

Draft Guidance for Public Bodies on Collection and Publication of Data on Sex and Gender.

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This document responds to the Chief Statistician’s Draft Guidance, published for consultation on 9 December 2020. We have divided our response into four parts: the first two respond to the general issue of definitions used in the Guidance; the third refers to formulating questions on sex / gender; and the fourth pertains to privacy concerns. We use the terms non-trans and cisgender interchangeably.

A. Definitions: asking about someone’s “sex”

1. Professor Cowan made this point in her response to the consultation on the Scottish census, but **there is no legal definition of sex or gender in Scots law, or indeed in UK law, or any other comparative common law jurisdiction.**

2. This is not an accident or an oversight. Concepts are sometimes left open-ended in law deliberately so that those interpreting and applying law can adjust meaning to the specific situation in which they are used. Since there are multifarious understandings and applications of the term “sex”, it would be imprudent to move towards a single understanding of the term. It is also often used interchangeably in law – for example in the Gender Recognition Act 2004.

3. With respect to common law, *Corbett v Corbett* ([1970] 2 All E.R.33) was an English case that laid down a biological (chromosomal) test for ‘sex’ in the context of a question about **marriage**. This is clearly not a generalisable test, nor is it the correct test following the ECtHR case of *Goodwin v UK* (2002) 35 EHRR 18, which led the UK government to introduce the Gender Recognition Act 2004.

4. A decision of the European Court of Justice of 30 April 1996 held that **discrimination based on a change of gender was equivalent to discrimination on grounds of sex** (*P v S and Cornwall County Council* [1996] IRLR 347). Those undergoing gender reassignment were able to bring a claim of sex discrimination from 1999, when legislation changed to reflect the decision in *P v S*.

5. Although the EHRC statement referred to in the Guidance in fn 7 says that sex is understood to be binary, **there is some indication that UK courts do recognise non-binary identities, and will protect those who identify as non-binary from harm** [see the case of *Mx M (gender identity – HJ (Iran) – terminology) El Salvador* [2020] UKUT 313 (IAC)].

[This EHRC statement is in part legally incorrect: see Sharon Cowan et al (2020) in *Scottish Affairs*, Vol 30(1), p74-95: <https://eupublishing.com/doi/full/10.3366/scot.2020.0347>.]

Therefore, a question asking about “sex” must not be defined as binary. It should include the possibility for an answer that is non-binary (as well as “prefer not to say”). There is no need to wait for the report of a Working Group on this, it could be easily implemented.

6. With respect to statute, there is no statutory definition of sex – the Gender Recognition Act 2004 refers to “acquired gender” (not acquired sex as stated on p15-16 of the Draft Guidance), though it could easily have been expressed as “acquired sex”, since it is the sex marker on the birth certificate that changes. The term “sex” is also used in the Act, with no definitive meaning offered of either sex or gender.

7. Some statutes have included trans women in their definition of women, such as the Gender Representation on Public Boards Act 2018, for the purposes of that specific Act.

8. The UK’s rules on discrimination were consolidated by the Equality Act 2010, which protects against discrimination on protected grounds including sex and gender reassignment. The Equality Act 2010 Act does not define sex or gender. It 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 characteristics such as genitalia or chromosomes, or based on gender as a social category, or some combination of the two. It does not refer to “biological sex” at all. But section 7, on the protected characteristic of gender reassignment, refers to ‘physiological or *other attributes of sex*’ (emphasis added), implying acceptance of the view that sex is not simply physiological (though again physiological is not defined!).

9. Under the Equality Act, trans people can make a claim of discrimination relying on either sex or gender reassignment or both, depending on the circumstances of their case. Discrimination law rules, and how they are applied in practice, reflect the complexity of sex/gender experience. Importantly, a trans person does not need to hold a GRC to make a discrimination claim either under the protected characteristic of sex, or under gender reassignment (see Cowan et al cited at paragraph 5 above).

10. It is true that, as the guidance states on p10, “having evidence on sex alone may not give a full picture of inequalities”. It must be remembered though that although the 2010 Act only mentions the protected characteristic of sex, it also protects against gender discrimination. That is, not only does the legislation offer protection against discrimination on what might be called biologically-linked grounds, such as pregnancy (in fact pregnancy and maternity are explicitly protected by sections 17 and 18 of the 2010 Act as well as under the protected characteristic of sex), it also protects those who have been subjected to *gender-based discrimination*, for example relating to assumptions about who provides child care. In *Burden v Chief Constable of Hampshire Constabulary* WL 12591122 (2015) for example, a tribunal held that an employer’s provisions, criteria and practices, individually or cumulatively, indirectly discriminated against female employees who were more likely to have childcare responsibilities. Thus, the concepts of sex and gender are so interrelated – as indeed are sex and gender types of discrimination – that often *both* are in play when we are talking about discrimination.

11. The consequence of all of this is that it is important not to overlook the complexity of what can sometimes be presented as a simple question – “what is sex?”.

B. Definitions: asking about someone's "legal sex"

12. Although "legal sex" for a trans person has often been taken to mean the sex designation on a reissued birth certificate following a GRC process, the term "legal sex" does not appear in the Gender Recognition Act itself. Nor is the term particularly helpful. This is because while a birth certificate includes registration of sex, there are several other "legal" documents where a person's sex marker can be changed without having a GRC, such as a passport or driver's licence. These are surely legal documents, and many trans people have these documents in their possession, with a sex marker that reflects their "lived sex", without having obtained a GRC. Therefore, it is important, again, to be precise when talking about "legal sex" – if a question is asking whether someone has changed their sex marker on their birth certificate then the question should be reformulated to something like, "what is your birth certificate sex?"

13. But the question also needs to be clear about whether it is asking about the sex marker on a certificate issued *at birth*, or the sex marker on a reissued birth certificate *following a GRC process*.

14. The question still remains, though, why it would *ever* be relevant to collect information about "certified at birth" sex. It may not even be relevant to collect information on a current birth certificate sex. Single-sex services can offer or refuse services on the basis of sex, but they do not collect information from birth certificates before they do so. Under the Equality Act 2010, to refuse services on the basis of sex (or any other protected characteristic) a service provider has to meet a high threshold – the decision has to be proportionate and meet a legitimate aim (see Cowan et al reference at paragraph 5 above).

15. Rather it will be more relevant to record data on a person's "lived" sex.

16. The term "lived sex" captures a spectrum of trans experiences of sex/gender, without having to distinguish between those who do and those who do not have a GRC, and without having to define sex based on genitals. In the discussions around the Census, it was clear that there was strong evidence in favour of collecting data that reflected how trans people were living rather than what their birth certificates said, or some aspect of their physiology, and the Census will allow people to answer the sex question as a "lived sex" question, with a follow up question on trans status.

17. There is a clear duty for public bodies to collect information pertaining to the delivery of services, and a broader duty on government to collect statistical information, particularly as regards protected characteristics. This is intended to inform public policy, service delivery, and the wider dissemination of information to the public. This is balanced, as is noted in the Draft Guidance, with a duty to minimise data collection to that necessary to fulfil these duties, both due to the burden on respondents of answering surveys and censuses, and to the wider potentials for harm which can be associated with intrusive data collection.

18. Following from this, there are clear reasons to collect information about gender; it is widely recognised, including by the Scottish Government, that collecting statistical information about the structural disadvantages faced by women, queer, and nonbinary

people as a result of misogyny and sexism is crucial to addressing these issues. This is additionally important for the management of service delivery. We note that many of these gender-specific services in Scotland themselves explicitly partition their service on the basis of self-identified gender, not “legal sex”.

19. We argue that when collecting statistical information about women, it is appropriate to include all those who identify as such – i.e. including trans women – particularly, as noted in the Draft Guidance, given the intersectional oppressions faced by different groups of women, and hence the vast diversity of experiences and outcomes within the broader category of “women”.

20. The collection of data about “legal sex”, as opposed to or in addition to information about gender, is more contested. In cases where questions about both are asked, the vast majority of respondents, (those who are cisgender, and binary transgender people with a GRC) will record the same information for the question on “legal sex” as the question on gender. For those who do not – i.e. a subset of queer and transgender people who do not have a GRC – the effect of this question is to implicitly contest the answer given for the gender question. For both cisgender and transgender respondents, this dual collection is likely to be redundant at best and at worst, confusing and upsetting.

21. It is clear that there are some purposes for which it is important to collect statistical information about Scotland’s transgender population. This need can be fulfilled through the collection of specific information about self-identified transgender status, as it will be on the Census.

22. Where there is a necessity to collect information about the specific bodily characteristics to inform delivery of, for example, particular medical services, we agree that it is important that this is accurate, and that these questions are presented in a simple, easy-to-understand way for respondents and survey professionals. However, this aim is ill-served by the collection of a separate “legal sex” question. There is an enormous variation in medical needs and lived, bodily experiences *within* the broader category of women. Collecting data on some of these needs through the proxy category of “legal sex” is likely to provide little useful information when compared to the collection of specific characteristics relevant to the policy issue or service in question, as the group of people with these particular needs might in practice include a range of trans and cis men and women, non-binary people, and others.

23. In practice, a proxy “legal sex” question marginalises trans people, by the implicit negation of their gender identity. But the question does not correspond with the real lives of many cisgender people, since it implies that particular characteristics (such as physiological or hormonal ones) are universal characteristics of their “legal sex”, where this may not in fact be the case. Attempting to capture data about such characteristics under the proxy category of “legal sex” is likely to reduce the accuracy of information collected, and miss the experiences of both trans people *and* (often vulnerable and under-represented) groups of cisgender people who, for a variety of reasons, might be in a particular putative “legal sex” category as surveyed but in fact have different needs from those imputed by those analysing the survey on this basis.

24. Underpinning the Code of Practice for Official Statistics is a duty to collect accurate statistical information, and to do so in a way that is understandable by those surveyed, based in their lived experiences (i.e. generally trusting people to be the best judge of aspects of their own lives) and in a way which respects their dignity. It is our view that, much as with data on ethnicity or disability, it both better respects the dignity of respondents, and facilitates the better collection of statistical data to gather these data according to the lived experiences and self-identification of those asked.

C: Formulating Questions: How to ask a question about sex/ gender

25. We understand that data collection tools can sometimes be - and sometimes have to be - blunt instruments, especially when the aim is consistency or comparability. However, it is important to be cognisant of the effects of asking what looks like a straightforward or standard question on those who do not fit standardised norms. The assumption seems to be that asking about “sex” is a straightforward question, because the “norm” is to be non-trans and binary in “sex”. That is, the majority of the Scottish population is not trans, and would describe their sex / gender in binary terms, and their answer to a “what is your sex?” question will usually be straightforward, based on what people understand to be the sex on their birth certificate, their body, their internal sense of self, and/or they way behave in and are seen in society – all of which, for the majority of the population, align.

26. The question asking simply about “sex”, therefore, assumes a norm that can be answered in a straightforward way, and then applies that standardised question across the board to all people, including trans and non-binary people.

27. The provocation defence in criminal law can be used as an illustration of the egregious effects of the unthinking application of a standard norm. A successful defence of provocation, which reduces murder to culpable homicide, requires that the accused has lost their self-control in the heat of the moment. This seems sensible as we don’t want those who kill “in cold blood”, e.g. for revenge, to be able to successfully plead the defence. However, as feminists have long pointed out, a heat of the moment defence only really suits those who have a particular temperament, a certain amount of physical power, and/or a particular socialised response to anger. In other words, the defence was historically designed for men, rather than women and children, and in effect benefits men disproportionately. The example illustrates that what looks like a standard, neutral, objective test, applies differently - and has an indirectly discriminatory effect - in practice, because not everyone *can* lose their temper in the heat of the moment to strike back against abusive and violent behaviour.

28. Although a very different context, the message remains the same here: designing a “standard” test, category, or question about sex, ignores the fact that not everyone meets that standard, and that the needs and interests of the “non-standard” person are marginalised. Care must be taken that what are sometimes seen as straightforward questions, tests or rules are not indirectly discriminatory in effect.

29. The only way to do this, and collect high quality data that is in keeping with the Scottish Government’s aspiration to be a society that “treats all our people with kindness, dignity and compassion” is to make the wording of each question in any data collection exercise sensitive to the purpose for which it is intended, rather than try to offer any overarching standard definition of “sex”, “legal sex”, “gender identity” or “gender”. Being sensitive to individual contexts, needs and interests also allows for more intersectional rather than generalised category-type data to be collected.

30. For this reason, we agree that it is important also to provide a short paragraph explaining the purpose of the question to the respondent, what it will be used for and how it will be stored (as recommended on p19 of the guidance).

D: Collection and Disclosure of Data

31. Regarding privacy concerns, we would like to draw the Chief Statistician’s attention to the way that one of the centre managers working within Rape Crisis Scotland has been viciously targeted on social media over the last 12 months simply for being trans. This has frequently been followed by demands from individuals, organisations and the press, for Rape Crisis Scotland to release statistics on how many trans people they employ or provide services to. While we see the need to collect data and sometimes publish it in order, for equality monitoring reasons, we want to urge caution in recommending the collection of or publication of fully disaggregated data where that would identify individuals in circumstances where the data can be publicly disclosed, and the motivation for accessing data is to further discriminate against, disadvantage or harm trans and non-binary people.