



## MurrayBlackburnMackenzie

Policy Analysis Collective

20 January 2020

Dear Roger,

Thank you for meeting us last week to discuss our views on sex and gender data, and your plans for making recommendations for Ministers. We appreciated your willingness to hear our concerns, which we are now writing to place on the record.

We would like to reiterate our view that biological sex<sup>1</sup> is a key determinant of a person's experiences and outcomes, and one of the most important variables for the purposes of policy, planning and research. This view is supported by decades of robust research evidence and analysis, which has examined the relationship, including causal relationships, between being born physically one sex or another, and a person's physical, social, economic and political experiences and outcomes from birth onwards. As such, in the meeting, we said it felt frustrating that we now needed to actively defend data collection on this basis. We also said that a failure to collect robust data on sex would weaken the ability of public authorities to fulfil their legal duties under the Equality Act 2010 in relation to equalities monitoring.

We spoke about the reliability of statistics. We suggested, as just one example, that the shift from police recording based on sex to recording based on gender identity means that Criminal Proceedings in Scotland official statistics are no longer reliable, in particular statistics for certain types of low volume crime committed by females, such as sexual assault. It should also be noted that this shift in police recording practices was not properly documented, nor subject to an impact assessment requirement, see here:

<https://www.scotland.police.uk/assets/pdf/434027/526774/526798/19-0696-response?view=Standard>

We also mentioned a recent article on the international increase in female offending rates, which we thought might to some extent relate to changes in recording practices by criminal justice agencies. This can be accessed here: <https://www.theguardian.com/us-news/2020/jan/06/female-fugitives-women-crime-rates-rise>.

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<sup>1</sup> We briefly discussed the relevance of DSD (sometimes called intersex) conditions. The evidence provided by a specialist body to the parliamentary committee considering the 2021 census is available here [https://www.parliament.scot/S5\\_European/Inquiries/CensusBill\\_DSDFamilies\\_CTEEAS518CB33.pdf](https://www.parliament.scot/S5_European/Inquiries/CensusBill_DSDFamilies_CTEEAS518CB33.pdf). We also note that in the context of the census the Scottish Government has clarified that this is an entirely separate issue to self-declared gender identity.

In relation to reliability, we discussed the size of the transgender population and agreed that despite estimates, such as that provided to you by the EHRC, this was unknown.<sup>2</sup> We also discussed the composition of the transgender population, which we noted appears to be heterogeneous, comprising people who have transitioned in different ways, to different degrees and at different ages (for further information we recommended the large-scale LGBT survey undertaken by the GEO which can be accessed here: <https://www.gov.uk/government/publications/national-lgbt-survey-summary-report>).

Given the uncertainty regarding both the size and composition of the trans population, we think that any shift from recording based on sex to recording based on gender identity would actively introduce risks to reliability. This will be felt particularly at a subpopulation level (for example within age groups) and therefore will become a larger issue whenever data on sex is cross-tabulated with other characteristics. We also noted that data for equalities monitoring may be used for relatively small groups (a single employer, or subject area within a university, for example) where small numbers of cases classified differently according to sex and self-declared gender identity could affect the data produced, again particularly where there was already a strong imbalance by sex. We noted that collecting data on pay gaps by self-declared gender identity already had the potential to obscure patterns based on sex in some sectors, and within individual employers. (Guidance from the GEO and Acas already instructs employers to collect data on their 'gender' pay gap based on their employees' self-declared gender identity and not their sex: [https://archive.acas.org.uk/media/4764/Managing-gender-pay-reporting/pdf/Managing\\_gender\\_pay\\_reporting\\_07.02.19.pdf](https://archive.acas.org.uk/media/4764/Managing-gender-pay-reporting/pdf/Managing_gender_pay_reporting_07.02.19.pdf))

Although not discussed in the meeting, we note that the Working Group Risk Register does not acknowledge the risk that, as a result of this project, data reliability will be diminished. We appreciate that this is a risk you will be hoping to avoid, but this is true for any risk on a register. We would urge that this one is added to the register precisely so that there is a formal commitment to evaluating the outcomes of this work against that criterion and to taking mitigating action. This risk also appears to be being ignored by the National Records of Scotland in their recommendation for a sex question based on respondents' self-declared gender identity. We also note that the EHRC submission makes no reference to subpopulation effects in its comments on the size of the trans population (see footnote 1).

You asked us whether there was any situation where we thought that authorities should collect data based on gender identity instead of sex. Having reflected further on this question, we could not think of any circumstances where gender identity should *replace* sex in any administrative data which is then drawn on to produce aggregate statistics on sex. It remains our view that if data on gender identity is required, it should be collected separately to sex, and the two concepts should not be conflated.

We noted that we needed more data, rather than less, on how far the experience and outcomes for those declaring a gender identity different from their sex as recorded at birth compared to other people of each sex more generally. We noted the UK LGBT Survey was helpful in allowing some analysis of that type (for example, on pay), which was only possible because it had collected data both on sex at birth and self-declared gender identity.

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<sup>2</sup> The EHRC submission to the Working Group states: 'The number of trans people is not big enough to skew data that is collected on sex and it is therefore deemed generally unnecessary, from a data collection view point, to merely focus on legal sex'.

We expressed our concerns about the composition of the Working Group, which consists wholly of representatives from bodies who have either: implemented gender self-identification for the purposes of data recording (Police Scotland, NHS Scotland); actively supported conflating sex and gender identity in data collection (Office of National Statistics, National Records of Scotland, EHRC); have already introduced policies based on gender self-identification ahead of legal change, or actively supported such an approach (Scottish Prison Service, COSLA); or are in the process of introducing legislation to provide for gender self-identification in law (Scottish Government). We said that we were particularly concerned that the Working Group did not include any expert quantitative social science academics and suggested that a meeting should be convened with quantitative data users, separate to any public meeting, as soon as possible. We were concerned that the exclusion of this group was also apparent in their exclusion from the associated stakeholder group (we do not think our inclusion is sufficient to represent the interests of this group). We felt that this lack of balance risked compromising the process.

While not discussed in the meeting, we note that the EHRC submission to the group suggests that asking a person their legal sex (with or without a Gender Recognition Certificate) may breach the Equality Act 2010, and that under the Public Sector Equality Duty (PSED) public bodies may ask for a person's self-identified sex instead of their legal sex (that the submission refers to 'forcing' a person to answer in their biological or legal sex appears to us to import into the discussion a clear bias).<sup>3</sup> This suggests that it is impossible to collect data relevant to monitoring issues relevant to the legally protected characteristic of sex without breaching the ECHR. That seems to us at minimum a contentious position that should not be taken at face value. If this view were to influence the outcome of this exercise, without formal legal advice on it being sought, we believe it would raise a question about the reasonableness of any resulting conclusions. The submission also states that data collected by public bodies would be better aligned with the census which collects data on self-identified sex. This is a view which clearly begs the question, by presupposing that what public bodies are doing now is the correct approach, which is of course what the review is intended to examine.

We remain concerned that Scotland is at a serious risk of losing the capacity to gather data that, for decades, has provided the building blocks for policy-makers and researchers to monitor and tackle discrimination based on sex, and that steps taken towards this to date have been taken without adequate due diligence, impact assessment, proper consultation with all interests affected, and general transparency. We are yet to hear any robust arguments for why public bodies in Scotland should cease to collect reliable data on sex, as distinct from self-declared gender identity.

We were reassured to hear that the final responsibility for decisions here would rest with yourself as the Scottish Government's senior statistician, rather than with the group. However, we wish to place on the record that as matters stand we are concerned about the process being followed here, particularly the level of engagement with different interests, and the degree of influence being given to organisations already committed in some way to prioritising self-declared gender identity over biological sex.

UK official statistics continue to be regarded as highly trustworthy by the British public<sup>4</sup>. A failure to consider the implications of replacing data on sex with data on self-declared gender identity imperils

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<sup>3</sup> Sex and Gender Working Group – Meeting 23 September 2019. Equality and Human Rights Commission submission.

<sup>4</sup> <http://natcen.ac.uk/our-research/research/public-confidence-in-official-statistics/>

those levels of trust. We hope that the Working Group will engage earnestly with the concerns we have expressed above.

If it would be possible to have a copy of the minutes taken of the discussion, we would be grateful. As we are concerned about the transparency of processes, and an absence of this around this subject more generally, we will put this letter on our website.

Kind regards,

Lucy Hunter Blackburn  
Dr Kath Murray

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