

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 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 women'. ([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 public concern that the Bryson case has generated about what it means to replace sex with gender identity within the criminal justice system.

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