

12th February 2021

Dear Mr Halliday,

We thank you for the opportunity to offer feedback on the draft guidance on collection and publication of data by Scottish public bodies.

We are experienced researchers and activists, specialising in equity in issues relating to gender, race and sexual orientation¹. We are very pleased the Data Working Group values gender diversity, and the effort to create official guidelines for Scottish public bodies, and the transparency in developing this guidance. We strongly agree that sufficiently granulated data is the best foundation to inform the evidence based interventions used to support people in Scotland, as highlighted in the introduction to the guidance. For the purpose of developing it further, we have a number of comments that we would like you to consider.

Support for emphasis of collecting granular and intersectional population data

As you know, the depth and granularity of the data gathered across the spectra of gender and sex form the foundation of policies, services and legal protections which uphold the human rights of all people. Failure to do so will lead to disenfranchisement of thousands of individuals by the Scottish public sector; for example, being excluded from health care, right to education in dignity, welfare, employment and physical and emotional safety.

We further highlight the importance of accounting for intersectionality in the census and the data analysis, particularly with regards to sex and gender intersecting with other protected characteristics such as race, disability, age and sexual orientation. For example, large surveys such as the 2015 US Transgender Survey covering over 28,000 transgender people highlighted that transgender people of Black, indigenous and Arabic ethnicities faced up to twice the rate of unemployment, harassment, incarceration and fall victim to violent crime compared to white trans people. Gaining more granular and accurate information about the people living in Scotland will support and increase the potential success rate of universal and targeted interventions and are more likely to further the people of Scotland and the UK more broadly.

¹ **Dr Izzy Jayasinghe**, Award winning activist and speaker, a trans woman from a minoritised ethnic background; **Dr Katie Nicoll Baines** Project Manager of EPSRC funded Inclusion Matters project Evidence Base with expertise in human genomic data analytics, statistics and quantitative research methods; **Dr Ben Britton**, Trustee Pride in STEM, was part of the consultation for the 2021 Census for England and Wales; and **Julie Jebson**, currently conducting PhD research on gender differences in career progression, and has advanced training in quantitative and qualitative research methods.

Recommended inclusion of intersex identities

The guidelines include thorough consideration of trans issues in collecting data on gender and sex. We recommend that this is also extended to intersex people. Research is well established on the fact that intersex people are more likely to face health risks and issues around legal recognition. The 2020 EU Agency for Fundamental Rights (FRA) report² “A long way to go for LGBTI equality” highlights that there is specific disadvantage for trans and intersex people in the EU (including at the time, the UK). This disadvantage is extended for young trans and young intersex people, with participants aged 15 to 17 experiencing more harassment as well as challenges in educational settings.

Data collection is routinely used to inform evidence based policy and specifically government funded interventions. It is noticeable that the FRA report highlights a decrease (from 33%, down to 24%) when participants were asked if they believed their national government effectively combats prejudice and intolerance towards LGBTI people. In this survey, 52% of UK respondents did not believe their government supported efforts to combat prejudice and intolerance towards LGBTI people.

Recommended inclusion of non-binary and gender non-conforming identities

The explicit option to indicate non-binary or gender non-conforming is missing from the gender identity descriptions. Under section 11 in the draft guidance, there is references made to expectations that the Working Group’s will provide more clarity of collecting and presenting data on non-binary groups. From the outcome of the legal case of Mx Rose Taylor versus Jaguar Land Rover Group Ltd last year³, the UK government clarified that non-binary and gender non-conforming identities are recognised as a protected characteristic under the Equality Act 2010⁴. We hope this will include direct and explicit recommendation to include non-binary identities alongside the other listed options. UK Universities attract international talent and there are currently 9 countries and 20 US states that enable legal recognition of non-binary people, for Scotland to be world leading it is vital we ensure these people can be counted in public data.

² https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf

³

https://assets.publishing.service.gov.uk/media/5fc8d559d3bf7f7f5c134ad3/Ms_R_Taylor_v_Jaguar_L_and_Rover_Limited_-_1304471.2018_-_Reasons.pdf

⁴ <https://committees.parliament.uk/writtenevidence/16766/html/>

Problematic demands for questions and documentation of legal sex

There remains the issue of when asking a question about someone's biological or legal sex might be necessary. The Working Group guidance asserts that 'In most cases [...] data should be collected on the basis of gender identity rather than sex'. Indeed, in the Scotland census, individuals when completing the mandatory question on sex are invited to complete according to their lived sex as surely this is a more accurate reflection of how people in Scotland are living their lives. 'Legal' or 'biological' may have legislative or medical relevance respectively, but these are still catch-all terms that actually fail to be wholly accurate and in reality, do not have their own specific definitions. Cowan *et al*, in a recent paper published in Scottish Affairs,⁵ detail how even in the law there is no specific definition of sex and gender and that these concepts may not be easily separable. Specifically,

"On the question of interpretation of sex and gender, the 2010 Act says 'woman' is a female of any age and 'man' is a male of any age. Female and male are not defined in the legislation. The Act does not specifically state whether the protected characteristic of sex is based on biological characteristics, such as genitalia or chromosomes, or based on gender as a social category, or some combination of the two. But it does give some guidance. Section 7, on the protected characteristic of gender reassignment, refers to 'physiological or other attributes of sex'"

It is concerning that the Working Group is proposing the differ from the format of the sex question in the forthcoming Scotland census. This would be in contrary to evidence from the National Records of Scotland demonstrating that a binary sex question with self-identification guidance enabled census participation for all people.

Insisting on documentation that proves your sex is exclusionary. The Gender Recognition Act is currently the subject of reform and evidence from the consultation⁶ indicates that trans people should not have to go through the current process to obtain a Gender Recognition Certificate (effectively a legal document that changes their sex) because it is overly intrusive, inaccessible (due to the limited number of authorised gender specialists available in the UK), costly and demeaning. As the current process of obtaining a GRC is so prohibitive, many trans people do not pursue it and so insisting on documentation will either be forcing trans people to engage in obtaining a GRC, or responding using documentation that does not reflect their true identity.

We welcome the Working Group's proposal to ask a direct question as to trans identity, rather than a more convoluted two-step question as to whether someone's gender identity is the same as their sex assigned at birth. It ensures those responding in the affirmative will be accurately counted as trans and prevent and false positives from

⁵ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730090

⁶ <https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-consultation-scottish-government/pages/5/>

those completing such questions in haste (anecdotally, this is something we have witnessed in my data collection practice both through surveys and in verbal conversations – many people simply do not follow the wording of the ‘does your gender identity match your sex’ question). We would recommend that further consultation on the accessibility of this question be undertaken, with focus groups of both trans, non-binary and cis-gender people, to establish the most inclusive wording.

Thank you for taking the time to review our feedback on this important guidance. We look forward to reading the final version and are available for further discussion should any clarification of our recommendations be required.

Yours sincerely,

Dr Ben Britton, Dr Izzy Jayasinghe, Dr Katie Nicoll Baines, and Julie Jebson

NOTES:

The guidance:

<https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2020/12/sex-and-gender-in-data-working-group---collecting-data-on-sex-and-gender-draft-guidance-for-feedback/documents/draft-guidance-on-data-on-sex-and-gender-collection-december-2020/draft-guidance-on-data-on-sex-and-gender-collection-december-2020/govscot%3Adocument/DRAFT%2B-%2Bguidance%2Bon%2Bcollecting%2Bsex%2Band%2Bgender%2Bdata%2B-%2BDecember%2B2020%2B-%2Bfor%2BStakeholders.pdf>