

Feedback on the Draft Guidance published by the Scottish Government's Sex and Gender in Data Working Group

Sex

It is disappointing that the Draft Guidance does not give clear definitions for the terms sex, gender and gender identity, preferring instead to rely upon definitions provided by a range of other organisations, and without specifying an agreed definition to be used consistently by all organisations using the guidance.

The references cited from the World Health Organisation, the Royal Statistical Society, and the USA Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys **all** state that sex refers to biological characteristics yet the Draft incorrectly introduces a statement that this objective and biological classification can instead be an emotional feeling.

The Draft then diverges from the consensus of the cited international organisations to separate sex into two sub-categories, biological and legal.

It should be noted that the Scottish Government gives sex its ordinary meaning^[1], and further explains that the Equality Act 2010 says that in relation to the protected characteristic of sex, a reference to a person who has this particular protected characteristic is a reference to a man or to a woman. Man and woman are defined at section 212; 'man' means a male of any age and 'woman' means a female of any age.

The Draft is therefore incorrect where it states "the 2010 Act doesn't purport to define sex".

Professor Rosa Freedman, when giving evidence to the CTEEA Committee in Dec 2018 on the Census Amendment Bill^[2] clarified the meaning of sex as relating to biology:

"At international level, the law remains that sex relates to biology. Sex is about chromosomes, gonads and genitalia. Therefore, under international human rights obligations - whether it is the Convention on the Elimination of All Forms of Discrimination against Women or the European convention on human rights - the definition of sex relates to biology. To suddenly turn the definition around and have male, female and another category, or to define sex as gender, would go against the law. If we want to change the law, the way to do it is not through conflating two things in a bill; we would need to go through the processes of changing the law."

Supplementary written evidence^[3] provided the supporting case law:

"The legal definition of sex is contained in the case of Corbett v Corbett (the April Ashley case) which can be found [here](#). That definition remains good law and has not been challenged let alone overturned in any subsequent cases. The law clearly sets out in that case that sex is biological, and that transsexualism (what we would now term transgender) is

[1] <https://www.gov.scot/publications/foi-202000116319/>

[2] <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=11836&i=107072&c=2137096#ScotParlOR>

[3] https://www.parliament.scot/S5_European/Inquiries/CTEEA_CensusBill_ProfFreedmanRosa_CTEEA_S5_18_CB_24.pdf

psychological. As a result, when we use the word 'sex' in law, we are referring to biological sex."

Further confirmation was provided in the oral evidence session of the Women and Equalities Committee on 10 February 2021^[4] when discussing reform of the Gender Recognition Act by barristers Karon Monaghan QC and Naomi Cunningham, both of whom confirmed sex in the Equality Act 2010 referred to biological sex.

It is therefore clear that the protected characteristic of sex is defined solely by biology and public bodies who have legal obligations of equality monitoring under the Equality Act's Public Sector Equality Duty (PSED) should be collecting data on this basis.

The Draft cites a submission to the Working Group from EHRC that states "*Forcing trans employees or service users to disclose their sex as assigned at birth would be a potential violation of their human rights, particularly their right to privacy and dignity under Article 8 [of the ECHR and the Human Rights Act 1998].*" This statement has since been assessed as "wrong, misleading or incomplete" by Aidan O'Neill QC, and Woman's Place UK, who commissioned the legal opinion, have asked EHRC to withdraw their submission.^[5]

The legal opinion clarifies that there is no violation of privacy and dignity rights, provided that asking a person's sex is made in accordance with the law, is proportionate, and is made for a legitimate purpose. It is extremely concerning that the Draft advises that "*Questions about a person's biology should not be asked, except potentially where there is direct relevance to a person's medical treatment*". Any public body following this advice is likely to find themselves in breach of the PSED and unable to uphold women's rights under the Equality Act and other legislation. For example, the recently passed Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill provides for victims to request a medical examiner on the basis of their sex, so it is essential that the NHS hold this information about their staff.

Any advice on the law from the EHRC should be taken with a pinch of salt since they are unable to even list the protected characteristics of the Equality Act correctly, introducing a new characteristic gender and eliminating sex entirely in the information about PSED on their website.^[6]

Sex has been asked about in the Census since 1801; it is a perfectly ordinary and unremarkable question. Recording information on sex is important for a whole host of reasons and is not just restricted to medical treatment. It is needed to enable the operation of single-sex services, mitigate discrimination in recruitment and promotion, measure the pay gap, tackle male violence, selective abortion, infanticide and FGM, participate in fair and safe sporting activities, and many more. Including, it seems, in today's debate in the UK Parliament, to decide on which Ministers are entitled to maternity leave.^[7]

[4] <https://committees.parliament.uk/event/3670/formal-meeting-oral-evidence-session/>

[5] <https://womansplaceuk.org/2020/12/11/ehrc-misrepresents-the-law-on-collecting-sex-data/>

[6] <https://www.equalityhumanrights.com/en/public-sector-equality-duty-scotland/public-sector-equality-duty-faqs>

[7] <https://twitter.com/joannaccherry/status/1359921849619140614>

The report issued on 09 February 2021 by the Women and Equalities Committee: “Unequal impact? Coronavirus and the gendered economic impact”^[8] recommends that all government departments should be required to collect and publish data disaggregated by sex.

Gender and Gender Identity

We note that the Draft has nothing to say about data collection on the protected characteristic of gender reassignment. It would seem more logical to collect data on this category rather than gender identity given that there is a legal basis for asking for information about a protected characteristic for equality monitoring purposes, and therefore, would meet the proportionate and legitimate tests regarding privacy concerns.

Instead, the Draft introduces two further terms - gender and gender identity - neither of which are defined in any Scottish or UK law.

Many feminists would agree that gender relates to stereotypes, labelled masculine or feminine, but the Draft relies on a misreading of Caroline Criado Perez’s book “Invisible Women” to suggest these are somehow personal qualities to be asked about. Rather, the significance of gender is in the impact these stereotypes have on the female sex.

The Scottish Government says it “*does not have an official definition of gender*”.^[9]

They are clear, however, that gender is distinct and separate from sex as explained by the Cabinet Secretary, Shirley-Anne Somerville, in answering a Parliamentary question on 10 January 2019^[10]:

“The protected characteristic of sex in the Equality Act 2010 relates to being a man or a woman. We accept that sex and gender are distinct concepts. The Scottish Government agrees that there is a need to have disaggregated data to allow for the impacts of policies on men and women to be demonstrated. In Scotland there is both technical guidance and non-statutory guidance on the public sector equality duty for public bodies, which is published by the Equality and Human Rights Commission. The Scottish Government expects all relevant organisations to comply with the requirements of the 2010 act and with the published guidance.”

Professor Rosa Freedman, when giving evidence to the CTEEA Committee in December 2018 on the Census Amendment Bill^[11] stated that:

“no one has defined gender identity properly - neither the United Nations nor the European Court of Human Rights has done so”, and also said: “Currently, internationally, at European level and within the United Kingdom, we do not have definitions of gender identity. In Massachusetts, the law says that gender identity is the gender that someone identifies as. In international law, the term is used in a way similar to the way that Stonewall uses it - it is an umbrella term for various individuals, whether that is people who have had gender

[8] Paras 129 and 130, <https://publications.parliament.uk/pa/cm5801/cmselect/cmwomeq/385/385.pdf>

[9] <https://www.gov.scot/publications/foi-202000116319/>

[10] <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=11875&i=107396&c=2142519#ScotParIOR>

[11] <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=11836&i=107072&c=2137093#ScotParIOR>

reassignment, people who are transsexual, who are transvestites, who are cross-dressers and all sorts of other people. There is a long list, but it is not a definition. Protecting gender identity, or putting gender identity into the census without a definition, would lack clarity. Moving forward, a definition would be required in law.”

The lack of a satisfactory definition was demonstrated on 07 July 2020 by the Cabinet Secretary for Justice, Humza Yousaf,^[12] who could only give a circular answer when asked about its definition in the Hate Crime Bill:

“Gender identity as outlined in paragraph 80 of the Explanatory Notes refers to an individual's gender identity where this is different from their sex at birth.”

Having cited definitions of the two terms, much of the Draft goes on to conflate them.

Given that the RCGP^[13] recognises six different genders, Stonewall^[14] lists 17 variations of trans, Facebook^[15] lists 71 genders, the BBC^[16] say there are over 100, and Mermaids^[17] claim 8 billion, we wonder if the consequences of asking gender identity have been thought through. How would equality be monitored between, for example, vapogendered and surgendered^[18] people?

Additionally, the definition in the Draft is limited to an “innate sense” and does not seem to have considered ‘genderfluid’ identities or people like Philip/Pippa Bunce^[19] who claims to be a man on certain days of the week, and a woman on others.

Many people, including trans people, do not believe in gender ideology and the assumption in the Draft that everyone has a gender identity is false. No member of FWS has a gender identity and it is significant that 91% of 2500 people responding to a poll on the Mumsnet forum do not have a gender identity either. This poll originates from a thread^[20] in the general area of the forum so has reached a much wider audience than if it had been in the Feminist board.

[12] <https://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5W-29943&ResultsPerPage=10>

[13] <https://www.thetimes.co.uk/article/bbc-films-teach-children-of-100-genders-or-more-7xfhbg97p>

[14] <https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms#t>

[15] <https://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html>

[16] <https://www.thetimes.co.uk/article/parents-condemn-bbc-educational-film-describing-100-gender-identities-396092v18>

[17] https://twitter.com/Mermaids_Gender/status/1171856832320679936

[18] <https://dudeasks.com/how-many-genders-are-there-in-2020/>

[19] <https://www.thetimes.co.uk/article/anger-over-women-s-business-honour-for-cross-dressing-banker-h0qv3l7nw>

[20] https://www.mumsnet.com/Talk/am_i_being_unreasonable/4158457-To-think-that-the-vast-majority-of-people-do-not-feel-they-have-a-gender-identity

To think that the vast majority of people do not feel they have a gender identity?

(1000 Posts)

Galvantulang Sat 06-Feb-21 21:49:23

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My company has recently started suggesting that we can record our gender identity and preferred pronouns (these would be publicly displayed on the intranet) on our HR record system. It's optional for now, but almost everyone I asked at work when the email came out went "eh?".

Apart from the data protection issues of collecting all this extra information, AIBU to think that the majority of people don't consider themselves to have a gender identity, just their sex?

i.e. you don't identify as a man or woman, you just... are one? 🙄

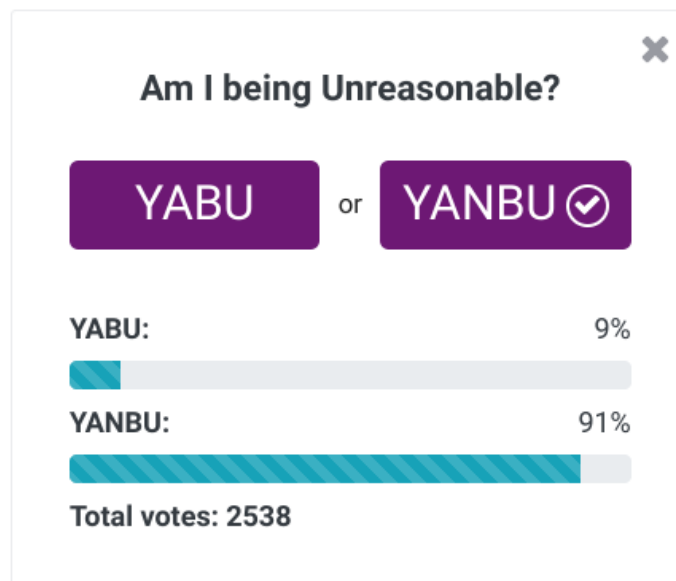
Watching laws and amendments to bills being proposed (especially in Scotland) based on recognising gender identity rather than biological sex, seems somewhat unreal.

Um...

Yabu = I feel like I have a gender identity.

Yanbu = I do not feel like I have a gender identity.

OP's posts: [See next](#) | [See all](#)



The Draft makes the assumption that the number of people with a gender identity (or rather, identifying as the opposite sex) is so small as to make no significant impact on overall data. However, the only evidence offered is from 2011 and does not take into account more recent data, including that of an unprecedented increase in referrals of young people to gender identity clinics in recent years^[21] and which is currently reflected in schools and universities. The potential for data to be skewed significantly, particularly when looking at smaller, distinct populations is already being seen.

[21] <https://forwomen.scot/28/12/2019/sandyford/>

A recent news story^[22] reporting an 84% increase in females who sexually abused children is relevant. Are women really abusing children at never before seen levels? It is possible that the decision of UK police forces, including Police Scotland,^[23] to record criminal offences by the perpetrators self-identified gender rather than sex, has led to male sex offenders being hidden in the data. The truth is we just do not know which scenario is correct as the conflation of terms and consequent corruption of data has rendered the information unreliable and worthless.

The situation is illustrated perfectly in the sample questions in the Draft, the first of which is titled gender identity (feelings) but then only asks about gender (stereotypes). The choice of answers are sex-based terms (man/boy, woman/girl). Most respondents will not understand what is being asked of them, but will recognise the words man or woman and select accordingly. The data collector is relying on the conflation of terms to collect information and draw conclusions on what they call gender identity but is actually sex.

Given that one of the main tenets of statistical collection is trust this may have serious consequences. The 'gold-standard' of data collection, the national census is now embroiled in similar arguments. Scotland has opted to allow self-identification on the sex question despite having a second question relating to trans status, and England has just announced it will do likewise.^[24] Statisticians and data users have repeatedly warned^{[25] [26]} this will result in unreliable data and women have lost faith that important information about their lives will be recorded. It is likely that this will affect participation rates.

Summary

Sex is biological. The terms male, man, boy, female, woman, girl all refer to sex. Public bodies have legal obligations to collect and record data on sex in order to provide services and to monitor sex discrimination. The Scottish Government and the EHRC agree that sex and gender are distinct and separate concepts and both the Scottish and UK Governments stress the importance of sex-disaggregated data.

Gender/gender identity is a subjective concept, based on masculine or feminine stereotypes or inner feelings which may change over time. Neither are protected characteristics and fall outwith equality monitoring requirements. Gender ideology is an unscientific concept and the majority of people do not accept it as fact.

The Working Group has fallen short of its remit to address the concerns raised by women during the consultation on Gender Recognition reform, namely that sex and gender are increasingly conflated in law, public policy and data collection. The Draft Guidance has in fact exacerbated the situation by recommending that virtually no data can be collected on sex, despite it being a distinct protected characteristic in the Equality Act. This wholesale redefinition of women from a sex-class to a gender-class is detrimental to women and is

[22] <https://www.bbc.co.uk/news/uk-55338745>

[23] <https://forwomen.scot/02/06/2019/police-scotland/>

[24] <https://twitter.com/fairplaywomen/status/1359875526261882887>

[25] <https://www.thetimes.co.uk/article/plan-to-ignore-birth-sex-in-census-alarms-academics-vn6k5p9dq>

[26] <https://twitter.com/ProfAliceS/status/1359779914283687939>

unacceptable. We hope the working group will promptly engage with statisticians and women's groups and reassess the guidance before final publication.

Keeping our name, our data and our rights in law is important enough to women that collectively we have raised almost £100,000 to challenge the redefinition of the word 'woman' in the Gender Representation on Public Boards (Scotland) Act 2018 in a judicial review.^[27] The conflation of sex and gender has resulted in the inclusion of males in the female sex category and simultaneously excluded many women. This case was heard in January and we await the Court of Session's decision.

If the Scottish Government wishes to remove all mention of the words woman and sex from legislation and public policy we would much prefer if it was debated openly and transparently in public and not by conflation and stealth which insults the dignity of many women.

[27] <https://www.crowdjustice.com/case/stop-scottish-government-redefining-woman/>