

Citizen Participation and Public Petitions Committee

18th Meeting, 2023 (Session 6), Wednesday
6 December 2023

PE1876: Accurately record the sex of people charged or convicted of rape or attempted rape

Lodged on 5 July 2021

Petitioner Lucy Hunter Blackburn, Lisa Mackenzie and Kath Murray

**Petition
summary** Calling on the Scottish Parliament to urge the Scottish Government to require Police Scotland, the Crown Office and the Scottish Court Service to accurately record the sex of people charged or convicted of rape or attempted rape.

Webpage <https://petitions.parliament.scot/petitions/PE1876>

Introduction

1. The Committee last considered this petition at its meeting on [22 March 2023](#). At that meeting, the Committee agreed to write to the Scottish Crime Recording Board and Police Scotland. The Committee also agreed to invite the Petitioners to give evidence at a future meeting.
2. The petition summary is included in **Annexe A** and the Official Report of the Committee's last consideration of this petition is at **Annexe B**.
3. The Committee has received new responses from Scottish Crime Recording Board, Police Scotland and the Petitioners, which are set out in **Annexe C**.
4. Written submissions received prior to the Committee's last consideration can be found on the [petition's webpage](#).
5. Further background information about this petition can be found in the [SPICe briefing](#) for this petition.

6. The Scottish Government's initial position on this petition can be found on the [petition's webpage](#).
7. Every petition collects signatures while it remains under consideration. At the time of writing, 13,125 signatures have been received on this petition.

Action

The Committee is invited to consider what action it wishes to take.

Clerk to the Committee

Annexe A

PE1876: Accurately record the sex of people charged or convicted of rape or attempted rape

Petitioner

Lucy Hunter Blackburn, Lisa Mackenzie, Kath Murray

Date lodged

5 July 2021

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to require Police Scotland, the Crown Office and the Scottish Court Service to accurately record the sex of people charged or convicted of rape or attempted rape.

Previous action

We have met the Scottish Government's Chief Statistician to argue for the need to collect accurate data on sex in various contexts, including in cases of rape and attempted rape.

Draft guidance subsequently issued by the Chief Statistician rejected this in all but exceptional circumstances, which did not include the recording of these cases.

Background information

Police Scotland recently stated that a person directly charged with rape or attempted rape could be recorded as female. The Scottish Government has stated that 'this is a matter for Police Scotland'.

Rape is defined in law as involving penetration by a penis without consent and is therefore, by definition, the act of a male body (cases involving a surgically constructed penis appear to be unknown to date).

Women may be charged with rape as accessories, but this is extremely rare. Only a very small proportion of offenders directly charged with rape or attempted rape would therefore need to be recorded as female to have a substantial and misleading effect on the understanding of female offending. The same issue appears to arise for information collected in other parts of the criminal justice system.

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.

Annexe B

Extract from Official Report of last consideration of PE1876 on 22 March 2023

The Convener: Item 2 is consideration of continued petitions. First, PE1876, which was lodged by Lucy Hunter Blackburn, Lisa Mackenzie and Kath Murray, calls on the Scottish Parliament to urge the Scottish Government to require Police Scotland, the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunals Service to accurately record the sex of people who are charged with, or convicted of, rape or attempted rape. We last considered the petition almost a year ago, on 23 March 2022, so I apologise to the petitioners that we have not given it further consideration before now. At that stage, we agreed to write to a number of bodies to gather information on recording practices and the guidance underpinning those practices. That has taken some time.

Members will be aware that issues relating to the collection and use of data were discussed during consideration of the Gender Recognition Reform (Scotland) Bill. To assist us in our consideration of the petition, the Scottish Parliament information centre has published an updated petition briefing that highlights the consideration that was given to data collection during the passage of that bill.

We have now received responses from the Cabinet Secretary for Justice and Veterans, the Crown Office and Procurator Fiscal Service and Police Scotland, copies of which are included in our meeting papers. The cabinet secretary's response reiterates the Government's position that recording practices are operational matters for the relevant bodies to determine. The cabinet secretary also refers to the chief statistician's guidance, "Data collection and publication guidance—Sex, Gender Identity, Trans Status", and he notes that there are no current plans to revise that guidance, which was published in September 2021.

Similarly, Police Scotland refers to its previous response to the petition, stating that police

"do not routinely ask the gender or sex of people with whom they interact",

with records based on how a person presents to officers at the time of engagement. The response from Police Scotland also notes that DNA samples are obtained from all individuals who are accused of a sexual offence, with the DNA profile obtained from those samples indicating the person's biological sex.

The committee has received a new submission from the petitioners, which offers their reflections on the various responses that we have received. The petitioners highlight a freedom of information response that shows a discussion between the Scottish Government and Police Scotland on how sex should be recorded. The

petitioners understood that area to be the responsibility of the Scottish crime recording board, so there is, in effect, a contradiction. The petitioners have also raised concerns about Police Scotland's policy for recording sex being developed and approved in advance of reforms to gender recognition coming into effect.

That summarises the submissions that we have received. What comments, thoughts or observations do colleagues have? I certainly feel that the petition deserves to remain open, but I look forward to hearing what colleagues have to say.

Fergus Ewing (Inverness and Nairn) (SNP): We should keep the petition open. I would like the opportunity to hear from the petitioners. Plainly, we have had responses to the petition, including a submission from Michelle Thomson and an oral contribution from Ruth Maguire, my predecessor on the committee. Ruth Maguire pointed to the importance of data being accurate and, perhaps more important, to the very sensitive nature of the issue. There must be a risk of retraumatising a victim of rape by failing to record the perpetrator as male and possibly recording the gender of the perpetrator as female. We should not underestimate the harm and trauma that that could cause.

Given that the replies have been somewhat dry and technical, I would be interested in hearing what the petitioners have to say, because, after all, this is the petitions committee, which is a gateway for people to seek clarity. It is a well-focused petition, and there would be an opportunity for us, after taking evidence, to pursue matters further. I therefore hope that we can hear from the petitioners in order to get their response to the information that we have gleaned from the various authorities.

Carol Mochan (South Scotland) (Lab): I agree that we should keep the petition open. It is well thought through and put together, and it is evidence based. The convener mentioned the Scottish Crime Recording Board, and we should pursue the matter with it to see what information it records and how it will take things forward. Along with hearing from the petitioners, which would be immensely helpful, it would be worth while to make a formal approach to the Scottish Crime Recording Board.

Alexander Stewart (Mid Scotland and Fife) (Con): I concur with my colleagues that more information is required. We have already discussed data collection. Police Scotland talks about "operational" procedure, but it would be interesting to get more clarity and to seek further information from Police Scotland on the process of updating and recording the policy, including whether there has been a wider consultation on the policy change and how such work is progressing. I acknowledge that the police see it as one thing, but I think that we and the petitioners see it as something else. Clarification is required, and we need to ensure that we get the full information, so I add that to what my colleagues have recommended.

The Convener: It might be worth asking Police Scotland to reflect on its previous response, in which it said:

“there are no known cases where a biological male has been charged with the physical crime of rape and has self-identified as a woman.”

That might have been its view at the time, but, as the Parliament knows from subsequent events, it is not a robust basis on which to form a policy judgment. Police Scotland wrote to us in January 2022, so we might want to hear from it further on that, as well as from the board, as Carol Mochan suggested.

Are we content to invite the petitioners to meet the committee when we have received responses to the various further inquiries that we will make? At this stage, are we content to approach the relevant bodies that have been suggested?

Members *indicated agreement.*

The Convener: We will therefore keep the petition open. We will seek further information from those bodies, and we will invite the petitioners to join us at a future committee meeting in order to discuss directly with them their views on the responses that we receive and where we might take the petition. Do we agree to take that approach?

Members *indicated agreement.*

Annexe C

Scottish Crime Recording Board (SCRB) submission of 16 May 2023

PE1876/CC: Accurately record the sex of people charged or convicted of rape or attempted rape

Thank you for your letter dated 18th April 2023 on petition PE1876: *Accurately record the sex of people charged or convicted of rape or attempted rape.*

You wrote to me in my capacity as chair of the Scottish Crime Recording Board (SCRB), on behalf of the Citizen Participation and Public Petitions Committee. The Committee agreed on the 22nd March to seek clarity from the SCRB on the policy for recording the sex of individuals charged or convicted with sexual offences and whether this policy is under review.

It may help if I first set out the background to the SCRB. The Board was set up in 2015 with the specific aim of supporting wider efforts to redesignate (i.e. badge) Scotland's police recorded crime statistics as *National Statistics*. This was achieved in 2016, with the Office for Statistics Regulation confirming they met the highest standards of trustworthiness, quality and value as set out in the Code of Practice for Official Statistics¹. A further compliance check in 2019 confirmed a similar outcome².

The SCRB primarily fulfils its role through governing the Scottish Crime Recording Standard (SCRS)³, which guides police officers on how to classify breaches of the criminal law into useable operational data that can eventually be produced as the recorded crime *National Statistics*. All changes to the SCRS must be approved by the Board, which is

¹ [Assessment of statistics on Recorded Crime in Scotland – Office for Statistics Regulation \(statisticsauthority.gov.uk\)](https://statisticsauthority.gov.uk)

² [Compliance Check of Statistics on Recorded Crime in Scotland – Office for Statistics Regulation \(statisticsauthority.gov.uk\)](https://statisticsauthority.gov.uk)

³ [Scottish crime recording standard: crime recording and counting rules - gov.scot \(www.gov.scot\)](https://www.gov.scot)

independent of Ministers and seeks to operate by consensus (ultimately reporting to the Chief Statistician if necessary).

The SCRB is not responsible for the production of any other crime or justice-themed set of Official Statistics, including those related to criminal proceedings against individuals such as convictions. Our remit is focused solely on the police recorded crime *National Statistics*, which themselves measure crimes (not people) and like the SCRS, have never included the recording of demographic details on suspects or perpetrators.

As such, I can confirm that the SCRB and its membership has no role or responsibility in requiring Police Scotland or any other body to record the sex of people charged or convicted of crime, including rape, in a certain way and that the Scottish Government position remains that as outlined to the Committee in the response of the previous Justice Secretary in October 2022.

Further to the above, the Committee may also wish to note a more recent response on the 2nd May 2023 by the Cabinet Secretary for Justice and Home Affairs to a parliamentary question from Pam Gosal MSP⁴. This asked whether the Scottish Government plans to require Police Scotland, the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunals Service to record the sex of people charged with or convicted of rape or attempted rape.

The answer highlights that the Scottish Government has no plans to introduce such a requirement and that, as noted in the October response, it is a matter for those relevant public bodies collecting information on sex to establish the best approach in their individual institutional settings. In the case of those committing crime, this approach will rightly be shaped by how Police Scotland, the Crown Office and Procurator Fiscal Service and Scottish Courts and Tribunals Service operationalise the wider legal context (where for example an arrested person is not legally required to answer questions on their sex or gender) and any associated guidance on collecting data about sex and gender.

⁴ [Written question and answer: S6W-16640 | Scottish Parliament Website](#)

It is further noted that the recorded information on people's sex will be based on how they present unless an alternative gender is disclosed. It will have no impact on how cases are investigated or prosecuted, and in the case of rape or attempted rape, the presence of a penis or constructed penis must be established.

Finally, at the Committee meeting on the 22nd March it was suggested there may be a contradiction between the Scottish Government's position on this petition and the recent response to a Freedom of Information (FOI)⁵ request seeking SCRB correspondence on the recording of sex and gender (also attached as an Annex to this letter).

I would like to use this opportunity to reassure the Committee that the FOI response was consistent with the Scottish Government's position. As stated above and in the FOI response itself, the recorded crime *National Statistics* and SCRS guidance do not include or refer to any information on those who commit crime. The only instance where demographic information is collected, bringing the subject into the SCRB's remit, is for some sexual crimes and those recorded under the Domestic Abuse (Scotland) Act 2018 – where the crime is operationally coded based on whether the victim was male or female.

For context, the response to the FOI shows a short conversation between officials from the Scottish Government's Justice Analytical Services division and Police Scotland following publication of the Chief Statistician's guidance on collection and publication of data on sex, gender identity and trans status. This related to those codes on victims of sexual crime and domestic abuse, whereby we reflected that any role for the SCRB should be consistent with the Chief Statistician's guidance, and that the collecting organisations (in this case Police Scotland) must decide themselves the most useful definition(s) to use to capture the data they need, including for operational reasons.

The FOI correspondence further highlights that it was then left open for Police Scotland to request feedback from the Board on their approach to recording information on victims of sexual crime and crimes recorded under the Domestic Abuse (Scotland) Act, with the initial suggestion that it might not be consistent with the victim-centred approach that

⁵ [Scottish Crime Recording Board: FOI release - gov.scot \(www.gov.scot\)](https://www.gov.scot/foi-releases/2023/03/scottish-crime-recording-board-foi-release)

underpins the recording of crime through the SCRS, to expect those victims to confirm their biological sex with officers for the purposes of producing statistics.

I hope this response is helpful to the Committee's work in this area.

Chair of Scottish Crime Recording Board
Justice Analytical Services
Scottish Government

ANNEX

FOI response – 27 Feb 2023

Your request

In regards to the Scottish Crime Recording Board, you asked for copies of all internal and external correspondence and information held (minutes, notes, briefing etc.) in relation to the recording of sex and gender in crime statistics.

Response to your request

As this request is identical to an earlier one ([FOI/202100209851](#)), we have based the timeframe of our response from the date we received the first request (4th June 2021) to the date we received this request (30th January 2023).

The purpose and objectives of the Scottish Crime Recording Board relate to the Recorded Crime National Statistics. The data we receive from Police Scotland for the production of these statistics is a simple count of the number of crimes and offences, for each local authority, which the police have recorded. With the exception of a number of Sexual crimes and crimes under the Domestic Abuse (Scotland) Act 2018 (where the codes used to categorise the crimes indicate gender of the victim), the data do not include any information on the demographics of either victim or perpetrator.

There was some correspondence in October 2021 that related to the Scottish Crime Recording Board and the collection of data for those aforementioned crimes codes that specify a victim's gender (see Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot St Andrew's House, Regent Road, Edinburgh EH1 3DG www.gov.scot attached as Document One and Two). While our aim is to provide information whenever possible, in this instance we are unable to provide some of the information you have requested because an exemption under section s.38(1)(b) (personal information) of FOISA applies to that information. Further redactions have also been applied where information does not fall into the scope of this request.

No further information is held in relation to this request. There has been one meeting of the Board since October 2021 (in February 2022). A note of the Agenda and resulting actions are available on the Scottish Government website ([SCRB meeting: 8 February 2022](#)). This didn't include any discussion on recording of sex and gender in crime statistics.

[FOI202300340805 - Information Released - Document 1](#)

[FOI202300340805 - Information Released - Document 2](#)

Police Scotland submission of 30 May 2023

PE1876/DD: Accurately record the sex of people charged or convicted of rape or attempted rape

I write in response to your letter dated 18th April 2023 to Police Scotland's Parliament and Government Liaison in relation to the above petition, for which the Citizen Participation and Public Petitions Committee seek further information, particularly:

- The process for updating the recording policy, whether this included wider consultation on the policy change, and if so, with whom.

- Committee Members would also appreciate any reflections or update Police Scotland may have on the previous response provided to the Committee, specifically around the statement: *“there are no known cases where a biological male has been charged with the physical crime of rape and has self-identified as a woman”*.

As you are aware, Police Scotland is currently undertaking a review of recording policy and I can confirm that this is progressing through our internal governance processes. Such a review involves the consideration and agreement of all relevant business areas within the organisation.

I can confirm that the outcome of the review will be presented at our next Professionalism, Strategy & Engagement Management Board (PSEMB). If approved, it will be subject to wider consultation and engagement with relevant stakeholders, with feedback provided to the PSEMB for consideration and progression to the Senior Leadership Board (SLB).

In respect of your second request, the gender identification of individuals who come into contact with the police will be based on how they present, unless an alternative gender is disclosed. This is the case for all offences. In the context of operational duties, officers do not routinely ask the sex or gender of people they interact with. Police Scotland requires no evidence or certification as proof of biological sex or gender identity.

There are circumstances where the issue of biological sex may require to be explored for a legitimate policing purpose, for example, sexual offences and, more specifically, contraventions of Sections 1 and 18 of the Sexual Offences (Scotland) Act 2009. The essential elements to allow the completion of these crimes is the *“penetration of the vagina, anus or mouth of the victim by a penis or surgically constructed penis”*; therefore, in order to charge a person with rape, it is evidentially critical to ascertain if they have a penis or surgically constructed penis. Hence, self-identified gender is of no relevance to the charge and is not evidentially influential in proving the crime.

In order to be of assistance, I have requested a review of our recorded crime data, to determine whether our previous response outlined in your request is still valid. Please note that, due to recording practices, we are not in a position to provide information beyond 2020. The future implementation of a national crime reporting system should address these limitations.

In respect of females who are recorded on our systems as a suspect or accused for the crime of rape, please see the table below:-

Year	Suspect	Accused	Total
2016	1	1	2
2017	1	1	2
2018	0	0	0
2019	1	13	14
2020	4	6	10

All statistics are provisional and should be treated as management information.

All data have been extracted from Police Scotland internal systems and are correct as at 07/07/2021.

The data was extracted from crime management, UNIFI, IMAGE & Crime File using the crime's recorded date.

Unfortunately, our crime management systems do not record information on how many of the individuals above were born male or who were self-identifying as female at the time of the offence; however, a manual review of the above crimes has been carried out and I can confirm that none of the females recorded for the crime of rape were involved in the physical act itself i.e. the penetration of a vagina, anus or mouth with a penis or surgically constructed penis. In all cases, their involvement was art and part (aiding or abetting in the perpetration of the crime); therefore, the previous statement submitted to the Committee confirming that *"there are no known cases where a biological male has been charged with the physical crime of rape and has self-identified as a woman"* is still true and accurate.

For your information, a woman may be recorded as having committed rape in the following scenarios:

1. If a woman is art and part of the rape.
2. Where a person born male, obtains a full gender recognition certificate and then commits rape (providing they have a penis).
3. If the attending officer is satisfied the individual presents as a female and subsequently records them as such on our crime systems which, if the offender is a first time offender and having a new record created on Crime History System (CHS), will be created as female. If the offender already has a CHS record where they are recorded as male, this will only be changed to female if the individual has a full gender recognition certificate as described above.

4. Where a person born female transitions to male (who has a surgically constructed penis) commits rape but does not have a full gender recognition certificate and so remains legally female. Again, if the subject already has a CHS record where they are recorded as female, this will remain the case. If the individual presented as male based on the enquiry officer's assessment and a new record was being created, they would be created as male.

Police Scotland has recently reviewed the report and recommendation around sex and gender recording and is content that the policy approach still meets our legislative responsibilities and operational requirements.

I hope this response is beneficial to the Committee.

Petitioner submission of 30 June 2023

PE1876/EE: Accurately record the sex of people charged or convicted of rape or attempted rape

Who is responsible?

The Committee has repeatedly sought to establish which body is responsible for recording in this area. Most public bodies, including the Scottish Government, state Police Scotland (PS) is responsible (see [Annex A here](#)).

At the same time, PS appear to take some direction from government. When asked about the policy by the Scottish Parliament's Criminal Justice Committee, DCC Malcolm Graham stated PS had been awaiting guidance from the Chief Statistician, but had not found the published guidance helpful:

“While this considered many factors in how such information should be gathered in a consistent and respectful manner, it does not provide answers to a number of challenges in how organisations should record to meet recording standards”. [Letter from Police Scotland to the Convener, Criminal Justice Committee, 28 January 2022](#)

DCC Graham's letter also indicated that PS policy would depend on the direction of gender recognition reform:

“Further direction and guidance from Scottish Government's Chief Statistician is awaited, due to Scottish Government's decision to postpone its proposals to reform the Gender Recognition Act 2004, pending further consultation”.

In response to a recent Parliamentary Question ([ref. S6W-16640](#)) Scottish Government made clear it has no intention to require PS to accurately record the sex of those charged with rape or attempted rape. From this, we can conclude Ministers believe the current recording policy is ethical, with no risks to data reliability. As [argued](#) previously, we do not think this position is tenable in either respect.

Latest Police Scotland submission

In April 2023 the Petitions Committee asked PS for further information in two areas:

- The process for updating the recording policy, whether this included wider consultation, and if so, with whom.
- Any reflections or updates on its earlier statement that ‘there are no known cases where a biological male has been charged with the physical crime of rape and has self-identified as a woman’.

Policy-making process

The [Police Scotland response](#) ignores the first request and focuses on its current review. This omission is surprising, given [DCC Graham has previously told the Criminal Justice Committee](#) about the process in some detail:

“In 2019, to prepare for proposed reform of the Gender Recognition Act, Safer Communities Equality and Diversity team considered a draft Police Scotland policy on Gender Identification and assessed that a Police Scotland position statement was required.

A position statement (below) was developed by Police Scotland. This was approved by the Senior Leadership Board in November 2019 for use in response to enquiries while Police Scotland awaited direction and guidance from Scottish Government on the identification and

recording of sex and/or gender, which would emerge from a review by the Scottish Government's Chief Statistician.”

Reflections or updates

In response to the request for ‘any reflections or update’ on its previous statement that ‘there are no known cases where a biological male has been charged with the physical crime of rape and has self-identified as a woman’, PS set out tangential process points. For example, it explained:

If the attending officer is satisfied the individual presents as a female and subsequently records them as such on our crime systems which, if the offender is a first time offender and having a new record created on Crime History System (CHS), will be created as female.

[Police Scotland submission, 30 May 2023](#)

There is no indication of what ‘presents’ means in this context, although typically the term simply refers to gender stereotypes. This means for those coming into contact with the police for the first time, data recording in relation to sex is left dependent on the extent to which any individual officer believes a person conforms to ‘feminine’ ideals. We think that this is sexist and statistically incoherent.

The response also states if a person already known to the police as male acquires a full gender recognition certificate, their criminal history record will be changed to female. Again, this is statistically incoherent and likely to undermine data reliability. Should Scotland introduce legal gender recognition based on self-declaration, these risks will increase further.

Isla Bryson and Andrew Miller cases

The PS response did not reflect on the recent Bryson and Miller cases, both of which show an organisation that treats the wishes of violent male offenders as paramount.

While double-rapist Isla Bryson was arrested and recorded as male, he was *allowed* to be processed in court as a woman. Andrew Miller ([charged](#) with abduction, sexual assault and other offences), who was known locally to use a woman's name and to have dressed ‘as a

woman', was recorded all the way from arrest onwards as male *at his own request*.

The PS submission did not address the statistical or ethical implications of either case, nor acknowledge it was Miller's *own decision*, not their own stereotype-based policies, that led to his being recorded as a male charged and convicted of sexual assault.

As we have [previously argued](#), while the PS statement remains technically correct (since Bryson declared a trans identity after being charged) the case reveals the inherent instability in police recording practices and statistical outputs. Had Bryson claimed a trans identity ahead of being charged his offences, these would have been recorded as committed by a woman. It should be obvious that this is a misguided approach to data collection.

Institutional sexism and misogyny

Chief Constable Iain Livingstone recently stated that PS was [institutionally sexist and misogynist](#). We think it is difficult to think of a more sexist or misogynistic policy than one that prioritises the feelings of men charged with rape or attempted rape over predominantly female victims. If PS wishes to address the observations made by the Chief Constable, this is a good place to start.

Meanwhile, we are grateful to the Committee for pursuing this point with such determination over the past 18 months.