

OSR Assessment of the UK censuses: Response from MurrayBlackburnMackenzie

22 April 2022

Since late 2018 we have researched and written extensively on the censuses in Scotland, and England and Wales, principally in relation to the development of the sex question, and the implications of this for data reliability and trust in public statistics. Our work in this area can be accessed here:

<https://murrayblackburnmackenzie.org/sex-and-gender-identity-data-in-the-census/>

This response focuses on Scotland and the conduct of the National Records of Scotland (NRS) and Scottish Government in relation to the sex question, although many of the observations are applicable to the Office for National Statistics (ONS) and the 2021 England and Wales census. We also draw on first-hand observations of the Fair Play for Women vs the Registrar General and the Scottish Ministers Appeal [hearing](#), and the arguments put forward in court by the Scottish Government.

Because of the approach taken by the Scottish Government, the key demographic variable of sex - the item of data most used from census outputs - will be unstable, conflating two different demographic concepts to an unknowable degree. The data will not be directly comparable to data on sex in the other UK censuses, nor will it be suitable for equality monitoring purposes.

We conclude that the conduct of the Scottish Government in relation to the census is likely to breach a range of the principles set out in the Code of Practice for Statistics.

1. Partial stakeholder engagement: user vs respondent needs

In 2015/2016 the NRS consulted with a range of stakeholders on the questions for the 2021 census. The [consultation document](#) (2015) linked to the [2011 sex variable](#), described as 'The classification of a person as either male or female'. The consultation made no reference to the sex question as being based on self-identification, either in the 2011 census or forthcoming census.

The subsequent [consultation report](#) (2016) confirmed ongoing user need for data on sex, again without any reference to self-identification.

There is a well-established user need for the key demographic variables age and sex. They are vital inputs to population estimates and household projections which are used by central and local government to inform resource allocation, target investment, and carry out service planning and delivery. Age and sex are protected characteristics as set out in the Equality Act 2010 and the data are widely used to inform equality impact assessments. They are also essential for analysis and research conducted by a wide range of users, including public bodies and third and private sector organisations. NRS propose to continue to collect information on age (via a question on date of birth) and sex in 2021.

It appears that the request for a self-identified sex question initially arose at a '[Sexual Orientation and Gender Identity Stakeholder Meeting](#)' in January 2017, attended by representatives from three lobby groups (Equality Network, Stonewall Scotland, and

LGBT Health) and government officials. The NRS [Sex and Gender Identity Topic report](#) (2021) shows that the request related only to *respondent* need: the Topic report does not identify any *user* need for a self-identified sex question.

‘At this event stakeholders identified a respondent need for changing the 2011 binary sex question in that the 2011 sex question which is mandatory does not allow non-binary people to answer the question truthfully. A non-binary self-identified sex question allows those who do not identify as either male or female to tick a third response option and write in how they identify. People who are trans are also able to tick the response option for how they identify rather than their having to disclose their sex assigned at birth.’ ([NRS 2021; 9](#)).

NRS completed the development of questions for sex and gender identity/transgender status before 1 October 2018 ([NRS 10 June 2019](#)), that is, prior to the introduction of the Census (Amendment) (Scotland) Bill. An [FOI response](#) shows that until this point, NRS engaged only with lobbyists advocating for policies based on self-defined gender identity on the development of the sex question.

In the [Stage One Report](#) on the Bill, the CTEEA Committee stated that it found the ‘lack of early engagement with a range of groups and individuals, including a broad range of women’s groups, to be a serious deficiency in the process of consultation on the sex, gender identity and transgender status topics’.

Minutes from the Scottish Government’s [Board of Official Statistics](#) suggest that the Board had no input or discussion on the 2021 Census prior to the Bill being laid in Parliament. This omission is striking given that part of the Board’s remit is ‘to make sure the voices of those using data and statistics about Scotland are heard and influence the way the strategy is developed and delivered’. Ten days after the introduction of the Bill, NRS [updated the Board](#) on its plans, although it is not clear in what detail, or if the proposed changes to the sex question were discussed.

Following publication of the Bill, academics working with population data began to raise serious concerns about the proposed approach to the sex question. In September 2019 eight academics based in Scotland wrote to the Culture, Tourism, Europe, and External Affairs (CTEEA) committee setting out their concerns:

“We are regular users of Census data and reports, as well as data and reports from a range of household surveys which are methodologically reliant on the Census. We are concerned that the proposed changes may reduce the ability of the Census and these other sources to distinguish the situation of those who are male and female, and hence to capture sex-based discrimination and disadvantage.”

([Bailey et al. 8 September 2019](#))

[Correspondence](#) published by the CTEEA committee shows that three academics met with NRS in October 2019 to discuss their concerns about the sex question guidance. The correspondence also reveals the academics’ frustration with NRS officials, and notes that the draft minute produced by NRS ‘misrepresent[ed]’ the meeting, and omitted parts of the discussion.

In November 2019 NRS published its [Impact Assessments Stakeholder Survey Report](#), based on an online survey and sessions with stakeholders. The report noted that at the stakeholder sessions ‘it was commented by some stakeholders that the Equality Impact Assessment lacked protection of sex’ and that ‘much of the discussions at these sessions focussed on the sex question and supporting guidance’. In the online survey,

when asked about negative effects, the highest number of responses related to the sex question.

In December 2019 a letter from 80 experts in social statistics and users of population level data, including some of the UK's leading social scientists and ten Fellows of the British Academy, wrote to the CTEEA Committee, setting out their concerns:

“The proposed guidance assumes that the number of respondents who self-identify as members of the opposite sex will be small, and that the measurement errors will therefore be small compared to other sources of misclassification. There is however no systematic evidence on the size and distribution of the trans population to support this assumption. It is unlikely that the trans population will be evenly distributed across the population, for example by age, sex and geography. This means that the effects on data reliability are likely to be greater at the sub-group level. This can have extreme consequences for particular subgroups, e.g. 1 in 50 male prisoners in England and Wales identify as transgender.” (Sullivan et al. 8 December 2019)

Despite the weight of professional concern about an explicitly self-identified sex question, the Scottish Government continued to give precedence to those advocating for a question based on self-defined gender identity. This imbalance was raised at the CTEEA Committee on 6 January 2020. Commenting on a letter cited by the then Cabinet Secretary Fiona Hyslop in support of a self-identified sex question, the Convener stated:

“I would like to compare the letter that was led by Professor Alice Sullivan with the letter from the 50 academics you mention. The letter from Professor Alice Sullivan was signed by 80 senior academics—mainly social scientists, and mainly professors—who work with population data. The signatories include professors of research methodology, professors of public health, professors of medical sociology and professors of demography and statistics. However, although the signatories of the letter that you highlight include some professors—and I am sure that a small number of them use population data—it also includes academics from departments of creative writing, Atlantic studies, theology, computer science and linguistics. The signatories do not consist of population-data users; they are activists. They are entitled to their views, and I am sure that they are accomplished in their fields, but they do not compare to people whose specialism is in using population data. It seems strange that you have ignored one group of experts and preferred another group of activists when making your decision.” (SP OR 30 January 2020 col. 6).

NRS confirmed in a Freedom of Information response seen by MBM that it undertook no analysis ‘to establish the relevant expertise of each signatory in relation to the use of population data’. This raises serious concerns about the approach to evidence within government and runs counter to the standards expected of the census authorities. It shows that NRS failed to undertake basic due diligence on a letter before it was used by officials, and Ministers were presumably briefed to refer to it, to support the Scottish Government proposal, while at the same time discounting the views of professional statisticians and population data users.

In June 2020, two University of Edinburgh Scottish academics, Professors Susan McVie and Lindsay Paterson, wrote to the Registrar General, Paul Lowe, to ask about NRS’ plans for involving data users in the development of the guidance in Scotland. In response, Mr Lowe stated that the CTEEA committee had already approved the guidance. Professors McVie and Paterson sought to verify this with the CTEEA

committee Convener Joan McAlpine MSP, who **disputed** the claim made by Mr Lowe, and confirmed that the Committee had no locus to approve the guidance.

On 11 September 2020, as part of the ongoing assessment of the UK censuses, OSR **advised NRS** that it should continue to engage with stakeholders, particularly around areas of contention.

At an **oral evidence session** with NRS officials on 17 September 2020, Ms McAlpine questioned the Registrar General on his misrepresentation of the Committee’s role vis-à-vis the guidance, asking him whether he *“would you like to take the opportunity to clarify that what you told them was not the case and that the committee does not have the ability to approve or disapprove the guidance”*. In response, Mr Lowe stated that he had written to the two professors to clarify this position.

In March 2021, following the interim ruling by the High Court of England and Wales, we understand that two academics wrote to NRS offering further dialogue, but that none took place.

The Scottish Government continued to rely on the non-expert letter noted above, discussing it in open court in the Fair Play for Women Appeal Hearing as evidence that there was at least as much expert support for its proposals as there was concern, in respect of any impact on data quality. We have asked Fair Play For Women what reference was made to these letters in the written submissions to the court: they have confirmed that in these documents the Scottish Government referred to the 50 signature letter as having at least equal weight as the others, and did not recognise the views submitted to it by a large group of senior academics with relevant expertise as meriting any attention.

Relevant principles include:

Trustworthiness	Honesty and integrity (T1.2, T1.3), Independent decision making and leadership (T2.2, T2.4), Transparent process and management (T4.1)
Quality	Suitable data sources (Q1.1, Q1.2, Q1.5), Sound methods (Q2.1, Q2.3, Q2.6)
Value	Relevance to users (V1.1, V1.3, V1.4), Innovation and improvement (V4.3, V4.5)

2. Conflation of separate demographic characteristics

Good questionnaire design requires clarity on what is being measured. The UK Statistics Authority report '[Leaving no one behind – How can we be more inclusive in our data?](#)' recommends that:

'Data producers should review the conceptual foundations of their measures for relevant populations and groups, ensuring the measures that are used accurately reflect the current standards and legislation. Data providers should ensure that measures are conceptually robust and do not incorporate formulations that might be deemed to be derogatory, inappropriate or misleading.'

And:

'Data producers and analysts should ensure that the language used in the collection and reporting of all characteristics is clear. For example, clearly distinguishing between concepts such as sex, gender and gender identity; or ethnic identity and ethnic background. This would help to avoid ambiguity and confusion among respondents and data users, which can undermine data and analytical quality, as well as belief in the validity and reliability of data.'

In its [Stage 1 report](#), the CTEEA Committee expressed concern about the conflation of sex and gender identity in the sex question.

'The Committee agrees that the way the term 'gender identity' has been used in the Bill has created confusion and a perception that 'sex' is being conflated with 'gender identity'. The Committee welcomes the proposal from the Equality Network with regard to how the Bill can be amended to address this issue. This would require 'including gender identity' to be removed from the Bill leaving paragraph 1 of the Schedule to the 1920 Act regarding the mandatory sex question unchanged. 'Trans-status' would be added as a category for census questions on the same basis proposed for 'sexual orientation'. The Committee therefore recommends that the Scottish Government brings forward amendments, at Stage 2, to this effect'.
([2019: para. 9](#))

In giving [Stage 1 oral evidence](#) to the Committee, the then Cabinet Secretary Fiona Hyslop MSP acknowledged these concerns, conceding that "*it is a very serious point that we will certainly look at*". Thereafter, during the [Stage 1 debate](#) on 28 February 2019, Ms Hyslop confirmed that: "*the intention behind the bill has never been to conflate sex and gender identity*".

At Stage 2 of the Bill, the Scottish Government brought forward an amendment to remove the phrase "including gender identity" from the draft bill, which Ms Hyslop explained in the following terms:

"In my response to the committee's stage 1 report and during the stage 1 debate on the bill in Parliament on 28 February, I committed to lodging amendments to address the perceived conflation of sex and gender identity in the bill as introduced. Amendments 1 to 4 have been lodged to deal with that issue, as highlighted by the committee." ([Fiona Hyslop MSP, 2 May 2019 col. 1](#))

The approach taken to the sex question in the 2022 census is wholly at odds with the commitment to address the conflation of sex and gender identity, as made by the Minister.

Relevant principles include:

Trustworthiness	Honesty and integrity (T1.3)
Quality	Suitable data sources (Q1.1), Sound methods (Q2.1, Q2.2), Assured quality (Q3.1)
Value	Relevance to users (V1.1, V1.3), Clarity and insight (V3.1)

3. Failure to understand or investigate impacts on data reliability

Data labelled 'sex' in Scotland's census will conflate sex and gender identity to an unknowable extent, and introduce risks to data reliability. The most substantial effects will be when sex is cross-referenced with one or more other variables, such as age, education, and location. These concerns are compounded by a lack of any robust data on the size of the transgender population, and how this is distributed by for example, age and sex. See further [here](#).

Misunderstanding the nature of census data

There is substantial evidence to indicate that the transgender population has increased since 2011. Nonetheless the Scottish Government maintain that the number of trans people is too small to distort census data, more so given that there are both trans men and trans women, with the implications that these will balance each other out (the latter point was confirmed by Fair Play for Women).

This position suggests that the Scottish Government fundamentally misunderstands the unique value of the census. The census is the only data collection exercise in Scotland which covers the whole population and is not drawn from a sample. It is this unique quality which justifies the exceptional powers under which it is conducted and the scale of spending on it. In November 2021 [Audit Scotland](#) reported that Scotland's census was £21.6 million over the pre-pandemic estimate of £117 million.

By not sampling, the census provides a periodic benchmark for sampled surveys. It also allows for detailed analysis that is not possible using any other source such as sampled surveys. This may mean counting the total size of a very small group, or counting smaller groups of people who share a particular combination of characteristics (for example, sex, age and council ward). The more detail required, or the smaller the group of interest, the more the census becomes the only reliable data source. The 2021 Topic Consultation report explains this in relation to relation to minority ethnic groups and small areas:

Collecting this information in the census is particularly important because many minority ethnic groups in Scotland are too small in number to be captured effectively by sample surveys. The census gives the only robust information on size of groups at small area level. (2015: 16)

This type of data can usefully inform planning decisions about local or national services. Reliable data will also be needed to respond to changing policy priorities and emerging issues. Even where further research data is gathered, census data can still be uniquely useful at the initial stage: to identify differences between groups or areas on an issue of interest and help develop research questions.

As noted above, senior academic quantitative researchers have repeatedly pressed the Scottish Government on the impact of a self-identified sex question on sub-group data

reliability. This is of particular concern where sex and age are combined given clear evidence of an uneven age distribution of trans identification, overall and by sex. For further evidence in this area see [here](#):

Extraordinarily, the Scottish Government has resisted any recognition of this as an issue, instead relying on supportive statements from academics who do not work with population data, or with quantitative data at all. As a result, no sensitivity testing appears to have been done to test the potential effect on the reliability of outputs relating to sex when census data is used to obtain results for population sub-groups. To our knowledge, there is no evidence of any analysis undertaken by NRS to examine the impact of the guidance on subgroups. At a CTEEA committee meeting ([30 January 2020](#)) NRS failed to respond to a question from Convener about the impact on subgroup population data. A lack of testing in this area was later confirmed in an [FOI response](#) in May 2020.

In failing to explore these concerns, the Scottish Government appear to rely only on two assumptions that it cannot support and are highly likely to be wrong. These are that:

- (a) The total number of those likely to complete the census sex question based on identity rather than actual sex will be the same for MtF and FtM and;
- (b) These cases will be evenly distributed in the population by every other possible characteristic of interest over the next decade.

This is very unlikely to be true by age, with data on younger age groups most likely to be affected. For all other characteristics, the assumption is premature at best, ahead of initial data collection for this group. It is also highly improbable that FtM and MtF cases will mirror each other precisely for location (down to smaller areas), ethnicity, occupation, and other variables.

This means there is an evident risk to the reliability of outputs on sex in combination with multiple other factors, especially age, jeopardising to an unknown degree a core justification for and purpose of the census.

Relevant principles include:

Trustworthiness	Honesty and integrity (T1.3)
Quality	Suitable data sources (Q1.1), Sound methods (Q2.1. Q2.2), Assured quality (Q3.1)
Value	Relevance to users (V1.1, V1.3), Clarity and insight (V3.1)

4. Misrepresentation of the 2011 census guidance

In defending its approach to the sex question guidance, the Scottish Government has argued that this would provide continuity with similar online guidance made available for the first time in 2011, without any challenge. The Scottish Government has further interpreted all previous census sex data as relating to respondents' 'self-identified' sex. We think this account is partial at best, lacks historical context, is conceptually confused, and fails to reflect data handling practices at the time of the 2011 census.

Self-identification vs self-reporting

The guidance published in 2011 was an outlier. No guidance on sex was published in the previous censuses between 1801 and 2001. While NRS (and ONS) have interpreted all previous census data as relating to respondent's self-identified sex, we think this approach is conceptually mistaken, and that it is historically implausible to characterise all census data, as far back as 1841 in these terms. NRS and ONS confuse the common practice of asking people to report a characteristic without providing evidence ('self-report'), and actively guiding people to consider a characteristic as having no definition beyond the personal and subjective ('self-identified').

While biological sex is easily recognised and understood, in recent years an extraordinarily unhelpful degree of confusion has been sown around this ordinary concept, as exemplified in the muddled definition used in Scotland's census. As a further measure of this confusion in this area, in the Fair Play for Women Appeal hearing the Scottish Government counsel stated:

"It may once have been thought that sex at birth is immutable. It is no longer so".

There is no evidence to support this statement. Nor is there evidence to suggest that ideas about sex, as defined in terms of subjective self-identity, extend to previous generations as far back as 1841, in terms of common public understanding.

At a CTEEA evidence session in December 2020, Professor in Quantitative Criminology Susan McVie stated:

"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. We are now trying to disentangle those things. Arguably, the measure of sex in the 2011 census data is not accurate." ([McVie, 13 December 2018. Col. 4](#))

Public awareness of the 2011 guidance

There are strong reasons for a lack of opposition to the 2011 guidance, principally that the decision to introduce online guidance was made without wider consultation, and that public awareness was exceptionally limited. To our knowledge, neither NRS nor the ONS made any announcement as to the introduction of the guidance. At a roundtable event in June 2020 organised by ONS, an ONS official [stated](#) that the 'guidance was first introduced in 2011 at the request of the LGBT community'.

The 2011 guidance was discussed by the CTEEA Committee during the passage of the Bill, at which the then Director of Statistical Services conceded both a lack of prior public awareness, and further, that NRS did not know what impact the guidance had had on the data collected:

The Convener: ... The 2011 guidance was online guidance and my understanding is that only about 20 per cent of people answered the 2011 census online. Is that correct?

Amy Wilson: Yes.

The Convener: Is it also correct that the online guidance was not necessarily flagged up—it was not beside the question and people had to seek it out?

Amy Wilson: That is correct.

The Convener: It is therefore fair to say that very few people would have been aware of that online guidance; in fact, it has been drawn to our attention that Stonewall’s submission to your census topic consultation in 2016 suggested that it was unaware of the online guidance because, according to it, sex and gender are different things and people would not know how to answer the sex question. The main LGBT charity did not seem to be aware of the guidance, and when you engaged with stakeholders for the 2021 census, the feedback from trans people indicated that many of them did not seem to be aware that they could answer the sex question in the way that I have described. It seems to me that even your own material shows that not many people were aware of the guidance, so it would not have affected the data in 2011.

Amy Wilson: That is a fair point. I do not think that we know how it affected the data in 2011. From looking at the data and the quality assurance that we have done, there is no evidence to suggest that we started to see trends that were different from anything that had happened in the past. However, you are right—we do not know how the guidance affected people and we do not know how many people actually looked at it in 2011. ([CTEEA Committee 12 September 2019](#))

Organisational awareness of the 2011 guidance

It is also unlikely that the guidance was recognised *even within the census authority itself*. As noted above, the 2021 Topic Consultation made no reference to a self-identified question in either the 2011 or forthcoming census.

A lack of organisational awareness is also strongly suggested by the 2011 ‘Edit and imputation rules’ used to correct inconsistent entries on a census return. In the 2011 census (pre-equal marriage) it was not possible for a married couple to be the same sex, nor for a couple in a civil-partnership to be a different sex. Reflecting these legal criteria, the imputation rules stated:

“If two people are married then both cannot be of the same sex; if two people are civil partners then both must be the same sex.” ([NRS 2020: 57](#))

These rules indicate that as an organisation, the census authority was operating on the basis of legal sex, not self-identified sex.

Note on imputation: We have asked NRS how it will manage inconsistencies between the sex question and the trans status question (for example, if a person records their sex as female and their trans status as ‘trans woman’), whether imputation will be used, and if so which response will be imputed.

Relevant principles include:

Trustworthiness	Honesty and integrity (T1.3)
Quality	Suitable data sources (Q1.1), Sound methods (Q2.1. Q2.2), Assured quality (Q3.1)
Value	Clarity and insight (V3.1)

5. Breaching the UK harmonisation agreement

In retaining consistency with the 2011 guidance, data on sex in Scotland will differ to that collected in England and Wales, and Northern Ireland (following the ONS ruling, Northern Ireland chose to change its guidance to align with England and Wales).

In relation to the risk of divergence, in the Fair Play for Women appeal case, the Scottish Government QC argued that “this point is overplayed” and that if it mattered “it is surprising parliament permits different questions”. We find this argument reckless. The purpose of harmonisation is to provide consistent, coherent and accessible statistics across the census jurisdictions. Whilst countries can ask questions on different topics, harmonisation means that when the same question is asked, the same definition should be used. To this aim, the UK census authorities have a Statement of Agreement, to which the Scottish Government is a signatory. This [states](#): ‘Common definitions and classifications, typically based on international standards, should be agreed, used and published’

In seeking to win its argument in Court, the NRS and Scottish Government abandoned this basic principle of data collection. We think that the argument made by the Scottish Government in the Appeal court represents a wilful breach of this agreement.

Relevant principles include:

Trustworthiness	Independent decision making and leadership (T2.4)
Quality	Suitable data sources (Q1.4), Sound methods (Q2.2)
Value	Clarity and insight (V3.3), Innovation and improvement (V4.4), Efficiency and proportionality (V5.1)

6. Misrepresentation of response rate risks

In defending its approach to the sex question, the Scottish Government placed a strong emphasis on response rates and encouraging participation, arguing that a biological or legal sex question would deter people with a trans identity from completing the census.

This argument was not supported by the large-scale representative quantitative testing undertaken by Scotcen, commissioned by NRS, which found that the overall non-response rate to a sex question with ‘self-identification’ guidance did not significantly differ from the non-response rate to question with legal sex guidance.

‘For the self-identification sex guidance, 2% said they would ‘skip the sex question’ in the census if the guidance was used and 1% said they would ‘not complete the census at all’. The likely impact of the legal sex guidance was the same - 2% would skip the sex question if the legal sex guidance were used and 1% would not take part in the census at all.’ ([Scotcen, 2019: 3](#))

The Scottish Government has also failed to balance the imperative to secure a high response rate with the need to secure reliable data. Reliability is not improved by getting more people to give an incorrect answer: it is improved by getting more people to provide accurate responses.

Having prioritised engagement over reliability, it is of particular concern that Scotland’s census appears to be lagging significantly behind the 2011 census in terms of securing responses from households.

On 4 April 2022 NRS announced on social media that around a million households had yet to complete the census. This indicates a return rate of around 60% 16 days after census day, compared to a 74% response rate 10 days after census day in 2011, at a time when most responses were paper based (2015: 4.67).

The reasons for this shortfall remain unclear, although contributory factors may include the decision to delay Scotland’s census by a year, thereby failing to benefit from the momentum of a UK-wide campaign, as well as the perceived politicisation of the questionnaire in relation to various questions, including that for sex. We would also suggest that the decision to release data on the number of non-responses was misplaced and risked a counter-productive effect, by making failure to respond feel less unusual for those already disposed not to.



Relevant principles include:

Trustworthiness	Honesty and integrity (T1.1)
Quality	Suitable data sources (Q1.6), Sound methods (Q2.1, Q2.4)
Value	Innovation and improvement (V4.5), Efficiency and proportionality (V5.6)

7. Detrimental impact on equality monitoring

The NRS Equality Impact Assessment for Scotland’s census clearly states that census data is used for equality monitoring, as required under the Public Sector Equality Duty (PSED):

A key reason for requiring census data on a range of topics is to be able to fulfil the public sector equality duty. Census data would, for example, assist public authorities in carrying out equality impact assessments when they assess and review policies and practices.

[Scotland’s Census 2022 Equality Impact Assessment Results v4.0 2020: 8](#)

As noted above, the Sex and Gender Identity Topic report also stated that sex ‘is a protected characteristic as set out in the Equality Act 2010 and the data are widely used to inform equality impact assessments’.

Equality monitoring is further referenced on the face of the sex question guidance:

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.

[Scotland’s Census 2022: sex question guidance](#)

Sex is defined as biological in the Equality Act 2010 (see [For Women Scotland v the LA & the Scottish Ministers](#)), which is carried through to the PSED under the same legislation.

However, during the passage of the Bill, in giving oral evidence to the CTTEA Committee, the senior principal legal officer for the Scottish Government departed from this position, asserting that the census should not ‘slavishly’ follow the meanings employed in the Equality Act 2010:

‘Arguably, it would be wrong to completely hitch the census to the wagon of the Equality Act 2010, because the definition in that act does its job with all the things that are round about it. It deals with direct and indirect discrimination and with discrimination based on whether somebody has a protected characteristic or is perceived as having that protected characteristic. All those things are wrapped up there. The census has to do something entirely different: it has to collect data and address a wide range of user needs.

At one level, it might seem superficially attractive to copy and paste the language of the Equality Act 2010 into the census but, if we did that, the census would not do the job that we ask it to do...’ ([12 September 2019 Column 20](#)).

The argument put forward here and subsequently defended in court means that the Scottish Government has actively undermined the public good argument set out in its own equality impact assessment.

Relevant principles include:

Trustworthiness	Honesty and integrity (T1.2)
Quality	Suitable data sources (Q1.1), Assured quality (Q3.1)
Value	Relevance to users (V1.1), Clarity and insight (V3.1)

8. Damaging impact on other data collection exercises

As the gold standard data collection exercise, the approach to the sex question in Scotland’s census is likely to affect other surveys, including medical and biological research, where there is already evidence that public authorities are shifting away from collecting data on biological sex.

This damaging impact is already evident in [Scottish Government guidance](#) for public authorities on collecting data on sex and gender identity, which defines sex in terms of biological, legal, and self-identified ‘aspects’. Correspondence accessed by FOI shows that this definition was introduced in the final weeks of a two-year process, expressly to align with Ministerial decision-making on Scotland’s forthcoming census:

“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.”

(Chief Statistician to the Executive Team, 18 June 2021: [p.5](#))

In contrast, a draft version of the guidance published just nine months early in December 2020 defined sex in objective biological and/or legal terms. As the Chief Statistician previously explained to the Director’s Oversight Group:

“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.” (Office of the Chief Statistician to the Director’s Oversight Group, 7 September 2020: p.4)

On 22 September 2021, following publication of the guidance, the then Chief Statistician Roger Halliday [wrote](#) to Scotland’s public bodies to inform them of the guidance and to ask about any plans for implementation.

A further FOI request shows that a range of bodies are in the process of implementing or reviewing/planning to implement the guidance in some or all business areas, thereby cementing the loss of reliable data on sex more widely. These include:

Audit Scotland; Caledonian McBrayne; Care Inspectorate; Crown Estate Scotland; HM Inspectorate of Prisons for Scotland; Loch Lomond and the Trossachs National Park; Mental Welfare Commission Scotland; National Galleries of Scotland; NHS Golden Jubilee; Registrars of Scotland; Scottish Fire and Rescue Service; Scottish Funding Council; Scottish Human Rights Commission; Scottish Legal Complaints Commission; Scottish Prison Service; and the Scottish Social Services Council.

9. Summary

The definition of the key demographic variable of sex in Scotland’s census, the item of data most used from census outputs, will be unstable, conflating two different demographic concepts to an unknowable degree. This data will not be directly comparable to data on sex in the other UK censuses. Nor will the data be suitable for equality monitoring purposes. Remarkably, the Scottish Government went to court, twice, to defend its ability to do this. These detrimental impacts can be reasonably attributed to a partial and politicised engagement process that prioritised the views of lobbyists claiming to represent the views of one respondent group, over and above those of data experts and census data users.

For the purposes of the ongoing OSR assessment, as indicated above we think that the conduct of the Scottish Government as documented here fails to meet the standards set out in Code of Practice for Statistics across all three Pillars (Trustworthiness, Quality and Value). We draw to your attention particularly:

T1.2 The collection, access, use and sharing of statistics and data should be ethical and for the public good. Those producing and releasing statistics should be free from conflicts of interest, including political and commercial pressures, that may influence the production, release and sharing of the statistics and data.

T4.1 Organisations should be transparent about their approach to public engagement with users, potential users, and other stakeholders with an interest in the public good served by the statistics.

Q2.2 Statistics, data and metadata should be compiled using recognised standards, classifications and definitions. They should be harmonised to be consistent and coherent with related statistics and data where possible. Users should be provided with reasons for deviations from these standards and explanations of any related implications for use.

Q2.5 Producers of statistics and data should provide users with advance notice about changes to methods, explaining why the changes are being made. A consistent time

series should be produced, with back series provided where possible. Users should be made aware of the nature and extent of the change.

Q3.1 Statistics should be produced to a level of quality that meets users' needs. The strengths and limitations of the statistics and data should be considered in relation to different uses, and clearly explained alongside the statistics.

V1.5 *The views received from users, potential users and other stakeholders should be addressed, where practicable.* Statistics producers should consider whether to produce new statistics to meet identified information gaps. Feedback should be provided to them about how their needs can and cannot be met, being transparent about reasons for the decisions made and any constraints.

V1.6 Statistics producers should periodically review whether to continue, discontinue, adapt or to provide the statistics through other means, *in discussion with users and other stakeholders.*

V2.4 Statistics, data and metadata, including those available through data services, should be released at the greatest level of detail that is practicable to meet user needs. *They should be consistent with common data standards and protocols wherever possible.*

To date OSR has avoided commenting on the definition of sex or the importance of collecting robust data on what is a fundamental demographic variable. This is stated in terms, in the OSR draft guidance on collecting data on sex and gender identity:

As the regulator of official statistics, it is not for us to define what data about sex are collected across the statistics landscape.

[OSR Draft Guidance: Collecting and reporting data about sex in official statistics](#)

Looking ahead, we do not think that this position is sustainable, and that urgent intervention is now required, to make it clear that the reliability and substantive meaning of public statistics will always be defended from substantial breaches of the Code. At the Fair Play for Women Appeal hearing, the Scottish Government and judges agreed that it was not the court's place to consider the quality of official statistics. This leaves OSR as the only external check on government, on matters relating to quality.

Our view here is reinforced by the conduct of the Scottish Government which proceeded to court, even after the ONS conceded the same point in legal proceedings in England and Wales, to the detriment of Scotland's census. Moreover, it did so as a political choice. These events show that with sufficient determination, core elements of official statistics - up to and including the most widely used variable in the gold standard of the census - are at risk of being subsumed to a political project.

We think that it needs to be put beyond any doubt that this is not acceptable, and that where such behaviour seriously undermines the quality of data, no data exercise is regarded as so major as to be exempt from the risk of de-designation.