

Citizen Participation and Public Petitions Committee

5th Meeting, 2022 (Session 6), Wednesday
22 March 2022

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

Lodged on 5 July 2021

Petitioners Lucy Hunter Blackburn, Lisa Mackenzie & 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 [23 March 2022](#). At that meeting, the Committee agreed to write to Police Scotland, the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service and the Scottish Government.
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. An updated SPICe briefing has been prepared and can be found at **Annexe C**.
4. The Committee has received new responses from the Crown Office and Procurator Fiscal Service, the Cabinet Secretary for Justice and Veterans, Police Scotland, and the Petitioner, which are set out in **Annexe D**.
5. Written submissions received prior to the Committee's last consideration can be found on the [petition's webpage](#).

6. The Scottish Government's initial position on this petition can be found on the [petition's webpage](#).

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Draft guidance subsequently issued by the Chief Statistician rejected this in all but exceptional circumstances, which did not include the recording of these cases.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 23 March 2022

The Convener: We move to consideration of further continued petitions. 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 the Scottish Courts and Tribunals Service to accurately record the sex of people who are charged with or convicted of rape or attempted rape. There have been some developments on the petition, so I have a slightly long introduction before we consider potential ways forward.

At our last consideration of the petition, the committee agreed to write to a number of bodies. We have now received responses from Police Scotland, the Crown Office and Procurator Fiscal Service, the Equalities and Human Rights Commission, and the Scottish Courts and Tribunals Service. We also have an additional submission from Lesley Warrender and a further response from the petitioner.

Since issuing our papers, we have received a submission from Michelle Thomson MSP, which was published and circulated to members yesterday. Unfortunately, she cannot join us as she is participating elsewhere in the Parliament this morning. In her submission, Ms Thomson highlights concerns about the failure to consider the experience of victims in the responses that the committee has received. She also highlights an evidence gap in qualitative research on the impact of the approach to recording the sex of perpetrators on those who have suffered from rape or sexual violence.

Police Scotland states that, under current operational and recording practice, sex and gender are used interchangeably, and identification is recorded based on how individuals present. However, it indicates that there are

“circumstances where the issue of biological sex may require to be explored for a legitimate policing purpose”,

such as in the case of sexual offences.

Police Scotland’s submission also states that, in considering a crime, it is irrelevant whether the perpetrator is legally defined as, or self-identifies as, male or female. It is only relevant whether they have a penis, including a surgically constructed penis, which has penetrated one of the defined bodily orifices. The submission sets out specific circumstances in which a woman might be recorded on police systems as having committed contraventions of sections 1 and 18 of the Sexual Offences (Scotland) Act 2009. In concluding, Police Scotland states that its data governance

board has been instructed to review Police Scotland's internal policies and recording procedures.

The Crown Office and Procurator Fiscal Service advises that information that is used in criminal proceedings originates from Police Scotland, and therefore it is a matter for Police Scotland to record the data. The Scottish Courts and Tribunals Service indicates that information relating to sex is not displayed in court papers.

The Equality and Human Rights Commission states that

“Any public body collecting data, including Police Scotland, should have a clear and transparent policy relating to the data they collect and the use they put it to”

and that that

“policy should be equality impact assessed”.

Collection of data

“must be necessary and proportionate”.

That means that

“where a body carries out a number of functions, the data they collect and the way it is collected will vary, depending on”

the intended purpose. For example,

“Police Scotland may collect information on the protected characteristics of those to whom they are providing a service, or who are the victims of crime, differently from those charged with serious offences”.

The commission also states that how best to record data on the sex of people who have been charged or convicted of rape or attempted rape will depend on how that data is to be used, and it is important that that

“is clearly defined and stated”.

The commission considers that the chief statistician's recently produced guidance on data collection and publication provides

“helpful information on an appropriate balance to be struck in relation to the recording of data in relation to those charged with or convicted of rape or attempted rape”.

The petitioners have responded to Police Scotland's submission and have highlighted two recent rulings of the inner house of the Court of Session. The petitioners consider that the rulings place a duty on Police Scotland to collect data on biological sex in relation to people who are charged with rape or attempted rape. The

issues of the messaging to victims of sexual offending, the experience of those victims and the need to put them at the centre of consideration are also highlighted by the petitioner and included in the submission by Lesley Warrender. The petitioners have also submitted a further response, which was circulated to committee members yesterday. It references the submission from the commission and the guidance from the chief statistician.

Apologies—that is quite a comprehensive package of updates that we have received. I wonder whether, on reflection, having read these responses, members have any thoughts.

Ruth Maguire: What you have informed the committee of helpfully covers the main points that I was going to make, convener. I think that, in summary, two aspects of the petition are important and there are two reasons why we should keep it open.

The first aspect is around data. Obviously, public bodies have a duty to collect and use data appropriately. The second aspect is highlighted in the submission from Lesley Warrender and the submission from our colleague Michelle Thomson MSP, and that is about the centring of victims. Sometimes when we talk about data in such matters, it can all be a bit cold. At the centre of this issue are women who have been raped, and the consequences of some of the practices that are being spoken about here are, frankly, devastating for victims of that particular crime.

I suggest that the committee ask the Scottish Government for its consideration of the recent rulings of the inner house of the Court of Session and what implications they have for the recording practice of Police Scotland, the Crown Office and the Scottish Courts and Tribunals Service in relation to people who are charged or convicted of rape and attempted rape. The petitioner considers that the recent rulings of the inner house of the Court of Session place a duty on Police Scotland to collect data on biological sex in relation to people who are charged with rape or attempted rape. Can we ask the Scottish Government for its position on that?

Can we also ask whether the draft guidance on collecting data on sex and gender has been updated or finalised since it was published in December 2020, and whether there are plans to consider the potential need for further revision of the guidance following those recent rulings?

I would like us also to contact Police Scotland, the Crown Office and the Scottish Courts and Tribunals Service. As you stated, convener, we need to be clear about whether they have a clear and transparent policy relating to the data that they collect and the use that they put it to. Importantly, has that policy been equality impact assessed and is the equality impact assessment a public document? Have they defined in a clear statement how data is collected in relation to the sex of people who are charged or convicted of rape or attempted rape and how it is used?

The Convener: Thank you, Ruth. That is a very comprehensive series of recommendations, which I am happy to endorse. I wonder whether the committee is. Would any other member like to comment or add further recommendations? I see that they do not, so we are content to proceed on that basis. We will keep the petition open and write as suggested by Ruth Maguire to the various bodies concerned.

Annexe C

The logo for SPICe, featuring the text 'SPICe' in white on a dark blue background.The logo for The Information Centre, featuring the text 'The Information Centre' and 'An t-Ionad Fiosrachaidh' in white on a dark blue background.

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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Annexe D

Crown Office and Procurator Fiscal Service submission of 20 October 2022

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

I refer to your Clerk's letter dated 23 September 2022 to the Lord Advocate. As your letter relates to the statistical approach of the Crown Office and Procurator Fiscal Service, I will respond to the letter on behalf of COPFS.

The sex of an accused person forms part of the personal data that COPFS receives from reporting agencies, including the Police Service of Scotland. This will include those accused persons who have been charged with rape or attempted rape. Sex is a protected characteristic in terms of the Equalities Act 2010.

In compliance with our statutory obligations under section 44 of the Data Protection Act 2018 and the UK General Data Protection Regulations (GDPR), COPFS does have a publicly available [privacy notice](#) on the COPFS website which provides members of the public with information in relation to the processing of their personal data, including protected characteristics in terms of the Equalities Act 2010. I attach a copy of this privacy notice for your information.

The privacy notice has not been equality impact assessed as it is not a COPFS policy. It is a statutory requirement which sets out how COPFS will comply with the statutory obligations in processing data in terms of section 44 of the Data Protection Act 2018 and the GDPR

Cabinet Secretary for Justice and Veterans submission of 25 October 2022

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

Thank you for your letter of 27 September following the Committee's consideration of this petition on 23 March.

As set out in previous correspondence, it is a matter for Police Scotland to determine how the sex of people charged or convicted of rape or attempted rape is recorded within their operational databases. Similarly, the recording practices of the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunals Service are operational matters for those bodies.

Any legal implications of the two judgments of the Inner House of the Court of Session on these operational matters would be for Police Scotland or the other bodies mentioned to consider and to obtain their own legal advice on, if it is appropriate to do so.

You also ask for further information on the Chief Statistician's guidance on Sex, Gender Identity, Trans Status – Data Collection and Publication. The final guidance was published on 22 September 2021 and is available [online](#). There are no current plans to revise this guidance.

Police Scotland submission of 3 November 2022

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

I refer to your correspondence of 23 September 2022 to Police Scotland in respect of the above petition and your request to provide a response. Police Scotland provided a response to the initial petition on 22 November 2021 and the original response can be found here.

https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-citizen-participation-and-public-petitions-committee/correspondence/2021/pe1876_t-submission-from-police-scotland-of-22-november-2021.

As detailed in the response on 22 November 2021 officers from Police Scotland do not routinely ask the gender or sex of people with whom

they interact and the records created on our IT systems will be based on how the person presents to officers at the time of engagement. This recording practise is applicable for all crimes and offences and is not limited or exclusive to crimes of a sexual nature.

Police Scotland currently obtains DNA samples from all individuals accused of a sexual offence and from this sample a DNA profile will be obtained that will indicate the person's biological sex. This profile, and biological sex, is retained on the Scottish DNA Database and is available to be searched against crime scene samples to aid historic and future investigations. The taking and retention of DNA samples is governed by the Criminal Procedure (Scotland) Act 1995. An EqHRIA regarding this operational procedure is in place.

Police Scotland has a number of publicly available documents which explain clearly how the data obtained by the organisation is held, why it is held and for how long. The retention of such information is governed by GDPR and the Data Protection Act 2018. Full details can be located at <https://www.scotland.police.uk/access-to-information/data-protection/>

Petitioner submission of 6 March 2023

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

This note provides a further update on our petition. We comment on recent responses to the Committee, submitted by Police Scotland, the Scottish Government, the Crown Office and Prosecution Service (COPFS). We also comment on the Adam/Bryson case, and its implications for Police Scotland recording practices.

Recent responses from Police Scotland, the Scottish Government, the Crown Office and Prosecution Service (COPFS)

1. In October/November 2022 the Committee received new submissions from Police Scotland, the Scottish Government and the Crown Office and Prosecution Service (COPFS).
2. The [COPFS submission](#) defers to other reporting agencies, including Police Scotland. It notes that sex is a protected

characteristic under the “Equalities Act” (sic) but offers no comment on its definition.

3. Similarly, the [Scottish Government submission](#) defers to Police Scotland:

‘As set out in previous correspondence, it is a matter for Police Scotland to determine how the sex of people charged or convicted of rape or attempted rape is recorded within their operational databases. Similarly, the recording practices of the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunals Service are operational matters for those bodies’. (Scottish Government, 25 October 2022)
4. The Scottish Government also confirmed that it currently does not plan to revise the [Chief Statistician’s guidance for public authorities](#) on collecting data on sex and gender identity. This advises against collecting data on biological sex except in very limited circumstances. Note however, it does single out the ‘investigation of serious sexual offences’ (2021: 11) as an example where data on biological sex is required.
5. It is our understanding that responsibility for crime recording practices lies with the Scottish Crime Recording Board (SCRB), which is chaired by the Scottish Government. The role of the Board is to ‘act as the guardian of, and ultimate decision maker on, issues related to the Scottish Crime Recording Standard’. The remit of the Board is [here](#).
6. A recent [Freedom of Information response](#) shows a discussion between Scottish Government and Police Scotland on how sex should be recorded. A government official states, ‘The question of how sex-based crimes codes are applied might be best considered by the full Board’. In response, a Police Scotland employee states, ‘I’m just about to arrange and look for a paper to be presented to SCRB’ (18 October 2021). We would urge Committee members to seek clarity, and put beyond doubt, where responsibility for recording in this area lies.
7. The recent Police Scotland [response](#) to the Committee (3 November 2022) largely refers back to its previous submission on the petition, which confirmed that sex and gender are used

interchangeably for all offences. It also notes that DNA samples are collected from all those accused of a sexual offence, and that biological sex is recorded on the Scottish DNA database. This is of no relevance to the publication of recorded crime statistics.

8. In January 2022 Police Scotland confirmed to the Scottish Parliament that it had developed its recording policy 'to prepare for the Gender Recognition Reform Act reform', and that its approach was consistent with its 'values' (see [Letter from Police Scotland to the Convener, Criminal Justice Committee](#)). We do not think that latching onto prospective legislation in this way is a sensible approach to policy-making: that it is unclear whether the Act will proceed to Royal Assent is a case in point.
9. We would also suggest that members establish whether Police Scotland consulted on this far-reaching policy change, made ahead of the law, and if so, who was involved.
10. The previous Police Scotland submission made the observation that no biological male charged with rape had self-identified as a woman. It stated:

‘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’. ([Police Scotland, 22 November 2021](#))
11. We do not think that rarity should be relied upon here. As a general rule, good policy-making should account for all eventualities, and in this specific context, should account for both frequency *and* severity. We would also reiterate that only very small number of rapes recorded as having been perpetrated by 'women' will give a false impression of a significant increase in female sexual offending.

The Bryson case

12. In January 2023 a trans-identified male, Adam/Isla Bryson, was tried on two counts of rape in the High Court in Edinburgh. Police Scotland subsequently confirmed that Bryson was arrested and charged as a male, and his crimes would be recorded as such (Scotsman, 28 January 2023). Police Scotland explained that *this was because the charges predated Bryson's trans identity*.

‘Widespread speculation on social media suggested that official crime statistics would log Bryson's crimes as having been committed by a woman. But a Police Scotland spokeswoman confirmed to the Record that because the offences took place before Graham's transition, they would be recorded as being the act of a male.’

Daily Record, 27 January 2023

13. The Bryson case reveals the inherent instability in police recording practices and statistical outputs. Had Bryson claimed a trans identity ahead of being charged, or, committed any further offences after changing identity, these would have been recorded as committed by a women. It is, or should be, obvious that this is a misguided, if not absurd, approach to data collection.
14. Putting aside the risks for data accuracy and the inherent instability in Police Scotland's approach to crime recording, as demonstrated by the Bryson case, we think that a policy that prioritises the perspectives of those charged with rape or attempted rape delivers a bleak message about Police Scotland values in this area.
15. We are grateful that the Committee is continuing to engage with our petition. Doing so is one way for MSPs to show that they take seriously the level of public concern that the Bryson case has generated about what it means to replace sex with gender identity within the criminal justice system.

Dr Kath Murray
Lucy Hunter Blackburn
Lisa Mackenzie