

The draft guidance states that 'questions about a person's biology should not be asked, other than potentially where there is direct relevance to a person's medical treatment'. It states also

'in a small number of instances, it may be necessary to record a person's legal sex' but cautions

'this would be on an individual basis for a very specific purpose'.

These proposals mean firstly, generally, organisations should not collect data on sex at all, no matter how defined. Secondly when organisations do collect data on 'sex', it should purposively conflate two separate demographic categories.

An accompanying Scottish Government summary states 'in most cases... data should be

collected on the basis of gender identity rather than sex'.

Gender identity is defined as 'a personal, internal perception of oneself'. The draft does not

consider how relying on such a subjective concept might affect data quality and reliability. Nor does it acknowledge that gender identity is a contested concept that some people strongly reject. Indeed the government themselves cannot define what gender actually is.

The draft cites an EHRC submission, stating that collecting data on biological sex raises privacy

concerns, and may be unlawful.

This submission has since been assessed as 'wrong or misleading or incomplete', in a legal opinion from Aidan O'Neill QC commissioned by Woman's

Place UK. The legal opinion states that privacy rights are not absolute and that data on biological sex

may be collected providing it is for a legitimate aim. The draft ignores the fact that organisations

sometimes need to know staff or users' sex to operate sex-specific services, such as recently

agreed for forensic examinations for rape victims.

The draft relies heavily on an assumption that only small numbers will answer sex and gender

identity differently. This assumption is untested and based on an estimate produced in 2011,

drawing on a limited source. The draft ignores the clear evidence of a large rise since 2011 in

those identifying as trans, concentrated in younger age groups, especially girls.

There is no consideration given to the potential impact of the proposal on the reliability of sub-group

analysis, particularly by age and sex. This omission is surprising, given that both the Office for Statistics

Regulation and the UK Statistics Authority's Methodological Assurance Review Panel for the Census have recently intervened in this area.

'Invisible Women' by Caroline Criado Perez is cited in support of assuming sex 'may not give a

full picture of inequalities', because 'many people take the view that the term 'gender' also raises

important issues'. This spectacularly misreads Criado Perez's argument, which is the ongoing failure to recognise in data, the distinct needs and experiences of females.

The draft indeed quotes her explanation that 'gender' is 'the social meaning that we ascribe' to 'the female body'.

Biological sex is well-understood to exert a key influence over experiences and outcomes from birth onwards. It is one of the most important variables for the purposes of policy, planning and research.

The draft does not discuss why current gender identity is now seen as more useful to collect.

Scotland is already at serious risk of losing the capacity to gather data that, for decades, has

provided the building blocks for policy-makers and researchers to monitor and tackle discrimination

based on sex, through the adoption of data collection practices that muddy sex and gender self-

identification. If accepted, the draft proposals are likely to cement this.