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Queer Conflicts, Concept Capture and Category Co-Option: The Importance of Context in the State Collection and Recording of Sex/Gender Data

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Abstract

Queer, trans and non-binary lives, bodies, relationships, and communities often complicate the taken-for-granted processes through which the state manages those under its power. In this article, we explore the forms of power and harm at play in attempts to quantify people through administrative processes of state data collection about sex and gender, and in the current UK and Scottish context, examine some of the sites for wider conflicts over constructions of sex and gender in public life. We emphasise the need to collect sex/gender data in ways that reflect the intersectional lives of data ‘subjects.’ We also suggest that governments and public bodies should not adopt a unitary definition of sex or gender in data collection exercises such as the census, or other administrative categories such as criminal justice records, and argue those who lobby to record ‘sex not gender’ in data collection are engaging in a strategy of *concept capture* (reducing sex to a binary, biological model that excludes trans and non-binary people) through the *co-option* of a number of administrative and legal categories across a wide range of social and political fora. We conclude by recommending that public bodies asking about sex and gender should: co-produce questions with the community that is being surveyed; ensure that the wording of each question, and its rubric, is sensitive to the context in which it is asked and the purpose for which it is intended; and avoid

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attempting to offer any overarching standard definition of sex or gender that would be applicable in all circumstances. To engage in meaningful sex/gender data collection and recording that does not cause harm, governments and public bodies should avoid relying on reductive, over-simplistic and generalistic categories that are designed to fit the standardised norm. In being attentive to individual contexts, needs and interests when formulating categories and records, they can make space for more intersectional experiences to be made visible.

Keywords

sex, gender, queer, trans, non-binary, data collection, census, concept capture

Introduction

Queer, trans and non-binary lives, bodies, relationships, and communities often complicate the taken-for-granted processes through which the state manages the people who come under its power. In this article, we explore the forms of power and harm at play in attempts to quantify queer people through administrative processes of state data collection, and how, in the current UK and Scottish context, these have become a site for wider conflicts over constructions of sex and gender in public life.

In the UK, there is a clear duty for public bodies to collect information pertaining to the delivery of services, and a broader duty on government to collect statistical information, particularly as regards what are commonly referred to as ‘protected characteristics’ – i.e. the types of characteristics – such as age, sex, race and disability – that the UK Equality Act 2010 (EqA) protects from discrimination. Collection of this sort of information is intended to inform public policy and service delivery, and facilitate wider dissemination of information to the public. Whether intended or not, it also increases the visibility and intelligibility of a broader diversity of human lived experience, potentially thereby reducing stigma and discrimination against more marginalised groups and individuals.

These obligations and incentives to collect information have to be balanced with a duty to minimise potential harm associated with over-intrusive attempts to count and measure populations and their needs or experiences. This includes balancing the need for information against the burden on respondents of answering surveys and censuses; and the individual right to privacy, particularly under Article 8 of the European Convention on Human Rights (ECHR), as well as the collective need for and public interest in security and privacy.

Recently, there have been a range of social conflicts across the UK focused on the categorisation and collection of *data* – the administrative systems that regulate and measure our lives, and the systems of social power they embody. The categories embedded in apparently-innocuous collections of data are sites of struggle, shaping directly who ‘counts’ as what for the purposes of public life. Thus, these ‘category conflicts’ matter deeply.

Some of these conflicts have focused on what we mean by sex/gender data, and the importance and impact of collecting such data. In December 2020, the Office of the

Chief Statistician in the Scottish Government opened a public consultation on their *Draft Guidance for Public Bodies on Collection and Publication of Data on Sex and Gender*. The OCS stated that this was ‘in response to concerns raised during proposals to reform the Gender Recognition Act in Scotland, about how data on men and women is currently collected, disaggregated and reported’ (<https://www.gov.scot/publications/sex-and-gender-in-data-working-group—collecting-data-on-sex-and-gender-draft-guidance-for-feedback/>). The consultation closed in February 2021 and final guidance was produced in September 2021 (Scottish Government, 2021b).

In this article, we develop the arguments we made in responding to the Chief Statistician’s consultation on collecting data on sex and gender, with the aim of generating broader insights on sex/gender data collection for the current UK context. In the next two sections we set out relevant arguments from the literature about the reasons for and the potential negative impacts of data collection on particular groups being surveyed, and argue for the need to collect data in ways that reflect the intersectional lives of data ‘subjects’. In section four we unpack more precisely the definitions of sex and gender that are and should be used in such data collection exercises, arguing there is no one definition of sex or gender – nor should there be. Section five places the discussion in previous sections in the current context of collecting data about sex and gender, giving two recent examples of areas where conflict has arisen in Scotland over if and how to collect sex/gender data: the Census; and criminal justice records. Here we focus our critique specifically on the ‘sex not gender’ movement that has lobbied for the collection and recording of data about ‘biological’ sex rather than self-declared sex or gender. Finally, in section six we offer an explanation for the continued attempts to make seemingly minor administrative changes to how we record sex/gender that have exercised politicians, academics, ‘policy analysts’, activists and others across Scotland (and beyond). We argue that in lobbying to record sex rather than gender, the ‘sex not gender’ movement harnesses strategies of *concept capture* that attempt to embed a regressive binary and biological understanding of sex in an array of legal and administrative categories. We conclude by recommending that public bodies asking about sex and gender should: co-produce questions with the community that is being surveyed; ensure the wording of each question is sensitive to the context in which it is asked and the purpose for which it is intended; and avoid attempting to offer any overarching standard definition of sex or gender that would be applicable in all circumstances. We also conclude that being sensitive to individual contexts, needs and interests when formulating categories and records allows for more data about intersectional lived experiences to be generated and made visible.

The Limits and Impacts of State Data Collection

In working towards an appropriate approach to data collection about sex and gender, it is useful to consider in more depth *why* data are collected and the potential harms of collecting or not collecting data about particular groups.

An explicit tension exists between the state’s duty on one hand to collect information and on the other to minimise intrusion into people’s lives. A wide and rich body of theoretical scholarship describes and explores the ways in which the collection of data by the state exerts power – often drawing on and developing Foucault’s (1980) work on bio-power

and subsequently biopolitics. According to this view, the state's gaze – the many ways in which it produces knowledge about its subjects – itself becomes a power strategy, with knowledge and power irrevocably bound together in the forces of government. Subsequent developments of the concept of biopower emphasise how the categories through which data are collected have the power to shape populations both at the micro and macro level, as people are made to fit themselves into particular categories and thus reinforce the values and ideas which underlie these systems of categorisation (Raman and Tutton, 2010). While collecting data about people and groups can contribute to harms experienced by these communities, *not* collecting data on particular sections of the public can also cause harm, where the state deliberately, or through lack of capacity, withdraws its gaze and hence the protective functions of government (Mbembe, 2008).

The state and public services collect data about a wide variety of groups and for a wide variety of purposes. In addition to censuses, which collect a small number of key indicators over the large majority of a country's population, data are collected through household surveys, consultations, and by marketing and communications consultancies working with the public sector. Public services collect their own data to inform delivery and evaluation, and anyone who interacts with a service will generate large quantities of (often revealing and intimate) administrative data (Baffour et al., 2013).

Narratives of contemporary government and digital innovation often rest on the contention that the public sector has historically lacked the data to evaluate and target social policy – that although it collects large amounts of information about the people who do use its services, this only covers the people it is able to reach, and the most vulnerable are missed out (Lerman, 2013; Munne, 2016; ONS, 2020). From this perspective (one also implicit in the foundational values of the Office for National Statistics' Code of Practice for Official Statistics), many of the harms faced by vulnerable groups are intensified by insufficient or inaccurate collection of data by the public sector, so that services are not designed to meet their needs or they are locked out from access (ONS, 2021; Smith and Henderson, 2018).

Thus, there is often a drive on the part of governments to collect more data in order to feed 'scientific' or 'evidence-informed' policy. Modernisation of government in this context involves expanding governance – i.e. the administrative data collection infrastructure of government and public services, and drawing other 'novel' data sources to extend the gaze of the state, including private sector and commercial data, data from social networking sites, and data collected by Internet platforms (Kennedy and Moss, 2015; Munné, 2016). Thus, data collection is now not only managed through formal censuses, surveys, and administrative records, but a wide variety of other sources of data (Eubanks, 2018) that are used by public bodies to a variety of ends – to tailor and evaluate policy, manage and administer public services including, importantly, health services, and to measure and evaluate social progress. This additionally fulfils a democratic function, allowing the public to scrutinise governments' performance in tackling social issues and the progress and effects of different public policies. These sources are used to target and profile individuals and groups that may be missed out, directing government messaging, services, and the evaluation of policies. But for those, particularly from disadvantaged groups, who use public services, this can paradoxically involve both extremely intimate and extensive surveillance of sensitive administrative characteristics and

information about their lives, but also, at a community level, produce a view which is partial, patchy, and fails to notice, support, or intervene where serious harm is occurring (Smith and Henderson, 2018).

Thus, there are a range of countervailing considerations which operate against the desire of the state to see more and more intimately into the lives of its publics. Foremost in many legal, sociological, and activist discourses on state data collection is the lens of *privacy*, which broadly understands personhood and participation in democratic societies as dependent on a right to freedom from intrusive state control, particularly as conducted through the collection of data as ‘surveillance’ (Nissenbaum, 2020). Privacy is generally understood through a rights-based framework (and has particular resonance with Article 8 of the ECHR which protects the right to private and family life) which aims to allow space for people to conduct a family life of their choosing, associate with one another, organise politically, and develop their own identities individually and relationally, without fear of repression (Bridges, 2011). Long-standing privacy concerns with respect to traditional modes of state data collection have in recent years been newly intensified as further commercial and social data sources have become available to governments, sources which have the potential for newly intimate and intensified forms of surveillance (Kennedy and Moss, 2015). This has led to an increased focus on the right to data protection, enshrined most recently in the Data Protection Act 2018, introduced to bring the UK into line with EU General Data Protection Regulation (GDPR). The legislation obliges anyone who holds personal data (defined as any information relating to an identified or identifiable natural person) to keep that data safe and secure, and makes them accountable for failing to meet these obligations.

In addition to concerns with intrusiveness from a privacy or data protection perspective, the administration of data collection can itself cause more direct harm. This can be seen, for example, in welfare and immigration contexts, which rely in their present forms in the UK on confusing bureaucratic systems which are designed so that enormous quantities of data are collected regularly at a significant burden to the people who need to engage with them in order to access benefits or be granted immigration status (Oliver, 2020). The burden of data collection and the strain it places on people can therefore constitute a distinct form of harm in addition to the violation of privacy (Stewart, 2018). Equally, once collected, data can be used in a range of ways to disadvantage individuals and communities, from detecting and punishing administrative violations to targeting sanctions and other punitive measures. Although data are often collected at the individual level, in the aggregate these contribute to patterns of enforcement and control directed at communities – such as gang matrices, risk scores, and ‘hotspot’ policing (Hannah-Moffat, 2019).

These arguments underpin a broader ethic which is at the heart of public service in the UK and many other countries – that in order to balance these potential sources of harm, state data collection should be designed with a view to the collection of minimal, accurate data, tailored for the purposes of particular services where there is a clear need, and as far as possible shaped by communities rather than imposed on them. This value of *co-production* of statistics underlies important aspects of the Office for National Statistics (ONS)’s Code of Practice (2021).

However, issues of state data collection and surveillance are more complex than simply balancing the harms posed by insufficient as opposed to over-extensive collection; the categories and instruments through which these data are collected equally pose their own issues of harm. In the following section, we discuss how intersectional perspectives can contribute to a deeper understanding of how data collection produces and intensifies certain sorts of social harms, and what this means for sex and gender data.

Accounting for Intersectionality

As well as addressing questions of how to go about defining sex and gender, public bodies must consider how these characteristics interact with other aspects of human experience and identity rather than focus on them solely in isolation, even where ostensibly the only data sought relates to sex/gender (Scottish Government, 2021a, 2021b: 3). Feminist scholarship has long argued that the effects of misogyny and patriarchy are experienced differently by different communities and groups of women, reflecting the broader reality of patriarchy as a system of power which intersects with other systems of power such as race and class. This critique was initially brought to prominence by the work of black feminist scholars (such as Patricia Hill Collins, Kimberlé Crenshaw, Angela Davis, and Angela Harris) through the lens of ‘intersectionality’, now most commonly associated with the work of Kimberlé Crenshaw. Crenshaw showed how categories of social identity and experience are often disaggregated in ways that fail to recognise the intersecting forms inequality and discrimination often take (1989; 1991). Inspired by her work, feminists have theorized the multiple dimensions of women’s experiences of discrimination, and challenged the extent to which sex or gender can provide a universal category that describes the inequality suffered by ‘all’ women (Fuss, 1989; Spelman, 1988).

A wide and deep body of scholarship and testimony now exists that encompasses experiences and perspectives at the intersection of disability, sexuality, racialisation, gender, colonialism, and other systems of socio-political structural power. This has sometimes taken the form of personal accounts and testimony, of academic research, of political writing, and of activist work, or some combination thereof, among other modes (see for example Christoffersen, 2020, 2021; Hill Collins, 2019). UK equality legislation itself recognises that discrimination can be experienced on more than one axis and simultaneously (see section 14 of the EqA) – though, as drafted, it only refers to two combined protected characteristics listed therein, including race, sex, gender reassignment and sexual orientation. There is no reason to think, therefore, that a person could not experience sex (including gender) discrimination *and* gender reassignment discrimination simultaneously (as some have suggested – see for example the arguments made by the petitioners in *For Women Scotland Ltd Petr* [2021] CSOH 31).

However, the translation of feminist intersectional work into administrative or legal categories has proven challenging – section 14 of the EqA itself was never commenced, meaning that while case law might address combined discrimination (and might even give greater protection than section 14, which only acknowledges dual but not multiple axes of discrimination) there is no statutory provision, leaving potential claimants fully dependent on the discretion of courts to undertake intersectional analyses. There are

also other potential limits in practice as to the extent that lived intersectional experiences can be represented *at all*, for example where the state collection of data simply takes an additive approach to discrimination based on linked but neatly divisible characteristics (Spelman, 1988: 15; 136). This is the antithesis of Crenshaw's original idea, and renders the existence and impact of intersectional discrimination less visible. This may be particularly problematic in the context of racial justice, as Christoffersen saw in her ethnographic research examining how equality organisations were 'doing' intersectionality: she found that implementation of a more 'generalised' intersectional practice across the 9 protected characteristics of the EqA 'whitens' the concept of intersectionality, and can in fact 'uphold white supremacy and efface intersectional marginalization among people of colour' (2021: 1). The 'othering' that can occur through this process embeds rather than challenges marginalisation.

There is also a concern about the power that category systems themselves embody: even where they are designed to try to measure the complex experiences and groups created by historic and present structures of power, the categories chosen can also in practice serve to reify themselves. Over-simplified category systems can collapse difference and concretise the very oppressions that they are designed to monitor. For this reason, some contemporary theorists have problematized certain ways of operationalising intersectionality that risk conceiving of identity strands as essentially static, rather than dynamic, relational and collectively constituting (Conaghan, 2009). The concern is that each identity marker will be named, collected and analysed as an 'empirical reality' already in existence, rather than constituted (at least in part) by the social fact of the discrimination itself (Brown, 1995: 87).

This point has been taken up by Kath Browne in the context of governmental social research about people's race and ethnicity and their sexual identities: information about these categories is not merely raw data to be collected or measured, but rather the exercise of categorising and asking about those categories produces and legitimates certain kinds of racialised and gendered identities, and in so doing, complexity and nuance are often lost: she quotes Eve Kosofsky Sedgwick as saying, 'knowledge does rather than simply is' (2016: 234; see also Nobles, 2000 and Guyan, 2021). Thus, not only do these sorts of inquiries shape (and are shaped by) social interactions and discourses around identities, reifying and linearising narratives, and excluding or invisibilising even as they attempt to include and make visible the marginalised; they also, of course, have an impact on the distribution of resources, and the intensity of state surveillance and other governance and control mechanisms. This gives the state the power not only to legitimise certain identities and delegitimise others, but also to enforce through the collection of data particular *systems of categorisation* and the philosophies, power structures, and hierarchies which they represent. For example, in systems that record sex and gender, the rigid specification of biological, binary sex as the sole appropriate data category set enforces and encodes the structures of heteropatriarchy, as we explore below.

The questions of potential harm related to state collection of data cannot therefore be considered to operate on a simple, unitary logic. Again, we argue this makes clear the importance of data collection systems being designed with the input of the people whose data are collected and the importance of a collection regime based on sincere self-identification. In the context of sex/gender data these concerns have particular relevance

for queer and non-binary people in society, particularly those whose intersecting identities render them at further risk of marginalisation, through for example, ableism and racialisation discourses, because their identities often do not fit standard norms of data collection categories.

Collecting and Defining Sex and Gender in the UK

Any data collection exercise asking about sex or gender must have a working definition of what is meant by those terms, so that it can collect data that is appropriate for the specific purpose of the exercise; however, there is no single legal definition of sex or gender in any UK jurisdiction.

Some have claimed a (binary and immutable) definition of sex is provided in by the English case of *Corbett v Corbett* ([1970] 2 All E.R.33 (Freedman, 2018)). In that case the court laid down a biological test for sex in the context of a question about marriage, holding that a trans woman could not legally marry a man, because she was biologically male. Indeed, in a retrograde move, the recent UK Employment Appeal Tribunal decision in *Forstater v CDG and Others* (UKEAT/0105/20/JOJ) stated that *Corbett* is still the ‘law of the land’ on the definition of sex (para 115; for comment see Cowan and Morris 2021). This is surprising, particularly since Justice Ormrod himself stated in *Corbett* that he was only deciding the meaning of woman in the context of marriage, and ‘not the ‘legal sex’ of the respondent at large’ ([1970] 2 All E.R. 33, at 48). Arguably, then, the case does not provide a general definition of sex.

Moreover, this case is from a different social era, one in which trans people were not given legal rights or protections, and same sex marriage was prohibited – since the Marriage and Civil Partnership (Scotland) Act 2014 and the *Marriage (Same Sex Couples) Act 2013* in England and Wales, UK men can now marry each other, rendering the question addressed by the court in *Corbett* effectively moot. Moreover, in the case of *Goodwin v UK* (2002) 35 EHRR 18, which led the UK government to introduce the GRA, the European Court of Human Rights noted ‘a continuing international trend towards legal recognition’ and that internationally, ‘courts are moving away from the biological birth view of sex...and taking the view that sex...should depend on a multitude of factors to be assessed at the time of the marriage’ [para 84]. The court remained unpersuaded ‘these terms (man and woman) must refer to a determination of gender by purely biological criteria’ [para 100]. Trans people are also now more visible and accepted in mainstream public discourse than ever before (see: <https://yougov.co.uk/topics/politics/articles-reports/2020/07/16/where-does-british-public-stand-transgender-rights>) – notwithstanding recent heated debates over reforms to the Gender Recognition Act 2004 (GRA) and the increase in transphobic hate crime (which has doubled in Scotland in the last five years – Scottish Government (2021b)). In the face of these changes, the idea that the half a century old *Corbett* provides a general contemporary definition of sex is questionable.

There is no statutory definition of sex or gender either. For example, the GRA refers to ‘acquired gender’ (for critique see Cowan et al., 2009) but gender is not defined; however, a person holding a GRC can change their sex (also not defined) on their birth certificate, notwithstanding the oft-professed view that sex cannot be changed.² The EqA does not

define sex or gender; though section 212 says ‘woman’ is a female of any age and ‘man’ is a male of any age, female and male are not defined, and the EqA does not refer to the term ‘biological’ sex at all, even though some assert that the definition of sex in the Act is ‘biological’ (Murray et al., 2019). The EqA does not specifically state whether the protected characteristic of sex is based on characteristics such as genitalia or chromosomes, or based on gender as a social category, or some combination of the two. However, section 7, on the protected characteristic of gender reassignment, refers to ‘physiological or other attributes of sex’ (emphasis added), implying acceptance of the view that sex is not simply physiological (though again ‘physiological’ is not defined). It is possible that courts in future may interpret this to mean that sex, for the purposes of the 2010 Act, is not a purely physiological concept.

So, how should the terms sex and gender be understood by those who want to collect data on these characteristics? The answer to this is not straightforward.

While some conceptions of sex and gender define them as entirely separable, with sex denoting an inherent and immutable ‘biological’ characteristic, and gender describing the manifested ‘social’ meanings and characteristics associated with sex (see for example *Bellinger v Bellinger* [2002] Fam. 150, at 160), sometimes sex and gender seem to be used interchangeably in law – for example in the GRA, where a Gender Recognition Certificate (GRC) certifies a change in *gender* that allows the certificate holder to change the *sex* designation on their birth certificate. Sex is also sometimes used as a category that *encompasses* gender or even gender reassignment, for example in the EqA, where discrimination on the grounds of sex includes gender discrimination, for example, relating to assumptions about who provides child care (see for example *Burden v Chief Constable of Hampshire Constabulary* WL 12591122 (2015)), or where sex discrimination was interpreted to include discrimination on the grounds of gender reassignment (*P v S and Cornwall County Council* [1996] IRLR 347). Finally, the legal meaning of terms such as sex and gender, woman and man, shift over time, reflecting changes in community habits, social knowledge and linguistic practices: thus the Gender Representation on Public Boards (Scotland) Act 2018, explicitly included trans women in its definition of women.³

In other words, the social and legal meaning of sex is not settled – and nor should it be. Definitions, and how they are applied in practice, should reflect the complexity of sex/gender experience. Recent changes in institutional, legal and social acceptance of trans people’s lived identities are appropriately reflected in UK government policies and in the way that public bodies administer our social lives. These shifts are not indicative of ‘policy capture’, as some would argue (Murray et al., 2019; Sullivan, 2021): rather, these are grounded in legal changes that go beyond the territorial boundaries of the UK, and that are driven by a growing social, legal and political recognition of the importance of the human rights of minorities (Cowan et al., 2021; Cowan and Morris, 2021). Scientific understandings of sex and gender – and sex versus gender – have also advanced over time (Ainsworth, 2015; Rippon, 2020), and it is unlikely that science – and/or other discourses – will ‘freeze’ their idea of what constitutes sex for all time. Eekelaar (2020: 807) describes such developments in scientific thinking as reflected in moves to align legal records more closely with an evolving understanding of physical truth, since an increasing number of countries record individuals at birth without using the binary

male/female classification and lean more towards recognising behavioural features and individual self-perception of gender. Since it seems that scientific – and some judicial – views on sex are moving away from a simple binary model, it seems appropriate that others – including the state and public bodies – should follow suit.

What this means for states and public bodies collecting sex and/or gender data is that they are not required to apply one universal definition of these terms, nor does a binary ‘biological’ definition (whatever that is taken to mean) necessarily take precedence over other lived experiences of sex/gender. The latter point is particularly important when considering one specific aspect of the Chief Statistician’s guidance on how public bodies should collect and publish sex/gender data in Scotland – i.e. the question of non-binary sex/gender. Although the guidance recognises that some people identify as non-binary, it declines to meaningfully engage with how to collect data about non-binary people, suggesting that a sex question should allow only for the responses female, male or prefer not to say (with non-binary included as an example only in the suggested question on ‘trans status description’ – Scottish Government, 2021a, 2021b: 16). The guidance then defers further responsibility on how to record and publish such to the Scottish Government’s Working Group on non-Binary Equality (Scottish Government, 2021a, 2021b: 24). In this respect the guidance – and indeed the Scottish Government more generally – are lagging behind the direction of travel of recent cases in the UK; courts in asylum law and employment discrimination contexts have not only recognised non-binary sex/gender, but afford legal protections to those who identify as non-binary (*Mx M (gender identity – HJ (Iran) – terminology) El Salvador* [2020] UKUT 313 (IAC)); and *Taylor v Jaguar Land Rover Limited* ET/1304471/2018; see also White and Newbegin, 2021). Therefore, any data collection exercise question asking about sex (and not just trans status) should include the possibility for an answer that is non-binary, as well as ‘prefer not to say’ (Guyan, 2021).

In summary, governments do not need to provide a single definition of sex or gender that can be used in all social contexts. The fluidity of the legal, scientific and social meanings of the terms sex and gender over time and in different contexts suggests the lack of a single legal definition of either term is not an oversight, but a way of leaving the terms open-ended so that those interpreting and applying law can adjust meaning to the specific situation in which they are used. And since there are multifarious understandings and applications of the term sex, it seems that it would be unwise to move towards a single legal or administrative binary understanding. Collecting data on sex and gender is therefore a complex, nuanced and context-sensitive task.

Potential harms of sex/Gender Data Collection – the Current UK Context

Having laid out some of the potential impacts of the collection of data by the state in general, and the definitions of sex and gender that are currently in use, we now discuss how debates have recently been mobilised around the collection specifically of sex and gender data in the UK, and especially in Scotland.

The UK has over the past several years increasingly experienced a backlash against advances in the rights of trans people, with substantial coverage of trans issues in the mainstream media presenting trans rights activism as in conflict with the goals of feminist activism. The rise to prominence of this perspective in a UK context can be generally linked to resistance to governmental proposals to review and improve the GRA, to allow trans people to change their sex (i.e. the sex designation on their birth certificate through a process of self-declaration rather than the more onerous and pathologising route of a medical diagnosis of gender dysphoria (Whittle and Simkiss, 2020)).

While some of these conflicts have revolved around access to public spaces such as changing rooms, toilets, or swimming pools, others relate to the provision of sex-specific or sex-segregated services or accommodation such as women's refuges or women's prisons.⁴ Many of these – sometimes vehement and vitriolic – disagreements have had at their heart questions of data. Controversies abound over who is able to be recorded as belonging to a particular gender for the administrative purposes of public services and public life, but also over the category systems used themselves, which generally do not permit the recording of gender identities which fall outside the traditional binary. Although these conflicts often seem to dominate Twitter and other social media platforms, as well as mainstream media (including broadsheet newspapers),⁵ in fact, trans-exclusion is a relatively minor perspective within contemporary feminist activism and campaigning, with the main women's service providers in Scotland, at least (such as Rape Crisis Scotland, Scottish Women's Aid and Shakti Women's Aid), being trans inclusive.

However, the backlash has spilled out into a much wider set of attempts to embed in law, and in the processes and practices of public bodies, a binary, biological – i.e. trans-exclusionary – construction of sex, often in areas which have *de facto* relied on self-identified sex/gender rather than biological sex for some time. Mobilising the imagined threat of trans people (particularly trans women) as sexual predators (a portrayal for which there is no established medical, psychological, or criminological evidence),⁶ has prompted a moral panic which has been circulating in the UK (and beyond – see Cossman, 2018) for some years, with the explicit backing of the mainstream media, and which has been used to develop material structures of administrative power at both the micro and macro level, as we will discuss in section seven below.

In the Scottish context, recent controversies have included: whether and how the Scottish census should collect data about a person's trans history or status (Cowan et al., 2021); whether a Bill allowing sexual assault complainants to choose the 'gender' of their forensic examiner should be amended to read 'sex' instead (Brindley, 2020); whether the Scottish Government went beyond its legislative competence in defining woman as including trans women in the Gender Representation on Public Boards (Scotland) Act 2018 (*For Women Scotland Ltd Petr* [2021] CSOH 31); whether a rape crisis centre could employ a trans woman as its manager (Harding, 2021); and whether the Scottish criminal justice system should record the biological sex or the self-identified gender of those accused of rape or attempted rape (see below).

In the next section, we will revisit the sites of two of these conflicts – the Scottish Census, and data recording in the Scottish criminal justice context – where there have been attempts to design out trans inclusion. We then go on in the subsequent section

to suggest a term to describe the strategy employed in these contexts by those opposed to a trans inclusionary definition of sex (and indeed, often a more trans inclusive society more generally): that of *concept capture*.

Designing out Trans Inclusion

The Census

The Census has been a particularly telling site of conflict. Through its status as the archetypal mode of state data collection it provides material examples of many of the key arguments around the collection of data on sex and gender. The Census is collected in the UK every 10 years, with all UK households legally required to take part (Guyan, 2021). It has historically collected information only on *sex*, using a binary category system in which respondents – including now trans respondents – self-identify as a man or a woman. Current guidance used in the most recent Census in England and Wales (following a high court ruling on a legal challenge by the organisation Fair Play For Women) recommends that respondents use the sex listed on their birth certificate or gender recognition certificate rather than self-identified sex (see <https://census.gov.uk/help/how-to-answer-questions/paper-questions-help/what-is-your-sex>; for discussion see Sullivan, 2020; and in response Hines, 2020).

In Scotland, however, the current sex question asks respondents to self-identify. Proposals to include a voluntary question on transgender status in the Scottish Census in 2019 opened the sex question up to criticism by those who contest a self-identified sex question (Murray et al., 2019). Campaigners opposing the use of self-identified sex in the Scottish Census and in wider official statistics made a range of submissions on the proposal, and the issue was subject to intense public debate. The arguments deployed revolved around concerns of *insufficiency* or *inaccuracy* of data – that sex/gender self-identification will either increase the rates of deliberately false returns made or will lead to confusion on the part of respondents, in both cases leading to ‘inaccuracies’ in the census data collected. This concern does resonate, at least superficially, with the problem we described earlier, of the invisibility of non-normative minorities – i.e., that a lack of sufficient data to support and target the protective functions of the state can itself create or contribute to structural inequality. However, the critical edge of the ‘inaccuracy’ objections made in this context were somewhat blunted by the lack of consideration given to the reality of Census data.

The Census return is often presented in these arguments as aiming to produce an immutable and direct measurement of objective ‘factual’ or ‘scientific’ reality. In fact, the relationship between individual returns and the final outputs of the census is not linear, rather, it is deliberately constructed, complicated, corrected, brought into contact with other data sources, and obfuscated (Guyan, 2021). These processes begin with the design of the questions themselves. Census questions are designed as communications – questions are asked to an individual who interprets their meaning and provides responses which are meaningful to them. Therefore, the ‘production’ of a response to the sex question is an interpretive encounter between an administrative system and a particular individual. Much of the research which underlies the creation

of these categories and the wording of Census questions involves testing how people interpret and respond to them – which often produces a wide diversity of understandings of even apparently ‘simple’ or ‘objective’ questions (National Records of Scotland, 2021). The record of sex on the Census is thus manifestly socially produced rather than a direct ‘scientific’ measurement; through the phrasing and design of the question itself, through processes of assurance and imputation, and through the assumptions which go into these processes.

This means that questions and categories need to be formulated and presented in such a way that they are meaningfully interpretable by all respondents in a population that will have different constructions of the meaning, relevance, and composition of ‘sex’. Constructions of sex will vary depending on in which context it is encountered – whether that context is medical, legal, identity, cultural, or community-based – and how it intersects with other structures of oppression or identity in that situation. In order to produce data which is sufficiently *useful* and *robust* to study matters of interest, it is important that the categories used for collection are as portable as possible. They need to be understandable to the majority of the population, but also collect sufficient information about small groups who may not straightforwardly fit the experiences of the majority. These ideas animate the research and testing carried out in the development of questions for any Census, including questions on trans status for the Scottish Census by the Scottish Census authorities (the National Records of Scotland) which found that the inclusion of questions on trans status met this standard of wider comprehensibility (National Records of Scotland, 2021).

This is particularly important for groups who make up small populations in society, especially those who interpret and fit themselves into dominant category systems differently from the majority. These groups, in addition to experiencing direct structural oppression, also experience what Bowker and Star term *torque* – the strain caused by the continual work required to exist where one’s self-classification does not accord with how one is read by dominant external systems (Bowker and Star, 1999). It is these groups who, unable to be ‘seen’ by the state, are most often missed by its protective functions altogether. These questions are given substantial consideration by the National Records of Scotland, and can be seen in their attempts to embed practices of *co-production* in their research on respondents’ attitudes to sex and gender data in the census (ONS, 2021).

Thus, Census categories are *always* ‘boundary objects’ – concepts with the flexibility to allow multiple groups to interpret them in different ways, allowing them to translate their different perspectives together into something of mutual value (Star, 2010). Aiming to collapse this flexibility in the name of a single ‘objective’ system both misses the point of the exercise and undermines, rather than improves, the utility of the data collected. Moreover, in this case, the idea of ‘accuracy’ put forward by the ‘sex not gender’ movement (see below) is a spurious one, relying on supposedly objective, external, and ‘biological’ categories which are in practice much more nuanced, complex, and contested.

Aside from respondents understanding the questions, there is also the issue of deliberate false returns. Failing to return or filling out incorrect information in the Census intentionally is an offence in the UK, punishable by a fine of up to £1000 (although it

is not an offence to fail to answer questions about religion, gender or sexual orientation – see <https://www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/censusenforcementprocess>). While some undoubtedly return ‘incorrect’ information deliberately to make a political point (particularly for the ‘religion’ question, for which according to Booth (2012) around 330,000 people in England and Wales submitted the response ‘Jedi Knight’ in 2001 as part of an organised campaign), this is impossible to prevent directly, and the concern of the National Records of Scotland and Office for National Statistics should be to ensure that everyone taking the Census is able to understand the questions asked and to be able to make an informed choice to fill them out correctly. Outwith these sorts of co-ordinated political campaigns, there is overwhelming evidence (for example from the National Records of Scotland (2015) evaluation of the Scottish Census) that most people take the Census seriously and fill it out to the best of their ability. In some cases, such deliberately facetious or incorrect responses are retained as administrative curios, in others, they are ‘corrected’ from administrative data, and in others they are simply coded as missing.

While the design of the census questions is itself important, it is not the only factor involved in producing the final Census data. Incorrect returns on the census are a long-standing and well-established phenomenon (Steckel, 1991). Census returns are verified through an extensive quality assurance process with numerous stages; the information recorded on the form by the respondent, although important, is not the end but the *start* of the process of generating a record. A range of methods are used to correct the data where deliberate or accidental errors or omissions occur. Data are cleaned after recording, with obviously incorrect, inconsistent, or missing information imputed in a range of ways, either drawing from alternative administrative sources, or through ‘hot deck’ imputation, where data are pulled from a ‘donor’ census record belonging to another individual who gave similar answers to other census questions for which information is available (see National Records of Scotland, 2020). Choices are made throughout this process – what counts as ‘inconsistent’, for example – which can validate or invalidate particular responses or identities. The subsequent data tables and statistics produced are themselves subject to complex processes to limit the possibility of disclosure, including swapping records and responses between individuals while preserving the statistical properties of the census dataset as a whole.

Still, the Census is able to collect more useful information on trans and queer status, along with data on ethnicity and disability, than most other surveys, because other surveys condense all but a few populous categories into ‘other’ groups, collapsing very different groups and experiences together. For these smaller groups, self-provided data sources such as household surveys are unsuitable for analysis due to insufficient sample sizes. Administrative sources constitute one alternative. But these administrative sources are also shaped by the categories of legal, criminal justice, education, or medical systems, rather than the sincerely-declared social reality of the individual. Even the Scottish Surveys Core Questions dataset, which combines core questions from three harmonised surveys for a total sample of around 20,000 respondents per year, does not collect data on trans status (see <https://www.gov.scot/collections/scottish-surveys-core-questions>). As stated in the 2021 consultation by National Records of Scotland into the collection of sex and gender data, the Census ‘is the only source comprehensive

enough' to accurately collect data on trans people in Scotland, given their low numbers and wide distribution throughout the population' (2021: 8), though of course even the Census does not include a category for non-binary people.

To summarise, we have argued in this section that even well-established data collection tools such as the Census are not expected to produce objective, scientific, precise data since there is always an interpretive encounter between an administrative system and a particular respondent. The final data 'products' are created through processes which inherently make malleable the initial returns provided by respondents; recorded responses are 'cleaned' and verified through an extensive quality assurance process, such that the information recorded is only the start of the process of generating data.

Census categories carry some inherent flexibility in meaning. Acknowledging that does not entail a complete rejection of goals of comparability or harmonisation across data sets; rather it means allowing public bodies and others to (continue to) develop reflexive data collection practices that are useful to them, while being attentive to the nuance and complexity of lived needs and experiences. Therefore, rather than advocating for 'accurate' results, it is clearly important to send, through Census questions, as strong an initial 'signal' as possible that the categories are inclusive as possible, particularly for groups with a low population share, to ensure that data relating to that population is not lost in the 'fuzz' which responses can generate.

The Census is only the most prominent of a range of large and small data collection sites in which these sex/gender conflicts are appearing. We now discuss another, apparently more innocuous example where sex/gender data is categorised and recorded, which has also become a site of conflict.

Criminal Justice Records

One of the most recent attempts to have 'common sense' administrative changes made to legal provisions or administrative systems around the recording of sex/gender has been led by 'policy analysis collective' MBM (<https://murrayblackburnmackenzie.org/>). Introducing petition PE1876: 'Accurately Record the Sex of People Charged or Convicted of Rape or Attempted Rape', they called for 'the Scottish Parliament to urge the Scottish Government to require Police Scotland, the Crown Office and the Scottish Court Service to accurately record the sex of people charged or convicted of rape or attempted rape' (<https://petitions.parliament.scot/petitions/PE1876>.) The petition followed FOI requests to Police Scotland, about how the gender of the accused was recorded in cases of rape (<https://www.scotland.police.uk/spa-media/mduizvzm/21-0145-response.pdf>). Police Scotland's response confirmed that they record the self-declared gender of those charged with an offence, including those charged with rape or attempted rape.⁷

Section 1 of the Sexual Offences (Scotland) Act 2004 defines rape as the act of penetration (of the vagina, mouth or anus) by a penis. This means that it is possible that some of those charged with rape or attempted rape have a penis, but identify as female and are recorded as such in police records. As such, the perceived 'problem' that MBM's petition seeks to address is that rape statistics could include offenders designated as female, who are 'really' male; again, this is presented in the petition as problem of data accuracy, as

well as an issue of ‘trust in official statistics, public policy, media reporting, research, and...trust in public bodies.’ When asked about this issue, Detective Superintendent Filippo Capaldi said: ‘The sex/gender identification of individuals who come into contact with the police will be based on how they present or how they self-declare, which is consistent with the values of the organisation’ (Marland, 2021).

MBM’s petition states that the correct approach here is to record the ‘biological’ rather than self-declared sex/gender of the offender, because to record self-declared sex/gender would mean that ‘only a very small proportion of offenders directly charged with rape or attempted rape would therefore need to be recorded as female to have a substantial and misleading effect on the understanding of female offending’. A question about this was raised in the Scottish Parliament in March 2021, in response to which the Cabinet Secretary for Justice at the time suggested that any unexpected result such as a change in patterns of offending according to sex/gender would be investigated (see <https://www.theyworkforyou.com/sp/?id=2019-03-13.16.0#g16.1>). This does not seem to have assuaged the concerns of MBM, who then raised the petition, which garnered around 12,800 signatures.

Leaving aside the lack of evidence for MBM’s statement, or any sense of what is meant by biological sex in this context (would it be based on chromosomes, genitals, gonads, hormones or some combination thereof?) or how it would be assessed by police officers or others (physical examination? DNA tests? legal documents?), recording demographic data based on presentation and/or self-declaration is of significant practical value to police officers (and other criminal justice or law enforcement agents). Entering ‘male’ on charge or arrest sheets, or indeed other criminal justice records, for a person who identifies and/or presents as a woman would not seem to be practical, accurate – or indeed common sense. It is also, as Detective Superintendent Capaldi suggested, in line with Police Scotland’s values and principles (and one might add, equality legislation – see Equality and Human Rights Commission 2011, para 13.57) to treat people as the gender they present, unless there are specific legal reasons not to (Cowan et al., 2021). In any case, Police Scotland have stated that in practice, in around 17,000 reports over 8 years documenting rape and attempted rape, none have been suspected by Police Scotland to have been committed by a trans woman (McLaughlin, 2021). Given that there were 2343 recorded rape/attempted rape offences in Scotland in 2019–20 (the second highest number since records began in 1974), and since trans women have been able to secure a GRC without surgery since the GRA in 2004, 17 years ago, and not one trans woman has been a suspect in a rape/attempted rape in Scotland, it might be tempting to think of MBM’s petition as a solution in search of a problem.

On the other hand, if this change petitioned for is relatively innocuous, since in practice it makes no difference to the statistics, what is there to object to? Is this not a minor administrative change that has no real impact currently, but might preserve the integrity of accurate data collection and public trust in the future, as MBM have argued (see <https://murrayblackburnmackenzie.org/2021/07/23/petition-1876-next-steps-and-further-action-needed/>)? A similar question could also be raised about Johann Lamont MSP’s (successful) attempt to amend the Forensic Medical Services Bill so that sexual offences victim-survivors could request the sex rather than gender of their forensic medical examiner (FME). The amendment was described as ‘technical’ (see <https://www>.

theyworkforyou.com/sp/?id=2020-12-10.31.31). The argument was made that if the term gender was used, women victim-survivors might ask for an examiner who was female, but be assigned one who was gendered female but of the male biological sex (i.e. they could be assigned a trans woman FME). From anecdotal evidence it seems there are currently no trans women FMEs in Scotland so this imagined scenario would never materialise; in fact, although 60% of FMs in Scotland are women, this is not sufficient to ensure that women victims can be guaranteed a female FME, meaning that many women will be given a male FM regardless of their request for gender-matching (Brindley, 2020). Those lobbying for 'sex not gender' in the Bill might well still make the argument, though, that the shift manages the risk of the imagined scenario happening in the future.⁸

So exactly what is there to object to about these attempts to have administrative and legal categories record sex rather than gender? We believe that by attempting to argue for and embed a categorisation or record of 'sex not gender' in as many places as possible (for example, the Census, criminal justice records, the definition of 'women' in legislation such as the Gender Representation on Public Boards (Scotland) Act 2018, the Forensic Medical Services (Scotland) Act 2020 or the Equality Act 2010), activists, analysts and lobbyists are engaging in what we would call *concept capture*, through the co-option of administrative categories

(Re)Inscribing Patriarchy: Concept Capture and Category Co-Option

Here we reflect on why the 'sex not gender' movement, who campaign against a trans inclusive definition of sex, and any reform to the law that would allow sex/gender self-declaration in the UK, are pursuing with such zeal what appear to be a series of minor administrative changes to data records that at best have little practical applicability or impact, but that at worst – as explored above – might well detract from the utility of the data.

Potential explanations might reasonably entertain the hypothesis that this activity provides a focus for fundraising which sustains the intellectual and political activity of the broader 'sex not gender' movement. Alternatively, one might pursue a symbolic explanation – that victories in such arenas consolidate and advance a political proposition and signal its broader acceptability to the public.

In fact, we argue that pursuing these changes constitutes a much more insidious and potentially damaging engagement with, and exercise of, power. As discussed in section four, there is no single legal meaning of sex or gender, and this has left something of a definitional vacuum; by attempting to establish a binary, sex-assigned-at-birth definition in the categories used in government laws, policies, and administrative systems, the 'sex not gender' movement is cultivating fertile ground in which regressive arguments can then take root. As noted above, some have argued there has been 'policy capture' of state and public body policies, practices and initiatives by trans activists (Murray et al., 2019; Sullivan, 2021). We suggest that 'policy capture' is an ill-founded concept which ignores empirically-demonstrable processes of legal and cultural change (see also Cowan et al., 2021). Instead, we posit that the multifarious attempts to instill

a single, binary, biological notion of sex in as many legal and administrative categories as possible in Scotland (and elsewhere) constitute a deliberate programme of *concept capture* through *category co-option*. That is, the slow takeover of administrative categories of sex/gender ultimately provides a mechanism through which a rigid and regressive binary and biological concept of sex is (re)produced and reiterated. Although this way of understanding sex is increasingly being superseded by lived social reality, its proliferation by lobbyists, activists and academics can be read as an attempt to inscribe a default legal and administrative definition of sex as 'biology'.

The argument for a shift to 'sex not gender' across these areas of public life is based on the idea that 'Sex Matters' (see for example <https://sex-matters.org/>), and that gender has come to replace sex in public discourse in a way that erases the reality of the biological binary-sexed foundations of human life. 'Adult human female' has come to denote not just a Twitter hashtag but a political position that places primacy on female biological sex as the universal marker of authentic womanhood, and that often treats trans women as predatory, dangerous men. This is not a new argument (see Serano, 2013: 31). But it is one that has been the subject of challenge and critique in feminist theory and activism for over 30 years. As far back as 1988 Elizabeth Spelman observed how the supposedly unitary and homogenous category 'women', in valorising sexual difference above all other ontological considerations, elides differences *between* women, conflating the problems of some women with the problems of all women regardless of age, class, sexuality, race and so on (1988: 3; see also Harris 1990). To see biology (re-)emerge in recent times as the single focal point for femaleness – at least in some feminist circles – is in that sense alarmingly regressive.

Over time, these sorts of 'sex not gender' strategies build a supportive infrastructure with which to co-opt, perform and perpetuate the category systems and power structures of white patriarchy, in a bid to capture a (biological) concept of sex that excludes trans and non-binary people. We believe the creation of such a legal and practical infrastructure through concept capture is deeply short-sighted as a self-described feminist project – it enables many of the problematic exclusionary characteristics of carceral, white feminism including the formation of alliances between feminists and far right organisations, white supremacists, evangelical and anti-abortionist groups, amongst others (Phipps, 2020: 136–39). Such alliances and approaches can be used to harm women, queers and trans and non-binary people; amongst other things it can deny women reproductive rights; preclude trans and queer people; from self-identifying and subject them to 'conversion therapy' or deny them medical treatment such as puberty blockers; deny sex workers' rights and agency; be mobilised against lesbian, gay, and bisexual people for example in denying gay men access to surrogacy or against LGBTQ organisations, such as Stonewall, offering education and training to public and commercial bodies. In all these respects, the power of administrative category systems is being co-opted by the 'sex not gender' movement to shore up a white patriarchal system challenged by the gains of queer and feminist activism over the past decades (Phipps, 2020: 133–35). Moreover, the apparently low-stakes nature of many of these conflicts helps with their social acceptability, and allows them to be framed as 'common-sense' propositions when considered from the perspective of public sensibilities.

To be trans inclusive does not necessitate denying that sex matters in life or in law, but sex is not *all* that matters, and sex is not necessarily only and inevitably ‘biological’: to treat biology as the universal marker of female experience denies individual ways of *living* sex, as well as intersectional experiences *beyond* sex, ignoring the fact that often sex does not matter as much as someone’s gender identity or expression, or indeed some other aspect(s) of their lived experience, as we discuss in the final section, below. The rhetorical force of the slogan ‘Sex Matters’ occludes a more nuanced discussion of whether, when and how sex matters, and how the matter of sex should be considered alongside and interwoven with other axes of human experience, including but not limited to gender; but also how concepts of sex and gender are themselves constructed and represented in public discourse. Public bodies should therefore be wary of overly simplistic and potentially harmful ‘sex not gender’ edicts when formulating data collection questions about sex/gender.

So how Should Public Bodies Formulate Questions About Sex/Gender?

We conclude this article with some thoughts about how sex and gender data should be recorded by public bodies. As we have argued above, it is important not to overlook the complexity of what can sometimes be presented as a simple question – ‘what is sex?’ or ‘what is gender?’. So how, then, should public bodies ask about, categorise and collect this data?

As outlined above, public bodies should collect information through the least intrusive methods, with the lowest impact on particularly vulnerable groups, in dialogue with those groups. So, for example, while there are some purposes for which it is important to collect statistical information about Scotland’s transgender population, this need can be fulfilled through the collection of specific information about lived sex/gender, and self-identified transgender status, rather than asking a proxy question about ‘legal sex’, as some have suggested (Murray et al., 2019).

‘Legal sex’ is usually understood to mean the sex recorded on a birth certificate (and for a trans person this might be a reissued birth certificate following a GRC process – though the term ‘legal sex’ does not appear in the GRA). The effect of recording ‘legal sex’ would be that a trans person without a GRC would have to answer in their assigned-at-birth sex – i.e. a non-certified trans woman would have to tick male rather than female. In practice, then, a ‘legal’ – i.e. birth certificate – sex question implicitly draws a hierarchical, normative distinction between sex that has been state sanctioned and certified, and non-certified but lived sex/gender; it gives succour to the notion that those who are not certified are not really the sex/gender they say they are. In any case, the term ‘legal sex’ is not a particularly helpful term: while a birth certificate records sex, there are several other documents – such as passports and driver’s licences, where a person’s sex is recorded, and this can be changed through a straightforward administrative process without the need for a GRC. These are legal documents, and many trans people without a GRC have these documents in their possession, with a sex designation that reflects their ‘lived sex’ (although in March 2021 an English High Court ruling

indicated that only a birth certificate or GRC counted as a legal document for the purposes of officially recording sex).⁹ Attempting to collect data about trans people under the proxy category of ‘legal sex’ is also likely to reduce the accuracy of information collected, and miss the real-life experiences of both trans people *and* (often vulnerable and under-represented) groups of cisgender people since it implies that particular characteristics (such as physiological or hormonal ones) are universal characteristics of their ‘legal sex’, where this may not in fact be the case.¹⁰

Asking about ‘biological’ sex would not necessarily be adequate either: for example, it would not accurately identify the cervical screening needs of a woman, trans man or non-binary person, designated female at birth, who had undergone a total hysterectomy. Thus, it would be far more efficient and accurate to collect data on specific characteristics relevant to the policy issue or service in question, focusing on questions designed to measure a particular real-life need (such as medical treatment), and asking such questions in a simple accessible way. Most of the time this will involve asking about ‘lived sex/gender’, which captures a spectrum of trans experiences of sex/gender, without having to distinguish between those who do and those who do not have a GRC, and without having to define sex based on genitals. The Scottish Census will include a ‘lived sex’ question, with a follow up question on trans status (although the Scottish Census question about sex is still a binary one, with the options male or female). This will greatly improve the probability that trans people would answer both the sex and the trans status/history question accurately. Collecting the information in this way also seems to be the most appropriate way to protect trans people’s dignity.

Campaigners against self-identification explicitly argue that *not* collecting information on ‘biological’ (i.e. assigned-at-birth) sex is a source of harm. This is again based on a twofold argument – first that not having biological sex data hampers the ability of services to collect data which they need to provide certain services such as medical screening, or record certain experiences such as discrimination (see Topping (2021)); and secondly, that not collecting data on biological sex ‘erases’ women as a ‘sex class’.

Arguments to the effect that not collecting ‘biological’ sex data causes harm tend to assume that sex/gender categories are ‘natural’, universal, and simple enough that on the one hand, they are not particularly revealing, or are revealing of traits or category membership so universal and fundamental to human experience that they are uncontroversial, and thus do not pose significant issues of privacy and intrusion. On the other, those taking this position argue that this simplified approach allows for the collection of sex category data which is vital for use as an easy, non-invasive proxy to a range of relevant social and medical characteristics. However, in line with our arguments above, we suggest that asking about ‘sex not gender’ in public data collections, where sex is by default reduced to a biological, binary, at-birth category, has the potential to cause harm. Categories are rarely as simple or straightforward as the ‘sex not gender’ movement would suggest. In fact, what for some is a fairly easily readable, seemingly universal categories, are much more invasive for other people (both cis and trans), creeping into intimate aspects of medical, social, and legal history. This assumption that sex categories are human universals overlooks the complication of the ‘natural’ or ‘universal’ construction of the biology of sex for cis women and men whose social and embodied experiences can differ substantially within as well as between categories (Wilson et al.,

2019). This can itself then be harmful as it exerts *torque* (Bowker and Star, 1999) on the individual, who needs to re-justify and explain themselves in every case, leading to mistakes where, for example, medical needs are assumed directly from this over-simplified data.

There are clear reasons to collect information about lived sex/gender rather than biological sex: it is widely recognised, including by the Scottish Government in its Draft Guidance produced for consultation in 2020 (<https://www.gov.scot/publications/sex-and-gender-in-data-working-group—collecting-data-on-sex-and-gender-draft-guidance-for-feedback/>), that collecting statistical information about the structural disadvantages faced by women, queer, and nonbinary people as a result of misogyny and sexism is crucial to addressing these issues. This is additionally important for the management of service delivery. Many of women's services in Scotland – such as Rape Crisis Scotland and Scottish Women's Aid – themselves explicitly target their service on the basis of self-identified gender, not 'legal sex', and have done so for around a decade (Scottish Women's Sector, 2018). We argue, therefore, that when collecting statistical information about women, it is appropriate to include all those who identify as such – i.e. including trans women – particularly given, as explored in section three above, the intersectional oppressions faced by different groups of women, and hence the vast diversity of experiences and outcomes within the broader category of 'women'. Moreover, asking directly for information about specific characteristics as needed – rather than through the proxy of sex category assigned at birth – reduces harm to those for whom this will deny their lived identity (such as trans men accessing reproductive healthcare) and reduces the possibility for administrative confusion. Underpinning the Code of Practice for Official Statistics is a duty to collect accurate statistical information in a way that is understandable by those surveyed, based on their lived experiences (i.e. generally trusting people to be the best judge of aspects of their own lives) and in a way which respects their dignity. Doing so does not conflate sex and gender, as some have argued (Sullivan, 2020; cf Hines, 2020). Rather, much as with race, ethnicity or disability, it both better respects the dignity of respondents, and facilitates the better collection of statistical data, to gather data that accords with the lived experiences and self-identification of those asked.

We understand that data collection tools can sometimes be – and sometimes have to be – blunt instruments, especially when the aim is consistency or comparability. However, it is important to be alive to the impacts upon those who do not fit standardised norms of asking what looks like a straightforward or standard question. Asking about sex is assumed to be straightforward because the vast majority of the population is not trans, and would describe their sex/gender in binary terms; answering a 'what is your sex?' question will usually be based on what people understand to be the sex on their birth certificate, their body, their internal sense of self, and / or the how they behave in and are seen in society – all of which, for the majority of the population, align. Asking 'simply' about (biological) sex assumes a norm that can be answered in a straightforward way, and then applies that standardised question across the board to all people, including trans and non-binary people who do not meet that standard and whose needs and interests are then marginalised (Ruberg and Ruelos, 2020). Particular care must therefore be taken to ensure that apparently straightforward questions or categories are not indirectly

discriminatory or exclusionary in effect. While blunt instruments may be useful at a population level, at an individual level there must be some room for the messiness and diversity of lived experience to be accommodated in the way information is collected and recorded.

Conclusion

As Browne (2016: 247) reminds us, data categories inherently have ‘excesses’ that ‘cannot contain sexual and gender categories’; in practice, this means, amongst other things, that government counting and measuring exercises are always going to undercount marginalised groups and individuals who remain suspicious, fearful or confused about attempts by the state or public bodies to encapsulate their lived experiences in tick boxes. However, the positive potential effects of inclusion of a more diverse array of marginalised narratives in any public data collection exercise encourage us to ‘contest objectionable and exclusionary social norms’ (Browne, 2016: 249). For this reason, we must pay particular attention to how and why we collect such data.

We suggest that the only meaningful way for public bodies to collect high quality data on sex or gender is to bear in mind aspirations, such as those of the Scottish Government, to be a society that ‘treats all our people with kindness, dignity and compassion’ (Scottish Government, 2018: 5). This means ensuring that the wording of each question in any data collection exercise is produced in dialogue with those whose data is being collected, paying particular attention to those who do not meet the standardised (hetero, cis-sex) norm, and being sensitive to the purpose for which the sex/gender information is intended. We propose, therefore, that it is crucial that a short paragraph explaining the purpose of the question, what it will be used for, by whom, and how it will be stored, is provided by public bodies to respondents when collecting sex/gender data. Governments and public bodies need not move towards a single definition of sex or gender, but should leave open the meaning of sex and gender to allow for complex lived experiences to be included in data collection exercises such as the Census, and administrative and legal categories such as criminal justice records. In doing so we are attentive to individual contexts, needs and interests, and make space for more intersectional experiences to be made visible.

We have also argued that the ‘sex not gender’ movement who have resisted a trans-inclusive definition of sex are engaging in a strategy of *concept capture*, i.e. replicating a binary, biological model of sex, that excludes trans and non-binary people, through the co-option of a number of administrative and legal categories across a wide range of social and political life. This can be read as a deliberate tactic, in the absence of a legal definition of either sex or gender, to create default legal and administrative norms about what sex ‘really’ means. These strategies are sometimes harnessed by feminists, but also others, who rely on regressive and reductive notions of sex and gender despite decades of feminist and queer scholarship highlighting the failures of universal, essentialist concepts to reflect the messy reality of intersecting aspects of lived experience. If public bodies want to engage in meaningful sex/gender data collection and recording, that does not cause harm, they would be well advised to avoid relying on reductive, over-simplistic and generalistic categories that are designed to fit the

standardised norm, but decontextualise, marginalise or invisibilise the needs and interests of some women, queer and non-binary people.


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Notes

1. The authors would like to thank Vic Valentine and Alex Sharpe for comments on an earlier draft.
2. See for example the words of Lord Tebbit in 2003 during the passage of the Gender Recognition Act 2004 at the House of Lords Second Reading, 18/12/03, Hansard: Column 1304: (<https://hansard.parliament.uk/Lords/2003-12-18/debates/1bacc5de-e32f-4556-8cb3-0ca85c51fc63/GenderRecognitionBillHl>). Lord Tebbit's view is one shared by some contemporary "gender critical feminists", and a view that has been the subject of legal debate in employment discrimination cases (such as *Mackereth v The Department for Work and Pensions and another* ET/1304602/18; *Forstater v CGD Europe and others* ET/2200909/2019; *Forstater v CGD Europe and Others* UKEAT/0105/20/JOJ; *Mrs K Higgs v Farmor's School*: 1401264/2019); and in academic discourse (see for example the work of academic philosopher Kathleen Stock and legal academic Rosa Freedman) as well as in wider socio-political discourse (see for example the twitter hashtag #Sex Matters).
3. This provision has recently been held by the Court of Session to fall within the competence of the Scottish Government when carrying out their public sector equality duties under the EqA (*For Women Scotland Ltd Petr* [2021] CSOH 31). The petitioners' had claimed in that case that the EqA is predicated on a binary view of sex. This is highly questionable given that the protections of the EqA also apply to non-binary people: *Taylor v Jaguar Land Rover Limited* [ET/1304471/2018](https://www.courts.gov.scot/cases/2021/1304471/2018) (14 September 2020). See also Cowan et al. (2021).
4. A landmark decision in the High Court in July 2021 held that the Ministry of Justice policy allowing trans women to be placed in the female prison estate is not unlawful – see: <https://www.bbc.co.uk/news/uk-57692993>.
5. The argument that many articles of the articles published by the *Times / Sunday Times* are biased against trans people was raised in an (unsuccessful) unfair dismissal claim against *The Times* in 2019: see <https://www.theguardian.com/uk-news/2019/aug/23/transgender-journalist-discrimination-claim-times-newspaper>). On May 24th 2021, Professor Alex Sharpe wrote on Twitter that the *Times / Sunday Times* had published 223 stories about trans issues and trans people since the beginning of the year. For a group that represents a tiny proportion of the population, this seems grossly disproportionate.
6. As others have pointed out, there is a oft-miscited Swedish study said to show that trans women show male pattern offending behaviours even after transitioning: Dhejne C, Lichtenstein P, Boman M, Johansson AL, Långström N, Landén M. (2011) Long-term follow-up of

- transsexual persons undergoing sex reassignment surgery: cohort study in Sweden. *PLoS One* 6(2):e16885. doi: 10.1371/journal.pone.0016885. In fact the study shows something different, as the lead author herself has said: see https://www.transadvocate.com/fact-check-study-shows-transition-makes-trans-people-suicidal_n_15483.htm#easy-footnote-bottom-1-15483.
7. See also the earlier FOI request about when Police Scotland started recording gender rather than sex: <https://forwomen.scot/wp-content/uploads/2019/06/PoliceScotlandFoI.pdf>.
 8. In fact, some of the media attention on the issue suggested wrongly that amending the provision from gender to sex meant that complainers would be guaranteed the right to a female FME (rather than the right to ask for a female FME), and one article in the Scotsman (<https://www.scotsman.com/news/opinion/columnists/transgender-debate-msps-must-stand-womens-sex-based-rights-key-vote-bill-help-rape-victims-susan-dalgety-3057640>) was amended on this point after Rape Crisis Scotland complained to IPSO (personal communication with RCS, 23 August 2021). Note that despite the intentions of the sex not gender lobbyists, trans women holding a GRC, who are legally women, would arguably be included in the pool of potential FMEs that could be assigned to a complainer who chooses a female FME.
 9. See <https://www.theguardian.com/uk-news/2021/mar/09/guidance-on-sex-question-in-uk-census-must-be-changed-high-court-rules>. In October 2021 a new Bill was proposed in Quebec, Canada, that would require sterilisation surgery before a trans person could legally change their sex designation on legal documents. It also proposes that anyone who does not meet that surgical requirement will be asked to have both their ‘birth’ sex and their gender identity on their legal documents, effectively immediately outing those trans people who have not had surgery. See <https://montrealgazette.com/news/local-news/bill-2-is-the-most-transphobic-bill-ever-proposed-in-quebec-activist-says>.
 10. The crucial question still remains why and when it would be relevant for a public body to collect information about ‘legal sex’. For example, single-sex services can offer or refuse services on the basis of sex, but they do not collect information from birth certificates (original or reissued after a GRC) before they do so, and the decision to refuse services on the basis of sex or any other protected characteristic has to meet a high threshold: it must be proportionate and meet a legitimate aim – see Cowan et al. (2021).

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