

11 September 2019

Dear Committee Members,

We have been made aware of a letter co-signed by a number of LGBT organisations in relation to the sex question in the census that ascribes certain views to us, as based on a recent article published in the journal *Scottish Affairs*.

For the avoidance of confusion, we would like to state that we do not recognise the description given of the argument in our article, and wish to take the opportunity to put an accurate account of our position on the record.

We believe that we believe that public authorities should recognise the importance of sex as a political and legal category, **as well as** self-declared gender identity. It is not our view, as suggested, that sex should **replace** self-declared gender identity in policy-making. Nor do we object to recognising self-declared gender identity in public services as the letter asserts.

We have repeatedly argued that the 2021 census is an opportunity to gather data **both** on sex and self-declared gender identity, and to provide good quality data on what are separate demographic characteristics. For example, in this blog on [Finding the middle ground](#) from February this year we state:

'Given where we are, we think the most appropriate and pragmatic response would be to recognise that both sex and gender or lived identity may be relevant to people's lived experiences. The more data we gather on both, the better placed we will be to understand the operation of each separately, and together. In practice, this means enabling people to declare their gender or lived identity in the census, without objecting to the continued collection also of clear data on sex in two categories, as defined in law. In a debate which can feel characterised by uncompromising either/or choices, the Committee's approach to the census offers a middle way which acknowledges the complexity and range of practical needs and individual perspectives.'

In a more [recent blog](#), we make the same point and raise our concerns about the current approach to testing:

'We think that the sex question should, as it unequivocally states, collect data on sex, and not data on gender identity. Any further testing should therefore have as its clear and sole purpose ascertaining the best way to do this... Data on gender identity, where this differs from a person's legal sex should be clearly collected as a category in its own right, using the separate voluntary transgender question.'

We fully understand that this is a sensitive policy area. The fundamental question at stake here is whether there are any circumstances in which it is reasonable to record data about a person's sex as recognised on their current birth certificate, as well as their self-declared gender identity, where the two do not match.

We believe that if recording sex is accepted as an insupportable infringement of rights in the high-profile context of the census, then this is likely to set a precedent in all other data gathering contexts, whether statistical or related to service provision.

Removing the ability to establish sex **alongside** that of self-declared gender identity is therefore a major step, with serious implications for the ability of public bodies to

implement and monitor the operation of the Equality Act in relation to the protected characteristic of sex.

We hope that Committee Members will understand why we felt it was necessary to write quickly in these terms, to prevent any misunderstanding developing of our views, as expressed in our article and elsewhere.

A summary of the main arguments in our article and our views are attached beneath this letter.

Kind regards,

Dr Kath Murray and Lucy Hunter Blackburn

Scottish Affairs article: key arguments

Losing sight of women's rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland

[Scottish Affairs Vol. 38 \(3\)](#)

This article is essentially a study about policy-making *processes*, which 'makes the case for the continued *relevance* of sex as an essential policy and legal category' (p.265, emphasis added here).

Looking at two case studies, we examines the *way* in which public authorities *replaced* sex, which is a protected characteristic under the Equality Act 2010, with self-declared gender identity as a basis for policy-making. The case studies examine decision-making by the census authorities and Scottish Prison Service respectively.

The article also lists other policy areas where this process has occurred. These are: NHS patient records; NHS ward allocation; local government equalities policies; the management of leisure services; recording in the criminal justice system; guidance for women's services; and guidance for supporting transgender children in schools (Herald, 2018). While space precluded further analysis of the processes followed in these areas, we note that they are part of a broader pattern. In this respect we quote from a book chapter authored by James Morton (Scottish Trans Alliance) in which he states:

'We strategized that by working intensively with the Scottish Prison Service to support them to include trans women as women on a self-declaration basis within very challenging circumstances, we would be able to ensure that all other public services should be able to do likewise... the learning from our prison work has made it much easier to assist other Scottish public services, such as NHS wards and schools, and to also respect trans people's gender identities' (2018, 233-234).

The main focus is therefore on the *processes* by which authorities *replaced rather supplemented* sex with self-declared gender identity as a key policy category, ahead of any change to the law. Our analysis shows that:

‘in policy-making the concept of gender, as a subjective matter of self-identity, has increasingly taken precedence over sex, as officially recorded at birth based on observed physical characteristics.’ (p. 266 emphasis not in original)

Looking at the policy development process, we observe that:

‘Public authorities have often failed to assess properly the impact on other groups who have specific protections under the Equality Act 2010, as the Act requires, or to consider intersections, for example between sex and religion’ (p. 283).

In this respect, our analysis:

‘raises questions about the adequacy of institutional safeguards against well-organised and highly purposeful lobbying, particularly where any groups detrimentally affected do not have effective representation’ (p. 262).]

We *do not* argue that public bodies should be blind to self-declared gender identity. Rather, we argue that public authorities need to balance the interests of different groups of rights-holders. For example, in relation to the Scottish Prison Service we state:

‘While policy on transgender prisoners concerns the safety and well-being of two groups of prisoners both usually regarded as vulnerable, the decision-making process only treated the vulnerability of transgender prisoners as relevant, even though the Angiolini report had recently highlighted the vulnerability of female prisoners.’ (p. 281)

The article does not discuss *how* service providers *should* balance the respective needs and interests of those with the characteristics of sex and self-defined gender identity, aside from underscoring that the rights of different groups must be balanced.

Our research has led us to the conclusion that the steps already taken in this direction have happened with insufficient scrutiny and impact assessment. We state that:

‘Policy capture has serious social and political consequences. In the case of gender self-identification, it has led to a clear failure to recognise the full range of interests affected.’ (p.84)

And that:

‘without space for counter arguments or alternative voices in the policy-making process, the idea that subjective identity should supersede sex remains a powerful policy driver.’ (p.275)

For the record, it is absolutely not our view that service providers should always treat all people of the same sex in the same way, nor is it our view that service providers should make no provision to recognise that some people have a self-declared gender identity which is different from their sex.

It is our view that meeting the needs of both groups will require considered and nuanced policy-making. This will most likely involve different approaches in different contexts, and sometimes new ways of delivering services to ensure everyone's rights are equally respected.