31 May 2019

Dear Ann,

Many thanks for your letter of 29 May 2019 on behalf of the Constitution Committee about the Census (Return Particulars and Removal of Penalties) Bill ("the Bill"). You expressed concern that the Census Act 1920 ("the 1920 Act") and Census Act (Northern Ireland) 1969 ("the 1969 Act") are ambiguous as to whether or not omitting to answer census questions on religion is an offence. You asked that the Bill, which is drafted consistently with the existing law, be amended so as to state explicitly that no offence is committed by failing to answer census questions concerning religion, sexual orientation or gender identity. You also expressed concern that the Bill’s Explanatory Notes are self-contradictory on this point.

I welcome your Committee’s careful attention to and scrutiny of this Bill. However, I would like to reassure the Committee that the existing law is not ambiguous on this point; refusing or neglecting to answer census questions concerning religion (in respect of the existing law) or sexual orientation and gender identity (in respect of this Bill) is not a criminal offence. This Bill rightly follows the tried and tested existing statutory language to which you refer. I have looked at this carefully with officials, following your letter, and believe that departing from our approach is unnecessary and would risk unintended consequences for the existing law.

This question was debated in detail during the passage of the Census (Amendment) Act 2000 ("the 2000 Act", which inserted the exception from penalty for religion into the 1920 Act). That exception was added to that Bill by the House of Lords. The House of Commons debated whether this sufficed to ensure that failing to answer would not be an offence and, relatedly, that the question was voluntary.²

Ultimately, a proposal to amend the Bill so as to specify that failing to answer the question was not an offence was rejected in House of Commons Committee. This followed express reassurances from the promoters of that Bill that failing to respond to the religion question would not be an offence and that the question was voluntary.³

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¹ ‘Religious profession’ in the case of Northern Ireland.
³ See HC Committee (5 July 2000, Standing Committee D): ‘Secondly, [the amendment] would make it clear that a person would not be required to respond to such a question and would not be guilty of an offence if they failed to do so. Again, that is already in the Bill.’ (Mr Sayeed); ‘we have made a clear statement that there will be no penalty for not answering the question, that it is voluntary and that the form will state that it is voluntary.’ (Ms Johnson (Economic Secretary to the Treasury)).
The promoters of that Bill summarised the position as follows:

‘Clearly, removing the penalty for anyone who fails to provide the particulars with respect to religion, makes any question on religion in the census voluntary. Only the criminal sanction in section 8 of the 1920 Act makes the census compulsory in the first place. However one wraps it up, removal of the sanction makes the response to the question on religion voluntary. As the Bill stands, therefore, an individual may decide to answer the question on the form or may freely decide not to do so, without any fear of a penalty. It is entirely up to the individual. [...]’

I can assure the House that the legal opinion that my officials have taken on this matter confirms...that the removal of the penalty for anyone failing to provide particulars on religion makes the census question on religion voluntary, as only the criminal sanction in section 8 of the 1920 Act makes it statutory to comply with the census in the first place.’

(HC 26 July 2000, v 354, cc 1147 and 1150, per Mr Sayeed and Miss Johnson (Economic Secretary to the Treasury) respectively).

When considering and rejecting an amendment to this effect in 2000, Parliament did so on the express understanding that the language it was using rendered the question voluntary and removed all risk of criminal prosecution. In the absence of a change in circumstances, it is appropriate that in this Bill we follow the same approach.

Moreover, whilst there may be debate as a matter of high legal theory as to whether a criminal offence could exist without a criminal penalty, this debate does not arise with respect to the 1920 and 1969 Acts. Parliament and the Northern Ireland Parliament created penalties for various acts and omissions in relation to the census; they then expressly dis-applied those penalties in relation to failures to answer questions on religion. In doing this, it is clear that the Parliamentary intention was for the penalty and criminality to be removed.⁴ The same is true, as a matter of ordinary interpretation, of Parliament’s use in other statutes of materially identical language.⁵ This same interpretation will apply to the exceptions inserted by this Bill, which follow the existing statutory language.

Finally, an amendment to refer explicitly to criminal offences would risk undesirable consequences. First, an amendment to the 1920 and 1969 Acts with respect to religion would fall outside the scope of this Bill. By amending this Bill’s language with respect to sexual orientation and gender identity only, Parliament would risk casting doubt on the voluntary nature of the long-standing religious exception. It would also risk casting doubt on the interpretation of the 1920 Act in Scotland. Second, even if the religion exception were amended in the same way, this would cast doubt on whether the question had been voluntary in the 1971, 1981, 1991, 2001 and 2011 censuses (in Northern Ireland) and the 2001 and 2011 censuses (in England, Wales and Scotland). Third, this would risk wider consequences to the numerous statutes that have used the same language.

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⁴ Compare Bennion on Statutory Interpretation (7th edn and supplement, 2019), section 7.10).
⁵ See, amongst others, section 1(3) of the Rights of Entry (Gas and Electricity Boards) Act 1954.
For the reasons set out above, in my view the existing law and this Bill are clear. This Bill is consistent with the existing statutory framework and with the wider legislative landscape, both of which would be put at risk by a use of different language.

It follows that in my view the Bill’s Explanatory Notes are not self-contradictory. Paragraph 5 is accurate for the reasons set out above: failing to answer is not a criminal offence. I do not read paragraph 32 as implying that a failure to answer remains a criminal offence. It rather tracks the language used in the Explanatory Notes to the 2000 Act (see paragraph 20 of those Notes). However, I would be happy to consider suggestions from the Committee if you consider that the wording could helpfully be clarified.

I hope this has provided you with some reassurance and I would of course be happy to discuss further at your convenience.

LORD YOUNG OF COOKHAM CH