

# Citizen Participation and Public Petitions Committee

5th Meeting, 2021 (Session 6), 6 October  
2021

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

## Note by the Clerk

<b>Petitioner</b>	Lucy Hunter Blackburn, Lisa Mackenzie, Kath Murray
<b>Petition summary</b>	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.
<b>Full petition</b>	<a href="https://petitions.parliament.scot/petitions/PE1876">https://petitions.parliament.scot/petitions/PE1876</a>

## Introduction

1. This is a new petition that has been under consideration since 5 July 2021.
2. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe A**.
3. While not a formal requirement, petitioners have the option to collect signatures on their petition. On this occasion, the petitioner elected to collect this information. 12,834 signatures have been received.
4. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. This response is included at **Annexe B** of this paper.
5. The petitioner has provided a submission. This is included at **Annexe C** of this paper. Written submissions have also been received from Martin A. Neill, Kate

Buchanan, Anne Marie Docherty, Mary Gordon, Dr Laetitia Pichevin, Frontline Feminists Scotland and Professor Alice Sullivan. The Committee has also received an anonymous submission. These are included at **Annexe D**.

## Scottish Government submission

6. In its written submission, the Scottish Government states that—
  - the vast majority of sexual offences are committed by people who are biologically and identify as male; and
  - women and children are disproportionately the victims of these crimes.
7. The submission notes that the crime of rape is committed by someone with a penis, including a surgically constructed penis. It further notes, however, that a person (male or female) can also be convicted of rape if they assisted in the perpetration of the crime.
8. In respect to crime statistics, the Scottish Government explains that it publishes a bulletin on Criminal Proceedings in Scotland annually.
9. This bulletin provides statistics on criminal proceedings concluded in Scottish courts, including a breakdown by sex of convicted persons by crime type.
10. These statistics are derived from data held on the Criminal History System (CHS), an operational database which is used for the primary purpose of recording of information on people accused or convicted of perpetrating a criminal act.
11. The submission notes that the CHS is used and maintained by Police Scotland. As such, it would be for Police Scotland to determine how the sex of people charged or convicted of rape or attempted rape is recorded on the CHS.
12. In its submission, the Scottish Government asserts that it queries any unusual sex values in criminal justice statistics with Police Scotland, the Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service.
13. It cites the 2018-19 statistics which show one female as having been convicted of rape. The submission explains that this was an error: in reviewing the rape statistics for recent years two errors were identified in relation to how sex was recorded, including this one.

## Petitioner submission

14. In their written submission of 7 June 2021 [[PE1876/A](#)], the petitioners state that in 2019-20 in Scotland there were 2,343 reported rapes or attempted rapes, 300 prosecutions and 130 convictions. All convictions were recorded as male.

15. They explain that, as a result, the figures for female offenders are therefore very sensitive to any reclassification of cases.
16. In their submission, the petitioners highlight a response to a parliamentary question which stated that the Scottish Courts and Tribunal Service (SCTS) records cases by 'self-declared gender', rather than physical or legal sex, 'unless evidentially relevant to the crime'.
17. The petitioners state that the relevant SCTS guidance does not discuss whether sex would be regarded as relevant in all cases of rape or attempted rape. It is the petitioners' impression, however, that it would not be.
18. In their submission, the petitioners stress that the petition is only concerned with the accurate recording of physical sex on these cases. They explain that accurate data recording matters for research, public policy development, and for public understanding of women's offending.

## Additional submissions

19. The Committee has received a number of additional submissions in respect of this petition, which echo the concern that unless the sex of people charged or convicted of rape or attempted rape is recorded, crime statistics could be distorted.
20. One submission, provided by Professor Alice Sullivan, highlights the importance of accurate data on sex for quantitative social scientists, including criminologists.
21. The submission argues that sex is a fundamental demographic variable, which is essential to analysis across the human and social sciences.
22. Professor Sullivan raises concerns about the impact of misallocating cases, noting that small numbers can have a large effect on research findings in any sub-group analysis where one sex is dominant. She states that crime statistics in general, and sexual crime statistics in particular, provide a clear example of this.
23. In her submission, she states—

"sex and gender identity are distinct variables. We can respect people's gender identities without denying the material reality of sex. Ideally, crime statistics should record both variables. It is vital that information on sex is recorded, given the importance of sex in itself, and its intersection with other variables, including gender identity."

## Action

24. The Committee is invited to consider what action it wishes to take on this petition.

**Clerk to the Committee**

# 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.



## 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.

### Key organisations

- [Administrative Data Research Scotland](#)
- [Engender](#)
- [Equality Network](#)
- [Equality and Human Rights Commission](#)

- [For Women Scotland](#)
- [Police Scotland](#)
- [Rape Crisis Scotland](#)
- [Scottish Courts and Tribunals Service](#)
- [Scottish Government](#)
- [Scottish Trans Alliance](#)

**Frazer McCallum**

Senior Researcher

29/06/2021

SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at [spice@parliament.scot](mailto:spice@parliament.scot).

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

Published by the Scottish Parliament Information Centre (SPICe), an office of the Scottish Parliamentary Corporate Body, The Scottish Parliament, Edinburgh, EH99 1SP.

# Scottish Government submission of 23 September 2021

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

Thank you for your email of 11 June 2021 seeking Scottish Government views on the actions called for in this petition. I apologise for my delay in replying.

The vast majority of sexual offences each year are committed by people who are biologically and identify as male. Women and children are disproportionately the victims of these crimes.

The [crime of rape](#) is committed by someone with a penis, including a surgically constructed penis. As the petition mentions, a person (male or female) can also be convicted of rape when their involvement was [art and part](#) (assisted in the perpetration of the crime).

Police Scotland recently [responded](#) to a Freedom of Information request on rape statistics.

The Scottish Government publishes each year a statistical bulletin known as [Criminal Proceedings in Scotland](#). The bulletin presents statistics on criminal proceedings concluded in Scottish courts, including a breakdown by sex of convicted persons by crime type. As the introduction to the bulletin notes, these statistics are derived from data held on the Criminal History System (CHS), an operational database which is used for the primary purpose of recording of information on people accused or convicted of perpetrating a criminal act. The CHS is used and maintained by Police Scotland. It is, therefore, for Police Scotland to determine how the sex of people charged or convicted of rape or attempted rape is recorded on the CHS.

The table below gives information taken from Table 8(c) of Criminal Proceedings in Scotland: People convicted by sex, main crime/offence and main penalty, 2019-20.

Sexual crime	Number of males convicted	Number of females convicted
Rape and attempted rape	130	0
Sexual assault	302	3
Crimes associated with prostitution	39	6
Other sexual crimes	703	21
<b>Sexual crimes (all)</b>	<b>1,174</b>	<b>30</b>

These statistics show that all people convicted of rape or attempted rape in 2019/20 were recorded as male.

The Scottish Government queries any unusual sex values in criminal justice statistics with Police Scotland, the Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service. The 2018-19 statistics do show 1 female as having been convicted of rape. This was an error: in reviewing the rape statistics for recent years we came across two errors in relation to how sex was recorded and this was one of them.

I hope this is helpful to the Committee.

# Petitioner submission of 7 June 2021

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

Section 1 of the Sexual Offences (Scotland) Act 2009 defines rape as requiring the use of a penis. Recently, Police Scotland [described](#) its recording policy in relation to rape and attempted rape as:

“If the male who self-identifies as a woman were to attempt to or to penetrate the vagina, anus or mouth of a victim with their penis, Police Scotland would record this as attempted rape or rape and the male who self-identifies as a woman would be expected to be recorded as a female on relevant police systems.”

In 2019-20 in Scotland there were 2,343 reported rapes or attempted rapes, 300 prosecutions and 130 convictions. All convictions were recorded as male. The figures for female offenders are therefore very sensitive to any reclassification of cases. It is possible in theory for a woman to be charged with rape as an accessory. In practice however, such cases are very rare. We queried the one recorded female conviction for rape or attempted rape in the past decade: the Scottish Government now believes this is likely to be due to a “data error”. We have not found a case reported anywhere of a rape committed using a surgically-constructed penis.

Commenting on current police policy [in the press](#), the Scottish Government stated “this is a matter for Police Scotland”. In the same article, the Cabinet Secretary for Justice was reported to have provided a different description of police policy to an MSP in earlier correspondence. This had suggested that physical sex would be recorded unless an offender had changed their sex in law, via the acquisition of a Gender Recognition Certificate.

According to a response to a parliamentary question, the Scottish Courts and Tribunal Service records cases by ‘self-declared gender’, rather than physical or legal sex, ‘unless evidentially relevant to the crime’. The relevant SCTS [guidance](#) does not discuss whether sex would be regarded as relevant in all cases of rape or attempted rape, but at first sight it appears it would not be.

This petition is only concerned with the accurate recording of physical sex on these cases. Whether, where relevant, gender identity should be

recorded by the police, prosecutors and the courts, in addition to sex, is a separate issue. It should be stressed that to the best of our knowledge there is no evidence that having a transgender identity is associated with a higher risk of offending, including sexual offending, whether in the population generally, or looking only at all people born male. Ensuring any suspects with a transgender identity are treated sensitively by police and court staff should be dealt with as a separate matter from gathering data for use in anonymised form.

We do not think that organisations providing services to those who have experienced sexual violence should be expected to see this as a priority issue for them to lead on, given their limited resources. They already face large challenges in providing support to individuals, including the relatively low conviction rate for these offences.

This petition instead raises questions of principle, trust in statistics, and trust in public organisations. Accurate data recording matters for research, public policy development, and for public understanding of women's offending.

The petition also raises questions about how police and court recording practices can affect those who have reported rape or attempted rape. For example, how perpetrators are described to complainants, how complainants are expected to describe perpetrators in police interviews and when giving evidence in court, and how recording may affect media reporting. We believe strongly that those who have experienced rape and attempted rape should be free to describe how they perceive their attacker's sex in their own preferred language, and to have their attacker described to them in the same way. The Committee could help clarify the situation here.

We recognise that much higher rates of male offending are also seen for other types of offence, including sexual offending more generally, and violent offending. Similar arguments can be made about the risks of credibility of official statistics, muddying the understanding of offending patterns for women and any effect on what is expected of victims. Those arguments deserve further attention, but they are not the focus of this petition.

We have engaged with various organisations over the past two years, seeking clarity on what recording practices underpin the production of statistics in the criminal justice system. We have been unable to obtain clear answers on when, how, and why practices have changed. We believe the Public Petitions Committee is uniquely placed to use its

powers to establish what current policies are, why and how they have been developed and to offer support to the case for re-establishing clear practices on the accurate recording of sex of all those charged with or convicted of rape or attempted rape.

## Annexe D

The following further submissions are circulated in connection with consideration of the petition at this meeting —

- [PE1876/B: Martin A. Neill submission of 25 July 2021](#)
- [PE1876/C: Kate Buchanan submission of 26 July 2021](#)
- [PE1876/D: Anne Marie Docherty submission of 26 July 2021](#)
- [PE1876/E: Mary Gordon submission of 28 July 2021](#)
- [PE1876/F: Dr Laetitia Pichevin submission of 27 August 2021](#)
- [PE1876/G: Frontline Feminists Scotland submission of 29 August 2021](#)
- [PE1876/H: Professor Alice Sullivan submission of 27 August 2021](#)
- [PE1876/I: Anonymous submission of 21 September 2021](#)

All written submissions received on the petition can be viewed on the petition [webpage](#).