

# Petitioner submission of 16 March 2022

## PE1876/U - Accurately record the sex of people charged or convicted of rape or attempted rape

This submission responds to Police Scotland's submission and highlights two relevant recent court judgments.

### **Police Scotland submission**

Police Scotland states that its position on recording rape is based on self-declared gender identity and that 'This is the case for all offences'.

**We are concerned, in stating there is no risk to data reliability because of the small *proportion* of cases classified as female, that Police Scotland fundamentally misunderstand the risks to data reliability presented by their current policy on recording the self-declared gender identity and not the sex of those charged or convicted with rape or attempted rape.**

The risks are specifically due to the very low *number* of women charged with rape. The point here is that a very small number of males recorded as female would show as a large percentage increase *in cases of female sexual assault*, making any trend data unreliable.

Police Scotland has conducted a physical review of 28 crimes for the period 2016-2020 which established that none of the females recorded for the crime of rape were involved in the physical act itself and that their involvement was art and part. **This only tells us about the basis on which the person was charged, not the sex of those involved, which remains unknown.**

The [Scottish Crime Recording Standard](#) states: 'Ethical recording of crime is integral to modern policing and it is vitally important that crime recording and disposal practices are capable of withstanding rigorous scrutiny.'

**The ad hoc interrogation of data that is not in the public domain, as undertaken by Police Scotland for the purposes of this submission, does not meet this standard.**

**We believe the Police Scotland response also fails to address the strong ethical imperative, from the perspective of respect for victims, to record sex accurately in cases of rape and attempted rape.** Criminal Justice statistics paint an aggregate picture but are comprised of individual incidents that reflect people's lives and experiences.

We are dismayed that Police Scotland has not reconsidered its position and ask the Committee to reflect on the message that this delivers to victims of sexual offending.

### **Recent court rulings: implications for police recording practice**

Two recent rulings of the Inner House of the Court of Session are of direct relevance here. Both judgments were handed down last month.

These are the [ruling](#) in the Appeal case brought by For Women Scotland (FWS), which overturned an earlier judgment in favour of the Scottish Government in relation to the Gender Representation in Public Boards Act, and the [ruling](#) in the Appeal case brought by Fair Play For Women (FPFW) which sought to overturn an earlier judgment that allowed people to self-identify their 'sex' in Scotland's 2022 Census. While the latter Appeal was unsuccessful, the judgment confirmed key points of law relevant to data collection.

FWS appealed against Scottish Ministers in the Court of Session, in relation to the definition of 'woman' used in legislation aimed at increasing the number of women on public boards. The [judgment](#) ruled that under the Equality Act 2010, the protected characteristics of 'sex' and 'gender reassignment' are separate and distinct, **that 'sex' refers to biological males and females**, and that an individual approach to the protected characteristics is required.

This definition of sex was reaffirmed in the FPFW Appeal case, where the judges argued that a biological definition of sex may be necessary 'in prescribed circumstances involving status, proof of identity or other important rights'.

**These rulings put beyond question that public bodies need to collect data on biological sex to carry out their statutory duties under the Equality Act 2010.** The protected characteristic of 'sex' is now unambiguously defined in law as biological sex.

At most, people holding a Gender Recognition Certificate (GRC) may be entitled to be treated under the Equality Act as being the opposite sex than would otherwise be the case, by virtue of the specific provisions of the Gender Recognition Act.

Under the Public Sector Equality Duty, as legislated for in the Equality Act 2010, Police Scotland is subject to the General Equality Duty and Scotland Specific Duties. As part of meeting these duties, Police Scotland use recorded crime data, for example in relation to violence against women and girls (see: [Joint Equality Outcomes for Policing 2021-2023](#)). **These duties cannot be properly met using data that is inconsistent with Equality Act definition.**

We also draw the Committee's attention to a [letter](#) from the Chair of the Equality and Human Rights Commission to the Cabinet Secretary for Social Justice (26 January 2022). This sets out the Commission's concerns about the Scottish Government's proposals to reform the Gender Recognition Act and refers specifically to 'data collection' as an area that merits attention.

For this reason, we suggest that the Committee make a fresh approach to the Commission to submit evidence on this petition.