

## Briefing for the Citizen Participation and Public Petitions Committee

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

### 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In this context, the petition argues that Scottish Government draft guidance on collecting data on sex and gender (discussed below) fails to ensure that information on the sex of a person is accurately recorded in official statistics.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In December 2020, as part of continued consultation on the topic, the Scottish Government published [draft guidance on collecting data on sex and gender](#). In relation to the draft guidance, a [blog by the Chief Statistician \(December 2020\)](#) noted: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.

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