

More invisible women? MBM response to the Chief Statistician's draft guidance on collecting data on sex and gender

murrayblackburnmackenzie.org

24 January 2021

"I will take the opportunity to begin to address an issue that was raised by some women's groups during the [Gender Recognition Act] consultation: collection, disaggregation and use of data by sex and gender. The issue does not result specifically from gender recognition, but there is some overlap. It has also received increased prominence following publication of the book "Invisible Women: Exposing Data Bias in a World Designed for Men" by Caroline Criado Perez. **The book has drawn attention to the frequency with which data is neither collected nor aggregated in a way that takes account of the differences—including biological and physical differences—between men and women, and their impact in areas such as transport, health and access to services.**

I therefore announce that the Scottish Government will establish a working group on sex and gender in data, which will comprise professionals from across statistical services. The group will be led by, and will report to, the chief statistician. The working group will consider what guidance should be offered to public bodies on collection of data on sex and gender, including what forms of data collection and disaggregation are most appropriate in different circumstances."

[Shirley-Ann Somerville, Cabinet Minister for Social Security and Equalities. Statement on gender recognition. 20 June 2019 \(our emphasis\)](#)

'statistics have to be based on the right data sources, with transparent judgements about definitions and methods, and judgements about the strengths and limitations of the statistics. Producers should demonstrate how they assure themselves that their statistics are robust and reliable.'

[UK Code of Practice for Statistics](#)

Without accurate data on sex, we lose the ability to understand differences and to design evidence-based policies tackling problems facing girls and boys, women and men. We also lose the ability to gain an accurate understanding of issues facing trans people of both sexes.

[Professor Alice Sullivan \(2020: 524\)](#)

Table of contents

Introduction	3
Part 1. Draft guidance analysis	5
1.1. Background.....	5
1.2. Working Group membership and draft guidance development	5
1.3. The erasure of sex in data collection.....	7
1.4. Equality Act 2010	8
1.5. Privacy concerns.....	10
1.6. Defining gender identity	13
1.7. Proposed questions on sex and gender identity for public bodies.....	14
1.8. International guidelines	15
Part 2. Data reliability	19
2.1. Are the numbers too small to matter?	19
2.2. Differences between sex and gender identity by age, sex, and other characteristics.....	20
2.3. Data reliability and the census	21
Part 3. Why we need data on sex	24
3.1. Sex is a core demographic variable	24
3.2. Conclusion	28
Annex 1. Losing sight of biological sex: Working Group on sex and gender in data	30
Annex 2. MBM letter to the Chief Statistician. 20 January 2020.....	33
Annex 3. Legal Opinion on EHRC Statement by Aidan O’Neill QC: Key extracts	37
Annex 4. Letter to Sir Bernard Silverman	39

Introduction

In June 2019, as part of a statement on Gender Recognition Act reform, the Cabinet Minister for Social Security and Equalities announced that the Scottish Government would establish a Sex and Gender in Data working group, to be led by the Chief Statistician Roger Halliday. In her statement, the Minister noted *'the frequency with which data is neither collected nor aggregated in a way that takes account of the differences—including biological and physical differences—between men and women, and their impact in areas such as transport, health and access to services'*.

In December 2020 the Scottish Government published the Chief Statistician's [draft guidance on the collection of data on sex and gender](#) for public bodies, with a view to seeking stakeholder feedback by 12 February 2021. The draft guidance states that it is intended *'to be applicable to a wide range of data collections across the Scottish public sector'* (p.16). These include data collection for operational decisions (including whether to offer a single-sex service), service design, funding and planning, monitoring key performance measures or societal trends, and meeting legal obligations to collect certain data (p.9).

Setting a worrying precedent, the draft guidance advises that public organisations should not ask questions about biological sex, except where relevant to medical treatment, while 'legal sex'¹ should only be collected *'in a small number of instances' and 'on an individual basis for a very specific purpose'* (p.10). Instead, it is advised that *'in most cases... data should be collected on the basis of gender identity rather than sex'*.² The draft guidance thus precludes data collection that *'takes account of the differences—including biological and physical differences—between men and women, and their impact'*, as noted by the Minister.

The justification for this conclusion is not set out at all clearly. We would have expected any case for such a major decision as **ceasing** to collect data on biological sex and asking **only** for gender identity to have demonstrated clearly one or more of the points below. The report does not do this.

- **Effects related to sex are irrelevant or uninteresting to know about and understand, but this is not true for effects related to gender identity.**

The Scottish Government does not appear to believe this, but a clear statement to that effect would be helpful.

- **All or most effects currently thought to be related to sex are in fact related to gender identity.**

At points, the Scottish Government appears to believe this might be true. However, it does not make this argument explicitly and provides no empirical or theoretical support for it.

¹ Legal sex is determined by what is recorded on a person's birth certificate. A person may apply for a Gender Recognition Certificate (GRC) to change their legal sex.

² See accompanying Scottish Government summary: ['Sex and Gender in Data Working Group - data collection: draft guidance'](#).

- **Asking for gender identity will produce results that are not materially different from those for sex.**

The Scottish Government does appear to believe this. We discuss below how the case it makes relies on weak evidence and overlooks multiple more recent sources.

- **Asking for sex raises substantial legal issues, including human rights issues, whereas asking for gender identity does not.**

The Scottish Government does appear to believe this, and that these issues are so substantial that they should take priority over any concerns about the effect on the data. As we discuss below, the Scottish Government has not relied on formal legal advice to reach this conclusion, despite its profound implications, and the advice that it has relied on has already been challenged in a legal opinion.

Our response to the draft guidance is structured as follows:

Part one analyses the draft guidance and discusses our key concerns. These include: the composition of the Working Group; the erasure of sex in data collection by public bodies; failure to consider the implications for the operation of the Equality Act 2010; uncritical reliance on EHRC guidance that legal opinion has deemed inaccurate; uncritical reliance on ‘gender identity’ as a measurable construct; and a failure to consider existing international guidelines.

Part two considers issues around data reliability, and highlights the failure to consider the implications of wider societal shifts in relation to the size and demographic composition of the trans population on data collection. We also discuss recent interventions made in relation to data reliability in the next census, which are relevant to the Chief Statistician’s proposals.

Part three discusses the lack of conceptual clarity or understanding as to the nature of sex discrimination in the draft guidance, and makes the case for collecting robust data on biological sex.

We conclude that the draft guidance, as presented, does not provide a responsible, reasonable nor rational basis on which to decide that public sector data in Scotland should no longer be collected for sex, and that self-declared gender identity be treated as a replacement.

If it is widely accepted that it is wrong, in principle, to ask a person about their sex at birth, this will result in the eventual loss of data on a core demographic variable. Indeed, Scotland has already lost robust, high quality data on sex across a number of policy areas in Scotland through the adoption of data collection practices that muddy sex and gender self-identification. These include criminal justice, health, and Higher Education (see further Annex 1). If accepted, the draft guidance will cement this loss, and further damage our ability to understand how sex operates in Scotland as a determinant of social, economic, and physical outcomes, and to redress discrimination on the basis of sex.

Part 1. Draft guidance analysis

1.1. Background

- 1.1.1. The Scottish Government established the Working Group on Sex and Gender in Data against the backdrop of gender recognition reform. While the Scottish Government has paused its plans for legal reform, debate in this area remains sensitive, most recently seen in the debates surrounding the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill, and whether victims should be allowed to request a medical examiner on the basis of their biological sex or their gender.³
- 1.1.2. At the heart of this debate is an argument as to whether rules and policies that have traditionally been described as relating to sex, including data collection, should be based on a person's biological sex, their gender identity, or reflect both.
- 1.1.3. The key message from the draft guidance is that gender identity is more important, and that public organisations should not ask questions about biological sex. The guidance does not however, explain why gender identity is more important, or why clear data on biological sex no longer matters. Nor does it unpick the issues underlying this debate.
- 1.1.4. In the context of data collection, achieving a balanced position is straightforward. It involves collecting good quality data on each of biological sex and gender identity separately. It is disappointing that the draft guidance has clearly prioritised one set of interests above the other. We believe that this imbalance is in part, likely to be informed by the composition of the Working Group, the existing organisational perspectives this reflected, and the lack of any independent expert representatives.

1.2. Working Group membership and draft guidance development

- 1.2.1. The Working Group first met in September 2019. Minutes and papers from the group are available [here](#). The group consisted of representatives from COSLA, Police Scotland, the Equality and Human Rights Commission (EHRC), NHS Information Services Division, and the Scottish Prisons Service. In addition to Scottish Government officials, the group also included one representative from the National Records of Scotland (NRS) and three representatives from the Office for National Statistics (ONS).
- 1.2.2. The draft guidance describes the Working Group as '*experts in collecting and presenting data from across the UK*', and states that '*an important part of this work is making sure that this draft guidance is informed by evidence from a wide range of individuals and organisations with views on a lived experience of these issues*' (p.1). We are concerned that 'lived experience' was highlighted as a concern on which evidence would be sought from others, but no mention was made of placing at least equal weight on

³ See: [Opinion: Securing legal clarity in the Forensic Medical Services Bill](#) (Scottish Legal News, 9 December 2020)

gathering evidence on issues relating to data reliability or usefulness. We also note that there was no expert member specialising in quantitative data collection and analysis from outside the government family.

- 1.2.3. We also do not think the draft guidance is informed by a '*wide range*' of views. Rather, it appears to be reflective of the policy capture that is evident across a range of public sector organisations, including those represented on the Working Group, which consists wholly of representatives from organisations that have already introduced data collection practices or policies based on gender self-identification (see Annex 1). Scottish Government officials in the group included the lead on Gender Recognition Act reform.
- 1.2.4. At the first meeting of the Working Group, the EHRC representative was unable to attend, and a [short briefing](#) was submitted to the group instead, which appears to have influenced the final draft. As discussed further in section 1.5, the EHRC briefing advised against collecting data on biological sex and suggested that to do so might be unlawful.
- 1.2.5. A [briefing](#) by Scottish Government-funded advocacy group Engender was submitted to the Working Group in February 2020. Consistent with Engender's wider support for gender self-identification laws and policies, the briefing includes 'non-binary' within its definition of sex. We note however that the Engender response to the Scottish Government's 2017 consultation on gender recognition reform expressed concern that the '*proposals to expand the definition of 'sex' in the Equality Act 2010 to include 'non-binary' lacked clarity, had not been tested or developed with feminist equality law scholars and practitioners, and may undermine existing protections for women against sex discrimination and unequal pay*'.⁴
- 1.2.6. At our request, in January 2020 we met with the Chief Statistician, and expressed our concerns about the composition of the Working Group, among other issues. Following the meeting, we wrote to the Chief Statistician, putting our concerns on the record. The letter is shown in full in Annex 2. In relation to the Working Group we stated:

'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

⁴ Engender (2020) [Engender response to the Scottish Government consultation on the Gender Recognition Reform \(Scotland\) Bill](#)

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.'

- 1.2.7. In addition to the Working Group the Scottish Government organised [two public events](#), which around 40 people attended. At these sessions, several attendees made the case for collecting data based on biological sex, including at least two senior quantitative social scientists. These views are not reflected in the draft guidance.
- 1.2.8. Citing the Official Statistics Code of Practice, the draft guidance states that '*Those producing statistics should be protected from any undue pressure that may influence the production or presentation of the statistics*' (p.5).
- 1.2.9. In light of the disproportionate influence of organisations and individuals already strongly committed to gender self-identification principles, the lack of independent expert input, and apparent disregard for the views of expert data users, we do not think this principle has been adhered to in the development of the guidance.

1.3. The erasure of sex in data collection

- 1.3.1. The draft guidance states that '*questions about biology should not be asked, except potentially where there is direct relevance to a person's medical treatment*' (p.10). The draft also advises that data on 'legal sex' should only be collected '*in a small number of instances... but this would be on an individual basis for a very specific purpose*' (p.10).
- 1.3.2. These proposals mean firstly, that in most instances, public organisations should not collect data on sex at all, no matter how defined. And secondly, that when organisations do collect data that is termed 'sex', that this should purposively conflate two separate demographic categories: biological sex, and legal sex. For example, the draft guidance sets out two example questions for stakeholders that ask, '*What is your sex?*' (p.15). But neither are sex questions as ordinarily understood. Rather as the accompanying notes explain, both are also intended to capture 'legal sex'.
- 1.3.3. This is an extraordinary position for the Scottish Government to arrive at, with far reaching and detrimental implications for our understanding of society, that requires far more consideration than has been given. We are not aware of any evidence to suggest that biological sex no longer acts as a key determinant of social, economic, and physical outcomes and the document offers none. The burden of proof that such data no longer matters lies with the Scottish Government.

Defining sex

- 1.3.4. The definition and usage of sex in the draft guidance is confusing and does not meet basic data standards that require clarity in the concept being measured. The draft describes sex in terms of its '*biological aspects*', as ordinarily understood, and its '*legal aspect*', which it explains, can change '*if a full Gender Recognition Certificate (GRC) is obtained*' (p.6). At various points, the draft guidance also confusingly refers to '*self-identified sex*', which is used as a synonym for 'gender identity', and is entirely separate to sex.
- 1.3.5. In recent years, an unhelpful amount of confusion has been sown round the concept of sex for policy and law makers. This confusion is reflected in the draft guidance. Biological sex is easily understood and recognised, and in numerous species, including homo sapiens, means the state of being male or female for reproductive purposes.⁵ ⁶ For almost everyone, sex is observed accurately at birth from outward appearance.⁷ Obtaining a GRC does not alter a person's physical characteristics,⁸ and as discussed below, organisations may continue to ask for information on a person's sex, as observed and recorded at birth, providing it is proportionate. 'Self-identified sex' is an unhelpful and confusing misnomer to introduce into this discussion.

1.4. Equality Act 2010

- 1.4.1. The draft guidance observes that sex is a protected characteristic under the Equality Act 2010, and that '*man and woman are defined for the purposes of the 2010 Act at section 212; 'man' means a male of any age and 'woman' means a female of any age*' (p.7). In direct contradiction, the draft guidance then states: '*Although the 2010 Act **doesn't purport to define sex**, section 11, in relation to the protected characteristic of sex, takes a binary approach – someone is either a man or a woman*' (p.7).
- 1.4.2. This convoluted drafting suggests that the Scottish Government does not believe that Section 11 provides a definition of 'sex' for the Act. By this logic, all of the protected characteristics, described in Sections 5 to 12 of the Act using a similar formula, are technically not 'defined'. Otherwise or as well, the Scottish Government rejects that defining 'man' and 'woman' as 'male'

⁵ Dahlen, S. (2020). De-sexing the Medical Record? An Examination of Sex Versus Gender Identity in the General Medical Council's Trans Healthcare Ethical Advice. *The New Bioethics*, vol. 26:1.

⁶ Richie, C. (2019). Sex, not gender. A plea for accuracy. *Experimental and Molecular Medicine* vol. 51 (1).

⁷ A small number of people are diagnosed with differences in sex development (DSD) conditions each year, however the specialist charity dsdfamilies estimates that in the UK, sex will be unclear in only about seven or eight of these cases. See: dsdfamilies (2018). '[Culture, Tourism, Europe and External Affairs Committee. Census \(Amendment\) \(Scotland\) Bill. Submission from dsdfamilies](#)'. Scottish Parliament

⁸ Acquiring a GRC changes a person's legal sex, and confers some rights on that basis. A GRC does not change a person's reproductive category, because humans cannot do that. Julian Norman QC explains 'Once a GRC is acquired, a **legal fiction** is created that the person is of their new sex' (emphasis added). While the Gender Recognition Act 2004 states that a person becomes 'for all purposes' the sex they acquire, the Act proceeds to make clear that these rights are conditional. For example, there are exemptions in relation to inheritance and sport.

and 'female' counts as providing a definition of sex. We are not aware of another source which regards the Equality Act as failing to provide a definition of sex for its purposes. It would be helpful to know if the government's lawyers have cleared claims made in the draft guidance about the law.

- 1.4.3. Drawing on the EHRC statement provided to the Working Group at the first meeting, the draft guidance then segues from sex to the concept of gender identity, which is described as '*self-identified sex*'.

'The EHRC's most recent position is that "public bodies are not required to collect information on legal sex and can enable employees and service users to self-identify their sex"' (p.7).

- 1.4.4. The same argument is made in relation to the Public Sector Equality Duty (PSED), which requires some public bodies in Scotland to gather employment information on the protected characteristics of their employees, including sex and gender reassignment. Again citing the EHRC submission, the draft guidance states that data on gender identity can be collected instead of sex.

'The EHRC, who are responsible for ensuring compliance with the PSED, have stated that the requirement to gather employment information does not mean that employment information on the basis of legal sex... must be recorded...

[R]ecording data on gender identity can support the equality monitoring and service development under the 2010 Act. In their evidence to the working group, the Equality and Human Rights Commission wrote '*The language used by a body does not dictate whether the PSED requirements have been met. Public bodies are not required to collect information on legal sex and can enable employees and service users to self-identify their sex.*' (p.11)

- 1.4.5. The draft guidance does also include the statement that, '*outside of the employment context, there may be circumstances when collecting data on sex on a legal sex basis may be required in order for a public body to comply with the PSED*' (p.11), which it implies is the view of the EHRC. However, this statement stands isolated in the document. It contradicts the EHRC advice quoted, and is not reflected in the conclusions of the draft guidance. The contradiction is not acknowledged or explained.

- 1.4.6. The advice provided by the EHRC to the group elides two different protected characteristics, sex and gender reassignment, as well as the broader concept of 'gender identity', into a single ill-defined measure. This makes it impossible to collect robust data on each of the protected characteristics for equality monitoring purposes, and so to support PSED requirements. In doing so it also undermines the PSED requirement to foster good relationships between *different* characteristics. We have considerable concerns about the advice note provided by the EHRC to the group and the degree of uncritical reliance placed on it.

- 1.4.7. The draft guidance cites ‘Invisible Women’ by Caroline Criado Perez, and suggests that data on sex ‘may not give a full picture of inequalities’ (p.8).

‘While the 2010 Act protects against discrimination on the basis of sex, many people take the view that the term ‘gender’ also raises important issues in current inequalities. For example, Caroline Criado Perez in her book “Invisible Women” writes “Although I talk about both sex and gender throughout, I use gender data gap as an overarching term because sex is not the reason women are excluded from data. Gender is. In naming the phenomenon that is causing so much damage to so many women’s lives, I want to be clear that the root cause and, contrary to many claims you will read in these pages, the female body is not the problem. The problem is the social meaning that we ascribe to that body, and a socially determined failure to account for this”.

As such, having evidence on sex alone may not give a full picture of inequalities.’ (p.8)

- 1.4.8. This misinterprets the core argument in ‘Invisible Women’, which is about the persistent failure to recognise in data the distinct needs and experiences of female people. As the quote states, gender is a term Criado Perez uses to discuss the social meaning **ascribed to the female body**, not a free-standing phenomenon detachable from that.

1.5. Privacy concerns

- 1.5.1. The argument against collecting data on sex appears to be based largely on privacy concerns. Drawing on the idea that it is insensitive, or even potentially unlawful, to ask a person about their biological sex, the draft guidance states that a question about a person’s biology is ‘*likely to breach an individual’s human privacy*’ (sic) (p.10).
- 1.5.2. This is consistent with the EHRC statement submitted to the Working Group, which states that requesting, gathering, and collating data on individuals’ biological sex could be in breach of the law:

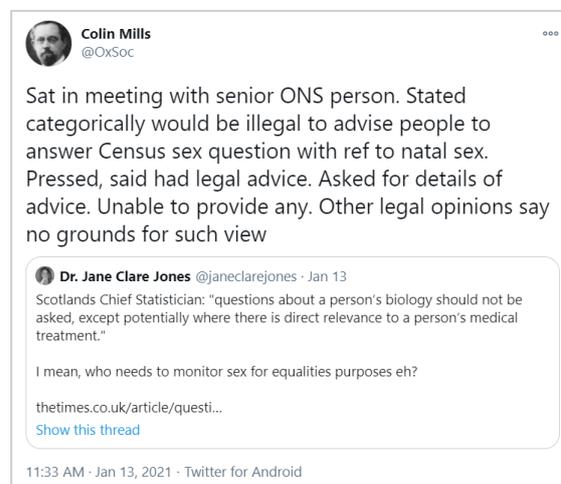
‘There are important human rights considerations that need to be considered when asking employees or service users to state their sex, especially in regard to people’s right to privacy under [Article 8 of the ECHR](#) and the [Human Rights Act 1998](#). Forcing trans employees or service users to disclose their sex as assigned at birth would be a potential violation of their human rights, particularly their right to privacy and dignity under Article 8. In addition, forcing a trans person without a [Gender Recognition Certificate](#) (GRC) to disclose their legal sex would result in that person being ‘outed’ as a trans person. It is also a criminal offence under the [Gender Recognition Act 2004](#) (GRA) for a person who has acquired the information in an official capacity, to disclose information relating another person’s application for a GRC or their gender prior to grant of the GRC. In some instances, forcing people to ‘out’ themselves will also breach the [Equality Act 2010](#).’ (EHRC, 23 September 2019)

1.5.3. Similarly, in research published in 2012 the EHRC stated:

‘Under this legislation, trans people obtaining a Gender Recognition Certificate cannot be required to reveal their birth sex or gender history, although they may choose to disclose this information. This would rule out, for example, a compulsory question that asks for birth sex and only allows the responses ‘male’ and ‘female’.’⁹

1.5.4. This argument has also gained traction in relation to the census, where ONS and NRS officials (both represented on the Working Group) have put forward similar claims. ONS email correspondence (accessed via Freedom of Information) states: *‘there are concerns that a mandatory sex at birth question may contravene people’s human rights (the right to privacy under article 8 of the European Convention on Human Rights)’* (17 June 2020: p.35).

1.5.5. The ONS has so far refused to disclose on what or whose advice this assessment is based. Commenting on the ONS’ refusal to disclose their source, Professor Colin Mills (University of Oxford) posted on Twitter: *‘Sat in meeting with senior ONS person. Stated categorically would be illegal to advise people to answer Census sex question with ref to natal sex. Pressed, said had legal advice. Asked for details of advice. Unable to provide any. Other legal opinions say no grounds for such view.’*



1.5.6. The privacy argument has also been made by groups that advocate for gender self-identification, in evidence to the Culture, Tourism, Europe and External Affairs (CTEEA) Committee on the Census (Amendment) (Scotland) Bill. These include the Equality Network, in [oral evidence](#) (6 December 2018), and [written evidence](#) submitted by Engender, Rape Crisis Scotland, Scottish Women’s Aid, Close The Gap and Equate Scotland.

1.5.7. We believe that the privacy arguments being put forward by the EHRC and others are overstated. HM Courts and Tribunals Service guidance to applicants for a GRC, who have stronger privacy rights than non-GRC holders, states that *‘You should bear in mind that privacy does not mean absolute secrecy... Although the gender recognition process seeks to safeguard your privacy, you do not have a right never to disclose the fact that you obtained a GRC’* (2019: 7).¹⁰

⁹ Glen, F. and Hurrell, K. (2012) [Technical note: Measuring Gender Identity](#). EHRC

¹⁰ HM Courts and Tribunals Service (2019) [The General Guide for all Users: Gender Recognition Act](#)

- 1.5.8. In November 2020 campaign group Woman’s Place UK commissioned a [formal legal opinion](#) by Aidan O’Neill QC regarding the statement provided to the Chief Statistician by the EHRC. This concluded that the EHRC guidance misrepresented the law, and that collecting data on biological sex for the achievement of a legitimate aim was lawful, as shown in Box 1 below. Further key extracts from the legal opinion are shown in Annex 3.

Box 1. On the requesting, gathering and collation of data on individuals’ biological sex: Advice by Aidan O’Neill QC

The EHRC advice to the effect that

“*Forcing* trans* employees or service users to disclose their sex as assigned at birth *would* be a *potential* violation of their human rights, particularly their right to privacy and dignity under Article 8 ECHR”

is either wrong or misleading or incomplete. It should properly have advised that

“*Requiring* trans* employees or service users to disclose their sex as assigned at birth *would not* be a potential violation of their human rights, particularly their right to privacy and dignity under Article 8 ECHR, provided that

- such a requirement was made ‘in accordance with law’ and
- the requirement was made for a legitimate purposes and
- requiring this information was in all the circumstance ECHR proportionate.’

- 1.5.9. Notice of the legal opinion was sent to the Chief Statistician by WPUK on 7 December 2020, prior to publication of the draft guidance on 9 December. We hope that the final version of the guidance will acknowledge and reflect this.
- 1.5.10. The draft guidance does not discuss why one group should be afforded privacy rights specifically in relation to providing information on biological sex. There is no suggestion that privacy considerations might preclude asking other types of intimate question that pertain to a person’s biology, for example questions about age, disability, or health, which people might reasonably feel to be more intrusive than their sex. A similar point was made by MSP Annabelle Ewing during a CTEEA Committee session, in relation to the proposal by NRS to ask a self-identified sex question in the next census:

“This is not about how a person feels about a particular question—there may be lots of other questions in the census that lots of individuals find slightly intrusive for whatever reason. This is a question of collecting data for the benefit of the state on all aspects of public life, public services provision and so on.”
(Ewing, 12 September 2019 [col. 12](#)).

1.6. Defining gender identity

- 1.6.1. A Scottish Government summary of the draft guidance states that *'in most cases... data should be collected on the basis of gender identity rather than sex'*. The draft guidance then defines gender identity in the following terms:
- ‘a personal, internal perception of oneself and so the gender category someone identifies with may not match their sex at birth;
- what an individual experiences as their innate sense of themselves as a man, a woman, as having no gender, or as having a non-binary gender - where people identify as somewhere on a spectrum between man and woman.’ (p.6-7)
- 1.6.2. This makes it clear that the proposal is to depart from the most basic element of the Equality Act definition of sex, which is as being one of two states: woman/female or man/male. This is nowhere acknowledged.
- 1.6.3. The draft guidance does not state the source for either definition, but noted more loosely that organisations *'such as the World Health organisation and the Royal Statistical Society'* (RSS) (p.6) define gender identity in these terms. The draft guidance also references an ONS article, and a report from the USA Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys.
- 1.6.4. We think that these sources should be treated cautiously. The RSS source is a magazine article,¹¹ which states that sex cannot be reduced to dichotomies, and that *'gender and sex vary across a continuum'*. Neither of these assertions regarding sex are accurate. Similar factual errors are evident in the ONS source,¹² which describes sex as *'generally male or female'*, and something that is *'assigned at birth'*. It also describes Variations in Sex Characteristics as *'where people are born with hormones, chromosomes, anatomy or other characteristics that are neither exclusively male nor female'* and that such cases are *'usually assigned a sex (male or female) by their family or doctor at birth'*. Again, these descriptions are inaccurate, and should be read as further evidence of the confusion that has been sown around the concept of sex, which has drawn substantially on mischaracterising the nature of developmental conditions affecting the reproductive tract and/or the expression of sex chromosomes. Most of these produce individuals who are still unambiguously and accurately observed to be either male or female at birth or before. In the context of the census, the Scottish Government has been explicit that the existence of these developmental conditions is a separate issue from the classification of sex.
- 1.6.5. We note that difficulty in pinning down what is meant by gender identity is not limited to data collection, and that the Justice Secretary also failed to explain the concept in the context of the Hate Crime and Public Order (Scotland) Bill. In response to a parliamentary question asking for clarity on the meaning of 'gender identity' as used in the accompanying documents to

¹¹ Alba, S., Wong, F. and Bråten Y. (2019) [Gender matters in household surveys](#). Significance.

¹² ONS [What is the difference between sex and gender?](#)

the Bill (para. 80),¹³ the Justice Secretary replied in circular terms, describing gender identity, specifically, as ‘*an individual’s gender identity where this is different from their sex at birth*’.¹⁴

- 1.6.6. In the absence of evidence to support the idea of an innate gender identity, the concept is better understood as a belief, rather than an objectively testable quality. Some people strongly believe that everyone has a gender identity, which may be different from their sex at birth. Other people object to the concept and view it as rooted in retrogressive sex-based stereotypes and assumptions about what it ‘feels’ like to be a man or a woman and reject that they have a ‘gender identity’, except in so far as it is used to mean a mundane awareness of their physical sex. The draft guidance only reflects the former position, and fails to acknowledge anywhere the second set of views.
- 1.6.7. No consideration is given as to how such an unclear concept might be operationalised for the purposes of data collection to produce an output with the same degree of reliability and validity as sex. As a wholly subjective category, grounded in a person’s feelings, compared to sex it has substantially more limitations and is less easily reconciled with the various [statistical principles](#) that are purported to underpin the proposals. These include:

‘Transparent judgements about statistical definitions and methods, together with judgements about the strengths and limitations, are essential in supporting confidence in the quality of the statistics (Principle Q2)

Risks to data quality should be minimised – both operationally, such as using insight from audits and inspections of the data – and in the collection and data preparation processes (Practice Q3.1.ii)

Statistics should be consistent and comparable, while remaining relevant to society (Principle Q4)’ (p.5)

1.7. Proposed questions on sex and gender identity for public bodies

- 1.7.1. The draft guidance sets out ten standard questions, responses, and guidance that public bodies might use to collect data on gender identity, legal sex and trans status, subject to further testing and feedback. These consist of two questions on gender identity (aimed at face-to-face and written data collection respectively); two follow up questions on gender identity; two questions on legal sex; two trans status question (face-to-face and written); and two follow up questions on trans status.
- 1.7.2. The two questions titled ‘gender identity’ then proceed to ask about gender (*How would you describe your gender?*) which is a different concept. This slippage is not acknowledged (p.13).

¹³ [Hate Crime and Public Order Bill Explanatory Notes](#)

¹⁴ [Question S5W-29943](#) 7 July 2020

1.7.3. For those who respond to the gender identity question with '*in other way*', two open-text follow-up questions are then proposed. The draft guidance explains:

'With gender identity, it is important that people can express their own deeply held sense of their own gender, hence the suggested questions offering the opportunity to describe this in their own words.'
(p.12)

1.7.4. No such recognition is made in respect of those who think it is important to clearly record their biological sex, nor is it recognised that some people would not be willing to respond to a question on gender identity. The response options include 'prefer not to say', which is not an adequate option for those who actively reject the concept of gender identity.

1.7.5. The two questions titled '*legal sex*' then ask, '*What is your sex?*' (p.15). Again, this slippage between different concepts is not discussed. The draft states that guidance should be given, making clear the question is about legal sex, which has the effect of conflating two separate characteristics in the same question.

1.8. International guidelines

1.8.1. The draft guidance states '*There are no international standards for how to ask questions around sex and gender*' (p.12). This ignores a range of European guidelines which advise organisations to collect data on biological sex. It also appears to ignore the role undertaken by Eurostat in relation to survey harmonisation, which is described in a lengthy ONS report on the UK Labour Force Survey in the following terms:

'Eurostat - the "Statistical Office of the European Communities" was established in 1953. Its mission is to provide the European Union with a high-quality statistical information service, by using uniform rules to collect all statistical data from the National Statistical Institutes of each of the Member States of the European Union.'
(2017: 3).¹⁵

1.8.2. The draft guidance cites the European Statistics Code of Practice (in relation to methodology) which is published by Eurostat. However it does not acknowledge that Eurostat views sex as a core social variable (indeed, it is listed as the first core variable for data collection) and that this '*refers to the biological sex of the person*' (2007: 55). This is shown in Box 2.

¹⁵ ONS (2017) [Labour Force Survey User Guide User Guide. Volume 9 – Eurostat 2010 - 2017](#)

Box 2. Eurostat: Task Force on Core Social Variables Final Report

VARIABLE: SEX

Short description

Sex of the person

Coding

- Transmission codes

Codes	Labels
1	Male
2	Female

- Classification used This variable is a standard one in survey and administrative data.

Definition

- Reporting unit Individuals
- Filter None
- Reference period No reference period
- Concept Sex of the person
Sex refers to the biological sex of the person. According to WHO, “sex” refers to the biological and physiological characteristics that define men and women while “gender” refers to the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women. Following this description, WHO considers that “male” and “female” are sex categories, while “masculine” and “feminine” are gender categories.
- Technical Issues There are no technical issues linked to this variable.

Rationale

The need for adequate information on the situation of women and men in all policy areas it is generally recognised. By studying the gender differences and inequalities it is possible to understand them, and on this basis, make plans, formulate and monitor policies in all spheres of society. Hence, the importance of the variable “sex” which being cross classified with other characteristics of the population provides the basis for evaluating progress towards the complete elimination of still existing gender-based stereotypes.

Issues and developments

- Coverage of the variable: all persons

Good practices

- Data collection through interviews or registers
For analysis purposes, it is essential that information on sex is not only filled in, but also accurate as much as possible. If the information on sex is missing from the questionnaire, it should be imputed on the basis of the answers provided to other questions.

Source: Eurostat: [Task Force on Core Social Variables Final Report 2007](#): 57

- 1.8.3. In 2020 the European Commission (EC) published guidelines on implementing standardised key social variables in surveys. This set out: 'definitions, categories and implementing guidelines of 38 social variables common to the several datasets under Regulation (EU) 2019/1700 of the European Parliament and of the Council of 10 October 2019 establishing a common framework for European statistics relating to persons and households, based on data at individual level collected from samples (IESS).' ¹⁶
- 1.8.4. Again, the EC guidelines list sex as the first key social variable, using a biological definition. The EC guidance states, '***In case the biological sex of a person is not known, the information should be replaced by either the administrative sex (administrative data) or the self-declared sex (survey data)***' and that '*for data transmission to Eurostat the categories 'not stated' and 'not applicable' are not allowed for the variable 'sex'.*' (p.5)
- 1.8.5. A recent EC policy report on inclusive analysis advised that '*in survey research, questions about gender should not be used as a proxy for birth sex*' (2020: 179)¹⁷ and cautioned that '*conflating birth sex and gender identity in questionnaires can lower the precision and relevance of survey research for policy development and innovation*' (Ibid. 192).
- 1.8.6. The UN Nations Economic Commission for Europe manual for developing gender statistics (2010)¹⁸ states that sex refers to the '*relatively fixed biological and physiological characteristics that define men and women*' and that sex-disaggregated data is needed to underpin gendered analysis.
- 'The policy and research interest is almost always in gender, not sex, but examination of data by sex is the means to making gender-based analyses. Sex-disaggregated data are needed to show the differences that exist between women and men in a given society. Data must be disaggregated by sex in order to analyze gender issues.' (p.1-2)
- 1.8.7. In November 2020, independent analyst Susan Sinclair [wrote](#) to the Chief Statistician to advise him as to how some international organisations operationalise sex and gender identity in data collection, citing guidance published by the United Nations (UN) and the European Institute for Gender Equality (EIGE). As highlighted by Ms Sinclair, the UN guidance states:
- 'Confusion between "sex" and "gender" still persists among producers and users of statistics. The word "sex" refers to biological differences between women and men. Biological differences are fixed and unchangeable and do not vary across cultures or over time. "Gender", meanwhile, refers to socially-constructed differences in the attributes*

¹⁶ European Commission (2020) [Standardised key social variables. Implementing guidelines](#)

¹⁷ European Commission (2020) [Gendered Innovations 2: How Inclusive Analysis Contributes to Research and Innovation. Policy Review.](#)

¹⁸ United Nations Economic Commission for Europe (2010) [Developing Gender Statistics: A Practical Tool.](#)

and opportunities associated with being female or male and to social interactions and relationships between women and men...

*The term “gender” has often been wrongly used in association with data. “Gender disaggregation” or “data disaggregated by gender” are incorrect terms. Gender statistics are disaggregated by sex, an individual-level characteristic commonly recorded in censuses, surveys and administrative records, not by gender, a social concept relevant at the level of a population group. **When data on demographic, social or economic characteristics are collected in the field, it is the sex of a person that is recorded, as female (woman) or male (man), not the gender.***’ (p.2, emphasis added)¹⁹

- 1.8.8. The EIGE also define [sex](#) in biological terms, and describe [sex-disaggregated statistics](#) as ‘*data collected and tabulated separately for women and men allowing the measurement of differences between women and men in terms of various social and economic dimensions*’.
- 1.8.9. Both the UN and EIGE reports are referenced in the draft guidance, but the key points highlighted by Ms Sinclair are omitted, namely that data should be collected on the basis of biological sex, and not conflated with gender identity. Nor are the statistical standards set out by Eurostat discussed. The draft guidance therefore does not acknowledge that if its proposals are adopted, Scotland will be a clear outlier according to European standards.

¹⁹ United Nations (2016) [Integrating a Gender Perspective into Statistics](#). Department of Economic and Social Affairs Statistics Division

Part 2. Data reliability

2.1. Are the numbers too small to matter?

2.1.1. The draft guidance assumes that data collected using either a sex question or a gender identity question will be effectively interchangeable due to the small trans population.

‘For the vast majority of people, sex and gender identity questions will provide the same response, namely female and woman/girl, or male and man/boy. This also means that for many uses, whether data is collected using a sex question or a gender identity question, will in reality give you data that will work for uses where you need data on either concept.’ (p.9)

2.1.2. The draft guidance relies on two sources to support the assumption that the trans population is so small that the impact on data will be negligible. Neither source is sufficiently reliable for the purposes of the proposal in the draft guidance. The first source is a GIRES report, published in 2011, which estimated a UK transgender prevalence rate of between 0.6 and 1%.²⁰ The draft guidance does not discuss whether this being almost a decade old raises any issues for its relevance now.

2.1.3. The second source is an EHRC report, which the draft guidance relies on to estimate the size of the ‘non-binary’ population. The draft guidance states that ‘*estimates suggest that 1 in 250 people in the UK identify as neither male nor female*’ (p.9). This appears to be taken from Table 1 in the EHRC report, which shows that 0.4% of respondents described their gender identity ‘*in another way*’. However the EHRC report is based on non-representative trial data (using panel members who had signed up to answer online surveys) and states that the data ‘*cannot be used to estimate the percentage of the population in particular trans groups*’ (2012: 4).²¹ It is a concern that this clear caveat is ignored.

2.1.4. In the large-scale non-randomised UK National LGBT survey (GEO, 2018)²² just over half (51.7%) of the trans cohort (n=14,320) identified as non-binary (2018: fig 3.1). The high proportion of non-binary respondents is particularly noteworthy given that the UK Government estimate of the UK trans population (between 0.35% and 1%) does not include non-binary people (2018: 14 note 5).²³

²⁰ Gender Identity Research and Education Society (2011) The number of gender variant people in the UK

²¹ Glen, F. and Hurrell, K. (2012) [Technical note: Measuring Gender Identity](#). EHRC

²² Government Equalities Office (2018) [National LGBT Survey: Research report](#)

²³ Government Equalities Office (2018) [National LGBT Survey: Research report](#)

- 2.1.5. As discussed below, the trans population is now likely to be larger than estimated in 2011. There is persistent international evidence of sharp growth in the numbers identifying as transgender, particularly among younger age groups. This is not acknowledged anywhere in the draft guidance.

2.2. Differences between sex and gender identity by age, sex, and other characteristics

- 2.2.1. No consideration is given to variation within the trans population, or to societal change since 2011, and what this means for how substituting gender identity for sex would affect data reliability differentially across the population.

Change in trans status by sex and age

- 2.2.2. The draft guidance does not acknowledge what appears to be significant change within the cohort of people who identify as trans, particularly in terms of age and sex, and that the proportion of younger females reporting as transgender is now consistently higher than that of males.
- 2.2.3. This patterning is evident in [referrals](#) to the Gender Identity Development Services (GIDS) in the UK, where the number of girls far outstrips that of boys. Referrals of natal girls to GIDS increased by more than 4,000% from 2010 to 2017/18: from 40 to 1,806.²⁴ In 2017/18, natal girls accounted for 72% of referrals to GIDS.²⁵ By contrast, GIREs reported that in 2007, of those aged 15 years and over presenting to gender services, the split was 80% male to 20% female.
- 2.2.4. In Scotland, practitioners from clinical and voluntary organisations have observed a large increase in demand for gender identity services from younger adults (under 25-year olds) and pre-pubertal children (Thomson et al. 2018: 70).²⁶ While data on referrals to the Sandyford Gender Identity clinic in Glasgow are limited, Thomson et al. state *'these percentage increases in referrals [to GIDS] are very similar to those experienced by the Sandyford Young Persons service, who saw a 103.2% increase from 2014 to 2015, and a 43.0% increase from 2015 to 2016'* (2018: 90).
- 2.2.5. An uneven sex-distribution is evident in multiple jurisdictions, including Canada, the United States, Finland, and the Netherlands (Marchiano, 2017).²⁷ A recent large-scale study of adolescents in China, based on data collected in 18 secondary schools, reported that of the 5,590 female respondents, around a quarter did not identify with their sex at birth: 15.4% identified as boys, 2.0% as non-binary, and 8.5% as 'questioning'. By contrast, among the 6,518 male respondents, only 3.2% identified as girls,

²⁴ Telegraph (2018) [Minister orders inquiry into 4,000 per cent rise in children wanting to change sex](#). 16 September 2018.

²⁵ See GIDS: [Gender Identity Development Service statistics](#) (undated); [GIDS referrals increase slows in 2016/17](#) (2017).

²⁶ Thomson, R., Baker, J. and Arnot, J. (2018) [Scottish Public Health Network \(ScotPHN\) Health Care Needs Assessment of Gender Identity Services](#)

²⁷ Marchiano, L. (2017) [Outbreak: On Transgender Teens and Psychic Epidemics](#) Psychological Perspectives: A Quarterly Journal of Jungian Thought. Vol. 60.

2.1% as non-binary, and 4.9% as 'questioning'.²⁸ The same pattern is also reflected in the distribution of applications to change legal sex in Belgium, following the introduction of gender self-identification in 2018.²⁹

2.2.6. A 2018 large-scale Swedish study, based on a population-representative sample of 50,157 Stockholm County residents, reported that 2.0% of males and 3.5% of females wanted to live or be treated as someone of a different sex. This proportion increased to 6.3% among the 22 to 29 year old age-group (for both sexes).

2.2.7. Age and sex differences are also reported in the National LGBT survey:

'Amongst trans respondents, those aged under 35 were more likely to identify as trans men (26%) than those aged 35 or above (10%). Trans respondents aged under 35 were also more likely to identify as non-binary (57%) than respondents aged 35 or above (36%). In contrast, trans respondents aged 35 or above were three times as likely to identify as trans women (54%) than those aged under 35 (17%).' (GEO, 2018: 19).³⁰

Other characteristics

2.2.8. Data from the National LGBT survey (GEO, 2018)³¹ also suggests potential for other significant differences in the distribution of the trans population. The full survey secured over 108,000 non-randomised responses, and allows for analysis comparing trans respondents with non-trans respondents. The survey's trans cohort differed from those without trans status across a range of demographic factors. For example, the proportion of trans respondents reporting a disability was double that of respondents without trans status, at 32.5% and 14.1% respectively (2018: fig. 3.7). This suggests that replacing sex with gender identity will alter information on those with disabilities more than those without. The survey also reports a different distribution by income, education level and other characteristics.

2.2.9. Without a reliable estimate as to the size and demographic distribution of Scotland's trans population, the proposals in the draft guidance represent a clear risk in terms of data reliability.

2.3. Data reliability and the census

2.3.1. The draft guidance states that a self-identified sex question will be asked in Scotland's Census 2022, and that '*previous censuses have also asked a self-identified sex question*' (p.7). It does not however acknowledge that the approach taken by the census authorities remains contentious and has been

²⁸ Wang Y, Yu H, Yang Y, et al (2020) [Mental Health Status of Cisgender and Gender-Diverse Secondary School Students in China](#). JAMA Netw Open. vol.3 (10)

²⁹ See MurrayBlackburnMackenzie (30 November 2020) [International evidence and the risks of reframing the sex question in the census](#)

³⁰ Government Equalities Office (2018) [National LGBT Survey: Research report](#)

³¹ Government Equalities Office (2018) [National LGBT Survey: Research report](#)

subject to strong criticism from academic experts in relevant subject areas.³² It remains, moreover, a question limited to two responses.

- 2.3.2. It should be noted that *only* the 2011 census explicitly guided respondents to self-identify in answering the sex question, using online guidance for a paper form. This was introduced at the request of special interest advocacy groups, without proper consultation or democratic oversight. It can also be assumed that most people were unaware of the online guidance, given that this had to be purposively sought out. Indeed, as observed by the CTEEA Convener Joan McAlpine MSP, even Stonewall seemed unaware that such online guidance existed (CTEEA Official Report 12 September 2019 [col. 6](#)).
- 2.3.3. The effect of the shift in 2011 is unknown. Giving oral evidence to the CTTEA Committee, the then Director of Statistical Services stated:

“I do not think that we know how it affected the data in 2011. From looking at the data and the quality assurance that we have done, there is no evidence to suggest that we started to see trends that were different from anything that had happened in the past. However, you are right—we do not know how the guidance affected people and we do not know how many people actually looked at it in 2011”.

(Wilson, 12 September 2019 [col. 6](#))
- 2.3.4. While it is true that respondents have self-reported their sex in previous censuses, this differs from a situation where guidance explicitly frames the question in terms of self-identified gender. It is unhelpful to confuse the common practice of asking people to report a characteristic without providing evidence (self-report), and *actively guiding* people to consider a characteristic as having no definition beyond the personal and subjective (self-identified).
- 2.3.5. The draft guidance states that the proposed approach in Scotland’s 2022 census was recommended by NRS ‘*as being the best balance in meeting the diverse range of user needs*’ (p.16).
- 2.3.6. NRS have failed to provide any evidence of ‘user need’ for a sex question based on self-identified data. On 9 January 2019 in a CTEEA Committee session, NRS Director of Statistical Services Pete Whitehouse refused to disclose the details of any census users who had requested data based on a self-declared gender identity question despite being pressed several times by Committee Members.³³ As noted above, many expert stakeholders have also argued strongly against a self-identified sex question.
- 2.3.7. No consideration is given to the recent interventions by regulators on the census, which are also more generally relevant to the Chief Statistician’s proposals, as detailed next.

³² Sunday Times (15 December 2019) [Sex question catapults census into trans war](#)

³³ For further details see: MBM blog (13 January 2020) [Losing consensus on the census](#)

Office for Statistics Regulation

- 2.3.8. In September 2020 the [Office for Statistics Regulation](#) (OSR) as part of its assessment of the UK censuses, stated that it was ‘*essential*’ that the ONS examine the concerns raised by users, including senior statisticians, about the proposed sex question guidance, and the implications for data reliability at a small group level. In a strongly worded recommendation, OSR stated:

‘The assessment team thinks it essential for ONS to consider the concerns raised by users during its further testing and research on the guidance on the sex question, and consider the impact of data quality on the analysis of small sub-groups of the population.’

Methodological Assurance Review Panel

- 2.3.9. On 30 October Sir Bernard Silverman, Chair of the Methodological Assurance Review Panel for the 2021 Census in England and Wales [wrote](#) to the National Statistician Sir Ian Diamond, stating that the Panel required a clear assessment on the possible statistical effects of a self-identified sex question in the England and Wales census, and expected the ONS to provide rigorous and detailed feedback on to stakeholders on the issues raised.³⁴

‘Whatever ONS’s view of the aim of the sex question, and whatever the wording of the guidance, the Panel expects to be given a clear assessment of any possible bias or distortive effects, both directly on the question itself, and also on other aspects of the methodology of the census, such as approaches to linkage, undercount and imputation, and future uses of the census...

The code of practice refers to stakeholders, users, and topic and methods experts. The authors of the two letters, in the main, fall into all three categories. This may well also be the case for other stakeholders who take a different view. The code of practice places strong requirements for the views of groups in all these categories to be understood and addressed. Because this issue is contentious, it would be prudent for ONS to err on the side of abundance of engagement, collaboration and understanding of needs and views. It would seem appropriate to approach paragraph Q2.2 of the code of practice with a presumption that there is a sincere range of views as to what constitutes “recognised standards” in this area. As well as more informal contact with users and experts, they will presumably be given written feedback addressing issues they have raised, at an appropriate level of detail and rigour.’

- 2.3.10. While these are key interventions, made well ahead of the publication of the draft guidance, they are not acknowledged and none of the implications of these recommendations and advice for this exercise are considered.

³⁴ Sir Bernard’s letter was in response to a letter by a group of individuals, ourselves included, who have been involved in scrutinising plans for the sex question in the census. This is shown in Annex 4.

- 2.3.11. Overall, considerations for data reliability appear to be absent from the development of the draft guidance. The [risk register](#) published around the time of the first meeting does not discuss data quality or reliability: instead, the key concern is that some stakeholders will not agree with the proposals.
- 2.3.12. In January 2020 we wrote to the Chief Statistician and asked that the risk register might be updated to reflect concerns around data reliability; however this was not taken on board.

‘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.’ (See Annex 2).

Part 3. Why we need data on sex

3.1. Sex is a core demographic variable

- 3.1.1. Biological sex is well-established to be a key influence on 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 between being born physically one sex or the other, and a person’s physical, social, economic, and political experiences and outcomes from birth onwards.
- 3.1.2. It is surprising and frustrating that we now need to actively defend data collection on this basis. That the case for collecting data on sex has been made by senior academics who routinely work with large population data sets, including statisticians, as noted earlier, is not acknowledged in the draft guidance.
- 3.1.3. Existing research has not only demonstrated substantial differences related to sex in outcomes and experiences across multiple contexts, it has also sought to provide explanations for these differences, based on studying the potential mechanisms. Researchers have examined, among other things, how different social and educational responses to girls and boys from birth onwards may influence future behaviours and choices; employer reluctance to employ and promote women who are perceived as a ‘pregnancy risk’; the effect of going through a male puberty on the body, for factors such as strength and height, affecting differences in areas such as sporting performance. The precise link between socialisation and social perceptions and expectations based on sex, and sex itself, is often contested: but both come back to the same point, the sex a person has.

- 3.1.4. As Criado Perez argues, without sex-disaggregated data we cannot see, understand, and address sex discrimination, direct or indirect. The draft guidance offers no theoretical argument as to why gender identity would better explain differences in the experiences of women and men, or empirical evidence that it does.
- 3.1.5. In treating identity as a replacement variable for sex, there is also no recognition that transition types and ages vary considerably. In the National LGBT Survey 2017 (GEO, 2018), a much higher proportion of transmen respondents reported starting to transition (social or medically) at a younger age (69% before 25 years), compared to transwomen (37% before 25 years). Around 15% in both categories responded that they had not yet started to transition. Among the non-binary respondents, 43.7% believed that transition was not relevant to them. These findings are shown in Table 1. They show that gender identity is not only a subjective category, but is also a highly heterogeneous within each identity category, in terms of the extent and timing of transition.

Table 1. Age-group of transition among GEO National LGBT survey trans respondents (%)

Age-group	Gender identity			
	Trans woman	Trans man	Non-binary	All trans respondents
Under 16	5.8%	22.6%	7.6%	10.5%
16-17	6.8%	21.1%	6.7%	9.9%
18-24	24.1%	25.5%	12.8%	18.6%
25-34	15.7%	7.8%	4.5%	8.2%
35-44	14.3%	3.9%	1.8%	5.6%
45-54	11.3%	1.1%	0.7%	3.5%
55-64	4.7%	0.3%	0.2%	1.4%
65-74	0%	0%	0.1%	0.2%
75+	0%	0%	0.2%	0.1%
Not started	14.7%	16.5%	20.1%	17.9%
Not relevant to me	1.3%	0.5%	43.7%	23.1%
Prefer not to say	0.7%	0.4%	1.6%	1.1%
Total (%)	99.4%	99.7%	100.0%	100.1%
N	3,740	3,170	7,410	16,590

Source: National LGBT Survey 2017, UK Government

Data calculated using: <https://government-equalities-office.shinyapps.io/lgbt-survey-2017/>

Totals may not add to 100% due to rounding.

- 3.1.6. The draft guidance does not consider that transgender identities may be regarded as fluid in the present, or change over time, and in some cases, a person may cease to have an identity different from their sex. Yet the proposal assumes that in understanding a person's present situation in a

host of contexts, their present declared identity will be relevant, but that their sex since birth, and the continuing material reality of that, will not.

- 3.1.7. The Scottish Government needs to explain why, for example, in a case such as the one shown in Box 3 below, that it believes it is more useful and explanatory to record the convicted person as female, and not as male, in the data gathered by the police, the Crown Office, the courts and the prison service, and how that better assists planners, policymakers, researchers and those holding services to account.

Box 3. ‘Cambridgeshire rapist jailed for 15 years after attack that left victim with recurring nightmares’

Cambridge Independent, 15 January 2021

A rapist has been jailed following an attack on a woman in Godmanchester.

Michelle Winter, 49, of Buttermel Close, Godmanchester, a transgender individual who identifies as a female but has not undergone surgery, raped the woman at the same address on May 16 last year.

The victim told police the following day and officers noticed she was covered in bruises.

They worked closely with staff at The Elms Sexual Assault Referral Centre (SARC) to support the victim and build a case against Winter.

The victim told officers she still had nightmares about the attack and had since woken up screaming “get off me”.

At Cambridge Crown Court today (Friday January 15), Winter was jailed for 15 years for charges of rape and assault occasioning actual bodily harm.

Judge David Farrell described Winter as a dangerous individual, with a “clear propensity to violence”...



- 3.1.8. Recording based on gender identity alone is likely to have significant implications for the accuracy and reliability of criminal justice statistics, given the differences in offending patterns by sex. The inclusion of a very small number of biological males who identify as female could easily skew female

sexual offending statistics, or any other category for which the prevalence of female offending is particularly low.

- 3.1.9. We note that [Criminal Proceedings in Scotland 2018/19](#) show a case of rape/attempted rape by a female. Whether this case refers to a male or female is not known. When we enquired, a Scottish Government official stated that the case 'appeared' to be misclassified, on the basis that they had '*found nothing in the media that would fit the bill for a female being convicted of rape during 2018-19*', but could provide no further clarity.
- 3.1.10. The Scottish Government needs to explain why, in data on pay and grading in public bodies, it is more useful and explanatory to record as female a group that is likely to include people who have transitioned after one or more decades in the workplace as men, perceived as men, and not uncommonly having had families as men, without interruptions due to pregnancy and maternity leave.
- 3.1.11. It ought to set out why it is more helpful to record a growing group of young people who appear likely to be drawn disproportionately from one sex only, as transgender, in trying to understand the various influences on their lives and what might cause their individual experiences to differ.
- 3.1.12. The draft guidance simply does not explore whether a loss of reliable data on sex will disadvantage our understanding of how outcomes differ by sex, nor does it make the case for why such data is no longer needed.
- 3.1.13. These proposals are an absolute loss for those who need data on sex, but they are also a lost opportunity to understand better how experience and outcomes vary with different types of transgender identity. It is irresponsible to decide that sex is irrelevant to the experience of those who identify as non-binary, without first testing that. This can only be done by collecting data on both gender identity and sex. The UK LGBT survey demonstrates how much more can be done with a data set which collects both sets of data.
- 3.1.14. Data collected by public bodies on sex is not only needed to monitor and research public functions at the aggregate level. It is also directly relevant where single sex provisions under the Equality Act are invoked. The Scottish Government's own consultation document on the Gender Recognition Act argued that single sex services should continue to be able to exclude under certain conditions all users of certain sex, regardless of identity, and employers should be able to operate effectively the genuinely occupational requirement, which allows staff of only one sex to be deployed in certain contexts.³⁵ In its response to the House of Commons Women and Equalities Committee [inquiry into Gender Recognition Act reform](#), the UK Government Equalities Office stated '*The law is clear that service providers are able to restrict access to single-sex spaces on the basis of biological sex if there is a clear justification*'.³⁶

³⁵ Scottish Government (2019) [Gender Recognition Reform \(Scotland\) Bill: consultation](#)

³⁶ Government Equalities Office (2020) [Written evidence submitted by Government Equalities Office on behalf of HM Government](#)

3.1.15. It is there remarkable that, although this document proposes rules on data gathering which will apply across the public sector, and apply mainly to data gathered in the context of service delivery, the draft guidance does not consider how this need can be met. It instead proposes an approach that is in direct conflict with the statements in the GRA consultation document.

3.2. Conclusion

- 3.2.1. The argument for collecting sex is not an argument against service providers also gathering information on how staff and users identify, to assist the delivery of services as well as increase what we know. It is an argument for not treating such data as a *replacement* for data on sex.
- 3.2.2. The initial view of the Chief Statistician – that public bodies should not collect data on biological sex – raises serious concerns about our ability to understand how sex shapes people’s lives and develop policies that redress sex discrimination.
- 3.2.3. An uncritical reliance on a contested and subjective concept, for the purposes of data collection, including official statistics, also carries risks for trust in data produced by public bodies. We note also that [trustworthiness](#) is one of the three pillars that underpin the UK Code of Practice for Statistics.
- 3.2.4. The draft guidance states that ‘*currently the vast majority of official data is collected on the basis of gender identity and there is very little data collected on the basis of sex registered at birth, or legal sex*’ (p.12). We think that many stakeholders will be surprised to learn of this. If true (no supporting evidence is provided), we think that further investigation is required to establish when Scottish bodies stopped collecting data on sex, why, who was consulted and what impact analysis was done before and after.
- 3.2.5. In a recent article (see below) we argued that if data on sex ceases to be collected in the census, that this would set a precedent for other organisations. The draft proposals produced by the Chief Statistician, confirms this concern.

‘Further, if sex were to cease to be collected in the census, it would set a powerful precedent: many organisations would be likely to believe that if sex is too sensitive even for the census to solicit, they could not ask for it either, in almost any other context, including ones where asking such a question is used to determine access to single sex provision of any sort. This is the larger risk we see posed to sex as a functional category for any purpose, including the operation of the Equality Act 2010.’ (2020: 15)³⁷

- 3.2.6. Once sex is conflated with self-declared gender identity in a single category, it becomes impossible to collect data which allows the impact of policies on people who are born female and who live with various consequences associated with that to be accurately described and assessed. The burden of

³⁷ Hunter Blackburn, L., Murray, K. and Mackenzie, L. (2020) [Losing Sight of Women’s Rights \(Again\): A Response to Cowan et al.](#)

proof remains with the Scottish government to provide the evidence that data on sex is no longer relevant and that it is preferable to collect gender identity. The draft guidance does not produce the arguments and evidence upon which such a far-reaching policy decision can be rationally justified.

Annex 1. Losing sight of biological sex: Working Group on sex and gender in data

Scotland has already lost robust, high quality data on sex across a number of policy areas in Scotland through the adoption of data collection practices that muddy sex and gender self-identification. As detailed below, this conflation is evident in the policies and practices adopted by the organisations variously represented in the Working Group, as well as existing data collection practices.

COSLA

In February 2019 The Times reported that COSLA had instructed officials to replace 'sex' with 'gender' in formal documents and correspondence, and that this move was informed by the Scottish Government's position which 'confirmed that they speak about gender rather than sex and are moving towards a non-binary definition'.³⁸

Police Scotland

Police Scotland already [record incidents](#) based on self-declared gender identity rather than sex, unless evidentially relevant to the crime ([COPFS guidance](#) gives an example of where a complainer subsequently learns of the biological sex of a transgender person they have had sexual contact with and alleges that had they been aware of this they would not have consented). The Cabinet Secretary for Justice has also confirmed that the Scottish Courts and Tribunal Service record by 'self-declared gender', rather than biological or legal sex.

It is not known why or when criminal justice agencies introduced recording based on self-declared gender identity, or if any due diligence was carried out in relation to the impact on data quality. Police Scotland policy '[evolved as best practice](#)', with no effective start date, and was not subject to an impact assessment.

The Police Scotland '[Transitioning at Work](#)' policy for staff members is based on gender self-identification principles. Similarly Police Scotland [search procedures](#) provide for a suspect to be searched by staff of the same 'gender' rather than sex (section 12.6).

Equality and Human Rights Commission

As discussed in part one, the EHRC support data collection based on gender self-identification principles, and suggest that collecting data based on sex may be unlawful. This approach is consistent with its wider position in this area, which asserts that people with the characteristic of gender reassignment should generally be treated in line with their self-declared gender, irrespective of whether they hold a GRC.

The EHRC is currently facing a judicial review on the grounds that some of its statutory guidance on sex and gender reassignment is not fully compliant with the Equality Act 2010, and gives undue weighting to the latter characteristic.³⁹ The EHRC has recently withdrawn from its website some of its administrative advice

³⁸ Times (6 February 2019) [Top civil servant's tweet leads to accusations of pro-trans bias](#)

³⁹ See: Ann Sinnott crowdfunder [Official sources provide unlawful guidance on the 2010 Equality Act](#)

relating to the provision of services to people with the characteristic of gender reassignment and amended others, after being challenged to explain how it was justified from the legislation. In relation to the EHRC 2011 'Statutory Code of Practice: Services, Public Functions, and Associations' practising solicitor Rebecca Bull states that in her view *'the Code does not adequately reflect the EA 2010 and it seems that it has been deliberately edited in order to take into account the views of only one stakeholder group (gender reassignment) over those of women'* (2020: 6.19).

NHS Information Services Division

In Scotland the Community Health Index (CHI) is a population health register used for administering the functions of primary care departments (such as General Practitioner services), ensuring that individuals are invited to screening and immunisation programmes, and as an epidemiological tool for public health research.

All patients in NHS Scotland are assigned a **CHI number**, which is 10 digits long, where the 9th digit encodes biological sex: an even number designates female, an odd number designates male. In written **evidence** to a parliamentary committee in December 2018, the Head of Equality and Engagement, NHS National Services Scotland stated that patients could record their gender identity, in place of their sex.

"Allowing trans people to record their sex in accordance with their lived identity on medical records and diversity monitoring forms in health rather than their biological or GRC sex"

In practice, when a person chooses to change their sex marker a new medical record is created, with a CHI number that reflects the opposite sex, and both records (old and new) linked. A patient may however, refuse to link the new and old records.

See further: Wheater (2020) [Recording sex on medical records: a case study of NHS Scotland](#)

Scottish Prisons Service

In 2014 the Scottish Prison Service (SPS) **introduced** its *Gender Identity and Gender Reassignment Policy*. The policy was developed in partnership with the Scottish Trans Alliance (STA) and Stonewall, and established a de facto mixed-sex estate, by enabling male prisoners who identified as women to be accommodated in the female estate on a case-by-case basis, subject to risk assessment, and vice-versa. The policy also provided that prisoner searches be undertaken on the same basis, and stated that staff concerns about searching a person of the opposite sex should be addressed, 'via training and information about gender reassignment and equality requirements'. The impact on female prisoners and staff was not considered or assessed. In **late 2018** the SPS stated that the policy would be reviewed. Two years, in **December 2020**, the SPS stated that it was due to start 'a series of conversations' with stakeholder in the new year.

National Records of Scotland (NRS) and Office for National Statistics (ONS)

Both the ONS and NRS plan to publish accompanying guidance to the sex question in the next census, which will advise respondents to answer based on their self-declared gender identity. The NRS originally proposed a 'sex' question with a non-

binary response option, however this was rejected on the recommendation of the CTTEA Committee.

Both groups have unusually close working relationships with transgender advocacy groups, as evidenced in correspondence accessed via Freedom of Information: see [here](#) (ONS) and [here](#) (NRS). Further detail on the partisan approach taken by both organisations are available in the following blogs (see also Jones and Mackenzie, 2019⁴⁰ and Murray and Hunter Blackburn, 2019).⁴¹

[Back under the radar? A review of plans for the census](#) (24 September 2020)

[A tale of two letters: whose views count?](#) (24 February 2020)

[Losing consensus on the census](#) (13 January 2020)

Both organisations use terminology associated with transgender advocacy⁴², such as ‘assigned at birth’⁴³ and ‘cisgender’.⁴⁴ These are not neutral descriptive terms, but are underpinned by particular ideological assumptions that many people reject, namely that everyone has an innate gender identity, and that for some people this does not match their biological sex.

Scottish Government: Scottish Household Survey

In 2018 the Scottish Household Survey (SHS) replaced the longstanding sex question (male/female) with a question that asks respondents’ to describe their gender identity, including ‘in another way’. While referring to sex in previous outputs, the 2018 SHS report stated that biological sex was not previously collected:

“In SHS 2018, the question on gender was non-binary and included two additional responses: ‘Identified in another way’ and ‘Refused’. This addition allows those who identify as neither a man nor a woman the option to respond accurately and honestly. In previous years, the question on gender was binary and only two response options were available to respondents: male and female. As the questions have always reported gender based on what respondents tell interviewers, there has been little change to the concept behind the question being asked. Biological sex is not collected and has never been asked in the SHS.

Higher education

While not represented on the Working Group, the loss of data on biological sex in Higher Education datasets should also be noted. The UK [Higher Education Statistics](#)

⁴⁰ Murray, K. and Hunter Blackburn, L. (2019). [Losing sight of women's rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland](#). Scottish Affairs vol. 28(3)

⁴¹ Jones, J.C. and Mackenzie, L. (2020) [The political erasure of sex: Sex and the census](#)

⁴² For example, see: [MSPs' 'frustration' revealed over census sex questions](#) (National, 10 January 2020) and ONS [Gender identity: An overview of our work on gender identity](#).

⁴³ The phrase “sex assigned at birth” reflects a belief that a prediction is being made at birth about the inner gender identity a person will later manifest, rather than an observation being made of whether they are female or male in reproductive terms. The phrase originates with the treatment of the very small number of people whose physical sex is ambiguous at birth, estimated to be around 7 or 8 cases in the UK per year. See:

https://www.parliament.scot/S5_European/Inquiries/CensusBill_DSDFamilies_CTEEAS518CB33.pd

⁴⁴ ‘Cisgender’ is used to refer to a person who is believed to have a sense of gender identity which aligns with their biological sex. The term is contested and rejected by those who critique the underpinning assumption of innate gender identity.

Agency (HESA), which has a [Statutory role](#) in Scotland, states that data collection on 'sex' by Higher Education Institutions (HEIs) should include an 'other' response, for staff who do not identify as male or female.

Annex 2. MBM letter to the Chief Statistician. 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 sex⁴⁵ 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>.

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

⁴⁵ 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.

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.

unknown.⁴⁶ 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)

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,

⁴⁶ 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'.

on pay), which was only possible because it had collected data both on sex at birth and self-declared gender identity.

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).⁴⁷ 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

⁴⁷ [Sex and Gender Working Group – Meeting 23 September 2019. Equality and Human Rights Commission submission.](#)

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 public⁴⁸. A failure to consider the implications of replacing data on sex with data on self-declared gender identity imperils 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 and Dr Kath Murray

⁴⁸ <http://natcen.ac.uk/our-research/research/public-confidence-in-official-statistics/>

Annex 3. Legal Opinion on EHRC Statement by Aidan O’Neill QC: Key extracts

‘... **privacy rights are not absolute** and individuals do not have a universal veto on what can and cannot be asked of them. In any event, the Human Rights Act 1998 requirements apply only to public authorities or to private bodies when exercising public law functions.

Although the collation (and potentially the disclosure) of information and data about people’s private lives (which would include, details such as their name, age, sex, address, nationality, racial or ethnic origins, marital status, sexual orientation, sexual history, gender identity, health records, credit history, political affiliation, voting record, financial health, criminal record, whether charges and/or convictions) may be said to engage the rights protected by Article 8 ECHR, it **will not constitute (unlawful) interference with those rights provided that the collation and/or disclosure is done in accordance with law and separately may be said to be “necessary” within the context of the proportionality test**: that is to say that the collation and/or disclosure must involve the least interference with the right to respect for private and family life which is required for the achievement of the legitimate aim pursued.

...The EHRC advice to the effect that

“Forcing trans* employees or service users to disclose their sex as assigned at birth would be a potential violation of their human rights, particularly their right to privacy and dignity under Article 8 ECHR”

is either **wrong or misleading or incomplete**. It should properly have advised that

“Requiring trans* employees or service users to disclose their sex as assigned at birth would not be a potential violation of their human rights, particularly their right to privacy and dignity under Article 8 ECHR, provided that

- such a requirement was made ‘in accordance with law’ and
- the requirement was made for a legitimate purposes and
- requiring this information was in all the circumstances ECHR proportionate”

(3) The EHRC further advise that

“Forcing a trans* person without a Gender Recognition Certificate (GRC) to disclose their legal sex would result in that person being ‘outed’ as a trans* person. ... In some instances, forcing people to ‘out’ themselves will also breach the Equality Act 2010.”

The terms of this statement are too general and unspecific and divorced from any actual context to count properly as legal advice.

What can be said, however, is that requiring a person without a

Gender Recognition Certificate (GRC) to disclose their legal sex may be justified as a proportionate requirement made in pursuit of a legitimate aim. Such a requirement would not necessarily involve a person being “outed” as a trans* person, if “outed” is understood to mean publicised or made common knowledge by its unauthorised or unwarranted disclosure by the recipient of the information to others.

... **there is nothing in the GRA to require the expunging or re-writing of past history**, or to require that the previous state of affairs be expunged from the records of officialdom, or the eliminating or denial of the memories of individuals who knew the person in a non official capacity in their original birth sex.

In sum it may certainly be said that a mandatory question relative to “what was your sex at birth” will not constitute an unlawful intrusion into an individual’s right to respect for their private life as protected under and in terms of the European Convention on Human Rights (ECHR) in particular Article 8 ECHR if the information is required by a public authority or a private body exercising public law functions in accordance with law, and the information is properly necessary for the achievement of a legitimate aim.

Legitimate Aims

...Among the legitimate aims which might be envisaged for asking such information might be:

- to coordinate and monitor the implementation of international law – for example the *UN Convention on the Elimination of All Forms of Discrimination against Women* (‘CEDAW’) and the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (‘the Istanbul Convention’);
 - to develop and/or improve where necessary national policies against violence against women, based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women and prevention. This might include the protection of victims of sex-related violence by the provision of women only shelters;
 - to help to inform policymaking and separately to assess the impact on women’s rights and experience, of measures taken (including positive action measures to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers).
 - the freedom of association (in cases of membership of single-sex private clubs) and the organisation of sporting activities (for example single-sex sports events);
- in the carrying out by public authorities of their public sector equality duties under the EA 2010.’

Annex 4. Letter to Sir Bernard Silverman

Dear Sir Bernard

We are writing to you in your capacity as Chair of the Methodological Assurance Review Panel for the 2021 Census in England and Wales, noting the Panel's role in providing assurance that the 2021 Census will produce results which meet the code of practice for official statistics and is methodologically robust, and in identifying significant gaps and risks in methods.

Over the past year, all of us have been involved in scrutinising plans for the forthcoming census, and we have taken a particular interest in the development of the questions on sex and gender identity.

We are concerned about the guidance proposed by the Office for National Statistics to accompany the longstanding, mandatory sex question. The guidance advises respondents to answer in line with their self-declared gender identity, not their sex registered at birth. This is in spite of the fact that there is a new, separate question on gender identity, which we all welcome. We are concerned the guidance as it stands could seriously compromise the integrity of data on sex, which is a variable of critical importance in practically all applied uses for census data and is a protected characteristic under the 2010 Equality Act.

It emerged during the passage of the Census (Amendment) (Scotland) Act 2019 that similar guidance accompanied the sex question in the 2011 census but that its adoption was never subjected to any formal parliamentary or other external scrutiny. A senior official in the National Records of Scotland admitted in September 2019 that it was not known how widely used the guidance was, nor what impact it had on the quality of data collected on sex.

Whilst we recognise that the vast majority of respondents are unlikely to do so, we do not know how many individuals with transgender identities might seek out the guidance when answering the mandatory question on sex.

There is very little data on the transgender population in the UK. However, it is unlikely that those with transgender identities are evenly distributed across the population. For instance, 1 in 50 male prisoners in England and Wales identify as transgender. The Tavistock and Portman NHS Trust claims that between 1.2% and 2.7% of children and young people are 'gender-diverse'. A recent study (2018) based on a population representative sample of over 50,000 Stockholm County residents found that over 6% of 22-29 year olds want to be treated as a member of the opposite sex.

In December 2019, 80 of the UK's leading quantitative social scientists (including six of us signing this letter) wrote to the three UK census authorities to express concern about the potential impact of this guidance on the quality of data collected on sex, particularly for some subgroups of the population. It took almost six months for us to be granted a meeting with ONS to discuss our concerns, which eventually took place on 24 June this year at a large 'roundtable' event where most of the attendees represented a particular political

perspective on gender identity rather than having been selected for their expertise on data collection and analysis. There was a further, short meeting between data users and ONS staff in mid-July. The need to address our concerns has since been raised by the regulator.

From these and other exchanges, we have been left deeply concerned that senior staff at ONS do not recognise the risks being taken here with data quality, due to the methodological weakness the guidance introduces. We would urge the Panel to discuss their plans for guidance on the sex question urgently with relevant staff at ONS.

We wish to draw to your attention in particular that senior ONS staff have been unable to assure us that they have undertaken any analysis to assess the potential impact of this guidance on the quality of data collected on sex in the next census, in particular for some subgroups of the population.

We are concerned that the ONS does not appear to have assessed how far any guidance may exert more influence on respondents than in 2011, with the census being conducted online, and with the higher profile of transgender issues. Also, the ONS appears to be taking a position on response rates which confuses obtaining any response with obtaining a valid and statistically useful one, and it does not appear to have assessed the potential for its preferred approach to be objectionable to some participants, who on a reasonable guess, are likely greatly to outnumber those that may find an alternative guidance that directs respondents to use sex registered at birth, in a way which could have a negative impact on wider public engagement with the census.

For this reason, we have grave concerns about the quality and trustworthiness of the data that will be collected on sex in the 2021 census in England and Wales. We believe that this is a consequence of the ONS having failed to have due regard for the procedural standards set out in the code of practice for engagement with stakeholders.

We would very much welcome the opportunity to discuss this with you and your colleagues at the earliest opportunity, given that we understand the guidance will soon be finalised.

Yours sincerely

Nick Allum, Professor of Research Methodology, University of Essex

Tarani Chandola, Professor of Medical Sociology, University of Manchester

Amanda Gosling, Senior Lecturer in Economics, University of Kent

Lucy Hunter Blackburn, former Deputy Director, Scottish Government, and doctoral candidate, University of Edinburgh

Jane Clare Jones, philosopher, author of 'The Political Erasure of Sex: Sex and the Census'

Lisa Mackenzie, policy analyst, author of 'The Political Erasure of Sex: Sex and the Census'

Colin Mills, Associate Professor of Sociology, University of Oxford

Kath Murray, Research Fellow in Criminology, University of Edinburgh

Lindsay Paterson, FBA, Professor of Education Policy, University of Edinburgh

Alice Sullivan, Professor of Sociology, Director 1970 British Cohort Study, UCL
Selina Todd, Professor of Modern History, St Hilda's College, University of Oxford

About us

MurrayBlackburnMackenzie is an independent policy analysis collective, made up of Dr Kath Murray, Lucy Hunter Blackburn and Lisa Mackenzie. Between us, we have extensive experience in policy-making, research and communications. We are Edinburgh based.

[**murrayblackburnmackenzie.org**](http://murrayblackburnmackenzie.org)