

Dear Mr Halliday

Sex and Gender in Data Working Group – Response to Draft Guidance

We welcome the opportunity to provide feedback on [draft guidance](#) published by the Sex and Gender in Data Working Group.

We are experienced quantitative and qualitative social science researchers and have played an active role in the design process for questions on sex, sexual orientation and trans status/history in Scotland's 2022 census.¹

Overall, we are pleased to see the guidance underscore the importance of establishing whether there is a need for public bodies to collect data and how the research question that data collectors wish to answer should ultimately determine the type of question asked. In addition, we welcome:

- A clear emphasis on reasons why public bodies collect data and its intended use for action.
- Meaningful recognition of individuals who choose not to disclose information in data collection exercises, for whatever reasons, through the provision of a 'Prefer not to say' response option for all recommended questions.

Our response focuses on the strengths and weaknesses of the guidance's three recommended questions on gender, sex and trans status/history.

Gender question

We welcome the recommendation of a gender question that aligns with the approach currently followed in Scottish Household Surveys, in terms of question wording, response options and the provision of a write-in box.

The guidance's detailed account of the contribution from the Equality and Human Rights Commission provides a strong evidence-base for the Working Group's recommendations. Although a legal opinion from Aidan O'Neill QC has subsequently clarified that the collection of data on biological sex needs to be for a legitimate aim, this does not change the main thrust of the EHRC's submission, which confirms that **the collection of data about an individual's gender is sufficient to comply with reporting requirements** such as those associated with the Public Sector Equality Duty and the Gender Pay Gap. As a key driver for

¹ **Dr Kevin Guyan** is a higher education researcher and author of the forthcoming book *Queer Data*, which explores the collection, analysis and use of gender, sex and sexuality data in the UK. He has also recently published a peer-reviewed article in the Journal of Gender Studies on the [design of the sexual orientation question in Scotland's 2022 census](#).

Kirstie English is currently conducting PhD research on how differences of sex, gender and sexuality should be represented by UK surveys. Kirstie has advanced quantitative methods training from both the University of Glasgow and the University of Sheffield and has previously worked for the Urban Big Data Centre and the Scottish Human Rights Commission.

decisions made by the Working Group, it is worth restating evidence submitted by the EHRC:²

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 restrict the information they collect to legal sex and can enable employees and service users to self-identify their sex (p. 5).

For public bodies in Scotland, this means:

- ‘A public body may decide to collect data on a person’s gender (or their gender identity) as well as on sex, according to their data needs’ (p. 8).
- ‘Recording data on gender identity can support the equality monitoring and service development under the 2010 [Equality] Act’ (p. 11).

Against this backdrop, the Working Group should not lose sight of data that suggests that around 99% of the UK population experience no difference between their gender and sex.³ This estimate is **the most robust figure we have at present** and aligns with studies undertaken in other national contexts.⁴ Following analysis of Scotland’s 2022 census, the Scottish Government will have population-level data on the proportion of people who identify as trans or as someone with a trans history.

In smaller studies that involve sub-group analysis by gender and age, asking a question about legal sex or biological sex in place of a question of gender is likely to introduce noise in the sample. For example, the sample might include individuals who hold a Gender Recognition Certificate; individuals from overseas who do not identify their sex as either ‘Male’ or ‘Female’; individuals who have undergone transition-related medical treatment and/or surgery to change their sexual characteristics; individuals born with differences in sex development; alongside individuals who chose to self-identify their sex regardless of what is advised in the question guidance. We share these examples to underscore that **there is nothing more clear-cut about a question on legal sex or biological sex than on gender**. With this in mind, the Working Group’s guidance should continue to focus on the general activities of public bodies rather than specific instances (such as a survey of LGBTQ young people in Scotland) where a contextual and bespoke approach to data collection might be required.

Sex question

We agree with the Working Group’s position that, in a small number of instances, public bodies will need to ask about an individual’s legal or biological sex. We appreciate that the

² Equality and Human Rights Commission, (2019), Scottish Government Sex and Gender in Data working group, [EHRC submission to meeting 23rd September 2019](#).

³ Government Equalities Office, ‘National LGBT Survey: Research Report’ (Manchester: Government Equalities Office, 2018). The GEO note that no robust measure of the trans population in the UK exists. The estimate is therefore based on studies from other countries that indicate between 0.35% and 1% of population are likely to identify as trans.

⁴ For example, it is estimated that 0.3% of the adult population in the US identify as trans, see Gary J Gates and Jody L Herman, ‘Beyond Academia: Strategies for Using LGBT Research to Influence Public Policy’, in *Other, Please Specify*, ed. D’Lane Compton, Tey Meadow, and Kristen Schilt, *Queer Methods in Sociology* (Berkeley: University of California Press, 2018), 81–82.

focus of the guidance is not on the relative importance of different concepts related to sex and gender but on the collection of data that returns information that is of most value to data users. In addition, we support the Working Group's view that 'In most cases [...] data should be collected on the basis of gender identity rather than sex' (p. 3, supplementary guidance). **The vast majority of data collection activities across Scotland's public, private and voluntary sectors do not ask questions about an individual's biological or legal sex**, including national censuses in Scotland (an approach supported by National Records of Scotland after comprehensive testing of several questions). The Working Group's proposed approach mirrors that of Canada's National Statistical Office (Statistics Canada), which has recently adopted a 'gender by default' approach to its data collection activities, and New Zealand's National Statistical Office (Stats NZ), which has proposed an approach that 'defaults to the collection of gender data as opposed to sex at birth' with the 'collection of sex at birth information [viewed] as an exception where there is a specific need'.⁵

However, upon reading the draft guidance, it remains unclear when (if ever) public bodies would need to ask a question about sex rather than a question about gender. We understand the need for those working in health and medical contexts to collect data on biological sex, in some instances, but we do not believe that these specific situations are the intended focus of the guidance. We therefore recommend the following changes:

- Describe the question as a 'legal sex' question and articulate when (if ever) public bodies would be required to collect data on an individual's legal sex.
- Emphasise that public bodies should not base their decision on whether to ask a question on 'legal sex' on 'gender' on the design of legacy data collection systems. In other words, just because a data item was previously labelled 'sex' does not mean the question related to 'legal sex'.
- Add a third write-in option, such as 'In another way...', to enable respondents who neither identify as 'Male' or 'Female' to answer the question. As the proposed guidance offers a 'Prefer not to say' option, which we support, the provision of a write-in box would maximise the number of respondents who answer this question and aid the production of good quality data that meets user needs.

We also wish to express concern about the Working Group's proposal to depart from the format of the sex question used in Scotland's forthcoming census (which asks respondents to self-identify their sex). As the guidance describes, National Records of Scotland's extensive testing of sex questions and feedback from stakeholders confirmed that a binary sex question with self-identification guidance enabled census participation for all people and clarified to data providers and data users the basis of the question (see Appendix A).

In a 2018 submission to the Scottish Parliament's Culture, Tourism, Europe and External Affairs Committee, Professor Sharon Cowan (University of Edinburgh) explained:⁶

There is no single definition of 'sex' for all purposes, in practice, legally 'sex' has meant different things, depending on the context in which the term is

⁵ Marc Lachance, Kaveri Mechanda, and Alice Born, '[Gender – Developing a Statistical Standard](#)' (New York: United Nations Department of Economic and Social Affairs Statistics Division, 30 August 2017); Stats NZ, '[Sex and Gender Identity Statistical Standards: Consultation](#)', Stats NZ, 2 July 2020.

⁶ Cowan, S. (2018), Culture, Tourism, Europe and External Affairs Committee, [Stage 1 Evidence](#).

used. [...] This means that the Scottish Government is free to interpret and apply the category of 'sex' (or indeed 'gender') in any given context, in a manner that is appropriate to that context, without having to define 'sex', and without having to abide by any previous definition or application of the term 'sex' (p. 2).

Cowan also noted:

Although sex is a protected characteristic under the Equality Act 2010, the Act does not define sex. Section 212 (1) simply says that a man is a male of any age and a woman is a female of any age. **How male and female are to be interpreted is not stated** (p. 1).

In contrast to this position, the Working Group's recommendation for a sex question that is *externally-identified* (ie. linked to another identity document, a birth certificate) is a departure from the existing precedent in data collection activities undertaken by public bodies in Scotland. For example, there exists legal or official documentation related to the following identity characteristics:

- Race, ethnicity and nationality (eg. a passport with a birth location).
- Health and disability (eg. holder of a Blue Badge).
- Sexual orientation (eg. a same-sex couple's marriage or civil partnership certificate).

However, as documentation only covers *some* people included under this characteristic, we feel strongly that it is exclusionary and inappropriate for public bodies to advise respondents to describe their identity in a way that is linked to a legal or official status. The Scottish Government is currently reviewing the Gender Recognition Act (2004), the legislation that sets out the process for applying for a GRC, and has stated that 'trans people should not have to go through this intrusive process in order to be legally recognised in their lived gender'.⁷ Basing respondent guidance for trans people on their willingness and ability to engage with a system that is considered demeaning, intrusive, distressing and stressful will lead to measurement validity issues. In other words, trans respondents (who answer the question in line with guidance) will be measured differently purely based on their willingness and ability to engage with the current gender recognition system.

Asking about 'legal sex' also poses potential issues related to the verification of data and respondents' comprehension of what the question is *actually* asking, for example:

- In instances where public bodies ask a question about legal sex, will they be expected to verify that an individual's response matches the sex noted on their birth certificate?
- If verification practices are not in place (such as the cross-referencing of birth certificates and respondent data) will respondents come to understand a legal sex question, in practice, as a self-identified sex question? The Working Group might wish to explore this possibility in cognitive testing of any proposed questions.

⁷ Scottish Government (2019). [Gender Recognition Reform \(Scotland\) Bill: consultation](#).

We discuss research into respondents' comprehension of a legal sex vs. self-identified sex question in Appendix A.

Trans question

Finally, we welcome the Working Group's recommendation to ask a 'trans question' rather than a more convoluted question on whether someone's gender identity is the same as their sex registered at birth? (as asked in the 2021 English and Welsh census) or a two-step approach that asks one question about sex at birth and one question about a person's current gender. The Working Group's recommended question is the most innovative proposal included in the guidance, in terms of international data collection practices, and positions Scotland as a leading light in terms of approaches to the collection of data about cis and trans populations.

However, looking towards the future, the proposed question is not perfect as it differs from other questions on identity characteristics in the census and household surveys as it only asks about individual's who identify as trans (leaving undiscussed the concept of cis, someone who is not trans). For example, I do not believe the Working Group would recommend comparable questions that ask 'Do you consider yourself to be gay?' or 'Do you consider yourself to be Black?' However, we also acknowledge that terms such as 'cis' are not currently widely known and therefore may lead to issues with respondent comprehension and the quality of data collected.

Lastly, page 9 of the draft guidance states:

For the vast majority of people, sex and gender identity questions will provide the same response, namely female and woman/girl, or male and man/boy. This also means that 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.

This means that **much of what the guidance describes pertains to people who do not identify with their sex assigned at birth**. Given this, and the hard-to-reach nature of this group, the Working Group should dedicate further attention to engaging with trans and non-binary people.⁸ Without actively making sure trans and non-binary people both know how to engage and feel safe doing so, the Working Group will find it hard to understand how best to reflect their needs in data collection activities.

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As quantitative researchers, we understand the desire for clear rules that standardise approaches when working with different groups in a variety of contexts. However, our background in gender, sex and sexuality scholarship also highlights the limitations of a one-size-fits-all model and the potential for data collection activities to perpetuate practices that exclude Scotland's most minoritised communities from 'being counted'.

⁸ What Works Scotland. (2017). ['Hard to reach' or 'easy to ignore'? Promoting equality in community engagement.](#)

At the intersection of data and identity characteristics, it is rare to find categories that are discrete or fixed in time and space. As our response makes clear, the collection of data about *all* identity characteristics (including biological and legal sex) is contested. For this reason, most questions asked in public sector equality monitoring activities are based on self-identification and present multiple non-binary response options, including questions on race, disability, religion and sexual orientation. Rather than see this as a problem, we encourage the Working Group to embrace the diversity of how people in Scotland define their gender, sex and sexuality and **develop inclusive recommendations that maximise the possibility for people to engage in data collection activities.**

As the guidance describes, the solution to these challenges is to ask questions that will return data that informs the questions researchers wish to answer. For example, if someone is investigating gender inequality in higher education - ask a question about gender. If someone is researching biological differences between men and women's response to the covid-19 vaccines - ask a question about biological sex. We do not read the guidance as an invitation to ask about a person's sex in place of asking about a person's gender but rather selecting the most appropriate question for the topic under investigation.

Going forward, we would like the Working Group to further recognise that issues related to equality, diversity and inclusion data are not only answered through the collection of data and the design of questions. The sharing and analysis of data can equally shine a light on inequalities or render them invisible. We would like to see the Working Group develop its promotion of an intersectional approach to data analysis that acknowledges that no single identity characteristic exists in a vacuum.

We believe that the draft guidance signals a promising start and we hope that the Working Group gives serious consideration to our recommendations on how to further strengthen the final version of the guidance.

Yours sincerely

Dr Kevin Guyan & Kirstie English

Additional feedback:

- The guidance discusses gender and gender identity as distinct concepts, whereas gender identity (how someone understands their identity) is one element of an individual's gender alongside other elements such as gender expression (how someone presents to others) and gender roles (behaviours, values and attitudes that a society considers 'appropriate' for men and women).
- Remove reference to 'wellbeing' on page 26.
- Revise the guidance's discussion of bias on page 26. It seems unrealistic to expect individuals to identify and correct inherent biases in data, particularly unconscious biases and/or systemic biases that are beyond the consciousness and control of an individual.
- On page 20, the guidance notes: 'My expectation is that organisations across Scotland should be publishing disaggregated data that illuminates the situation for men and women, and actively looking to review their data collection to do more to both collect and publish disaggregated data, therefore helping to understand where there are differences and where there are not'. As the guidance also relates to the capture of data on trans people, this should be noted here. In some situations, data might also reveal insights about the experiences of non-binary and/or gender diverse respondents, which are not included in the current text.

Appendix A

How would respondents answer a question on legal sex?

In most data collection activities undertaken by public bodies in Scotland, it is **likely that the majority of respondents will be unfamiliar with conceptual differences between gender and sex** or the long history of scholarship on the inter-relationship of these identity characteristics.

This means that, in most situations, respondents will neither (i) read the guidance presented nor (ii) provide different responses to a question whether it asks about 'gender', 'legal sex' or 'self-identified sex'.

Detailed research undertaken by ScotCen in 2019 for National Records of Scotland provides a strong evidence base for these claims and emphasises the benefits of asking a self-identified sex question rather than a legal sex question.⁹

ScotCen's research tested two sex questions (one on legal sex and one on self-identified sex) with two groups (a random sample of the general population (n = 2,208) and a sample of trans or non-binary people (n = 75)). Testing found that 'for most people their self-identified sex equates to their biological and legal sex and they do not require or access guidance to answer the sex question' (p. 28). Reflecting on this finding, NRS reported:

Most people – as confirmed by the ScotCen General Population study – will not consider guidance prior to answering the sex question. The basis on which they answer is therefore not explicitly defined and therefore NRS take the position that self-identification captures the reality of how people complete this census question (p. 7).

This conclusion was based on the finding that **just 0.5% of the general sample read guidance provided for the sex question**, compared to 25% of the trans and non-binary sample (p. 19). Therefore, NRS noted:

The ScotCen General Population study and the recent NRS census rehearsal confirmed that most people don't read the guidance on the sex question and that neither legal or self-identification guidance would change behaviour regarding participation with the census (p. 7).

Although the type of sex question asked did not result in any difference in engagement among the general sample, the type of question asked did impact engagement among trans and non-binary respondents. ScotCen's research found that three times as many trans and non-binary respondents would be willing to answer a sex question with self-identification guidance than with legal sex guidance (p. 7). In addition, the research found that 'around half (49%) of the trans sample said they would not answer the sex question if the legal sex guidance was used' (p. 20).

⁹ National Records of Scotland (December 2019). [Scotland's Census 2021: Sex Question Recommendation Report](#).

To underscore this point, NRS provided a helpful table that outlines how they would expect different groups of respondents to answer the question depending on whether it asked about self-identified sex or legal sex:

Table 1. How respondents would answer sex questions.

	Self-identified sex guidance	Legal sex guidance
Cisgender man	Male	Male
Cisgender woman	Female	Female
Trans man with GRC	Male	Male
Trans woman with GRC	Female	Female
Trans man without GRC	Male	Female
Trans woman without GRC	Female	Male
Non-binary	Male/Female/Non-response	Male/Female/Non-response

Table 1 shows that **responses are identical for all but two groups** (trans people without a GRC, highlighted in red). Reflecting on this observation, NRS noted:

Self-identified guidance for the sex question would allow trans people who have and do not have a GRC to answer consistently. The legal sex guidance, in contrast, would produce inconsistencies in how people who have and do not have a GRC respond (p. 30).

In summary:

- The purpose of data collection activities is to generate good quality outputs that meet the needs of a wide range of users.
- Testing undertaken by ScotCen in 2019 demonstrated that guidance based on a legal sex approach would lead to a higher non-response rate, for both the sex question and the overall collection exercise, which would impact the data quality.
- Irrespective of guidance provided, public bodies cannot ensure the validity of response to questions about legal sex, biological sex or sex registered at birth as respondents answer without verification of responses and are most likely to ignore any guidance provided.