

# **Sex, sport and Data: The importance of sex disaggregated sport and physical recreation data for compliance with the 2010 Equality Act in Scotland.**

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## **1. Introduction**

- 1.1. In December 2020 the Chief Statistician for Scotland published draft guidance for public authorities advising that such organisations should not collect data on biological sex, and in most instances, should collect data on self-defined gender identity.
- 1.2. This paper looks at the implications of losing sex disaggregated data for organisations charged with providing sport and physical recreation services to the public, and their ability to fulfil their legal obligations under the Equality Act 2010<sup>1</sup> in relation to the protected characteristic of sex.
- 1.3. The paper focuses on the work of sportscotland, which is the national agency for sport in Scotland. Specifically, the analysis looks at two areas of sportscotland policy, which rely on data collected in the Scottish Government Scottish Household Survey (SHS).<sup>2</sup> These are:
  - funding decisions taken by sportscotland in relation to female and male sport and physical recreation preferences (Section 4),
  - the impact on female single sex sport categories, of eligibility criteria based on gender identity rather than biological sex (Section 5).
- 1.4. In 2018, the SHS replaced the long-standing sex question with a 'gender identity' question. In this respect, the SHS has moved ahead of the Chief Statistician's proposals, by ceasing to collect data on sex.
- 1.5. In practice, this means that sportscotland are now unable to 'see' the protected characteristic of sex. Using estimated figures as to the size of the transgender population, the analysis shows that this is likely to:
  - damage the ability of sportscotland to address the significant under-funding for female sports and physical recreation;
  - damage the ability of sportscotland to assess the impact of self-defined gender identity eligibility criteria on single sex sport categories;
  - damage its ability to meet its EA requirements;
  - weaken sportscotland accountability, in relation to the protected characteristic of sex
- 1.6. Given the evidence and analysis presented herein, it is of deep concern that the Chief Statistician is recommending such an approach for all public bodies.

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<sup>1</sup> HM Government, Equality Act 2010: <https://www.legislation.gov.uk/ukpga/2010/15/contents>

<sup>2</sup> Scottish Government, Scottish household survey 2019: annual report, Section 8 Physical Activity and Sport (2020). See excel tables in supporting files. Available at <https://www.gov.scot/publications/scottish-household-survey-2019-annual-report/pages/9/>

## 2. sportscotland

- 2.1. sportscotland is the national agency for sport in Scotland and a non-departmental public body, responsible to the Scottish Parliament. One of its overarching objectives is 'fostering, supporting and encouraging the development of sport and physical recreation among the public at large in Scotland'.<sup>3</sup>
- 2.2. Together with the Scottish Government,<sup>4</sup> sportscotland is responsible for shaping and framing the sport and physical recreation infrastructure in Scotland. One of its main functions is the distribution of public money and investment of 'Scottish Government and National Lottery funding in recognised SGBs (Scottish Governing Bodies of Sport), on a sport-by-sport basis'.<sup>5</sup>

### **sportscotland, sex and the Equality Act**

- 2.3. As a public body, sportscotland is required under the Equality Act (EA) to eliminate direct and indirect discrimination in sport and physical recreation between females and males with the protected characteristic of sex and to advance equality between the sexes in the provision of sport and physical recreation (see Annex 1).
- 2.4. The sportscotland 2019-21 Business Plan<sup>6</sup> outlines its vision of 'An active Scotland where everyone benefits from sport', and commits to 'support disadvantaged groups', 'expand our reach to the inactive and underrepresented in sport' and specifically to 'increasing the participation, engagement, and promotion of women in sport' (p.3). It states that the key actions in its equality outcomes action plan 2017-21 are 'mainly targeted at young people, women and girls, disabled people and people who live in Scotland's most deprived communities' (p.5).

### **Scottish Household Survey (SHS)**

- 2.5. The SHS is the main primary data source and planning tool for sportscotland, in relation to its vision, inclusion and action priorities for female sport and physical recreation participation.<sup>7</sup>
- 2.6. Until 2018, the SHS collected sex disaggregated adult participation data for some sport and physical recreation activities, allowing sportscotland to meet its Public Sector Equality Duty (PSED) requirements, under the EA. As the PSED explains: 'Adequate and accurate equality evidence, properly understood and analysed, is at the root of effective compliance with the general equality duty' (see further Annex 2).

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<sup>3</sup> sportscotland was set up by [Royal Charter](#) in 1971. See further, sportscotland 'What we do': <https://sportscotland.org.uk/about-us/what-we-do/>

<sup>4</sup> The Executive Non-Departmental Public Body Model Framework Document<sup>6</sup> states: 'Effective strategic engagement between the SG and sportscotland is essential in order that they work together as effectively as possible to maintain and improve public services and deliver improved outcomes' and that 'Scottish Ministers are ultimately accountable to the Scottish Parliament for the activities of sportscotland and its use of resources'. at <https://sportscotland.org.uk/media/5001/sportscotland-executive-ndpb-model-framework-document-2018-final.pdf>

<sup>5</sup> sportscotland, Principles of investment to LAs and SGBs. Available <https://sportscotland.org.uk/about-us/investment-reporting/>

<sup>6</sup> sportscotland, sportscotland business plan 2019-21. Available at <https://sportscotland.org.uk/media/5000/business-plan-2019-2021-final-august-2019.pdf>

<sup>7</sup> For further details see: <https://www.gov.scot/collections/scottish-household-survey/#about>

- 2.7. In 2018 the Scottish Government replaced the SHS binary male/female sex question and female/male options, with a question that asks, 'How would you describe your gender identity?', with three response categories: man/boy, woman/girl and 'in another way'.<sup>8</sup>
- 2.8. This change means that the SHS no longer collects reliable and clearly defined sex-disaggregated data. Instead, the data may variously reflect biological sex, legal sex, and self-defined gender identity. Note that this inconsistency is not acknowledged in the sportscotland progress report 2019/20,<sup>9</sup> which simply states that the sex of those taking part in the programmes in which they invest was 65% male and 35% female.<sup>15</sup>

### **Participation in sport by men and women**

- 2.9. SHS data captures participation in a range of physical activities and sports, although as noted above, this data is no longer on the basis of sex. Nonetheless, by either definition, there are sharp differences in participation by men and women.
- 2.10. Table 1 shows the gap between 'women's' and 'men's' participation is especially marked for traditional competitive sports played in single sex sport categories at all levels, and that the pool of males is significantly larger than that of females. In sports where competition is integral to participation such as football and golf, women are significantly underrepresented. For football, the proportion of men to women is 91% to 9%, and for golf, 80% men to 20% women.

*Table 1. Sports participation gender identity disaggregated data 2019.*

Sport	Men (%)	Women (%)
Football	91	9
Golf	80	20
Cycling	59	41
Multigym/weight training	52	48
Running/jogging	52	48
Swimming	40	60
Keep fit/aerobics	30	70
Dancing	21	79

- 2.11. SHS data collected in 2014 shows lower levels of female participation in football (7%) and golf (15%). However given the shift to a gender identity question in 2018, it is no longer possible to ascertain the extent to which participation by sex has changed, nor the impact of sportscotland policies in this area. Nor can the data be used as either a planning tool for sportscotland or as equality evidence to ensure EA compliance.
- 2.12. The next section looks at grant aiding decisions made by sportscotland, and shows how women and girls are already disadvantaged in sportscotland spending decisions.

<sup>8</sup> See further: Scottish Women, 'How would you describe your Gender Identity?' replaces the question for Sex [Updated]. Available here <https://scottish-women.com/2019/09/10/how-would-you-describe-your-gender-identity-replaces-the-question-for-sex-updated/>

<sup>9</sup> sportscotland (2020) Sport for Life: Summary of progress April 2019 – March 2020. Available at [https://sportscotland.org.uk/media/6072/final\\_sport\\_for\\_life\\_20.pdf](https://sportscotland.org.uk/media/6072/final_sport_for_life_20.pdf)

### 3. Sex, sport and money: the investment of Exchequer and Lottery funding.

- 3.1. In an earlier peer-reviewed analysis of 2014 SHS sport and physical recreation sex disaggregated data (Devine, 2018),<sup>10</sup> I investigated funding decisions made by sportscotland in relation to the protected characteristic of sex.
- 3.2. The research found that male preferences were disproportionately grant-aided, leaving those of females significantly under-funded:
- ‘25% of funding to the top six ranked sports for women and men goes to female preferences and 75% to male’,
  - ‘The largest sexual division of play occurs in dance, and keep fit/ aerobics, much preferred by women (sportscotland funding £4,500); and football and golf, much preferred by men (sportscotland funding £2.6m).’ This appeared to be because although the remit of sportscotland is ‘sport and physical recreation’, it tends to be reframed as ‘sport’, primarily competitive team sport.
- 3.3. Table 2 shows that the spend per participant decreased as the proportion of females increased. This means that the largest funding gap occurs ‘between football which is 93% male, funded at £3.5 per participant and golf which is 85% male, funded at £4 per participant; and keep fit/aerobics which is 65% female with £0 per participant and dancing which is 71% female with £0.01 per participant’. This leaves women who, on average, have fewer financial resources than men, disproportionately reliant on the private sector to access their sport and physical recreation preferences.

*Table 2. Sex disaggregated spend per participant in selected sport and physical recreation activities.*

Sport	% male	% female	Total participants	Total spend (£)	Spend per participant (£)
Football	93%	7%	374,332	1,325,000	£3.5
Golf	85%	15%	320,856	1,275,000	£4
Cycling	70%	30%	588,236	862,000	£1.5
Multigym use	64%	36%	641,712	0	£0
Running/jogging	58%	42%	641,712	940,000	£1.5
Swimming	46%	54%	962,568	1,253,000	£1.3
Keep fit/aerobics	35%	65%	695,188	0	£0
Dancing	29%	71%	374,332	4500	£0.01

- 3.4. The research concluded that sportscotland and/or the Scottish Government: ‘may not be fulfilling their legal requirements, under the Equality Act, particularly in relation to mainstreaming equality. They could be indirectly discriminating in relation to the protected characteristic of sex in the public provision and funding of both SPR (sport and physical recreation) ...and failing to meet the GED’.

<sup>10</sup> C Devine, Sex, sport and money: voice, choice and distributive justice in England, Scotland and Wales (2018) Sport, Education and Society, 23:9: 824-39, DOI: [10.1080/13573322.2016.1275542](https://doi.org/10.1080/13573322.2016.1275542)

- 3.5. Disappointingly, this research seems to have made little impact on policy making in sport and physical recreation in Scotland, despite providing clear evidence on which the funding priorities of sportscotland and the Scottish Government in relation to sport and physical recreation for females might be challenged.
- 3.6. Against this already uneven background, the next section shows how the replacement of sex-disaggregated data with data on self-defined gender identity may potentially affect sportscotland policy, to the further disadvantage of women and girls.

#### **4. Single sex sport and gender identity**

- 4.1. The inclusion of girls and women in sport in single sex sport categories is legislated for in the 2010 Equality Act (Section 195) and the 2004 Gender Recognition Act, for reasons of fairness and/or safety in 'gender (meaning sex) affected activities'. Most sports are 'gender affected' as defined in Section 195, since from puberty onwards, at all levels from participation to excellence, they involve competitive activity in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex (Hilton and Lundberg, 2021).<sup>11</sup> Even with a Gender Recognition Certificate (GRC) transgender participants can or must be legally excluded from single sex sport categories of the opposite biological sex for reasons of fairness and/or safety, primarily to avoid indirect discrimination against females.
- 4.2. This provision is widely misunderstood or ignored,<sup>12</sup> while sport organisations often advise that eligibility into single sex categories should be on a case-by-case basis according to 'gender identity', rather than on a category basis, that of biological sex, even in 'gender affected' sports. This may contravene the EA by indirectly discriminating against females with the protected characteristic of sex.
- 4.3. Under the PSED, sportscotland has a legal duty to give due regard to addressing discrimination against girls and women, advancing equality of opportunity between the sexes, and fostering good relations between them. The objectively justified policy of single sex sport for the inclusion of girls and women in 'gender affected' sports is legally enshrined in the EA in Section 195.
- 4.4. Consequently, sportscotland must consider both the legality, and effect on girls and women as a sex, of any eligibility policies into single sex sport based on gender identity, rather than the protected characteristic of sex. To do this, they need data.<sup>13</sup> However as outlined above, sex disaggregated data is no longer collected in the SHS.

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E Hilton and T Lundberg (2021) Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage. *Sports Med.* 2021 Feb;51(2):199-214. doi: 10.1007/s40279-020-01389-3. PMID: 33289906. Available at <https://pubmed.ncbi.nlm.nih.gov/33289906/>

<sup>12</sup> For example: LGBT Youth Scotland advise that school children (primary and secondary) 'should be allowed to compete in the category which matches their gender identity' (2017: 21). <https://www.lgbtyouth.org.uk/media/1344/supporting-transgender-young-people.pdf>

<sup>13</sup> EHRC Statutory Code of Practice guidance on 'pools of comparison' recommends data disaggregated by protected characteristic which sportscotland cannot now access for neither the protected characteristic of sex, nor that of gender reassignment given the broad definition of 'gender identity'. See Equality and Human Rights Commission, 'Services, public functions and associations: Statutory Code of Practice' (2011). Available at [https://www.equalityhumanrights.com/sites/default/files/servicescode\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf)

moreover, gender identity is not defined in the EA since it is not a protected characteristic. Despite these limitations, some cautious estimates about the impact of gender self-identification on single sex polices may nonetheless be drawn, using alternative data sources.

- 4.5. While acknowledging that no robust data on the UK trans population exists, the Government Equalities Office (GEO) also 'tentatively estimate[s] there are approximately 200,000-500,000 trans people in the UK',<sup>14</sup> which equates to a prevalence of 0.3-0.8%. Stonewall<sup>15</sup> estimates that 1% of the population fall under the 'transgender umbrella', which includes a wide range of identities.
- 4.6. Using the higher Stonewall 1% estimate, and UK GRC sex disaggregated data, indicates a transgender prevalence of 1.45% in adult males and 0.55% in adult females (see further Annex 3). Using these estimates, Table 3 calculates the potential impact of self-identification of gender identity on single sex sport categories. All calculations are based on SHS gender identity participation data for 2019, which is reasonably similar to 2014 SHS sex disaggregated, and Scottish adult population statistics.<sup>28</sup>

*Table 3. The impact of self-identification of gender identity eligibility criteria on single sex sport categories.*

Sport	Transwomen eligible for female categories (% of category)	No. transwomen eligible for female categories	Transmen eligible for male categories (% of category)	No. transmen eligible for male Categories
Football	12%	3,866	<1%	127
Golf	6%	3,222	<1%	254
Cycling	2%	4,511	<1%	1,018
Multigym/ weight training	2%	6,121	1%	1,781
Running/jogging	2%	5,155	1%	1,526
Swimming	1%	5,155	1%	2,417
Keep fit/aerobics	1%	2,900	1%	2,162
Dancing	<1%	1,289	2%	1,526

- 4.7. Table 3 shows that gender identity eligibility criteria is most likely to disproportionately affect female categories, and in competitive team sports.<sup>16</sup> This is due to the

<sup>14</sup> Government Equalities Office, Trans People in the UK (2018). Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721642/GEO-LGBT-factsheet.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf)

<sup>15</sup> Stonewall, How many trans people are there in Britain at the moment? Available at [The truth about trans \(stonewall.org.uk\)](https://www.stonewall.org.uk/the-truth-about-trans)

<sup>16</sup> Data from Sport England<sup>17</sup> shows that males are significantly over-represented in most traditional competitive sports including cricket and rugby. Although comparable data is not collected in Scotland, we could reasonably expect similar proportions of transgender participants in opposite sex categories. Indeed, if the sports where the data include both competitive and recreational forms, for example cycling, running and swimming, were disaggregated along competitive/recreational lines, we would also find males significantly over-represented in the competitive elements of the sports. See: Sport England, Active Lives. Available from <https://www.sportengland.org/know-your-audience/data/active-lives>

disproportionately large pool of males in these activities. It suggests that 12% of female footballers and 6% of female golfers could be transwomen (biological males) whereas less than 1% of the male footballers and 1% of male golfers could be transmen (biological females).

- 4.8. sportscotland provides additional ‘gender’ segregated data<sup>17</sup> (2019: 42-49) which can be used to further investigate the impact of gender identity eligibility policies on opposite sex sport categories. Table 4 summarises this for sports club members and UK Coaching Certificate Candidates (UKCC), using the same methodology as above.

*Table 3. The impact of gender identity eligibility criteria on sex disaggregated sport categories.*

	% Male	% Female	Transwomen in female categories (% of category)	Transmen in male Categories (% of category)
Playing club members in supported clubs	69	31	3%	<1%
Playing club members affiliated to SGBs	71	29	3%	<1%
Coaches in supported clubs	73	27	4%	<1%
Coaches in clubs affiliated to SGBs	66	34	3%	<1%
UKCC1	52	48	2%	1%
UKCC2	63	37	2%	<1%
UKCC3	68	32	3%	<1%
UKCC4	100	0	n/a	n/a

- 4.9. Table 3 shows that across all sports, eligibility policies based on self-identified gender could result in around 3% transwomen (biological males) participating in female sport categories in both supported clubs and clubs affiliated to SGBs. In predominantly male sports (football, cricket, rugby, golf) any such impact is likely to be much larger. Conversely, the potential impact of transmen (biological female) participants in male sport categories is less than 1% in both categories, as the pool of female participants is so small.

- 4.10. The analysis suggests that around 4% of female coaches could be transwomen (biological males) in supported clubs, and 3% in SGB affiliated clubs. Again, we would expect the impact to be higher in predominantly male sports. And as before, the impact of transmen (females) in male sport categories is negligible, due to the small pool of female participants.

- 4.11. For UK Coaching Certificate candidates, the percentage of transwomen (biological males) in female coach categories would equate to 2% at Levels 1 and 2, and 3% at Level 3 (the lack of any female candidates precludes analysis at Level 4). As before, we can expect a higher impact within male dominated sports, while the impact on male sports remains negligible.

<sup>17</sup> sportscotland, Playing Our Part: Summary of progress 2018-19 (2019). Available at [https://sportscotland.org.uk/media/5020/sportscotland\\_playingourpart2019.pdf](https://sportscotland.org.uk/media/5020/sportscotland_playingourpart2019.pdf)

## 5. Conclusion

- 5.1. The sex disaggregated data that used to be collected by the SHS was of central importance to sportscotland. It was the primary source of quantitative representative evidence enabling accountability of this public body and the Scottish Government in relation to the legal requirements of the EA and the protected characteristic of sex.
- 5.2. The replacement of sex-disaggregated data with gender identity data carries several risks. Firstly it is likely to overestimate female participation. In particular, it is likely to mask the continued low participation levels of females in male dominated sports such as football, rugby, cricket and golf. This is because the pool of footballers, rugby players, cricketers, and golfers out of which transwomen identify is much larger than the pool into which they identify.
- 5.3. The potentially artificial inflation of female participation in sport makes it difficult, if not impossible to assess progress in this area. It muddies funding decisions, and risks helping to justify the existing disproportionate Scottish Government and National Lottery funding awarded to the sport and physical recreation choices of males.
- 5.4. A lack of reliable data in this area is also a significant problem for the fair and safe participation of females in sports which are inherently competitive, from foundation to excellence levels and in which male puberty confers a significant advantage in 'gender affected' sports (Hilton and Lundberg, 2021).<sup>18</sup>
- 5.5. Overall, a failure to collect sex-disaggregated data means that sportscotland is unable to meet its equalities monitoring duties under the PSED in relation to the protected characteristic of sex. If females are disadvantaged as a result, this may constitute indirect discrimination under the EA. Nor does the SHS collect data on the protected characteristic of gender reassignment, thereby also precluding equalities monitoring in this area. The SHS approach to data collection is nonetheless, consistent with the Chief Statistician's draft recommendations.
- 5.6. Lastly, it should be noted that accurate data collection is likely to be hampered by a lack of clear and consistent terminology. For example, sportscotland online publications routinely conflate sex and gender, or switch between the two, thereby compromising its ability to demonstrate compliance with the EA. The same type of slippage is also evident in the Chief Statistician's draft guidance.
- 5.7. In the interests of accuracy and clarity, and to enhance data integrity, standardised terminology is essential. This should not conflate different protected characteristics and should align with the protected characteristics under the EA. In particular, sex should not be conflated with gender identity.
- 5.8. The Scottish Government has overarching responsibility for ensuring both public and private bodies providing services to the public and/or with responsibility for public functions comply with the EA. It should ensure that primary overarching data collection and planning instruments such as the SHS and Scotland's census collect clear accurate standardised data for all nine protected characteristics in the EA to enable the equitable fair and legal provision of these services and functions for the people of Scotland.

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<sup>18</sup> E Hilton and T Lundberg (2021) Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage. *Sports Med.* 51(2):199-214. Available at <https://pubmed.ncbi.nlm.nih.gov/33289906/>

## **Annex 1. The 2010 Equality Act**

The 2010 Equality Act<sup>1</sup> applies to any individual or organisation, including government departments, providing goods facilities or services to the public. It makes it unlawful to discriminate, directly or indirectly unless objectively justified, on the basis of nine characteristics, one of which is sex. Sex is reference to 'a man or to a woman' (Section 11) and 'woman' 'means a female of any age' (Section 212). As the Statutory Code of Practice<sup>12</sup> explains, 'Sex does not include gender reassignment' (p. 38 para 2.56).

The EA outlines that direct discrimination occurs when an individual or organisation providing services to the public treats someone less favourably because of a protected characteristic (Section 13). Indirect discrimination is the use of an apparently neutral practice, provision or criterion which puts people with a particular protected characteristic at a disadvantage compared with others who do not share that characteristic, and applying the practice, provision or criterion cannot be objectively justified (Section 19). The term objectively justified means that something can be shown to be a proportionate means of achieving a legitimate aim.

A provision, criterion or practice 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions'<sup>12</sup> (p. 70 para 5.6). Equality law applies not just to services but also to organisations carrying out public functions which also have a 'duty not to discriminate in carrying out these functions' (p. 19 para 1.8).

The General Equality Duty (GED) requires public bodies to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity between people who share a protected characteristic and those who do not and foster good relations between people who share a protected characteristic and those who do not (Section 149).

It is supported by eight more specific duties for Scottish public bodies in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012<sup>30</sup>. As a listed organisation, the Scottish Sports Council (sportscotland), is also required to:

- report on mainstreaming the equality duty and publish progress every two years
- publish equality outcomes every four years and report progress toward achieving these every two years
- assess and review policies and practices
- publish in a manner that is accessible.

## Annex 2. Technical Guidance and the Statutory Code of Practice

The Technical Guidance on the Public Sector Equality Duty: Scotland<sup>19</sup> outlines guidance to enable public authorities such as sportscotland to meet their responsibilities under the Equality Act. Of particular importance is the extensive Chapter 5 which focuses in great detail on ensuring evidence-based decision making in order to demonstrate compliance with the Act. The evidence required is termed 'equality evidence' and public authorities need to provide 'sufficient evidence of the impact its policies and practices are having, or are likely to have, on people with different protected characteristics' (p.47). The Guidance explains 'Adequate and accurate equality evidence, properly understood and analysed, is at the root of effective compliance with the general equality duty' and 'Without it, a body subject to the duty would be unlikely to be able to have due regard to the needs of the duty'. The Guidance suggests bodies subject to the Duty should ask themselves a range of questions, the first three of which are:

- 'What information, if any, does it already routinely collect which could help it understand the impact of its functions?
- Is that information disaggregated by different protected characteristics? If not, can it be?
- Does that information give it a sufficient understanding of the particular disadvantages, different needs and/or disproportionately low participation experienced by people who share particular protected characteristics?' (p.52)

Further, Chapter 5 of the Code of Practice<sup>20</sup> elaborates on indirect discrimination. It explains 'A significant factor in determining whether a public authority is able to justify what may be indirect discrimination is the extent to which the authority has complied with their public sector equality duties' (p. 81 para 5.36). It explains it is 'possible to use national or regional statistics to throw light on the nature and extent of the particular disadvantage' (p. 73 para 5.13). Assessing indirect discrimination claims would involve a 'pool for comparison' and 'a comparison must then be made between the impact of the provision, criterion or practice on people without the relevant protected characteristic, and its impact on people with the protected characteristic' (p. 75 para 5.19). Further, one established approach involves asking:

- 'What proportion of the pool has the particular protected characteristic?
- Within the pool, does the provision, criterion or practice affect service users without the protected characteristic?
- How many of these service users are (or would be) disadvantaged by it? How is this expressed as a proportion ('x')?
- Within the pool, how does the provision, criterion or practice affect service users who share the protected characteristic?
- How many of these service users are (or would be) put at a disadvantage by it?
- How is this expressed as a proportion ('y')?' (p. 75. para 2.51)

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<sup>19</sup> Equality and Human Rights Commission (2016) Technical Guidance on the Public Sector Equality Duty: Scotland (2016).

[https://www.equalityhumanrights.com/sites/default/files/redraft\\_of\\_psd\\_tech\\_guidance\\_-\\_v6sc.pdf](https://www.equalityhumanrights.com/sites/default/files/redraft_of_psd_tech_guidance_-_v6sc.pdf)

<sup>20</sup> Equality and Human Rights Commission (2011) 'Services, public functions and associations: Statutory Code of Practice'

[https://www.equalityhumanrights.com/sites/default/files/servicescode\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf)

### Annex 3. Estimating the transgender population

The numbers identifying as transgender without undergoing any medical transition (via hormones or surgery) are larger than the trans population who do undergo a medical transition of some kind. Collin et al<sup>22</sup> state 'the empirical literature on the prevalence of transgender identities highlights the importance of adhering to specific case definitions because the results can range by orders of magnitude. Standardized and routine collection of data on transgender status and gender identity is recommended.' They find 'whereas in most studies estimating the prevalence of surgical or hormonal gender affirmation therapy or transgender-related diagnoses, the prevalence estimates generally ranged between 1 and 30 per 100,000 individuals, self-reported transgender identity was orders of magnitude higher ranging from 100 to 700 per 100,000 or 0.1%-0.7%.' They also find the prevalence of transgender identity in adults is almost twice as high in biological males identifying as women, compared with biological females identifying as men. This is consistent with UK sex disaggregated data<sup>23</sup> which shows that of those awarded a GRC from 2005-2019, 73% were biological males, compared to 27% biological females.

Since 2004 around 400 people have been issued with a GRC in Scotland<sup>21</sup> however changing eligibility criteria from a diagnosis of gender dysphoria to self-declaration of gender identity would significantly increase this number. Given the requirement for a diagnosis of gender dysphoria, the 400 GRCs awarded to date probably relate primarily to transsexuals who, according to Collin et al (2016),<sup>22</sup> may make up perhaps 1% of the much larger transgender population, the majority of whom will transition socially at most. Further, many transsexuals appear unhappy about the conflation of the two categories as witnessed by a letter to the Guardian newspaper from 17 transsexual people who state: 'Replacing the evidenced-based process for obtaining a gender recognition certificate with an over-the-counter style self-declaration blurs the distinction between us and transgender people who remain physically intact'.<sup>23</sup>

The National Records of Scotland records an adult (16+) population of 4,534,539<sup>24</sup> and the Scottish Government estimates that under an eligibility system of self-declared gender identity numbers with a GRC will increase 10-fold,<sup>25</sup> which would mean 4000 people would have a GRC. Stonewall's transgender estimate is 1% giving an adult transgender population of 45,345 in Scotland. Not everyone who identifies as transgender will apply for a GRC and as we have seen, both data collection and some single sex sport eligibility criteria are disaggregated by gender identity rather than possession of a GRC.

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<sup>21</sup> MBM Policy Analysis, Gender Recognition Act reform: The purpose of the GRA (2019). Available at <https://murrayblackburnmackenzie.org/2019/12/27/gender-recognition-act-reform-the-purpose-of-the-gra/>

<sup>22</sup> L Collin , S Reisner, V Tangpricha, M Goodman (2016) Prevalence of Transgender Depends on the "Case" Definition: A Systematic Review. J Sex Med. 13(4):613-26. doi: 10.1016/j.jsxm.2016.02.001

<sup>23</sup> The Guardian, Standing up for transsexual rights, *Letters* (4 May 2018). Available at <https://www.theguardian.com/society/2018/may/04/standing-up-for-transsexual-rights>

<sup>24</sup> National Records of Scotland, Mid-Year Population Estimates Scotland, Mid-2019 (2020). Available at <https://www.nrscotland.gov.uk/files//statistics/population-estimates/mid-19/mid-year-pop-est-19-report.pdf>

<sup>25</sup> MBM Policy Analysis, Gender Recognition Act reform: The purpose of the GRA (2019). Available at <https://murrayblackburnmackenzie.org/2019/12/27/gender-recognition-act-reform-the-purpose-of-the-gra/>