



# HOW POLICE FORCES IN ENGLAND & WALES RECORD SUSPECTS' SEX IN CRIME & INCIDENT REPORTING

Keep Prisons Single Sex

[kpssinfo.org](http://kpssinfo.org)

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## Executive Summary

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. Sex registered at birth is recognised throughout the criminal justice system as important to analysing patterns of offending, pathways into offending and risk. This is well-established and uncontroversial. The differences between males and females underpin service provision and development throughout the criminal justice system.

Despite the importance of sex 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 Gender Recognition Act 2004 and that which is simply self-declared.

We undertook to determine how police forces in England and Wales record suspects' sex in crime and incident reporting by asking Freedom of Information Access Requests.

From our research it is clear that many police forces record suspects' gender identity in lieu of sex registered at birth, frequently on the basis of self-identification. Of the 22 forces that provided information only one police force stated that they record sex registered at birth as standard.

- 18 record gender identity, with 16 doing so on the basis of self-identification
- 16 forces answered specific questions on how rape suspects' sex is recorded: 13 record gender identity, with over 50% doing so on the basis of self-identification
- 12 forces answered specific questions on how they record the sex of a suspect who identifies as non-binary: 6 stated that they would record the suspect's sex as indeterminate, unspecified, or other

Offending patterns differ significantly between males and females with females only committing a minority of offences. Some offence categories are only very rarely committed by females. This means that the allocation of even one or two cases of male offending to the female subgroup, on the basis of the suspect's gender identity may have a significant impact on the data, compromising its utility and relevance to service development.

The data recording decisions made by individual police forces affect the criminal justice system more widely. This is because data collected by police forces are transferred over onto other data management systems. These include the Police National Computer (one of the main sources of information for Disclosure and Barring Service checks), the Annual Data Requirement (provided to the Home Office for research and statistical purposes) and Magistrates and Crown Courts case management systems.

Currently the Home Office does not centrally mandate how police forces should record a suspect's sex and forces are free to make their own data-recording decisions. A response to a FOIA received in April 2022 reveals that the Home Office has requested that police forces on a voluntary basis record suspects' sex registered at birth, unless the suspect is in receipt of a gender recognition certificate, in which case legal gender should be recorded. Whilst this may appear to be a positive step, this remains insufficient to ensure the collection of accurate, relevant and reliable data on offending.

Our recommendations include that the Home Office issue clear centralised guidance which mandates police forces to record suspects' sex registered at birth. This guidance should make clear the importance of sex to policing and the need to record suspects' sex registered at birth for reasons that include fulfilling obligations under Equality Act 2010 and forces' Public Sector Equality Duty, as well as international legal obligations and Convention rights.

The lawfulness of police forces collecting data on suspects' sex registered at birth is clear. To request this data of suspects is neither discrimination nor harassment and does not constitute a violation of Article 8 rights to privacy, provided that any personal data are stored and managed securely and sensitively. This includes the circumstances where a suspect is in receipt of a gender recognition certificate and it is also lawful for forces to collect data on whether suspects have a gender recognition certificate. This guidance should provide explicit statement as to the lawfulness of collecting data on suspects' sex registered at birth in all circumstances.

**Keep Prisons Single Sex, April 2022**

## Terminology

In this report the following terms are used:

- **Sex registered at birth:** This is the sex that was observed at birth, registered and is as recorded on an individual's original birth certificate.
- **Legal gender:** Where an individual has obtained legal recognition of their acquired gender in accordance with the Gender Recognition Act 2004 and has obtained a gender recognition certificate, they are issued with a replacement birth certificate where their sex registered at birth is replaced by their legal gender. The grant of a gender recognition certificate is not retrospective and does not change the sex specified in the original registration of birth. Hence, an individual whose sex registered at birth is male and who has obtained a gender recognition certificate will have acquired the legal gender of a woman and will be issued with a replacement birth certificate with the entry for the sex data category recorded as female, together with the new chosen name. The original registration of birth showing the sex data category as male remains unchanged. Issuing a replacement birth certificate is for reasons of privacy of information. A gender recognition certificate is an example of a so-called 'legal fiction', there being no suggestion that the individual has changed biological sex or that the replacement birth certificate is an accurate record of historical fact.
- **Gender identity:** Where a person has been diagnosed with gender dysphoria, their gender identity may be legally recognised, via the provisions of the Gender Recognition Act 2004. Gender identity may also be self-declared. Where an individual's sex registered at birth is male, but they identify as a woman, their subjective, self-declared gender identity is that of a woman. Where this individual has not obtained a gender recognition certificate, their gender identity will differ from what is stated on their birth certificate, because this document still reflects their sex registered at birth. The sex data category in some documentation that is commonly used to establish identity may, in practice, be changed to reflect that individual's gender identity on the basis of self-declaration, even though the individual has no gender recognition certificate and their birth certificate reflects their sex registered at birth. These include passport and driving licence. Hence, an individual's birth certificate may state that they are male, yet that individual's passport and driving licence may state that the individual is female.

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## 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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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

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

<sup>2</sup> Thanks to Dr Emma Hilton.

<sup>3</sup> 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.

provisions of the Gender Recognition Act 2004 and that which is simply self-declared.<sup>4</sup> 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 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 answer 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.<sup>5</sup> 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.<sup>6</sup> 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.

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<sup>4</sup> The 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.

<sup>5</sup> Sullivan, 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.

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

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.<sup>7</sup>

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



## The Importance of Sex-Disaggregated Data on Offending

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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> For women, history of male violence, including coercive control, frequently forms a distinct pathway into offending.<sup>11</sup> 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.<sup>12</sup> 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

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<sup>8</sup> <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>)

<sup>9</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/938360/statistics-on-women-and-the-criminal-justice-system-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938360/statistics-on-women-and-the-criminal-justice-system-2019.pdf)

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

<sup>11</sup> <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>

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

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 mental health problems;<sup>13</sup> over 50% of female prisoners report experiencing abuse as a child;<sup>14</sup> over half of women in prison report experiencing domestic violence;<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> More generally, differences due to sex underpin risk assessment processes,<sup>18</sup> the provision of offender treatment programmes<sup>19</sup> and the differing security categorisation and arrangements in the male and female prison estates.<sup>20</sup>

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

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

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

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

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

<sup>17</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/719819/female-offender-strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719819/female-offender-strategy.pdf)

<sup>18</sup> see e.g. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1060166/osp-guidance-practitioners.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060166/osp-guidance-practitioners.pdf)

<sup>19</sup> see e.g. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/769540/process-study-horizon-programme.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/769540/process-study-horizon-programme.pdf)

<sup>20</sup> 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/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](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

## **How Do Police Forces in England and Wales Record Suspects' Sex in Crime and Incident Reporting?**

In light of changing data collection practices where gender identity may be collected in place of sex registered at birth and in recognition of the fact that sex registered at birth is the most significant variable for analysing offending and crime, we undertook to determine how police forces in England and Wales record suspects' sex in crime and incident reporting.

Currently, the Home Office does not centrally mandate how an offender's sex must be recorded by police. It is for each individual police force to decide what information to record.<sup>21</sup> From April 2022, the Home Office has requested that police forces, on a voluntary basis, record the sex currently shown on the birth certificate for both suspects and victims of crime.<sup>22</sup> This will be the sex registered at birth unless the individual is in receipt of a gender recognition certificate, in which case this will be their legally recognised acquired gender. Police forces are also requested to record gender identity separately, if this is relevant.

There is no standard recording system for crime and incident reporting across police forces, with forces able to make their own decisions concerning the intelligence and case management system they use. The majority of police forces use the case management system Niche RMS. Athena and Red Sigma are also used. There may still be variation between forces using the same case management system because data fields are labelled according to the requirements specified by each force. This means that the data field relating to a suspect's sex could be labelled 'sex' or 'gender', as that force chooses.<sup>23</sup>

Throughout this section we refer to how police forces record suspects' sex. However, different forces refer to this data field differently: some refer to suspects' "sex" and others to suspects' "gender". Similarly the documents forces referred to may refer to a suspect's "gender" instead of their "sex".

### ***Policing in England and Wales: an Overview***

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<sup>21</sup> <https://petition.parliament.uk/petitions/590123>

<sup>22</sup> <https://twitter.com/TerryStock8/status/1511747211729809416>

<sup>23</sup> Correspondence from Niche Technology UK Limited, 5th January 2022.

The Home Office is responsible for policing in England and Wales.<sup>24</sup> The Home Secretary answers to Parliament and the public for the provision of an efficient and effective Police Service. There are 43 territorial police forces in England and Wales, four of which are in Wales. Together with the three specialist forces, British Transport Police, Civil Nuclear Police and Ministry of Defence Police, this gives a total of 46. The Chief Constable/Commissioner of a force is responsible for delivering policing services.

Outside of London, publicly elected Police and Crime Commissioners (PCCs) are responsible for holding their police force to account and setting the direction of the force. Their responsibilities include the appointment and, if necessary, the dismissal of the chief constable; holding the chief constable to account for the performance of the force's officers and staff; setting out the force's strategy and policing priorities; and reporting annually on progress. In London, the Mayor's Office for Policing and Crime (MOPAC) has responsibility for the governance of the Metropolitan Police while the City of London Police continues to be overseen by the City of London Corporation. The Mayors of Greater Manchester and West Yorkshire also exercise PCC functions.

The National Police Chiefs' Council (NPCC) brings together the expertise and experience of chief police officers from England, Wales and Northern Ireland. Chief officers holding a substantive rank or appointment at the rank of Assistant Chief Constable level (Commander in the Metropolitan Police Service and City of London Police) or above and senior police staff equivalents are members of NPCC. NPCC leads and coordinates the direction and development of the police service in England, Wales and Northern Ireland.

The College of Policing (COP) is the professional body for the police service and operates independently of government. It sets the framework for operational and training standards, professional development and a knowledge base.

Her Majesty's Inspectorate of Constabulary (HMIC, or HMICFRS including fire and rescue) has a statutory duty to independently assess and report on police forces and policing activity in England and Wales, including the Metropolitan Police Service and the City of London Police. HM Inspectors of Constabulary are appointed by the Crown, they are not employees of the police service or government. HM Chief Inspector reports to Parliament on the efficiency and effectiveness of police forces in England and Wales. HMIC inspect and regulate other major

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<sup>24</sup> The Scottish Government is responsible for policing in Scotland. In 2021 the feminist policy think-tank Murray Blackburn Mackenzie asked FOIAs of Police Scotland regarding the recording of suspects sex <https://www.thetimes.co.uk/article/rape-suspects-can-choose-to-self-identify-as-female-vfl678tg6>. A letter from the Assistant Chief Constable of Police Scotland to Kenny MacAskill MP stated that even where DNA evidence contradicted the recording of gender identity in crime and incident reporting, the stated gender identity would not be corrected. "It is worthy of note that even if DNA gives a scientific analysis of biological sex which does not match the sex recorded on a persons's CHS record, this would not prompt a change of the CHS record, but would be noted in the persons's DNA profile." (Ref PPCW 92.21; 03 December 2021)

policing bodies such as the National Crime Agency and British Transport Police. HMIC does not have statutory powers of enforcement.

The Independent Police Complaints Commission (IPCC) oversees the police complaints system in England and Wales.

### ***The Freedom of Information Access Requests***

In accordance with the Freedom of Information Act 2000, Freedom of Information Access Requests were made of all 46 police forces in England and Wales in respect of how they record suspects' sex in crime and incident reporting. The questions asked are set out in Appendix 1.

Questions were submitted at the beginning of July 2021. As at April 2022, 26 forces had provided answers to the questions. The information forces supplied varied considerably in how comprehensive it was. A further four forces replied with a refusal to supply the information on the grounds that the information was not centrally recorded or that it fell outside of the scope of the Freedom of Information Act 2000. Sixteen forces did not respond despite repeated chasing. These 16 sets of FOIAs have now been escalated to the ICO.

### ***Overview of responses***

The following 28 forces provided information in response to the FOIA request:

*Avon and Somerset Police*

*Bedfordshire Police*

*Cheshire Constabulary*

*City of London Police*

*Cleveland Police*

*Cumbria Constabulary*

*Gloucestershire Constabulary*

*Hampshire Constabulary*

*Kent Police*

*Lancashire Constabulary*

*Lincolnshire Police*

*Merseyside Police*

*Metropolitan Police Service*

*Northamptonshire Police*

*Northumbria Police*

*South Yorkshire Police*

*Staffordshire Police*  
*Thames Valley Police*  
*Warwickshire Police*  
*West Mercia Police*  
*West Yorkshire Police*  
*Wiltshire Police*  
*Dyfed-Powys Police*  
*Gwent Police*  
*North Wales Police*  
*South Wales Police*  
*British Transport Police*  
*Civil Nuclear Constabulary*

Five police forces responded but declined to supply the information requested:

*Cambridgeshire Constabulary*  
*Durham Constabulary*  
*Hertfordshire Constabulary*  
*Humberside Police*  
*Ministry of Defence Police*

Derbyshire Constabulary and Essex Police each replied that they required additional time to decide where the balance of public interest lies in respect to providing the information requested.

The following 11 forces did not respond to the FOIA request:

*Devon & Cornwall Police*  
*Dorset Police*  
*Greater Manchester Police*  
*Leicestershire Police*  
*Norfolk Constabulary*  
*North Yorkshire Police*  
*Nottinghamshire Police*  
*Suffolk Constabulary*  
*Surrey Police*  
*Sussex Police*  
*West Midlands Police*

Five police forces did not state how suspects' sex is recorded, although they provided some information:

*City of London Police*

*Hampshire Constabulary*

*Metropolitan Police Service*

*Thames Valley Police*

*South Wales Police*

The Civil Nuclear Constabulary replied that as they operate within the jurisdiction of other police forces, they do not have, or have responsibility for, a crime recording system.

The remaining 22 police forces provided at least some information concerning how suspects' sex is recorded. The information provided reveals that data recording practices vary across forces, no doubt reflecting, at least in part, the lack of guidance on this issue that many forces reported.

Two forces replied that data recording decisions concerning suspects' sex are made on a case-by-case basis. Avon and Somerset Police replied that these data recording decisions are for the officer recording the data to make. However, they also reported that no guidance had been issued to officers on how to make these decisions. Bedfordshire Police replied that they make decisions concerning recording suspects' sex on a case-by-case basis but did not state the criteria used in making those decisions. Bedfordshire Police stated that the issue of recording suspects' sex, specifically where the suspect identifies as transgender, had been raised at the National Crime Recording Standard Technical Working Group. Bedfordshire Police reported that the National Crime Registrar had responded that "*a case-by-case decision would need to be made by the Senior Investigating Officer as compiling a set of rules is likely to be counter-productive. Most important is that the crime is recorded, the victim is supported and the matter progressed.*"

Sixteen police forces replied that they record suspects' self-declared gender or gender identity:<sup>25</sup>

*British Transport Police*

*Cheshire Constabulary*

*Cumbria Constabulary*

*Gloucestershire Constabulary*

*Kent Police*

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<sup>25</sup> Information provided by the Metropolitan Police Service in response to a previous FOIA request, who on this occasion declined to answer the specific questions asked about how suspects' sex is recorded, indicates that self-declared gender identity is recorded and has been since 2009 <https://twitter.com/HairyLeggdHarpy/status/1105876457434296323>.

*Lancashire Constabulary*

*Lincolnshire Police*

*Northamptonshire Police* (Northamptonshire Police stated that if the matter related to that person being transgender, an additional field would be completed.)

*Northumbria Police Service* (elaborated that if “the gender becomes a relevant factor, this may be recorded as Additional Information”. We interpret this to mean that if a suspect’s sex is relevant to the crime or the investigation, where this differs from the recorded gender identity, this will be recorded as additional information)

*South Yorkshire Police*

*Staffordshire Police*

*West Mercia Police*

*West Yorkshire Police* (West Yorkshire Police also reported that sex registered at birth is recorded)

*Dyfed-Powys Police* (Dyfed-Powys Police stated they record the gender/sex as per the persons wishes)

*Gwent Police*

*North Wales Police*

Two police forces replied that where a suspect has obtained a gender recognition certificate, legal gender is recorded:

*Merseyside Police*

*Warwickshire Police* (‘self-defined gender’ may be recorded separately)

One police force replied that suspects’ sex registered at birth is recorded:

*West Yorkshire Police* (West Yorkshire Police also reported that suspects’ gender identity is recorded)

Separate questions were asked about how rape suspects’ sex is recorded in crime and incident recording. Sixteen police forces provided answers. Where forces declined to answer these specific questions, we assume that data collection conforms to their general data collection practices, i.e. that if they replied that suspects’ gender identity is recorded, rape suspects’ gender identity will also be recorded.

Northamptonshire Police reported that recording decisions would be made on a case-by-case basis. Where a rape suspect who identified as transgender but who had no gender recognition certificate was already on the system, recording decisions would likely conform to the existing record (Northamptonshire Police stated they record gender identity). Where a rape suspect identified as transgender and had a gender recognition certificate, again recording decisions would most likely conform to the existing record. Where a suspect with a gender recognition



certificate was not already known to the force, the most likely recording would be 'male with female alias'.

Two forces stated that they record rape suspects' sex registered at birth:

*Gloucestershire Constabulary* (this contradicts their general recording practice, which is to record suspects' self-declared gender identity)

*Staffordshire Police* (this contradicts their general recording practice, which is to record suspects' self-declared gender or gender identity)

Five forces stated that where a rape suspect has obtained a gender recognition certificate, legal gender will be recorded:

*Bedfordshire Police*

*Cleveland Police*

*Merseyside Police*

*Warwickshire Police* (also stated 'self-defined gender' may be recorded separately)

*Wiltshire Police*

Eight forces stated that rape suspects' self-declared gender identity is recorded:

*Cumbria Constabulary*

*Kent Police*

*Lancashire Constabulary*

*Northumbria Police*

*South Yorkshire Police*

*Gwent Police* (Gwent Police stated that transgender status would be recorded separately.)

*North Wales Police*

*West Mercia Police*

### ***Recording Non-Binary Identity***

Police forces were asked how they would record a suspect who identified as non-binary. Twelve forces answered this question, although Cheshire Constabulary simply reported that there is no non-binary option for recording suspects' sex.

Northamptonshire Police, in the course of providing their answer, replied that the issue of how to record the sex of a suspect who identifies as non-binary is currently under national consultation as a national change to the system.

Six forces stated that where a suspect identified as non-binary they would record sex as indeterminate, unspecified, other or would leave this blank:

*Cumbria Constabulary*

*Lancashire Constabulary*

*Northamptonshire Police*

*Gwent Police*

*North Wales Police*

*West Mercia Police*

Three forces stated that they would record sex registered at birth:

*Gloucestershire Constabulary*

*Warwickshire Police* (That the suspect identifies as non-binary could be recorded in the free text field 'Reason to treat as different gender')

*West Yorkshire Police* (Additional information concerning the suspect's non-binary identity can be recorded as free text comments.)

Northumbria Police declined to state how they would record a non-binary suspect's sex. However they stated that were gender to become a relevant factor to the investigation, this would be reflected in the investigation and may also be recorded in the crime report as additional information.

Wiltshire Police stated that a non-binary suspect's sex would be recorded in line with how the recording officer observes it to be.

### ***Supporting documentation***

In the course of answering the questions some forces made specific reference to documents, to back up their answers and the data recording decisions they had made:

- two forces referred to the Home Office Counting Rules <sup>26</sup> (Bedfordshire Police and Hampshire Constabulary);
- two referred to PACE Code C Annex L<sup>27</sup> (Avon and Somerset Police and Merseyside Police);

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<sup>26</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/387762/count-vision-december-2014.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387762/count-vision-december-2014.pdf)

<sup>27</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/903473/pace-code-c-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903473/pace-code-c-2019.pdf)

- one referred to the National Standard for Incident Recording Rules<sup>28</sup> (Hampshire Constabulary);
- four referred to the College of Policing Authorised Professional Practice Detention and Custody document<sup>29</sup> (Avon and Somerset Police, Merseyside Police, Metropolitan Police Service and Thames Valley Police).

However, none of these documents contain guidelines on how to record suspects' sex.

Two forces who record suspects' gender identity referred to National Police Chiefs' Council (NPCC) Guidance on recording of gender (Lincolnshire Police and British Transport Police). We were unable to locate this guidance, despite extensive searching. Further FOIA requests were submitted to these police forces and to the NPCC asking for a copy of this guidance. The response from the NPCC stated that they have no knowledge of any such document. British Transport Police also subsequently clarified that they were unable to identify a specific document fitting this description and were not aware of any formal NPCC guidance. However, Lincolnshire Police replied with a copy of a document *Trans Guidance for the Policing Sector, An Overview*.<sup>30</sup> This document is produced by Stonewall in partnership with the NPCC, amongst others, and is available on the NPCC website.

*Trans Guidance* provides support and guidance to staff members and managers where officers or other staff members identify as transgender. It does not provide any guidance on the management of suspects nor how their data should be recorded.<sup>31</sup> It is unclear why this document has been cited as authoritative for the purposes of making decisions around the recording of suspects' sex.

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<sup>28</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/116658/count-nsir11.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/116658/count-nsir11.pdf)

<sup>29</sup> <https://www.app.college.police.uk/detention-and-custody-index/>

<sup>30</sup> <https://www.npcc.police.uk/2018%20FOI/EDHR/Trans%20Guidance%20for%20the%20Policing%20Sector%20Overview.pdf>

<sup>31</sup> Examples of how the document advises that data in respect of staff who identify as transgender should be recorded can be found on pages 6 and 8. The advice on page 6 is that "Personal records for individuals who transition shouldn't refer to a previous name and records made prior to their name change should be updated. One option is to mark the individual down as having left the force and create a fresh record with their new details." Page 8 advises that officers who identify as gender fluid "may require two [warrant and staff identity] cards to reflect their gender on different days."

## **Discussion**

From our research it is clear that many police forces are recording suspects' gender identity in lieu of sex registered at birth. This is frequently on the basis of suspects' self-declaration. Assuming that our findings are representative of those forces that did not respond to our FOIAs, this may mean that only a small minority of police forces actually record sex registered at birth. A number of forces are also attempting to enable the non-binary status of suspects to be recorded by recording the sex of a suspect who identifies as non-binary as indeterminate, unspecified or by leaving it blank.

Of the 28 police forces that replied to the FOIA requests, 22 provided at least some information concerning how suspects' sex is recorded. The large majority (N = 18) record suspects' gender identity, with most forces (N = 16) doing so on the basis of self-declaration. Only one police force stated that they record sex registered at birth.

Sixteen police forces answered the separate questions asking how rape suspects' sex is recorded. Again, the majority (N = 13) record gender identity, with over 50% doing so on the basis of self-declaration. Only two police forces stated that they record sex registered at birth.

The assumption that those forces who answered only the general questions about recording suspects' sex collect data on rape suspects in the same way that they do for other suspected offences, means that an additional four forces are likely to record gender identity for rape suspects.

Forces were also asked how they would record the sex of a suspect who identifies as non-binary. Six out of the twelve who answered stated that they would record a non-binary suspect's sex as indeterminate, unspecified, other or would leave it blank.

## **Management of Data in the Criminal Justice System**

The data-recording decisions made by individual police forces affect the criminal justice system more widely. This is because data collected by police forces are used throughout the criminal justice system when they are transferred over onto other data management systems. Where gender identity is recorded for a suspect's sex, or where police forces have attempted to record a suspect's non-binary identity by recording sex as indeterminate or unspecified, this will be replicated wherever that information is used within the criminal justice system.

### ***Police National Computer:***

The Police National Computer (PNC) is a system that stores and shares criminal records information across the UK. The PNC records details of convictions, cautions, reprimands, warnings and arrests. Anyone who is arrested for any recordable offence has a record created in the PNC. Law enforcement agencies use it to access information that will support national, regional and local investigations.

Organisations that have access to the PNC include all police forces, National Identification Service, HM Revenue and Customs, National Crime Agency, NPCC, Department for Work and Pensions, HM Court Services and Probation Services. The PNC is one of the main sources of information accessed when a Disclosure and Barring Service (DBS) check is made.

The options available for recording the 'gender' of a suspect are: *male; female; unknown*. There is no guidance on how this should be recorded. However, as the PNC is not the initial recorder of data, the data will be returned in accordance with how it has been recorded on the source system, meaning that how forces originally recorded suspects' sex will be transferred over.

The PNC User Manual at section 33.10, page 394, addresses what happens when an individual obtains a gender recognition certificate:<sup>32</sup>

*The gender change of successful GRC applicants is identified on the PNC via the Gender Re-assigned (GR) Information Marker. The notifying force will be shown as the 'owner' of the information. All original associated records such as fingerprints, court records etc, will remain in the person's original filename if they were created when the person was using that name. New records will be in their new filename.*

The PNC record may be updated in one of two ways:

- Via self-notification, where a person who has a PNC record notifies the police to have their record updated, subject to documentary confirmation. In this case, PNC Reconciliations adds a GR Information Marker with the text: *SELF NOTIFICATION TO POLICE - GENDER RECOGNITION*. The Filename and Gender are changed to reflect the new identity. The former Filename is recorded as an Alias Name.
- Via police notification where, as a result of police interaction with a person, who already has a PNC record, the person is shown to have a different legal gender to that shown on their

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<sup>32</sup> [https://www.whatdotheyknow.com/request/704857/response/1688218/attach/4/61120%20Annex%20A%20PNC%20Manual%20v20.01%20Redacted%20v4.pdf?cookie\\_passthrough=1](https://www.whatdotheyknow.com/request/704857/response/1688218/attach/4/61120%20Annex%20A%20PNC%20Manual%20v20.01%20Redacted%20v4.pdf?cookie_passthrough=1)

record.<sup>33</sup> In this case PNC Reconciliations adds a GR Information Marker with the text: *POLICE NOTIFIED - LIVING AS FEMALE* or *POLICE NOTIFIED - LIVING AS MALE*. The subject's new name is added as an Alias Name.

There is no legal obligation on any person in possession of a gender recognition certificate to inform the police that they have changed their name or gender. The Manual notes:

*It is, therefore, quite possible that an arrested person could be released or otherwise dealt with before any link to their previous offending history is known...*

The Manual states that the documents that are valid for the purposes of the self-notification route to changing a PNC record are listed in *PNC L/O Letter 2015/008*. Whilst this is not appended to the Manual, Northamptonshire Police included it in their response to our FOIAs. This letter from the Home Office dated 4th February 2015 states that the subject must provide two documents, one from Group A and one from Group B.

Group A:

- Statutory declaration
- Deed poll
- Official medical letter/report concerning the subject's gender identity

Group B:

- Driving licence in the reassigned gender
- Passport in the reassigned gender
- Birth certificate in the reassigned gender

Although the Manual provides that this process is intended only for suspects with a gender recognition certificate, the letter allows that suspects are able to update their PNC record on the basis of self-declaration alone: two documents from Group A (deed poll; medical letter/report) and two documents from Group B (driving licence; passport) can all be obtained on the basis of self-declaration with no need for a gender recognition certificate.

### ***The Annual Data Requirement:***

The Annual Data Requirement (ADR) is a list of all requests for data made to all police forces in England and Wales under the Home Secretary's statutory powers. A wide range of crime and

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<sup>33</sup> The Manual uses the phrase 'gender identity' here, but by stipulating that the GR Information Marker should be added, which the Manual has already stated should be added in the situation where a person has obtained a gender recognition certificate, we deduce that this is also a situation where an individual has obtained a gender recognition certificate and not a situation where an individual has self-declared their gender identity.

policing data are collected directly from police forces including data on crime, police workforce, arrests and stop and search. These data are provided to the Home Office for research and statistical purposes.<sup>34</sup>

Where ADRs require a sex information category, the data will be returned in accordance with how it has been recorded on the source system, meaning that how forces originally recorded suspects' sex will be transferred over.<sup>35</sup> Where gender identity is recorded for a suspect's sex, or where police forces have attempted to record a suspect's non-binary identity by recording sex as indeterminate or unspecified, this will be transferred over.

### **Court Records:**

At the beginning of 2021 we submitted a series of FOIA requests asking how defendants' sex is recorded where a suspect is prosecuted. These were answered by the Ministry of Justice in March 2021:

*Most case data are not entered by HM Courts and Tribunals Service, rather it is entered by police forces onto their systems and transmitted via an interface. Libra is the Magistrates Courts case management system. Xhibit is the case management system for Crown Courts. The sex of a defendant will not be determined by court staff, but will be provided by the prosecutor.*

The Ministry of Justice also stated:

*Where an error has been made by the prosecutor in recording the sex of a defendant, this can be corrected when the case comes to court.*

However, no information was given concerning how such errors are identified and on what basis they may be corrected.

The Court Proceedings Database is a management information system that takes data from Libra and Xhibit. There is no option to change the data and whatever is held in Libra and Xhibit will be transferred to the Court Proceedings Database.

Therefore, it appears that where police forces record the gender identity of suspects, this will be transferred over to the courts' case management systems meaning that some convictions, including those for rape, will have gender identity recorded, not sex registered at birth.

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<sup>34</sup> <https://data.police.uk/data/statistical-data/>

<sup>35</sup> There is no separate guidance on recording of sex/gender save for ADR148 (police use of force) which provides a single line: Subject's perceived gender - male; female; transgender.

### ***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 collect data in this way, or it could be broadly the same throughout the country. Appeal to 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 in 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.

Some examples to illustrate will assist.

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.<sup>36</sup> 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

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<sup>36</sup> <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.



reported in the British press and it is clear that Darbyshire's sex registered at birth is male.<sup>37</sup> Indeed, Darbyshire was imprisoned in the male prison estate at HMP Belmarsh.<sup>38</sup>

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.<sup>39</sup> Again, it was possible to ascertain that Jeska's sex registered at birth is male because the case was reported in the press.<sup>40</sup>

The impact of allocating these two convictions to the female data set is not inconsiderable. 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 attempted murder was elevated by around 20%.<sup>41</sup> 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

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<sup>37</sup> e.g. <https://www.bbc.co.uk/news/uk-england-london-35774143>

<sup>38</sup> <https://www.dailymail.co.uk/femail/article-7898933/Ross-Kemps-HMP-Belmarsh-viewers-praise-prisons-brave-transgender-prisoner-Claire.html>

<sup>39</sup> <https://www.thelawpages.com/court-cases/court-case-search.php?click=submit&action=search&mode=3>

<sup>40</sup> e.g. <https://news.sky.com/story/fell-runner-lauren-jeska-admits-attempted-murder-of-athletics-official-10588270>

<sup>41</sup> 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.

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.<sup>42</sup> 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, 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.

### **Police Guidance on Data Collection**

Currently, the Home Office does not centrally mandate how a suspect's sex must be recorded by police. It is for each individual police force to decide what information to record.<sup>43</sup> From April 2022, the Home Office has requested that police forces, on a voluntary basis, record the sex currently shown on the birth certificate for both suspects and victims of crime.<sup>44</sup> This will be the sex registered at birth unless the individual is in receipt of a gender recognition certificate, in which case this will be their legally recognised acquired gender. Police forces are also requested to record gender identity separately, if this is relevant.

There is no standard recording system for crime and incident reporting across police forces, with forces able to make their own decisions concerning which intelligence and case management system they use. The majority of police forces use Niche RMS. Athena and Red Sigma are also

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<sup>42</sup> <https://www.bbc.co.uk/news/uk-55338745>

<sup>43</sup> <https://petition.parliament.uk/petitions/590123>

<sup>44</sup> <https://twitter.com/TerryStock8/status/1511747211729809416>

used. There may still be variation between forces using the same case management system because data fields are labelled according to the requirements specified by each force. This means that the data field relating to a suspect's sex could be labelled 'sex' or 'gender', as that force chooses.<sup>45</sup>

Consistent with this, police forces reported a lack of guidance on how suspects' sex should be recorded. This is notwithstanding that a small number of forces referred to various documents to support the data collection decisions they had made.<sup>46</sup> It should be noted, however, that none of these documents contain guidelines on how to record suspects' sex.

Although not mentioned by any of the police forces that responded to the FOIAs, the College of Policing has produced guidance on information management.<sup>47</sup> At section 3.3.2.1 it states:

*A description has to include a name in order to create a person record. Other desirable basic fields to add to a person record are:*

- *age (date of birth)*
- *sex*
- *race/ethnic origin*
- *height*

This is the clearest indication that it is sex, not gender identity, that should be recorded. What is also clear is that there is no guidance stating that when a subject's sex is recorded, this should be on the basis of anything other than sex registered at birth.

Elsewhere, the College of Policing recognises the importance of sex and its significance to policing. For example, the guidance on detention and custody arrangements addresses the specific, sex-based needs of female detainees.<sup>48</sup> This Authorised Professional Practice document acknowledges that there are "fundamental differences between male and female offenders", and

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<sup>45</sup> Correspondence from Niche Technology UK Limited, 5th January 2022.

<sup>46</sup> Home Office Counting Rules ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/387762/count-vision-december-2014.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387762/count-vision-december-2014.pdf)); PACE Code C Annex L ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/903473/pace-code-c-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903473/pace-code-c-2019.pdf)); National Standard for Incident Recording Rules ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/116658/count-nsir11.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/116658/count-nsir11.pdf)); College of Policing Authorised Professional Practice Detention and Custody document (<https://www.app.college.police.uk/detention-and-custody-index/>); National Police Chiefs Council (NPCC) Guidance (<https://www.npcc.police.uk/2018%20FOI/EDHR/Trans%20Guidance%20for%20the%20Policing%20Sector%20Overview.pdf>)

<sup>47</sup> <https://www.app.college.police.uk/app-content/information-management/management-of-police-information/collection-and-recording/#-incident-record>

<sup>48</sup> <https://www.app.college.police.uk/app-content/detention-and-custody-2/detainee-care/equality-and-individual-needs/#female-detainees>

recommends that "a different and distinct approach is needed for women". It also clearly states that "Custody staff should be aware of protected characteristics as set out in part 2, chapter 1 (sections 4-12) of the Equality Act 2010." Sex is one of these protected characteristics and is defined in the Equality Act in biological terms at section 212(1). The significance of sex as defined in the Equality Act is clear and these documents acknowledge that it is desirable to record it.

Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) publishes Expectations documents. These are used by HMICFRS to assess the custody arrangements of all police forces in England and Wales, with a particular focus on the treatment and conditions of those detained. They also offer a guide to the public, senior police officers and police and crime commissioners as to the standards police forces are expected to meet. Version 4 of *Expectations for police custody: Criteria for assessing the treatment of and conditions for detainees in police custody* published in 2021 is consistent with the College of Policing Authorised Professional Practice document on detention and custody arrangements referred to above in recognising the importance of sex.<sup>49</sup>

This HMICFRS Expectations document also refers to the Public Sector Equality Duty. At section 1.3 it states there is the clear expectation to recognise, record and monitor the protected characteristics under the Equality Act 2010. These include sex:

*The force understands its obligations under the Equality Act 2010, including the public sector equality duty. It promotes respect for people from all backgrounds and with diverse needs. It assesses that outcomes for all detainees are fair. [...]*

*Information on the throughput of detainees and services provided to them is collected by ethnicity and other protected characteristics. Any disproportionality of treatment is identified and assessed. The reasons for any over or under-representation of particular groups are understood and actions taken to address any concerns.*

*Staff have been trained to recognise and meet the needs of people who have diverse needs and/or one or more of the protected characteristics under the equality legislation.*

As in the College of Policing Authorises Professional Practice document, the Expectations at section 3.2 recognise the importance of sex and its significance to policing and discuss how to meet the sex-specific needs of female detainees.

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<sup>49</sup> <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/expectations-for-police-custody-version-4.pdf>

Although there is no specific guidance on recording suspects' sex, both COP and HMICFRS documentation acknowledge the significance of sex to policing and that it is desirable to record it for reasons that also include the expectation that the protected characteristics under the Equality Act 2010 should be recorded and monitored.<sup>50</sup> It is reasonable to expect individual police forces to pay close attention to these guidance documents when making data collection decisions.

### **Other Guidance on Data Collection**

Other guidance on data collection addresses the importance of collecting data on sex, including by police forces and in respect of crime.

The UK Statistics Authority is an independent statutory body. The Authority has a statutory objective of promoting and safeguarding the production and publication of official statistics that “serve the public good”. In September 2021, the UK Statistics Authority’s Inclusive Data Taskforce published their recommendations report, *Leaving no one behind? How can we be more inclusive in our data?*<sup>51</sup>

At section 3 the document emphasises the importance of collecting data on characteristics that are legally protected in equalities legislation, stating at section 3.4:

*Sex, age and ethnic group should be routinely collected and reported in all administrative data and in-service process data, including statistics collected within health and care settings and by police, courts and prisons.*

Gender reassignment, as a separate protected characteristic, should be separately recorded. Section 5 addresses the need for clarity of concepts. At section 5.4 the document states that sex, gender and gender identity should be distinguished from one another:

*Data producers and analysts should ensure that the language used in the collection and reporting of all characteristics is clear. For example, clearly distinguishing between concepts such as sex,*

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<sup>50</sup> Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) has consistently called for accurate and consistent recording of protected characteristics of victims of crime by the police. Most recently, the September 2021 report, *Police response to violence against women and girls: Final inspection report* is quite clear in this respect (<https://www.justiceinspectors.gov.uk/hmicfrs/publication-html/police-response-to-violence-against-women-and-girls-final-inspection-report/>). Recommendation 3.2 states that: *By March 2022, all police forces should ensure information on the protected characteristics of victims is accurately and consistently recorded.* The report draws attention to data gaps and inconsistent practice in recording protected characteristics, stating that this has “...been a common finding from other thematic inspections in this area (such as our 2021 joint inspection of the police and CPS response to rape, which we conducted with HM Crown Prosecution Service Inspectorate...)”

<sup>51</sup><https://uksa.statisticsauthority.gov.uk/publication/inclusive-data-taskforce-recommendations-report-leaving-no-one-behind-how-can-we-be-more-inclusive-in-our-data/pages/7/>

*gender and gender identity; or ethnic identity and ethnic background. This would help to avoid ambiguity and confusion among respondents and data users, which can undermine data and analytical quality, as well as belief in the validity and reliability of data.*

The Office for Statistics Regulation (OSR) is a national regulatory body that aims to ensure that statistics “serve the public good”. The OSR operates across ten different domains, including crime and statistics which covers statistics on crime, policing, justice systems (family, civil and criminal, and National security).<sup>52</sup> The OSR conducts research and produces a variety of policy and guidance documents, including the *Code of Practice for Statistics*.<sup>53</sup>

In 2021 the OSR published *Draft Guidance: Collecting and reporting data about sex in official statistics*.<sup>54</sup> This sets out OSR expectations on producers with respect to using data sources in the wider context of meeting user needs. As part of a consultation process, external stakeholders and other interested parties were invited to make submissions. At the time of writing (April 2022), the final guidance remains unpublished.

The Draft Guidance begins with recognition both that sex is a commonly recorded variable and that changes are being made in that data that are collected for that variable:

*Data on an individual’s sex is a commonly asked for or recorded variable in official statistics. Some producers of statistics are making changes, or considering making changes, to the data they collect and report about sex.*

The guidance is not intended to be prescriptive, and acknowledges that “there can be valid reasons to produce measures based on different classifications or definitions depending on the question the producers are trying to address through the statistics.” The purpose is to “[detail] what producers should consider when collecting and reporting data about sex, to meet the expected standards of trustworthiness, quality and value.” The considerations include the following:

- *The collection and reporting of statistics about sex should support a legitimate public interest.*
- *Statistics should meet their intended uses and should inform public debate [...] producers must seek to understand their whole user base and the questions that users want to be able to*

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<sup>52</sup> <https://osr.statisticsauthority.gov.uk/themes/crime-security/>

<sup>53</sup> <https://code.statisticsauthority.gov.uk/>

<sup>54</sup> <https://osr.statisticsauthority.gov.uk/publication/draft-guidance-collecting-and-reporting-data-about-sex-in-official-statistics/>

*answer with their statistics.*

- *Producers must have a good understanding of, and clearly explain, the sources of data about sex they are using and how these are collected [...] and whether this is a mixture of sex registered at birth, self-identified sex, lived gender and others.*
- *Producers should be clear about definitions or terminology they use [...] The terms 'sex' and 'gender' should not be used interchangeably in official statistics.*
- *Uncertainty in the source data should be identified and the extent of any impact on or limitations of the statistics should be clearly reported. For data about sex this may be particularly relevant when considering data at smaller sub-group levels.*
- *Decisions about whether to continue, discontinue or adapt statistics about sex should be made in discussion with users and other stakeholders. If a change is made to data collection [...] a clear explanation of the change should be published, with evidence of the rationale and, wherever possible, the analysis that informed the change.*

These provide a clear statement of the need for clarity and transparency around data collection, the decisions that underpin it and the utility of the data and statistics that are produced. The evidence around crime and offending indicates that data and statistics will have the greatest utility and relevance when they record sex registered at birth, not gender identity.

### **Gender Recognition Act 2004<sup>55</sup> and Equality Act 2010<sup>56</sup>: the lawfulness of data collection on sex registered at birth**

Data collectors may be concerned that the provisions of the Gender Recognition Act 2004 and/or those in the Equality Act 2010 mean that where an individual has reassigned their gender including but not limited to the situation where that individual has been granted a gender recognition certificate, that collecting data on sex registered at birth is unlawful. In short: even where an individual has obtained a gender recognition certificate, it is lawful for police forces to collect data in suspects' sex registered at birth, provided adequate steps are taken to protect the privacy of such data.

#### ***The Equality Act 2010***

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<sup>55</sup> <https://www.legislation.gov.uk/ukpga/2004/7/contents>

<sup>56</sup> <https://www.legislation.gov.uk/ukpga/2010/15/contents>

At section 7(1), the protected characteristic gender reassignment is specified as follows:

*A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassignment the person's sex by changing physiological or other attributes of sex.*

The protected characteristic gender reassignment applies whether or not the individual has a gender recognition certificate. The protected characteristic gender reassignment protects both men and women who have reassigned their gender as a single group and without differentiating on the basis of sex.

At section 11, the protected characteristic sex is specified as follows:

*In relation to the protected characteristic of sex—*

*(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;*

*(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.*

At section 212(1) man and woman are defined in biological terms as being a male of any age and a female of any age respectively.

Under the Equality Act 2010 all protected characteristics are considered separately: they operate in parallel. Consequently, the protected characteristic gender reassignment is not a 'feeder' into the protected characteristic sex. Thus, a person whose sex registered at birth is male who has a gender recognition certificate showing their acquired gender as female is not covered by the protected characteristic sex 'woman'.

A recent legal case supports this. In February 2022 judgement was handed down in the reclaiming motion brought by the campaign group For Women Scotland in respect of their petition for judicial review of the Scottish Government's decision by way of the Gender Representation on Public Boards (Scotland) Act 2018 to implement certain positive action measures.<sup>57</sup> The challenge included the definition of "woman" in section 2 of the Act. This provided that:

*"woman" includes a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman*

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<sup>57</sup> [https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf?sfvrsn=7920df79\\_1](https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf?sfvrsn=7920df79_1)



*and is proposing to undergo, is undergoing or has undergone a process (or processes) for the purposes of becoming female.*

Thus section 2 would allow persons whose sex registered at birth is male and who have the protected characteristic gender reassignment to be defined as “women” for the purposes of the Act.

The judgment found in favour of For Women Scotland, ruling that the definition of “woman” in section 2 of the Act is outside the legislative competence of the Scottish Parliament in that it relates to reserved matters. As such “woman” in the Act should be defined in the same way as in section 212(1) of the Equality Act 2010, such that “woman” means “a female of any age”.

In the judgment, Lady Dorrian commented on the protected characteristics in the Equality Act 2010 as follows:

At paragraph 37, she states that within the protected characteristic gender reassignment “no distinction is made between those for whom the relevant process [of gender reassignment] would involve reassignment male to female or *vice versa*... In other words, it is the attribute of proposing to undergo, undergoing or having undergone a process (or part of a process) for the purpose of reassignment which is the common factor, not the sex into which the person is reassigned.”

At paragraph 38, she notes that the Equality Act 2010 maintains the distinct categories of protected characteristics. She further explains at paragraph 49, “by incorporating those transsexuals living as women in the definition of woman the 2018 Act conflates and confuses two separate and distinct protected characteristics” and at paragraph 40, that “transgender woman” is not a protected characteristic.

Police forces are public authorities bound by the Equality Act 2010 in the exercise of public functions. In order to fulfil these obligations, including their Public Sector Equality Duty, police forces may legitimately collect accurate data on the protected characteristic sex and record the sex registered at birth of suspects.<sup>58</sup> This is entirely independent of the fact that a suspect may also have additional protected characteristics that may include that of gender reassignment. Indeed, the collection of accurate data on the protected characteristic gender reassignment of suspects may also be a legitimate aim. However, if police forces are to comply with their obligations under the Equality Act 2010, collection of such data cannot be either instead of collection of data on sex registered at birth, nor amalgamated with data on sex registered at birth.

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<sup>58</sup> The Public Sector Equality Duty is set out in Section 149(1) of the Equality Act 2010: *(1) A public authority must, in the exercise of its functions, have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

## ***The Gender Recognition Act 2004***

Under the Gender Recognition Act 2004 an individual who fulfils certain criteria is able to obtain legal recognition of their acquired gender.<sup>59</sup> The individual is issued with a gender recognition certificate and a new copy birth certificate which shows, together with the newly adopted name, their acquired and legally recognised gender as their sex in lieu of and as being opposite to their sex entered in the official register of births. This original entry of their sex in the official register of births remains unchanged, although protected for their privacy.<sup>60</sup>

The effect of legal recognition of acquired gender is limited by s9(2) and s9(3) in that it does not affect events prior to the grant of a gender recognition certificate and it is subject to further provisions in legislation. Hence receipt of a gender recognition certificate does not change the individual's registered birth sex (the entry in the original birth register remains unchanged) and subsequent legislation by way of the Equality Act 2010 clarifies at section 212 that 'woman' and 'man' are defined in biological terms as a female of any age and a male of any age respectively.

The issue of a gender recognition certificate grants the recipient legal recognition of their acquired gender and primarily certain privacy protections, e.g. an individual whose sex registered at birth is male who is the recipient of a gender recognition certificate is granted privacy protections to present their gender as female by way of a new copy birth certificate.

Such privacy rights, however, are not absolute. Under Article 8, a person's right to privacy can be qualified where such actions are lawful, pursue a legitimate aim and are necessary in a democratic society.<sup>61</sup> Indeed, section 22 of the Gender Recognition Act 2004 prohibiting the disclosure of protected information by a person in an official capacity to another person about an application or grant of a gender recognition certificate is subject to exclusions for specified purposes including the purposes of preventing and investigating crime and related to court/tribunal proceedings.<sup>62 63</sup> Thus police forces requiring of suspects a truthful declaration of sex

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<sup>59</sup> See Gender recognition Act 2004 section 3.

<sup>60</sup> A 2022 decision of the European Court of Human rights in *Y v. Poland* has clarified that the right of an individual under Article 8 of the Convention to have their gender legally recognised and reflected on their short-form birth certificate does not extend to a right to have the original full birth certificate similarly amended. A refusal to alter this original full birth certificate following gender reassignment did not amount to a violation of Article 8 rights, nor discrimination under Article 14 of the Convention. The Court states that it was "mindful of the historical importance of original birth certificates and the need to guarantee the reliability of civil records." <https://hudoc.echr.coe.int/eng?i=001-215604>

<sup>61</sup> [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)

<sup>62</sup> See section 22(4) (e) and section 22 (4) (f)

<sup>63</sup> See also *The Gender Recognition (Disclosure of Information) (England and Wales) Order 2021* SI 2021/1020, which came into force on 1st October 2021 and introduced a further exception to section 22 where the disclosure of protected information is necessary for the management of offenders and arrangements related to their probation.

registered at birth and of acquired gender would not fall within the section 22 prohibitions and is arguably not an infringement of that person's Article 8 rights to privacy.<sup>64</sup> Neither would it necessarily fall under the definition of harassment set out in section 28 of the Equality Act 2010.

Two recent legal cases demonstrate that it is lawful to collect data on sex that excludes self-declared gender identity and that it is lawful that sex may be defined as sex registered at birth. These cases also demonstrate that decisions to gather data on self-declared gender identity rather than sex registered at birth may be subject to legal challenge where there is good reason. Such legitimate reasons might include for the purposes of safeguarding and risk assessment, or in instances where it is important to gather data on the basis of sex registered at birth to avoid discrimination against females on the basis of their sex.

### ***Data collection in Census 2021, England and Wales: What is your sex?***

The Office of National Statistics sought to redefine sex to include gender identity for the purposes of the 2021 England and Wales Census. Hence, guidance in respect of compulsory Question 3 'What is your sex?' stated:

*please select either 'Female' or 'Male'. If you are considering how to answer, use the sex recorded on one of your legal documents such as birth certificate, Gender Recognition Certificate, or passport...*

By including passport, a document that may record gender identity in lieu of sex registered at birth on the basis of self-declaration, the guidance indicated that respondents' could answer the question by recording their gender identity. The guidance also introduced ambiguity through use of the words "such as" implying that respondents could refer to other documents which may record gender identity, for example a driving licence.

In response, the campaigning and consultancy group Fair Play for Women brought an application for judicial review against the UK Statistics Authority challenging the guidance for Question 3. This was heard at the High Court on 9 March 2021. Mr Justice Swift found in favour of Fair Play for Women that the meaning of sex in the Census did not include self-declared gender identity.<sup>65</sup>

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<sup>64</sup> Section 22 applies in respect of individuals who have obtained or who have applied for a gender recognition certificate only. Therefore, information relating to the sex registered at birth of those individuals who self-declare their gender identity is wholly outside this provision and disclosure of this information is not subject to prohibition.

<sup>65</sup> R-Fair-Play-for-Women-Ltd-v-UK-Statistics-Authority-09.03.21JUD-1

Interim relief was awarded ordering that the guidance should be changed, limiting the documents that could be referred to when answering Q3 to birth certificate or gender recognition certificate. Permission to bring a judicial review was granted, however, on 16 March 2021, the UK Statistics Authority conceded and the claim for judicial review was withdrawn.<sup>66</sup>

The judgement established that sex is a distinct and definable concept in law, not something determined by reference to how a person feels or identifies. As Sullivan notes, the outcome, that sex for the purposes of the Census means sex recorded on a birth certificate or legal gender, does not imply that other data collection exercises cannot collect data on sex registered at birth.<sup>67</sup> However, the ruling does establish that organisations may legitimately ask people their sex and that collecting data on sex is not necessarily a violation of the right to privacy and dignity under Article 8 of the European Convention on Human Rights and under the Human Rights Act 1998.<sup>68</sup> Mr Justice Swift ruled that it is lawful to collect data on respondents' sex where it is a proportionate means of achieving a legitimate aim.<sup>69</sup> The case is also an important indication that phrasing of questions intended to gather data on sex or, as in this case, published guidance on how those questions should be answered, may be subject to legal challenge.

### ***Data collection in 2022 Scottish Census: the “sex question”***

In February 2022 judgement was handed down in the petition for judicial review of the guidance issued by National Records of Scotland to accompany the “sex question” on the 2022 Scottish census, again brought by Fair Play for Women.<sup>70</sup> Although the circumstances and wording of the guidance differed, as the with the England and Wales Census, the guidance permitted respondents to answer the sex question on the basis of self-declared gender identity.

Lord Sandison ruled against Fair Play for Women finding that the guidance is lawful stating at paragraph 40 that there is no general rule or principle of law that a question as to a person's sex may only be properly answered by reference to the sex listed own that person's birth certificate or gender recognition certificate. However, he goes on to state at paragraph 47 that there are certainly instances where it is clear, usually from the context rather than exclusively from the word use, that “sex” in a statute does indeed mean biological sex. Thus, we can conclude that it is

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<sup>66</sup> <https://fairplayforwomen.com/wp-content/uploads/2021/03/CO007152021.pdf>

<sup>67</sup> Sullivan, A. (2021). Sex and the Office for National Statistics: A Case Study in Policy Capture. *The Political Quarterly*.

<sup>68</sup> [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)

<sup>69</sup> This is consistent with the legal opinion of Aidan O'Neill QC obtained by the campaigning group Women's Place UK; <https://womansplaceuk.org/2020/12/11/ehrc-misrepresents-the-law-on-collecting-sex-data/>

<sup>70</sup> [https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh20.pdf?sfvrsn=9a4944d9\\_1](https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh20.pdf?sfvrsn=9a4944d9_1)

certainly not unlawful that sex can be limited to mean sex registered at birth, even if it is not legally required that it is in all cases and in all contexts.

## **Conclusions & Recommendations:**

The evidence overwhelmingly demonstrates that the interests of data collection are best served where police forces collect data on suspects' sex registered at birth. Throughout the criminal justice system, it is acknowledged that sex registered at birth is a fundamental variable in the analysis of data on crime and offending. Sex underpins the provision and planning of services within the criminal justice system. Sex underpins risk assessment processes, the provision of offender treatment programmes and the differing security categorisation and arrangements in the male and female prison estates. It is no exaggeration to say that sex is the most significant variable to offending. Sex matters and the robust collection of data disaggregated by sex registered at birth is fundamental to policing and to the criminal justice system more widely.

There is no evidence to demonstrate that allowing the substitution of gender identity, whether on the basis of self declaration or where an individual has obtained legal recognition of acquired gender in accordance with the Gender Recognition Act 2004, affords greater (or even equivalent) explanatory power. Indeed, the evidence indicates that to allow the collection of data on gender identity in lieu of that on sex registered at birth has a negative impact on the utility of data on crime and offending. This impact also includes those cases where a suspect is in receipt of a gender recognition certificate. The most significant impact will be on the female sub-group, due to the disproportionate distribution of offending across males and females. This is the case for all offence categories, but will have a particularly marked impact on the offence categories that females only very rarely commit, such as serious violent and sexual offences. Here, as we have seen, the allocation of even one or two cases of male offending to the female sub-group can have a dramatic impact. Where data on offending are compromised in this way, the formulation of an appropriate policing response is frustrated and the ability to plan the appropriate services to tackle offending are hindered. This also potentially obscures indirect discrimination against biological females on the basis of their sex

The data-recording decisions made by individual police forces affect the criminal justice system more widely because data captured by police forces are transferred over onto other data management systems including the Police National Computer, Annual Data Requirement and the case management systems for magistrates and crown courts. Where gender identity is recorded for a suspect's sex, or where police forces have attempted to record a suspect's non-binary identity by recording sex as indeterminate or unspecified, this will be replicated wherever that information is used within the criminal justice system.

Police forces are public authorities bound by the Equality Act 2010 in the exercise of public functions, including their Public Sector Equality Duty. To comply with these obligations, police forces should record accurate data on the protected characteristic sex and record the sex registered at birth of suspects. A suspect may also have the protected characteristics gender reassignment and the collection of accurate data on this is also a legitimate aim. However, if

police forces are to comply with their obligations under the Equality Act 2010, collection of such data cannot be either instead of collection of data on sex registered at birth, nor amalgamated with data on sex registered at birth.<sup>71</sup> Here, we emphasise that neither “gender identity” nor any form of non-binary identity is a protected characteristic under the Equality Act 2010.

There is a clear and evidence-based case for police forces collecting data on suspects’ sex registered at birth. Yet our research demonstrates that across England and Wales, police forces are routinely collecting data on suspects’ gender identity, not their sex registered at birth. For the reasons stated, this is of concern. We are particularly concerned that a number of police forces are attempting to capture suspects’ non-binary identities by recording sex as “unknown” or “indeterminate”. We can see no legitimate reason to support this data collection decision. The purpose of data on offending and crime statistics is not to act as a form of validation for individual’s subjective self-beliefs or identities.

Many forces pointed to the lack of guidance on how to record suspects’ sex. Currently, the Home Office does not centrally mandate how police forces should record suspects’ sex and it is for each individual police force to decide what information to record. A response received in April 2022 to a FOIA reveals that from April 2022, the Home Office has requested that police forces, on a voluntary basis, record the sex currently shown on the birth certificate for both suspects and victims of crime. This will be the sex registered at birth unless the individual is in receipt of a gender recognition certificate, in which case this will be their legally recognised acquired gender. Police forces are also requested to record gender identity separately, if this is relevant.

Notwithstanding that at present this remains a request that police forces voluntarily agree to record data in this way, this may appear to be a move in the right direction. Certainly, if this request is adhered to and subsequently rolled out as centrally mandated guidance, it would see an end to police forces recording gender identity in lieu of sex registered at birth on the basis of self-declaration alone. It should also see an end to the practice of recording non-binary identities for suspects rather than their sex. However, Northamptonshire Police reported that the specific issue of how to record the sex of a suspect who identifies as non-binary is currently under national consultation as a national change to the system. This suggests that attempts to capture non-binary identities in police force data instead of sex may persist.

However, this request from the Home Office remains insufficient to ensure the collection of accurate, relevant and reliable data on offending: sex registered at birth is the variable that is of the greatest significance and explanatory power. Legal gender is not. Whilst the effect of this

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<sup>71</sup> Recording sex registered at birth is also necessary for the UK’s international legal commitments to the protection of women, including the UN Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) (<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>) and the Council of Europe Convention on preventing and combatting violence against women and domestic violence (the Istanbul Convention) (<https://www.coe.int/en/web/istanbul-convention/text-of-the-convention>).

request would likely be a reduction in the number of cases of male offending allocated to the female subgroup, the real possibility of a significant and dramatic impact on the data for female offending remains. As we have seen, the allocation of even one of two cases to the female subgroup can have a marked impact.

Collecting data in the way requested will not enable police forces to meet their obligations under the Equality Act 2010. It is only by recording the relevant protected characteristics (sex defined in biological terms and gender reassignment, not gender identity, as the request states) that forces are able to meet these obligations, including their Public Sector Equality Duty. We are concerned that this request treats a gender recognition certificate as a ‘feeder’ into the protected characteristic of sex. However, there is no justification for this, as the recent decision in *For Women Scotland Limited v (1) The Lord Advocate (2) The Scottish Ministers (2022)* attests.

Our final concern is that the request reinforces the erroneous belief that it is unlawful to ask the sex registered at birth of an individual in receipt of a gender recognition certificate, and that police forces must not ask whether an individual has a gender recognition certificate. The legislation is quite clear that police forces may ask these questions in the course of undertaking legitimate policing activities.

Other guidance produced by the College of Policing and HMICFRS recognises the importance of sex, its significance to policing and the need to record sex as one of the protected characteristics in the Equality Act 2010. Similarly, the UK Statistics Authority states the importance of collecting data on the protected characteristics, including by police forces. There is no guidance that we have found which mandates recording suspects’ gender identity, whether on the basis of self-declaration or where an individual has obtained legal recognition of acquired gender in accordance with the Gender Recognition Act 2004, in lieu of sex registered at birth: correspondence received from the NPCC confirms that none exists. Neither is there any guidance to mandate capturing a suspect’s non-binary identity by recording sex as “unknown” or “indeterminate”. The decision, therefore, to record suspects’ gender identity in lieu of sex registered at birth is out of step with police guidance on recording sex in other circumstances.

The lawfulness of police forces collecting data on suspects’ sex registered at birth is clear. To request this data of suspects is neither discrimination nor harassment and does not constitute a violation of Article 8 rights to privacy, provided that any personal data are stored and managed securely and sensitively. This includes the circumstances where a suspect is in receipt of a gender recognition certificate and it is also lawful for forces to collect data on whether suspects have a gender recognition certificate.

**Recommendations:**



**Accurate, relevant and reliable data on offending is a legitimate public interest. Current data collection practices mean that the utility, relevance and reliability of data on offending are compromised.** Our recommendations will better enable police forces to produce data and statistics on crime and offending that serve the public good.

**Police forces must record data on suspects' sex registered at birth as standard.** The practice of allowing suspects to answer by giving their gender identity, whether on the basis of self-declaration or where an individual has obtained legal recognition of acquired gender in accordance with the Gender Recognition Act 2004 must cease. Police forces must cease attempting to capture suspects' non-binary identities in lieu of sex registered at birth. Additional data on gender reassignment, as a separate protected characteristic, should be collected for suspects.

**The collection, storage, security and management of personal data on suspects' sex (and gender reassignment status) should be standardised across police forces,** respecting necessary confidentiality for all individuals. Data collection decisions concerning suspects' sex should no longer be left to individual officers to make, nor should they be made on a case-by-case basis.

**Language in data collection used must be clear and unambiguous and should reflect the protected characteristics in the Equality Act 2010.** Data fields should be labelled accordingly. We note the widespread use of "gender" as a 'more polite' way of referring to sex. Novel, emerging concepts of gender and identity means that the use of "gender" is unclear and no longer a synonym for "sex". This practice should cease: the protected characteristic is "sex", not "gender" or "gender identity".

**We consider the request from the Home Office dated April 2022 to be insufficient. Instead the Home Office should issue clear centralised guidance which mandates police forces to record suspects' sex registered at birth.** This guidance should make clear the importance of sex to policing and the need to record suspects' sex registered at birth for reasons that include fulfilling obligations under Equality Act 2010 and forces' Public Sector Equality Duty, as well as international legal obligations and Convention rights.

**This guidance should provide explicit statement as to the lawfulness of collecting data on suspects' sex registered at birth,** including in the situation where a suspect is in receipt of a gender recognition certificate. The guidance should be clear that to record that a suspect has been issued with a gender recognition certificate is lawful.

We recommend that the list of documents that are valid for the purposes of the self-notification route to changing a Police National Computer (PNC) record in *PNC L/O Letter 2015/08* is

reviewed and that individuals are no longer able to update their PNC record on the basis of self-declared gender identity.

## Appendices

### Appendix 1: FOIA Questions

In accordance with the Freedom of Information Act 2000, the following questions were asked as a Freedom of Information Access Request:

1. What explanatory guidance has been provided to your police force on the information you should record in the 'gender' category of Crime and Incident Reports? As examples, this might include guidance documents provided by: College of Policing, Home Office, ONS, or any other official body, Please provide me with a copy of the guidance document(s) in use for Crime and Incident Reports.
2. In the gender category of Crime and Incident Reports does your police force record a victim's or suspect's "natal sex" (their biological sex observed at birth), their "legal sex" (the sex on their birth certificate), or their "self-declared gender or gender identity"?
3. If a male-born person self-identifies as female will this be recorded by you in Crime and Incident Reports as female or male?
4. If a male-born person self-identifies as non-binary will this be recorded by you in Crime and Incident Reports as female or male or something else?
5. If someone is transgender (identifies as a different gender to the sex assigned at birth) and has obtained a Gender Recognition Certificate is this recorded by you separately in Crime and Incident Reports?
6. If someone is transgender (identifies as a different gender to the sex observed at birth) but has not obtained a Gender Recognition Certificate is this recorded by you separately in Crime and Incident Reports?
7. If a male-born person identifies as female, has obtained a Gender Recognition Certificate and is arrested for/charged with the crime of rape will you record the gender of the suspect/perpetrator in Crime and Incident Reports as male or female? Will transgender status also be recorded?
8. If a male-born person identifies as female, has not obtained a Gender Recognition Certificate and is arrested for/charged with the crime of rape will you record the gender of the suspect/perpetrator in Crime and Incident Reports as male or female? Will transgender status also be recorded?

9. The College of Policing requirements for Information Management specify that each UK police force must have an Information Management Strategy (IMS): <https://www.app.college.police.uk/app-content/information-management/management-of-police-information/common-process/#-common-process-at-force-level>. As you will know, the IMS should be made available to partners and the public, and I would therefore ask you to please provide me with a copy of your local police force IMS.

## **Appendix 2: Summary of Responses by Individual Police Force**

### ***Avon and Somerset Police:***

Avon and Somerset Police replied that no specific guidance has been issued in respect of how information concerning a suspect's sex should be recorded. These data recording decisions are for the officer recording the information to make. Avon and Somerset Police use the Niche RMS intelligence and case management system. This has the following categories to record a suspect's sex: male, female, indeterminate, unknown. A field within the additional information area permits transgender status to be recorded, with the following options available: neutral, trans man, trans woman, transvestite/cross dresser.

Avon and Somerset Police declined to answer the specific questions about data collection practices in different sets of circumstances on the grounds that these questions about the implementation of policies fell outside the scope of the FOI Act.

### ***Bedfordshire Police:***

Bedfordshire Police replied that they follow Home Office Counting Rules (HOCR) for crime recording and that the HOCR contain nothing about how to record suspects' sex and that there is no national guidance on how to record this. Bedfordshire Police stated that this issue, specifically recording crimes where the suspect identifies as transgender, had been raised at a National Crime Recording Standard Technical Working Group. The National Crime Registrar responded that *"a case by case decision would need to be made by the Senior Investigating Officer as compiling a set of rules is likely to be counter-productive. Most important is that the crime is recorded, the victim is supported and the matter progressed"*.

Bedfordshire Police, in common with other police forces in England and Wales uses the Athena case management system and stated that there was no guidance published by the consortium in respect of how sex or gender should be recorded. The case management system allows that a suspect's sex can be recorded as male and the suspect's title as Mrs or Miss. Where an individual has transitioned and may previously have had for example a record showing male, a new female record can be added but must be linked to ensure the records indicate that these relate to the same person.

Bedfordshire Police expressed concerns around recording a suspect's gender recognition certificate status, referring to Section 22 of the Gender Recognition Act, stating that *"consent must be obtained on each and every occasion so we need to be extremely careful if and when recording this information. The person should not specifically be asked if they have a GRC."*

The answer given in respect of recording the sex of a rape suspect suggests that either sex registered at birth or legal gender, in the case of an individual who has obtained a gender recognition certificate, is recorded, and not gender identity. However, the answer also states that data recording is on a case-by-case basis, introducing uncertainty whether there are circumstances where the gender identity of a rape suspect could be recorded in place of sex registered at birth or legal gender.

***British Transport Police:***

British Transport Police replied that they follow the National Police Chiefs Council guidance regarding the recording of gender<sup>72</sup>. British Transport Police records the gender of all people (victims, offenders or witnesses) according to the gender that they present as and/or how they self-identify. No specific answer was given to the questions concerning recording the sex of a rape suspect, but we assume that gender identity will be recorded.

***Cheshire Constabulary:***

Cheshire Constabulary replied that no specific guidance has been provided. People are recorded as the gender they identify themselves as, at the time of recording. Confusingly Cheshire Constabulary stated that some records may have both a male and a female gender. No specific answer was given to the questions concerning recording the sex of a rape suspect, but we assume that gender identity will be recorded. In respect of how the sex of suspects who identify as non-binary is recorded, Cheshire Constabulary simply reported that there is no non-binary option.

***City of London Police:***

Although City of London Police did respond to the FOIA request, they did not answer any of the questions, except to provide a copy of the Information Management Strategy. This document gives no information concerning recording suspects' sex.

***Civil Nuclear Constabulary:***

The Civil Nuclear Constabulary replied that as they operate with the jurisdiction of other forces, they do not have, or have responsibility for, a crime recording system.

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<sup>72</sup> Despite extensive searching, we have been unable to identify any guidance document produced by the NPCC that addresses the issue of recording suspects' gender. Lincolnshire Police also cited this document and in response to a subsequent FOIA provided this Stonewall document that provides support and guidance to staff and managers: <https://www.npcc.police.uk/2018%20FOI/EDHR/Trans%20Guidance%20for%20the%20Policing%20Sector%20Overview.pdf>

**Cleveland Police:**

Cleveland Police Force did not provide answers in respect of crime and incident reporting, rather answers were given in respect of data entry for the Police National Computer.

Although Cleveland did not answer the questions in respect of rape suspects, they stated that a suspect who has obtained a gender recognition certificate will “*be dealt with within the criminal justice system as a person of that sex when it comes to gender specific sexual offences.*” From this, we assume that legal gender will be recorded where a rape suspect has a gender recognition certificate. No information is given about whether gender identity, in the absence of a gender recognition certificate, is recorded.

**Cumbria Constabulary:**

Cumbria Constabulary stated that no formal guidance has been issued in relation to recording suspects’ sex. Cumbria Constabulary records suspects’ gender identity, including for rape suspects with no requirement for a gender recognition certificate. Transgender status is not recorded separately, even if the suspect has not obtained a gender recognition certificate.

The sex of a suspect who identifies as non-binary will be recorded as indeterminate or not specified.

**Gloucestershire Constabulary:**

Gloucestershire Constabulary uses the UNIFI system for crime and incident data recording. They confirm that there is no guidance on inputting ‘*gender information*’. Although suspects’ gender identity is standardly recorded, with no possibility of also recording transgender identity, in the case of rape, suspects will be recorded as male.

In the case of a suspect who identifies as non-binary, sex registered at birth will be recorded.

**Hampshire Constabulary:**

Although Hampshire Constabulary did respond to the FOIA request, they did not answer any of the questions, except to provide a copy of the Information Management Strategy. This document gives no information concerning recording suspects’ sex or gender.

**Lancashire Constabulary:**

Lancashire Constabulary replied that they record suspects' self-declared gender in all cases, including for rape. Where a suspect identifies as non-binary, this will be captured in the data by recording the suspect's sex as "other".

***Lincolnshire Police:***

Lincolnshire Police replied that they follow the National Police Chiefs Council guidance regarding the recording of gender. A subsequent FOIA to Lincolnshire Police revealed this to be the Stonewall document *Trans Guidance for the Policing Sector, An Overview*<sup>73</sup>. This document provides support and guidance to staff members and managers where officers or other staff members identify as transgender. It does not provide any guidance on the management of suspects nor how their data should be recorded. Lincolnshire records the gender of all people, including victims, offenders and witnesses according to the gender that they present as, and/or how they self-identify.

***Merseyside Police:***

Merseyside Police replied that where a suspect has a gender recognition certificate, legal gender not sex registered at birth is recorded, including for rape suspects. Merseyside Police did not answer questions concerning recording sex for suspects who identify as transgender but who do not have a gender recognition certificate. They reported the general lack of guidance on recording gender.

Merseyside Police provided additional information, which we had not requested. They reported that no document guidance has been identified concerning how to record the gender of police officers and staff. However Human Resources Shared Services stated that gender recorded (personal files) is that which the person has stated is their gender, indicating the Merseyside Police records the self-declared gender identity of police officers and other staff.

***Metropolitan Police Service:***

The Metropolitan Police Service responded but declined to answer the individual questions, save to state that there was no specific guidance on recording suspects' gender. A variety of documents were linked to, but none of these provided answers to the questions asked.

However, a previous FOIA request made of the Metropolitan Police Service revealed that the Met has been recording suspects' gender as self-defined since 2009.<sup>74</sup>

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<sup>73</sup> <https://www.npcc.police.uk/2018%20FOI/EDHR/Trans%20Guidance%20for%20the%20Policing%20Sector%20Overview.pdf>

<sup>74</sup> <https://twitter.com/HairyLeggdHarpy/status/1105876457434296323>



In the course of examining the documents linked to, we accessed other documents published by the Metropolitan Police Service.<sup>75</sup> These state that where a police officer transitions, the officers' warrant card and police staff card will be issued on the basis of an officer's gender identity and that all permanent personal records will be changed to reflect that officer's new gender identity. The officer will be given a new personnel file and the old records can no longer be accessed. There is no requirement for a gender recognition certificate. Since May 2012, Metropolitan Police Service officers have been able to carry out their searching duties in accordance with their gender identity, with no requirement for a gender recognition certificate. This means that male officers who identify as women are able to carry out the searching duties of female officers, i.e. they are able to search female detainees. Vice versa for female officers who identify as men.

### ***Northamptonshire Police:***

Northamptonshire Police record suspects' gender identity. If transgender status were relevant, this could be recorded in an additional data field. Recording a rape suspect's sex would be decided by the custody sergeant on a case-by-case basis. If the suspect was already on the system in relation to a previous suspected crime, that record would inform how sex would be recorded. If the suspect identified as transgender and had a gender recognition certificate, again any previous recording on the system would steer how sex was recorded. Otherwise, "they would initially likely be recorded as male, with female alias, pending a force review/decision working with the Regional Data quality team."

Northamptonshire Police stated that the main record system does not currently cater for non-binary as a specified field. They stated that "this is currently under national consultation as a national change to the system."

### ***Northumbria Police:***

Northumbria Police stated that there is no official guidance regarding the recording of gender. Gender identity is recorded, including for rape suspects. However, if "*the gender becomes a relevant factor, this may be recorded as Additional Information*". In relation to rape, Northumbria replied, "*There would be due consideration to the relevance of the facts to be presented during the decision-making process. It is also obviously relevant that only a person with a penis can commit the offence of rape.*"

Northumbria Police declined to state how they would record a non-binary suspect's sex. However, they stated that if the gender becomes a relevant factor to the investigation this would

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<sup>75</sup> See: [https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure\\_2019/july\\_2019/information-rights-unit---transgender-policy](https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure_2019/july_2019/information-rights-unit---transgender-policy)

be reflected in the investigation and may also be recorded in the crime report as additional information.

**South Yorkshire Police:**

South Yorkshire Police confirmed that they record gender identity, including for rape suspects. No explanatory guidance has been issued on how to record gender.

**Staffordshire Police:**

Staffordshire Police reported that gender identity is recorded for suspects. However, in the case of rape, the suspect will be recorded as male. Where transgender identity is relevant, this can be recorded in a case-by-case basis as free text.

**Thames Valley Police:**

Although Thames Valley Police replied to the FOIA request, they did not answer the questions asked and the documents provided did not contain the information that was requested.

**Warwickshire Police:**

Warwickshire Police described the process of recording a suspect's sex as follows:

*“ATHENA includes fields for Sex and Self-defined Gender. Sex will include legal sex. If an individual identifies as a different gender to their legal sex, this may be recorded in the self-defined gender field (otherwise this field is blank). There is no explicit field to record trans status, although there is a free text field entitled "Reason to treat as different gender" (note that hate crime strand should not be used to infer demographic information about the victim). However, ATHENA includes records for individuals for each investigation (iterations, correct at the time of that investigation) and a composite (master) record. If an individual is trans, this could be ascertained from the iterations over time. This is the case regardless of offence type.”*

Therefore, a male suspect who identifies as a woman, and who does not have a gender recognition certificate will be recorded as: Sex: 'Male'; self-defined gender: may be 'female', including in cases of rape. Where a suspect who identifies as transgender has obtained a gender recognition certificate, the legal gender will be recorded, including in cases of rape. Warwickshire reported that transgender status is not recorded in an easily extractable form, and that no guidance has been issued on recording suspects' sex.

In the case of a suspect who identifies as non-binary, sex registered at birth will be recorded. That the suspect identifies as non-binary could be recorded in the free text field 'Reason to treat as different gender'.

### **West Mercia Police**

West Mercia Police replied that they record suspects' self-declared gender, including in the case where a suspect whose sex registered at birth is male is arrested on suspicion of rape. Where a suspect has a non-binary identity, West Mercia Police will capture this by recording the suspect's sex as "unspecified".

### **West Yorkshire Police:**

West Yorkshire Police replied that for crime and incident reporting, suspects' sex registered at birth is recorded in the data field marked 'gender'. Other relevant information may be added as free text comments.

However, in response to the questions concerning recording data in the Police National Computer, West Yorkshire replied that this *"is uploaded from the Force local system, therefore is dependant on what the Officer has recorded. West Yorkshire Police utilise whatever gender/sex the individual self-identifies as. For example, if they say they are female, they are recorded as such."*

Again, West Yorkshire report that no specific guidance has been issued.

In the case of a suspect who identifies as non-binary, West Yorkshire Police stated that they will record sex registered at birth. Additional information concerning the suspect's non-binary identity can be recorded as free text comments.

### **Wiltshire Police:**

Wiltshire Police replied that a male rape suspect who identifies as transgender but who does not have a gender recognition certificate, would be recorded as male. A suspect with a gender recognition certificate *"may well be recorded as female but when considering a charge for rape this crime can only be committed by a person with male genitalia."*

Wiltshire Police stated that a non-binary suspect's sex would be recorded in line with how the recording officer observes it to be.

### **Dyfed-Powys Police:**

Dyfed-Powys Police replied that they record the suspects' "gender/sex as per the persons wishes." The answer provided to the questions asking how rape suspects' sex would be recorded were unclear.

***Gwent Police:***

Gwent Police replied that they record suspects' gender identity and make no separate recording of transgender identity. The exception to this is in the case of rape, where the transgender status of a rape suspect will be captured on the crime recording system in addition to their gender identity. Where a suspect identifies as non-binary, the record will show sex as 'indeterminate'.

***North Wales Police:***

North Wales Police replied that there is no guidance. North Wales reported that suspects' gender identity is recorded, including in the case of rape.

***South Wales Police:***

Although South Wales responded, it is unclear on what basis suspects' sex is recorded.

## **About Keep Prisons Single Sex**

Keep Prisons Single Sex campaigns for the sex-based rights of women in prison throughout the United Kingdom to single-sex accommodation and same-sex searching. KPSS also campaigns for data on offending to be recorded by sex registered at birth throughout the criminal justice system.



Caption