



Equality  
Network



Scottish  
Trans

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The Equality Network is a national lesbian, gay, bisexual, trans and intersex (LGBTI) equality organisation in Scotland existing since 1997. The Scottish Trans Alliance, based within the Equality Network since 2007, focusses specifically on trans equality. This submission is on behalf of both Scottish Trans Alliance and Equality Network.

We welcome the opportunity to comment on this draft guidance, and in particular we welcome the aims and intentions of gathering more and better data that means that Scottish public bodies and the Scottish Government can analyse the gendered differences in people's lives, and use this data to inform decisions on how to take meaningful action to tackle gendered inequalities.

However, we note that the majority of the draft guidance is not actually focused on how to gather data that provides an evidence base for tackling gendered inequalities, but instead is focused on how trans people fit in the collection of sex/gender data. As a trans equality organisation we are of course happy to participate in this discussion. However, we are concerned about this hyper-focusing on trans people's place in such data collection. This seems to be the result of an increasingly concerted campaigning effort to scrutinise and challenge trans people's existing inclusion in daily life, rather than the most important focus for improving the collection and use of data on gendered inequalities.

### *Summary of our response*

Overall, we welcome the Chief Statistician's recommendations about what kinds of questions should be asked. We strongly agree that:

- Considerations around privacy, and treating people with dignity and respect, are important principles to underpin the recommendations in this guidance
- Public bodies should in the vast majority of instances ask sex/gender questions which, if needed, are accompanied by guidance to trans people that they should answer in line with their lived sex. This question should include a response option for non-binary people
- Public bodies will rarely need to ask about the current sex on a person's birth certificate, and will need to consider carefully if this is the information that is needed. However, if they do need to ask about this, this should be done by

asking a different question that specifies it is asking about current birth certificate sex

- Public bodies should be asking about trans status / history, so that they can build an evidence base about trans people's experiences. This will also allow them to disaggregate data by trans status to analyse whether this impacts the findings of data disaggregated by sex/gender

However, we do have some serious concerns that in attempts to rigidly define broad multi-dimensional concepts like sex, gender and gender identity for the purpose of data collection, trans people's existing equality and inclusion may be undermined. Those concepts do not have strict, single, agreed definitions, either in law or in practice, and this is an area of significant current debate that cannot be resolved within the scope of this guidance. In particular, recommendations in the guidance that the term "sex" now be understood to refer to the sex on a person's current birth certificate is not reflective of current policy, practice or the law. It is absolutely vital that this guidance does not give the impression, by proposing changes or restrictions to the meaning of terminology already widely in use, that trans people's existing rights, to be recognised and treated in line with how we live our lives, have been reduced. It is also vital that the guidance does not inadvertently lead to policy changes driven by decisions based on definitions for the purposes of data collection, and not based on the current UK, EU and international law.

- The draft guidance aims to standardise the definitions of sex, gender and gender identity in ways that are out of step with the use of these definitions in existing law and policy
- Decisions on how to define these terms for the purpose of data collection could have very significant impact on trans people's existing rights and inclusion
- Attempts to standardise the definitions of sex, gender and gender identity are likely to be counterproductive given their interchangeable and overlapping uses in a range of contexts outside of data collection
- Therefore, great care is needed around the terminology used for labelling data collection. For example, if it is necessary to ask for current birth certificate sex, that should be referred to as such, not just as "sex"

## 1. Definitions: Sex/gender and trans people

On page 6, the guidance attempts to outline some of the different ways that "sex", "gender" and "gender identity" are defined by a variety of organisations.

It describes these definitions as "broadly similar" although also acknowledges that "the terms sex and gender are used by some people interchangeably".

We would suggest that language around sex, gender and gender identity remains debated and contested. This guidance will be unable to solve this issue (and as we go on to explain below, perhaps it is not an issue that can be solved when trans people necessarily do not fit into general population sex/gender norms).

We strongly agree with the statement on page 9 which states:

“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.”

For the vast majority of the population, questions on sex/gender, whatever is asked, will provide information on a person’s sex registered at birth, physical and biological sex characteristics, the sex on their current birth certificate, and how they live and identify, and these will all align in ways that are considered “typical”.

For trans people, asking one question cannot give you all of this information. That is true whether you ask a question on their sex registered at birth, physical and biological sex characteristics, the sex on their current birth certificate, or how a person lives – these will not align in the “typical” way that they do for the vast majority.

We are concerned that attempts to standardise the definitions used for these terms for the purposes of data collection are overlooking the reality that trans people by necessity pose a “problem” to this standardisation. The value of sex/gender questions is that for the vast majority of the population, this question can give you a single variable that measures all of these things. Most public bodies and data users will presume that all data collected, by any question asked, will provide information on all of these things, and that these things will align.

We don’t think that there is a way to correct or design data collection on sex/gender which removes this issue – it is simply the case that trans people do not quite fit in sex/gender categories in identical ways to the general population.

However, we do think that asking a sex/gender question that allows trans people to respond in line with how they are living, and also asking a question about trans status, will provide public bodies with the information that they need. Asking these questions allows public bodies to learn more about trans people, to compare trans people with the general population, and to ensure that how data is collected respects individuals’ privacy, and treats them with dignity and respect.

## 2. Definitions: Sex/gender, policy and the law

The guidance attempts to standardise the definitions of sex, gender and gender identity for the purposes of data collection by public bodies in Scotland. However, the recommended definitions proposed in relation to this language for the purposes of data collection do not reflect the use of the same language in policy and the law.

This is particularly important given that on page 10 the guidance states that: “In a small number of instances, it may be necessary to record a person’s legal sex”. The question that is proposed to accompany gathering data on legal sex is then “What is your sex?” (as shown on page 15).

This presents two significant problems. The first is that trans people are lawfully able to interact with public bodies, services, and their employers in-line with their lived sex

before they obtain a Gender Recognition Certificate (GRC). This includes using single-sex services.

The second is that it is our understanding that legally, there is no difference in Scots, UK, or relevant EU or international law between sex and gender. Instead, the concepts of sex and gender in the law are used interchangeably, and are interrelated. Attempts to standardise the definitions used for the purpose of data collection will not change the fact that these terms are used in these ways in the law.

We are very concerned that attempts to define these terms for the purpose of data collection may in fact be counterproductive, and have a significant impact on trans people's existing rights. Public bodies may then be using language in data collection that is defined differently to how that same language is used in the law. Or, public bodies may mistakenly believe that these definitions mean there is an intention from the Scottish Government that there should be a change in policy regarding how trans people are treated.

We provide further details of these two points at Appendix A.

### **Recommendations:**

1. The guidance should acknowledge that the meanings of the terms "sex" and "gender" in policy and the law are not uniform. Attempts to standardise their definitions for the purpose of data collection does not and cannot standardise their interrelated and interchangeable use in these contexts
2. The guidance must explicitly state that existing rights of trans people are not changed and should not be changed as a result of its publication
3. The guidance should not attempt to create specific definitions of the broad multi-dimensional terms "sex" and "gender". It should make clear that the use of terms in data collection has no wider effect on how the terms are to be interpreted in other policy and legal contexts

### **3. Collecting "gender identity" data**

We broadly support the questions outlined on pages 13 and 14.

We welcome that the Chief Statistician recommends that in almost all instances, public bodies should be collecting data about how a trans person lives and identifies (which the Chief Statistician has called data on "gender identity"). We note that this has long been current practice in data collection, whether the question is labelled "sex", "gender" or "gender identity". It is incorrect to claim (as some campaign groups do) that recommending that the sex/gender question should allow trans people to respond with their lived sex would be a change to existing practice. It would not.

We agree that this question must therefore include a third option for non-binary people to be able to answer this question accurately. We also support the recommendation to include an option to then provide more details if you have said that you describe your gender "in another way" as this gives non-binary people the same opportunity as men and women to have who they are recorded accurately.

We note that the recommended question is already used in several Scottish Government household surveys.

As the draft guidance explains on page 9, for the vast majority of the population, any questions that asks about sex/gender, however defined, will be answered in the same way. We agree that for the small number of people who may answer these questions differently – trans people – that they should be counted, recorded and described by public bodies in line with their lived sex.

This is the most useful and relevant thing for public bodies to know about a trans person. This is because trans people, regardless of whether or not they have a GRC, and regardless of their sex registered at birth, are lawfully able to, and do, interact with public bodies in line with how they are living.

Whilst we agree that this is the correct approach to gathering data on sex/gender, we are not convinced that this question needs to be labelled “gender identity” – we would be comfortable with it being labelled “sex”, “gender” or “gender identity” (or in fact to have no label at all). Instead the principle that trans people should be able to answer in line with how they are living when asked questions about sex/gender is what is important.

Many public bodies are already asking a question that takes this approach that is labelled “sex”, and trans people are used to responding to questions labelled this way, and updating their sex on identity documents, to reflect how we live our lives. For example, we note that many trans people, regardless of whether they have a GRC, have updated the sex on their passport and NHS records.

We do think that it could be made clearer that the recommendation is that in almost all instances public bodies should be collecting data about how a trans person lives and identifies. The draft guidance outlines on page 10 that a question about current birth certificate sex would only need to be asked rarely, and on an individual basis for a very specific purpose. It is also made clear that questions about a person’s “biology” should not be asked (except on an individual basis in relation to medical treatment). We agree.

In line with this, the guidance would benefit from a clearer positive statement that the general recommendation is to ask a question that allows people to respond in line with how they are living.

We also note that on page 25, the Chief Statistician outlines that reporting on non-binary people may be difficult due to the potential small size of the population. This is true for a range of demographic information collected about people. Whilst we welcome that the Scottish Government has announced a Working Group on Non-Binary People, we do not think that public bodies need to wait on the work of this group or its recommendations to begin collecting and reporting data about non-binary people. Instead, they can take the same approach they would to reporting on data about other groups where only a small number of individuals report certain demographic characteristics.

**Recommendation:**

1. It should be clearer in the guidance that in almost all circumstances public bodies should be collecting data about how a person lives and identifies.
2. The guidance should advise public bodies to take the same approach to reporting on data about non-binary people as it does data on other groups that make up a small number of the general population

#### 4. Collecting data on the sex on your current birth certificate

On page 10, the draft guidance states:

“In a small number of instances, it may be necessary to record a person’s legal sex but this would be on an individual basis for a very specific purpose and it would be up to public bodies who need this data to develop the best approach to do this”.

If the Chief Statistician thinks a question on current birth certificate sex may sometimes be appropriate, then the question asked by public bodies should both be labelled and asked in a way that makes it clear that the current sex on a person’s birth certificate is what is being asked about.

We therefore think that the questions outlined on page 15 need to be amended.

This is for three key reasons:

1. Many public bodies already label their sex/gender questions as “sex” questions, and collect information about how a person lives and identifies (e.g. as the guidance acknowledges on page 16, this will be the approach of the Scottish Census in 2022)
2. The use of the term “sex” in policy and the law does not always refer to the sex on someone’s birth certificate (e.g. with regards to single-sex services)
3. Where organisations have an existing question labelled “sex”, they may default to maintaining this labelling, and thus adopting the guidance for the current birth certificate sex question – even if this would mean changing the data they have been collecting from lived sex to current birth certificate sex where this isn’t needed or appropriate for their aims

Having said that, we are unable to think of specific examples where collecting data on current birth certificate sex would be useful or appropriate for public bodies.

Collecting data on the current sex on a person’s birth certificate would seem to indicate times where it is useful to count a small minority of trans people in line with their lived sex, and the majority as their sex registered at birth (due to the small proportion of trans people with a GRC<sup>1</sup>). However, trans people with or without GRCs are lawfully able to interact with public bodies and update the majority of their identity documents in line with how they are living, at the point at which they begin to transition. It is therefore extremely unclear from the guidance when information on current birth certificate sex would be relevant.

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<sup>1</sup> Government Equalities Office: National LGBT Survey  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721704/LGBT-survey-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf)

One specific example mentioned in passing on page 9 regarding why a public body may ask a question on current birth certificate sex is “whether to offer a single sex service”.

However, whether or not a trans person can use a single-sex service, and decisions about whether or not they can be treated less favourably or even excluded from a single-sex service, are not determined by whether or not the trans person has a GRC. It would therefore be inappropriate for the Chief Statistician to recommend that single-sex services should be asking a question about current birth certificate sex in order to make a decision of “whether to offer a single-sex service”. The sole legal test in the Equality Act is whether, by treating the trans person less favourably or excluding them, the service is applying “a proportionate means of achieving a legitimate aim” [Equality Act 2010, schedule 3, paragraph 28].

Furthermore, this guidance may lead to public bodies considering for the first time that there are different questions on sex/gender to choose from. The key issue for all public bodies doing sex/gender data collection now will be about choosing between questions from the options provided. Therefore, guidance on selecting a question appropriately is of particular importance.

We welcome that any question on current birth certificate sex (if needed) would include a prefer not to say option.

#### **Recommendations:**

1. If there is a need to ask a question about current birth certificate sex, this question should be labelled as such. It should ask “What is the sex on your current birth certificate?”
2. Where public bodies continue to collect data using a question labelled “sex” for legacy reasons, and while they implement the best practice recommendations of the Chief Statistician, this should be understood as collecting questions on a person’s lived sex
3. The guidance should make it clear that it is very unlikely to be appropriate for a public body to change an existing question labelled “sex” so that it starts asking about current birth certificate sex
4. The reference to “whether or not to offer a single sex service” should be removed from page 9, as current birth certificate sex is not the appropriate basis on which to make this decision
5. If the Chief Statistician believes a question on current birth certificate sex may sometimes be appropriate, clear guidance should be provided on when this question would be needed

#### **5. Asking a question on trans status**

We strongly support the recommendation in the guidance that public bodies should be asking a question on trans status, and we support the wording of questions suggested on pages 17 and 18.

This question has been tested by NRS for inclusion on the Census in 2022, is understood well by trans people, and has high levels of public acceptability<sup>2</sup>.

Asking this question will allow public bodies to begin to build an evidence base about trans people's lives, and use this to inform decisions in the future about service provision, policy and resources.

Furthermore, if data users have concerns about how trans people fit into sex/gender data, asking this question will allow data users to disaggregate data by trans status, and investigate if any unexpected findings are a result of differences amongst trans people's responses, or indeed whether trans people make no statistically significant difference to the findings. We agree with the statistical principle on page 5 that "if statistics produce an unexpected result, they should be investigate further, to see if there is a reason for these results".

Asking a trans status question would allow, for example:

- for trans people to be removed from data about women or men, if that data was going to be used to plan for the resourcing of cervical cancer or prostate cancer screenings. (It should be noted that such planning cannot accurately assume the screening requirements of all trans people from either their lived sex/gender, or from their current or their original birth certificate sex.)
- for data users to analyse whether or not trans people do or don't experience a gender pay gap, and whether or not their inclusion in sex/gender data impacts on the findings of the pay gap between men and women

However, it may be, as the draft guidance recognises, that in all or almost all cases, disaggregating data in this way will turn out not to be necessary – as trans people are unlikely to make up a large enough proportion of the population for them to have a statistically significant impact on sex/gender data.

However, we note that the Chief Statistician has recommended that the trans status question outlined on pages 17 and 18 is only asked to those aged 16 or over.

We are not convinced that the question should be restricted in this way, particularly as it is also recommended that there is a 'prefer not to say' option included. Trans young people under 16 should be able to have their trans status recorded, if they want to, either by their parents/carers providing this data on their behalf, or where they are responding themselves. This will allow public bodies to collect important information on trans young people's experiences.

### **Recommendation:**

1. Remove the restriction that a trans status question can only be asked to someone who is 16 or over.

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<sup>2</sup> [https://www.scotlandscensus.gov.uk/documents/census2021/Sex\\_and\\_Gender\\_Identity\\_Topic\\_Report.pdf](https://www.scotlandscensus.gov.uk/documents/census2021/Sex_and_Gender_Identity_Topic_Report.pdf)

## APPENDIX A: DEFINITIONS: SEX/GENDER, POLICY AND THE LAW

The guidance attempts to standardise the definitions of sex, gender and gender identity for the purposes of data collection by public bodies in Scotland. However, the recommended definitions in relation to this language for the purposes of data collection does not reflect the use of the same language in policy and the law.

This presents two significant problems.

### 1. Sex and trans people's existing rights

The first is that trans people are lawfully able to interact with public bodies, services, and their employers in-line with their lived sex before they obtain a GRC. Below are two examples of how a misunderstanding of the scope of this guidance – in particular, that the term “sex” refers specifically to the sex recorded on a person's current birth certificate, could cause misunderstandings about, or a potential rollback of, trans people's existing rights.

#### Identity documents

It is already the case that trans people are able to update their sex on identity documents before obtaining a GRC, and have been able to do so for decades. This includes the sex on passports and NHS medical records.

For passports, trans people are told:

“You can apply for a passport in an acquired gender. This option is available to those who do not hold a Gender Recognition Certificate or have not had gender reassignment surgery, as well as those who have.<sup>3</sup>”

To update their Community Health Index (CHI) number, trans people are told:

“None of the following information is dependant on the patient changing their gender formally under the Gender Recognition Act 2004.

- No evidence is required; the patient simply needs to advise either their GP practice or Practitioner Services (a business unit within NHS National Services Scotland) that they wish to change their gender. This is often accompanied by a change of name being requested by the patient.<sup>4</sup>”

This then allows trans people to be issued a new CHI number, which will include changing the number that records their sex.

These identity documents have not been mistakenly allowing trans people to update their sex. Instead, this has been possible because trans people's right to be treated in line with how they are living is, in the overwhelming majority of circumstances, not determined by whether or not they hold a GRC. This has been the case for many decades – starting with the decision in *P v S and Cornwall County Council* in 1996 at

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<sup>3</sup> HM Passport Office *Applying for a Passport: Additional information for transgender and transsexual customers:*

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/251703/Applying\\_for\\_a\\_passport\\_additional\\_information.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/251703/Applying_for_a_passport_additional_information.PDF)

<sup>4</sup> <https://nhs.uk/foi-disclosure/requirements-for-processing-a-change-of-gender-and-title/>

the European Court of Justice, which led to the Sex Discrimination Act (Gender Reassignment) Regulations 1999, and further consolidated in the Equality Act 2010.

When this guidance is published, it is of course highly unlikely that HM Passport Office and NHS Scotland would swiftly amend the fields on UK passports, or the codes in CHI numbers to be labelled “gender identity” rather than “sex”.

Unless the guidance is therefore seeking to change the decades old policy of allowing trans people to update such identity documents, it will remain the case that many public bodies use the term “sex” whilst also allowing trans people to update these markers without a GRC. Any definition in the guidance of “sex” as meaning current birth certificate sex would therefore remain anomalous and inconsistent with other practice.

### Single-sex services

Whether or not a trans person can use a single-sex service is not determined by the sex on their current birth certificate.

Gender reassignment is one of the protected characteristics under the Equality Act 2010. The protected characteristic is held by anyone who is:

“proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.”<sup>5</sup>

Anyone with the protected characteristic is described as a “transsexual”.

The definition makes it clear that in order to have the protected characteristic, a person does not need to have undergone any gender reassignment medical treatments, to be under medical supervision, or to have obtained a GRC. Social and legal aspects of changing your sex count, in the definition, called “other attributes of sex”, as well as medical changes. The recent decision in *Taylor V Jaguar Land Rover* also confirmed that non-binary people are covered by the protected characteristic<sup>6</sup>. In this sense, the protected characteristic is broad, and covers a diverse range of trans people at varying stages of their transition.

There are exceptions in the Equality Act 2010 that allow services to be provided separately to men and women, or only to either men or women, if the services meet certain criteria<sup>7</sup>. Without these exceptions, providing separate or single-sex services would be unlawful (because it would be treating men and women less favourably on the basis of their sex, which is prohibited).

Trans people can use single-sex services that align with their lived sex. Trans women can use single-sex services for females, and trans men can use single-sex services for males. This is outlined in the original Statutory Code of Practice (SCoP)

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<sup>5</sup> <https://www.legislation.gov.uk/ukpga/2010/15/section/7>

<sup>6</sup> <https://www.gov.uk/employment-tribunal-decisions/ms-r-taylor-v-jaguar-land-rover-ltd-1304471-2018>

<sup>7</sup> These are outlined in Schedule 3, Part 7, Sections 26 and 27:  
<https://www.legislation.gov.uk/ukpga/2010/15/schedule/3/part/7>

that was produced to go alongside the Equality Act 2010 which gives information on how to ensure single-sex services do not unlawfully exclude trans people<sup>8</sup>.

The SCoP is clear at section 13.57 that

“If a service provider provides single- or separate sex services for women and men, or provides services differently for women and men, **they should treat transsexual people according to the gender role in which they present.**”  
(emphasis added)

This establishes that a single- or separate sex service should not default to service provision only to those people who share their sex registered at birth or their current birth certificate sex, but also to all trans people who present, live, and identify in a way that is in-line with that service. This means that **the starting position is that women-only services are inclusive of trans women, and that men-only services are inclusive of trans men, whether or not they have a GRC.**

There is also an additional gender reassignment exception in the Equality Act that allows single- or separate sex service providers to treat trans people differently if they feel it is necessary, but this is optional, not a requirement<sup>9</sup>. There is never any legal requirement to treat trans people differently in a single-sex service. Any choice to use this exception to restrict or adapt trans people’s access to or treatment in a single-sex service must be a “proportionate means of achieving a legitimate aim”<sup>10</sup>.

The SCoP expands on the restrictiveness with which this exception must be applied at section 13.60, which includes the line “any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances.”<sup>11</sup> Section 13.60 also makes it clear that the exception that allow trans people to be treated differently must be used and applied on a “case-by-case” basis<sup>11</sup>.

This additional exception applies to all trans people with the protected characteristic of gender reassignment. This includes both those who have a GRC, and those who do not. So, for example, a single-sex service for men could choose to exclude a trans man in certain restricted circumstances whether he was “legally male” (because he had obtained a GRC), or whether he was “legally female” (because he had not obtained a GRC), because either way he would have the protected characteristic of gender reassignment.

Using the term “sex” does not mean that single-sex services should exclude trans people, or treat trans people with or without GRCs differently. The term “sex” is used in the Equality Act, and the Act’s provisions are clear that treating trans people differently is an exception you can make in limited circumstances, not a rule of how services should be provided.

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<sup>8</sup> [https://www.equalityhumanrights.com/sites/default/files/servicescode\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf)

<sup>9</sup> This is outlined in Schedule 3, Part 7, Paragraph 28:

<https://www.legislation.gov.uk/ukpga/2010/15/schedule/3/paragraph/28>

<sup>10</sup> Ibid.

<sup>11</sup> [https://www.equalityhumanrights.com/sites/default/files/servicescode\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf)

## 2. Sex and gender in the law

The second problem is that, it is our understanding that legally, there is **no difference in Scots, UK, or relevant EU or international law between sex and gender**. Below are several examples of how sex and gender are used interchangeably, and are interrelated. Attempts to standardise the definitions used for the purpose of data collection will not change the fact that these terms are used in these ways in the law.

### UK anti-discrimination law

The Sex Discrimination Act 1975 was the first UK legislation introduced to explicitly protect people from sex discrimination. The next legislation was The Equality Act 2006 which made reference to “gender” rather than “sex”, and part of the enforcement mechanism was named the gender equality duty 2007. The Equality Act 2010 now describes one of the nine protected characteristics as “sex”. There is no indication that the Equality Act 2006 meant something different, when it used the term “gender” than was meant by the term “sex” in either the Sex Discrimination Act or the current Equality Act.

Similarly, if we return to the definition of gender reassignment in the Equality Act:

“proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or **other attributes of sex**.”(emphasis added)

The terminology “other attributes of sex” indicates that the Equality Act 2010 considers there to be aspects of sex that are not purely “physiological” – but that there are social and legal aspects to sex as well.

If the intention had been that this definition of sex, that includes both “physiological or other attributes of sex”, only apply to the gender reassignment protected characteristic, this would have been made explicit in the drafting.

By proposing to, changing, or having changed any of these (multiple) attributes of sex, you have the protected characteristic of *gender* reassignment.

We also note that on page 8 the guidance references an EHRC statement which says that trans people are protected from sex discrimination on the basis of their “legal sex”.

Whilst it is the case that a trans person’s legal sex for the specific purpose of the Equality Act sex protected characteristic is determined by whether or not they have obtained a GRC, this does not change the fact that trans people are still protected from sex discrimination that they may face as a (trans) man or a (trans) woman.

For example, a trans woman without a GRC who received less favourable treatment in a job application because the employer did not want to appoint a woman, would indeed be able to make a sex discrimination claim under the 2010 Act. She would not have the grounds for a gender reassignment discrimination claim, because the

employer discriminated against her because of sexism, and not because she was trans. The legal sex of the trans woman would not matter – if she had not obtained a GRC and was still “legally male”, this would not make the employer’s actions any less sex discrimination (and sex discrimination against women).

We therefore think that the quoted explanation from the EHRC on the situation around sex discrimination for the trans woman in the example (that she would be protected “for being male”) is incomplete and misleading.

### The Gender Recognition Act

Furthermore, the Gender Recognition Act 2004 is the law which allows trans people to amend their birth certificates, and change their legal sex “for all purposes”. The key effect of applying for a gender recognition certificate is that:

“the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).”<sup>12</sup>

The language used in the Gender Recognition Act 2004 shows there is no clear distinction in law between the concepts of sex and gender. By living in your “acquired gender”, you provide evidence that allows you to change the sex on your birth certificate, and this then becomes your sex “for all purposes”.

### EU Equality Law

EU equality law protects trans people from discrimination because they are trans, but it does so within the law against sex discrimination, rather than under a separate protected characteristic such as gender reassignment. The key European Court of Justice case of *P vs S and Cornwall County Council*, in 1996, established that in EU law, discrimination against someone because they are trans is a form of sex discrimination.

In other words, in EU law, the concept of sex encompasses all the different dimensions of sex including physical and biological sex characteristics, registered sex, and lived sex.

### The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

We note that the UN Committee on the Elimination of Discrimination against Women recommends in its eighth periodic report to the UK in Spring 2019 that the UK should:

“(c) Review and amend the public sector equality duty in order to address situations of intersecting forms of discrimination, such as discrimination faced by “Black, Asian and Minority Ethnic” women, older women, women with

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<sup>12</sup> <https://www.legislation.gov.uk/ukpga/2004/7/section/9>

disabilities, asylum-seeking and refugee women, lesbian, bisexual and transgender women and intersex persons;<sup>13</sup>”

This shows that the Committee clearly consider transgender women to be included in the scope and protections of CEDAW. In part 1 Article 1 of the Convention, discrimination against women is defined as:

“any distinction, exclusion or restriction made on the basis of **sex** which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>14</sup>” (emphasis added)

The above examples all show that there is no clear and distinct way that sex and gender are defined, used and understood in policy and the law in Scotland, the UK and internationally. This will continue to be the case even if this guidance seeks to standardise the way these terms are defined for the purposes of collecting data by Scottish public bodies.

We are very concerned that attempts to define these terms for the purpose of data collection may in fact be counterproductive, and have a significant impact on trans people’s existing rights. Public bodies may then be using language in data collection that is defined differently to how that same language is used in the law. Or, public bodies may mistakenly believe that these definitions mean there is an intention from the Scottish Government that there should be a change in policy regarding how trans people are treated.

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<sup>13</sup> <https://digitallibrary.un.org/record/3801131?ln=en>

<sup>14</sup> <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>