



**Equalities, Human Rights and Civil Justice Committee,
Gender Recognition Reform (Scotland) Bill
Supplementary Evidence**

Thank you for giving me the opportunity to submit supplementary written evidence following the oral evidence given on Tuesday 7th June 2022.

This written evidence will focus on the importance of sex registered at birth to data collection within the criminal justice system: due to time constraints and the many issues that needed to be covered in the session I attended on 31st May, I was unable to cover this.

We believe that data recording throughout the criminal justice system is compromised when sex registered at birth is overwritten by legal gender (where an individual has obtained a GRC), or by self-declared gender identity. Notwithstanding that current data collection practice in Police Scotland to record self-declared gender identity, the direction of movement south of the border is towards recording legal gender, where an individual has obtained a GRC, and sex registered at birth in all other cases.

The lifespan of legislation is of longer duration than that of policy, guidance or practice. When considering this Bill, I urge Committee members to be alive to the future consequences and impact of this Bill that may eventuate as policy, guidance and practice changes.

For these reasons we believe that the provisions contained in the Bill which will, as the Scottish Government predicts, see an increase in the number of successful GRC applicants resulting in almost doubling the number of GRCs granted each year throughout the United Kingdom, will have a detrimental impact on the accuracy, relevance and reliability of data on offending.

The Importance Of Disaggregation By Sex For Data Collection

Humans comprise two sexes: male and female. Sex is genetically determined at fertilisation, fixed in development and immutable during our lifespan. The classification of individuals as male or female is grounded in the evolved reproductive function of qualitatively different reproductive systems organised around sperm or eggs, respectively. This classification is independent of the ability of any individual to exercise their reproductive function, which may be constrained by illness, congenital abnormality, age or accident: an infertile man remains male and a post-menopausal woman remains female. It is of course wholly independent of an individual's choice

whether or not to reproduce.

Developmental disorders (or differences) of sexual development, also known as 'intersex' conditions, are almost all sex specific, meaning that individual disorders are either diagnosed in males or in females. Developmental disorders of sexual development are estimated to apply to 0.018% of all births.¹ People with these diagnoses do not undermine the binary system of sex classification; rather, every individual falls within that system and diagnosis will indicate the sex of that individual as male or female. This is important for medical decision making in terms of future sexual and reproductive function. Developmental disorders of sexual development do not prove the existence of 'additional sexes', intermediate/mixed sexes, 'sex as a spectrum', or that someone may be of 'no sex'.

Sex is easily and routinely observed at birth (and subsequently entered into the birth registry), by visual and palpable inspection of external genitalia with an extremely high degree of confidence. Errors, where observed sex is incongruent with reproductive sex, are vanishingly rare. Sex registered at birth is certainly a variable that is very resistant to noise or error.²

Sex registered at birth is a fundamental demographic and explanatory variable. It is a powerful predictor of outcomes in almost every dimension of social life including education, the labour market, political attitudes and behaviour, religion, physical and mental health.³ Data on sex guides the allocation of public services. Sex is a protected characteristic under the Equality Act 2010 and data on sex is therefore required for equalities monitoring.

Despite the importance of sex as registered at birth, there is a growing tendency to instead collect data on gender identity, both that which has been legally recognised in accordance with the provisions of the Gender Recognition Act 2004 and that which is simply self-declared.⁴ Thus, sex as registered at birth has been overwritten by gender identity across a range of different data collection services and in respect of a range of different data questions. This has occurred in tandem with both legislative and administrative changes designed to accommodate the

¹ Sax, L. (2002) How common is intersex? A response to Anne Fausto-Sterling. *Journal of Sex Research* 39(3): 174-78.

² Thanks to Dr Emma Hilton.

³ Sullivan, A. (2020) Sex and the Census: Why surveys should not conflate sex and gender identity. *International Journal of Research Methodology* vol. 23: 517-24.

⁴ Gender Recognition Act 2004 provides a legal mechanism whereby an individual who fulfils certain criteria can obtain legal recognition of acquired gender. At s2(1) the criteria are specified as: (a) has or has had gender dysphoria, (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made, (c) intends to continue to live in the acquired gender until death. There is no requirement for any reassignment treatment or surgery in order to obtain a gender recognition certificate. Successful applicants now have a legal gender which differs from their sex registered at birth. They are issued with a Gender Recognition Certificate, together with a replacement birth certificate with the name changed to the newly adopted name and the sex marker changed to reflect the legal gender.

comparatively novel concepts around gender, gender identity and gender non-conformity that most recently find expression within the concept 'non-binary'.

This results in two commonly seen possibilities for data collection. The first is the collection of data ostensibly on sex, but where the answer can be given with reference to gender identity (either on the basis of self-declaration, or on the basis of that which has been legally recognised) as the respondent sees fit. The second is the collection of data where respondents are explicitly asked to state their gender identity and are not also asked to provide an answering concerning their sex registered at birth.

It is well established as part of good research methodology that data collection questions should be clear and specific. Conflating two distinct concepts, sex registered at birth and gender identity, into a single question by permitting respondents to answer either with reference to their gender identity or their sex registered at birth, is an unusual methodological approach to questionnaire design.⁵ Yet sex registered at birth and gender identity are two distinct concepts: even when legally recognised, one's acquired gender does not result in a change of one's birth sex and the original entry in the birth registry remains unchanged.

It is sometimes assumed that where individuals answer with reference to their gender identity, not their sex registered at birth, this will only have a small, indeed negligible, effect on data accuracy. However, even very small numbers of misallocated cases can have a significant effect on data in sub-group analysis where one sex is dominant.⁶ As we shall see, offending is one such example where the allocation of cases of male offending to the female sub-group, whilst this will have negligible effect in the male sub-group, may have a significant effect on the female sub-group, falsely increasing the numbers in that data set.

It is sometimes claimed that gender identity is more important than sex registered at birth in determining outcomes. This assertion is a departure from the accepted understanding that it is sex registered at birth that is the variable with explanatory power. As such, this assertion requires supporting empirical evidence. However, none has been provided. In fact, where evidence is available, it continues to demonstrate the superior explanatory power of sex registered at birth.⁷

The Importance of Sex-Disaggregated Data on Offending

⁵Sullivan, A. (2020). Sex and the census: why surveys should not conflate sex and gender identity. *International Journal of Social Research Methodology*, 23(5), 517-524.

⁶ Sullivan, A. (2021). Sex and the Office for National Statistics: A case study in policy capture. *The Political Quarterly* 92(4): 638-51.

⁷ Sullivan, A. (2021). Sex and the Office for National Statistics: A case study in policy capture. *The Political Quarterly* 92(4): 638-51.

Sex registered at birth is recognised throughout the criminal justice system as important to analysing patterns of offending, pathways into offending and risk. Thus, it is well-established that offending patterns differ on the basis of sex registered at birth, both for all offences and for individual offence categories. Males and females offend at different rates, with males offending at significantly increased rates compared to females. In September 2021, women represented just 4% of the total prison population.⁸ Some offence categories, including serious violent and sexual offences, are only very rarely committed by females, with the overwhelming majority of these offences committed by males.⁹ For example, women comprise 2% of prosecutions for sexual offences, 16% of prosecutions of violence against the person and 7% of prosecutions for possession of weapons. The indictable offence groups with the highest proportion of females prosecuted were fraud offences (33% female) and theft offences (21% female), while the groups with the highest proportion of males prosecuted were sexual offences (98% male) and possession of weapons (93% male).

Pathways into offending also differ between the sexes. There are strong links between women's acquisitive crime, for example theft and benefit fraud, and their need to provide for their children.¹⁰ For women, history of male violence, including coercive control, frequently forms a distinct pathway into offending.¹¹ It is recognised within the criminal justice system that female offenders are frequently the victims of more serious crimes than those for which they have been convicted.¹² This is not withstanding that male offenders may also have been victims of abuse and that this may be bound up with their offending.

When we look at the characteristics of women in prison, sex continues to be an important predictor. Women in prison are regarded as an exceptionally vulnerable group, unlike both male offenders and women in the wider community. Women in prison are acknowledged as being more likely to have experienced violence and abuse, often since childhood, and are more likely to have mental health problems and to self-harm. For example, over 70% of female prisoners report

⁸ <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2022/02/Womens-briefing-paper.pdf> This difference between males and females is not due to the courts being unwilling to impose a custodial sentence on women for offences that would see a man imprisoned: 23% of women in prison have been imprisoned for a first offence, compared with 14% of male prisoners (<http://www.prisonreformtrust.org.uk/Portals/0/Documents/why%20focus%20on%20reducing%20women%27s%20imprisonment%20BL.pdf>)

⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938360/statistics-on-women-and-the-criminal-justice-system-2019.pdf

¹⁰ <http://www.prisonreformtrust.org.uk/Portals/0/Documents/why%20focus%20on%20reducing%20women%27s%20imprisonment%20BL.pdf>

¹¹ <https://webarchive.nationalarchives.gov.uk/ukgwa/20130206102659/http://www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf>; <https://www.nao.org.uk/wp-content/uploads/2022/01/Improving-outcomes-for-women-in-the-criminal-justice-system.pdf>

¹² <https://webarchive.nationalarchives.gov.uk/ukgwa/20130206102659/http://www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf>

mental health problems;¹³ over 50% of female prisoners report experiencing abuse as a child;¹⁴ over half of women in prison report experiencing domestic violence;¹⁵ the rate of self-harm in the female estate at 3,808 incidents per 1,000 prisoners, is seven times the rate of self-harm in the male estate.¹⁶

Sex also underpins the provision and planning of services within the criminal justice system, with the Female Offender Strategy providing an evidence-based case to address the distinct needs of women in the criminal justice system.¹⁷ More generally, differences due to sex underpin risk assessment processes,¹⁸ the provision of offender treatment programmes¹⁹ and the differing security categorisation and arrangements in the male and female prison estates.²⁰

In short, throughout the criminal justice system, it is acknowledged that sex matters.

Transwomen: female or male rates of offending?

There is no evidence demonstrating that transwomen post-transition conform to female patterns of offending. All evidence demonstrates that male patterns of offending and risk persist, including for the most serious offences. This includes the situation where ‘transition’ is defined as a medical diagnosis plus surgical reassignment.

The oft-quoted Swedish study published in 2011, Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden found that transwomen, who for the purposes of the study had all been diagnosed with gender identity disorder and had

¹³ <http://www.prisonreformtrust.org.uk/Portals/0/Documents/why%20focus%20on%20reducing%20women%27s%20imprisonment%20BL.pdf>

¹⁴ <http://www.prisonreformtrust.org.uk/Portals/0/Documents/why%20focus%20on%20reducing%20women%27s%20imprisonment%20BL.pdf>

¹⁵ <http://www.prisonreformtrust.org.uk/Portals/0/Documents/why%20focus%20on%20reducing%20women%27s%20imprisonment%20BL.pdf>

¹⁶ <https://www.justiceinspectors.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2022/02/Womens-briefing-paper.pdf>

¹⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719819/female-offender-strategy.pdf

¹⁸ see e.g. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060166/osp-guidance-practitioners.pdf

¹⁹ see e.g. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/769540/process-study-horizon-programme.pdf

²⁰ see e.g. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1011502/security-categorisation-pf.pdf; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1028815/psi-39-2011-cat-women-prisoners.pdf; <http://www.prisonreformtrust.org.uk/ForPrisonersFamilies/PrisonerInformationPages/Categorisation>; PSI 07/2016 National Security Framework 3.1 Searching of the Person

undergone reassignment surgery, had a significantly increased risk for crime compared to female controls, but not compared to male controls: the authors conclude that they retained a male pattern regarding criminality, the same being true regarding violent crime.²¹

Data provided by the Ministry of Justice in response to parliamentary question 98878 states that based on the 2021 data 60% of transwomen with no GRCs housed in the male estate have at least one conviction for a sexual offence.²² This is far in excess of the rate of conviction for sexual offences amongst female offenders, which is around 2%. It is also higher than the rate for male offenders which is around 17%.

Arguments against this are that these data are unreliable because the true number of transwomen in prison is not known: the risks posed by transphobia have the result that many are too frightened to come out.

However, in order to bring the rate of sexual offending in this cohort down to the female rate of around 2%, there would need to be over 3,800 additional transwomen in prison, none of whom had convictions for sexual offending. This is more than the entire female prison population in England & Wales. I suggest that whilst the true number of transwomen in prison may be higher than the number officially recorded, the existence of an additional 3,800 in the male estate who are unable to come out is an unlikely scenario.

Surely the numbers are small, so does it matter?

The claim may be made that the number of suspects for whom gender identity is recorded in place of sex registered at birth, or where an attempt is made to capture a non-binary identity by recording sex as unknown or indeterminate must surely be so small that the impact on data is negligible. Even though recording suspects' sex in this way does occur, if it happens as rarely as it surely must, does it really matter?

The first point to be made in response to this claim is that there is simply no way of ascertaining from the data collected by police forces how many suspects have their gender identity recorded in lieu of sex registered at birth, whether this is on the basis of self-declaration or subsequent to obtaining a gender recognition certificate. The only way to ascertain this would be if there was an additional data field recording that the suspect had requested that their gender identity be recorded in lieu of sex registered at birth and that this request had been honoured. There isn't. The number of suspects for whom gender identity is recorded could be small or it could be large. It could be stable across time, or it could be growing. It could vary across police forces who

²¹ <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885>

²² <https://questions-statements.parliament.uk/written-questions/detail/2022-01-06/98878>

collect data in this way, or it could be broadly the same throughout the country. The data police forces collect will not provide the answers and that fact alone should give pause for thought.

Nevertheless, working on the assumption that the number of suspects for whom gender identity is recorded is small, what is the likely impact on the data? Is it negligible? The short answer is that even a small number of cases may have a significant impact on the data. This impact is disproportionate across the sexes and will have the greatest effect on the data for females where suspects whose sex registered at birth is male are allocated to the female subgroup. This is due to the significance of sex registered at birth as a predictor of offending.

As discussed above, offending patterns differ significantly on the basis of sex registered at birth both for all offences and for individual offence categories. What this means is that allocating even a few cases of male offending to the subgroup of female cases, where a male suspect asserts the gender identity of a woman, may have a significant effect on that female subgroup by increasing the number of cases recorded as female.

For example, in 2016, Claire Darbyshire (also known as Christopher) was convicted of murder at the Old Bailey. The record of this conviction shows the gender as female.²³ We have been able to identify this as the conviction of a male offender who has been recorded as female because the case was widely reported in the British press and it is clear that Darbyshire's sex registered at birth is male.²⁴ Indeed, Darbyshire was imprisoned in the male prison estate at HMP Belmarsh.²⁵

A second example is Lauren Jeska (also known as Michael Jameson) who was convicted of attempted murder (and other offences) at Birmingham Crown Court in 2017. The record of this conviction shows recorded name as Lauren Jeska and gender as female.²⁶ Again, it was possible to ascertain that Jeska's sex registered at birth is male because the case was reported in the press.²⁷

The impact of allocating these two convictions to the female data set is considerable. In the case of Darbyshire, recording this conviction as female elevated the number of females convicted of murder in that year by 5%. When we look at Jeska, the number of females convicted of

²³ <https://www.thelawpages.com/court-cases/court-case-search.php?click=submit&action=search&mode=3> There is no separate 'sex' data field, this being an example of where 'gender' is used to label a data field intended to record sex.

²⁴ e.g. <https://www.bbc.co.uk/news/uk-england-london-35774143>

²⁵ <https://www.dailymail.co.uk/femail/article-7898933/Ross-Kemps-HMP-Belmarsh-viewers-praise-prisons-brave-transgender-prisoner-Claire.html>

²⁶ <https://www.thelawpages.com/court-cases/court-case-search.php?click=submit&action=search&mode=3>

²⁷ e.g. <https://news.sky.com/story/fell-runner-lauren-jeska-admits-attempted-murder-of-athletics-official-10588270>

attempted murder was elevated by around 20%.²⁸ These two cases demonstrate that for offence categories that women rarely commit, the inclusion of just one offender whose sex registered at birth is male can have a marked impact.

Allocating cases of offending by those whose sex registered at birth is male to the female data set means that it is now impossible to ascertain the true number of convictions for females or to plot how rates of offending by females change over time. Nothing in the data recorded by police forces will reveal that an individual requested that their gender identity be recorded in lieu of sex registered at birth: Darbyshire and Jeska can only be identified as being offenders whose sex registered at birth is male due to media reports. However, the majority of crimes and convictions, even serious ones, do not reach the press. The *reductio ad absurdum* is that it is impossible to state with certainty in respect of any record of a suspect or of a conviction whether this relates to a male or a female.

What this means is that it is impossible to correctly ascertain crime rates for males and females or to analyse changes in rates of reported crime. Again, and for previously stated reasons, this is particularly significant for crime rates for females. In turn, this impacts services by frustrating attempts to formulate the most appropriate response to crime. Where offence categories are only very rarely committed by females, any increase in the rates of female offending for these categories may be remarkable and significant, requiring further analysis and attention. However, where reported crime may record suspects' gender identity in lieu of sex registered at birth, we cannot conclude that an apparent rise in female rates of offending is indeed due to increased numbers of females committing these offences. The change may instead be due to increased numbers of male offenders being recorded in the female statistics on the basis of their gender identity. The data simply do not permit us to tell which it is.

An example of an apparent dramatic increase in female offending was reported by the BBC in January 2021.²⁹ The BBC had asked 45 regional police forces in the United Kingdom for data on reported cases of female-perpetrated child sexual abuse from 2015 to 2019. The data received indicated that between 2015 and 2019 there was an increase of 84%. This is a marked increase in reported cases of a crime that women rarely commit. Further analysis is required to understand why this is. However, because some police forces are recording suspects' gender identity not sex registered at birth, uncertainty is introduced. There are at least three possible explanations: the same number of women are committing these offences, but victims have become more able to step forwards and make a report; more women are committing child sexual offences; males who commit child sexual offences are being recorded in increasing numbers in the female statistics on the basis of gender identity. We do not know which explanation, or combination of explanations,

²⁸ These percentages are based on the assumption that all other cases in the female subgroups for murder in 2016 and for attempted murder in 2017 were offenders whose sex registered at birth was female.

²⁹ <https://www.bbc.co.uk/news/uk-55338745>

is responsible for this large increase of 84%. Given that the pathways into offending differ for males and for females, even within the same offence category, each explanation may require a different policing response. However, the uncertainty introduced by the methods of data collection frustrates this.

Dr Kate Coleman

Director

Keep Prisons Single Sex

kate@kpssinfo.org

9th June 2022