



Sex and the census

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LOSING SIGHT OF WOMEN'S RIGHTS: THE UNREGULATED INTRODUCTION OF GENDER SELF-IDENTIFICATION AS A CASE STUDY OF POLICY CAPTURE IN SCOTLAND

Kath Murray and Lucy Hunter Blackburn

Abstract

Within the last two years, respective proposals by the Scottish and UK Governments to reform the Gender Recognition Act 2004 (GRA) to allow people to change their legal sex based only on making a legally-registered self-declaration have sparked an intense debate on how sex and gender identity should be defined in law and policy. This paper examines how gender self-identification had in fact become a feature of Scottish policy-making and practice, long before public consultation on GRA reform began. The analysis is structured as two case-studies that examine firstly, policy development on the census in relation to the 'sex' question, and second, Scottish Prison Service policy on transgender prisoners. The analysis shows that the unregulated roll-out of gender self-identification in Scotland has taken place with weak or non-existent scrutiny and a lack of due process, and that this relates to a process of policy capture, whereby decision-making on sex and gender identity issues has been directed towards the interests of a specific interest group, without due regard for other affected groups or the wider population. The paper raises questions about the adequacy of institutional safeguards against well-organised and highly purposeful lobbying, particularly where any groups detrimentally affected do not have effective representation.

Census and policy capture



MBM policy analysis

The next UK census

- March 2021: England, Wales and Northern Ireland
- March 2022: Scotland (postponed due to Covid-19 workload pressures)
- Three UK census authorities:
 - Office for National Statistics (ONS)
 - National Records of Scotland (NRS)
 - Northern Ireland Statistics and Research Agency (NISRA)

The sex question

3 What is your sex?

➔ A question about gender identity will follow if you are aged 16 or over

☐ Female

☐ Male

 This question is **voluntary**

- ☐ Yes
- ☐ No, write in gender identity

[illegible]

- ◆ This question is **voluntary**
- ◆ Answer only if you are aged 16 or over
- ◆ Trans is a term used to describe people whose gender is not the same as the sex they were registered at birth
- ◆ Tick **one** box only

- ☐ No
- ☐ Yes, please describe your trans status (for example, non-binary, trans man, trans woman):

[illegible]

Guidance for the sex question

All three UK census authorities intend to provide guidance to accompany the sex question

Guidance proposed by ONS and NRS

Rehearsal guidance for sex question

Sex

What is your sex?

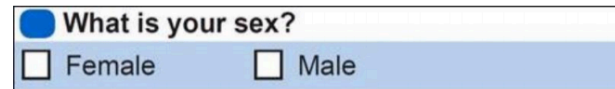
Select either “Female” or “Male”.

If you are one or more of non-binary, transgender, have variations of sex characteristics, sometimes also known as intersex, the answer you give can be different from what is on your birth certificate.

If you're not sure how to answer, use the sex registered on your official documents, such as passport or driving licence, or whichever answer best describes your sex.

A later question gives the option to tell us if your gender is different from your sex registered at birth, and, if different, to record your gender.

Sex question – version 1



☒ What is your sex?

☐ Female ☐ Male

How do I answer this question?

If you are transgender the answer you give can be different from what is on your birth certificate. You don't need a [Gender Recognition Certificate \(GRC\)](#).

If you are non-binary or you are not sure how to answer, you could use the sex registered on your official documents, such as your passport or driving licence. The next question is a question about trans status and history. You can respond as non-binary in this question.

I am answering for someone else. How do I answer?

If you're answering for someone else, where possible you should ask them how they want to answer. If they're away, select the answer you think they would choose. You don't need to know or ask whether they have a Gender Recognition Certificate (GRC).

Why is this question asked?

The sex question provides vital information for organisations on national and local population statistics, and for long term analysis, as it has been asked since 1801. This question is also used for equality monitoring.

NISRA guidance

What is your sex?

If you are completing the paper census questionnaire please use the [paper census guidance](#).

> [Why we ask this question](#)

Select either female or male.

If you're not sure how to answer, for example if you are intersex, you could use the sex registered on your official documents, such as your passport or driving licence.

Answering on behalf of someone else

If you're answering for someone else, where possible you should ask them how they want to answer. If they're away, select the answer you think they would choose. You don't need to know whether they have a Gender Recognition Certificate.

Confidentiality

The personal information you submit to us is protected by law. We do not share it with anyone. You cannot be identified in the statistics that we publish.

Related content

[Keeping your answers private from your household](#)

[Contact us](#)

History of guidance for the sex question





MARGARET WORT
Census Legislation
Room 4300 (E)

Our Ref: W1 1 00/024

Date: 14 December 1998

Ms Paula Thomas

address deleted

Dear Ms Thomas

Thank you for your email of 13 December 1998 concerning the completion of the 2001 Census form.

The White Paper on the 2001 Census, which details the Government's plans and the proposed questions for the Census, will not be published until mid January 1999. Should there be the traditional question on the individual's Sex in the 2001 Census, it would be reasonable for you to respond by ticking either the 'Male' or 'Female' box whichever you believe to be correct, irrespective of the details recorded on your birth certificate.

Yours sincerely

MARGARET WORT
CENSUS LEGISLATION

Letter from Press for Change campaigner, December 1998

“Should there be the traditional question on the individual's Sex in the 2001 Census, it would be reasonable for you to respond by ticking either the 'Male' or 'Female' box whichever you believe to be correct, irrespective of the details recorded on your birth certificate.”

ONS, 14 December 1998

Press for Change advice on 2001 census

Press For Change

The Campaign

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people's
discrimination](#)

The year 2001 Census

How should *you* fill it in?

February 1999

For most people, the ten-yearly census is just another form to fill in ... but for thousands of trans people around the country, it raises yet again the question of how to legally and truthfully answer the question about sex.

Because UK law does not fully recognise trans people in their true gender, the possibility arose that once again, it would be impossible to provide a truthful answer which also matched legal requirements. There is a legal obligation to complete the census form accurately, so trans people faced an unpleasant dilemma.

However, this letter from the Office of National Statistics (in response to an enquiry from Press For Change campaigner Paula Thomas) makes it clear that trans people **can** now give an answer which is both truthful and legal:

- **Trans women** should record their sex as **female** if they believe that to be correct, even though their birth certificates will still say 'male'
- **Trans men** should record their sex as **male** if they believe that to be correct, even though their birth certificates will still say 'female'.

ONS planning for 2011 census

- ONS commission Diversity Solutions to undertake an equality impact assessment for the 'development of question on sex/gender'
- "In the view of the assessor, it would be a disproportionate use of resources to conduct an equality impact assessment on the sex question."
- "In drawing up guidance for 2011 Census respondents, ONS must consult with trans people, trans community groups and others to develop appropriate guidance on gender identity in relation to the sex question."

Recommendations of Diversity Solutions (2008)

ONS has recommended that the 2011 Census sex question should be the same as that asked in the 2001 Census, resulting in a classification of person to male or female. The question to be asked is as follows:

What is your sex? Male ☐ Female ☐

The census demography, families and households topic group, which considered the question in detail, has published the following:

“The data will be used to produce breakdowns by sex of the census population itself and the population by other census variables. It is also required for use of census for making population estimates. It is recognised by the topic group that what is actually collected is gender rather than sex in that respondents choose which box to tick. The group recommend no change to the question from 2001, although it should be noted that a private individual wanted the right to record themselves as non-gendered. More formal guidance for the transsexual and transgender community should be provided in advice on how to complete the form.”

The 2011 Census: Statement of user requirements – Demography, families and households, ONS, November 2007, paragraph 3.2.

In the view of the assessor, it would be a disproportionate use of resources to conduct an equality impact assessment on the sex question.

Gender identity: Issuing guidance on census form completion

ONS does not intend to ask a question on gender identity in the 2011 Census.

As with the 2001 Census, the 2011 Census raises issues of census form completion for trans people and proxy respondents that must be addressed by ONS. Some of the issues were also raised by the Trans Community in 2001: see Appendix 1.

Changes to equality legislation since 1999 have given greater protection against discrimination to trans people in the areas of employment, goods, facilities and services. Public sector bodies have a statutory duty to promote gender and gender identity equality.

The Gender Recognition Act 2004 gives transsexual people the legal right to live in their acquired gender. A trans person who has obtained a Gender Recognition Certificate should put their true gender on all official forms, including the census form.

European case law has determined that sex includes gender reassignment. To reflect this determination, the Sex Discrimination (Amendment of Legislation) Regulations 2008 – SI 2008/963 extends protection in employment against discrimination on the ground of gender reassignment to apply also to the provision of goods and services.

To comply with their statutory duty to promote gender equality, ONS must issue clear guidance to trans people, including those who do not have a Gender Recognition Certificate so that they, or others completing the census form on their behalf, are enabled to give accurate answers to the question.

Recommendations of Diversity Solutions (ctd)

Consulting on guidance

In drawing up guidance for 2011 Census respondents, ONS must consult with trans people, trans community groups and others to develop appropriate guidance on gender identity in relation to the sex question.

For this equality impact assessment screening process, consultation has been conducted with Paula Thomas, a trans community representative who was asked to give her expert view. Ms. Thomas also made a relevant enquiry of ONS related to the 2001 Census (see Appendix 1). Her current view is as follows:

“Where no Gender Recognition Certificate has been issued:

Clear guidance is required here. For example, it should be made clear that someone who believes herself to be female, despite having a male birth certificate and no Gender Recognition Certificate, can tick the female box without fear of prosecution under the Perjury Act.

Where the form is not being filled in by the trans person:

Particularly difficult problems could arise where the form is being filled in by someone else (e.g. partner, parent/guardian). They [the proxy respondent] may fear prosecution for false statement and not be aware of the significance of the

Gender Recognition Certificate. They may not believe the trans person's assurances that it really isn't a problem.”


Consultation on the guidance should include the views of trans community groups such as the Gender Trust and Press for Change, which work on behalf of adult trans people. It is also essential to consult with Mermaids, to capture the views of younger trans people and their parents. Links to their websites are below:

<http://www.gendertrust.org.uk/>


<http://www.pfc.org.uk/>

<http://www.mermaids.freeuk.com/>

2011 census guidance on sex question




Scotland's
Census 2011
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How to fill in your questionnaire

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Question 2

What is your sex?

2

What is your sex?


☐ Male ☐ Female

How to answer

Tick one box only.

[Jobs](#)
[Contact us](#)

Census timelines

Find out more about the history of the census with our interactive timeline 

Why this question is asked

This question provides important basic information about the population and is used extensively along with other data (for example, age and marital status) to produce statistics at national, regional and local level and to allocate public money to local authorities, health authorities and other community projects. By combining sex with age, the census provides a basis for measuring changes in society and calculating rates of morbidity, mortality, fertility, marriage and divorce.

More questions?

I am transgender or transsexual. Which option should I select?

If you are transgender or transsexual, please select the option for the sex that you identify yourself as. You can select either 'male' or 'female', whichever you believe is correct, irrespective of the details recorded on your birth certificate. You do not need to have a Gender Recognition Certificate.

If you are answering for someone who is transgender or transsexual then where possible you should ask them how they want to be identified. If they are away, you should select the sex you think they would wish to be identified as. You can select either 'male' or 'female', irrespective of the details recorded on their birth certificate. You do not need to know if they have a Gender Recognition Certificate.

**Fast forward to planning for
the 2021 census...**



Passage of the Holyrood census bill

... [the question in 2011] “in effect, was a self-identified sex question. As the committee has heard, in 2011 the 1 per cent of people who are trans were told to answer it according to the sex that they believed themselves to be. In fact, the Office for National Statistics issued guidance for the England and Wales census for 2001 that said the same thing, so this has been going on for two decades.”

Evidence to Scottish Parliament, 6 December 2018

Tim Hopkins, Director, Equality Network

Passage of Westminster census bill

Baroness Barker tables a probing amendment to insert a clause stating that there should be ***“guidance on how the particulars relating to sex and gender identity should be answered...and whether this should be on the basis of self-identification”***. She says she wishes to clarify ***“whether it will be the case in 2021 – as it has been for the two censuses in the past 20 years, if not before – that people answer on the basis of their lived identity”***.

Baroness Liz Barker (Liberal Democrat), Lords debate, 4 June 2019

Impact of 2011 guidance on the quality of data collected on sex

“I think that the General Register Office for Scotland got it wrong when it redesigned the census in 2011 and conflated sex and gender identity into one question. Arguably, the measure of sex in the 2011 census data is not accurate.”

Professor Susan McVie, Edinburgh University, 13 December 2018

“I do not think that we know how it affected the data in 2011... we do not know how the guidance affected people and we do not know how many people actually looked at it in 2011.”

Amy Wilson, Director of Statistical Services, National Records of Scotland, 12 September 2019

Åhs et al. 2018: “Proportion of adults in the general population of Stockholm County who want gender-affirming medical treatment”

<u>Age</u>	<u>Registered Sex</u>	<u>I feel like someone of a different sex.</u>		<u>I would like to live as or be treated as someone of a different sex.</u>	
		<u>n</u>	<u>Weighted % (CI)</u>	<u>n</u>	<u>Weighted % (CI)</u>
Total		770	2.3 (2.1–2.6)	779	2.8 (2.4–3.1)
	Male	309	2.1 (1.7–2.5)	218	2.0 (1.6–2.5)
	Female	461	2.5 (2.1–2.8)	561	3.5 (3.0–3.9)
22–29 years		72	4.0 (2.8–5.2)	107	6.3 (4.7–7.9)
30–44 years		219	2.5 (2.1–3.0)	284	2.9 (2.5–3.4)
45–66 years		329	2.0 (1.7–2.3)	286	2.0 (1.7–2.3)
67+ years		150	1.1 (0.9–1.4)	102	1.0 (0.6–1.1)

<https://doi.org/10.1371/journal.pone.0204606.t003>

The census as a standard setter

YouGov

How do you identify yourself on the gender spectrum?

- ☐ Cisgender man or woman (someone who identifies with gender assigned at birth)
- ☐ Transgender person (someone who does not identify with gender assigned at birth)
- ☐ Non-binary or genderqueer person (someone who does not fall within the traditional spectrum of the male and female genders)
- ☐ Agender/gender non-conforming person (someone who chooses not to identify with traditional binary genders because they disagree with their impositions)
- ☐ Gender fluid person (someone who remains flexible about their gender identities within the spectrum)
- ☐ Other
- ☐ Don't know
- ☐ Prefer not to answer

The reason we ask this question in this way is for two reasons:

Firstly, I would like to let you know that currently most of the times YouGov asks about gender and/ or sex, we ask about people's sex assigned at birth, giving the options of only male or female. This is based off the Office of National Statistic's question from the National Census, and is widely accepted and practiced by members of the Market Research Association. However, the ONS question is due to be changed in the 2021 census, to include and recognise gender fluid and transgender terms such as those you have highlighted below. As such, market research agencies will be making the change accordingly. YouGov is currently transitioning between the use of these two questions, to ensure we have the best coverage possible.

Secondly, our highly trained researchers do define gender identity as separate from the sex assigned at birth, and it is important to note that many of our panellists do identify with a different gender from the sex they were born with. As a company, YouGov strives to be as inclusive as possible, and we strive to cover all bases to ensure everyone is provided with an answer they feel they can select honestly. This is why it is equally as important for us to recognise and use the terminology of cisgender, so that we have the most accurate understanding of both your birth sex and your gender identity. On this occasion, we are sorry you feel this way. We use these prefixes to ensure as many people as possible feel represented, however we recognise they are not the perfect fit for everyone.

Robust data on sex is already being lost

× [Sex](#)

This field records the sex of the member of staff, as opposed to the gender with which they identify.

Other is included for staff whose sex aligns with terms such as intersex, androgyne, intergender, ambigender, gender fluid, polygender and gender queer.

The specification of this field is based on the [Recommendations on monitoring from ECU \(Equality Challenge Unit\)](#). HESA does not, however, include a 'prefer not to say' option.

Prior to 2017/18, the legal sex of the member of staff was used. Due to the requirement to return this information to HM Revenue & Customs, legal sex information will be known for all staff.

Scottish Household Survey - Household – 2018

Master version

Question name	Question
HA6	<p>Ask HA6 for each member of the household</p> <p>SHOWCARD A1</p> <p>HOW WOULD YOU DESCRIBE YOUR GENDER IDENTITY/HOW WOULD YOU DESCRIBE THE GENDER IDENTITY OF {NAME}?</p> <p>Note to interview: Do not probe.</p> <p>(1) Man/Boy [1] (2) Woman/Girl [2] (3) In another way (if you would like to, please tell me what other words you use) [Other specify] [3] Refused (spontaneous) [4]</p>

Letter from Office for Statistics Regulation to the census authorities, September 2020

- *“We are aware that some stakeholders have outstanding concerns with the guidance on the Census sex question. ONS has continued to engage with users and stakeholders about this and we recognise the efforts being made to provide answers or explanations on areas of concern. ONS should seek to address outstanding concerns raised by users within its further question testing and research on the guidance on the sex question. ONS should share the outcomes of this research in a transparent and open way.”*
- *“The assessment team thinks it essential for ONS to consider the concerns raised by users during its further testing and research on the guidance on the sex question, and consider the impact of data quality on the analysis of small sub-groups of the population.”*

Thank you

Further information available at
www.murrayblackburnmackenzie.org