)](#)
- [Official Report of Meeting 27 February 2020 \(493KB pdf\)](#)
- [Minute of Proceedings of Meeting 30 January 2020 \(60KB pdf\)](#)

Motion

8. Fiona Hyslop, Cabinet Secretary for Culture, Tourism and External Affairs ('the Cabinet Secretary'), lodged Motion S5M-20742 on 5 February 2020. The Committee debated the motion at its meeting on 27 February 2020.
9. After the debate was concluded, the Cabinet Secretary moved Motion S5M-20742—
-  "That the Culture, Tourism, Europe and External Affairs Committee recommends that the Census (Scotland) Order 2020 [draft] be approved."
10. The Motion was agreed to by the Committee without a division.

Recommendation to the Parliament

11. The Committee recommends that the draft Census (Scotland) Order 2020 be approved.

Annexe A: Process of 'informal scrutiny'

12. The Session 3 Economy, Energy and Tourism Committee recommended that consideration be given to the parliamentary procedure and process followed for the scrutiny of future versions of the census.⁴ The National Records of Scotland's Census Legislation Briefing Paper notes the steps taken by the Scottish Government to respond to this recommendation. This includes a new process of 'informal scrutiny', as explained in the extract from the briefing below—

” As Standing Orders do not provide for how the Parliament should exercise its unusual modification power, the Scottish Government proposed a new process of informal scrutiny in advance of the formal laying of the draft Census Order. This process will enable the Committee to consider the draft Census Order and express its views on the parts of the Order to which the modification power would apply (the paragraph 6 particulars) and its views on the remainder of the Order. To inform scrutiny of the draft of the Census Order, the Scottish Government proposed including the draft question set and other material that the Committee would find helpful as part of the informal scrutiny pack. National Records of Scotland officials have liaised with the Committee Clerk to help determine the documents to provide the Committee.

The Scottish Government will take the views of the Committee into consideration when it comes to lay the formal draft Census Order before the Parliament. This will reflect the ongoing engagement between the Scottish Government and Committee throughout the informal process, which may include evidence sessions and briefings, providing written clarifications and supporting guidance as necessary, so that the Committee can fully consider matters during this period. National Records of Scotland officials and the Cabinet Secretary will be available throughout to support the Committee.⁵

13. Accordingly, the Committee took evidence from the Scottish Government and the National Records of Scotland on the preparations for laying the draft Order at the following meetings—

14. **20th Meeting, Thursday 12 September 2019**

Meeting papers for 12 September 2019—

- [Part 1 \(2.57KB pdf\)](#)
- [Part 2 \(2.27KB pdf\)](#)
- [Part 3 \(2.03KB pdf\)](#)
- [Part 4 \(late paper\) \(302KB pdf\)](#)
- [Part 5 \(late paper\) \(998KB pdf\)](#)
- [Official Report of Meeting 12 September 2019](#)
- [Minute of meeting on Thursday 12 September 2019 \(47.6KB pdf\)](#)

15. **1st Meeting, Thursday 09 January 2020**

- [Meeting papers of meeting 9 January 2020 \(9398KB pdf\)](#)
- [Official Report of Meeting 9 January 2020](#)
- [Minute of proceedings of meeting 9 January 2020 \(92KB pdf\)](#)

Annexe B: Correspondence

16. The following correspondence was exchanged between the Committee and the Scottish Government/the National Records of Scotland—
- [Letter from the Convener to the Cabinet Secretary for Culture, Tourism and External Affairs dated 27 June 2019 \(117KB pdf\)](#)
 - [Letter from the Cabinet Secretary for Culture, Tourism and External Affairs to the Convener dated 7 August 2019 \(102 KB pdf\)](#)
 - [Letter from the Cabinet Secretary for Culture, Tourism and External Affairs to the Convener dated 7 August 2019 \(133KB pdf\)](#)
 - [Letter from Convener to National Records of Scotland dated 18 September 2019 \(97.7KB pdf\)](#)
 - [Letter from Convener to National Records of Scotland dated 24 September 2019 \(91.8KB pdf\)](#)
 - [Letter from National Records of Scotland dated 30 September 2019 \(90KB pdf\)](#)
 - [Letter from National Records of Scotland dated 25 October 2019 \(813KB pdf\)](#)
 - [Letter from National Records of Scotland dated 18 December 2019 \(297KB pdf\)](#)
 - [Letter from the Convener to the Cabinet Secretary for Culture, Tourism and External Affairs of 16 January 2020 \(79KB pdf\)](#)
 - [Letter from the Cabinet Secretary for Culture, Tourism and External Affairs to the Convener of 29 January 2020 \(145KB pdf\)](#)
 - [Letter from the Convener to the Cabinet Secretary for Culture, Tourism and External Affairs of 6 February 2020 \(104KB pdf\)](#)
 - [Letter from the Cabinet Secretary for Economy, Fair Work and Culture of 26 February 2020 \(94KB pdf\)](#)
17. The Committee received the following correspondence from stakeholders—
- [Letter from Sikhs in Scotland, dated 10 July 2019 \(184KB pdf\)](#)
 - [Letter from LGBTI organisations, dated 10 September 2019 \(157KB pdf\)](#)
 - [Letter from Susan Sinclair, dated 10 September 2019 \(66KB pdf\)](#)
 - [Letter from Dr Kath Murray and Lucy Hunter Blackburn, dated 11 September 2019 \(151KB pdf\)](#)
 - [Letter from Murray Blackburn Mackenzie, dated 11 September 2019 \(81KB pdf\)](#)
 - [Letter from Social Science researchers, dated 11 September 2019 \(98KB pdf\)](#)

- [Letter from Dr Kevin Guyan on behalf of individual researchers, academics, practitioners and data users, dated 20 September 2019 \(100KB pdf\)](#)
- [Letter from forwomen.scot, dated 27 September 2019 \(63KB pdf\)](#)
- [Letter from LGBTI organisations, dated 1 October 2019 \(128KB pdf\)](#)
- [Letter from the Office for Statistics Regulation, dated 4 October 2019 \(77KB pdf\)](#)
- [Letter from Murray Blackburn Mackenzie, dated 7 October 2019 \(71KB pdf\)](#)
- [Letter from LGB Alliance, dated 26 November 2019 \(78KB pdf\)](#)
- [Letter from Stonewall Scotland, dated 10 December 2019 \(376KB pdf\)](#)
- [Letter from Prof. Alice Sullivan on behalf of individual quantitative social scientists dated 18 December 2019 \(182KB pdf\)](#)
- [Letter from Sikh Federation \(UK\) dated 10 January 2020 \(1.89MB pdf\)](#)
- [Correspondence from Dr Alf Baird to the Convener of 22 January 2020 \(11KB pdf\)](#)
- [Correspondence from Sikh Federation \(UK\) of 27 January 2020 \(113KB pdf\)](#)
- [Correspondence from the Network of Sikh Organisations of 31 January 2020 \(108KB pdf\)](#)
- [Correspondence from the Sikh Federation \(UK\) of 13 February 2020 \(156KB pdf\)](#)
- [Correspondence from the Sikh Federation \(UK\) and Sikhs in Scotland of 21 February 2020 \(58KB pdf\)](#)
- [Correspondence from Murray Blackburn Mackenzie of 26 February 2020 \(314KB pdf\)](#)

Annexe C: Membership changes

18. The following membership change occurred during the Committee's consideration of the Order—
- On 5 February 2020, the Parliament [agreed](#) that Beatrice Wishart be appointed to replace Mike Rumbles as a member of the Committee in accordance with Parliamentary Bureau Motion S5M-20737.
 - On 25 February 2020, the Parliament [agreed](#) that Gordon Lindhurst be appointed to replace Alexander Stewart as a member of the Culture, Tourism and External Affairs Committee; and Oliver Mundell be appointed to replace Donald Cameron as a member of the Culture, Tourism and External Affairs Committee in accordance with Parliamentary Bureau Motion S5M-21001.

Annexe D: Legislation Briefing Paper

19. The National Records of Scotland provided the Committee with a Census Legislation Briefing Paper for the Committee's meeting on 12 September 2019. This briefing was issued with the papers for that meeting and has been reproduced below for ease of reference.

Census Legislation Briefing Paper

Enabling Powers

20. Section 1 of the Census Act 1920 (the 1920 Act) provides the enabling powers which underpin the taking of the census, as set out at Annex A. It allows the making of the Census Order (an Order in Council) which directs that the census be taken. It also prescribes:
- the date on which it is to be taken;
 - the persons by, and in respect of whom, returns are to be made; and
 - the particulars which are to be stated in the returns.
21. In addition, section 8(1A) of the 1920 Act⁶ provides that particulars with respect to transgender status and history may be prescribed so that the Act's penalty provisions are disapplied in relation to them (rendering voluntary the question which solicits those particulars).
22. The forms used in the census are prescribed in the Census Regulations made by the Scottish Ministers under section 3 of the 1920 Act, as set out at Annexe B. This is where the census questions, as they will be seen by individuals completing the forms, are set out in legislation. The census questions must solicit the particulars set out in the Census Order.

Census Order Procedure

23. The procedure for making the Census Order is complex, has varied over the years and does not easily read across to the procedures currently used for scrutiny of Scottish Statutory Instruments. Most of the Census Order is subject to the negative procedure. However, the particulars which are covered by the "catch-all" of paragraph 6 of the schedule of the 1920 Act ("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") are subject to the affirmative procedure and, unusually, the Parliament has a power to agree modifications to these particulars. These provisions are shown in italics in the draft Census Order 2020.
24. If a draft Census Order was produced with no reliance on paragraph 6, it would follow negative procedure. If a draft Census Order was produced that only relied on paragraph 6 then it would follow affirmative procedure (and be amendable by the Parliament due to a special modification power). The Scottish Government has produced a draft Census Order that draws on paragraph 6 and other paragraphs of the schedule to the 1920 Act, as well as prescribing certain provisions under section

8(1A) of the 1920 Act. As that will include a mix of provisions subject to negative and affirmative procedure the Scottish Government proposes that these be combined so that the affirmative procedure is used for the whole instrument. This will in effect mirror what was done in practice on previous occasions.

Interpretation and Legislative Reform (Scotland) Act 2010

25. Since the last Census Order went through the Parliament the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) has come into force. Part of what ILRA does is to modify Parliamentary procedures which are prescribed in pre-ILRA Acts, such as the 1920 Act. The main thing it did was rationalise the different classes of parliamentary procedure down to just three standard procedures (affirmative procedure, negative procedure, and “laid only”) and standardise the wording which is used in enabling legislation to engage those procedures. Schedule 3 of ILRA has the effect that provisions of the 1920 Act which (using old wording) engaged the old versions of negative and affirmative procedure, now engage the new affirmative and negative procedures.
26. Additionally, section 33 of ILRA, in effect allows instruments (such as the Census Order) to formally combine procedures. This was not an option available last time Parliament considered a Census Order. This allows all the provisions of the Census Order to be combined in a single instrument taking one of the standard procedures provided for in ILRA, with the higher level of scrutiny taking precedence. So as some of the provisions of the Census Order would otherwise be subject to negative and some subject to affirmative, procedure section 33 of ILRA can be relied on to make it all affirmative (as this is a higher level procedure than negative). This does not affect the modification power (discussed below) which remains relevant only to the provisions in the Order to be made in reliance on paragraph 6 of the schedule to the 1920 Act.

Parliament’s Modification Power

27. The Scottish Parliament considered a Census Order in 2000 and in 2010 and each time a different procedure was adopted with the modification power not being exercised on either occasion. Standing Orders do not provide for how the modification power should be exercised and this was extensively debated around the time of the 2010 Census Order. At that time the Scottish Government’s position was that if the Census Order as laid was unacceptable to the Parliament, the Government should withdraw it and lay a revised version.
28. This approach brings with it the risk of negatively impacting the timetable for the census legislation. The Scottish Government proposed a new approach to the Census Order process for the 2021 census which gives the Committee early sight of the draft Order in order to address the issues with procedure that have arisen in the past.

Informal Scrutiny Process

29. As Standing Orders do not provide for how the Parliament should exercise its unusual modification power, the Scottish Government proposed a new process of informal scrutiny in advance of the formal laying of the draft Census Order. This process will enable the Committee to consider the draft Census Order and express its views on the parts of the Order to which the modification power would apply (the

paragraph 6 particulars) and its views on the remainder of the Order. To inform scrutiny of the draft of the Census Order, the Scottish Government proposed including the draft question set and other material that the Committee would find helpful as part of the informal scrutiny pack. National Records of Scotland officials have liaised with the Committee Clerk to help determine the documents to provide the Committee.

30. The Scottish Government will take the views of the Committee into consideration when it comes to lay the formal draft Census Order before the Parliament. This will reflect the ongoing engagement between the Scottish Government and Committee throughout the informal process, which may include evidence sessions and briefings, providing written clarifications and supporting guidance as necessary, so that the Committee can fully consider matters during this period. National Records of Scotland officials and the Cabinet Secretary will be available throughout to support the Committee.

Census Regulations Procedure

31. The Census Regulations [that will be laid after the passing of the draft Order] follow the usual negative procedure.

- 1 Census (Scotland) Order 2020 (SSI 2020/draft). Policy Memorandum, page 1.
- 2 National Records of Scotland (September 2019). *Census Legislation Briefing Paper*, para 5. See Annexe D.
- 3 [Delegated Powers and Law Reform Committee. 9th Report, 2020 \(Session 5\). *Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 4 February 2020* \(SP Paper 673\).](#)
- 4 [Economy, Energy and Tourism Committee. 5th Report, 2010 \(Session 3\). *Report on Subordinate Legislation - the draft Census \(Scotland\) Order 2010* \(SP Paper 420\).](#)
- 5 National Records of Scotland (September 2019). *Census Legislation Briefing Paper*, paras 10-11. See Annexe D.
- 6 Section 8(1A) is substituted by the Census (Amendment) (Scotland) Act 2019, section 1(3), with effect from 18 September 2019.

