



Dear Ed Humpherson,

On 7th April the Good Practice Team confirmed that the ONS has failed to notify them of a potential breach of the Code of Practice for Statistics following their use of unlawful Guidance accompanying the sex question in the Census. As such no breach report has been published evaluating why and how this mistake was made, or what damage may have been done to the Census. I am writing to ask you if the OSR granted an exemption (according to T2.9 of the Code) such that no breach report would be required for this incident. **Or if no exemption was granted I would like to make a formal complaint to the OSR that a breach report has not yet been published by the Census Team at ONS and I request that one is now completed.**

The UKSA has a statutory obligation under the Statistics and Registration Service Act 2007 to promote and safeguard good practice in relation to official statistics. Producers support and uphold this principle by reporting breaches of the Code of Practice for Statistics to the OSR. By acting beyond its statutory powers set down in Census legislation ONS has failed to meet its obligations under the Code in terms of both Quality and Trustworthiness. It is highly likely that breaches have occurred both in terms of the initial policy decision resulting in the unlawful guidance and the subsequent decision to use the guidance when the Census launched on 22nd February despite legal action having already commenced. These decisions directly led to the Census being damaged because the guidance needed to then be reissued part-way through the Census period.

The fact that damage will have occurred is not in dispute. It was highlighted by Iain Bell in his witness statement to the High Court as part of the permission hearing for judicial review. He told the court that if the Guidance was changed after launch the Census would be damaged in terms of completion rates, quality of the data collected, operational disruption, quality of advice given. Extracts of the witness statement are copied below:

*"By 12 March we expect to have received **approximately 5 million returns**".*

*"The ONS will have no opportunity to evaluate or test the impact of changing the Guidance at this stage. However, in my view **any change at this stage is likely in itself to be detrimental to the Census**. Amending guidance with collection underway is likely to confuse respondents. It also means that respondents who have regard to the Guidance will potentially answer the question differently either side of any change resulting in less consistent data."*

*"Any changes to the guidance will have a much greater impact on those populations [trans and VSC/intersex], **both in terms of completion rates and the quality of data collected.** This is of particular importance in 2021 when the census is for the first time collecting and producing data on gender identity."*

*"Changing the guidance at this stage in the Census is also likely to lead to **operational disruption and a reduction in the quality of advice that is given to respondents**"*

It is extraordinary that ONS found itself in the position where unlawful guidance was used despite years of preparation for the Census. There are unknowns and anomalies that the OSR, and indeed the public, should expect answers to regarding this incident:

Was ONS given incorrect legal advice by the Government Legal Department?

Had ONS failed to request legal advice regarding what Guidance would be lawful?

Had ONS been given correct legal advice but chose to ignore it? If so why?

Why and how did the proposed guidance change between 28th January and 12th February?<sup>1</sup>

Why was it left until 12th February to publish the final wording of the Guidance, leaving just 10 days before Census launch?

Why did ONS choose to publish the Guidance on the Census website at risk before the legal challenge had been resolved?

What steps have been taken to mitigate the damage caused by changing the Guidance part way through the Census?

How many Census returns had there been and how many times had the Guidance been accessed before the Guidance was changed?

Will Census returns made before the Guidance was changed be used or will respondents be asked to make a new return?

What edit and imputation rules will be used to identify and correct any answers given in response to the sex question based on the unlawful Guidance?

What retraining of staff and volunteers has been done to ensure advice provided on the Census reflected the new guidance?

What public statements have been made to ensure the public is aware the Guidance has been changed, should they need to change their previous answer?

What outreach work has been done to the trans community to explain why collecting sex data is important?

How will ONS deal with incidents where they are notified of respondents deliberately putting a false answer to the sex question?

The purpose of reporting breaches of the Code is to build public trust in statistics and for producers of statistics to learn and improve. This is of particular importance and urgency because another statistics producer, NRS, is currently at risk of also acting unlawfully

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<sup>1</sup> Ian Diamond was publicly stating ONS's position to be that the sex question would be asking for respondents to state their legal sex, including on BBC Radio 4's Today Programme as recently as 22 January 2021. He confirmed this to Professor Alice Sullivan in a meeting on 1 February 2021 when he informed her that the Guidance would direct respondents to state their legal sex as evidenced only on a birth certificate or gender recognition certificate. Mr Bell also stated in an email to Professor Sullivan on 28th January in advance of that meeting that they had "**settled on legal sex**" and that they "**think it is best possible solution**". There has, as yet, been no explanation for what appears to have been a last minute change of position by ONS. Attached is a copy of the email correspondence between Iain Bell and Alice Sullivan that was provided as an exhibit in my witness statement to court.

regarding the Scottish Census in 2022. Understanding how and why the ONS breach occurred is likely to provide important insights and learning that can be of use to NRS. It is unconscionable that with 12 months remaining before Scottish Census Day the NRS would begin the Census carrying with it known and strongly arguable doubts over its legality, in the same way ONS and NISRA did. It is therefore important that a breach report should be made by the ONS and steps taken by OSR to prevent a second breach of a similar in nature.

I have recently written to Paul Lowe of NRS to provide him with the information we have available to assist the NRS regarding the implications for Scotland. I have asked him to 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, whether he will be reopening a period of stakeholder engagement and when the final decision will be made. I attached a copy of the letter I sent to him on 1st April<sup>2</sup>.

I would be grateful if you could let me know whether OSR will be asking ONS to prepare a breach report and what involvement OSR will have overseeing the process by which the NRS makes a decision about its Guidance.

I would of course be very happy to meet with you to discuss any of the issues raised in this email in more detail.

Best wishes.

Dr Nicola Williams  
Director, Fair Play For Women Ltd

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<sup>2</sup> [https://fairplayforwomen.com/wp-content/uploads/2021/05/NRS\\_FPFW\\_010421.pdf](https://fairplayforwomen.com/wp-content/uploads/2021/05/NRS_FPFW_010421.pdf)