

Sex and Gender Working Group – Meeting 23 September 2019  
Equality and Human Rights Commission submission

The Public Sector Equality Duty (PSED)

The [PSED](#) requires some public bodies in Scotland to gather employment information on the protected characteristics of their employees, including sex and gender reassignment. However, this does not mean that employment information on the basis of legal sex<sup>i</sup> must be recorded. Public bodies need to find a balance between recording appropriate data and people's right to privacy.

Public bodies must also give due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations of in relation to people who share protected characteristics, when they are providing services. While there is no specific duty to collect information to do this, it would be difficult, if not impossible to meet the duty or undertake adequate Equality Impact Assessments without knowing who uses their services.

Public bodies must also publish a set of equality outcomes which they consider will enable them to better perform the PSED. A public body must publish a report on the progress made to achieve its equality outcomes every two years and publish a fresh set of equality outcomes within four years of publishing its previous set. Again, information must underpin the development and monitoring of these equality outcomes.

There are important human rights considerations that need to be considered when asking employees or service users to state their sex, especially in regard to people's right to privacy under Article 8 of the ECHR and the Human Rights Act 1998. Forcing trans employees or service users 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. In addition, forcing a trans person without a Gender Recognition Certificate (GRC) to disclose their legal sex would result in that person being 'outed' as a trans person. It is also a criminal offence under the Gender Recognition Act 2004 for a person who has acquired the information in an official capacity, to disclose information relating another person's application for a GRC or their gender prior to grant of the GRC. In some instances, forcing people to 'out' themselves will also breach the Equality Act 2010.

Many public bodies use the terms 'sex' and 'gender' interchangeably. The language used by a body does not dictate whether the PSED requirements have been met. Public bodies are not required to collect information on legal sex and can enable employees and service users to self-identify their sex.

The vital question that public bodies need to address is what they will be using the information they are collecting for and whether allowing respondents to self-identify their sex will affect that. The number of trans people is not big enough to skew data that is collected on sex and it is therefore deemed generally unnecessary, from a data collection view point, to merely focus on legal sex.

Public bodies often compare their data to information collected through the census, which (currently) allows respondents to self-identify their sex. The comparison would therefore be more accurate if public bodies use the same approach.

A full list of the public bodies who are subject to the Public Sector Duty specific duties in Scotland can be found [here](#).

#### Data gathered by EHRC for internal purposes

As a public body, the Commission is itself subject to the England and reserved body PSED requirements. The commission collects equality monitoring data annually from staff and also from people applying for jobs with us. The Commission analyses and reports on this data annually in a [Workforce Diversity Report](#).

The questions used in monitoring are:

- What is your sex? Male/Female/Prefer not to say
- Is your present gender the same as the one assigned at birth?  
Yes/No/Prefer not to say

In the latest report (2017/18) 60% of staff completed at least some of the monitoring information.

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<sup>i</sup> For a trans person with a GRC, legal sex is their acquired sex. For a trans person without a GRC, legal sex is their sex assigned at birth.