



Fife Centre for Equalities 12 August 2019

Equal Opportunities Monitoring and the Census 2021  
(interim Equality Briefing)



## Who does this concern?

This briefing is aimed at employers, team leaders and HR staff of organisation wishing to deliver both legally compliant and best practice in Equal Opportunities Monitoring. The degree of Equal Opportunities monitoring required or expected from organisations, depending on their type and size.

For instance, Gender Pay gap Reporting applies to employers in Great Britain with more than 250 staff. Some key points for reporting are highlighted below:

### *a) Public Sector Equality Duty – key authorities*

Public authorities subject to the specific equality duties arising under section 149 of the Equality Act 2010, and specific duties which are imposed by The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (revised April 2016) have the requirements below in addition to the general equality duty:

- report on mainstreaming the equality duty
- publish equality outcomes and report progress
- assess and review policies and practices
- gather and use employee information
- publish information on board diversity and succession planning
- publish gender pay gap information
- publish statements on equal pay
- consider award criteria and conditions in relation to public procurement
- publish required information in a manner that is accessible.

### *b) For organisations delivering a public function or service (as defined under the Equality Act 2010)*

Other organisations not listed in the Act must also comply with the public sector equality duty if they carry out public functions. This can be a public sector organisation but it can also be a private organisation or third sector / charity.

This could include - for example:

- privatised utilities like water companies or rail
- some organisations subcontracted to carry out a public function like a private security company running a prison
- some housing associations when carrying out some of its functions as a social landlord
- private care homes providing care on behalf of the local authority
- private hospitals providing care on behalf of the NHS.
- Private organisations and charities which carry out public functions are called hybrid authorities.

If an organisation is not set out in the Equality Act, the courts decide if it's a public authority carrying out a public function. Courts also look at other factors to decide if a private organisation is carrying out a public function. It will look at whether the organisation is:



- publicly funded
- supervised by a state regulatory body
- exercising powers given to it by the law
- taking the place of central or local government
- providing a public service
- acting in the public interest
- carrying out coercive powers devolved from the state.

### c) All employers:

You are an employer if you are:

- recruiting people to work for you or
- making any decisions about what happens to the people working for you, or
- taking action in relation to the people working for you, equality law applies to you.

Equality law concerns all the different types of unlawful discrimination<sup>1</sup> (in other words in diverse sets of situations, irrespective of:

- size of organisation
- sector
- whether you have one worker or 10 or hundreds or thousands
- whether or not you use any formal processes or forms to help you make decisions.

### **Beyond minimal compliance / preventing risk**

Putting measures in place to address and prevent unlawful discrimination is a key policy priority for organisations wishing to minimise risk or legal implications. Going beyond minimal avoidance of legal risk (AKA good practice) involves developing:

- Equality policies
- Equality training
- Monitoring.

The distinction is important, as there is a 'data' differential that gradually forms during routine collection of information and data on employees and service users. For example, from GOV.UK<sup>2</sup>:

- 1 There is no legal requirement for *detailed tracking* on numbers of job applications received from different groups of people, or the characteristics of staff.

<sup>1</sup> Short breakdown at <https://www.equalityhumanrights.com/en/advice-and-guidance/your-rights-under-equality-act-2010#situations>

<sup>2</sup> See online guide at: <https://www.gov.uk/employers-responsibilities-equality-monitoring>



- 2 If you collect personal information about job applicants or staff, under GDPR you must protect any data that can identify specific individuals, and also put further measures and justifications in place for 'special category data'<sup>3</sup> - e.g. ethnicity, gender, faith, sexuality.
- 3 However, you must also not discriminate against a candidate based on their personal information.

This means that over a period of time (or large number of applications/employees), most employers will be data controllers for a range of data that may have an equality dimension and implication, even if not originally collected for that purpose. In those situations, one recommendation would be to implement Equal Opportunity monitoring before it becomes an issue through data access requests or otherwise.

### Equal Opportunity Monitoring – tracking changes vs Census 2021

#### What should be recorded?

- Our recommendation is to work from a standard format and adapt to your circumstances – in the example below: ACAS EO Monitoring, applied to the Scottish Context.
- Scotland's Census Question development is crucial to track as an employer as it is indicative of a country's population and changing social attitudes
- Those are currently continuously drafted and re-drafted - the Scottish Parliament will make the final decision on which questions to include in Scotland's Census 2021
- Provisional data fields/consideration are highlighted below with some notes where relevant

#### 1. Gender, Sex, Gender Identity

It should be noted that "sex", "sexual orientation" and "gender re-assignment" are three separate and distinct matters, and that good equality systems will keep them separate, e.g. Trans people, as anyone else, may be bisexual, lesbian, gay or heterosexual. This is a current debate in policy<sup>4</sup> that is not settled, following the Holyrood report which argued on the lack of consultation with women's groups leading publication of legislation that conflated sex and gender identity.

The proposal from the National Records of Scotland (NRS), which is responsible for the census, was for the mandatory sex question to include a non-binary response option as well as male and female. This formula was recently rejected by the Office for National Statistics for the next census in England and Wales in

<sup>3</sup> See FCE briefing on EO Monitoring and <https://centreforequalities.org.uk/wp-content/uploads/2018/07/FCE-Briefing-GDPR-and-Equal-Opportunities-Monitoring-MAY18.pdf>

<sup>4</sup> E.g. : "Leading crime expert urges MSPs to ensure sex and gender are not conflated in Census" 12 June 2019 - [Scotsman](#)



favour of maintaining the binary male/female sex question and adding a voluntary question on gender identity for those aged over 16.

Previous census guidance has allowed people to declare their lived sex but data experts have cautioned that doing so again and a non-binary sex question, would imperil the reliability of census data.

**ACAS**

Gender Man  Woman  Intersex  Non-binary  Prefer not to say   
 If you prefer to use your own term, please specify here .....

1.1. (Gender Reassignment)

Have you undergone, are you undergoing or do you intend to undergo gender reassignment? For example, this includes having changed your sex (gender) Yes  No

**Scotland’s Census 2021 – current (debated) positions:**

- a. Question: **At birth you were identified as?**
  - i. Male
  - ii. Female
  - iii. Intersex
  - iv. I prefer not to say
  
- b. Question: **Which of the following describes how you think of yourself?**
  - i. Male
  - ii. Female
  - iii. Other
    - 1. Optional – Please describe:
  - iv. I prefer not to say

Additional Question: **Have you gone through any part of a process (including thoughts or actions) to change from the sex you were described as at birth to the gender you identify with, or do you intend to?**

**2. Age**

For monitoring purposes, it is normally sufficient to collect a person’s age by using the question ‘What is your date of birth?’ Where more detailed information is required, collecting the full date of birth allows the resulting data to be used or manipulated in any way appropriate, including categorisation into age-bands.

Age 16-24  25-29  30-34  35-39  40-44  45-49   
 50-54  55-59  60-64  65+  Prefer not to say

Or: **How old are you ?**

**3. Disability**



The Equality Act 2010 defines disability as a physical or mental impairment that has a ‘substantial’ and ‘long-term’ negative effect on your ability to do normal daily activities. The Act defines ‘substantial’ as being more than minor or trivial – e.g. if it takes much longer than it usually would to complete a daily task like getting dressed. ‘Long-term’ is defined as lasting for a period of 12 months or more – e.g. a breathing condition that develops as a result of a lung infection.

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**Do you have a health condition or disability that has lasted or is expected to last 12 months or more that makes it difficult for you to do day-to-day activities?**

Yes  No  Prefer not to say

- i. Learning Disability
- ii. Long Term Illness
- iii. Mental Health Condition
- iv. Physical Impairment
- v. Sensory Impairment

What is the effect or impact of your disability or health condition on your ability to give your best at work? Please write in here: + \_\_\_\_\_

#### 4. Race

Collecting data on ethnic group, and national identity, can be complex because of the subjective and multifaceted nature of the concepts. Membership to each of the concepts is something that is self-defined and subjectively meaningful to an individual.

ONS introduced two new subcategories into the ethnicity question for the 2011 Census, namely ‘Gypsy or Irish Traveller’ under the ‘White’ category and ‘Arab’ under the ‘Other ethnic group’ category. Another change since the 2001 Census question on ethnicity is that ‘Chinese’ has moved into the ‘Asian or Asian British’ category.

#### ACAS

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##### What is your ethnicity?

Ethnic origin is not about nationality, place of birth or citizenship. It is about the group to which you perceive you belong. Please tick the appropriate box

##### White

English  Welsh  Scottish  Northern Irish  Irish   
 British  Gypsy or Irish Traveller  Prefer not to say

Any other white background, please write in:

##### Mixed/multiple ethnic groups

White and Black Caribbean  White and Black African  White and Asian   
 Prefer not to say  Any other mixed background, please write in:

##### Asian/Asian British

Indian  Pakistani  Bangladeshi  Chinese  Prefer not to say

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 equal and inclusive place to live, work and study.*



Any other Asian background, please write in:

**Black/ African/ Caribbean/ Black British**

African  Caribbean  Prefer not to say

Any other Black/African/Caribbean background, please write in:

**Other ethnic group**

Arab  Prefer not to say  Any other ethnic group, please write in:

**Scotland's Census 2021 – current positions:**

- a. White
  - v. Scottish
  - vi. Irish
  - vii. Other British
  - viii. Gypsy / Traveller
  - ix. Polish
  - x. Any other White background
    - 1. Please describe:
- b. Mixed
  - xi. Please describe your mixed or multiple ethnic group
    - 1.
- c. Asian; Asian Scottish; Asian British
  - xii. Pakistani, Pakistani Scottish or Pakistani British
  - xiii. Indian, Indian Scottish or Indian Scottish
  - xiv. Bangladeshi, Bangladeshi Scottish or Bangladeshi British
  - xv. Chinese, Chinese Scottish or Chinese British
  - xvi. Any other Asian background
    - 1. Please describe:
- d. African
  - xvii. African, African Scottish or African British
  - xviii. Any other African background
    - 1. Please describe:
- e. Caribbean
  - xix. Caribbean, Caribbean Scottish or Caribbean British
  - xx. Black, Black Scottish or Black British
  - xxi. Any other Caribbean or Black background
    - 1. Other, please describe
- f. Other ethnic background
  - 2. Arab
  - 3. Other ethnic background
    - a. Other, please describe

**5. Religion and Belief**

**ACAS**

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**What is your religion or belief?**



No religion or belief  Buddhist  Christian  Hindu  Jewish   
 Muslim  Sikh  Prefer not to say  If other religion or belief, please write in:

**Census 2021 – current positions:**

- c. Church of Scotland
- d. Roman Catholic
- e. Christianity Other
  - 1. Optional – Please describe:
- f. Islam
- g. Buddhism
- h. Sikhism
- i. Judaism
- j. Hinduism
- k. Paganism
- l. No religion
- m. Other
  - 1. Optional – Please describe:

**6. Sexual Orientation**

The protected characteristic under the Equality Act 2010 in this area is ‘sexual orientation towards’. The initial question below is informed by the research carried out by ONS as part of the Government response to the Equalities Data review

**What is your sexual orientation?**

Heterosexual  Gay  Lesbian  Bisexual   
 Prefer not to say  If you prefer to use your own term, please specify here

**7. Carer status**

**Do you have caring responsibilities? If yes, please tick all that apply**

- None  Primary carer of a child/children (under 18)
- Primary carer of disabled child/children
- Primary carer of disabled adult (18 and over)  Primary carer of older person
- Secondary carer (another person carries out the main caring role)
- Prefer not to say

**8. Marriage and Civil Partnership**

**ACAS**

**Are you married or in a civil partnership?** Yes  No  Prefer not to say

**Census 2021 – current positions:**

Question: **How would you describe your marital status?**



- a. Single
- b. Living with partner
- c. Married
- d. Civil Partnership
  
- e. Separated
- f. Divorced
- g. Widowed
  
- h. Other Click here to enter text.
  - 1. Optional - Please describe:

## 8. Working Pattern / Situation

### [ACAS – Working Pattern]

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#### What is your current working pattern?

Full-time       Part-time       Prefer not to say

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#### What is your flexible working arrangement?

None       Flexi-time       Staggered hours       Term-time hours   
 Annualised hours       Job-share       Flexible shifts       Compressed hours   
 Homeworking       Prefer not to say       If other, please write in:

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### FCE - Occupation or situation (adapt to your service users)

Question: **Which of the following options would you say best describes your current situation?**

- a. Self-employed
- b. Employed full-time
- c. Employed part-time
- d. Volunteering full-time
- e. Volunteering part-time
- f. Looking after the home or family
- g. Unemployed and seeking work
- h. At school
- i. In further/higher education
- j. Government work or training scheme
- k. Armed Forces Veteran
- l. Permanently sick or disabled
- m. Unable to work due to short-term illness or injury
- n. Other
  - i. Optional – Please describe:



## **APPENDIX 1: Useful resources / Guides**

### **ACAS (2018) Prevent discrimination: Support equality**

[https://www.acas.org.uk/media/4402/Prevent-discrimination-support-equality/pdf/Prevent\\_discrimination\\_June\\_2018.pdf](https://www.acas.org.uk/media/4402/Prevent-discrimination-support-equality/pdf/Prevent_discrimination_June_2018.pdf)

### **GOV.UK (2018) Employers' responsibilities: equality monitoring**

<https://www.gov.uk/employers-responsibilities-equality-monitoring>

### **Civil Service (2012) Best practice guidance on monitoring equality and diversity in employment**

<https://www.whatdotheyknow.com/request/174677/response/430146/attach/3/Equalities%20Monitoring%20Guidance%20final.pdf>

### **Scotland's People (2019) – Census 2021 Question Development Updates**

<https://www.scotlandscensus.gov.uk/question-development>

### **NHS England (2021) Monitoring Equality and Health Inequalities: A Position Paper**

<https://www.england.nhs.uk/wp-content/uploads/2015/03/monitrg-ehi-pos-paper.pdf>

### **ISD Scotland (2012) Equalities Monitoring Guidance and recommended questions for NHS Scotland**

<https://www.isdscotland.org/Health-Topics/Equality-and-Diversity/Training-Materials/EqualitiesMonitoringGuidance3403WEB.pdf>

### **ISD Scotland (2018) Measuring Use of Health Services by Equality Group Report**

<https://www.isdscotland.org/Health-Topics/Equality-and-Diversity/Publications/2017-06-27/2017-06-27-Measuring-Use-of-Health-Services-by-Equality-Group-Report.pdf>



## APPENDIX 2: Public Sector Equality Duty Organisations (PSED)

### Q: What authorities does the PSED apply to in Fife / Nationally?

#### [Fife]

- Fife College
- Fife Council
- Fife Health and Social Care Partnership
- Fife Education Authority
- Fife Licensing Board
- NHS Fife
- University of St Andrews

- Protection Agency
- Scottish Fire and Rescue Service
- Scottish Fire and Rescue Service (Chief Officer of)
- Scottish Funding Council
- The Scottish Legal Aid Board
- Scottish Ministers
- Scottish Natural Heritage
- Scottish Police Authority
- Scottish Qualifications Authority
- Scottish Social Services Council
- Scottish Water
- Skills Development Scotland
- South-East of Scotland Transport Partnership (SESTRAN)
- Sportscotland (Scottish Sports Council)
- State Hospitals Board for Scotland
- Student Awards Agency for Scotland
- Transport Scotland
- VisitScotland

#### [National]

- Accountant in Bankruptcy
- Disclosure Scotland
- Education Scotland
- Police Scotland (Chief Constable of)
- Scottish Children's Reporter Administration
- Scottish Courts and Tribunals Service
- Scottish Criminal Cases Review Commission
- Scottish Prison Service
- Scottish Public Pensions Agency
- Scottish Enterprise
- Scottish Environment



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Tell us about your community concern online at:

<https://centreforequalities.org.uk/support-and-advice/community-concerns/>



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