

Our Ref: IM-FOI-2021-0145  
Date: 2<sup>nd</sup> March 2021



## FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

I refer to your recent request for information which has been handled in accordance with the Freedom of Information (Scotland) Act 2002.

For ease of reference, your request is replicated below together with the response.

**Please can you confirm: If a male-born person self-identifies as female and is arrested/convicted for the crime of rape, will the gender of the suspect/perpetrator be recorded as male or female?**

The common law offence of 'rape' was replaced with the statutory offence under S1 of the Sexual Offences (Scotland) Act 2009.

This defines 'rape' as follows

- 1) If a person ("A"), with A's penis—
  - (a) without another person ("B") consenting, and
  - (b) without any reasonable belief that B consents, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.

Having consulted with our Equality and Diversity within Safer Communities Division they advise the following:

The first point of note is that the Sexual Offences (Scotland) Act 2009 is gender neutral in respect of a section 1 offence (Rape). It defines the perpetrator and victim of the crime as 'Person A' and 'Person B'. It is therefore irrelevant if the perpetrator is legally defined as male or female, it is only relevant that the perpetrator has a penis, and this includes a surgically constructed penis.

A person can identify and obtain a Gender Recognition Certificate without undergoing surgery. So a Trans female (Male to female transition) can be legally identified as female without having a surgically constructed vagina and may be in possession of a fully functional penis.

In these cases the charge of section 1 Rape would still be competent and is legislated for under Section 20 of the Gender Recognition Act 2004 which was adopted into Scots law under a Sewell motion without alteration.

## Section 20 Gender-specific offences

- (1) Where (apart from this subsection) a relevant gender-specific offence could be committed or attempted only if the gender of a person to whom a full gender recognition certificate has been issued were not the acquired gender, the fact that the person's gender has become the acquired gender does not prevent the offence being committed or attempted.
- (2) An offence is a "relevant gender-specific offence" if— (a) either or both of the conditions in subsection (3) are satisfied, and (b) the commission of the offence involves the accused engaging in sexual activity.
- (3) The conditions are - (a) that the offence may be committed only by a person of a particular gender, and (b) that the offence may be committed only on, or in relation to, a person of a particular gender, and the references to a particular gender include a gender identified by reference to the gender of the other person involved.

The gender of a perpetrator in these circumstances would be expected to be recorded as female on relevant police systems and a charge of rape would be competent.

Should you require any further assistance please contact Information Management - Edinburgh on 0131 311 3901, quoting the reference number given.

If you are dissatisfied with the way in which Police Scotland has dealt with your request, you are entitled, in the first instance, to request a review of our actions and decisions.

Your request must specify the matter which gives rise to your dissatisfaction and it must be submitted within 40 working days of receiving this response - either by email to [foi@scotland.pnn.police.uk](mailto:foi@scotland.pnn.police.uk) or by post to Information Management (Disclosure), Police Scotland, Clyde Gateway, 2 French Street, Dalmarnock, G40 4EH.

If you remain dissatisfied following the outcome of that review, you are thereafter entitled to apply to the Office of the Scottish Information Commissioner within six months for a decision. You can apply [online](#), by email to [enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info) or by post to Office of the Scottish Information Commissioner, Kinburn Castle, Doubledykes Road, St Andrews, Fife, KY16 9DS.

Should you wish to appeal against the Office of the Scottish Information Commissioner's decision, there is an appeal to the Court of Session on a point of law only.

As part of our commitment to demonstrate openness and transparency in respect of the information we hold, an anonymised version of this response will be posted to the Police Scotland Freedom of Information [Disclosure Log](#) in seven days' time.