

# **THE POLITICAL ERASURE OF SEX**

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with Lisa Mackenzie

## **1: Sex and the Census**



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# Table of Contents

*Acknowledgements* 1

*Table of Contents* 2

## **INTRODUCTION** 3

Foreword: Selina Todd 3

The Political Erasure of Sex 7

Sex and the Census 9

## **1: THE CAPTURE OF THE OFFICE FOR NATIONAL STATISTICS** 12

**1.1** 15

**ONS and Question Development for the 2021 Census**

## **2: THE CAPTURE OF THE NATIONAL RECORDS OF SCOTLAND** 21

**2.1** 24

**ONS and the Self-Identification Guidance**

**2.2** 27

**NRS and the Non-Binary Sex Question**

## **POSTSCRIPT** 36

Passage of the Census (Amendment) (Scotland) Act 2019 36

Timeline of the Passage of Census (Amendment) (Scotland) Act 2019 37

England and Wales Census Legislation 2019 37

The Unresolved Issue of the Guidance 38

Annex 1 40

Annex 2 46

Annex 3 47

Annex 4 48

Annex 5 49

Annex 6 50

*References* 56

# Foreword:

## Selina Todd

This is the first in a series of reports examining how women can best be considered in significant areas of policymaking. This report focuses on women's inclusion in the UK census. The introduction to the report outlines why collecting census data on males and females matters, and why it is uncertain that the 2021 census (2022 in Scotland) will collect robust, high quality data on sex.

The main body of the report analyses the proposed changes to the census which would result in sex-based data being distorted or discarded. It examines the recent history of census design to show that the proposed changes do not reflect the needs or wishes of data users and will be harmful to policymaking. The report further suggests that the proposed changes to the census have not been developed through, or evaluated by, rigorous and transparent consultation with user groups. We argue that in a democracy, the creation of datasets by government should be subject to such scrutiny.

### WHY COLLECTING CENSUS DATA ON SEX MATTERS

The first UK census was taken in 1801. Since then the census has become established as an authoritative, decennial measurement of some key data for policymakers and researchers. These include data on population, migration, employment, education, and housing.

Since its inception the census has collected data on the sexes (males and females). These have been important in illuminating the significant extent to which participation in key areas of economic and social life has differed according to sex. For example, census data show that over the past two hundred years women were far less likely to be employed in certain professions than men were.

Census data have been invaluable in helping researchers to explain these differences. For example, they have shown that women's employment status is not solely or even primarily determined by their education. Since the 1990s, women's participation in higher education has been higher than men's, but this has not resulted in a concomitant rise in their participation in the professions. Census data also show that women's employment patterns diverge from those of men with similar qualifications from their mid-thirties. Such findings have significant consequences for policymaking, by suggesting that women's role as mothers has a significant effect on their labour market participation.<sup>1</sup>

Census data can also contradict longstanding myths that inform policymaking. The census undermines the notion that, until recently, most women did not undertake paid work and relied solely on a male breadwinner.<sup>2</sup>

The census has also shown that many policy initiatives have significantly different outcomes according to sex. For example, investment in adult and further education in the 1970s disproportionately benefited women, who returned to education as mature students following childbearing. Their adult education enabled them to access a greater range of jobs in the 1980s and helps to explain why they were less directly affected by the 1980s recession than men were.<sup>3</sup>

The need for sex-based data in local and national policymaking has been made more important by the 2010 Equality Act. Sex is a protected characteristic under this act. As Professor Alice Sullivan, a leading social scientist, writes, this means that "data on sex is clearly necessary for equalities monitoring. Research and analysis by users of population level data typically presumes the ability to distinguish who is male and female."<sup>4</sup>

### CHOOSING CENSUS QUESTIONS

The process of choosing and designing censuses is meant to be transparent and easy to comprehend. In a factsheet for schoolchildren, the Economic and Social Research Council explains it this way:

*During the period between censuses, a number of consultations and tests are carried out to examine the feasibility of changing topics and methods of collecting data... The criteria used for choosing topics covered by the Census are:*

- ◆ They must be those most needed by the major users. For instance, they should be relevant to allocation of resources or improving services or policy development;
- ◆ They must be expected to produce reliable and accurate data.<sup>5</sup>

The sex question meets these criteria. As the examples given above show, sex-based data has and can assist decisions about allocating resources and improving services and policy. The sex question does produce reliable and accurate data: it has consistently been answered by the vast majority (>95%) of respondents.

## WHY DATA ON SEX MAY NOT BE COLLECTED IN THE 2021/2022 CENSUS

There are three UK censuses. The next census of England and Wales and the next census of Northern Ireland will take place in 2021. The next census of Scotland will take place in 2022. All three census authorities have committed to include the longstanding, compulsory sex question, which will continue to enable respondents to answer either 'female' or 'male.' In addition, the census in England, Wales and Scotland will carry a new, voluntary question on gender identity.

All three of the UK census authorities intend to carry guidance to accompany the sex question which instructs respondents to answer based on their self-declared gender identity, not their sex. This means that a natal-born man who prefers to describe himself as a woman will be able to do so in response to the sex question on the census.

Until 2011, no such guidance was issued for the sex question. Guidance issued to respondents of the 2011 census advised transsexual and transgender respondents to answer the sex question according to their self-declared gender identity. This was not subject to consultation with user groups. It is not clear what impact this guidance had on data collected. The 2011 census was predominantly paper-based, whereas it is understood that this guidance was only available online. But in 2021, the UK will shift to a 'digital-first' census. As Alice Sullivan concludes, "guidance will be much more visible and accessible...It is also likely the number of respondents who might seek to answer the sex question in terms of their gender identity will be higher in 2021."<sup>6</sup> The reasons for these proposed changes, and their potential consequences, are explored in more depth in the main body of this report.

## THE RESPONSE OF USER GROUPS TO THE POTENTIAL LOSS OF SEX-BASED DATA

Significant user groups of the census include social science researchers. In December 2019, 80 of the UK's leading social scientists wrote to the three census authorities to register their concern about the proposed guidance on the sex question. The authors of this letter were clear that they support the inclusion of the new question on gender identity. Their argument was that the census needs to collect data on sex *as well as* (not instead of) data on gender identity.<sup>7</sup>

This letter came from a very significant user group. Many of the signatories have a long track record of assisting policymaking, by evaluating the consequences of allocating resources, and developing services or policies. Ten of the signatories are fellows of the British Academy. Among the signatories of the letter was John Goldthorpe, whose work on social mobility has informed the initiatives of the Sutton Trust and who has given evidence to a House of Commons select committee on social mobility.<sup>8</sup> Professor Kathy Sylva, another signatory, was a specialist adviser to the Parliamentary Select Committee on Education between 2000 and 2009. She has received an OBE for services to children and families.<sup>9</sup>

Other user groups include professional and family historians, and others who are interested in community and public history. The popularity of television shows like 'Who Do You Think You Are?' demonstrate that this is a very wide constituency. In 2013, historians made clear the importance of the census to this constituency in a report to the Office for National Statistics. They stressed "the centrality of the historical relationship between the census and the...nation's civil registration system of births, deaths and marriages." Because users of census records are able to trace individuals by certain distinct characteristics – including sex – that has "created an unparalleled historical source which enables British citizens today...no matter how humble their distant ancestors' origins, to recover a knowledge of who they are and from where they have come."<sup>10</sup> For similar reasons, the census has been invaluable to adult education and other initiatives that have fostered a sense of community or shared identity. The importance of women as homemakers and primary carers means that community and neighbourhood cohesion often rely on them. Projects that enable women to find out more about the history of women in their local area can therefore have wide-ranging social benefits; but these rely on having access to sources in which women can be found.<sup>11</sup> In this respect, the sex question is a vital part of the census.

The wider public are also users of the census. An historical perspective shows how important it is that women are counted within a decennial survey that most people consider to be an important and definitive national record. The census has a very high response rate (more than 95% in most areas). As historians told the ONS, this demonstrates an "invaluable sense of public ownership" over the census, at a time when scepticism towards the state and its functions has grown. This reframing of the sex question will render it less reliable as a national record. "Long before the United Kingdom became a full suffrage democracy for both sexes in 1928, it had already become 'a democracy of public record': a nation of persons whose names and relationships were officially known to the state and recognised in law."<sup>12</sup> Women were legally recognised and recorded by the Census long before they had a vote. Failing to do so in future would be a momentous and dangerous precedent.

## CONCLUSION

This introduction has provided an overview of sex-based data in the census and why this matters to policymakers, researchers and the public. The inclusion of sex-based data in the census can produce better research and policymaking. The main body of the report builds on these findings by examining the recent history of the census to evaluate how, when and why the sex question, and how it should be answered, became a matter of controversy. The study of how we got here illuminates the way in which small interest groups are able to capture policy and distort the consultative processes on which democracy relies.

*Selina Todd*

*Professor of Modern History, University of Oxford*

# Footnotes

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<sup>1</sup> For example, Jacqueline Scott, Shirley Dex and Heather Joshi (eds), *Women and Employment. Changing Lives and New Challenges*, Edward Elgar, 2008; Alice Sullivan et al, “The path from social origins to top jobs: social reproduction via education,” *British Journal of Sociology*, vol. 69, no. 3, 2018.

<sup>2</sup> For example, Selina Todd, *Young women, work, and family in England 1918-1950*, Oxford University Press, 2005; Selina Todd, ‘Breadwinners and Dependants: working-class young people in England, 1918-1955’, *International Review of Social History*, vol. 52, no. 1, 2007.

<sup>3</sup> Eve Worth, ‘Women, Education and Social Mobility in Britain during the Long 1970s’, *Cultural and Social History*, vol. 16, no. 1.

<sup>4</sup> Alice Sullivan, ‘Sex and the census: why surveys should not conflate sex and gender identity’, *International Journal of Social Research Methodology*, vol. 23, no. 5, 2020, pp. 517-518.

<sup>5</sup> ESRC, ‘Census: the past, present and future’, <https://esrc.ukri.org/public-engagement/social-science-for-schools/resources/census-factsheet/>, c.2018.

<sup>6</sup> Alice Sullivan, ‘Sex and the census: why surveys should not conflate sex and gender identity’, *International Journal of Social Research Methodology*, vol. 23, no. 5, 2020, p. 518.

<sup>7</sup> ‘Census fears over gender identity’, *Sunday Times*, 15 Dec 2019, <https://www.thetimes.co.uk/article/census-fears-over-gender-identity-rmxogmzxq>

<sup>8</sup> House of Commons Children, Schools and Families Committee, *Social Mobility: Oral Evidence*, Dr John Goldthorpe, Professor Stephen Machin, and Dr Jo Blanden, HMSO, 2008, <https://publications.parliament.uk/pa/cm200708/cmselect/cmchilsch/281/281-i.pdf>.

<sup>9</sup> <https://epi.org.uk/team/prof-kathy-sylva-obe/>

<sup>10</sup> Lucy Delap and Simon Szreter on behalf of History and Policy, ‘The census and future provision of population statistics in England and Wales’, ONS Public Consultation submission, 3 Dec 2013, [http://www.historyandpolicy.org/docs/Census\\_Consultation\\_Document%20from\\_H&P\\_for\\_ONS%20\\_Dec\\_2013.pdf](http://www.historyandpolicy.org/docs/Census_Consultation_Document%20from_H&P_for_ONS%20_Dec_2013.pdf).

<sup>11</sup> Oxford University History Faculty, Research Impact and Knowledge Exchange: Case Study: Housing, Culture and Women’s Citizenship in Britain, <https://www.history.ox.ac.uk/research-impact-and-knowledge-exchange>

<sup>12</sup> Lucy Delap and Simon Szreter on behalf of History and Policy, ‘The census and future provision of population statistics in England and Wales’, ONS Public Consultation submission, 3 Dec 2013, [http://www.historyandpolicy.org/docs/Census\\_Consultation\\_Document%20from\\_H&P\\_for\\_ONS%20\\_Dec\\_2013.pdf](http://www.historyandpolicy.org/docs/Census_Consultation_Document%20from_H&P_for_ONS%20_Dec_2013.pdf).

***“The principle of trans equality...  
[is]...about ensuring that  
how people live and identify...  
is more important than...  
their biological characteristics.”***

Vic Valentine, Scottish Trans Alliance,  
CTEEA Committee Meeting on the Scottish Census Amendment Bill,  
Scottish Parliament, 6 December 2018

# The Political Erasure of Sex

This report is part of a wider project entitled *The Political Erasure of Sex*. This project examines the process by which the definition of sex in law and public policy, and the collection of important national data by sex, has become a matter of controversy. It seeks to understand how this has happened, and to explore the consequences erasing sex would have for women.

Existing research demonstrates that women are discriminated against on the basis of sex. Their sex impacts their life chances, **poverty, paid and unpaid labour, representation in public life, health-outcomes, and vulnerability to violence**. For that reason, it is imperative that sex remains an operative protected characteristic in the Equality Act 2010, and we continue to recognise sex in public policy and data-collection in order to track and challenge discrimination against women.

This report focuses on how two of the three UK census authorities have redefined sex as ‘self-identified sex’ or ‘gender identity’ in the formulation of the sex question on the census, and how this is part of a wider pattern of erasing sex in data collection and other areas of policy across public life. Our analysis shows that this process, which we call ‘the political erasure of sex,’ is due to undemocratic policy capture, effected by interest groups who believe, as suggested in the epigraph of this report, that the legal and civic recognition of people’s lived gender identity should be considered more important, and in fact, should overwrite, the recognition of biological sex.

We refer to the objectives of these groups, and the ideas that underpin these objectives, as ‘transgender ideology.’ We do not mean to suggest that all transgender people share these ideas, nor that transgender people would necessarily benefit from their implementation. Our research does not claim that the recognition of transgender people, in and of itself, should be a matter of concern for policymakers or researchers, providing that that recognition does not result in the overwriting of sex. However, our research here indicates that the recognition of gender identity, when informed by the conceptual structure of transgender ideology, does demonstrably lead to the overwriting of sex in data collection, and suggests that this is one instance of the erasure of sex happening across our public institutions. This is the heart of the present political conflict between advocates of transgender ideology, and campaigners for women’s sex-based rights.

## POLICY CAPTURE

In 2017, the Organisation for Economic Co-operation and Development (OECD), released a document as part of its ‘Public Governance Reviews’ entitled *Preventing Policy Capture: Integrity in Public Decision Making*. Public policy, OECD note, is “at the centre of the relationship between citizens and governments,” and has a substantive impact on “the quality of citizens’ daily lives.” While policymakers should, in theory, “pursue the public interest, they need to acknowledge, in practice, the existence of diverse interest groups, and consider the costs and benefits for these groups.” Good policy results from policymakers considering the interests of the widest range of stakeholders and balancing those interests to produce policy which most nearly reflects the ‘public interest.’ By contrast, “[p]olicy capture is the process of consistently or repeatedly directing public policy decisions away from the public interest towards the interest of a specific group or person.” (OECD 2017: 9)

OECD outline various ways policymaking can be captured by the interests of specific groups. These range from illegal activities like bribery, to disproportionate reliance on particular advisory or expert groups which are only representative of certain perspectives or interests. Often facilitated by professional networks and interpersonal relationships, expert groups may be consistently called on for consultation, meetings and conferences with policymakers, or to provide reports and research which may be manipulated to serve their interests. (36-7) Their engagement with policymakers often resembles a process of ‘co-creating’ policy, in contrast to a more traditional model of external lobbying. Such policy capture leads, OECD note, to “policy making in the interests of the few” and while it is “not necessarily illegal, it is always illegitimate” because it “violates core democratic values.” (19) Importantly, OECD’s primary recommendation for “mitigating the risks of capture” is that policymakers ensure that they are “[b]alancing views by engaging stakeholders with diverging interests.” (10)

In a *Scottish Affairs* paper published in August 2019, Kath Murray and Lucy Hunter Blackburn of the Scottish policy analysis collective, Murray Blackburn Mackenzie, noted that the OECD’s model aptly described the process of capture by which “gender self-identification had in fact become a feature of Scottish policy-making and practice.” (MB 2019: 262)



In ‘Losing Sight of Women’s Rights,’ they further note 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 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. (MB 2019: 262)*

Murray and Hunter Blackburn focus on two case studies of policy capture in Scotland. The first is Scottish Prison Service’s policy on transgender prisoners which “shows how SPS decision-making failed to consider the impact on both female prisoners and prison officers.” The second, significantly for our present purposes, is the process of “policy development on the ‘sex’ question in the census, and the recent Scottish Government proposal to reframe this as a sex and gender-identity question.” (263) As this study will demonstrate, the recent work on the next<sup>1</sup> census by the authorities in both Scotland, and England and Wales, is an axiomatic example of policy capture by advocates of the present trans rights project, to the detriment of those with a political interest in the recognition and recording of biological sex. As Professor Alice Sullivan has recently noted, the UK census authorities’ redefining of sex in line with subjective gender identity must be understood as part of a “broader political project aimed at replacing sex with gender identity in law, language and data-collection.” This project, she underlines, has “been done quietly, behind the scenes, within social and political institutions and organisations, without public debate, due process or public scrutiny” in a manner which, following Murray and Hunter Blackburn, she describes as ‘policy capture.’ (Sullivan 2020: 521)

## TRANSGENDER IDEOLOGY

As suggested above, for the purposes of this project the ideology of the present form of the trans rights movement will be described as ‘transgender ideology.’ This is not the name given to it by the advocates of the present trans rights project, who will frequently deny that the movement has an ideology. However, as detailed in the [separate appendix to this report](#), the present form of the trans rights project evolved from its beginnings in legal activism on both sides of the Atlantic from the early nineties onwards. In that process it developed what Professor Stephen Whittle, co-founder of Press for Change – the first major trans rights lobby group in the UK – has referred to as ‘transgender ontology.’ The basic premise of this ontology is, in Whittle’s own words, that to “be a man or a woman is contained in a person’s gender identity.” (Whittle 2002: 6) That is, to be explicit, that ‘man’ and ‘woman’ are words that describe someone’s gender identity, *not their biological sex*, and are, therefore, to be fundamentally redefined away from their generally accepted sense. This is the meaning communicated by the slogan ‘Trans women

are women,’ which is not, as many people assume, simply a request for politeness, but is, rather, an ontological assertion. The logic of that assertion is that ‘woman’ is a gender-category, not a sex-category, and that women therefore now come in two types – female women (‘cisgender women’) and males who transition to live as women, or indeed, by the logic of gender identity essentialism, simply assert that they self-identify as women (‘transgender women’).

In order to buttress this redefinition of the notions of ‘man’ and ‘woman,’ transgender ideology makes two key moves. The first is the essentialising of ‘gender identity,’ which, as we see in more detail in the appendix, has often relied on the dubious scientific notion of sexed brains. The second move can be described as ‘sex denial,’ and rests fundamentally on the instrumentalising of people with Differences of Sex Development (DSDs, often referred to by advocates of transgender ideology as ‘intersex’ conditions) in order to support the claim that ‘sex is a spectrum,’ and that the classification of male and female organisms is in some sense a culturally or historically arbitrary construction. (See [Sullivan 2020](#): 520, for more on ‘postmodern fallacies about sex’). The undermining of the material reality of human sexual dimorphism emerged early in the development of transgender ideology and is crucial to its efforts to redefine everyone on the basis of subjective, psychological gender identity over-against sex. As Martine Rothblatt framed it when speaking to a gathering of transgender lawyers in 1994, “[w]e must finally end the notion that sex is between our legs” and “realize that sex is between our ears.” (ICTLEP 1994a: 115)

The aim of this project is hence to document the process by which advocates of a sex-denialist transgender ideology have captured the process of policy-making in our institutions, and to outline the non-accidental way that operationalising this ideology across public life is leading to the phenomenon we call ‘the political erasure of sex’ in a manner contrary to the interests of people protected by law under that characteristic, and indeed, to the ‘public interest’ in general.

## Footnotes

<sup>1</sup>The next UK census will take place in March 2021. Citing Covid-19 related workload pressures, the National Records of Scotland announced in July 2020 that Scotland’s census will be delayed until 2022. However, the work of both census authorities we are examining here was undertaken under the rubric of ‘Census 2021’ and we will hence refer to it under that rubric for the purpose of this discussion.

# Sex and the Census

On October 2, 2018, an apparently unassuming one-page Bill was presented to the Scottish parliament. The ‘Census (Amendment) (Scotland) Bill’ – hereafter referred to as the ‘Scottish Census Amendment Bill’ – had been announced in the Scottish Government’s 2018/19 ‘Programme for Government’ and was intended to “permit National Records of Scotland to ask voluntary questions on sexual orientation and transgender status/history in the 2021 census and future censuses.” (SG 2018a: 28) Joan McAlpine MSP, convener of the Culture, Tourism, Europe and External Affairs Committee (CTEEA) charged with scrutinising the Bill, remembers that it “was a short one-pager and considered uncontroversial.” (WPUK 2020) However, when the Bill landed on her desk, she noticed that it included an amendment to insert the words ‘including gender identity’ after the word ‘sex’ in the original 1920 Census Act (Figure 1), which rang alarm bells, because it seemed to conflate biological sex with gender identity.<sup>1</sup> McAlpine was further concerned when it became apparent from the accompanying *Policy Memorandum* that the “sex question being proposed for the 2021 Census will continue to be one of self-identification and will provide non-binary response options.” (SG 2018c: 3) McAlpine grasped that the Bill was actually “try[ing] to change the definition of ‘sex’” (WPUK 2019) and that therefore “this one page bill was not straightforward at all.” (WPUK 2020) She also learned that the National Records of Scotland (NRS) had “only consulted with a small number of LGBT groups and had not thought for a second that there may be other groups affected. Like women, for example.” (WPUK 2020) Alarm bells were ringing indeed.

Almost exactly a year previously, on October 8, 2017, Judith Green, who had recently co-founded the campaign group Woman’s Place UK, was also alarmed. *The Sunday Times*

that day carried a piece by Andrew Gilligan reporting that the “Office for National Statistics (ONS) is proposing to make the sex question in the next census voluntary, after protests that it discriminates against transgender and other non-binary people.” (Times 2017a) Green, an experienced midwife, immediately recognised this proposed move by ONS as part of a larger pattern of sex-erasure across British public life, and contiguous with the implications of the proposed reform of the 2004 Gender Recognition Act, announced in early 2016. She quickly submitted a parliamentary petition entitled ‘Keep the category of sex a mandatory question in the 2021 Census,’ which asserted that “[d]ata collection disaggregated by sex gives us vital information for policy making and distribution of resources.” It further noted that if it became “widely acceptable that sex becomes a voluntary question” this would “render useless equal opportunities monitoring designed to combat sex discrimination” and on a global scale would “mak[e] difficult the monitoring of imbalances resulting from sex-selective abortion, female infanticide and unequal treatment of girls and women.” (PP 2017) This was then followed by a further piece in *The Times* on October 14, in which Danny Dorling, Professor of Geography at the Oxford University Centre for the Environment underlined the importance of gathering accurate sex data. Without it, he noted, “[w]e would be unable to calculate the most basic of social statistics.” (Times 2017b)

It would seem evident that gathering robust data on sex should be one of the fundamental functions of the census. Sex data has been collected since the first census in 1801, and the sex question remained unchanged until 2011, when official guidance allowing people who regarded themselves as transgender or transsexual to self-identify their sex first appeared online. As Selina Todd, echoing

- 1 **Particulars about gender identity and sexual orientation may be gathered in census**
  - (1) The Census Act 1920 is amended as follows.
  - (2) In the schedule (matters in respect of which particulars may be required)—
    - (a) in paragraph 1, after “sex” insert “(including gender identity)”;

Figure 1- Section of the Census (Amendment) (Scotland) Bill as Introduced

Danny Dorling, notes in [the foreword to this report](#), sex data has “been important in illuminating the significant extent to which participation in key areas of economic and social life has differed according to sex.” (3) Alice Sullivan, Professor of Sociology at UCL and Director of the Centre for Longitudinal Studies, is also adamant about the significance of sex data. In ‘Sex and the Census: Why surveys should not conflate sex and gender identity,’ she argues that ‘sex matters’ and is “a powerful predictor of almost every dimension of social life,” including education, the labour market, political and cultural attitudes and behaviour, religion, crime and physical and mental health. (Sullivan 2020: 519)

Women’s life-chances are thus substantially impacted by their sex, and it remains vital that both academics and public policymakers have access to accurate data by which to analyse, and try to mitigate, that impact. Women are also directly and indirectly discriminated against, and since the 1975 Sex Discrimination Act, incorporated into the 2010 Equality Act, it has been unlawful to discriminate against someone on the basis of their sex. The 2010 Equality Act lists sex as one of nine protected characteristics in law, and also formulates a Public Sector Equality Duty (PSED), which creates a responsibility for public institutions to eliminate unlawful discrimination and harassment and advance equality of opportunity for people with protected characteristics. (EHRC 2020) As Judith Green suggests above, accurate equalities monitoring is crucial to effectively combatting sex discrimination, and to public institutions fulfilling their equalities duties. The precedent set by the census regarding how we measure sex thus has implications that extend well beyond the important functions of the census itself as a data-source for both policymaking and resource allocation, as well as academic, genealogical and longitudinal research.

Given all this, it is, to say the very least, remarkable, that in recent years, the UK census authorities<sup>2</sup> have made or proposed changes to the sex question that fundamentally alter its meaning and status and have done so without any democratic transparency or accountability. As we will learn, this process actually began in 2001, and was formalised by the online self-identification guidance in 2011. This shift in the meaning of sex on the census was the result, we will demonstrate, of the census authorities uncritically absorbing the ideology of the present form of the trans rights movement, and unquestioningly accepting the demand that self-declared gender identity be allowed to overwrite sex in the conceptualising and practice of data collection. This ideological policy capture created the conditions which made it possible for ONS, in 2017, to entertain the idea of making the sex-question non-mandatory, or indeed, briefly mooted that it be removed altogether. These are also the conditions which led NRS, the following year, to present a Bill to the Scottish Parliament that explicitly conflated sex and gender identity and was accompanied by notes that included the proposal for a non-binary sex question. Given that biological sex does not come with ‘non-binary’ options,

this proposal effectively rewrote the sex question as a gender identity question, despite the fact that NRS’s data did not in any way support it over a binary sex-question. The non-binary proposal was, rather, a pure manifestation of ideological policy capture, effected by consulting exclusively with one group of stakeholders, and unilaterally prioritising their needs, interests and, significantly, emotional responses.

As a result of the 2007 Equalities Review, ONS first began consulting with trans rights organisations on the possibility of measuring the trans population in 2009, and immediately adopted their concepts and ideological framing. Concerted work on the development of sex and gender identity questions began after the 2015/6 consultation on the 2021 Census and involved a series of stakeholder workshops with LGBT and trans rights organisations, extensive cognitive testing with trans respondents, and numerous meetings and email exchanges between the census authorities and LGBT/trans rights groups. At certain points in this process, the census authorities appear to remember, or at least give lip-service to, the awareness that sex is a crucial demographic variable and a protected characteristic in law. However, as Joan McAlpine suggests above, at no point do they seem to understand that either women, or demographic data users more widely, are important stakeholders in the sex-question, and might have an interest in that question *not* being redefined as gender identity. As a letter from NRS to Joan McAlpine’s CTEEA committee on 5 December 2018 clearly documents, there was extensive consultation between NRS and the Equality Network, the Scottish Trans Alliance, Stonewall Scotland and LGBT Health. The letter concludes by also admitting that “no specific consultation with women’s groups has been carried out.” (NRS 2018d)<sup>3</sup>

This exclusive reliance on consulting groups that represent the interests of only one constituency, and the failure to balance these particular interests with those of other stakeholders, is, as we saw in the introduction to this project, exemplary of a process of policy capture, and the way it deviates from policymaking which serves the public interest. Moreover, the story of the policy capture of ONS and NRS’s development work on the sex and gender identity questions, is, I’d suggest, axiomatic of the process of sex-erasure happening across British public life. The confusion between sex and gender identity evinced throughout the development process is a pure conceptual manifestation of the ontological core of transgender ideology, and its intent to overwrite the recognition of biological sex with gender identity in all areas of law, public policy, and social organisation. The example of the census is particularly revealing, moreover, because it transparently exhibits the extent to which the present trans rights project is primarily driven by the pre-eminent interest in the *recognition and validation* of an individual’s gender identity over-against their sex, rather than by concerns about meeting the material interests of trans people.

As is the case for women, the trans population has a material interest and legitimate user need for good quality data for the purpose of resource allocation, equalities monitoring, and to track violence and discrimination against them, which indeed, is why the census authorities began developing questions to measure the trans population in the first place. Capturing this data and being able to track the specific needs of sub-populations of trans people, is actually muddled by conflating sex and gender identity measurements. Nonetheless, as we will see, the census authorities' question development process ended up being almost entirely beholden to the ideological and subjective responses of trans respondents to the sex-questions, and the extent to which questions asking about sex are perceived to be 'intrusive,' 'stressful,' or 'offensive' by people committed to the belief that their gender identity should be taken to absolutely overwrite their biological sex. Throughout this process the census authorities consistently confused the subjective reactions of *trans respondents*, and the ideological framing of trans rights stakeholders, with the legitimate *user interests* of the trans population for good quality demographic data. In so doing they effectively subverted the fundamental function of the census, transforming it from an instrument of demographic data collection, into an instrument of identity recognition and validation.

## Footnotes

<sup>1</sup>Notably the Equality Impact Assessment (EQIA) for the Bill covered the protected characteristics of 'sex' and 'gender reassignment' under *one* heading, which focused entirely on the impact on trans people, paying no attention whatsoever to assessing how changing the definition of sex in the census might impact people protected under that characteristic in law. (SG 2018e) Moreover, the accompanying *Policy Memorandum* made it completely explicit that those drafting the Bill considered the concept of sex to already include the concept of gender identity:

*The Scottish Government regards 'gender identity' as already being covered by the reference to 'sex' in paragraph 1 of the schedule to the 1920 Act and a census could ask questions about gender identity without the amendment of that paragraph being made.*

*There is an additional reason for amending paragraph 1 of the schedule to add reference to gender identity. The issues of sex and of gender identity are linked, especially if the sex question asked is a non-binary sex question (for example—Are you male, female, other?).*

(SG 2018c: 1-2)

<sup>2</sup>This study focuses on the policy capture of the question development process at ONS and NRS. The Northern Ireland Statistics and Research Agency (NISRA) also undertook a consultation in 2015 for the 2021 Census, but concluded that while there "was some limited user demand for information on gender identity/transgender status," they had "assessed options around amending the census sex question to gather this information but consider that to do so would risk the quality of data collected on a person's sex. Therefore it is not proposed to amend the 2011 census sex question for this purpose." (NISRA 2019: 35) Interestingly then, NISRA's response is explicit about the possible impact on sex-data of gender identity question development.

<sup>3</sup>In this letter NRS do commit themselves to consulting with women's groups going forward. These consultations are documented in an FOI released in June 2019, and began in January 2019, two months *after* the submission of the Scottish Census Amendment Bill to parliament. (NRS 2019c)

# 1.

## The Capture of the Office for National Statistics

In 2007, the Equalities Review – established under Tony Blair’s Labour government in 2005 and chaired by Trevor Phillips – published its final report, *Fairness and Freedom*. The Equalities Review had in turn commissioned a supporting report, *Engendered Penalties*, from the trans rights organisation Press for Change, which drew on the organisation’s own emails and communications, as well as an online survey, in order to document discriminations against Britain’s trans population and “transgender people’s self-reported experiences” that “highlighted a higher expectation of prejudice.” (HMG 2007: 92) The Equalities Review recognised that advances had been made in trans rights since the 1990s, noting that “a small but well-organised lobby, well versed in the law” had “used a combination of lobbying and domestic and European law to fight for rights such as equal access to employment.” (HMG 2007: 35) The Review also expressed substantial concern about “the lack of robust data on inequality within certain groups, most notably sexual orientation and transgender,” (HMG 2007: 95) and indicated the need for data-collecting authorities to develop instruments that would rectify this lack.

In response to this the Office for National Statistics (ONS) – the census authority for England and Wales – undertook an ‘Equality Data Review’ which concluded that “Government agencies work with non-Government stakeholders to agree an approach to obtaining more equality information on transgender people.” (ONS 2009: 2) This led in turn to the 2009 publication of the ONS *Trans Data Position Paper*, which acknowledged collaborative support from individuals at Press for Change, GIRES<sup>1</sup> and a:gender<sup>2</sup> as well as the Government Equalities Office (GEO) and the Equality and Human Rights Commission (EHRC). The *Trans Data Position Paper* exhibits how effortlessly ONS absorbed trans ideological definitions and concepts<sup>3</sup> in the course of engagement with trans rights organisations. In the executive summary, they immediately adopt the “broadest” or ‘trans umbrella’ definition “whereby trans is taken to mean anyone who experiences gender variance” and which, hence, covers not only transsexuals but “people who cross-dress” as well as “individuals who are androgynous and those who identify themselves as non-gendered.”

(ONS 2009: 2) The definitions given thus collapse the notion of ‘trans people’ entirely into the notion of ‘gender non-conformity,’ a trans person being someone “whose gender identity or expression falls outside of the stereotypical gender norms” and “whose lives appear to conflict with the gender norms of society.”<sup>4</sup> (4) At no point do ONS recognise that many gender non-conforming people do not consider themselves to be trans (some of them are called ‘feminists’), or that such a broad definition does not give conceptual clarity to what they are intending to measure. Indeed, in the absence of gender dysphoria as the criterion of ‘being trans,’ the difference between a gender non-conforming person and a trans person resides only in whether they identify as trans. And trans identification under the aegis of transgender ideology has particular, and serious, implications for the understanding of biological sex and the demographic recording of sex-data.

Indeed, the pressure towards sex erasure that will dog the ONS and NRS’s efforts to devise an instrument to measure the size of the trans population arises clearly in this early position paper. Press for Change inform ONS that “55% of respondents would refuse to answer questions that may lead to their gender history being disclosed under any circumstances,”<sup>5</sup> while a:gender note that trans people who have gone through gender reassignment “will no longer regard themselves as trans.” (9) For them, their gender identity is that they are members of the sex class into which they identify, and thus they want to be recorded *as a member of that sex class*, and not *as trans*. As a:gender further advise, “it is grossly insulting to [a transitioned trans person] to suggest that they should be requested to tick some box other than M or F.” (9) That is, ONS and NRS are trying to develop an instrument to measure the size of a population, many of whom do not want to be recorded as members of that population, and want, rather, their *gender identity to overwrite sex in the recording of their demographic data*. The conceptual issues this evidently throws up, and its necessary impact on the integrity of the census sex-data, are never adequately analysed, let alone confronted, by either census authority.

Because issues of “privacy and acceptability of terminology” stop many trans people from revealing their trans status, the 2009 *Trans Data Position Paper* comes to

the conclusion that “it would seem that data collection via household surveys is not the most appropriate method for fulfilling these user requirements.” (ONS 2009: 15) There is an ambiguity here in framing this as an issue of ‘user requirements’ which will run throughout ONS and NRS’s question development process. The trans population, and civic authorities more generally, have a legitimate *user* need in developing an instrument to measure the size of the trans population, in order to undertake resource allocation and equalities monitoring. This, after all, is *why* the Equalities Review expressed concern about the lack of usable data on the trans population. However, many of the population being measured do not actually want to reveal their trans status, or to record their biological sex, because of conflicts that creates with their sense of identity. This is not a *user* need, but a *respondent* need, and a respondent need, moreover, which actually conflicts with, and works *against*, the fulfilment of the user need to collect robust demographic data. As seen below, ONS note this tension, but neither ONS or NRS ever adequately unpack its implications for the question development process, and in fact, over the course of question development, they will frequently conflate user and respondent needs, and present respondent needs – or problems small groups of individual respondents have with questions – in terms of ‘user need’ or ‘public acceptability.’ In this way, the challenges trans respondents experience when confronted by questions pertaining to their biological sex, or asking them to reveal their trans identity, come to have a massively disproportionate influence on the development process, contrary to the user interests of the trans population itself, as well as other data users, and other stakeholders in the sex and gender identity questions.

The failure to confront these tensions is also evident in the 2011 report published by the EHRC in conjunction with NatCen, the National Centre for Social Research. Like the *Trans Data Position Paper*, EHRC Research Report 75, *Monitoring Equality: Developing a Gender Identity Question* exhibits an immediate adoption of trans ideological concepts, and a lack of critical awareness about the fundamental conflation of sex and gender. Notably, in the glossary section of the report, ‘gender’ is defined as “socially constructed roles; behaviours; activities” and, crucially, the “terms ‘man’, ‘masculine’, ‘woman’ and ‘feminine’” are understood to “denote gender.” (EHRC 2011: 4) This is somewhat shocking, given that the EHRC is the civic body charged with overseeing the interpretation and correct implementation of the Equality Act 2010 (hereafter EA2010), and that the EA2010 clearly defines the term ‘woman’ as “a female of any age.” (EA2010 s. 212) That is, the definition of the concept ‘woman’ in UK Equalities law is *sex-based*.<sup>6</sup> The body responsible for overseeing the implementation of that Act, however, here uncritically repeats the trans ideological assertion that ‘woman’ is a *gender-based* concept. The ongoing political conflict between advocates of transgender ideology, and women with an interest in being defined as a sex-class, is generated *precisely* by this slippage in the definition of ‘woman.’ The way the

EHRC here overwrites the sex-based concept with a gender-based concept, is, therefore, an exemplary indication of a process of ideological policy capture.

The aim of EHRC’s *Monitoring Equality* is to develop a suite of questions to measure the trans population, noting in the executive summary that a need for such instruments arises from the Public Sector Equality Duty (PSED) introduced by the EA2010, and which came into force in April 2011, a few weeks after the 2011 Census took place. In the process of question development and testing, the challenges surrounding the sex-question for some trans respondents is again evident. A proposed question framed as ‘and at birth, were you... 1. Male, 2. Female or 3. Other,’ is seen by some respondents as “inappropriate, insensitive and/or offensive to people who had always felt male/female at birth but who considered their body a ‘mistake’ compared to their identity now.” (EHRC 2011: 44) Another variant of the sex question, framed as ‘and were you born’... “made people who always felt male or female feel angry or ‘uncomfortable’ because it felt as if they were being ‘forced’ or ‘tricked’ into revealing their history.” (54) Notably, there was no uniformity in the trans respondents to the sex-questions. Some said “[t]hey would answer ‘honestly’ because their sex at birth was a ‘medical fact’” providing “there was complete anonymity and the monitoring could be shown to be beneficial to trans people.” Others however, said “they would answer ‘truthfully’ because they were always m/f or because they had their birth certificate changed.” (45) This use of ‘truthfully’ to assert the ‘truth’ of one’s gender identity over one’s sex is a notable lexical feature of how many trans respondents frame their response to the sex question, and plays a particular role in the development of, and discussion around, the proposed non-binary sex question in Scotland, which will be discussed in more detail in the next section.

# 1. Footnotes

<sup>1</sup>The Gender Identity Research and Education Society (GIRES) is a trans rights group originally established by Press for Change in order to generate literature providing ‘scientific’ support for the theory of gender identity. Literature from GIRES was, for instance, disseminated by Lynne Jones MP, long-time Chair of the Parliamentary Forum on Transsexualism, to her parliamentary colleagues, in the run up to the passage of the 2004 Gender Recognition Act.

<sup>2</sup>a:gender is a support network for trans people within the civil service. They are however also heavily involved in providing evidence to government and civic bodies, most notably perhaps their submission to the Women and Equalities Select Committee ‘Transgender Equality Inquiry’ which reported in January 2016, and led to the proposed reform of the 2004 Gender Recognition Act.

<sup>3</sup>It is worth noting here that ONS also straightforwardly reproduce trans activist interpretations of the exemptions in equalities law which entitle women to single sex spaces. Discrimination, ONS write, is “permitted where it is a proportionate means to achieve a legitimate aim.” According to Press for Change, ONS continue, “this means that transsexual people are never able to be sure they cannot be discriminated against unless they wish to go to court,” and “[i]t is felt that this equates to no protection whatever and discrimination in such instances is almost universal.” (ONS 2009: 8) ONS do not consider the reasons why UK equalities law contains these exemptions, and how they relate to the interests of women as a class with the protected characteristic of sex. This is then an early exemplification of the process of policy capture through which ONS’s decision making is framed by the consideration of the interests of only one set of stakeholders in these matters.

<sup>4</sup>Notably, this definition chimes with the usage by GIRES that ONS cite in the 2016 ‘Gender Identity Topic Report,’ in which the trans population are denoted simply as “gender non-conforming people.” (ONS 2016b: 9)

<sup>5</sup>This figure is based on a “recent informal poll’ undertaken by Press for Change. A footnote reads ‘Details provided on request.’ (ONS 2009: 8)

<sup>6</sup>During the course of evidence given to the CTEEA Committee charged with scrutinising the Scottish Census Amendment Bill, women’s rights advocates argued that the legal definition of the concept of sex is biological, and that the duties under the Equality Act fall under a biological definition. (CTEEA 2018a; Freedman 2018). Notably, this interpretation is also supported by the recent statement of Liz Truss, Minister for Women and Equalities, on the government’s response to the consultation on reform of the Gender Recognition Act, which asserted that “The Equality Act 2010... allows service providers to restrict access to single sex spaces on the basis of biological sex if there is a clear justification.” (HMG 2020) Advocates of transgender ideology argued, by contrast, the 2004 GRA had changed the meaning of sex in law, that because of the GRA there was “no statutory definition of ‘sex’” (Cowan 2018) and that the “sex protected characteristic in the Equality Act 2010 must be interpreted as provided by section 9 of the GRA.”

(EN 2018) In committee, Tim Hopkins of the Equality Network further asserted that in “the case of *Goodwin v the UK*...the European Court of Human Rights ruled that it is a human right to have your gender identity recognised in law,” (CTEEA 2018a: 25) which is quite an extreme distortion of the ECHR ruling and the framing of the GRA, which explicitly justified themselves by reference to the expense and difficulty of people who have gone through a meaningful process of transition, and were not formulated in terms of ‘the right to recognition of gender identity over against sex.’

It is beyond the scope of this present discussion to fully analyse these complex issues. My brief claim here would be that the GRA did introduce a *contradiction* into the law with respect to the definition of sex, but it was never intended to be taken as a wholesale redefinition of sex. In the course of the parliamentary passage of the GRA the government repeatedly refused to deal with the fundamental principles of law and justified the measure by reference to the long and difficult process of transition, the gatekeeping process, and the tiny number of people it would apply to. It consistently refused to accept that it was fundamentally changing the meaning of sex in law. As we discuss in the Appendix to this report, advocates of the present trans rights project have taken the GRA and attempted to use it as the basis of claiming a fundamental transformation of definition, and to undergird the efforts to overwrite sex with gender identity across public life. This is *precisely* what is causing the conflict between transgender ideologues and women who want to continue to be recognised in law as a sex-class. When transgender advocates make claims that the GRA transformed the meaning of sex in law, they are, therefore, demonstrating exactly why their rights movement is in conflict with the political interests of female people.

# 1.1 ONS and Question Development for the 2021 Census

The results of the EHRC's development process was a suite of five questions (Annex 1) that the census authorities thought imposed too great a respondent burden to be usable on a census. Following ONS's 2015 public consultation on topics to be included in the 2021 Census, the process of developing sex and gender identity questions to capture data on the trans population thus begins anew, and in earnest. ONS's initial response to the public consultation, published in November 2015, noted that of the 1,095 responses received, 14 respondents specifically requested inclusion of a gender identity topic, half of them representing organisations, for the purpose of "service planning and delivery and policy development and monitoring." (ONS 2015: 18) A further 30 responses mentioned gender identity in the 'Basic demographics and household composition' topic or elsewhere. Significantly, especially with respect to the non-binary sex question in Scotland, ONS note that "[s]ome respondents identified the need to ensure people who don't identify as male or female will be able to provide an accurate response to the 2021 Census," (18) although no further information or data is given to illustrate this.

In May 2016, ONS published three further documents arising from analysis of the 2015 consultation: the 'Census Topic Consultation' giving a general overview of responses (ONS 2016a), as well as a specific 'Gender Identity Topic Report' (ONS 2016b) and a 'Gender Identity Research and Testing Plan' (ONS 2016c). The 'Topic Consultation' underlined that the "criteria relating to user requirements remain the key criteria for evaluation" of topic inclusion, (ONS 2016a: 4) and that "[d]ata users showed a clear requirement for gender identity for policy development and service planning."<sup>1</sup> (24) In the 'Gender Identity Topic Report,' ONS assess the user requirement for data on the trans population to be a 'Medium User Need' (ONS 2016b: 10-14) and under 'Other Considerations' they note that issues of 'public acceptability' – by which they mean acceptability to trans respondents rather than the population at large – are likely to have a 'High Operational Impact.' (16) In an 'Updated View' on the 'Gender Identity' topic, they set the user requirement against 'Other Considerations' of 'public acceptability,' 'respondent burden' and 'data quality' and underline that they still consider the conclusion of the 2009 *Trans Data Position Paper* that the census was not the most appropriate means of gathering this data "to be valid." (18) They decide, however, "to take forward

work on gender identity," (18) undertaking to "[r]eview the 'Trans Data Position Paper,'" "work with stakeholders, including members of the trans community, to clarify the specific data required on gender identity and the concepts to be measured," and "identify options for meeting the user need; paying particular attention to public acceptability." (ONS 2016a: 28; 2016b: 21) Here, many of the issues that will bedevil the development process show themselves in outline; the intention to consult with stakeholders, which will in practice involve consulting *only* with government and trans stakeholders, the confidence that consulting only with trans stakeholders will enable a clarification, rather than an obfuscation, of 'concepts to be measured,' (see also ONS 2016c: 3) and the concerns about 'public acceptability' and 'meeting user need,' which will often conflate both the 'key criteria' of 'user need,' as well as the 'Other Consideration' of 'public acceptability,' with a limited pool of *respondents' needs*.

The initial muddled nature of ONS's concepts is also evident in these 2016 documents. The description in the 'Gender Identity Topic Report' of a non-binary person as someone who "considers their identity to be located at a point along a continuum between male and female" (ONS 2016b: 4) fails to note that such an identification is making a claim about someone's *sex*. Similarly, descriptions of questions on international censuses which conflate sex and gender identity pass without analysis. We are told that the 2011 Nepalese census "allowed people to record a gender other than male or female," and that India in 2011 produced "data on the population that identified as other than male or female," (5) but the fact that India recorded this *gender identification within the sex variable* (6) is unremarked. Australia in 2011, we learn, also allowed "respondents to report their sex as other than male or female," (5) and while this would appear to be another instance of gender identification recorded inside the sex variable, this is not clarified. New Zealand Statistics, we are further informed, published a new standard for gender identity in 2015 with "a threefold classification...male, female and gender diverse." (24) Once again, no clarification is given about whether this classification is intended to be recorded *within*, or *separately to*, the sex variable.

Despite this conceptual muddle, ONS maintain in the 'Gender Identity Topic Report' that collection of data on



gender identity “should not have a detrimental impact on the collection of other protected characteristics, such as sex.” (19) While assessing the impact on ‘Data Quality’ under ‘Other Considerations’ they state that:

*Sex, as biologically determined,<sup>2</sup> is one of the most frequently used and important characteristics the census collects as it is used in most multivariate analysis of data and feeds into the UK population projections. It is critical that the collection of information on gender identity for a small population (estimated to be less than 1%) does not jeopardise the quality of data collected on sex for the population who don't have trans identities or the protective characteristics of gender reassignment. (ONS 2016b: 15)*

We might imagine here that ONS would consider ‘recording data about people’s gender identity within the sex variable’ to undermine the quality of sex data. However, in the course of question development, ‘Data Quality’ considerations are taken to refer exclusively to the impact of certain questions on response rates, irrespective of the conceptual clarity of what is being measured. Both ONS and NRS thereby manage to contemplate, propose, and in fact, actualise – through the guidance – the overwriting of sex with gender identity, while simultaneously maintaining that it has no impact on data quality.

Nonetheless, having highlighted that sex is “one of the most frequently used and important characteristics the census collects,” it is still somewhat remarkable that some three months later ONS will record, as an outcome of their ‘Gender Identity Workshop,’ that “[p]articipants recognised that it was important for the respondent to feel that they had the opportunity to self-identify in the way they want to and feel comfortable in doing so, for any potential question on gender identity, including questions actually asking about sex.” (ONS 2016d; my emphasis) This workshop, held in London on 23 August 2016, was the first major event of ONS’s question development process, and included participants from GIRES, Stonewall, a:gender, Mermaids, The Beaumont Trust, The Equality and Diversity Forum, The Forum for Sexual Orientation and Gender Identity Equality, The National LGB&T Partnership, and the Asexual Visibility and Education Network, as well as representatives from all three census authorities, the GEO, and the EHRC. The workshop discussion around the sex question, ONS records in the minutes, “highlighted the need to clarify what information is actually being collected when we are asking about sex and what data is actually required,” which reads as a comment on the clarity of the discussion itself. Participants noted that, irrespective of possession of a Gender Recognition Certificate (GRC), someone “living as female” would likely still “identify as female” on the census, and that the sex question was difficult for “those who did not want to identify with the binary categories of ‘male’ and ‘female.’” Some participants “considered whether information on sex could be replaced with asking about gender,” while others

did note that “‘sex’ is also a protected characteristic” and as such, “there was a requirement to take this into account when considering any changes to the information on sex already collected.” ONS consequently conclude that given “issues raised in terms of gender identity, there is a need for us to review the instructions around the sex question,” although there is no evidence in the publicly available documents that this happens. They further note that it “was clear that not all data needs can be met using one measure” and that “engagement with stakeholders will be required to clarify the exact need for data on the trans population, gender reassignment and sex.” (My emphasis) There is no recognition here, nor will there ever be, that women are stakeholders in the sex question.

In January 2017, ONS publish the first ‘Gender Identity Update’ in the development process. They note that work is being carried out by other census authorities to develop instruments to measure the trans population and that such work “often involves a consideration or review of the sex question or response categories.” (ONS 2017a) They contextualise their work by asserting that “[w]ithin today’s society the traditional view of gender as a binary classification, male or female, is changing.” There are at least three conceptual obfuscations in this statement. First, as so often, it conflates sex and gender, ‘male’ and ‘female’ being *sex* not *gender* designations. Secondly, it erases the entire pre-trans-ideological history of the critique of ‘the traditional view of gender’ advanced, since the sixties, by the feminist movement.<sup>3</sup> Lastly, while there is a great deal of support in contemporary UK society for trans people to be treated equitably, huge numbers of the general public are not apprised of the ideological beliefs of the trans rights movement with respect to sex-erasure, and it is far from clear that there is wide social support for the idea, and all the political implications, of overwriting the sex categories of male and female with gender identification. ONS then go on to summarise the recommendations of the 2016 Trans Equality Inquiry, their work to date on gender identity, and conduct another overview of work by other census authorities which, as in the ‘Gender Identity Topic Report,’ overwrites sex with gender identity. Notably, Statistics Canada are, we are told, preparing for their 2021 census by “reviewing the ‘sex’ standard, to clarify whether the sex variable should be sex at birth.” Statistics New Zealand, likewise, are reviewing the sex categories for their 2018 census, and have also absorbed the trans ideological conviction that ‘intersex’ people do not have a sex, to support their review of the sex question. The update concludes by outlining the ‘public acceptability’ and qualitative testing ONS has planned for 2017.

Between January and March 2017, the three British census authorities (ONS, NRS and NISRA – The Northern Ireland Statistics and Research Agency) joint commissioned their first piece of extensive testing in the development process, from Ipsos Mori. This ‘public acceptability’ testing was intended to “explore the acceptability of the inclusion of

a gender identity question in the 2021 Census” (NRS 2018c: 10) and used the gender identity question (Question 2) developed by the EHRC in 2011. It is important to underline here that no testing was done at this stage of any changes to the sex question, that respondents were asked only about the acceptability of a gender identity question, and that most would have been ignorant of the fact that gender identity question development also involved potential changes to the measurement of sex. ONS report that 80% of those in England and 75% of those in Wales considered the gender identity question acceptable (ONS 2017e),<sup>4</sup> while NRS report the figure of 77% for the general public in Scotland (10).

In March and April 2017, the ONS Data Collection Methodology branch was tasked with doing the first piece of qualitative research on both the sex and gender identity questions, published as ‘Qualitative Research on Gender Identity: Phase 1 Summary Report’ on 15 September 2017 (ONS 2017c). This research used four focus groups to explore responses from the “cisgender population (total 29 participants),”<sup>5</sup> and eighteen one-to-one in depth interviews with trans respondents.<sup>6</sup> Three different forms of question were tested:

1. A binary sex question like that from the 2011 Census.
2. A non-binary sex question with a third response category of ‘Other.’
3. A two-step question comprising a binary sex question followed by a gender identity question asking “Which of the following options best describe how you think of your gender identity? With response options of ‘Male,’ ‘Female,’ or ‘In another way.’”

The aim of this testing was to investigate “how the trans population tackle the 2011 ‘Sex’ question,” how both trans people and the general population “interpret concepts around gender identity and sex,” and how they might answer such questions, as well as looking at issues of privacy, security, respondent burden and acceptability. (ONS 2017c)

Unsurprisingly, all iterations of the sex question caused challenges for the trans participants. In the section entitled ‘Meeting Respondent Needs,’ we are told that the binary sex question was “considered to be irrelevant, unacceptable and intrusive, particularly to trans participants, due to asking about sex rather than gender.” The non-binary sex question was “thought an improvement” but “asking about sex was again thought to be irrelevant and intrusive.” Notably, some of the trans respondents were unclear about what this question was intending to measure, “causing uncertainty to whether the question was actually about gender.” They were right to be uncertain. Given that humans come in two sexes,<sup>7</sup> and gender identification does not change your natal sex, non-binary sex questions which allow someone to identify as something other than male or female, are, in fact, asking about gender identification. Inevitably, given their lack of conceptual clarity about the relation of sex and gender, or indeed, about what they are

actually trying to measure, ONS do not acknowledge this. The final two-step question is considered by respondents to be a further improvement, although trans participants still object to the initial binary sex question. Moreover, there is again inconsistency in the trans population’s comfort with the very thing ONS is trying to devise an instrument to measure. That is, “[t]rans participants had mixed feelings that their two answers, in combination, might or might not result in their trans identity being visible in the census data.” (ONS 2017c)

Following this qualitative testing ONS conclude that “none of the three designs be used in the 2021 Census.” Remarkably, they then explicitly brush aside the key issue of whether it is “possible to meet data requirements,” and suggest that “change should be made to better meet the needs of trans respondents.” ‘Respondent need’ never appears on the ONS’s own criteria of how to assess topic inclusion or question development. ‘Public acceptability’ is one of the second-tier ‘Other Considerations,’ after the ‘key’ criteria of ‘User Requirements,’ and the negative responses of particular sub-populations would fall under the guideline that the “census should not ask sensitive or potentially intrusive questions that have a negative impact on response or may lead to respondents giving socially acceptable rather than accurate answers.” (ONS 2016a: 7) What would seem to follow from this is that if ONS are unable to devise an instrument to measure a population without offending them in a manner that interferes with measurement, then, just as they concluded in the 2009 *Trans Data Position Paper*, they should judge that the population can’t readily be measured, *not* start tinkering with and corrupting other variables, let alone variables which are the protected characteristics of *other* groups of people. This, however, is not what ONS conclude at this juncture. Rather, they suggest that “change should be made... for example, by removing ‘sex’ and adding one or more additional categories for non-binary and intersex people.” They further suggest the possibility that “an unchanged 2011 Census question [on sex] should not be mandatory, for the benefit of, particularly, intersex and non-binary people who cannot choose male or female as a reflection of their current sex or gender,” and that with respect to government social surveys, the “issues regarding the validity and unacceptability of the 2011 ‘Sex’ question suggest its continued use as a harmonised standard should be reviewed.” (ONS 2017c)

These startling suggestions were then picked up by Andrew Gilligan at *The Sunday Times*, who, on October 8, published a piece called ‘No sex, please, this is the census.’ The article contained quotes from Germaine Greer and feminist activist Stephanie Davies-Arai, the first time women’s voices appear in the public record concerning this question. “Women’s biological sex is being erased and that terrifies me. Once you stop gathering information, that skews everything for women,” observed Davies-Arai, while Greer noted with characteristic pith, “[w]e keep arguing that

women have won everything they need to win. They haven't even won the right to exist." (Times 2017a) Gilligan's report was then noticed by Judith Green, co-founder of the newly formed Woman's Place UK, who submitted a parliamentary petition approved on October 11. Entitled 'Keep the category of sex a mandatory question in the 2021 Census,' it asserted that "[d]ata collection disaggregated by sex gives us vital information for policy making...distribution of resources" and "equal opportunities monitoring designed to combat sex discrimination." (PP 2017) This was then reported by Lucy Bannerman on October 14 in 'Feminists fight to keep gender [sex!] question in census,' again in *The Times*. Bannerman quoted both Julie Bindel and Judith Green, as well as prominent academics with an interest in data integrity. Sir Michael Marmot, a global authority on health inequality, noted that it is of "scientific and public health interest to know what is happening to men and to women," and that while he "appreciate[d] the difficulty of getting a good question on transgender...we do need to keep getting numbers on males and females." Jonathan Portes, Professor of Economics and Public Policy at King's College London, observed that it was "difficult to think of a public policy area where that data is not relevant," while Danny Dorling, Professor of Geography at the Oxford University Centre for the Environment, echoed this exasperation, noting that without adequate sex data, "[w]e would be unable to calculate the most basic of social statistics." (Times 2017b)

ONS's response to this critical coverage was a manoeuvre most aptly described by the British journalistic colloquialism, 'reverse ferret.' On 10 October they published an official statement claiming Gilligan's article was 'inaccurate' because no firm proposals for census questions had yet been made. On December 13, 2017 they then released a summary of the '2021 Census topic research,' which sought to radically reframe the question development process. The section on 'Gender identity' begins by reiterating the user need for data on the trans population, and notes that they had also identified a 'respondent need' expressed by "some members of the public reporting that they were unable to complete the current sex question accurately as it only offered the two categories of male and female." They then assert, *ex nihilo*, that a "major concern was not to damage the information already collected through the male or female sex question"<sup>8</sup> and that their "research was focused to ensure we fully understood this issue." This last claim is allegedly supported with reference to the 2016 and 2017 workshops ONS held with trans stakeholders "to understand this user need further and to develop a clear understanding of the different concepts," observing that this had "shaped the testing... to ascertain whether we can devise questions that meet needs while ensuring that we can collect the vital information on male and female accurately."

Given that the workshops – and the later cognitive testing of trans respondents – had revealed the population's fundamental ambivalence about being measured, and the

predominant concerns that census questions conformed with, and *validated*, their own sense of gender identity while allowing them to overwrite their sex, it is disingenuous of ONS to maintain by this juncture that engaging with trans stakeholders was an adequate means of understanding *user* need, rather than primarily gathering information on *respondent* need. It is doubly disingenuous for ONS to suggest that this process had allowed them to 'develop a clear understanding of the different concepts,' when the source of the conceptual mess underpinning ONS's process was precisely accepting, entirely uncritically, the trans-ideological need to overwrite sex with gender identity. In this light, ONS's claim that shaping the testing on the basis of sole engagement with trans stakeholders was compatible with 'ensuring we collect information on male and female' is baseless. The fact that just three months prior, interviews with trans respondents had led to mooted the removal of the sex question to meet their needs, is more than ample evidence of this.

The 'Understanding concepts' section also evidences that the brush with public critique had brought no clarity to ONS's concepts. 'Sex' is defined as 'male or female' which is considered a "legal concept" although there is no further elaboration here of whether ONS consider the 'legal concept of sex' to refer to *biological* or *legal* sex. 'Gender' is defined as 'male, female or other' and is, they tell us, "about the respondent need to be able to self-identify and answer the census as well as being able to estimate those who identify as non-binary within the transgender community." No analysis is given of the glaringly obvious problems thrown up by the fact that the sex-terms 'male' and 'female' are being used to define both *sex* and *gender*, or that *self-identifying your gender* as 'male,' 'female' or 'other' actually involves, for many trans respondent, *being allowed to overwrite sex*. This lack of ability to confront the conceptual issues created by trans respondents' desire to self-identify their sex, persists throughout ONS's work on gender identity. In the 'Equalities Data Audit' published in October 2018 they are still noting that it is "apparent that there is a need to more clearly define the concepts of sex and gender in the data collection." (ONS 2018a) In February 2019, they publish an article on 'What is the difference between sex and gender?' which notes that the UK government defines sex as biological (as we'll see shortly, this is not actually the concept the census authorities are using), gender as "a social construction... based on labels of masculinity and femininity" and gender identity as a "personal, internal perception of oneself" in relation to these gender categories.

The first thing to underline here, is that the UK government, and UK laws, do not, in fact, define either 'gender,' or 'gender identity,' *anywhere*. 'Gender reassignment' is a protected characteristic, which pertains to the *intention* to go through a social *process* of transition. 'Gender,' as noted here, is a set of social conventions about the proper behaviour of males and females and *is not a legal concept* (although,

unhelpfully, many public bodies now use 'gender' when they mean 'sex.' (Cf. **MBM 2018**) 'Gender identity' is a belief about yourself, which despite disavowal by trans activists, can only be rendered meaningful as an identification, or disidentification, with social categories of gender, or, as translated into ONS muddly-speak, it is "a social construct that is an internal sense of self." (**ONS 2019a**) How this 'internal sense of self' should rightfully be recognised in law and public policy is a profoundly complex question which has yet to be remotely properly dealt with. Nonetheless, the fact that "whether someone sees themselves as a man, or a woman, or another gender identity" (**ONS 2019a**) is, in fact, distinct from *whether they are male or female*, and that erasing this distinction has profound implications for measuring sex, as well as for its social and political recognition more generally, is never confronted by ONS.

This evasion is also evidenced in the 2017 'reverse ferret' document where ONS try to assure us that their research has shown that "having a gender identity question did not affect the quality of the data collected on sex." Although not made explicit here, cross-reference with the summary of testing given in a later document (**ONS 2020c**) indicates this is the quantitative testing carried out for the three census authorities by Ispo Mori between June and August 2017 and discussed far more extensively by NRS (**NRS 2018c**). This testing involved mailing one of the three questions also used in the 2017 cognitive testing (i.e. binary, non-binary, or two-step) to households and assessing whether the type of question affected the rate of response, which it did not. (**NRS 2018c**: 11-13) When ONS tell us that "[o]ur research so far gives us confidence that collecting gender doesn't have a negative impact on collecting information on male and female" what they actually mean therefore is that having a non-binary or a two-step question doesn't impact the response rate to the sex question. What they do not and cannot mean is that they are confident that recording gender identity within the sex variable does not corrupt the sex data, because they haven't admitted to themselves that that is what they were contemplating, let alone tried to assess its impact. The evasiveness of this document then reaches its apex in the final sentence of the 'Gender identity' section where ONS lapse into what can only be described as an outright lie. "To be clear" they tell us in a manner evidently addressed to their feminist and statistical critics, "we have never suggested that people would not be able to report themselves as male or female. We have and will continue to collect this vital information." (**ONS 2017e**)

Hereafter, ONS, unlike NRS, abandon the idea of either removing the sex question, or replacing it with a non-binary question, and testing continues throughout 2018 to try and make the two-step question work. In December 2018, ONS present the white paper *Help Shape Our Future* to parliament, recommending that "the sex question remains unchanged," and that a second, voluntary gender identity question is asked to people aged over 16. They also tentatively

recommend, subject to further testing, that the sex question be presented "with a caveat...to explain that a gender question will follow later in the questionnaire. This has been found to increase acceptability amongst the transgender and non-binary populations." (**HMG 2018**: 38-9) In the Equality Impact Assessment for the 2021 Census, also released in December 2018, ONS underline that "[m]aintaining the current question is important to preserve the continuity of data in respect of the protected characteristic of sex," (**ONS 2018b**: 17) that there "would be risk to data on sexual orientation and sex, if inclusion of a gender identity question caused confusion about male and female categories" (11) and that, even though "there is greater recognition than previously of individuals who reject the 'binary' view of sex...the protected characteristic of sex as defined in the Equality Act 2010," nevertheless, "is whether a person is a man or a woman." (17)

Despite some close calls, ONS's question development process seems then to have come good in the end. But it would be a 'seeming.' On 11 September 2019, they released their 'Guidance for questions on sex, gender identity and sexual orientation for the 2019 Census Rehearsal for the 2021 Census.' As suggested in the white paper, the guidance for the sex question included the instruction that 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." It also, however, included another piece of guidance that ONS had not once discussed anywhere in the development process. This reads, "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." (**ONS 2019b**) We will have much to say about this mysteriously appearing guidance presently.

# 1.1 Footnotes

<sup>1</sup> ONS have a threefold criterion for assessing new topic inclusion. The first, and key criteria, is 'User Requirements,' which includes the sub-criteria of 'Purpose, Small geographies or populations, Alternative sources, Multivariate analysis, Continuity with previous censuses, and Comparability beyond England and Wales.' The second set of variables, 'Other Considerations,' considers the impact on 'Data quality, Public acceptability, Respondent burden, Financial concerns and Questionnaire mode.' The last set of criteria consider 'Operational Requirements.' (ONS 2016a: 4-9)

<sup>2</sup> Notably, while trying to justify the inclusion of self-identification guidance, ONS will pretend that because people report their own sex by filling in the form, then the variable being measured has always been 'self-identified sex' rather than biological sex. This quote, however, tells us that actually they well know that everyone has always assumed that what is being measured is 'sex, as biologically determined.'

<sup>3</sup> One of the most comprehensive restatements of the second wave feminist analysis of the difference between sex and gender, and how it relates to the present conflict between gender critical feminists and advocates of transgender ideology, is given by the philosopher Rebecca Reilly-Cooper at <https://sexandgenderintro.com/>

<sup>4</sup> ONS do not seem to have specifically published the data that was collected in this round of testing, and there is no specific document that covers it.

<sup>5</sup> Defined as "people whose self-identity conforms to the sex or gender assigned at birth." (ONS 2017c) This is another classic absorption of trans ideological rhetoric, and one which ONS never interrogates.

<sup>6</sup> The summary of testing given in the 2020 document 'Sex and gender identity question development for Census 2021' (ONS 2020c) also lists a further round of cognitive testing done with 18 "cisgender and transgender participants" in August/September 2017, although this is not specifically mentioned in the 'Phase 1 Report.'

<sup>7</sup> As discussed more fully in the appendix to this report, one of the key sex-denialist arguments used by advocates of transgender ideology is that 'sex is a spectrum,' and that dividing humans into male and female types is the product of an arbitrary cultural classification. This argument frequently relies on instrumentalising people with DSDs, most often called 'intersex' by trans advocates, to imply that intersex people are to be understood as 'between sex' or some other type of sex. This is an ideological distortion, as the vast majority of people with differences in the development of their reproductive anatomy can still be classified as male or female. As this submission by the charity DSD Families to the CTEEA Committee of the Scottish parliament explains, only a tiny proportion of people with DSDs have an ambiguity which requires medical input to determine the individual's sex. [https://www.parliament.scot/S5\\_European/Inquiries/CensusBill\\_DSDFamilies\\_CTEEAS518CB33.pdf](https://www.parliament.scot/S5_European/Inquiries/CensusBill_DSDFamilies_CTEEAS518CB33.pdf)

<sup>8</sup> Notably, almost the exact same phrase appears in an UN document on the proceedings of the 'Conference of European Statisticians' which met in June 2019 to conduct an 'In-depth review of measuring gender identity.' This document is again a significant instance of the uncritical adoption of trans ideological concepts, and their underwriting by their own process of policy capture, in a major international public body. It begins by asserting that "[s]ex and gender are becoming increasingly recognised by people in more and more countries as having both separate dimensions and a range of possibilities," before turning to the classic appropriation of historical forms of gender non-conformity to ground its conceptual infrastructure. (UN 2019: 2) As with many ONS documents, there is a considerable amount of time dedicated to outlining the ways various global statistical authorities are busy corrupting and/or erasing their measurements of biological sex. Most shockingly, we learn that Statistics Canada is presently using a two-step question as a transitional measure before "transitioning to only the gender question." (9: This is not that surprising, given that Canada is probably the most thoroughly captured of all the Anglophone, and indeed, Western nations). It notes – almost ruefully – that "not all countries developing data collection for the gender diverse population are changing their collection of sex," that sex is 'binary' in UK law and that the "[i]nteraction between the protected characteristic of sex and gender identity provokes a great deal of debate in the UK."

ONS repeats here the false claim that "a major concern" of their development process was not damaging the sex data, and that "ONS has found it vital to engage with stakeholders, aiming to understand objections as well as needs to ensure the acceptability of questions." (4) An ONS response to an FOI released in June 2019 lists the stakeholders they had engaged with in the process of developing the questions. It lists 47 stakeholders, two of whom were organisations that represent women's interests in the sex question remaining unchanged. At least 14 of the stakeholders were representative of the LGBT/trans rights position, with the majority of the rest being government and council representatives. Moreover, as we will see in the postscript, despite a letter being sent to ONS signed by over 80 prominent social scientists in December 2019, ONS did not meet with data-users until June 2020. And, as a recent blog by Murray Blackburn Mackenzie documents, ONS engaged in extensive email consultation with Stonewall and other LGBT/trans rights organisations in the run up to that one meeting. (MBM 2020) Claiming in Summer 2019 that they had adequately engaged with women's rights and data-user stakeholders is patently untrue.

## 2.

# The Capture of the National Records of Scotland

Unlike their cousins south of the border, the National Records of Scotland (NRS), the Scottish census authority, are far more explicit throughout their question development process that the sex variable they are intending to capture in 2021 is 'self-identified sex,' although as we'll see, the guidance which instructs people to record their gender rather than their sex originated with ONS. Like ONS, NRS undertake a 'Topic Consultation' which reports in August 2016, and once again identifies a user need for data on the trans population, recognises that "the precise nature of the concepts to be measured need to be better understood," and undertakes to "work with users initially to better understand the exact nature of user need." (NRS 2016: 38) Once again, this undertaking refers to the commitment to consult with trans stakeholders on the development of the question, and once again, this process will entirely ignore the interests of women in the sex question, and will also conflate the specific *respondent* needs of trans people with the *user* needs of both trans and non-trans people for robust demographic data on the trans population. This commitment is also first enacted through a workshop with 'Sexual Orientation and Gender Identity' stakeholders, held on 24 January 2017, and attended by representatives of the Scottish Government, the three census authorities, Stonewall Scotland, LGBT Health, and two representatives from the Equality Network, the parent organisation of the Scottish Trans Alliance, who will both play a major role in this story. (NRS 2017a: 2)<sup>1</sup>

Unlike ONS, who report on their testing and development process in a somewhat piecemeal fashion throughout 2017 and 2018, NRS produce an extensive *Sex and Gender Topic Report* in late 2018, released in conjunction with *Plans for Scotland's Census 2021*, published on September 27 (NRS 2018b). There is, however, an important document dated July 12, 2018, outlining the definition of terms to be used in the 2021 Census that was released into the public domain in response to an FOI submitted in November 2018, *after* the Census Amendment Bill had been presented to the Scottish Parliament. The FOI asks a number of questions, the first being: "When the 2011 Census asked 'What is your sex?' with two possible answers Female or Male, were the National Records of Scotland collecting information on biological sex or self-identified sex/gender identity?" (NRS 2018e: 1) NRS reply that the "2011 Census sex question collected self-

identified sex," (1) and then, in response to the next question about the guidance, provide the copy used in 2011, which reads:

*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.*

NRS also attach to these responses a copy of *Scotland's Census 2021: Definitions Paper 27*, produced by the 'Data Definitions Working Group,' which makes it evident that the sex variable NRS are intending to measure in 2021 is 'Self-identified sex.'

The first thing worth noting here is that the definition of gender identity, as the footnote makes evident, is copied word-for-word from the Equality Network's 'LGBTI Glossary,' as are many other definitions provided in this document, and which once again indicate a full and uncritical adoption of trans ideological concepts.<sup>2</sup> The second thing to note is that it is far from obvious that there is *any* meaningful conceptual distinction between an 'internal sense' of 'ourselves' as 'being a man, a woman, or somewhere in between' and how an individual 'identifies' as 'female, male or a self-identified response, irrespective of the details recorded on their birth certificate.' That is, asking people to self-identify their sex rather than asking them to tell you what sex they actually *are*, is, in fact, just another way of asking them about their gender identity. It may be that NRS are pretending to themselves that an 'internal sense of yourself as a man/woman/other identification' is somehow different from an 'identification as male/female/other identification.' However, as we have seen, gender identity is defined throughout the literature as either, or both, an identification as man/woman/other, *and/or*, male/female/other, and, moreover, as the challenges around the sex question make evident, trans ideological understandings always issue in the demand that gender identification overwrites sex. Indeed, the definition given here of 'self-identified sex' is precisely *caused* by this need to overwrite sex with gender identity.

## 2. Scotland's Census 2021 Definitions in Paper 27

This document contains the definitions approved on xx July 2018 by the Definitions Working Group Meeting.

These definitions are as follows.

<b>Self-identified sex</b>	This is the sex that an individual identifies themselves as. It can be female, male or a self-identified response, irrespective of the details recorded on their birth certificate. A transgender person does not need a Gender Recognition Certificate to identify as female or male.
<b>Gender identity</b>	Refers to our internal sense of who we are, and how we see ourselves in regards to being a man, a woman, or somewhere in between/beyond these identities. <sup>1</sup>

### Sources:

<sup>1</sup> Equality Network LGBTI Glossary <https://www.equality-network.org/wp-content/uploads/2018/06/LGBTI-Glossary-leaflet.pdf>

Figure 2 - Detail from Definitions Paper 27 (NRS 2018a: 6)

What NRS are doing here, therefore, is turning the sex question into another gender identity question. In 2011, non-trans respondents will have recorded their biological sex, while trans respondents who read the guidance will have recorded their gender identity. As will be explored further in the discussions around the passage of the Census Amendment Bill, NRS (and ONS) have thus committed the primary sin of data collection; lack of conceptual clarity about *what they are actually measuring*.<sup>3</sup> It is this conversion of the sex question into a gender identity question which then, in NRS's case, underpins the proposal that turning the binary sex question into a non-binary sex question is an entirely reasonable thing to do, and which also, in effect, gives the lie to any claims NRS make about not intending to conflate sex with gender identity.<sup>4</sup> On some level NRS must recognise that the sex question is now actually a gender identity question, because this is the conceptual condition of not seeing any issue with allowing people to identify their sex as something which is not, in fact, a sex. This transformation of the sex question, effected through the 2011 guidance, thus forms the fundamental framing of NRS's work on the census questions, and, in the course of the passage of the Bill, is often explicitly appealed to by LBGT/trans rights

organisations as well as government representatives.<sup>5</sup> However, the process by which this guidance came into existence is remarkably poorly documented. Before going on to examine NRS's question development process, we will first turn to what we can uncover about the genesis of the self-identification guidance.

## 2. Footnotes

<sup>1</sup>The records of the Equality Network held at Companies House show that over the last four years it has been, on average, around 90% funded by the Scottish Government. (2016, 91%; 2017, 93%; 2018, 91%; 2019, 86%) Approximately half that funding goes to the Scottish Trans Alliance, while a further proportion (£45,000 per annum since 2015) goes to an ‘intersex equality’ project. As well as responding to Government consultations and engaging in the policy development processes of other governmental organisations such as the National Records of Scotland, EN/STA also engage in lobbying elected representatives. A search of the Scottish Parliament’s Lobbying Register for 2018 shows that EN/STA made a total of 38 visits to lobby particular MSPs, mostly regarding the Scottish Government’s proposed reforms to the GRA. That is, to be clear, the Scottish government is paying in the region of 350 to 400 thousand pounds a year to a special interest group, who then consult with and lobby the Scottish government from the perspective of their particular interests. These interests, as this report makes clear, involve advocating for the overwriting in public policy and law of the protected characteristic of another class of persons, who are being forced to defend their political interests through grass roots campaigning which receives no public funding. This, in itself, is axiomatic evidence of how policy capture by one special interest group to the exclusion of other stakeholders functions.

<sup>2</sup>Notably, the definition of ‘gay’ is given as “a person who is emotionally, romantically and/or sexually attracted to people of the same gender” while heterosexuality is “attraction to people of a different gender only.” (NRS 2018a: 7) This replacement of the conventional understanding of sexual orientation as sex-based with the assertion that we are attracted to people of certain genders, is also an exemplary instance of the sex-erasure effected by trans ideology. Importantly, this shift in definition is the source of the current conflict within the LGBTQ community with respect to the impact of trans ideology on gay people’s understanding of their sexual orientation, and the extent to which same-sex attraction – now disparagingly recast by trans activists as ‘genital preferences’ – cannot in fact be recognised by trans ideological thinking.

<sup>3</sup>When giving evidence to the CTEEA Committee on 13 December, 2018, Professor Susan McVie, Co-director of the Administrative Data Research Centre in Scotland, argued that it was a “fundamental property of research that, in designing a questionnaire, you need to be extremely clear about what you are measuring.” Consequently, she continued, “I think the General Register Office for Scotland got it wrong when it redesigned the census in 2011 and conflated sex and gender identity in one question.” (CTEEA 2018b: 4)

<sup>4</sup>In the letter to the CTEEA Committee on 5 December 2018, NRS claimed that “the intention behind the Census Bill was not to conflate the matter of sex and gender identity.” (NRS 2018d)

<sup>5</sup>In the course of the passage of the Bill, it is argued that because the self-identification guidance was introduced in 2011, it should be retained to provide data-consistency. (Cf. Tim Hopkins, CTEEA

2018a: 31; Fiona Hyslop, CTEEA 2018c: 31) NRS also use the existence of the 2011 guidance in order to deflect questions asking about who was consulted about changing the meaning of the sex question. (NRS 2018e) Given that the 2011 guidance unilaterally changed the sex variable from that used for the previous 200 years, and that ONS and NRS performed no public consultation, equality impact assessment, or consideration of the impact on the data-quality of such a change, it is a little rich to appeal to ‘consistency’ of data-collection as justification for continuing the 2011 practice. This is even more true given that NRS admit in September 2019 that “we do not understand enough about the effect of providing the guidance” (5) and “I do not think that we know how it affected the data in 2011.” (CTEEA 2019: 6)



## 2.1 ONS and the Self-Identification Guidance

In December 1998, a trans woman identifying herself as Paula Thomas wrote to ONS to seek clarification about how she should answer the sex question on the 2001 Census. The reply, from a Margaret Wort, was then displayed on the Press for Change website, from February 1999. (Figure 3) The letter states that “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.” (PFC 1999) In the text introducing the letter, PFC note that “[b]ecause UK law does not fully recognise trans people in their true gender,” as the census loomed “the possibility arose that once again, it would be impossible to provide a truthful answer which also matched legal requirements.” Note here that PFC seem then to have been working on the assumption that the sex-question was asking about biological sex (the census authorities will shortly deny this), which, I’d imagine, the vast majority of people are. However, also note that PFC frames the issues around the sex question in terms of the recognition of trans people’s *true gender*. The victory represented by ONS’s response, they tell us, is that trans people “**can** now give an answer which is both *truthful* and legal.” (my emphasis) The way PFC constructs the overwriting of sex by gender identity as the ‘truthful’ response is exemplary of the way trans ideology posits gender identity as the essential *truth* not only of someone’s gender, but, in fact, of which sex a person ‘really’ is. Here then we see the trans-ideological origin of the overwriting of sex in the UK census, and the way the uncritical operationalisation of that ideology in civic policy creates conflicts with the interests of women in the protected characteristic of sex.

In 2008, ONS commissioned an independent consultant, Diversity Solutions, to conduct an ‘Equality Impact Assessment Screening’ on the ‘Development of question on sex/gender’ for the 2011 Census. ONS were not at this stage working on developing a gender identity question – as we’ll remember, the 2009 *Trans Data Position Paper* concluded that the census was not the right instrument to collect this data, and work on the gender identity question did not begin until 2016. What is here being referred to as the ‘sex/gender’ question, is then, in fact, the sex question. Indeed, this Impact Assessment quotes from a no longer


publicly available document, *The 2011 Census: Statement of user requirements – Demography, families and households*, which reads:


*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. Cited in DS 2008: 3)*

The Diversity Solutions document indicates that the “demography, families and households topic group... considered the [sex] question in detail,” (DS 2009: 3) and while we have no further record of those discussions, this citation makes it evident that ONS had by this stage decided that the sex question is, and actually, had always been, a question asking about gender, or gender identity. The rationale for this is that ‘respondents choose which box to tick,’ which is, frankly, baffling. The census is completed by individuals without supervision, and no corroborating evidence is required. It is, however, completed under the assumption that the information given by individuals is *true*, and indeed, the front of the 2011 Census form tells us that “[y]ou could face a fine if you don’t participate or if you supply false information.” (ONS 2011a: 1) There are actually facts about what sex people are – either biologically or legally, as recorded on their birth certificate – and the fact that people self-report their sex by choosing one of two boxes is not the same as people *choosing which sex they are* regardless of what their birth certificate says. This is, however, what ONS seem to be suggesting, and indeed, it’s a suggestion they reiterate in 2011 in response to an FOI lodged by the non-binary/genderqueer/androgynous/asexual transactivist Nat Titman. (NBW 2020) Titman asked

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Campaigning for respect and equality for ALL trans people

## The year 2001 Census

### How should you fill it in?

#### February 1999

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**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'.

**Letter from the Office of National Statistics**



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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

*Figure 3 - Press for Change Website (PFC 1999)*

ONS "How is the 'sex' question used in census statistics? What is an answer of 'male' or 'female' taken to mean?"<sup>1</sup> ONS respond that sex has "always been measured by the sex as reported subjectively by the respondent," (ONS 2011b) which is by no means evident, and completely conflates the notion of self-reporting with that of self-identifying. To put not too fine a point on it, this is a fudge.

And it's a fudge, I'd argue, originating from the decision to allow trans people to record their gender identity in the sex variable, begun with the advice given to Paula Thomas in 1998.

Indeed, Paula Thomas makes an appearance in the 2008 Impact Assessment. Cited as "a trans community representative who was asked to give her expert view,"

## 2.1 Footnotes

(DS 2008: 4) she suggests that ONS need to clarify their guidance so 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.” (4) The assessment underwrites this view, arguing that 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...are enabled to give accurate answers to the question,”<sup>2</sup>(4) and this is then signed off by ONS in an ‘actions agreed’ memo at the end of the document. (6) Once again, allowing gender identity to overwrite sex is presented as the more ‘truthful,’ or in this case ‘accurate,’ response to the question ‘what is your sex?’ over against answering with the facts of either your biological or legally registered sex (which in most cases will be the same). What ‘truthful’ or ‘accurate’ means here then is a rather radical departure from what most people would understand as ‘truthful’ or ‘accurate’ information about their sex. What it means is ‘the truth of a person’s gender identity as they experience it’ and the conviction that this ‘truth,’ as Vic Valentine suggested, is ‘more important,’ and in effect, actually eclipses, their biological sex.

No consideration is given to the fact that in producing this guidance, ONS are effectively conflating biological and/or legal sex with gender identification within one variable and are therefore confusing what they are actually measuring, or to the fact that ‘sex’ is both statistically vital and central to equalities monitoring for the 51% of the population who are female. The assessor glosses neatly over these issues by asserting without substantiation that there are “no adverse equality impacts likely to affect any communities” following from the self-identification guidance and that therefore, in their “view... it would be a disproportionate use of resources to conduct an equality impact assessment on the sex question.” (3) This is the sum total of the paper trail which exists around ONS’s decision to turn the sex-question into a self-identification/gender-identity question. They will spend large quantities of money between 2016 and the present day consulting, developing, and undertaking multiple forms of testing on the sex and gender identity questions, but the matter of the 2011 guidance receives this one cursory assessment, which, in fact, provides nothing in the way of analysis, let alone research, on the potential impacts of conflating sex and gender identity. This looks a great deal like an organisation that has already decided it’s going to do pretty much whatever trans rights organisations ask them to do, and the Impact Assessment Screening reads as little more than window dressing. Indeed, in a 2020 meeting between ONS and concerned data users on the question of the guidance, ONS clearly acknowledged that the 2011 guidance was “added at the request of the LGBT community.” (ONS 2020e: 4) We will briefly look at these later efforts to hold ONS and NRS to account on the question of the guidance in the postscript.

<sup>1</sup>Notably, Titman also asked a secondary question to this, “Could you please explain...[h]ow the ONS compensates for the inaccuracies/ambiguity introduced by conflating the separate concepts of sex, social gender, legal gender and gender identity into one binary question?” ONS accept Titman’s point that the sex question is currently a conflation between sex and gender, and respond by noting that because “For the overwhelming majority of the population \*\*\*sex\*\*\* and \*\*\*gender\*\*\* will be the same...no statistically significant inaccuracies are introduced by conflating the two.”

<sup>2</sup>The assessment also specifies that ONS should consult on the guidance with “trans community groups” such as Press for Change, the Gender Trust and Mermaids. (5)

## 2.2 NRS and the Non-Binary Sex Question

NRS's 80-page *Sex and Gender Identity Topic Report* was released in late 2018, prior to the presentation of the Census Amendment Bill to the Scottish Parliament on October 2, and documents NRS's question development process from the 2015/6 'Topic Consultation' up until autumn 2018. The report does not make any specific recommendations itself, but is clearly intended to support the passage of the Bill, including the introduction of a voluntary gender identity/trans status question and, much more controversially, the conversion of the binary sex question into a non-binary sex question. The *Policy Memorandum* that accompanied the Bill has a section on the development of the sex question which reads:

*The 2011 Census recognised that society's understanding of sex has changed and guidance provided explained that the question was being asked in terms of self-identified sex. Looking forward to 2021, consultation has identified the need for a more inclusive approach to measuring sex. The sex question being proposed for the 2021 Census will continue to be one of self-identification and will provide non-binary response options. Importantly, the sex question proposed will not seek a declaration of biological or legal sex. (SG 2018c: 3)*

It is vital to note here that the memorandum does not make the claim that there is evidence of a *user* need for a non-binary sex question, or that there is any hard-statistical support for its inclusion, because, as we will see, there is none. The non-binary sex question is framed, as we've just explored, by the conceptual conversion effected by the 2011 guidance, which is disingenuously presented as a change in 'society's understanding of sex,' rather than as 'the trans rights movement's preferred understanding of sex *qua* gender identity,' and conceals the fact that the 2011 guidance was introduced at the request of trans rights organisations, without consultation either with 'society' at large or with people protected by equalities law under the characteristic of sex. It is true that NRS have identified a 'need for a more inclusive approach to measuring sex,' but, as our investigation of the *Topic Report* will make evident, it is a need expressed *only* by an unspecified number of the twenty-three trans respondents interviewed extensively by NRS. As emails between NRS and the Equality Network/Scottish Trans Alliance (EN/STA) in the run up to the Bill's introduction make evident, what NRS are responding to

here is the demand by trans rights organisations that the collection of sex data be "inclusive and respectful of the reality of trans people's lives." (NRS 2019g)

The language of 'inclusivity,' as anyone familiar with this debate will know, has played a monumental role in framing the interests of the trans rights movement over against the interests of women, by leveraging the appeal to 'inclusion' as a universal moral good. Nobody, surely, would do something as mean and heartless as to 'exclude' vulnerable people. The problem here, of course, is that the definition of concepts depends on exclusion – for a concept to identify something meaningful, it must both include some things, and exclude others. Including things not previously included in a category, is, by definition, to change the meaning of that category, exemplified here by NRS's conversion of the category of biological and/or legal sex to the category of 'self-identified sex'/gender identity. Female people are protected under the law, because they are discriminated against, *on the basis of their sex*, and they have substantive political interests in sex data to track, describe and challenge that discrimination. Moreover, as Caroline Criado-Perez makes evident in *Invisible Women*, we have an interest in *far more* data being disaggregated by sex, because failure to do so leads to negative outcomes for women in many areas of public and private life.

The interests of the trans rights movement in a more 'inclusive' definition of sex is thus, in fact, an interest in changing the definition of women's protected characteristic in law, changing the collection of data on that characteristic, and, in the final analysis, the fundamental *transformation* of the political category of 'woman' itself from a sex-based to a gender-based category. NRS's conversion of the sex-variable into an 'inclusive' gender-variable is then a perfect exemplification of the core conflict between the interests of the trans rights movement and the interests of women, and the manner in which this has occurred is, furthermore, a perfect exemplification of the way women's interests in matters to do with sex have been systematically excluded from consideration by civic bodies working in close collaboration with trans right organisations, through a process of policy capture. Moreover, such a shift by the central demographic authorities not only sets a statistical precedent that will likely reverberate through many other forms of data collection, it sets, in and of itself, an *ontological* precedent, about what 'sex' is and what 'woman'

means, in law and public life. As the *Policy Memorandum* tells us, 'society's understanding of sex' has 'changed.' Except the truth of what has happened is that it *has been changed*, by civic authorities, at the behest of a specific interest group, without considering the interests or objections of women.

At the beginning of the *Sex and Gender Identity Topic Report*, NRS summarise what they consider to be the report's 'Main Points.' They begin by giving lip-service to 'sex' as a "key demographic variable" with a "well-established user need" which is "vital to population, household and other demographic variables" and a "protected characteristic as set out in the Equality Act 2010." (NRS 2018c: 3) There will, of course, be no analysis whatsoever of the fact that NRS are explicitly using 'self-identified sex' as the definition of this variable throughout the report, apart from, rather comically, when some trans respondents tell them they are conflating sex and gender, whereupon NRS are suddenly less than interested in their opinions. There is then a claim about the user need for data on gender identity – which is incontestable – supported by the claim that 'gender identity' is also a protected characteristic in the EA2010, which is false.<sup>1</sup> NRS then make three claims I want to examine in detail:

- i) "There is a respondent need for a non-binary sex question"
- ii) "The sex and gender identity questions are publicly acceptable" and
- iii) "Testing has supported the opinion of stakeholders that a non-binary sex question is more acceptable and produces less item non-response than a question set comprised of a binary sex question followed by a gender identity question." (NRS 2018c: 3)

We will deal with these in turn.

## i) "There is a respondent need for a non-binary sex question"

In the introduction to the report NRS lay out the criteria by which they evaluate questions and their responses, as shown in **Figure 4** below.

The first thing to note is that, as was the case with ONS, *respondent* need does not appear on this criterion. Once again also, the nearest criteria that would cover this need is that the question "must be acceptable to the majority of the population," and 'majority of the population' is, I'd suggest, a key phrase here. As we will see when discussing the next claim, NRS actually do no substantive public acceptability testing on the non-binary sex question, and there is no data on whether it is acceptable to the 'majority of the population.' What they do do, rather, is two rounds of cognitive testing, consisting of in-depth interviews, with a total of twenty-three trans respondents, recruited through a call put out by EN/STA on their website. The precise aims and methodology of these tests are detailed in **Figure 5** below.

The first round of this cognitive testing takes place in Autumn 2017 and involves twenty-six one-to-one, one-hour interviews, examining responses to two types of question; either a binary or non-binary sex question, followed by gender identity/trans status questions (**Annex 3**). Twelve of the respondents were trans, five of whom were non-binary, and a further fourteen interviews were conducted with members of the general population, although we are given almost no detail about what this sample had to say. Including both the summary at the front (13-15) and the extensive reporting of trans responses in Annex C (47-64), NRS devote a whopping 20-pages of this 80-page report to a very detailed recounting of what twelve trans people think and feel about the sex and gender identity questions. Dedicating 25% of their research document in support of a new piece of legislation to data which, let's remember, does not even appear on their evaluation criteria, is, in and of itself, a pretty compelling demonstration of the way NRS's development process was entirely, and uncritically, captured, by the political objectives of trans rights organisations. And this observation is only amplified when we discover that several of the trans respondents themselves expressed the view that NRS's non-binary sex question was "confused" and "muddled" about what it was measuring. (59)

The aim of this testing was to establish both how respondents understood the questions, and how acceptable they were. In response to the binary sex question, some respondents interpreted the question as asking about biological sex, some interpreted it as "synonymous with gender identity" (49) and some thought it was "ambiguous" (50). Understanding sex as biological occurred in both the trans and non-trans cohorts and was "the dominant understanding amongst trans respondents" (50) even though, as NRS underline, this is not "the intended meaning of the question" which was "self-identified sex." (49) This 'mistaken' understanding, "appeared to come," NRS tell us, with a near-comic denial of *how words mean things*, "from their 'prior' understanding of the term 'sex' as they had come across it in other contexts." (50) With respect to the non-binary sex question, some trans respondents again interpreted it as referring to biological sex, which NRS also attribute to their vexatious "prior understanding," (58) and to the fact that the gender identity question was presented before the sex question, which "could have reinforced the sex/gender distinction." (59)

This observation stands, in fact, as an admission that on some level NRS know full well that they *are* conflating sex and gender, and yet they never acknowledge that a great deal of trans respondent's confusion is arising because the concept they are measuring *is* confused, and deliberately so, in order to allow trans people to record their gender identity under the sex variable. Indeed, several trans respondents directly point to this confusion, one noting that "they did not think of non-binary as a biological sex" (59), another telling NRS that they need "to split sex and gender identity out," (59) and another observing, quite accurately,

Questions and their response options are evaluated against five main themes:

### Strength of user need

- ✓ Data collected by the census must meet a user need for equality monitoring, policy development, resource allocation and/or service planning and delivery.

### Suitability of alternative sources

- ✓ Data collected by the census must meet a user need that cannot be met elsewhere.

### Acceptability, clarity and data quality

- ✓ Questions asked in the census must be acceptable to the majority of the public, clear and be designed with minimal respondent burden in order to obtain good data quality that meets user needs.

### Comparability

- ✓ Data collected by the census should be comparable over time where possible, and harmonised across the UK where reasonable.

### Operational considerations

- ✓ Census questions must be considered as part of the census as a whole, where effective digital and paper design, space and financial constraints must be considered. Additionally, some questions may be required for operational purposes in the process of conducting the census.

Figure 4 - NRS Question Evaluation Criteria (NRS 2018c: 4)

that the question is “asking about sex, but it’s trying to ask about gender identity, so it has got the language wrong in the question.” (59) NRS bat this away by claiming it is “being made on semantic grounds” – as if what people often derisively term ‘semantic arguments’ are not, actually, about concepts and their clarity – before reiterating that the intention was “to measure self-identified sex” and not biological or legal sex. (59) Rather inconveniently for NRS’s efforts to make the word mean something else, even many trans people still seem to understand the word ‘sex’ to mean ‘biological sex,’ because that, in fact, is still *what it means*. So much for ‘society’s changing understanding of sex.’

Despite NRS’s best efforts to comply with trans ideological interests, the fact they are unfortunately constrained by having to pretend that ‘self-identified sex’ is still measuring sex and not gender identity thus leads to trans respondents experiencing both versions of the ‘sex-question’ as challenging. The binary sex question is felt to be “quite triggering” and “uncomfortable.” (49) A trans man finds it “upsetting” because “it’s asking about the one thing I can’t change,” (51) while a biological male whose identity is not specified notes that although “[w]here they fit into this is very difficult” they would “tick female, because...I... feel more female than male” and “my feelings and thoughts

are female.” (51) In line with trans ideological beliefs that intersex people are actually ‘between sex,’ ‘unsexed,’ or ‘some other kind of sex,’ some trans respondents argue that the binary sex question “completely erases intersex people” or, even more remarkably, people who “have...ever identified as intersex.” (49) One non-binary respondent was “disappointed” by the “binary view of sex,” another found it “stressful” and a third noted that it “[s]tumps me immediately” and that they would “opt out of the survey as a whole ‘cos [sic] I don’t like it.” (51) As with the binary sex question, some of the trans respondents who interpreted the non-binary sex question as asking about biological sex refused to answer the question and said it made them feel “uncomfortable,” (59) while another trans respondent refused to answer the question because “they thought it had confused the concepts of sex and gender,” which it had. (59)

The results of this cognitive testing actually produce no overall consensus about which question is better (60) so NRS draw a pro and con table of each question. (61) They then dismiss the views of respondents who prefer the binary sex/gender identity set because their view “stemmed from an understanding that ‘sex’ and ‘gender identity’ are separate concepts and...should be treated separately.” (61) They underline that the group who take sex as distinct

Date	Type of Testing	Conducted By	Aim	Method	Sample Size and Type	Results
14 January - 20 March 2017	Public acceptability	Ipsos MORI for the three census authorities	“[T]o explore the acceptability of the inclusion of a gender identity question in the 2021 Census” (10)	Using the gender identity question developed by EHRC (Question 2, Annex 1) respondents completed a survey rating how acceptable they found the question.	5,000 addresses in Scotland were selected using an unclustered sample design from the Postcode Address File. 1,087 surveys were returned, a response rate of 22%. (22-24)	<ul style="list-style-type: none"> <li>- 77% of respondents rated the question as ‘Very acceptable’ or ‘Acceptable’</li> <li>- 84% said they “would answer accurately and continue to complete the household form.” (26-7)</li> </ul>
June – August 2017	Quantitative testing	Ipsos MORI for the three census authorities	<p>“[T]o explore the impact on data quality of sex and gender identity questions asked in three ways.” (34)</p> <p><i>Note:</i> ‘Data quality’ here means ‘response rates’ and ‘return rates’</p> <p><i>Response rate:</i> “the proportion of sampled addresses, from which a completed survey was received.”</p> <p><i>Return rate:</i> “the proportion of sampled addresses, from whom contact was received.” (36-7)</p>	<p>Households were sent a survey containing one of the three types of sex/gender identity questions (Annex 2).</p> <p>The survey contained other census questions, so the respondents were unaware it was surveying response/return rates to these particular questions. (34-6)</p>	<p>Sample was drawn by randomly selecting residential addresses from the Scottish Address Register.</p> <p>Aim was to survey 5,000 households for each question.</p> <p>Over-sampled by 4% to account for unoccupied properties.</p> <p>Each question type sent to 5,193 properties. (36)</p>	<p><i>Response rates:</i></p> <p>Binary sex question: 35% / Non-binary sex question: 36% / Two-step question: 35%</p> <p>ANOVA showed “no statistically significant interactions between the questionnaire version and the response rate.” (36-7)</p> <p><i>Return rates:</i></p> <p>Binary sex question: 37% / Non-binary sex question: 39% / Two-step question: 37%</p> <p>ANOVA showed interaction of question version and return rate was significant. (38)</p> <p><i>Item non-response:</i></p> <p>Significantly higher to two-step question. More likely to occur at second stage.</p> <p>No significant difference between binary/non-binary sex question. (41-45)</p>
Autumn 2017	Cognitive testing	ScotCen	<p>To explore with both trans and general population:</p> <ul style="list-style-type: none"> <li>- understanding of the concepts</li> <li>- acceptability of the questions</li> <li>- which questions preferred (14)</li> </ul>	<p>One-hour 1-2-1 interviews face to face or on phone.</p> <p>‘Think aloud’ technique where subjects narrate responses as answering.</p> <p>‘Retrospective probing’ technique where subjects respond after answering.</p> <p>Questions in Annex 3 (2017b: 6)</p>	<p>26 interviews conducted. 12 participants from LGBTI groups, 14 general population.</p> <p>LGBTI respondents recruited through STA website, then ‘snowball sampling.’ (i.e. Respondents invited other potential respondents)</p> <p>7 identified as trans, 5 as non-binary. (2017b: 22)</p>	<ul style="list-style-type: none"> <li>- Different understandings of the term ‘sex,’ either biological sex or self-identified sex</li> <li>- Informed by “prior conceptions” and other questions asked</li> <li>- Interpretation of sex directly impacted acceptability to trans respondents</li> <li>- Binary sex question ‘not sufficient’</li> <li>- No objection to gender identity question</li> </ul> <p>But concerns about binary sex-question</p> <ul style="list-style-type: none"> <li>- ‘Other’ in NB sex question? (14-5)</li> </ul>

Figure 5 - NRS's Testing on the Sex and Gender Identity Questions 2017-18

Autumn 2017	Quantitative testing	ScotCen	<p>To analyse:</p> <ul style="list-style-type: none"> <li>- “distribution of responses ... by mode and age”</li> <li>- “item non-response rates as measure of data quality <u>and</u> acceptability”</li> <li>- “uptake of ‘prefer not to say’” for trans status question</li> <li>- “invalid responses as a measure of data quality.” (16)</li> </ul>	<p>Individual residential survey, testing new questions on sex, trans status, sexual orientation plus other census questions.</p> <p>Online and paper.</p> <p>Survey sent 15/11/2017, closed 2/01/2018</p>	<p>Unclustered sample of 3300 addresses from Postcode Address File designed to yield 1000 individual responses. (2017b: 8-11)</p>	<p>1530 responses received.</p> <p>After quality assurance, 1454 analysed.</p> <p>Good overall response rate. (2017b: 11)</p> <p>95% of 645 online surveys fully completed, all paper surveys fully completed. (2017b: 12)</p> <p><u>Item non-response to non-binary sex question was 2.6%, compared to 0.8% to the binary sex question in 2011 Census.</u> (2017b: 19)</p>
Autumn 2018	Further cognitive testing	NRS	<p>Trans and non-binary respondents unaware the sex question was self-identified sex. Aim to test extra guidance added to the stem to enable better understanding. (16)</p>	<p>1-to-1 interviews conducted face to face in Edinburgh and Glasgow using semi-structured interview protocols. (75)</p> <p>Questions in Annex 5</p>	<p>11 trans and non-binary participants were interviewed (5 non-binary, 3 trans men, 3 trans women). Recruited via SurveyMonkey publicised by STA and EN (75-6)</p>	<ul style="list-style-type: none"> <li>- Strong support for the non-binary response options [they’re all non-binary?]</li> <li>- Guidance not clear on B and C, difficult to interpret if it is asking about sex or gender identity [indeed]</li> <li>- ‘Identify in another way’ on version C ‘more inclusive’ but ‘made it a gender identity question’</li> <li>- Question A interpreted as biological sex, therefore non-binary respondents did not use ‘Other’ as assumed for intersex (78)</li> </ul>
Autumn 2018	General population survey	NRS	<p>To “ensure that any changes in questions did not have a negative impact on respondents’ understanding and their ability to answer questions.” (76)</p>	<p>Online survey asking respondents to answer different versions of the sex and trans status questions (Annex 5) and provide feedback. (76)</p>	<p>49 respondents.</p> <p>No information given on how they were recruited, or on method of sampling. (76)</p>	<ul style="list-style-type: none"> <li>- Small number (no data given) of respondents considered sex could only be binary, consistent with finding over last 18 months</li> <li>- Respondents interpreted Question A as biological sex</li> <li>- A few (no data given) commented on use of ‘identity’ in B was misleading as it implied gender identity not sex</li> <li>- Some respondents supplied feedback on the difference between sex and gender</li> <li>- 30% of respondents found question B difficult to answer (78-9)</li> </ul>

All page references are to NRS’s 2018 *Scotland’s Census 2021: Sex and Gender Identity Topic Report (NRS 2018c)* apart from those marked 2017b, which refer to the *Scotland’s Census 2021:2017 Cognitive and Quantitative Testing*

Figure 5 - NRS’s Testing on the Sex and Gender Identity Questions 2017-18



from gender identity “understand the term...to be biological,” (61) whereas, they remind us for the nth time, “[t]his was not the intended definition of the sex question using current NRS measurement objectives.” (62) Here then NRS effectively lay out that sex being distinct from gender identity depends on sex being a biological concept, the implication being, of course, that ‘self-identified’ or non-biological concepts of sex conflate it with gender identity. Which of course they do, although NRS will shortly deny that this is their intention. Moreover, what is becoming ever clearer by this point, is that NRS is so set on this conflation – one requested by EN/STA – that the ‘trans respondent needs’ that count in this cognitive exercise are not the ones that ask sex to be distinguished from gender identity.

On the way to their inexorable conclusion they then rehearse arguments expressed in favour of the non-binary sex question, which seem to consist, in essence, of two weak claims. The opinion of members of both the general and trans population who don’t view sex and gender as distinct that the two questions “overlapped,” or were “repetitive,” and the belief that the non-binary sex question was more “inclusive.” (62) The first argument depends on conflating sex and gender identity again, and the second on the taken-as-read but, nonetheless, *contested*, moral force of ‘inclusion.’ All these conflicting and, in fact, inconclusive responses will then be flattened out by NRS and represented by the single claim that there is a ‘respondent need for a non-binary sex question,’ which actually means ‘an undisclosed (but not unanimous) number of trans people (but definitely less than 12 in total) and the Equality Network/Scottish Trans Alliance want a non-binary sex-question.’ And this will be the sole basis for the suggestion that a non-binary sex question be included on the 2021 Scottish Census.<sup>2</sup>

## ii) “The sex and gender identity questions are publicly acceptable”

The first thing to say about this statement is that the claim ‘the gender identity question is publicly acceptable’ is empirically supported by NRS’s data. As previously mentioned, in winter 2017, the three census authorities joint commissioned public acceptability testing on the gender identity question and the results are that 77% of the Scottish population have no problem with a question on this topic. And neither, we should underline, do any of the critics of the census authorities’ handling of the sex question. The second thing to note is that the statement ‘the sex question is publicly acceptable’ is multiply problematic. In the first instance, *which* sex question is publicly acceptable? Because it remains unspecified. We might then take this to mean ‘the sex question proposed in the *Policy Memorandum* of the Bill,’ that is, ‘the non-binary sex question,’ in which case, the problems do not dissipate. The principal issue here is that NRS never actually undertake

substantive public acceptability testing on any form of the sex question. On page nine of the *Topic Report*, they helpfully provide us with a breakdown of the different types of testing they undertake in the course of question development, and their different functions. The public acceptability testing undertaken for the gender identity question involved directly asking over a thousand people to rate how acceptable they found a gender identity question, on a scale. By contrast, quantitative testing works by measuring the response and return rates to questions, and is, as is made evident in **Figure 6**, “undertaken primarily to identify data concerns.” Further, we learn, sometimes NRS “include feedback questions in the quantitative testing in order to gather further information on public acceptability.” However, the only testing of the ‘public acceptability’ of the sex question that NRS allude to takes place as part of the quantitative testing done on the non-binary sex question in Autumn 2017 (16), and there is no mention in the methodology of any ‘feedback questions’ to gain ‘further information on public acceptability.’

This quantitative test involved an online and paper survey which asked a variety of questions, including the non-binary sex question, trans status, and gender identity questions, as well as a number of other census variables, and received 1530 responses. It has no qualitative dimension whatsoever, and what NRS/ScotCen are doing here is using ‘item non-response,’ which is usually used as an index of data-quality, as a proxy of ‘public acceptability.’ (16) No explanation is given anywhere for this protocol. And despite claiming they are testing public acceptability, no analysis is offered about what the response rate to the question tells us about how acceptable the question was. We are told in the opening summaries of the testing that “97% of respondents provided a valid response to the non-binary sex question.” (16) What we are not told, and you wouldn’t know unless you looked at the graph on page 19 of the fascinating 2017 *Cognitive and Quantitative Testing*, is that the non-response rate to the non-binary sex question was 2.6% as compared to 0.8% in the 2011 Census. That is, the only actual statistical data we have on the alleged ‘public acceptability’ of the non-binary sex question shows that it produces a non-response rate 3.25 times the size of a binary sex question. Given that sex is a mandatory variable and the foundation of the calculation of a huge swath of social statistics, a jump from nearly 1% to nearly 3% non-response is perhaps not so negligible. Furthermore, if you are insisting that non-response is an adequate proxy of public acceptability, it is also perhaps not a ringing endorsement of your claim that ‘the sex question is publicly acceptable.’

The only other information we get on public responses to the non-binary sex question comes from the small general population survey NRS conduct in late 2018. This consisted of an online survey with 49 respondents that tested three different versions of non-binary sex question followed by a trans status question and aimed to ensure that “changes in questions did not have a negative impact

Both cognitive testing and quantitative testing processes were used in developing census questions. In addition, public acceptability testing was also undertaken for this topic.

1. Public acceptability testing is undertaken primarily to ascertain the acceptability of asking a question, whether respondents would answer the question for themselves, or on behalf of others in their household, and the impact on overall response of inclusion of sensitive questions.
2. Cognitive testing is a form of in-depth interviewing with a small number of respondents. It aims to provide an insight into the mental processes respondents use when answering questions. This helps us to identify if there are any problems with a question or question design and gain an insight into the source of any difficulty respondents are having.
3. Quantitative testing is undertaken primarily to identify data quality concerns. NRS included feedback questions in the quantitative testing in order to gather further information on public acceptability and to identify specific difficulties respondents faced if they were unable to answer a question easily.

*Figure 6 - NRS Question Testing Types (NRS 2018c: 9)*

on respondents' understanding." (76) We learn that "a small" but unspecified "number of respondents...have the view that sex can only be binary, and commented that therefore the question should be binary," which, NRS note, is "consistent with all the findings over the last 18 months." (78) Some also explain that sex and gender identity are different concepts, and the use of the word 'identify' in some of the question stems "suggest that the question on sex is asking about gender." (79) Once again, this is not what NRS are interested in hearing, and the people pointing to the conflation of sex and gender identity are ignored.

### **iii) "Testing has supported the opinion of stakeholders that a non-binary sex question is more acceptable and produces less item non-response than a question set comprised of a binary sex question followed by a gender identity question."**

At first glance this statement, which, significantly, begins with the phrase 'testing has supported the opinion of stakeholders that a non-binary sex question is more acceptable,' looks like a solid empirical claim in its favour. However, when we compare this statement to the quantitative testing which supports it, it becomes evident

that through a process of omission, NRS has created an impression of empirical support for trans rights stakeholders' preference for the non-binary sex question which does not, in fact, exist. The only testing that this could refer to is the June-August 2017 quantitative testing carried out by Ipsos MORI for the three census authorities. This involved an online/paper survey containing three different versions of the sex/gender identity questions as well as a variety of other census questions, so subjects did not know which question was actually being tested. The three questions were a) a binary sex question b) a non-binary sex question and c) a binary sex question followed by a gender identity question (**Annex 2**). The first thing to note here then is that this is quantitative testing, which focuses on measuring response/return/non-response rates, which, we will remember from the previous discussion, and NRS underline, is intending to "explore the impact on data quality of sex and gender identity questions asked in three ways." (34) That is, once again, this is not public acceptability testing and the phrase 'a non-binary sex question is more acceptable' is, hence, mysterious. Perhaps NRS are performing a bit of grammatical jiggery-pokery here, and 'acceptable' is intended to refer only to 'stakeholder's opinions,' but this won't quite wash, because the claim is clearly that 'testing has supported stakeholders' opinion that it is more acceptable,' and given that no public acceptability testing has been done on this question, that is, to say the least, misleading.

The other major issue here is that this testing involved testing three questions, while this statement refers to a comparison between only two questions. No mention is

*Table B1: Achieved response rates in Scotland by questionnaire version (unweighted data)*

	Binary sex question	Non-binary sex question	Gender identity question set
<b>Response rate</b>	35%	36%	35%
	1,811 responses of 5,193 survey invitations sent	1,887 responses of 5,193 survey invitations sent	1,835 responses of 5,193 survey invitations sent

*Figure 7 – Response rates for 2017 Quantitative Testing (NRS 2018c: 36)*

made of the comparison between the binary and non-binary sex questions, or between the binary sex question and the sex/gender identity two-step question. And no mention is made of the data about response and return rates. There are reasons for this. The first is that the ‘response rate’ between the binary and the non-binary sex question was a difference of only 1% (36), and indeed, the analysis of the response rates between all three questions showed that “there were no statistically significant interactions between the questionnaire version and response rate.” (37) The ‘return rate’ refers not to the number of completed surveys, but to “the proportion of sampled addresses, from whom contact was received.” (37) This showed that “the return rate was significantly higher for the non-binary sex question” compared to the other two questions. (38) That is, “the likelihood of the household to make contact in another way (e.g. by opting out of the research, returning the mail to sender, or abandoning the online survey partway) was increased for the non-binary sex question” (38), which doesn’t really sound like solid evidence that it was more publicly acceptable than the other options.

The last piece of data analysed in this testing was ‘item non-response.’ This demonstrated that there was “no difference in mean item non-response between the binary sex question and the non-binary sex question,” (42) so again, no statistical support was found to prefer one question over the other. What was found was that the “mean incidence of non-response to the gender identity question set was significantly higher than” and this needs to be underlined, *both* “the binary sex question” and “the non-binary sex question.” (42) The issue here then is that a two-step question produces more non-response than a one-step question of either kind, which makes sense, because two questions impose more respondent burden than one. NRS also analysed the non-response to the two-step question and found that it occurred more frequently at the second step of the question, the gender identity question, than at the sex question. (43-4)

No analysis is given of this, but one possible explanation is that some people didn’t understand the gender identity part of the question, or even, perhaps, that they did understand it but don’t consider themselves to have a gender identity. The proposal for the census is that the gender identity/trans status part of the question is voluntary, and indeed, the stem for the question NRS tested states that it is voluntary, so it’s not at all clear what can be drawn from the fact that it showed higher non-response.

**S**o, to summarise, what we have is no statistical support via response rates for preferring a non-binary sex question over a binary sex question. Some suggestion from return rates that a non-binary sex question is preferred less than a binary sex question or a two-step question. No significant statistical evidence that a binary sex question produces more non-response than a non-binary sex question. And evidence that a two-step question produces more non-response than *either* a binary *or* non-binary sex question, which may be explicable by the second step being voluntary and/or it not asking about something which is meaningful to everyone. If we factor out the issue of using quantitative testing as a proxy of public acceptability what we are left with is NRS representing these finding with the claim ‘a non-binary sex question produces less item non-response than a two-step question,’ which strictly speaking, is true. The problem is that the statement, ‘a binary sex question produces less item non-response than a two-step question’ is *equally true*. This is then, at best, a slippery and disingenuous way to present the results of this testing. And absolutely nothing in this testing supports the ‘opinion of stakeholders that a non-binary sex question is more acceptable’ than a binary sex question, which, from the perspective of both trans rights organisations and data users and women’s groups, is the crucial and contentious issue.

What is happening here, I would suggest, is that NRS are massaging and selectively presenting their findings

in order to support the pre-ordained outcome, which just happens to coincide with ‘the opinions of stakeholders.’ And the stakeholders with by far the most important opinions are EN/STA. On 21 August 2018, before the publication of the *Sex and Gender Identity Topic Report*, and several weeks before the Census Bill is presented to parliament, NRS send an email to the Equality Network, asking for an urgent telephone meeting, to “explore the existing legal framework, and penalty provisions” which they say, have “implications for the sex and trans status question development you [redacted]ted us with,” and concluding that they want “to get a sense of your views.” (NRS 2019g, Annex 6) This leads to a telephone call, which NRS follow up the next day with an email thanking EN/STA for their time, and “stres[sing] that the conversation was simply so that NRS had a clear view of the landscape and therefore how we can approach the legal and legislative process for Census.” They note that EN/STA’s feedback was “important in NRS being able to rule out some potential options for how we take this through the necessary processes,” and conclude by stating that this is just a “heads up” that EN/STA’s “support” as they “move forward...would be greatly appreciated,” and that “the development work on these questions would not be as far advanced as it currently is without the input from James [Morton, head of the STA] and yourself.”

This leads to an extensive response from someone, evidently senior, at the Equality Network, which makes it clear that some of the conversation the previous day was about the possibility of using a legal sex question – that is, a binary-sex question that asks people to record what is on their birth certificate. The email lays out eight points about why a legal sex question “would be unacceptable.” These include the claims that; trans people will still respond with their gender identity anyway; some will not answer; it “will do nothing to improve non-binary people’s ability to answer in a way that reflects who they are”; that this will constitute a “regression of their rights to answer the Census in a way that reflects how they live and identify”; that Census reports using legal sex will ‘misgender’ people (the individual census records are not made public for 100 years, and census data is processed in aggregates; what is meant here then by ‘misgendering’ is that data will be analysed by birth sex in large scale populations analyses or rather, what is actually of concern is that trans people will be “sent a message that they are seen as ‘male’ or ‘female’ by NRS”); it is out of step with other population surveys in Scotland that already collect gender identity; that if the law is reformed to recognise non-binary as a legal sex they will still be “completely unable to answer the question”; and finally, that nothing is being changed about the sex-question because the guidance has already made it *de facto* a gender identity question for the last two censuses, and that the “overall purpose and usefulness of collecting sex data is not impacted by being inclusive and respectful of the reality of trans people’s lives.”

What I want to draw particular attention to here is the degree of concern NRS have about soliciting EN/

STA’s opinions on this matter, how evidently comfortable EN/STA feel explaining at length to NRS all the ways a binary legal sex question is “unacceptable,” and the extent to which EN/STA’s very clear instruction on this may explain how NRS ended up proposing a major change to the sex question of the Scottish Census, that, as we have just seen, their own data did not support. NRS’s response to this extensive list of arguments is apparent alarm that they have upset EN/STA by even raising the question of a binary legal sex question. They reply in the first instance, forty-five minutes after EN/STA’s email, thanking them and noting that the “input from yourself and [redacted] continues to be invaluable as we move forward with the question development.” Twelve minutes later they reply again, noting that they have “reread the email” and “would just like to make clear that NRS were simply wanting to clearly understand the full implications of any definitions used in the Census as we consider the legal and parliamentary processes.” They continue, “[p]lease do not think this is a suggestion that NRS are taking a different approach to the work we have taken forward...just simply making sure everything is clearly evidenced as we move forward through the formal processes.” At an unspecified time, EN/STA reply. “Thanks for the reassurance,” they write, “we were hoping that was the case...Cheers.”

## 2.2 Footnotes

<sup>1</sup>The protected characteristic in the Equality Act is ‘Gender Reassignment.’

<sup>2</sup>There is a second round of cognitive testing conducted in Autumn 2018. By this stage NRS have decided to go ahead with the non-binary sex question and are testing three different formulations (Annex 5). The responses are not given the kind of detailed coverage we see for the first cognitive tests, but we are told that “there was strong support for the non-binary response options within the question on sex,” (78) which, given that all the questions were non-binary, doesn’t tell us a great deal. Once again subjects report confusion about whether the question “is asking about biological sex, gender identity or gender expression” and think that version including the phrase ‘identify in another way’ makes the question “a gender identity question.” (78)

# Postscript

## Passage of the Census (Amendment) (Scotland) Act 2019

On realising that the one-page Scottish Census Amendment bill was not as straightforward as would appear, Joan McAlpine's CTEEA committee put out a call for evidence, and three meetings were scheduled for the committee to hear oral evidence from women's organisations, data-users and representatives from LGBT/trans rights organisations. This is the first place women and data-users arguments against the conflation of sex and gender identity in the census questions appear substantively in the public record concerning this matter. Allowing these opinions to be heard caused considerable controversy. Professor Surya Monro, of the University of Huddersfield, **wrote to the committee** to express her "deep concern about the hijacking of critical approaches to gender by a small group of academics and others who claim to represent the views and interests of women," but who were merely, she maintained, peddling "prejudice...wrapped up in a cloak of supposed expertise and academic language and/or assertions of being feminist." Joan McAlpine **has also recalled** that she was "subjected to some unpleasant social media attacks simply for doing my job in committee and allowing women to speak on the parliamentary record." And indeed, that **abuse intensified** when the McAlpine **announced the results** of the Committee's Stage 1 report.

Just as with the contents of this report, the arguments presented by feminist representatives to the committee focused largely on the conflation of sex and gender identity, its impact on gathering sex data, why sex data matters to women, and the importance of such data for equalities monitoring and meeting the requirements of the EA2010 and the PSED. In oral evidence given on 13 December, Professor Susan McVie, speaking as the Co-director of the Administrative Data Research Centre in Scotland, argued that it was a "fundamental property of research that, in designing a questionnaire, you need to be extremely clear about what you are measuring." Consequently, she continued, "I think the General Register Office for Scotland got it wrong when it redesigned the census in 2011 and conflated sex and gender identity in one question." (**CTEEA 2018b**: 4) The response to this charge of conflation was somewhat confused. In the letter to the committee on December 5, NRS claimed that "the intention behind the Census Bill was not to conflate the matter of sex and gender identity," (**NRS 2018d**) even while the *Policy Memorandum* to the Bill, which must have been prepared in

conjunction with NRS, lays out that the "Scottish Government regards gender identity as already being covered by the reference to sex." (**SG 2018c**: 1) Contrary to NRS's disavowal, the submission from **Stonewall Scotland** explicitly embraces the fact of conflation, welcoming that the "Scottish Government will continue to recognise the existing question on 'sex' to reflect gender identity, rather than legal sex or sex assigned at birth," (5.4) and noting that the trans status question "should not ask about gender identity, which will be addressed through the sex question." (5.7)

After receiving a substantial quantity of **written submissions**, and taking three sessions of oral evidence, CTEEA published its Stage 1 Report on the Census Amendment Bill on **7 February 2019**. It concluded that it "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'" and accepted proposals that the Bill be amended to remove the phrase 'including gender identity' and leave "the mandatory sex question unchanged." The committee also "recognise[d] all sincere and strongly held views as to whether the mandatory sex question should remain binary," but proposed that "the mandatory sex question should remain binary in order to maximise response rates and longitudinal consistency with previous censuses." On 28 February, Joan McAlpine commented on the results of the committee's deliberation on Twitter, in a **thread** that won Holyrood Magazine's **'Tweet of the Year'**. "The census," she wrote, "sets an important precedent. How can we defend the Equality Act, which clearly gives women protections based on biological sex, if we have said this definition of sex is irrelevant to our largest data gathering exercise?"

## Timeline of the Passage of Census (Amendment) (Scotland) Act 2019

<b>2 October 2018</b>	The draft bill was <b>introduced</b> to the Scottish Parliament by the Cabinet Secretary for Culture, Tourism and External Affairs Fiona Hyslop MSP.
<b>11 October 2018</b>	The Culture, Tourism, Europe and External Affairs (CTEEA) Committee, whose convener is SNP MSP Joan McAlpine, is charged with scrutiny of the bill. CTEEA put out a call for evidence, with a deadline of 23 November 2018.
<b>6 December 2018</b>	The CTEEA committee takes <b>oral evidence</b> on the bill. The first panel consists of Professor Rosa Freedman of Reading University and Susan Smith from For Women Scotland. The second panel consists of Tim Hopkins from the Equality Network and Vic Valentine from the Scottish Trans Alliance.
<b>13 December 2018</b>	The CTEEA committee takes <b>oral evidence</b> on the bill. The panel consists of Lucy Hunter Blackburn from policy analysis collective Murray Blackburn Mackenzie, Professor Jackie Cassell from Brighton and Sussex Medical School, Gerry McCartney from NHS Scotland and Professor Susan McVie from the University of Edinburgh.
<b>20 December 2018</b>	The CTEEA Committee takes <b>oral evidence</b> on the bill. The panel consists of Cabinet Secretary Fiona Hyslop MSP, Amy Wilson and Scott McEwen from the National Records of Scotland and Simon Stockwell and Emma Luton from the Scottish Government.
<b>7 February 2019</b>	Stage 1 <b>report</b> on the bill is published by CTEEA. <b>Press release</b> on publication.
<b>28 February 2019</b>	Stage 1 <b>debate</b> in the Chamber.
<b>2 May 2019</b>	<b>Stage 2</b> in Committee, where the bill is subject to some amendments.
<b>12 June 2019</b>	Stage 3 <b>debate</b> in the Chamber.
<b>18 July 2019</b>	Bill receives Royal Assent and becomes the <b>Census (Amendment) (Scotland) Act 2019</b> .
<b>7 August 2019</b>	NRS <b>announce</b> their intention to carry a binary sex question in the 2021 census. Cabinet Secretary Fiona Hyslop MSP <b>writes</b> to CTEEA confirming this decision. She also notes that NRS intend to undertake “quantitative testing on the sex question and, over the coming months, will be testing the question and associated guidance, and how the transgender status/history and sexual orientation questions interact with it.”

## England and Wales Census Legislation 2019

The equivalent legislation at Westminster is the **Census (Return Particulars and Removal of Penalties) Act 2019**. This is introduced to the House of Lords on 1 May 2019 and receives Royal Assent on 8 October 2019. Unlike the Scottish legislation, the bill is not drafted in a way that conflates sex with gender identity and there is a much more limited discussion about this issue.

During the Second Reading of the bill in the House of Lords, Liberal Democrat Baroness Barker suggests (**Hansard, 13 May 2019**) to the Minister Lord Young that a binary sex question “*causes problems for...trans people, non-binary people and intersex people.*” Lord Young states in response: “*The ONS is recommending that there be a note on the sex question, to advise that a gender question follows and include guidance that those who wish to can use the free-text box on gender identity to write ‘intersex’ or another identity.*”

Baroness Barker later (**Hansard, 4 June 2019**) 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.*” Lord Young replies: “*The guidance accompanying the 2021 census is already in development. I can confirm that draft guidance for the sex question makes it clear that people do not need to answer according to the sex on their birth certificate, and that that is case whether or not they have a gender recognition certificate. This is consistent with the guidance that accompanied the 2011 census. The draft guidance for 2021 states that you can fill in whatever you prefer.*”

# The Unresolved Issue of the Guidance

Given evidence heard during the passage of the Scottish Census Amendment Act regarding the guidance accompanying the sex question, the Stage 1 Report also observed that the “Committee has received considerable evidence that there was a lack of clarity and awareness regarding the existence of online guidance concerning the self identification approach adopted in 2011. The Committee considers that there must be absolute clarity with regard to the approach that is adopted in 2021.” It was therefore arranged for NRS to provide oral evidence to CTEEA on two further occasions – 12 September 2019 and 9 January 2020 – before the census order was laid in the Scottish Parliament on 23 January 2020.

## 7 August 2019

Fiona Hyslop, the Cabinet Secretary responsible for the Bill, **writes to CTEEA** arguing, contrary to the testimony given by Susan McVie, that “There is no evidence to suggest that the addition of the guidance in 2011 introduced any discontinuity in the data and ONS are currently proposing to take the approach again for the 2021 Census in England and Wales. Continuing with the same approach in Scotland as in 2011 would maintain the consistency of the Scottish data over time and also allow for harmonisation across the UK.”

## 5 September 2019

NRS **write** to CTEEA ahead of their appearance at Committee on 12 September 2019. They note that “we are now entering a further period of testing on the guidance which accompanies the sex question (as detailed in the accompanying document) and we hope to have results by late December to feed into the Committee’s consideration of the formal draft Order.”

## 11 September 2019

Eight Scottish social scientists, including Susan McVie, write to CTEEA voicing concern about the guidance proposed to accompany the sex question on the basis that “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.”

## 12 September 2019

NRS attend an **oral evidence session** at CTEEA. When asked about the 11 September letter from Scottish social scientists, Amy Wilson, Director of Statistical Services at NRS, admits that “we do not understand enough about the effect of providing the guidance and people using it,” (5) and “I do not think that we know how it affected the data in 2011.” (6)

## 18 September 2019

CTEEA Convener Joan McAlpine MSP **writes** to NRS stating that: “The Committee would welcome clarification on whether the National Records of Scotland is testing responses to the sex question without accompanying

guidance. If such testing has not already taken place, the Committee requests that such testing is conducted and that the Committee receives an update on the outcome of that testing before the Draft Census Order is laid.”

## 20 September 2019

A group of 53 academics write to CTEEA “in support of National Records of Scotland’s recommendation that trans people continue to answer the sex question in the 2021 census in line with how they live.”

## 25 October 2019

**Letter** from CTEEA to NRS in which they state, “The recommendation from the National Records of Scotland’s Government Statistical Services statistician group continues to be that self-identification provides the best balance in meeting the diverse range of user needs across the full Census dataset. This recommendation is based on results of previous testing, approaches taken across the UK, and the feedback from discussions with stakeholders and peers.”

## 10 December 2019

**Letter** from Stonewall to CTEEA in which they state: “we have serious concerns about suggestions that have been made to amend the sex question guidance to require trans people to answer this in accordance with their sex assigned at birth, or their legal sex. Despite the inclusion of the voluntary trans status question, the 2021 Census would reflect a retrograde step for trans equality if the existing guidance on answering the mandatory sex question were to be amended in this manner and represent the first backwards step on LGBT equality in years.”

## 18 December 2019

**Letter** from 80 social scientists to the three UK census authorities is shared with CTEEA. The signatories highlight their concern about the proposed guidance for the sex question and in particular the impact on the quality of data collected for some subgroups of the population. (The letter originally appeared in **The Sunday Times** on 15 December 2019.)

## 18 December 2019

**Letter** from NRS to CTEEA in which NRS inform MSPs that they intend to share the outcome of their testing of the guidance in the oral evidence session on 9 January 2020.

## 9 January 2020

NRS attend **oral evidence session** at CTEEA. The papers for this meeting contain **correspondence** between NRS and three Scottish academics they met on 7 October 2019.

The correspondence also reveals the academics’ frustration with NRS officials, and states that the draft minutes produced by NRS ‘misrepresents’ the meeting, and omits parts of the discussion.

#### 16 January 2020

**Letter** from CTEEA Convener Joan McAlpine MSP to Cabinet Secretary Fiona Hyslop MSP. The letter contains a series of questions relating to the proposed guidance for the sex question, as referred to during the oral evidence session with NRS on 9 January 2020.

#### 30 January 2020

NRS and Cabinet Secretary Fiona Hyslop MSP attend **oral evidence session** with CTEEA.

#### 26 February 2020

Letter from Cabinet Secretary Fiona Hyslop to CTEEA confirming that NRS have decided to adopt guidance for the sex question that instructs respondents to answer based on their self-declared gender identity.

#### 26 February 2020

**Letter** from Murray Blackburn Mackenzie citing a freedom of information request response from NRS which revealed they had not considered the backgrounds and expertise of the signatories to the letter to CTEEA co-ordinated by Kevin Guyan (see above).

#### 27 February 2020

NRS and Cabinet Secretary Fiona Hyslop MSP attend **oral evidence session** with CTEEA, following which the Committee formally votes to pass the census order.

#### 4 March 2020

Scottish Parliament formally approves the census order.

#### 2 April 2020

**Letter** from NRS to CTEEA with some detail about how the sex and gender identity questions will appear in the online questionnaire.

#### 28 April 2020

**Letter** from Cabinet Secretary Fiona Hyslop MSP to CTEEA regarding the legal status of the guidance.

#### 17 July 2020

**Letter** from Cabinet Secretary Fiona Hyslop MSP to CTEEA to inform MSPs that NRS will be postponing the census in Scotland to 2022.

#### 4 August 2020

**Letter** from Professors Lindsay Paterson and Susan McVie of Edinburgh University seeking clarity regarding the locus of CTEEA in approving the guidance for the census. (The academics refer to a letter they had received from NRS Registrar General Paul Lowe in which he claimed that the committee had approved the guidance.)

#### 6 August 2020

**Letter** from CTEEA Convener Joan McAlpine MSP in response to Professors Paterson and McVie, in which she clarifies that CTEEA have no formal role in signing off the guidance.

#### 17 September 2020

NRS **oral evidence session** with CTEEA, during which Convener Joan McAlpine MSP questioned the Registrar General on his misrepresentation of the Committee's role vis-à-vis the guidance.

## INTERACTION BETWEEN ONS AND DATA USERS ON GUIDANCE

#### 18 December 2019

**Letter** from 80 social scientists (co-ordinated by Professor Alice Sullivan) to the three UK census authorities. The signatories highlight their concern about the proposed guidance for the sex question and in particular the impact on data quality for some subgroups of the population. (The letter originally appeared in **The Sunday Times** on 15 December 2019.)

#### 4 June 2020

ONS send out invitation to attend a roundtable discussion regarding the proposed guidance for the sex question. [Source: **FOI**]

#### 24 June 2020

Roundtable discussion takes place. In attendance are representatives from: Stonewall, LGBT Foundation, the Government Equalities Office, NHS England, the Equality and Human Rights Commission and Fair Play For Women, as well as the LGBT National Health Adviser and individuals from 11 UK higher education institutions. [Source: **FOI**]

#### 11 September 2020

Office for Statistics Regulation **writes** to all three UK census authorities. In the letter to ONS, it states that "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 regulator goes on to say that "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."

The question of the guidance remains unresolved at the time of going to press.



## Annex 1: Results of EHRC development of a suite of sex and gender identity questions

Suggested questions	Data captured/Recommendations
<p><b>Q1</b> At birth were you described as...</p> <p><i>Please tick one option</i></p> <p>Male <input type="checkbox"/></p> <p>Female <input type="checkbox"/></p> <p>Intersex <input type="checkbox"/></p> <p>I prefer not to say <input type="checkbox"/></p>	<p>a) We would recommend that this question is asked first and a clear explanation is given for collecting the information. Confidentiality and anonymity should be described and assured (where possible).</p> <p>b) This question captures the sex ascribed to individuals at birth. A small number of individuals are described as intersex at birth, rather than male or female, therefore this option should be included. The sensitivity of the question requires a 'prefer not to say' option. This question, when used in combination with question 2, will allow for gender identity and transgender history to be captured.</p> <p>c) Testing did reveal that some trans</p>

Suggested questions	Data captured/Recommendations
	<p>participants would not be comfortable answering a question like this in <i>any</i> context, because they do not have to reveal this identity, are legally protected from doing so (hold a GRC) ), or feel uncomfortable revealing this. There will always be participants who will not want to reveal this information.</p>
<p><b>Q2</b> Which of the following describes how you think of yourself?</p> <p><i>Please tick one option</i></p> <p>Male <input type="checkbox"/></p> <p>Female <input type="checkbox"/></p> <p>In another way: <input type="checkbox"/> _____</p>	<p>a) We would recommend that this question is asked after question 1. This question captures the identity of individuals <b>now</b>. The insertion of the ‘in another way’ option was considered to be important for those individuals who may not think of themselves as male or female, and this terminology is preferred to the usual option of ‘other’. This question, when used in combination with question 1, will allow for gender identity and transgender history to be captured.</p> <p>b) Testing found that the terms ‘male’ and ‘female’ are less problematic than ‘man’ and ‘woman’ because the former are seen as biological facts and not socially constructed like the latter terms. Additionally, despite concerns raised in the focus groups around the potential confusion of using traditional sex categories when asking how one describes themselves (such as about</p>

Suggested questions	Data captured/Recommendations
	<p>gender), evidence from cognitive interviews suggests that the categories 'male' and 'female' do work, and they work well for both trans and non-trans individuals.</p> <p>c) Where there is limited space in a form or questionnaire, or where the information required need not capture the legal definition of gender reassignment; this question and question 1 are adequate for capturing transgender history and gender identity.</p> <p>However, there will be people with a transgender history who will not disclose it through questions 1 and 2, either because they hold a GRC or because they simply do not wish to. A reliance on these two questions alone may therefore result in underestimation.</p>
<p><b>Q3</b> Have you gone through any part of a process (including thoughts or actions) to change from the sex you were described as at birth to the gender you identify with, or do you intend to?</p> <p>(This could include changing your name, wearing different clothes taking hormones or having any gender reassignment surgery).</p>	<p>a) Question 3 enables a better capture of gender reassignment in line with the definition of gender reassignment protected by the 2010 Equality Act. We recommend this question is used in combination with Q4, which will enable capture of the stage at which individuals are in the process, if any.</p> <p>However, there will always be trans</p>

Suggested questions	Data captured/Recommendations
<p>Yes <input type="checkbox"/> → Please go to Q4</p> <p>No <input type="checkbox"/> → End.</p>	<p>people who will choose not to answer this question (see above).</p>
<p><b>Q4</b> Continuing to think about these examples, which of the following options best applies to you?</p> <p><i>Please tick one option</i></p> <p>I am thinking about going through this process <input type="checkbox"/></p> <p>I am currently going through this process <input type="checkbox"/></p> <p>I have already been through this process <input type="checkbox"/></p> <p>I have been through this process, then changed back <input type="checkbox"/></p> <p>None of the above <input type="checkbox"/> _____</p> <p>I prefer not to say <input type="checkbox"/></p>	<p>a) Question 4 only works in conjunction with question 3, as it directly refers to the examples used in the previous question. Trans people will be routed to question 4. Question 4 enables a better capture of where individuals are in the process, in line with the definition of gender reassignment protected by the 2010 Equality Act. The options elicit intention to, whether currently undergoing and having gone through gender reassignment (as defined by the individual).</p> <p>b) The ‘prefer not to say’ option was recommended by participants. The ‘none of the above’ answer option gives participants the opportunity to write in an alternative response if they wish to.</p>

Suggested questions	Data captured/Recommendations
<p><b>Q5</b> Which of the following describes how you think of yourself?</p> <p><i>Tick all that apply</i></p> <p>Trans man <input type="checkbox"/></p> <p>Trans woman <input type="checkbox"/></p> <p>Transsexual person <input type="checkbox"/></p> <p>Gender variant person <input type="checkbox"/></p> <p>Cross dressing person <input type="checkbox"/></p> <p>Transvestite person <input type="checkbox"/></p> <p>Intersex person <input type="checkbox"/></p> <p>In another way: <input type="checkbox"/> _____</p> <p>I prefer not to say <input type="checkbox"/></p>	<p>a) This question will enable capture of the different gender identities within the trans population.</p> <p>b) We would advise that where possible, this question is included since it provides an opportunity for people to express themselves in the way that they want to.</p> <p>c) The ‘prefer not to say’ option was recommended by participants, and the option to self-define ‘in another way’. The use of ‘person’ enables a human identity, rather than simply a category. The options ‘transvestite’ and ‘cross dresser’ were recommended separately as they can be different identities, as were the options to define as a ‘trans man’ or ‘trans woman’. The list of answers is not exhaustive, but represents most forms of identity and self identity, without becoming onerously long.</p>



# Annex 2: Three Questions Tested in ONS/NRS/Ipsos MORI June-August 2017 Quantitative Testing

Figure 3: The binary sex question

3 What is your sex?  
◆ Tick one option

Male  
 Female

Figure 4: The non-binary sex question (with 'other, write in')

3 What is your sex?  
◆ Tick one option

Male  
 Female  
 Other, write in

Figure 5: The sex and gender identity question set

3 What is your sex?  
◆ Tick one option

Male  Female

4 Which of the following describes how you think of your gender identity? *This question is voluntary*  
◆ Tick one option

Man  Woman  
 In another way, write in

(NRS 2018c: 15)

# Annex 3: Questions Tested in NRS/ScotCen Autumn 2017 Cognitive Testing

Figure 6: Questions tested on sex, gender identity and trans status

Version one: Sex and Gender Identity version	Version two: Non-binary Sex
<p><b>1</b> What is your sex?</p> <p>◆ Tick one option</p> <p><input type="checkbox"/> Male      <input type="checkbox"/> Female</p> <p><b>2</b> Which of the following describes how you think of your gender identity? <i>This question is voluntary</i></p> <p>◆ Tick one option</p> <p><input type="checkbox"/> Man      <input type="checkbox"/> Woman</p> <p><input type="checkbox"/> In another way, please write in</p> <p>□□□□□□□□□□□□□□□□</p> <p><b>3</b> Do you consider yourself to be transgender, or have a transgender history?</p> <p>◆ Tick one option</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Prefer not to say</p>	<p><b>1</b> What is your sex?</p> <p>◆ Tick one option</p> <p><input type="checkbox"/> Male</p> <p><input type="checkbox"/> Female</p> <p><input type="checkbox"/> Other, please write in</p> <p>□□□□□□□□□□□□□□□□</p> <p><b>2</b> Do you consider yourself to be transgender, or have a transgender history?</p> <p>◆ Tick one option</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Prefer not to say</p>

(NRS 2018c: 14)





# Annex 5: Questions Tested in NRS Autumn 2018 Further Cognitive Testing and Small-Scale General Population Survey

Figure E1: Sex Question – version A

**A** What is your sex?  
◆ Tick **one** box only

Female  
 Male  
 Other, please write in

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Figure E2: Sex Question – version B

**B** What is your sex?  
◆ Please select the option for how you identify.  
◆ Tick **one** box only

Female  
 Male  
 Other, please write in

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Figure E3: Sex Question – version C

**C** What is your sex?  
◆ Please select the option for how you identify.  
◆ Tick **one** box only

Female  
 Male  
 Identify in another way, please write in

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(NRS 2018c: 77)

# Annex 6: Emails between National Records of Scotland and the Equality Network/Scottish Trans Alliance

Email thread 21 August 2018 - 29 August 2018 - 'Census questions 2021'

From: [REDACTED]@nrscotland.gov.uk [REDACTED]@nrscotland.gov.uk  
Sent: 21 August 2018 11:06  
To: [REDACTED]@equality-network.org [REDACTED]@equality-network.org  
Cc: [REDACTED]@nrscotland.gov.uk  
Subject: Census questions 2021

[REDACTED]

I appreciate this is very short notice, but I wonder if either or both of you would be available for a telephone meeting this morning. In preparation for Census 2021, NRS are currently exploring the existing legal framework, and penalty provisions. There are implications for the sex and trans status question development you [REDACTED] alerted us with, and [REDACTED] we have careful consideration.

I would like a quick discussion to get a sense of your views.

Thanks,

[REDACTED]

National Records of Scotland | Ladywell House | Edinburgh | EH12 7TF  
[REDACTED]@nrscotland.gov.uk  
[www.nrscotland.gov.uk](http://www.nrscotland.gov.uk) | [www.scotlandscensus.gov.uk](http://www.scotlandscensus.gov.uk)

From: [REDACTED]@equality-network.org  
Sent: 21 August 2018 13:58  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Census questions 2021

Hi [REDACTED]

Unfortunately both [REDACTED] and I were out of the office this morning. I'm around this afternoon, or alternatively looking at our diaries James may be available tomorrow afternoon and we both have fairly decent availability Thursday [REDACTED] - let me know if there's any [REDACTED] work for you this week and we can try and firm up something for definite?

Best Wishes,

From: [redacted]@nrscotland.gov.uk [redacted]@nrscotland.gov.uk>  
Sent: 21 August 2018 14:36  
To: [redacted]@equality-network.org [redacted]@equality-network.org>  
Cc: [redacted]@nrscotland.gov.uk  
Subject: RE: Census questions 2021

[redacted]

Thank you for getting back to me. Are you available just now? If so, if you pass on your phone number I can give you a quick call just now.

Thanks, [redacted] [redacted]

From: [redacted]@equality-network.org [redacted]  
Sent: 21 August 2018 14:40  
To: [redacted]  
Cc: [redacted]  
Subject: RE: Census questions 2021

Hi [redacted]

Yes sure – I'm on [redacted]

[redacted]

From: [REDACTED]@nrscotland.gov.uk [REDACTED]@nrscotland.gov.uk>  
Sent: 22 August 2018 10:02  
To: [REDACTED]@equality-network.org [REDACTED]@equality-network.org>  
Cc: [REDACTED]@nrscotland.gov.uk  
Subject: RE: Census questions 2021

[REDACTED]

Thank you for your time yesterday – it was very helpful to hear your position. While I appreciate my questions may have appeared a little unusual given the work you have supported us with to date, I would like to stress that the conversation was simply so the NRS

had a clear view of the landscape and therefore how we can approach the legal and legislative processes for Census. This is particularly important for Census, as there are penalties associated with Census non-completion.

The points you raised yesterday were important in NRS being able to rule out some potential options for how we take this through the necessary processes. While the concerns you raised were not surprising, it was useful to have them reiterated again yesterday.

As things move forward with these questions, it is likely NRS will need to undertake further testing. This is simply because any changes we make to questions must be fully tested before they can be included in Census. The testing last week was very positive, but again did provide evidence where we may need to make some further small changes to the questions.

So this is simply a heads up that if you are able to support us with [REDACTED] to move forward that would be greatly appreciated, as the development work on these questions would not be as far advanced as it currently is without the input from James and yourself.

Many thanks,

[REDACTED]

National Records of Scotland | Ladywell House | Edinburgh | EH12 7TF  
[REDACTED] contactSCOTLAND-BSL [REDACTED]@nrscotland.gov.uk  
[www.nrscotland.gov.uk](http://www.nrscotland.gov.uk) | [www.scotlandscensus.gov.uk](http://www.scotlandscensus.gov.uk)

From [redacted]@equality-network.org]

Sent: 23 August 2018 11:30

To [redacted]

Cc [redacted]

Subject: RE: Census questions 2021

[redacted]

No problem, always happy to chat! I thought it might be useful to put some of our conversation in writing in case it helps you going forward on what our position is.

So as we discussed, there were several reasons why a "legal sex" question would be unacceptable:

- 1) The majority of trans people will continue to answer this question with how they identify.
- 2) Large numbers will be unhappy and complain about, or not answer the question at all, when realising there is an attempt to insist on categorising them by what is on their birth certificates and not who they are.
- 3) It will do nothing to improve non-binary people's ability to answer in a way that reflects who they are.
- 4) For any trans men and women who feel obligated to respond with their legal sex where this doesn't correspond with their identity, this will be a regression in their rights to answer the Census in a way that reflects how they live and identify. There has been clear guidance for the last two Censuses from both NRS and ONS that trans men and women should answer in line with their identity, not with what is recorded on their birth certificates.
- 5) For any trans people who feel obligated to respond with their legal sex where this doesn't correspond with their identity, they will be reported on throughout all Census reports in a way that misgenders them. This will be sending a message to trans people that they are seen as "male" or "female" by NRS, regardless of their gender identity.
- 6) It is out of step with current approaches to equality across Scotland. In particular, it is not in line with:
  - a. The Scottish Government's position on collecting sex demographic information – which it now does in a way that reflects how people live and identify, and in a non-binary inclusive manner, across its household surveys.
  - b. Legislation such as the Gender Representation on Public Board's Bill, which makes it clear that trans women without Gender Recognition Certificates are to be treated as women.

- c. The accepted position on trans equality throughout public bodies in Scotland and protected through the Equality Act 2010 that trans people's identities should be treated with respect and dignity regardless of whether or not they have a GRC – particularly considering the current onerous and difficult process for obtaining gender recognition.
- 7) If there is a move to a question that captures "legal sex" it may be the case that between the Census being finalised and published, a third non-binary legal sex is recognised in Scotland, which would then render anyone who received gender recognition as a non-binary person completely unable to answer the question, either truthfully or untruthfully!
- 8) It is a fundamental misunderstanding to think that the data collected by the "sex" question is changing, particularly given the guidance for trans men and women over at least the past two Censuses. Trans people are a very small proportion of the population. For 99% of people (probably slightly more), biological sex, legal sex and self-identified sex are identical. Many trans people will view their biological sex as in line with their self-identified sex, and some trans people have a legal sex that corresponds with their self-identified sex. Acknowledging that less than 1% of the population have a slightly more complex relationship with the term "sex" than the majority does not dilute the quality of the data collected. The overall purpose and usefulness of collecting sex data is not impacted by being inclusive and respectful of the reality of trans people's lives.

All of the above would also apply to a move to collect "biological sex", with the addition that asking people their "biological sex" in a way that was explained as being defined as their sex assigned at birth may be unlawful given current Gender Recognition Act privacy protections.

I got the impression from our conversation that it was "legal sex" that was being touted as a more acceptable version of the two – to be clear we are entirely opposed to either. Any question that is designed to pressure trans people to answer, or record them as, something other than their self-identified sex is totally unacceptable. It would reflect a major setback in trans rights, and be entirely out of sync with the current Government's approach to trans equality.

As always, we are very happy to be included in any meetings where we can help clarify any of the above, or to meet with yourself and colleagues at NRS again anytime. We will certainly be happy to help recruit people for further question testing in the future as well – just let us know when future testing is coming up and we'll make sure to share it through our networks.

Best Wishes,

[Redacted signature]

From: [REDACTED]  
Sent: 23 August 2018 12:18  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Census questions 2021

[REDACTED]

Thank you, The input from yourself and [REDACTED] continues to be invaluable as we move forward with the question development.

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From: [REDACTED]@nrsotland.gov.uk [REDACTED]@nrsotland.gov.uk>  
Sent: 23 August 2018 12:27  
To: [REDACTED]@equality-network.org [REDACTED]@equality-network.org>  
Cc: [REDACTED]@nrsotland.gov.uk  
Subject: RE: Census questions 2021

[REDACTED]

Having reread your email, I would just like to make clear that NRS were simply wanting to clearly understand the full implications of any definitions used in Census as we consider the legal and parliamentary processes, particularly in order to be clear in what the Census is doing and clearly demonstrating the reasons for the decisions made.

Please do not think this is a suggestion that NRS are taking a different approach to the work we have taken forward .. just simply making sure everything is clearly evidenced as we move forward through the formal processes. I did appreciate that it was a slightly unusual conversation from your perspective, but for NRS to be able to demonstrate the views of stakeholders is a particularly important part of the process at each step.

Thanks,

[REDACTED]

[REDACTED]

Thanks for the reassurance - we were hoping that was the case.

Cheers,

[REDACTED]



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