



Response to the draft guidance on collecting and publishing sex and gender data

February 2020

1. Introduction

Close the Gap is Scotland's policy advocacy organisation working on women's labour market equality. For 20 years we have been working with policymakers, employers and employees to influence and enable action that will address the causes of women's inequality in the workplace.

Gender sensitive sex-disaggregated data is essential to understanding the different experiences that women and men have in entering and progressing in employment, and to track indicators of women's labour market equality over time.

The public sector equality duty requires public bodies to gather, analyse and use employee data, disaggregated by protected characteristic. However, as noted in the draft guidance, and as highlighted elsewhere, assessment work by Close the Gap and other national women's and equality organisations, and work by the regulator, the Equality and Human Rights Commission, has found that performance of the duty has largely regressed since reporting was introduced in 2013¹.

Close the Gap participates in a range of equality advisory groups which are convened to advise on the work of national agencies, delivery bodies and other public sector employers. We also participate in, and engage with, a variety of other national advisory groups, working groups and committees that are germane to women's experiences of the labour market. This experience, along

¹ Close the Gap (2020) *Response to the Scottish Government consultation on the Gender Recognition Reform (Scotland) Bill* available at <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-response-to-the-GRA-reform-bill.pdf>

with our experience of influencing policymakers over the past two decades, highlights that gender sensitive sex-disaggregated data is rarely used to inform policymaking.

We have become aware that some public bodies have incorrectly interpreted the introduction of the EU General Data Protection Regulation (GDPR) as prohibiting them from asking service users their sex. In recent years, Close the Gap has also engaged with public bodies that have interpreted their new understanding of non-binary identities as precluding asking staff members or service users about their sex on the grounds that it would be “offensive”. This is not only incorrect, but also harmful to women’s equality and rights. Sex-disaggregated data provides the building blocks for gender-sensitive data and gender competency². If public bodies stop gathering data on employees’ and service users’ sex because of misunderstanding the law, or a concern about a risk to their organisation, there will be fewer gender-sensitive statistics with which to support policy, legislative, and service delivery change that benefits women and women’s rights³.

Public bodies need clear and specific guidance, that is also gender competent, to enable them to gather, analyse and use gender sensitive sex-disaggregated data. This is a necessary step in developing employment practice and service delivery that will advance women’s equality and rights. We therefore welcome the opportunity to comment on the draft guidance on collecting and publishing sex and gender data.

2. General comments

Close the Gap welcomes the focus on collecting good quality data on sex and gender, and the importance of ensuring data collecting methods are free from biases, which perpetuate and sustain inequalities for women, particularly who share another protected characteristic, such as Black and minority ethnic women and disabled women. We also welcome the reference to good practice highlighted in the United Nations Gender Statistics Manual European Institute of Gender Equality Gender Statistics Database, which highlights existing international consensus on the features of gender sensitive statistics⁴.

² Gender competence refers to the skills, knowledge and analytical capability to develop policy that is well-gendered; that takes account of the socially constructed difference between men’s and women’s lives and experiences.

³ Engender (2020) *Sex/gender: Gathering and using data to enhance women’s equality and rights in Scotland*

⁴ Ibid.

However, we do not believe that, in its current form, the draft guidance will enable public bodies to develop improved practice on data collection and analysis and policymaking. In particular, we comment on the definitions section of the guidance, as well as responding to specific questions in the consultation which are answered in section three.

Definitions

Close the Gap recognises that there is currently significant discourse, and contention, around the definitions of sex and gender. The definitions section of the draft guidance describes definitions of sex, gender and gender identity used by a range of organisations including the World Health Organisation, the Royal Statistical Society and the US Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys. We believe that this is insufficient to enable public bodies to develop an improved understanding of sex and gender, and to develop better data collection and analysis. Although definitions may fluctuate over time, it is evident that public bodies need clear and specific guidance on the definitions of sex and gender to enable them to deliver work that will advance women's equality and rights.

In response to the proposed GRA reform, it was suggested by a small group of those who were opposed to reform, that enabling trans people to self-declare will artificially narrow the gender pay gap because some men will self-identify as trans women. Modelling undertaken by Close the Gap found that self-declaration would not adversely affect efforts to address the causes of the gender pay gap⁵. Close the Gap is also aware that there is a suggestion that there is no gender pay gap, but rather it is a "sex pay gap". This is simply incorrect; the gender pay gap is caused by a range of inter-related factors which are driven by women's subordinate position in a gendered hierarchy, for example, occupational segregation, assumptions about women's preferences around having children, stereotypical attitudes on women's abilities, and the undervaluing of women's skills. The notion that that the gender pay gap does not exist has the potential to create considerable confusion for public bodies, and to roll back progress on tackling the causes of the gender pay gap.

⁵ Close the Gap (2020) *Response to the Scottish Government consultation on the Gender Recognition Reform (Scotland) Bill* available at <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-response-to-the-GRA-reform-bill.pdf>

We would therefore urge that the guidance be clearer in the definitions it is recommending public bodies adopt. Without clarity, this description of definitions is open to interpretation, risks confusing public bodies, and is likely to result in divergent approaches to defining sex and gender.

3. The proposed recommended questions

The draft guidance proposes that public bodies should ask questions on legal sex, gender identity and trans status. We do not support the proposed question on legal sex because we do not believe it will support the production of gender sensitive sex-disaggregated data. The proposal to ask about legal sex will also create challenges for public bodies.

Poor data quality

The draft guidance notes that the Equality and Human Rights Commission's position is that "public bodies are not required to collect information on legal sex and can enable employees and service users to self-identify their sex". The Commission's guidance on asking questions about sex at birth, as part of a suite of four questions designed to produce rich information about an individual's trans identity and history, provides stark warnings about the need for keeping all such information strictly confidential⁶. The Commission also notes issues around inaccuracy in this approach, in that some people with a Gender Recognition Certificate (and indeed, some without) may answer the question by providing their lived identity.⁷

National LGBTI organisations also note that asking questions about biological sex at birth is ineffective because most trans people find this question offensive and will provide their self-identified sex instead, comprising the accuracy of the data⁸.

There is therefore a significant risk that asking about legal sex will produce inaccurate data, affecting overall data quality. Asking questions that may be perceived as offensive to trans people is likely to adversely affect disclosure rates, which are already very low.

⁶ https://www.equalityhumanrights.com/sites/default/files/collecting_info_gender_id.pdf

⁷ Scottish Women's Sector Note on the Census (Amendment) (Scotland) Bill, December 2018, available at: <https://www.closesthegap.org.uk/content/resources/Scottish-womens-sector-submission-to-the-Culture-Tourism-Europe-and-External-Affairs-Committee-on-the-census-v2.pdf>

⁸ Scottish Trans Alliance and Stonewall Scotland https://www.scottishtrans.org/wp-content/uploads/2017/06/getting_equalities_monitoring_right.pdf

The risk of human rights violation

There are clear legal risks to public bodies in asking questions on legal sex, which are highlighted by the Equality and Human Rights Commission in its submission to the sex and gender working group⁹. Compelling a trans employee or service user to disclose their sex as assigned at birth would be a potential violation of their human rights, particularly their right to privacy and dignity under Article 8. Forcing a trans person without a Gender Recognition Certificate to disclose their legal sex would result in that person being outed as trans. Furthermore, it is a criminal offence under the Gender Recognition Act 2004 for a person who has acquired this information in an official capacity to disclose information about another person's application for a Gender Recognition Certificate or their gender prior to grant of the Gender Recognition Certificate. This presents a stark risk to not only public bodies but also individual employees. We do not believe that including a 'prefer not say' option is enough to mitigate these risks.

Discouragement of data collection by public bodies

The risk of human rights violation inherent in compelling a disclosure on legal sex is very likely to have a detrimental effect on public bodies' approach to data collecting. In Close the Gap's experience, many public bodies take a risk averse approach to managing such data collection. For example, the application of GDPR by some public bodies has resulted in the cessation of data collection on sex on the grounds that it would be "offensive" to non-binary people. We are therefore extremely concerned that asking about legal sex would negatively affect the production of sex-disaggregated data.

Inconsistency between instruments and data sources

The draft guidance notes that the inclusion of legal sex diverges from the approach taken for the Census, which allows people to self-identify their sex when asked. Public bodies routinely use Census data to benchmark their performance on diversifying their workforce and access to services. Recommending that legal sex be the focus will create data comparability challenges for public bodies.

⁹ Equality and Human Rights Commission submission to the sex and gender working group – Meeting 23 September 2019

Trans people are already recorded on a range of administrative systems with their lived sex rather than legal sex. This will therefore generate further problems with comparing data across instruments and data sources.

Close the Gap believes that the use of legal sex would have a range of negative consequences for women and for trans people. In particular, there is a specific risk that public bodies reduce or stop the collection of sex-disaggregated data, which is critical to develop gender-sensitive employment practice and service delivery.

Close the Gap would urge that the guidance recommends that public bodies ask a question on sex, which is based on the respondent's lived sex. The relatively small number of trans people in Scotland means the data will be not skewed if self-identified sex is used. As a combination, a question on lived sex, along with a question on trans status, would most effectively contribute to the production of gender sensitive statistics which is critical to advance women's equality and rights at work.

4. The messages around intersectionality, harmonisation and presenting data on non-binary groups

Close the Gap has an intersectional analysis of women's equality and rights at work. This is because women will have divergent experiences depending on their multiple identities and trans women, BME women, disabled women, and lesbian and bisexual women will experience the labour market differently. The gathering and analysis of gender sensitive, sex disaggregated data that is also intersectional is necessary to ensure that policymaking meets the needs of different groups of women. There is however a dearth of intersectional data on women's experiences of the labour market. We therefore welcome the emphasis on the importance of intersectional data in policymaking in the guidance. We recognise that the specific guidance on sample size and data quality is important. However, we think that the guidance should also speak to the wider problem that is the lack of intersectional approach by public bodies, and therefore the paucity of intersectional data. The guidance should highlight this problem, and encourage public bodies to review their data collecting practices to improve the granularity of data gathered. This would result in a richer understanding of women's experiences of engaging with the labour market.

We agree with the messaging on the importance of harmonisation. However, we believe that this messaging is undermined by the inclusion of the legal sex question, which will create data comparability challenges for public bodies, and organisations which use data collected by the public sector to measure women's equality and rights. Similarly, we believe that the lack of clear and specific definitions in the guidance undermines the messaging on harmonisation. As currently drafted the section on definitions is open to interpretation, and this is likely to cause confusion for public bodies, and result in divergent approaches to defining sex and gender.