

Sex and Gender in Data Working Group – Data Collection: Draft Guidance

Submission from Stonewall Scotland

1. Stonewall Scotland was established in 2000. Since then, we have been campaigning for equality and justice for lesbian, gay, bi and trans (LGBT) people living in Scotland. We work with a range of partners across the public sector, including the Scottish Government, local authorities, police and criminal justice agencies, and NHS Boards, to improve the lived experience of LGBT people in Scotland.
2. We welcome the opportunity to provide feedback on the draft guidance for public bodies on the collection, disaggregation and reporting of data on sex and gender. This draft guidance is particularly relevant to our work as it is highly focused on how trans people should be incorporated in data collection on sex and gender, and proposes a standardised question on “trans status”.

Summary

3. We broadly welcome the key messages of this draft guidance, particularly that public bodies are encouraged to collect data on “gender identity” in most cases, and that data should not be collected about a person’s biology, except where relevant for their own medical treatment. However, we do have serious concerns about some aspects of the guidance, particularly regarding data collection on “legal sex”, which we believe must be addressed.
4. First and foremost, we would ask the Working Group to strongly re-consider whether there must be a question on “legal sex” included in this guidance. Should it be decided it is indeed necessary to include this question, we would request in the strongest terms that the following changes are made to this aspect of the guidance:
 - The question should not be labelled as simply a “sex” question, and should explicitly state that it is asking for the sex currently on a person’s birth certificate, in order to accurately reflect the data being collected.
 - Further clarity must be given on the circumstances in which it would be necessary, justifiable, and proportionate for public bodies to collect data on “legal sex”.
 - The guidance must be robustly and effectively implemented across Scotland’s public bodies, particularly considering the currently interchangeable use of “sex” and “gender” by public bodies in data collection to refer to how a person lives and identifies.

Considerations when deciding what data to collect

5. Stonewall Scotland welcomes the statement outlined in the summary of the guidance, that “in most cases this draft guidance suggests data should be collected on the basis of gender identity rather than sex”, where in this case, “gender identity” refers to how a person lives and identifies, and “sex” is taken to mean the sex on a person’s birth certificate.

6. We believe that this recommendation that public bodies should, in most cases, collect data on sex and gender in a manner in which enables people to self-report in line with how they live and identify (i.e., their lived sex) is a key message of the guidance, and one which should be much more clearly laid out within the final guidance than it currently is within the draft. Furthermore, it will be important that this recommendation is proactively communicated to public bodies prior to and following the introduction of the guidance.

Collecting data on “gender identity”

7. Trans people access most public services in accordance with their gender identity. Indeed, trans people are supported under the Equality Act 2010 to access single-sex services and facilities in line with their gender identity (except in restricted circumstances where a service can demonstrate that not doing so constitutes a ‘proportionate means of achieving a legitimate aim’). This applies regardless of whether or not trans people have obtained a gender recognition certificate (GRC), and have therefore had the “sex” on their birth certificate updated in line with how they live and identify. Further, trans people can update the “sex” on their passports, driving licenses, and NHS medical records and Community Health Index (CHI) numbers, without having a GRC.
8. Therefore, collecting data on lived sex accurately reflects how a broad range of public bodies and providers of goods, facilities, and services understand and treat trans people. We would echo the views of Engender, which, in a [submission](#) to the Working Group, stated that “in most instances where trans women answer a ‘sex’ question with ‘woman’, this will accurately reflect how the public body or provider of goods, facilities, and services will understand and treat them. Individual agencies have developed ways of managing exceptions.”
9. Collecting data on lived sex aligns with the majority of existing data sources on sex and gender. As recognised in the draft guidance (p. 12) the vast majority of official data is collected on the basis of gender identity and there is very little data collected on the basis of sex registered at birth, or the sex currently on a person’s birth certificate.
10. For example, trans men and trans women are able to record their “sex” in Scotland’s Census as male or female, in line with how they live. Guidance was introduced in 2011 to give trans people additional clarity that they could answer the sex question in line with their lived sex. Prior to then, there was not guidance or requirements to the contrary, and it was up to respondents to interpret the question and decide the basis for answering the question, meaning that trans people could respond in line with their lived sex. National Records of Scotland have confirmed that they intend for this approach to continue for the forthcoming census in 2022.
11. The proposed “gender identity” question in this draft guidance, which we support, also aligns with that used in the Scottish Household Survey. It is important to recognise that population surveys such as these are self-reported, enabling respondents, including trans people, to answer questions on sex or gender in line with how they interpret the question, or how they wish to respond.

12. Additionally, we are aware from our direct experience of working with some public bodies on equalities monitoring, that whether data is collected on “sex” or “gender”, this is on the basis of lived sex.
13. Further to aligning with the manner in which trans people interact with public bodies, and with existing data sources, it is important to recognise that collecting data on lived sex, as opposed to what is on a person’s birth certificate, respects the lived identity and experience of trans people, but is inconsequential to the vast majority of the population. We strongly agree with the statement made in the draft guidance (p. 9) that “for the vast majority of people, sex and gender identity questions will provide the same response... 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.”
14. It is important to note that the demographic group that would be treated differently by public bodies collecting data on “legal sex” instead of “gender identity” (in line with the draft guidance’s proposed questions) would be trans people who do not have GRCs. People who are not trans – the vast majority of the population – will have the same sex recorded at birth, “legal sex”, and gender identity, and would therefore provide the same response on their sex or gender regardless of the question used. Trans people who have GRCs would also provide the same response to questions on “legal sex” and “gender identity”. In our view, there are very limited circumstances in which it would be necessary for trans people with and without GRCs to provide differing information about their sex or gender, and we believe that broader data collection on “gender identity” would provide the most useful information for public bodies. Furthermore, it is important to recognise that data should not be collected on “legal sex” in order to distinguish trans respondents from non-trans respondents – indeed, trans men with GRCs and non-trans men, for example, would have the same “sex” (male) on their birth certificate.
15. We agree with the statement in the draft guidance (p. 9-10) that “for most groups of interest and issues one may want to measure, the inclusion of non-binary or trans people will not skew the statistics disaggregated by sex or gender.” As the draft guidance notes, international estimates suggest that trans people account for approximately 0.6 per cent of the population.

Collecting data on biology

16. Stonewall Scotland warmly welcomes that the draft guidance is clear in its statement that “questions about a person’s biology should not be asked, except potentially where there is direct relevance to a person’s medical treatment” and that “such a question is likely to breach an individual’s human privacy” (p.10).

Collecting data on “legal sex”

17. Stonewall Scotland has significant concerns about the approach outlined in the draft guidance to collecting data on “legal sex”. We would strongly request the Working Group to re-consider whether there must be a question on “legal sex” included in this guidance.

18. In our view, trans people should only be required to provide information to public bodies about the sex on their birth certificate where this is absolutely necessary. In the very few circumstances where an individual would need to provide such information, those public bodies requiring this data should have existing processes for collecting and storing this. Not including a proposed question on “legal sex” in this guidance would mirror the approach taken to sex recorded at birth and biological characteristics, upon which information is required by some public bodies in very restricted circumstances, but a proposed question is not included here due to not having broader application across Scotland’s public bodies. We are concerned that including a recommended question on “legal sex” in this guidance could encourage public bodies to collect data on “legal sex” in circumstances where they do not currently do so, and where they are not required to.
19. Our concerns are further confounded by the draft guidance not providing sufficient clarity on when public bodies should collect data on “legal sex”, using the recommended question. Should the Chief Statistician and the Working Group consider including a recommended question on “legal sex” to be absolutely necessary, further clarity is required for public bodies on the circumstances in which collecting data on “legal sex” would be necessary, justifiable, and proportionate.
20. While we are somewhat reassured that the draft guidance outlines that collecting data on “legal sex” may only be necessary “in a small number of instances”, “on an individual basis”, and “for a very specific purpose” (p.10), we would strongly recommend that specific examples of such circumstances should be explicitly included in the guidance. We believe it is crucial that trans people are not unnecessarily asked by public bodies about what is on their birth certificate – however, a lack of clarity could lead to public bodies asking for “legal sex” where they do not currently, out of uncertainty or confusion, particularly where questions on “legal sex” and “gender identity” had not previously been considered as providing potentially differing responses.
21. We are further concerned by the lack of clarity on how organisations should arrive at such a decision to collect data on “legal sex” instead of “gender identity”, and how they should take this data collection forward. The draft guidance currently states that “it would be up to public bodies who need this data to develop the best approach to do this” (p. 10).
22. Beyond where strictly necessary, we do not believe that data collection on “legal sex” provides any broader usefulness. As noted above, collecting data on trans people’s lived sex is useful for public bodies as this aligns with how they will access public services. Asking questions on “legal sex” would also treat trans people with GRCs and trans people without GRCs, differently, the latter being the only group in the population to elicit different responses to questions on “legal sex” or “gender identity”, should they choose to self-report in that manner. Trans men with GRCs and trans women without GRCs would have the same legal sex, yet have vastly different experiences and needs. We would strongly question what purpose such data collection would serve, whether for service planning, resource allocation, or equalities monitoring. Moreover, as discussed below (paragraphs 30-33), we do not believe that the formulation or framing of the proposed question on legal sex would even provide the desired information.

The importance of effective implementation

23. It is crucially important that this guidance, when published, is effectively and robustly implemented across all public bodies to ensure harmonisation across the sector. This is particularly pertinent considering, as noted in EHRC's [submission](#) to the Working Group, that “many public bodies use the terms ‘sex’ and ‘gender’ interchangeably.” From our experience of working with some public bodies on equalities monitoring, whether data is collected on “sex” or “gender”, this is on the basis of lived sex.
24. This guidance frames data collection on “sex” as referring to the sex on a person’s birth certificate, but recommends that data on “gender identity” is collected in most cases (our views on the framing of “sex” in this guidance can be found at paragraphs 30-33). Importantly, this means that for many public bodies who currently collect data on “sex” on the basis of lived sex, the introduction of this guidance would suggest they should update their data collection to ask for “gender identity” and adopt the questions recommended in the guidance. If public bodies were not actively encouraged to review and update their data collection on sex and gender, the introduction of this guidance would suggest that such questions on “sex” would now refer to “legal sex”. This could risk a lack of harmonisation, and an uncertain landscape for trans service users and employees, contrary to the aims of the guidance. We would recommend that in the interim incidence of public bodies not reviewing and updating their data collection on sex and gender, questions on “sex” should not be taken to refer to “legal sex”.

Recommended Questions

25. Stonewall Scotland welcomes that the draft guidance recognises (p. 11) that asking a question on “self-identified sex or gender identity”, followed by a trans status question supports “the principle of asking questions respectfully”, which “in turn leads to greater levels of response to the questions and better quality data that enables better decisions to be taken”, and would echo these observations. This two-step approach on gender identity and trans status is in line with our recommendations to public bodies and other employers on equalities monitoring.
26. We further welcome that the draft guidance recognises that “for the majority of people their legal sex and gender identity are the same and they do not understand why they are asked the same question twice.” This, in addition to the positive comments on the two-step approach to gender identity and trans status, strongly implies that public bodies are being advised *not* to collect data on both “gender identity” and “legal sex² concurrently. It may be beneficial to more clearly convey this where the recommended questions are laid out towards the end of the draft guidance document.
27. Lastly, we strongly support that an option of “prefer not to say” has been included across all recommended questions, with this being recognised by the draft guidance as being “very important” due to the privacy issues associated with asking individuals to disclose their gender identity, legal sex, or trans status (p. 11).

Gender Identity

28. Stonewall Scotland supports the proposed question on “gender identity”, which highly aligns with the monitoring advice we already provide to public bodies, and with other large-scale forms of data collection, such as the Scottish Household Survey.
29. We particularly welcome the proposed response options of “prefer not to say” and “in another way”, the latter of which gives a further option for individuals to self-describe their gender identity through an open text response. The endorsement of this inclusive approach through this guidance will support the provision of incredibly useful data on non-binary people and their access to public services (our views on the presentation of data on non-binary people can be found at paragraphs 38-40).

Legal Sex

30. As discussed above, we are unconvinced as to the merits of including a proposed question on “legal sex” within this guidance for public bodies. However, if providing a proposed question is deemed absolutely necessary, we do not believe the formulation or framing of this question would provide the desired information.
31. The question in the guidance is labelled as “legal sex”, however the wording of the question itself refers only to “sex” and, in the case of the face-to-face or phone interview, guidance that the question refers to the sex on a person’s birth certificate is only to be given when prompted. This means that many trans people, including those without GRCs, would answer this question in line with their lived sex, including those for whom this would deviate from the sex on their birth certificate. As the guidance frames data collection on “sex” as referring to the sex on a person’s birth certificate, it is important that this is explicit in how the question is asked, if to be asked at all, in order to accurately reflect the data being collected.
32. We are further concerned that the draft guidance frames “sex” much more narrowly than it is used across other areas of law, policy, and practice, whereby “sex” is often used interchangeably with “gender” to refer to a person’s lived identity. As mentioned above, trans people are able to update the “sex” on their passport and other identification documents and can access single-sex services in line with their lived sex, without having updated the sex on their birth certificate through obtaining a GRC. We are concerned that standardising the language used across data collection to refer to “sex” as strictly the sex on a person’s birth certificate could have detrimental effects on trans equality in other areas of policy.
33. Furthermore, the extent to which such a question would provide accurate information on the sex on trans people’s birth certificates is questionable. [Testing](#) on the sex question guidance for Scotland’s Census 2022 found that only 25 per cent of trans or non-binary participants accessed guidance before answering the question “what is your sex?”, which is the same wording being proposed for the “legal sex” question in this guidance. Furthermore, 49 per cent said they would *not* answer the “what is your sex?” question should guidance be used stipulating that this refers to the sex on a person’s birth

certificate. The inclusion of a “prefer not to say” option is, of course, welcome, and must remain, however further entrenches our view that this question is not necessary.

Trans Status

34. Stonewall Scotland supports the proposed question on “trans status”, which highly aligns with the monitoring advice we already provide to public bodies, and with the voluntary trans status question that will be included in Scotland’s Census 2022.
35. However, we are not convinced by the stipulation that this question should only be asked of people aged 16 or over, as is the case with the census. There are young people aged under 16 who are trans, as there are trans people aged 16 or over. Collecting data on trans status across the population, irrespective of age, could provide highly valuable data on trans young people and their experiences.

Information to accompany data collection

36. We strongly agree with the sentiment expressed in the draft guidance that “it is important that people understand why they are being asked to disclose certain information, and what a public body will use the collected data for” and that this particularly applies in the case of trans people with respect to data collection on gender identity, legal sex and trans status (p. 19). Many people would be hesitant to answer questions such as these if they are concerned their answers will not be confidential, or if they simply do not understand what they are being asked or why. It is crucial that public bodies are able to explain why they are asking for this information, to encourage high declaration rates.

Intersectionality

37. Stonewall Scotland strongly welcomes that the draft guidance supports that, “where sample size and quality allows, data should be disaggregated by socio-demographic factors, including...gender reassignment...and sexual orientation, where combinations of these factors can result in discrimination, disadvantage and inequality” (p. 22). It is crucial that in addition to trans status, public bodies collect, disaggregate, and publish data on sexual orientation.

How to present data on non-binary groups

38. As mentioned above, we warmly welcome that the proposed question on “gender identity” will include an option to respond “in another way” from “man/boy” and “woman/girl” and for respondents to self-describe their gender. It is vital that public bodies, who will be collecting data on non-binary people, are supported to disaggregate and present this data.
39. As such, we would like to express some caution at the approach outlined in the guidance (p. 15) to delay issuing guidance on this aspect until the Working Group on Non-Binary People has reported. The Working Group, of which we are member organisation, has not yet commenced work. It is important that this Working Group is supported to commence work as soon as practicable to ensure, on this particular subject, that public bodies are not

left in a void, and more broadly, to encourage wider developments in equality for non-binary people in Scotland.

40. Additionally, it is worth noting that it is likely that resource will be required from the Scottish Government and public bodies to update data collection and analysis tools, where existing systems are restricted to binary options on collecting data on sex or gender. It is important that this resource is forthcoming from the Scottish Government in order to support the effective implementation of the guidance.