

# Diminishing the value of public sector data: How the Chief Statistician's guidance lost sight of biological sex

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## Introduction

On 22 September 2021 the Scottish Government published [guidance](#) on collecting and publishing data on sex, gender identity and trans status. The guidance was drawn up by the Office of Scotland's Chief Statistician, in conjunction with a [Working Group](#) drawn from a number of public bodies, including representatives from the National Records of Scotland (NRS), Office for National Statistics (ONS), the Equality and Human Rights Commission (EHRC), Police Scotland and the Scottish Prison Service, as well as Scottish Government officials.

Following publication, we submitted a Freedom of Information (FOI) request to the Scottish Government asking for previous drafts of the guidance and related correspondence. In response, the Scottish Government shared eleven drafts and selected correspondence with us.

Drawing on the FOI response, this report considers firstly, the role of EHRC Scotland staff in influencing the guidance in its formative stages, and how staff appeared to tie the Chief Statistician's hands by refusing to support any version that was seen to promote the collection of data on biological sex. And secondly, how the definition of sex in the guidance was changed at the very end of the process to include subjective self-identification, in a way that ran counter to the Chief Statistician's previously stated preference.

## 1. 'There will be some purposes that require data about a person's biological sex'

In March 2020 a first draft of the guidance was circulated to Working Group members by the Office of the Chief Statistician. Prior to this, at the first meeting of the group on 23 September 2019, EHRC Scotland had submitted a [paper](#) setting out its position, namely that requesting, gathering and collating data on individuals' biological sex could be in breach of the law.

While the commitment to collecting data on biological sex in the first draft was weak and not advised on a routine basis, the draft nonetheless made clear that "There **will** be some purposes that require data about a person's biological sex" (emphasis added) and set out examples where this would be deemed appropriate, including

“planning maternity care services, making a decision about which prison to send someone to, or deciding on the group of people to involve in a clinical trial for an intervention that is specific to a person’s biological sex.” (version 1, March 2020).

Consistent with this position, the initial draft advised that where they judged it was necessary, data producers should use a “sex at birth” question, worded as “What was your sex at birth?” with simple male/female/prefer not to say options, **in addition to** questions on “lived gender”, “non-binary lived gender”, “trans status” and “non-binary trans status”.

Version 1 (May 2020) Suggested sex question

**Interviewer led (Face to face/phone) interview – sex at birth**

<b>Question wording</b>	What was your sex recorded at birth? Or “what was the sex of ( <i>name of respondent</i> ) recorded when they were born?” when responding for another person
<b>Question responses</b>	1. Female 2. Male 3. Prefer not to say  To not include in the question, but to code 9. Not known
<b>Question guidance</b>	Ideally present a show card with options 1-2. Otherwise read out options 1-2. At no time should the interviewer make a judgement of their own.  The value “Not known” indicates that sex has not been recorded. This covers sex of an unborn child, when someone has refused to answer the question or when the question has not been asked.

In response to the draft, EHRC Scotland staff wrote directly to the Chief Statistician stating that the Commission could neither support nor endorse guidance that promoted gathering data on biological sex:

*“Dear Roger,*

*Please find attached comments from myself and [redacted] on the draft guidance. I can’t seem to edit the document on the shared drive (sorry [redacted]).*

*The Commission has serious concerns about the guidance in its current form. The promotion of gathering data relating to biological sex is not something that we can support and we would not be able to endorse it.*

*The guidance also does not address the need to comply with human rights (or how asking about biological sex could contravene these), which feels like an omission.*

*I appreciate that it is a hard task (perhaps impossible) to produce guidance which has universal agreement. I am happy to arrange a meeting with [EHRC Scotland staff] and yourself if you would find it helpful to explore these concerns in more detail.”*

(EHRC to Roger Halliday, email correspondence 13 March 2020)

In tracked comments on the first draft, at points where the guidance suggested there were limited circumstances where data on sex at birth might be gathered, EHRC staff commented that collecting such data was unlikely to be human rights compliant, while the impact of not doing so on data reliability would be negligible.

*“Not comfortable with this section at all. Our take has been that there are so few trans people as to not skew questions. It is also unlikely to be human rights compliant to ask about biological sex (which is substantially more intrusive and unacceptable than legal sex and which would “out” someone even where they had legally changed sex).”*  
(EHRC Scotland)

[Extract from draft: ‘So, where there is not a clear use for data on biological sex along the lines described above...’]

*“As above – don’t think this would ever be okay”* (EHRC Scotland)

[Extract from draft: ‘From there, an organisation can then consider in specific areas what disaggregation is required, for example, if details of a person’s biology is required (for either operational or data reasons) and subsequently if disaggregation of data between male and female would meet a key objective’]

*“I think there’s a huge problem with this”* (EHRC Scotland)

Instead, it was suggested that the starting point for data collection should be ‘always be lived gender’, a concept that has multiple meanings and no basis in UK law:

*“I think we need to say that the starting point should always be lived gender and that there should be a very clear rationale for going beyond this. And that whether it is really appropriate to collect this in a large scale way through a survey or admin data”*  
(EHRC Scotland)

EHRC staff also sought to put beyond discussion the possibility that increasing numbers of sex offences committed by women might be attributed to recording practices based on self-declared gender identity.

[Extract from draft: ‘it is accepted good practice that if data collectors have results which are unexpected, the reasons for those results should be investigated. In these sorts of circumstances, it may be appropriate to investigate if the inclusion of trans people in their lived gender is the reason for unexpected results. Examples might be if data shows that an increasing number of sex offences are being committed by women or the number of women on boards has increased unexpectedly’]

*“A very offensive example that suggests trans women are likely to be sex offenders”*  
(EHRC Scotland)

As Part 3 shows, while the final published guidance did not fully preclude collecting data on sex registered at birth, nor did it promote it, citing privacy concerns and cautioning against any question requiring the disclosure of a person’s biological sex except “on an individual basis for a very specific purpose”, clearly taking its lead from the EHRC’s intervention.

## 2. From biological sex to ‘self-identified sex’

Comparison of the eleven drafts shows how the list of suggested questions for public bodies in the guidance changed over time. These changes are summarised in Table 1, at the end of the report.

### Biological sex to legal sex

As noted above, the first draft included ‘sex at birth’, alongside a set of questions about transgender identification. At the third iteration (August 2020) ‘legal sex’ replaced sex at birth. Legal sex means what was recorded on a person’s original birth certificate or else, if they have one, their Gender Recognition Certificate. For nearly a year from this point, this was retained in the various iterations of draft guidance.

#### Version 3 (August 2020) Suggested sex question

##### Interviewer led (Face to face/phone) interview – legal sex

<b>Question wording</b>	What is your sex? Or “what is the sex of ( <i>name of respondent</i> )?” when responding for another person
<b>Question responses</b>	1. Female 2. Male 3. Prefer not to say  To not include in the question, but to code 9. Not known
<b>Question guidance</b>	Ideally present a show card with options 1-3. Otherwise read out options 1-3. At no time should the interviewer make a judgement of their own.  If prompted, guidance should be given “this is sex registered at birth, or acquired sex for those with a Gender Recognition Certificate”  The value “Not known” indicates that sex has not been recorded. This covers sex of an unborn child, when someone has refused to answer the question or when the question has not been asked.

An update from the Office of the Chief Statistician to the Director’s Oversight Group issued on 7 September 2020 explained that a legal sex question was preferable because it was “objective and distinct from the gender identity question”.

“The recommended question on gender identity is already used in the Scottish Household survey, and the question on trans status is similar to the

question planned for use in Scotland's Census 2022. **The proposed question on sex in this guidance refers to legal sex...**

**The rationale behind including a sex question that asks a person for their legal sex is that this is objective** and distinct from the gender identity question, which asks a person to answer according to whether they identify as being a man or a woman, or in another way." (Emphasis added)

This approach was then proposed to the Permanent Secretary (23 September 2020) and later the Cabinet Secretary for Social Security and Older People (28 October 2020).

In December 2020, feminist campaign group Woman's Place UK shared with both the Scottish Government and the EHRC key findings from a [formal legal opinion by Aidan O'Neill QC](#). This argued that there was no general question mark over the lawfulness of collecting data on biological sex and that privacy arguments were only one issue to balance against others, according to context. O'Neill assessed the EHRC's advice on privacy initially submitted to the Working Group as "either wrong or misleading or incomplete" and "too general and unspecific and divorced from any actual context to count properly as legal advice". (Note also that the Commission's initial advice to the Working Group was repeated in its private comments on the first draft of the guidance in, if anything, even stronger, more sweeping terms). Conversely, O'Neill argued that:

*...Among the legitimate aims which might be envisaged for asking such information might be:*

*to coordinate and monitor the implementation of international law – for example the UN Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ('the Istanbul Convention');*

*to develop and/or improve where necessary national policies against violence against women, based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women and prevention. This might include the protection of victims of sex-related violence by the provision of women only shelters;*

*to help to inform policymaking and separately to assess the impact on women's rights and experience, of measures taken (including positive action measures to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*

*the freedom of association (in cases of membership of single-sex private clubs) and the organisation of sporting activities (for example single-sex sports events);*

*in the carrying out by public authorities of their public sector equality duties under the EA 2010.*

A version of the guidance circulated in May 2021 introduced new text specifying that data on biological sex could sometimes be proportionate to collect in operating a single sex service:

In a small number of instances, it may be necessary and proportionate to ask about a person's biological sex but this would be on an individual basis for a very specific purpose and it would be up to public bodies who need this data to develop the best approach to do this. The most likely scenarios where data on biological sex is required would be on a case-by-case basis in a medical context; in a criminal context where a serious sexual offence is being investigated; in operating a single sex service where this is for a proportionate and legitimate aim.

(Version 9, 25 May 2021)

The reference to single sex services was however dropped in the final draft (8 September 2021), shortly before publication on 22 September 2021 (see part 3 for the final published text).

Meanwhile, in her response to WPUK, the then EHRC [Chief Executive](#) stated that the Commission did not think it needed to alter the advice it had previously offered, not because it disagreed with the legal opinion, but, surprisingly, because it did not feel its advice had been contradicted.

### From legal sex to 'self-identified sex'

In May 2021, at a very late stage, the suggested 'legal sex' question was dropped from the guidance, for a 'sex' question, with a note that explained the guidance for this would align with that in the 2022 census. In June, it became clear this was in effect a move to self-identification, with the introduction of "*a person's innate sense of whether they are female or male*" as part of the general definition of 'sex'.

#### Definitions used in this guidance

For the purposes of collecting data, a person's **sex** is generally defined as male or female. There are different aspects to a person's sex:

- **Biological:** as determined by a person's anatomy, which is produced by a combination of their chromosomal, hormonal, genital and gonadal characteristics, and their interactions.
- **Legal:** typically legal sex is their sex registered at birth. However, for a trans person with a full Gender Recognition Certificate, their legal sex is their acquired sex.
- **Self-defined:** a person's innate sense of whether they are female or male

Version 10, 18 June 2021

An update from the Office of the Chief Statistician to the Executive Team suggested that this change was partly in response to feedback on an earlier published draft, although seems difficult to square with the Scottish Government's own analysis of the consultation responses which stated:

“A number of responses commented on the definitions of sex, gender and gender identity that are set out in the draft guidance, highlighting that these were unclear, used inconsistently throughout the guidance and contrary to their definition in law and/or practice”. ([Scottish Government 2021: 7](#))

The update also explained that change was made to align with Scotland’s forthcoming census:

20. ... As you may be aware, **Ministers are considering Scotland’s Census sex question guidance** in light of the successful legal challenge brought by Fair Play For Women to the sex question guidance in the England and Wales Census 2021 (i.e. to change it from a self-identified sex to a legal sex question). **We are working with colleagues in National Records of Scotland (NRS) to ensure that our positions are aligned.** (Halliday to the Executive Team, 18 June 2021, emphasis added)

On 31 August 2021 the National Records of Scotland [announced](#) that the sex question in Scotland’s 2022 census would be accompanied by guidance that advised people that they can answer based on their self-defined gender identity. [Publication](#) of the Chief Statistician’s guidance followed on 22 September.

Had the guidance not changed at this stage, its definition of sex would have aligned with the interpretation of sex in the interim High Court ruling on the census in England, as ‘legal sex’. However, as it did change, on 1 October 2021 NRS Chief Executive Paul Lowe was able to [write](#) to the Office for Statistics Regulation Director General Ed Humpherson asserting not only that the interim High Court ruling on the England and Wales census was not legally binding in Scotland, but also that:

Recent guidance from Scotland’s Chief Statistician indicates that NRS guidance [allowing self-identification of sex in the Scottish census] ... will deliver data which will not skew statistical outputs and analysis.  
(Paul Lowe, NRS to Ed Humpherson, ONS, 27 September 2021)

The relationship between the guidance and the census thus became circular, with each one cited as justifying the other. An obvious question is whether the late change to the guidance was made to avoid the potential embarrassment caused to ministers by the position being taken on the census not matching the more general guidance from the Office of the Chief Statistician.

### 3. Diminishing the value of public sector data

The response of EHRC Scotland staff to the initial guidance, namely, to threaten to withdraw support for any version that “promoted” the gathering of data on biological sex, however weakly, was an extraordinarily heavy-handed wielding of the Commission’s authority, aimed, remarkably, at more or less ending the collection of data on sex as registered at birth across the public sector in Scotland.

The finalised guidance cited privacy concerns and cautioned against any question requiring the disclosure of a person’s biological sex except “on an individual basis for a very specific purpose”.

Where it is not necessary and proportionate, a question requiring the disclosure of a person’s biological sex may be an unjustifiable breach of privacy: in some cases this would have the potential to reveal a trans history that otherwise a person may wish to keep private. **In a small number of instances**, it may be necessary and proportionate to require a person to answer a question on their biological sex **but this would be on an individual basis for a very specific purpose** and it would be up to public bodies who need this data to develop the best approach to do this. **The most likely scenarios where data on biological sex is required would be on a case-by-case basis in a medical context; in a criminal context where a serious sexual offence is being investigated.**

(Scottish Government, 2021:11)

In line with the advice given by EHRC Scotland staff, this narrow reading of when data on biological sex may be collected reflects a contested and extreme reading of the law relating to privacy. Strikingly, a similar assertion was made by ONS staff during consideration of their proposed guidance based on self-identification to accompany the sex question in the census in England and Wales (see p. 36 [here](#)). As noted earlier, this interpretation of sex was later successfully challenged in the High Court.

Meanwhile, assertions about lack of effect on data quality, as made by the head of NRS in relation to plans for the census in Scotland, remain no more than that: assertions. At no stage has the Chief Statistician, nor the NRS, EHRC Scotland, ONS (prior to losing its court case), nor any other body provided robust evidence to support this assertion, either in relation to the census, or any other data collection exercise. The material released under FOI discussed here reveals no such analysis. Conversely, the UK’s leading social scientists have repeatedly ([here](#) and [here](#)) raised concerns about the impact on data quality, particularly for sub-groups of the population.

Far from providing reassurance about due diligence and due process, the release of the internal audit trail for the guidance reveals various reasons for concern about its production. Firstly, professional statistical staff were under intense external pressure from the EHRC based on its assertion of the law in support of its preferred outcome.

Second, it provides no evidence that concerns presented to government by senior social scientists about the implications for data quality were properly assessed. Last, at a late stage the draft guidance from the Chief Statistician's office was aligned with what is described in the FOI response as ministerial decision-making on the framing of the sex question guidance in the 2022 census.

Changes to drafting are normal in the policy development process. However, here one of the most fundamental elements, the definition of sex, was radically changed in the final few weeks of a two-year process: from something objectively anchored either in biology or, failing that, in law, to something that could equally be based purely on subjective self-declaration.

If the guidance stands, it will mark the point at which Scotland officially became a nation unable to say what most of the data collected by its public sector marked as 'sex' is actually recording. The material released under FOI raises acute questions about the role of the EHRC in how Scotland was taken to this point. It also suggests that those responsible for this far-reaching outcome will have little to fall back on, if asked to defend it.

**Table 1. Recording sex in the Chief Statistician’s guidance: A timeline**

Version/date	Sex defined as:	Recommended question options
V1 9 March 2020	<b>Biological and legal</b>	<b>Sex at birth</b> Lived gender Non-binary lived gender Trans status (Non-binary trans status description)
V1 mark up	As v1	Lived gender Non-binary lived gender <b>Sex recorded at birth</b> Trans status (Trans status description)
V2 3 August 2020	As v1	Lived gender Non-binary lived gender <b>Sex at birth</b> Trans status (Trans status description)
V2 mark up	As v1	<b>Sex registered at birth</b> Gender identity Non-binary or trans gender identity Trans status (Trans status description)
V3 31 August 2020	As v1	Gender identity Non-binary or trans gender identity <b>Legal sex</b> Trans status (Trans status description)
V3 mark up	As v1	As v3
V4 7 September 2020	As v1	Gender identity (Gender identity “in another way” description) <b>Legal sex</b> Trans status (Trans status description)
V5 23 September 2020	As v1	As v4
V6 28 October 2020	As v1	As v4
V7 24 November 2020	As v1	As v4
V8 <a href="#">published draft</a> for stakeholder feedback 10 December 2020	As v1	As v4
V9 25 May 2021	As v1	<b>Sex (aligned with 2022 census guidance)</b> Trans status Trans status description
V10 18 June 2021	<b>Biological, legal, and self-defined</b>	As v9
V11 embargoed final copy 8 September 2021	As v10	As v10
<a href="#">Published guidance</a> 22 September 2021	As v10	As v10