

MBM review of the ONS paper 'Methodology for decision making on the 2021 Census sex question concept and associated guidance'

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1. Introduction

- 1.1. Less than six weeks before the date of the 2021 census in England and Wales, the Office for National Statistics (ONS) [published the guidance](#) which will accompany the compulsory sex question. The guidance is of critical importance because it defines what is meant by 'sex'.
- 1.2. The finalised ONS guidance advises: *'If you are considering how to answer, use the sex recorded on one of your legal documents such as a birth certificate, Gender Recognition Certificate, or passport'*.
- 1.3. This means that the definition of sex in the next census will conflate three separate demographic categories. These are: biological sex; legal sex (for those who have acquired a Gender Recognition Certificate and who may or may not have changed the sex marker on their birth certificate); and self-declared gender identity or gender reassignment (for those who do not have a GRC, but have changed the sex marker on their passport or other unspecified legal documents). It will not be possible to disentangle the data across these three categories.
- 1.4. To justify this approach, the ONS has produced a [methodological paper that outlines how it reached its final decision](#) (hereafter 'ONS paper'). This was presented to Methodology Assurance Review Panel (MARP) on the census, the Chair of which [wrote](#) to the Chief Statistician Professor Sir Ian Diamond in November 2020 seeking clarity about the decision-making process in relation to the sex question guidance.
- 1.5. This briefing considers the findings in the ONS paper. We also examine the available findings from a piece of qualitative research, undertaken by ONS in late 2020, which the ONS paper draws upon. Together with our wider body of research and analysis in this area, we argue that:

- ONS has not fully engaged with the substantive arguments as to why data on biological sex is important, nor demonstrated why robust data on biological sex is no longer needed.
- ONS has not provided any evidence to suggest a *balance of views* between expert population data users who require data based on biological sex, and those who require data on 'self-identified' sex.
- The consultation process on the sex question guidance has been partial, privileging particular views over others and lacking in transparency. This was also the case in the 2001 and 2011 census.
- The ONS' conclusions on response rates rely on unpublished, non-representative qualitative research, involving 52 purposively selected participants, undertaken at a very late stage in the decision-making process. *This research did not test the option that ONS have chosen.*
- ONS state that collecting data on biological or legal sex is likely to adversely affect response rates due to the perceived invasion of privacy. No robust research evidence is provided to support this conclusion, nor do the ONS acknowledge recent formal legal opinion in this area.
- ONS have not addressed the key concerns raised by expert data users in relation to data reliability for sub-groups.
- ONS' conclusions on continuity and comparability rely on the flawed and ahistorical assumption that self-reported sex is synonymous with 'self-identified' sex, and that all previous censuses therefore recorded 'self-identified' sex.
- Editing and imputation rules in the 2001 and 2011 censuses show that in both years, ONS treated responses to the sex question as legal sex, and not 'self-identified'.
- The most significant break in continuity is likely to occur in 2021, as a result of the proposed ONS guidance.
- ONS' approach to equality monitoring does not appear to recognise that the onus is on public authorities to collect data that is aligned with the Equality Act 2010.
- As the UK's gold standard data collection exercise, the sex guidance in the census will adversely affect other surveys, including medical and biological research, where there is already evidence that public authorities are shifting away from collecting data on biological sex.

2. Why data on sex is needed

2.1. The ONS paper starts from the position that 'sex can be defined in different ways' (p.2) and uncritically sets out five 'valid concepts'. These are sex as:

- Registered at birth [biological sex]
- Recorded on birth certificate [legal sex]
- Recorded on legal/official documents [self-identified]
- 'Living/presenting' [self-identified]
- 'Self-identified (often referred to as gender/gender identity)' [self-identified] (p.6).

2.2. Of the five concepts, only sex registered at birth refers to sex as ordinarily understood, that is, biological sex. The remaining four categories capture a mix of sex and gender identity, to varying degrees. The last three categories (including ONS' chosen approach) are particularly unstable. As the ONS paper states:

'The last three concepts may not have a single answer, for example because:

- *the person has changed some, but not all legal/official documents,*
- *the person is presenting in different ways in different contexts, or*
- *the person does not identify as either female or male, so which they most closely identify with may change depending on context'.* (p.6)

2.3. None of the five concepts are discussed in depth, including the implications of conflating separate demographic characteristics. Instead, the ONS paper places equal value on each of its five 'concepts', treating each one as holding equivalent theoretical weight and relevance.

2.4. The ONS paper does not provide any detailed comparative assessment as to the respective substantive value of each concept for policy, planning, and research purposes. While some comparisons are made across the various tables presented in the paper, this analysis is very limited in scope.

Sex registered at birth (biological sex)

2.5. 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. Biological sex is a stable category that is easily understood and recognised, and in numerous species, including homo sapiens, it simply means the state of being male or female for reproductive

purposes. For almost everyone, sex is observed accurately at birth from outward appearance.

- 2.6. That most surveys do not seek to define what is meant by sex can be read as reflective of this commonplace understanding. As the ONS paper states:

'Most people answer 'What is your sex?' question on surveys and applications for legal/official documents as a matter of course. As a result, ONS has not previously publicly defined the concept of sex it is aiming to capture.' (p.5)

- 2.7. The ordinary meaning of sex is also implied with reference to previous consultations on the census, where respondents clearly felt no need to specify what the term meant. The ONS paper states in the 2015 Topic Consultation *'none of the consultation respondents defined the concept of sex to be collected in their initial response'* (p.7). Similarly: *'in the previous Beyond 2011 consultation (2014), and the subsequent Census 2021 Output Content Design consultation (2018) sex is proven as a key variable, but no specific concept has been requested'* (p.7).
- 2.8. No detailed consideration is given to the substantive arguments and evidence as to why biological sex is important. Nor indeed does the paper provide any counter evidence to indicate that biological sex is no longer important. The distinction between biological sex as a fixed immutable category, and the subjective nature of gender identity as captured in the remaining categories is not explored, nor relatedly, is the changing and uneven demographic distribution of the transgender population acknowledged.

Sex recorded on birth certificate (legal sex)

- 2.9. For the vast majority of people, their birth certificate reflects their biological sex, which is their legal sex. Obtaining a Gender Recognition Certificate (GRC) allows a person to change the sex marker recorded on their birth certificate (i.e. to change their legal sex), although not everyone who acquires a GRC goes on to change their birth certificate (which means that a person may have a different sex marker across the two documents). Acquiring a GRC does not alter a person's physical characteristics. Importantly, for the purposes of the census, these data risks can be quantified, given that number of people with a GRC is known. This number is small, estimated at around 6,000 people in the UK.

Sex recorded on legal/official documents

- 2.10. This is most similar to ONS' chosen option for the 2021 census (which refers to unspecified 'legal' documents'). Again, for most people, sex as recorded on legal/official documents will capture biological sex, although this option carries more risks in relation to data reliability because, unlike a GRC, the number of people who have made such changes is unknown. In a recent Freedom of Information request, HM Passport Office confirmed that the

number of individuals who have been issued a passport with a change of sex marker is not 'readily available':

'The information you have requested on how many individuals have been issued a passport with a change of gender is not held in a readily available format. To determine whether an applicant has changed their gender on a passport would involve manually searching all our passport records and this would not be possible within the cost limit.' (HM Passport Office: 8 February 2021)

- 2.11. That no information is available on the number of people this guidance applies to is not discussed. Nor do the ONS state which specific documents are included in this category. A footnote explains that sex as recorded on legal/official documents '*refers to UK issues (sic) legal/official documents*', but no further examples are given. The ONS paper notes that people may have changed some but not all official/legal documents, but provides no clear guidance on how people should respond in this instance (p.6).

Sex as 'living/presenting' and 'self-identified' sex.

- 2.12. The last two categories both capture self-defined gender identity, and are entirely separate to biological or legal sex. To term either one as 'sex concepts' is misleading. Moreover, despite having undertaken an [extensive programme research on gender identity](#), at no stage have the ONS defined the concept in anything other than circular terms:

'Gender identity is a personal internal perception of oneself and, as such, the gender category with which a person identifies may not match the sex they were registered at birth. In contrast, sex is biologically determined.'

- 2.13. As a subjective category, grounded in a person's feelings, compared to biological sex, both sex as 'living/presenting' and 'self-identified' have substantially more limitations. No consideration is given as to how such unclear concepts might be operationalised for the purposes of data collection to produce an output that has the same degree of reliability, validity, and theoretical value as sex.

3. Data user needs

- 3.1. The ONS paper suggests that there is a range of views among the '*expert academic community*' (p.7) as to which definition of sex should be used in the census. The ONS have not however provided any evidence to suggest a balance of views between expert population data users who require data based on biological sex, and those who require data on 'self-identified' sex.
- 3.2. Annex B in the ONS paper lists a range of consultations and reports published by the ONS. Much of this material focuses on gender identity and is not relevant to the sex question guidance. For example, guidance to the sex question is not discussed in the 2016 [Assessment of initial user](#)

requirements on content for England and Wales: Basic demographics and household composition topic report', nor the 2017 census roadshow slides on 'gender identity', which describe sex as 'biologically determined'.

- 3.3. That no stakeholders raised any issues during the question development phase can be reasonably attributed to the acceptance of the ordinary understanding of sex, and that stakeholder awareness as to the existence of the 2011 guidance was exceptionally limited, prior to the issue being raised in the context of the Scottish Government's draft Census (Amendment) (Scotland) Bill, in 2018.
- 3.4. In December 2019, 80 social statisticians and users of population level data signed a letter to the directors of UK census authorities setting out their concerns about the proposed self-identification approach to the sex question guidance in the 2021 census. The backgrounds and relevant expertise of these signatories, which include ten fellows of the British Academy, are publicly available (72 signatories are listed, with eight wishing to be anonymised).
- 3.5. ONS met with some of the signatories in January 2020 and, as the ONS paper notes, subsequently '*held a roundtable with a wide range of academics who use data on sex in June 2020*' (p.7). Representatives from ten universities attended the meeting, along with Stonewall, the LGBT Foundation, Fair Play For Women (FPFW), and a number of public agencies, including the Equality and Human Rights Commission (EHRC), which supports a 'self-identified' approach to data collection.¹
- 3.6. The ONS paper states that the roundtable '*showed that there were a range of data needs amongst the expert academic community and no consensus was reached*' (p.7). In contrast to the letter's signatories, no information on the specific data needs, academic backgrounds, or seniority of those making the case for self-identification guidance is available.
- 3.7. In July 2020, ONS met with data users who supported collecting data on sex registered at birth, all of whom had signed the letter sent in December 2019. In August 2020, ONS met with data users who supported continuing to collect data on 'self-identified' sex (i.e. gender identity). Again, no information is available on the academic background of the latter group. In sum, at no point have ONS disclosed how many relevant data experts have explicitly called for a 'self-identified' sex question, nor given any indication as to their relevant expertise.

¹ The Scottish Government recently consulted on its Chief Statistician's draft guidance on collecting data on sex and gender. The draft guidance was developed in conjunction with a Working Group, which included the EHRC. The EHRC advised the Working Group that to ask for data on biological sex might be unlawful. This was found to be inaccurate in a formal legal opinion by Aidan O'Neill QC, commissioned by Woman's Place UK.

- 3.8. In an [open letter](#) published in February 2021, the group of social scientists who met ONS in July 2020 described their engagement with ONS senior officials in the following terms:

‘Despite our best efforts to have an evidence-led discussion, senior officials at ONS have failed to provide any reassurance that the decision-making process underpinning their approach to the development of guidance for the sex question is robust. We have been disturbed to be confronted with arguments that have shifted and twisted under challenge, an inability to provide evidence of the requisite underpinning research and analysis, and a process of engagement by ONS with academic users that been less enthusiastic than we would have expected.’

4. Underpinning qualitative research

- 4.1. The ONS paper places a strong emphasis on response rates and public acceptability although as noted above, no detailed consideration is given to what the data actually represents. To support its conclusions, the ONS rely on small-scale online qualitative research, aimed at testing question acceptability and response rates. This research was undertaken at a very late stage, in late 2020, following ongoing criticism from academic experts working with population data.
- 4.2. The qualitative research is referenced in both the ONS paper, and in a subsequent short online [‘methodology article’](#). The online article states: *‘These results formed part of the detailed evaluation of the target concept of sex for Census 2021 reported in the Methodology for decision making on the 2021 Census sex question concept and associated guidance.’*
- 4.3. At the time of writing, ONS has still not published this research in full. Given the extent to which the ONS paper relies on this research for its conclusions, this lack of transparency is concerning.
- 4.4. The qualitative research tested four different versions of the sex question guidance (see ONS Excel spreadsheet [‘All Tests: row 98’](#)), one of which was the option of having no guidance. The research did not however, test the specific option chosen by the ONS for the 2021 census.
- 4.5. Two versions of the guidance were framed in neutral, descriptive terms, for example: *‘If you’re not sure how to answer, use the ’* By contrast, the [self-identification option](#) (as preferred by ONS) was couched in what participants described as more inclusive and empathetic terms: *‘It’s up to you how you answer this question. If you’re not sure how to answer...’*. These differences in framing may elicit different responses from participants, and introduce bias across the different versions.

Qualitative research participants

4.6. The online summary states that the sampling criteria considered:

- *trans status: trans and cisgendered people*
- *organisation membership: representatives from trans ally groups and women's groups*
- *age group: people aged 16 to 29 years old, 30 to 59 years old, and 60 or more years old*

In total, 52 participants were recruited from the general population representing a mix of these criteria. 16 participants were trans, 7 participants were members of trans ally groups and 16 participants were members of women's groups. 16 cisgender participants were not members of either a women's group or a trans ally group and included males and females. These groups are not mutually exclusive so one participant may be in more than one of these groups. A range of geographical locations were represented in the testing.

- 4.7. Because participants were not selected at random, the research findings only relate to the people who took part and are not representative of any of the groups sampled, nor the wider population. While qualitative research is not intended to be generalisable, it is surprising that this is not acknowledged in either the ONS paper, or the online summary (which is aimed at a general audience).
- 4.8. No information is publicly available on the specific groups represented in the research, nor are the overlapping memberships specified. The online summary notes that some trans participants had a Gender Recognition Certificate (GRC), but the number is not stated.
- 4.9. ONS did not invite representatives from Woman's Place UK, FPFW, nor to best of our knowledge, any other groups that have specifically raised concerns in relation to the sex question guidance or the loss of sex-disaggregated data more generally.
- 4.10. Given that one of the research aims was to test risks around a campaign against the guidance, this approach seems flawed. It may also help to explain ONS' apparent failure to recognise the strength of feeling around the loss of data on biological sex, and to anticipate the onset of an organised campaign by 15 women's and equality groups following publication of its final guidance, and the legal action taken by FPFW.

4.11. Within 24 hours of the ONS’s publication of its final guidance, #BoycottTheCensus was trending on Twitter. On 15 February, FPFW [announced](#) that it was in the process seeking a legal opinion on ONS’ decision-making in relation to the formulation of the guidance, with a view to potentially proceeding to a High Court judicial review. On 17 February FPFW launched a crowdfunder for legal costs, which raised over £17k within the first 12 hours of launch. On 16 February, a [joint statement](#) by fifteen campaign groups announced that a website would be launched to provide guidance ‘*on how to take simple action to take part in the census, whilst also sending a clear message [of protest] to the ONS*’.



4.12. Based on the qualitative testing outlined above, the ONS paper sets out an evaluation of ‘*what sex concept will maximise Census responses*’ (p.17). Each of the five sex concepts is flagged as either red, amber, or green, according to the perceived risk of a negative reaction (for example, a public campaign against participating in the census, or refusing to answer the sex question). Neither the ONS paper, nor the online summary clearly explain how the five ‘concepts’ align with the four versions of the guidance as tested (which to recap, also include ‘no guidance’).²

4.13. Only sex registered as birth, that is, biological sex, is flagged as red. Table 7 in the ONS paper states:

‘This definition raises strong feelings among various groups.

Trans people would be less likely to respond to census, especially those with a GRC.

Testing suggests some individuals would exert pressure on others to disrupt the census by discouraging completion.’ (p.18)

4.14. Similarly, the online summary states:

‘The strongest and most shared objections was against the target concept sex registered at birth. There were participants who stated that they would refuse to answer the question and participants who

² The published summary suggests that the research tested five ‘concepts’, including the option of having no guidance. However, on a closer reading, a footnote explains that ‘self-identified’ sex and sex recorded on legal/official documents was tested within a single guidance version, and that the concept of sex as living/presenting was not tested. The article does not present the full wording of the versions used in the research. This presentation is confusing.

stated that they would refuse to complete the census. The objection was strongest among those with a Gender Recognition Certificate.³

After seeing this version some individuals stated that they would potentially join a campaign and would encourage others not to complete the census or the sex question.'

- 4.15. The ONS paper assesses legal and 'self-identified' sex as amber, and sex as recorded on legal/official documents and living/presenting as green. In relation to sex as recorded on legal/official documents (which is similar to the final guidance), ONS conclude:

Trans people without a GRC or another official document would be less likely to respond to census.

Seen as factual, reducing negative reaction across groups, including non-binary people, more than birth certificate as some legal/official documents easier to change

No evidence that this would lead to reposting of the guidance on other forums.

- 4.16. Neither the ONS paper nor the online summary present clear evidence to justify these assessments, or why the sex question should be framed in the final terms chosen by the ONS. In both publications, the presented findings appear ambiguous and not quantified, making it difficult, if not impossible to draw any firm conclusions. For example, the online summary states that 'some' participants, including trans participants, would typically answer with their birth sex, while 'some' trans participants would not. Other findings are framed in equally unclear terms.

Other relevant research: Scotcen testing

- 4.17. In Scotland, in response to similar criticism on the sex question guidance, the National Records of Scotland commissioned Scotcen to undertake [detailed research](#) (Scotcen, 2019). While Scotland's census is referenced in the ONS paper, the Scotcen research is not discussed in any detail.

- 4.18. The Scotcen research consisted of large-scale representative quantitative testing, with 2,208 participants, and a separate opt-in online survey, with 75 trans or non-binary respondents. The research tested both legal sex guidance and 'self-identified' sex guidance.

- 4.19. The quantitative testing showed that the overall non-response rate to a sex question with 'self-identification' guidance did not significantly differ from the non-response rate to question with legal sex guidance:

'For the self-identification sex guidance, 2% said they would 'skip the sex question' in the census if the guidance was used and 1% said

³ Given that there are estimated to be only 6,000 GRC holders in the UK, it seems unlikely that this would refer to more than one or two people in the sample.

they would ‘not complete the census at all’. The likely impact of the legal sex guidance was the same - 2% would skip the sex question if the legal sex guidance were used and 1% would not take part in the census at all.’ (p.3)

- 4.20. As noted above, Scotcen also undertook targeted survey research with trans or non-binary respondents, to better understand how this population might respond to legal sex and self-identification guidance. Unlike the ONS paper and online summary, these findings are strongly caveated:

‘Since participants were not selected at random, the findings relate only to those who took part and inferences to the wider trans or non-binary population in Scotland cannot be made. Different approaches to sampling mean that comparisons between the general population survey findings and the trans or non-binary findings cannot, and should not, be made’ (p.4).

5. Census response rates and privacy

- 5.1. The ONS paper also considers whether privacy concerns are likely to impact negatively on response rates. The privacy evaluation, which is framed in terms of the five sex concepts, states:

‘The highest negative impact is anticipated if sex registered at birth was collected due to reduction in census response. The data need is not considered to be strong enough to justify collecting this. The least impact is anticipated if sex as living/presenting is collected. However, the adjacent concept of sex recorded on legal/official documents is also anticipated to have low impact.’ (p.20).

- 5.2. In relation to both biological sex and legal sex, the evaluation indicates that that *‘trans respondents would be forced to reveal their gender history’* (p.19). This appears overstated, in particular, use of the term ‘forced’. For example, the 2021 census allow respondents aged sixteen or older [‘who want to keep their answers separate from the rest of the household’](#) to request an individual questionnaire (either a paper form or a code to access an individual online questionnaire). Answers provided on an individual form will take precedence over answers provided for the same person on a household form.
- 5.3. The ONS paper does not acknowledge the [formal legal opinion](#) commissioned by Woman’s Place UK and prepared by Aidan O’Neill QC. WPUK shared the following excerpts with the ONS (and others) in December 2020:

‘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.'

- 5.4. Examples of legitimate aims provided by Mr O'Neill include:
- *'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).*
 - *in the carrying out by public authorities of their public sector equality duties under the EA 2010.'*

5.5. The ONS paper 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 personal question pertaining to biology, such as age, disability, or health.

6. Data reliability

- 6.1. Expert data users have repeatedly raised concerns about data accuracy and reliability, both directly with the ONS, with the census regulator (Office for Statistics Regulation), and with the Chair of the Methodology Assurance Review Panel.⁴
- 6.2. In relation to the potential impact, the ONS paper states, *'The scale of the impact of collecting any specific concept of sex cannot be determined as multiple factors are at play. Quantitative testing to work out the size of this was considered and discarded...'* (p.16). This conclusion seems surprising, given that such research was undertaken in Scotland.
- 6.3. The ONS paper notes that *'the trans population is small, the GEO estimate it to be between 0.3 and 0.75% of the UK population'* (p.16), with the implication that data reliability is unlikely to be affected. However, the Government Equalities Office caveat this estimate in the following terms: *'There is no robust data on the number of trans people in the UK'* (2018: 14, footnote 5). In responding to the ONS consultation on the 2021 census, the GEO stated: *'In the absence of census data by gender identity (regarded as the gold standard by us and many of our stakeholders) there is considerable*

⁴ A copy of the letter sent to the directors of the three UK census authorities, the Prime Minister and First Minister of Scotland can be accessed [here](https://www.parliament.scot/S5_European/General Documents/CTEEA_2019.12.18_Sullivan.pdf) (https://www.parliament.scot/S5_European/General Documents/CTEEA_2019.12.18_Sullivan.pdf), and the letter to the Chair of MARP can be accessed [here](https://murrayblackburnmackenzie.org/2020/11/02/letter-from-sir-bernard-silverman-to-sir-ian-diamond/) (<https://murrayblackburnmackenzie.org/2020/11/02/letter-from-sir-bernard-silverman-to-sir-ian-diamond/>).

debate about the size and composition of the transgender population in Britain' (ONS, 2016: 9).

- 6.4. The ONS paper does not acknowledge the persistent international evidence of sharp growth in the numbers identifying as transgender, particularly among younger age groups. For example, 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). For further population level international evidence, see [here](#). Nor does the paper acknowledge evident demographic changes within the transgender population, including the sharp rise in young girls identifying as transgender.

Small-group analysis

- 6.5. Data experts have repeatedly raised concerns about the impact of 'self-identification' guidance on data reliability at a small group level. The key issue here is that an unknown (and unknowable) proportion of the population may respond to the sex question in a different way to the rest of the population, and that this discrepancy will be more marked among certain demographic groups. For example, we might reasonably expect a higher proportion of young people in urban areas to respond to the sex question based on their self-declared gender identity, as well as variation by sex. These effects are then likely to be felt when analysing smaller groups, for example when sex is cross-tabulated with age.
- 6.6. In September 2020, the Office for Statistics Regulation (OSR), as part of its ongoing assessment on the census, wrote to the Deputy Chief Statistician for England and Wales and [stated](#) that it was essential that ONS examine how its guidance would impact on sub-group analysis:
- '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. ONS should continue to engage with stakeholders particularly in relation to areas of contention, meet any commitments it has made, and seek to provide answers or explanations on areas of concern, in a transparent and open way.'*
- 6.7. Despite clear direction from the OSR, this specific issue is not addressed in the ONS paper. Instead, the section on 'accuracy and reliability' (p.17) segues to a consideration of response rate risks (based on the unpublished research), and an arguably flawed evaluation of privacy concerns. From this, the ONS paper concludes that asking about biological sex carries the highest risk in terms of accuracy and reliability, by dint of the negative impact on overall response rates:

'The highest negative impact on accuracy and reliability is anticipated if sex registered at birth was collected due to the likely negative impact on response rates caused by the perceived invasion of privacy. The data need is not considered to be strong enough to justify collecting this.' (p.20).

7. Continuity and consistency

- 7.1. The ONS paper states that a 'self-identified' sex question in the 2021 census will be compatible with the 2011 census, and with previous censuses, all of which are characterised as 'self-identified'.

'This is interpreted as self-identified sex both in 2011 and before, although in 2001 guidance to that effect was only available on request, and prior to that no guidance was provided'. (p.8)

- 7.2. Indeed, ONS characterise all surveys that ask if a person is male or female, without referencing sex or gender, or defining sex, as capturing 'living/presenting' sex (Table 6 p.14).
- 7.3. The argument that data collected in the 2011 census, and censuses prior to that, unequivocally collected sex data based on 'self-identification', is not borne out by the historical context.
- 7.4. The 'self-identification' guidance provided in 2011 was quietly introduced at the request of LGBT groups (see Annex 1 for details), without any wider consultation or scrutiny. It should also be noted that the 2011 guidance differed to that proposed in 2021, and was framed more broadly, as shown below.

'What is your sex?

Please select either male or female for your sex.

Transgender or transsexual: select the answer which you identify yourself as. You can select either "male" or "female", whichever you believe is correct, irrespective of the details recorded on your birth certificate. You do not need to have a Gender Recognition Certificate

If you are answering on behalf of someone who is transgender or transsexual then where possible you should ask them how they want to be identified. If they are away, you should select the answer you think they would wish to be identified as. You do not need to know whether they have a Gender Recognition Certificate.' ([National archives, online](#))

- 7.5. There is no evidence to suggest any meaningful public awareness of the change made in 2011, which may explain the absence of any objection at the time. To the best of our knowledge, no announcement was made and the guidance was only available online. Moreover, most people completed a paper questionnaire in 2011, with only 16% of returns submitted online

([House of Commons Library 2013: 28](#)). The guidance was also available via the telephone helpline, although as the ONS paper notes, this was not widely used (p.5). This means that for both online and paper questionnaires, respondents had to purposively seek out the guidance.

- 7.6. In Scotland, where similar guidance was made available in the 2011 census, it emerged during a Culture, Tourism, Europe and External Affairs (CTEEA) Committee evidence session on the draft Census (Scotland) Order 2020, that even Stonewall, the UK's largest LGBT advocacy group, appeared to have been unaware of the guidance in 2011. At the same evidence session, National Records of Scotland's then Director of Statistical Services Amy Wilson also acknowledged that the impact of self-identification guidance in Scotland's 2011 census was unknown. To the best of our knowledge, this also true of England and Wales.

"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."

([CTEEA Official Report 12 September 2019 col. 6](#)).

Data editing and imputation in the 2001 and 2011 censuses

- 7.7. Data editing rules on how to deal with inconsistent data entries indicate that in both the 2001 and 2011 censuses, ONS treated the sex category as 'legal' sex, as based on contemporaneous marriage laws, and not as 'self-identified'. The editing principles are briefly explained here:

'There are two types of edit rules; hard edit rules check the plausibility of data and lead to imputation if the record fails one of the rules. For example, 'a child cannot be older than their parent' or 'if aged between five and 15 then must be in full-time education'.

([2011 Census Item Edit and Imputation Process ONS, 2012: 8](#))

- 7.8. In the 2001 census, data editing rules meant that if a household questionnaire showed two people of the same sex in a marriage, that the responses would be overwritten to male/female, to reflect consistency with marriage laws. In response to the introduction of same-sex civil partnerships in 2005, the editing rules changed as follows:

'the 2001 rule that did not allow same-sex couples was removed and replaced with rules that said married couples had to be of opposite sex and civil partners had to be the same sex.' (p.8)

Risk of discontinuity

- 7.9. Against this background, we think that the most significant break in continuity is likely to occur in 2021, as a result of the proposed ONS guidance. This is because, in contrast to the 2011 census:
- It is anticipated that around 70% of returns in 2021 will be made online.
 - The online guidance in the 2011 census was separate to the online questionnaire, whereas in 2021 it can be accessed via the questionnaire (p.22).
 - As a result of media coverage, academic engagement and engagement by advocacy groups, there is much greater public awareness of the census guidance, compared to the 2011 census.
 - There is persistent international evidence of sharp growth in the numbers of people identifying as transgender, particularly among younger age groups.

Consistency with other census questions

- 7.10. The ONS paper notes that two other questions reference the word 'sex' (Table 6, p.14). These are marital status (if a person is married to someone of the same or opposite sex), and gender identity, where a person is asked if the gender with which they identify is the same as their sex 'registered as birth'. For both, the ONS paper states that these questions are only compatible with the concept of sex as recorded on legal/official documents. This appears mistaken, given that the wording in the gender identity guidance is explicitly aligned with biological sex, as recorded on a person's original birth certificate. The same inconsistency between questions was queried in a recent [Freedom of Information](#) request to ONS, however the response fails to address it.

8. Conflation of self-reported and self-defined sex

- 8.1. As noted above, ONS interpret all previous census sex data as relating to respondents' 'self-identified' sex. We think this approach is conceptually mistaken, and that it is historically implausible to characterise all census data, as far back as 1841, as based on people's 'self-identified' sex.
- 8.2. The ONS 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').
- 8.3. In practice, biological sex is easily recognised and understood. In numerous species, including homo sapiens, it simply means the state of being male or female for reproductive purposes. For almost everyone, sex is observed accurately at birth from outward appearance.
- 8.4. In recent years, an unhelpful degree of confusion has been sown around the ordinary concept of sex, as exemplified in the five 'concepts' proposed by the

ONS, which variously conflate sex and self-defined gender identity. There is, however, no evidence to suggest that ideas about sex, as defined in terms of subjective self-identity, extend to previous generations as far back as 1841, in terms of common public understanding.

9. Equality Monitoring

- 9.1. The ONS paper states that a key use of census data is for equality monitoring purposes (p.2), as undertaken in relation to the nine protected characteristics in the Equality Act 2010.
- 9.2. In relation to the protected characteristic of sex, the ONS paper states that the Equality Act does not define the status of being a man or a woman (p.10). This is incorrect. Section 212 states that “‘man” means a male of any age’ and “‘woman” means a female of any age’.
- 9.3. The ONS paper then assesses how different concepts of sex might be used to meet equality monitoring needs, and presents an ‘Assessment of Equality needs’ (p.11) with reference to the various sex ‘concepts’. The assessment does not include sex registered at birth, that is, biological sex, to which the protected characteristic of sex refers to.⁵
- 9.4. The analysis suggests that data on ‘sex as living/presenting’ is consistent with the interpretation of sex discrimination under the Equality Act, because ‘*cases are based on what the person committing the act to be, this would be as the person is living/presenting*’ (p.11). This appears to be an incorrect interpretation of the Act. Under the Act a person may be discriminated against based on their sex, or based on the sex that that a person perceives them to be. Section 24(1) states, ‘*For the purpose of establishing a contravention of this Act by virtue of section 13(1), it does not matter whether A has the protected characteristic*’. This does not however grant the person who is discriminated against the status of that characteristic,⁶ which appears to be ONS’s understanding. The ONS also appear to assume that all those who live and present as members of the opposite sex ‘pass’ as such, which is not included within the scope of the Equality Act.
- 9.5. The analysis discounts the option of collecting data on legal sex (recorded on birth certificate), because such data is seen as incompatible with census time-series data (i.e. data from 2011 and earlier). As explained above, we

⁵ Drawing on statute, common and case law, Komorowski (2020) considers the possible interpretations of ‘sex’ in the Equality Act 2010. He concludes that sex in the Act should be construed as meaning either that ‘sex is meant in the immutable, common law sense’, that is, as a biological characteristic which is fixed for life; or that it is meant in that sense ‘except for those who hold a GRC’. See: [Sex and the Equality Act](#).

⁶ It does not mean for example, that a person who is discriminated against because it is assumed they are Catholic by dint of their surname, could apply for a position in a Catholic school reserved for those of the Catholic faith.

think this is an ahistorical and flawed interpretation of what is ordinarily meant by the terms 'sex', 'male' and 'female'.

- 9.6. Overall, the analysis is difficult to interpret and appears to draw no clear conclusions. More importantly, the ONS paper fails to recognise that the onus lies on public bodies to collect data that meets equality monitoring requirements under the Public Sector Equality Duty, namely data that is directly aligned with protected characteristics, which includes biological sex.

10. Negative precedent

- 10.1. The census is regarded by many stakeholders, including the UK Government, as setting the 'gold standard' for data collection ([ONS, 2016: 9](#)). If the census ceases to collect data on biological sex, it will set a powerful and detrimental precedent, particularly if that decision is seen to be underpinned in part by privacy concerns.
- 10.2. 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 where asking such a question is used to determine access to single sex provision.
- 10.3. There is already evidence of this effect, in relation to medical research, as [reported](#) in The Daily Telegraph, following publication of the ONS guidance:

A clinical researcher at a Scottish university, who asked to remain anonymous citing fears about a backlash, told The Telegraph: "I think there is a concern among scientists that there are acceptable ways you can ask these questions. The ONS will make it more difficult to ask about sex registered at birth."

She added: "If we're looking at a clinical trial of a medicine, we know that biological sex does matter." Highlighting the example of a specific sleeping tablet, she said the drug was "licensed in the US, based on data that was just from men in clinical trials. It was discovered after licensing that women were having a lot of drowsiness because the dosage was too high".

She added: "There is a trepidation among researchers that we don't want to upset people, don't want to do something wrong. We're not experts in law. We'll tend to follow what's done by the main government agencies." (12 February 2021)

Annex One: 'Self-identification' guidance in the 2011 census

The introduction of 'self-identification' guidance in the census can be traced to the late 1990s, and a series of policy decisions that took place without proper consultation or scrutiny.

In 1998, a campaigner from the trans advocacy group Press for Change wrote to the ONS concerning completion of the census form in the forthcoming census. ONS responded in the following terms, stating that the individual could reply using the sex that they '*believed to be correct*':

'Should there be the traditional question on the individual's Sex in the 2001 Census, it would be reasonable for you to respond by ticking either the 'Male' or 'Female' box whichever you believe to be correct, irrespective of the details recorded on your birth certificate'. (Appendix 1)

Drawing on this exchange, in February 1999 Press for Change announced on their website that trans people could 'now give an answer which is both truthful and legal'

'For most people, the ten-yearly census is just another form to fill in ... but for thousands of trans people around the country, it raises yet again the question of how to legally and truthfully answer the question about sex. Because UK law does not fully recognise trans people in their true gender, the possibility arose that once again, it would be impossible to provide a truthful answer which also matched legal requirements. There is a legal obligation to complete the census form accurately, so trans people faced an unpleasant dilemma.

However, this letter from the Office of National Statistics (in response to an enquiry from Press For Change campaigner Paula Thomas) makes it clear that trans people can now give an answer which is both truthful and legal:

*Trans women should record their sex as female if they believe that to be correct, even though their birth certificates will still say 'male'
Trans men should record their sex as male if they believe that to be correct, even though their birth certificates will still say 'female'.
(Appendix 1)*

In 2008 the ONS commissioned an independent consultancy, Diversity Solutions, to undertake an [Equality Impact Assessment Screening](#) for the development of the 'sex/gender' question in the 2011 census. As part of the screening, the assessors consulted with one individual: the same Press for Change campaigner who previously contacted the ONS in 1998, whose view is shown below:

'For this equality impact assessment screening process, consultation has been conducted with Paula Thomas, a trans community representative who was asked to give her expert view. Ms. Thomas also made a relevant enquiry of ONS related to the 2001 Census. Her current view is as follows:

"Where no Gender Recognition Certificate has been issued: Clear guidance is required here. For example, it should be made clear that

someone who believes herself to be female, despite having a male birth certificate and no Gender Recognition Certificate, can tick the female box without fear of prosecution under the Perjury Act.” (p.4)

The screening report stated that ONS should consult with trans community groups such as the Gender Trust and Press for Change, and that it was ‘essential’ to consult with Mermaids, but made no wider recommendation.

In terms of internal scrutiny, the report advised against undertaking an Equality Impact Assessment:

‘In the view of the assessor, it would be a disproportionate use of resources to conduct an equality impact assessment on the sex question.

Crucially, the report erroneously concluded that that ONS had a statutory duty to provide ‘self-identification’ guidance for the sex question:

‘To comply with their statutory duty to promote gender equality, ONS must issue clear guidance to trans people, including those who do not have a Gender Recognition Certificate so that they, or others completing the census form on their behalf, are enabled to give accurate answers to the question.’ (p.4)

The screening assessment was signed off by the census Deputy Director in late 2008, with the following agreed actions:

- *Provide guidance to trans people, including those who do not have a Gender Recognition Certificate so that they, or others completing the census questionnaire on their behalf, are enabled to give accurate answers to the question asking ‘what is your sex?’*
- *Consult on this guidance with trans community group*

Both ONS and the National Records of Scotland subsequently introduced ‘self-identification’ guidance in the 2011 census. Consistent with the recommendation in the screening report, there is no evidence of any wider consultation beyond the trans community, nor additional layers of scrutiny.