

Briefing for the Public Petitions Committee on petition [PE1876](#): Accurately record the sex of people charged or convicted of rape or attempted rape, lodged by Lucy Hunter Blackburn, Lisa Mackenzie and Kath Murray

Note

This petition briefing has been updated to reflect some relevant developments since it was first produced.

Original briefing, June 2021

Background

The petitioners, operating as [Murray Blackburn Mackenzie](#), provide policy analysis on the interaction between sex and gender identity.

In this context, the petition argues that Scottish Government draft guidance on collecting data on sex and gender (discussed below) fails to ensure that information on the sex of a person is accurately recorded in official statistics.

The petitioners are concerned that an accused/offender who was born male but self-identifies as female may be recorded in criminal justice statistics as female. They state that this has the potential to distort understanding of crimes which are mainly committed by men (almost always men in the case of rape and attempted rape):

“Recording sex accurately in these cases matters for data accuracy and trust in official statistics, public policy, media reporting, research, and for trust in public bodies.”

Murray Blackburn Mackenzie’s website provides further background information – [Scottish Parliament public petition on recording sex accurately in cases of rape or attempted rape](#). In this, a distinction is drawn between:

- the recording of physical sex in anonymised form for statistical use
- the recording of gender identity for other purposes (e.g. to ensure trans people are treated sensitively by police and court staff).

Scottish Government

In 2019, the Scottish Government set up a [Sex and Gender in Data Working Group](#) to “provide a clear statement about the collection and use of data about a person’s sex and gender”. The working group is led by Scotland’s Chief Statistician, Roger Halliday.

The remit of the working groups extends well beyond the collection of criminal justice statistics. Further information about its remit, membership and meetings is set out on its website.

In December 2020, as part of continued consultation on the topic, the Scottish Government published [draft guidance on collecting data on sex and gender](#). In relation to the draft guidance, a [blog by the Chief Statistician \(December 2020\)](#) noted:

“I look forward to receiving your comments before Friday 12 Feb. I will balance the views expressed to refine these proposals and to shape the expectations I set for colleagues across the public sector.”

The draft guidance itself included consideration of what is meant by ‘sex’ and ‘gender’. Whilst noting that they are used interchangeably by some, it outlined how they are specifically used by a range of organisations. For example:

- biological sex – male or female as indicated by a person’s anatomy
- legal sex – male or female as registered at birth or set out in a gender recognition certificate
- gender – a social construct linked to ideas of masculinity and femininity
- gender identity – a person’s sense of themselves as a woman or man, as having no gender, or as non-binary
- transgender – a person whose gender identity differs from sex registered at birth.

It went on to outline relevant considerations for bodies seeking to collect data in this area, noting that:

“the starting point for any organisation is why does it need to collect data. Data will be collected for various specific purposes, and therefore organisations must decide on the most useful definition(s) to use to capture the data that they need.” (p 9)

It stated that, in many situations, responses based on either sex or gender will provide organisations with the information they need. And that:

“If you are looking for information specifically to plan, design, or fund services, it is important to consider whether it would help you design and run a better service:

- To ask about the concept of gender identity; or
- To ask about the concept of sex; or
- It makes no difference either way.

In a small number of instances, it may be necessary to record a person’s legal sex but this would be on an individual basis for a very specific purpose and it would be up to public bodies who need this data to develop the best approach to do this.” (p 10)

The draft guidance added that:

“Engagement has shown that trans people prefer to answer a self-identified sex or gender identity question followed by a trans status question. Asking this combination can support the principle of asking questions respectfully.”
(p 11)

As noted above, the petitioners argue that collecting information specifically on sex is important in relation to at least some criminal justice statistics.

A further [blog by the Chief Statistician \(March 2021\)](#) provided an update on the consultation process and next steps. It concluded saying:

“When I’m more certain of the timing, I will let people know. I can say that I’m keen to move forward as quickly as possible, as supporting public bodies to collect and use this data really matters.”

Scottish Parliament

Murray Blackburn Mackenzie’s website highlights a [parliamentary question asked by Joan McAlpine MSP](#):

“To ask the Scottish Government whether Police Scotland and the Scottish Courts and Tribunals Service record incidents according to the alleged perpetrator’s birth sex, or by self-declaration.”

The then Cabinet Secretary for Justice, Humza Yousaf MSP, responded in March 2019, stating that:

“With regard to victims, witnesses and suspects, Police Scotland and the Scottish Courts and Tribunals Service record incidents according to a person’s self-identified gender. Police Scotland requires no evidence or certification as proof of gender identity other than a person’s self-declaration, unless—it is important to emphasise this—it is pertinent to any criminal investigation with which they are linked and it is evidentially critical that Police Scotland legally requires such proof.”

Issues relating to sex and gender were also considered during Scottish Parliament scrutiny of the [Census \(Amendment\) \(Scotland\) Bill](#) (introduced October 2018). What is now the [Census \(Amendment\) \(Scotland\) Act 2019](#) includes provisions allowing questions on transgender status and history to be answered on a voluntary basis as part of the census.

A [SPICe blog published in advance of the final parliamentary debate on the Census \(Amendment\) \(Scotland\) Bill](#) provides a summary of scrutiny up that point. It notes that a key concern raised during scrutiny was that the Bill conflated sex (already covered by question in the census) with gender identity. Amendments were made seeking to ensure that this does not happen.

Update to briefing, February 2023

Guidance for public bodies on the collection of data on sex and gender

The original petition referred to the draft guidance of the Scottish Government's [working group on sex and gender in data](#). Its final report on '[Sex, gender identity, trans status - data collection and publication: guidance](#)' was published in September 2021.

The Working Group said that while most public bodies are collecting and analysing data about sex or gender,

“these terms are sometimes used interchangeably in the questions used in data collection, and there is typically limited guidance on exactly what is being asked for. This has the consequence that in reality people answering this question may be interpreting it in different ways.”

The Working Group said there was no standard approach to collecting data on sex and gender identity in Scotland, the UK or internationally. It was also clear that little data is collected on trans status or history in Scotland, and no definitive international standards for how to do this.

It further states:

“Given that for the vast majority of people sex and gender identity questions will provide the same result, for most issues one may want to measure, whether there is a question about sex or about gender identity, it will not skew the statistics when disaggregated by either concept.”

However, the guidance does state that in a small number of circumstances:

“it may be necessary and proportionate to require a person to answer a question on their biological sex, but this would be on an individual basis for a very specific purpose, and it would be up to public bodies who need this data to develop the best approach to do this. The most likely scenarios where data on biological sex is required would be on a case-by-case basis in a medical context; in a criminal context where a serious sexual offence is being investigated.”

Committee consideration

The Committee first considered the petition on [6 October 2021](#).

The committee had received a range of [written submissions](#) from various groups and the [petitioners](#) (3 October 2021).

The Committee agreed to write to Police Scotland, the Crown Office and Procurator Fiscal Service, the Equality and Human Rights Commission the Scottish Courts and Tribunals Service and the Lord Advocate.

The Committee considered the petition again at its meeting on [23 March 2022](#).

It had received responses from:

- [Police Scotland](#) (22 November 2021)
- [Crown Office and Procurator Fiscal Service](#) (4 November 2021)
- [Equalities and Human Rights Commission](#) (17 March 2022)
- [Scottish Courts and Tribunals Service](#) (2 November 2021).

Further submissions were received, including from [Michelle Thomson MSP](#) (21 March 2021) as well as the [petitioners](#) (16 March 2021).

The Committee agreed to ask the Scottish Government about the implications of two Court of Session rulings, referred to by the petitioners, on the recording practice of Police Scotland, COPFS and the SCTS.

The Committee has since received submissions from:

- [Scottish Government](#) (25 October 2022)
- [Police Scotland](#) (3 November 2022)
- [Crown Office and Procurator Fiscal Service](#) (20 October 2022).

Consideration of data collection during the passage of the Gender Recognition Reform (Scotland) Bill (GRR Bill)

During Stage 1 of the [GRR Bill](#), the Equalities, Human Rights and Civil Justice Committee (EHRCJ) heard evidence on how the provisions of the Bill could impact on the collection and use of data.

One view was that most research exercises are about self-declared sex and allow the respondent to answer questions as they wish. They are not about someone's legal sex or biological sex. Therefore, the Bill's provisions would not change the position on data collection but maintain the status quo.

Another view was that there is a difference between a respondent self-reporting their sex, compared with a respondent who uses their gender self-ID as a response. It was argued that self-declaration might lead to a reluctance to collect data on sex across a whole range of areas.

In its [Stage 1 Report on the GRR Bill](#), the EHRCJ Committee said the Scottish Government should ensure clarity when collecting data to ensure people respond in a manner that is consistent and comparable. A minority of the Committee said the Bill's provisions have the potential to affect data collection and that data on both biological sex and gender identity must be collected.

In [response](#), the Scottish Government referred to the report of the Working Group, highlighting the guidance that the vast majority of official data is currently collected on the basis of self-defined sex.

At Stage 2 of the Bill ([22 November 2022](#)), Pauline McNeill MSP lodged [amendment 110](#):

Reporting on sex

- (1) For the avoidance of doubt, nothing in Act affects any requirement to collect data on sex.
- (2) For the purposes of this Act, "sex" has the meaning in section 11 of the Equality Act 2010.

Debating the amendment, Pauline McNeill said, with reference to violence against women and girls, "data must continue to be collected, and I believe that it should be collected on the basis of biological sex. I would like to hear what definition the Government intends to use in that respect, because, as I have said, I do not think that that has been clear from what it has said in court".

The Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robison MSP, did not support the amendment "because its effect on the interpretation of the bill is unclear".

The Amendment was disagreed to: For 2, Against 4, Abstentions 1.

Pauline McNeill lodged the same amendment at Stage 3 ([amendment 128, Official Report 21 December 2022](#)) and argued that statistical evidence has been compromised by the conflation of these two categories, and that it is important for public services to collect data on biological sex and gender identity.

The Cabinet Secretary said that the amendment does not add value.

The amendment was disagreed to: For 56, Against 67, Abstentions 0.

**Frazer McCallum and Nicki Georghiou
Senior Researchers**

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