



Dear Mr Lowe,

**I am writing to you with regard to NRS' planned guidance to accompany the sex question in the 2022 census in Scotland.**

In a recent judicial review application hearing in the English High Court, Fair Play For Women contended that ONS had acted unlawfully in issuing guidance in respect of Question 3 "What is your sex" in the 2021 Census for England and Wales. The substantive claim was that part of the guidance on Question 3 rested on a misunderstanding of the meaning of the legal provisions that give rise to that question. The guidance proposed by the NRS for the same question in the 2022 Census for Scotland appears to be based on a similar misunderstanding of the legal provisions. While the decision of the High Court relates to the census in England and Wales I would like to share the information we have available to assist the NRS with its own considerations regarding the implications for Scotland. I enclose a link to our skeleton legal arguments<sup>1</sup> and a summary of the court outcome below:

On 9 March 2021, the Court granted permission to bring an application for judicial review, granted interim relief, and set directions, in the terms of an order sealed on 11 March 2021. In his oral judgement Mr Justice Swift said:

*"I do not doubt that the ONS has the power to publish guidance on the Census questionnaire. It has the power to do that because it is something expedient for the purpose of its own functions under the 1920 Act. But if guidance is given on how to answer Census questions, the guidance must match with the proper meaning of the particulars permitted by the Act and the Order. In this case, I am satisfied that the Claimant has a **strongly arguable case** on the proper meaning of "sex" in Para 1 in the Schedule to the Act, and in Para 8 of Schedule 2 to the Order. **That is to say that those references are to a person's sex as recognised by law, and not the sex with which the person self-identifies"***

*"In fact, I am satisfied that the Claimant is much more likely than not to succeed on this point for the reasons I have given. The consequence of this is that I am, in the same way, satisfied that to the extent that the **ONS's guidance suggests that Q3 can be answered other than by reference to the information recorded either on a birth certificate or in a Gender Recognition Certificate, that guidance is wrong. It does not match the question being asked"**.*

*"The Claimant's application for **interim relief is granted**. I propose to make an order to the effect that the present sentence in the guidance, that the Claimant has questioned, should be reformulated to read "If you are considering how to answer, use the sex recorded on your birth certificate or Gender Recognition Certificate". I should also say that, for the reasons I have given, **I would grant permission to apply for JR"**.*

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<sup>1</sup> <https://fairplayforwomen.com/wp-content/uploads/2021/04/FPFW-v-ONS-Claimant-Skeleton-for-Hearing-for-9-March-2021-final.docx>

On 15 March 2021, ONS signed a Consent Order<sup>2</sup> agreeing to publish its guidance on a final basis, in terms that “*If you are considering how to answer, use the sex recorded on your birth certificate or your Gender Recognition Certificate*” and agreed to the declaration below:

**IT IS HEREBY DECLARED THAT** “*sex*”, in paragraph 1 of the Schedule to the Census Act 1920 (as amended by the Census (Return Particulars and Removal of Penalties) Act 2019)), paragraph 8 of Schedule 2 to the Census (England and Wales) Order 2020, and the “*What is your sex*” question in Schedule 2 to the Census (England) Regulations 2020 means sex as recorded on a birth certificate or Gender Recognition Certificate.

As such, the claim for JR was withdrawn and the ONS agreed to pay Fair Play For Women's legal costs.

Following this, NIRSA also amended its own guidance for the sex question in the 2021 Census for Northern Ireland in line with the Court judgement.

## IMPLICATIONS FOR SCOTLAND

### a) Legality:

The reasoning of Mr Justice Swift on the Act and the Regs as they apply in England and Wales would appear to apply to the Act and Regs as they apply in Scotland. The Census (Scotland) Regs 2020 require the same question on sex to be asked as in England and Wales as well as a voluntary question: “*do you consider yourself to be trans, or have a trans history*”.

We note that the phrase “*trans status and history*” was inserted into the 1920 Act (as it applies in Scotland) instead of “*gender identity*”. The Scottish legislation uses the concept of “*trans*” in a very similar if not identical way to the way that the concept of “*gender identity*” is used in the legislation in England and Wales.

Moreover, an amendment to include “*and gender identity*” to the particular of sex in the 1920 Act (as it applies in Scotland) was rejected following scrutiny by the CTEEA Committee<sup>3</sup> because it risked the “*perception that ‘sex’ is being conflated with ‘gender identity’*”. During the Stage 1 debate on the Census (Amendment) (Scotland) Bill the Cabinet Secretary Fiona Hyslop made it very clear there was no intention to introduce the concept of ‘gender identity’ under the particular of sex.

*“As we do not want that kind of conflation, amendments will be lodged at stage 2 to deal with the issue. I want to make it very clear that it was never our intention to conflate sex and gender identity”* (Meeting of Parliament 28<sup>th</sup> February 2019 Session 5 report, page 102<sup>4</sup>)

Despite this, 12 months later in a letter to the Convenor of the CTEEA Committee on 26 February 2020<sup>5</sup> the Cabinet Secretary Fiona Hyslop confirmed that guidance for the sex question would be based on ‘self-identification’.

<sup>2</sup> <https://fairplayforwomen.com/wp-content/uploads/2021/03/CO007152021.pdf>

<sup>3</sup> <https://digitalpublications.parliament.scot/Committees/Report/CTEEA/2019/2/7/Stage-1-Report-on-the-Census--Amendment---Scotland--Bill#Recommendations-and-Conclusions>

<sup>4</sup> <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=11964&mode=pdf>

<sup>5</sup>

[https://archive2021.parliament.scot/S5\\_European/General%20Documents/20200226\\_CabSecEFWCToConven er.pdf](https://archive2021.parliament.scot/S5_European/General%20Documents/20200226_CabSecEFWCToConven er.pdf)

*"I can confirm that, subject to the Census Order and Census Regulations being in force, the Registrar General will conduct a census that has a binary sex question with guidance that provides for a self-identification basis of response if required and I support this approach for Scotland's Census 2021".*

Taken together, there is likely to be a strongly arguable case that NRS would also be acting unlawfully if it issued guidance on the sex question on the basis intended.

**b) Harmonisation:**

On 21 January 2021, a statement of agreement between the National Statistician and the Registrars General for Scotland and Northern Ireland was published<sup>6</sup>. One of the agreed aims was to achieve harmonisation of census outputs across the UK, where possible. The use of common definitions was specifically referenced.

*"Common definitions and classifications, typically based on international standards, should be agreed, used and published."*

Following the legal challenge, both ONS and NISRA are now using the same Guidance to define the question on sex *"If you are considering how to answer, use the sex registered on your birth certificate or Gender Recognition Certificate"*.

Therefore, if NRS now proceeds as planned with guidance based on 'self-identification' it would mean the definition of sex in the Scottish Census would no longer be harmonised with all other UK nations, in addition to carrying with it known and strongly arguable doubts over its legality.

For the reasons discussed above, I hope you can agree that the best course of action would now be to revise your policy such that any guidance does not refer to or imply 'self-identified' sex.

I would be grateful if you could confirm whether the NRS has already made the policy decision to remove guidance based on 'self-identification' from the sex question. Alternatively, if a policy decision regarding a change has not yet been reached, please confirm whether you will be reopening a period of stakeholder engagement. As constructive stakeholders regarding the sex question I would be very happy to work with you to share our expertise and experience on this issue to help in your decision-making process.

Finally, can you please advise when the final wording of the Guidance will be published. With almost a year remaining before Census Day in Scotland a timely policy decision will avoid any repeat of the unfortunate situation where last minute guidance has to be changed after going live.

Yours Sincerely,

Nicola Williams  
Director, Fair Play For Women<sup>7</sup>.

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<https://www.ons.gov.uk/census/censustransformationprogramme/legislationandpolicy/conductofthe2021and2022censusesintheuk>

<sup>7</sup> <https://fairplayforwomen.com/>