

Note on the equality and human rights considerations with collection of data on sex and gender (September 2019; updated in November 2021 to reflect developments in the law in England and Wales)

Equality and human rights considerations related to the collection of data on sex and gender

The PSED requires some public bodies to gather employment information on the protected characteristics of their employees, including sex and gender reassignment. Whilst this does not mean that employment information on the basis of legal sex¹ must be recorded, public bodies need to find a balance between recording appropriate data and upholding people's human rights, including the right to privacy.

Public bodies must also give due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations in relation to people who share protected characteristics, when they are providing services. While there is no specific duty on public bodies to collect information to do this, it would be difficult if not impossible to meet the duty or undertake adequate Equality Impact Assessments, without knowing who uses their services.

Public bodies must also publish a set of equality outcomes which they consider will enable them to better meet the PSED. A public body must publish a report on the progress made to achieve its equality outcomes every two years and publish a fresh set of equality outcomes within four years of publishing its previous set. Again, information must underpin the development and monitoring of these equality outcomes.

There are important human rights considerations that need to be considered when asking employees or service users to state their sex, especially in regard to people's right to privacy under **Article 8 of the European Convention on Human Rights** and the **Human Rights Act 1998**. Collection of data must be appropriate and proportionate to the particular purpose for which the data is being collected. At times, people's right to privacy will take precedence; at others, such as when a public body is fulfilling its statutory responsibilities, it is likely to be justified to ask such questions.

¹ Legal sex for most people is their sex registered at birth. For a trans person with a Gender Recognition Certificate, legal sex is their acquired sex. For a trans person without a Gender Recognition Certificate, legal sex is their sex registered at birth.

Requiring trans employees or service users to disclose their sex as registered at birth could in some circumstances be a violation of their human rights, particularly their right to privacy under Article 8. In particular, requiring a trans person without a **Gender Recognition Certificate** (GRC) to disclose their legal sex could result in that person being ‘outed’ as a trans person. It is a criminal offence under the **Gender Recognition Act 2004** (GRA) for a person, who has acquired the information in an official capacity, to disclose information relating to another person’s application for a GRC or their gender prior to grant of the GRC. In some instances, forcing people to ‘out’ themselves will also breach the **Equality Act 2010**. This point emphasises the need for data owners, in particular when asking questions on legal sex or sex registered at birth, to be assured that they give proper consideration to the appropriateness and proportionality of the data being collected and the purposes for which it is being used.

Many public bodies use the terms ‘sex’ and ‘gender’ interchangeably. The language used by a public body does not dictate whether the PSED requirements have been met. Public bodies are not always required to collect information on legal sex and can enable employees and service users to self-identify their sex, but only where this is suitable for the purposes for which the data will be used.

The vital questions that public bodies need to address are: what will they be using the information they are collecting for; and will allowing respondents to self-identify their sex affect that? Public bodies often compare their data to information collected through the census, so ensuring consistency of data over time may be a consideration when making such decisions.

Following Judicial Review proceedings in March 2021 in the English and Welsh High Court, the Office for National Statistics updated their census guidance on how to answer the question ‘what is your sex’ to say that respondents should use the sex recorded on their birth certificate or Gender Recognition Certificate. Therefore if public bodies are comparing their data to census information, with the provisos noted above, it is likely to be appropriate to ask for information about legal sex.