



Response to consultation on  
**Deception as to sex: proposed  
revision to CPS legal guidance on  
Rape and Serious Sexual Offences,  
Chapter 6 – Consent**

**Sex Matters** is a human rights organisation campaigning  
for clarity about sex in law, policy and language

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## Introduction

The CPS is conducting a public consultation on a proposed revision to its legal guidance on Rape and Serious Sexual Offences (RASSO), Chapter 6: Consent, the section on Deception as to Gender.<sup>1</sup>

Sex Matters is a human-rights organisation concerned with clarity on sex in law and policy. We argue that lack of clarity undermines the ability to protect human rights, through the ability to give or withhold consent to intimacy, and protect people from discrimination, harassment, humiliation and assault.

The CPS states that the aim of the guidance is to provide “predictability, transparency and consistency of decision making across the CPS”.

In fact by conflating sex with gender identity it does the opposite. It promotes sex by deception by avoiding clarity, and it puts both men and women, gay and straight, at risk of being victims, and trans-identifying people at risk of committing crime because they have been misled about the nature of sexual consent.

## The campaign to legalise sex by deception

The CPS states that the current redraft of the chapter on consent in the RASSO guidance follows a review and “pre-consultation with interested groups”. We are concerned at the lack of transparency regarding the pre-consultation process and have put in a Freedom of Information request for details.<sup>2</sup>

The draft guidance appears to reflect the position advanced by organisations such as Stonewall, the LGBT Foundation, Gendered Intelligence and Mermaids that self-declared gender trumps sex, even when it comes to consent to engage in sexual activity. They say that it is transphobic to consider that men are male and women are female.

For example, in 2015 the LGBT Foundation issued a statement arguing that:

“Trans bodies are varied and the assumption that all men have penises and all women have vaginas is not only transphobic, but legally inaccurate. These convictions set a concerning legal precedent, that trans bodies can be considered, fraudulent, illegitimate and not ‘real’.”<sup>3</sup>

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<sup>1</sup> CPS (2022). Deception as to Gender: proposed revision to CPS legal guidance on Rape and Serious Sexual Offences (RASSO), Chapter 6 – Consent.

<sup>2</sup> Freedom of Information request at WhatDoTheyKnow website.

<sup>3</sup> LGBT Foundation (2015). *Sex by deception: Statement from LGBT Foundation* by John Walding.

Stonewall in 2015 argued:

“Recent ‘sex by deception’ cases... demonstrate that it is possible for non-disclosure of a person’s trans status to impair the validity of consent. This leaves a great many trans individuals at risk of prosecution for a criminal offence. It is, however, still unclear as to whether the courts regard this to be the case for a trans person who has undergone medical transition, and it is further greyed by whether or not an individual can be defined as trans, based on their appearance, by the court. Clarity is urgently needed.”<sup>4</sup>

Despite this mention of “medical transition”, Stonewall has campaigned for a radical programme of legal reform to completely de-link a person’s legally recorded sex from their biological sex, on demand. As part of this it called for the law on sex by deception to be “**based on gender**” and “to ensure trans people’s privacy is protected”.

A group of lawyers and academics have also promoted the decriminalisation of sex by deception. Professor Alex Sharpe is a leading light of this movement. Sharpe states:

“My opposition to prosecution [for sex by deception] is also founded on arguments derived from poststructural feminism and queer theory. Here I offer a critique of the criminal law and philosophical concepts of consent, harm and deception. Thus I take seriously ‘apparent’ consent. After all, in the context of desire-led intimacy, it is surely spurious to deny desire for the masculinity or femininity on offer [...]

In relation to harm, I consider what is at stake for both parties to desire, not merely complainants, while also asking after the sources of harm. For it seems inescapable that ‘harms’ cisgender people experience are inextricably connected to cisnormative ideology. It is, I argue, precisely this ideology that renders transgender and other gender non-conforming people deceptive, their deception being an effect of cisnormative privilege and power, through which ontologies and epistemologies are constituted.”

Thus Sharpe argues that someone who has misled a potential sexual partner about their sex is not a perpetrator of assault but a victim of oppression by a “cisnormative ideology” that views the fact of their sex as a material reality.

The CPS’s proposed guidance departs from the law and reflects the arguments (and language, such as “sex assigned at birth”) of the campaigners for decriminalisation. It is concerning that organisations that do not respect consent are involved in advising schools and providing materials for sex and relationship education, some in association with the CPS.<sup>5</sup>

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<sup>4</sup> Stonewall (2016). *A Vision for Change*.

<sup>5</sup> In January 2021 the Crown Prosecution Service issued *Lesbian, Gay, Bisexual, Trans+ Bullying and Hate Crime Guidance* for use by schools. It was challenged in court by a 14-year-old girl. The teaching materials included a video

## Our answers to the consultation

### Question 1: Language

**Do you think that the language used is appropriate and sensitive to the issues addressed? If not, please identify concerns and share how it can be improved.**

No. The relevant section of the current Chapter 6 is headed “Deception as to Gender”. This is the result of historic confusion between sex and gender identity, and the adoption of language and concepts from queer theory. It should properly be headed “**Deception as to sex**”, and it **should be redrafted using clear language about sex throughout**.

The way it is currently drafted encourages sex by deception, for example saying: “there is no duty to disclose gender history”. While it may be true to say there is no general duty in casual or social situations, when someone is getting into a situation of sexual intimacy they do have a duty to be honest about their sex in order to obtain free consent.

The fundamental misunderstanding behind the guidance is its interpretation of the wording “deception as to gender”, which comes from [R v Justine McNally \[2013\] EWCA Crim 1051](#).

The decision, which determined that “depending on the circumstances, deception as to gender can vitiate consent” (paragraph 27), is the leading authority on sexual fraud. It is clear from the facts and the reasoning that the judgment used the word “gender” as a polite synonym for “sex” (i.e. male/female, man/woman) and to disambiguate from sex meaning sexual intercourse. The judgment does not use “gender” to mean a purported different personal characteristic such as “gender identity”, “gender expression” or “gender self-perception”. In fact, to interpret it this way is the exact opposite of what is meant in the judgment, and makes understanding the crime and communicating about consent impossible.

Sex is a biological characteristic fixed at birth based on chromosomal and physical characteristics (Corbett v Corbett [1971] P 83, 104D–G, 106B–D and 107A per Ormrod J; Bellinger v Bellinger [2003] 2 AC 467, HL, §§11–12 and 36–37 per Lord Nicholls, §§56–57 and 62 per Lord Hope; Chief Constable of West Yorkshire Police v A (No 2) [2005] 1 AC 51, HL, §3 per Lord Bingham, §19 per Lord Rodger, §30 per Baroness Hale). There are two sexes: male and female.

It is specifically relevant to sexual intercourse that female people can get potentially get pregnant, and male people can impregnate them. Whether a sexual coupling is between a male

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exercise encouraging school children to view an adult male as a “girl” and telling them that expressing legitimate discomfort when someone they understood to be male came into the ladies’ toilet was harassment. The case did not come to court as the CPS guidance was withdrawn for review and never reissued. See Safe Schools Alliance’s press release, 30th April 2020.

and a female or two males or two females is a fundamental difference, and essential for consent (by both parties).

As Lord Hope noted in *Bellinger*, gender-reassignment treatment and surgery may give someone some of the physical characteristics of the opposite sex. “But medical science is unable, in its present state, to complete the process. It cannot turn a man into a woman or turn a woman into a man.”

The facts of the *McNally* case were simply that a young woman (i.e. female, a girl) identified at the material time as a young man (i.e. male, a boy) and adopted a masculine appearance and online identity, and thus the victim (M) was deceived as to *McNally*’s sex and unable to give consent freely and by choice, and was assaulted by being penetrated by a fake penis.

“The case for the Crown was that M’s consent was obtained by fraudulent deception that the appellant was a male and that had she known the truth, she would not have consented to acts of vaginal penetration.” (paragraph 23)

“Thus while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of the acts is, on any common sense view, **different where the complainant is deliberately deceived by a defendant into believing that the latter is a male.** Assuming the facts to be proved as alleged, M chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant’s deception.” (paragraph 26)

Other cases where people have been convicted of having sex without consent through deception about their sex are similar. All of them concern girls or women who posed as boys or men, but the principles could also apply to men who posed or identified as women.

- [R v Gemma Barker \[2012\]](#) – Gemma Barker pleaded guilty to two counts of sexual assault on girls with whom she had sexual relationships under the pseudonyms Aaron Lampard, Connor McCormack and Luke Jones.
- [R v Christine Wilson \[2013\]](#) – Christine Wilson, who has a diagnosis of gender identity disorder and was said to have been “living as a man”, had sex with two girls.
- [R v Gayle Newland \[2015\]](#) – Gayle Newland posed as a man in order to engage in a sexual relationship with her best friend.
- [R v Kyran Lee \(Mason\) \[2015\]](#) – Kyran Lee is reported as being a woman who identifies as a man and has done so consistently since “he was at least fifteen”. The LGBT Foundation states: “Kyran had changed his name legally, been accepted into a Gender Identity Clinic

treatment programme, and undertaken some gender reassignment surgery at the time of the incident.”<sup>6</sup>

- [R v Jennifer Staines \[2016\]](#) – Jennifer Staines, 23, used the name “Jason” on social media to contact three girls, two of whom were aged between 12 and 17. After one victim’s mother raised concerns, police found Staines had used a rubber penis and condoms during some assaults.<sup>7</sup>

The CPS guidance completely misconstrues McNally by interpreting “gender” as meaning something different to sex. It states:

“On the facts of the case in McNally, the ruling that deception as to gender can vitiate consent applies to situations where a person falsely purports to be of a different gender (McNally was a girl who presented herself as a boy, using a male avatar “Scott” online). Although the courts have not addressed the point, the ruling would appear to be capable of applying broadly to include, for instance, deception as to birth gender/assigned biological sex, gender history or trans status. There is no duty to disclose gender history, but in some circumstances suspects who are living in a new gender identity at the time of the alleged offending (as opposed to falsely purporting to be a different gender), including those who have obtained a GRC, may still be capable of actively deceiving a complainant as to such matters relating to their gender. For example, where a suspect falsely asserts that their gender identity is the same as their birth gender/assigned biological sex; or lies in response to questions about their gender history; or denies being a trans man or a trans woman.”

Rather than stating clearly that the case was about deception about sex, it improvises points which the courts have not addressed that the ruling “would appear to be capable of deception” as to:

- “birth gender” (this means sex)
- “assigned biological sex” (this means sex)
- “gender history” (meaning whether someone has adopted an identity which differs from their actual sex)
- “trans status” (meaning whether someone has adopted an identity which differs from their actual sex).

In each case the language obfuscates what the deception is actually about, and suggests that a person’s sex is something that relates to their past, rather than being an immutable aspect of

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<sup>6</sup> LGBT Foundation (2015). *Sex by deception: Statement from LGBT Foundation* by John Walding.

<sup>7</sup> Bristol News (2016). ‘Woman posed as man to have sex with teenage girls’.

themselves. As the case of McNally reflects, the sex crime took place not because McNally kept an obscure fact about her babyhood secret, but because having been born female she would remain female throughout her life.

An earlier version of the CPS guidance added to its introduction of the McNally case the interpretation that:

“Whether there has been deception as to gender will require very careful consideration of all the surrounding circumstances including:

- How the suspect perceives his/her gender;
- What steps, if any, he/she has taken to live as his/her chosen identity; and
- What steps, if any, he/she has taken to acquire a new gender status.”

None of this is drawn from the law. Instead, it is based on:

- the adoption by the drafters of language and concepts from queer theory – for example that sex is “assigned at birth” and that it can become part of a person’s past history, to be replaced by gender identity
- the mistaken interpretation that the McNally case concerned deception about “gender” or “gender identity” rather than deception about sex
- a misunderstanding that the law provides rights to a transgender person which override other people’s sexual consent. The guidance refers to the European Convention on Human Rights, the Human Rights Act 1998, the Equality Act 2010 and the Gender Recognition Act 2004. In fact nothing in any of these laws or conventions implies that a victim has consented to a sexual act, when that consent has been obtained through the offender deceiving them about the fact of their sex.

The CPS Guidance (including its existing text) thus **promotes sex by deception** by encouraging confusion, ambiguity and the presumption of rights that do not exist.

To be clear about the law:

**The European Convention on Human Rights and the Human Rights Act 1998 include at Article 8:**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for



the protection of health or morals, or for the protection of the rights and freedoms of others.

It has been judged by the European courts that feelings of gender identity can be central to an individual's identity and private life under Article 8 and a person may suffer acute distress if their gender identity is not legally recognised (*Goodwin v UK* [2002] IRLR 664, ECtHR, §§72 & 90; *Bellinger*, §§34-35 per Lord Nicholls; *R (Elan-Cane) v Secretary of State for the Home Department* [2020] QB 929, CA, §§46-47 per King LJ38; §123 per Irwin LJ; *R (McConnell) v Registrar General for England and Wales* [2020] 3 WLR 683, CA, §55 per Lord Burnett CJ, King & Singh LJJ).

However, this legal recognition if used in place of sex can only ever be a deeming provision. A person's sex has not really changed, whatever laws are in place.

Article 8 is a qualified right and may be constrained "in accordance with the law and [as] necessary in a democratic society [...] for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." There are many situations where recognition of biological sex is necessary for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights of others.

Consent about having intimate contact with another person is an absolutely foundational situation where sex matters.

Article 3 of the convention enshrines one of the most fundamental values of democratic societies: the prohibition of torture and inhuman or degrading treatment or punishment. The prohibition in question is absolute, no derogation from it being permissible under even in the event of a public emergency threatening the life of the nation.

Rape and sexual assault carried out or enabled by agents of the state are clear infringements of Article 3. The state also has a responsibility to protect against and provide redress for acts of rape and sexual assault committed by private individuals. Being forced to undress in front of a member of the opposite sex can also be an infringement of Article 3.

Thus nothing in Article 8 implies the right of a person to deceive someone else about their sex in order to fraudulently secure apparent consent for a sexual act. The state should not assist someone to undertake deception about their sex in order to undertake a sexual act without consent.

Furthermore the person being deceived also has privacy rights, protected by Article 8. Even if the sexual liaison does not get as far as something that could engage Article 3, they may be tricked into acts such as removal of clothing, sharing nude pictures or videos, sexting and phone sex which are a breach of their privacy. Their Article 8 rights to protection of their

personal life and bodily autonomy come into direct conflict with their deceiver's right to keep their sex private.

**The Equality Act 2010** provides general protections against discrimination and harassment in employment and in receipt of goods and services based on nine protected characteristics. It includes at Section 7 a definition of the protected characteristic of "gender reassignment":

1. 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 reassigning the person's sex by changing physiological or other attributes of sex.
2. A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
3. In relation to the protected characteristic of gender reassignment –
  - a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
  - b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

It also includes exceptions to the general protection against discrimination, including in relation to single-sex services, which may be provided including in situations where (Schedule 3 Paragraph 26):

6. The condition is that –
  - a) the service is provided for, or is likely to be used by, two or more persons at the same time, and
  - b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.

Nothing in the Equality Act provides a person with the right to deceive another person about their sex (that is, by stating that they are the same sex as that other person when they are in fact the opposite sex, or vice versa) in order to secure fraudulent consent for any act of a sexual nature. This would be a derogation of Article 3.

Under the **Gender Recognition Act 2004**, a person can obtain a Gender Recognition Certificate (GRC) to be legally recognised in their "acquired gender" if they have or have had a medical diagnosis of gender dysphoria, have "lived in their acquired gender" for the previous two years and declare that they intend to live permanently in their acquired gender. This provides for administrative rights such as the right to marry in the acquired gender and to collect a pension in their acquired sex.

While the Gender Recognition Act (section 9) provides that where a person has acquired a Gender Recognition Certificate their sex is changed for all [legal] purposes, it is clear that it does not affect the minds, thoughts, perceptions or conduct of private citizens (see [R \(C\) v Secretary of State for Work and Pensions \[2017\]](#) 1 WLR 4127, SC, §§23-25 per Baroness Hale). A certificate cannot “eliminate... the memories of family and friends who knew the person in another life”.

Ministerial statements in Parliamentary debates also directly addressed this issue, making clear that the deeming provision in GRA, s9 is intended to apply for legal purposes, not to coerce the thoughts or behaviour of private citizens.<sup>8</sup> Similarly, the Joint Committee on Human Rights stated at the time the GRA was being debated:

“Members of religious groups may consider that a person remains a man in the eyes of God even after being recognized as being a woman in the eyes of the state (or vice versa).”<sup>9</sup>

People whose ordinary common-sense conviction that a person who is male remains a male – even if he changes his clothing, name, hairstyle or body – stems from non-religious beliefs have the same human rights as those who are members of religious groups.

**Nothing in the Gender Recognition Act provides the right of a person to deceive another person about their sex in order to fraudulently secure consent for any act of a sexual nature.**

#### *Recommended changes in wording*

Proposed wording	Suggested revision
Title: Deception as to gender	Deception as to sex
Deception as to gender may be relevant to the issue of whether consent to sexual activity was vitiated.	Deception as to sex may be relevant to the issue of whether consent to sexual activity was vitiated.
Cases in which deception as to gender is a live issue may involve a suspect whose gender identity differs from the sex they were assigned at birth.	[Delete this sentence. It is offensive and prejudicial to suggest that someone who identifies as transgender or transsexual is likely to use their identity to undertake a sex crime.]

<sup>8</sup> Lord Filkin, then the Parliamentary Under-Secretary of State in the Department for Constitutional Affairs. Hansard, House of Lords, 29th January 2004, col. 410–411.

<sup>9</sup> House of Lords, House of Commons, Joint Committee on Human Rights (2003). *Draft Gender Recognition Bill: nineteenth report of session*.

<p>Although the words “sex” and “gender” can both refer to the state of being male or female, “sex” tends to refer to biological differences, while “gender” tends to refer to social or cultural differences and the way in which an individual perceives themselves. A person’s gender identity therefore may not match the sex they were assigned at birth.</p> <p>However, in everyday use, sex and gender are often used interchangeably.</p>	<p>The term “sex” refers to the biological fact of being male or female. “Gender” is sometimes used interchangeably but it can cause confusion.</p> <p>Some people identify as transgender or transsexual. They may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, agender, gender fluid, non-binary and genderqueer.</p> <p>This does not change their sex. Where a case concerns deception as to sex it is particularly important to use clear words and concepts about the two sexes.</p>
<p>Gender dysphoria [whole section]</p>	<p>[Delete this section. It is offensive and prejudicial to suggest that someone who has a diagnosis of gender dysphoria is likely to commit sex crime using deceit.</p> <p>Having a diagnosis of gender dysphoria is not a defence to a crime of sex by deception.]</p>
<p>Gender Recognition Act</p> <p>The Gender Recognition Act 2004 (GRA) provides individuals with the opportunity to have their affirmed gender identity recognised in law. The GRA only offers legal recognition of male and female genders. It does not recognise gender identities outside the gender binary, including non-binary, and is not available to anyone under the age of 18. Under the GRA, trans men and women can:</p> <p>Obtain a Gender Recognition Certificate (GRC) to be legally recognised in their acquired gender.</p> <p>Obtain a new birth certificate, with an updated sex marker.</p> <p>Marry in their new gender.</p> <p>To apply for a Gender Recognition Certificate, a person must be 18 or over and demonstrate that:</p> <p>They have or have had a medical diagnosis of gender dysphoria.</p> <p>They have lived in their acquired gender for the previous two years.</p> <p>They intend to live permanently in their acquired gender.</p> <p>Note that under s9 GRA, where a GRC is issued, the person’s gender becomes for all purposes the</p>	<p>Gender Recognition Act</p> <p>The Gender Recognition Act 2004 (GRA) allows individuals with a diagnosis of gender dysphoria to change their sex recognised for some legal purposes (such as marriage and pensions) and to change the sex recorded on their birth certificate, via a Gender Recognition Certificate (GRC).</p> <p>A person can change the sex recorded on their passport, driver’s licence, NHS records and other official documentation for administrative identification purposes without obtaining a GRC.</p> <p>None of this changes their biological sex, which remains relevant in relation to the consent of other people to engage in sexual relations with them.</p> <p>Section 22 of the GRA makes it an offence for a person who has obtained “protected information” in an official capacity to disclose that information to any other person. Protected information is information about a person’s application for a GRC or, if they have changed their recorded sex via a GRC, information about their actual sex. A number of exceptions to section 22 are applicable:</p> <p style="padding-left: 40px;">S.22 (4)(d): the disclosure is in accordance with an order of a court or tribunal</p>

<p>affirmed gender – so that, if the affirmed gender is the male gender, the individual is legally seen as male and, if it is the female gender, the individual is legally seen as female.</p> <p>Prosecutors should request information as to whether a trans suspect possesses a GRC. However, a person’s gender identity is not dependent upon them obtaining or having a GRC, as a person may choose not to obtain one despite being eligible to do so. There is no provision for non-binary people to obtain a GRC that accurately reflects their gender identity. Therefore, a trans person’s gender identity should not be considered inauthentic if they have not obtained a certificate. Note also that persons under 18 cannot apply for a GRC and children under 17 cannot access adult gender dysphoria services or have surgical intervention on the NHS. In limited circumstances, under 18s may be prescribed puberty blockers (from the age of 12) or cross-sex hormones (from around the age of 16). Trans minors only receive such treatment whilst receiving psychological support.</p> <p>Prosecutors should be aware that Section 22 of the GRA makes it an offence for a person who has obtained “protected information” in an official capacity to disclose that information to any other person. Protected information is information about a person’s application for legal recognition of their affirmed gender or, if they have legal recognition, their gender history. There are a number of exceptions to section 22, which are applicable:</p> <p>S.22 (4)(d): the disclosure is in accordance with an order of a court or tribunal</p> <p>S.22 (4)(e): the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal</p> <p>S.22(4)(f): the disclosure is for the purpose of preventing or investigating crime.</p>	<p>S.22 (4)(e): the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal</p> <p>S.22(4)(f): the disclosure is for the purpose of preventing or investigating crime.</p> <p>Since sex by deception is a crime under Section 74 of the Sexual Offences Act, this gives justification for disclosing a person’s sex to prevent or investigate situations involving sexual consent, and in the prosecution of cases.</p>
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## Question 2: Factors to prove deception

**When considering the factors that are relevant to prove deception and lack of consent, does the guidance strike the right balance between recognising the rights of trans persons to live**

**fully in their new gender identity and the need not to put an undue onus on complainants to discover or confirm the gender status of the suspect?**

No – the guidance does not reflect the law and is confused, as is this question.

The interests of victims are barely mentioned, and the guidance describes itself as “offender-centric” and seeks to differentiate between a person who is genuinely living “as the opposite sex” and one who is deceiving people that they are the opposite sex.

While a transgender person may seek to “pass” socially as a member of the opposite sex in some social settings without harming any other person, a person who seeks to “pass” as a member of the opposite sex in a sexual situation will be committing a sex crime if they achieve their desired effect.

The right of a trans person to “live fully in their new gender identity” does not include the right to have sex with people without their free consent (this would be a derogation of other people’s rights under Article 3).

It is offensive and discriminatory to trans people to suggest that “living fully in their new gender identity” involves undertaking sex crimes through deceit about their sex.

It is also irresponsible. Children who are gender-questioning and considering transitioning need to have the concept of consent clearly explained to them.

The question about putting “undue onus on complainants to discover or confirm the gender status of the suspect” is confused. The crime of sex by deceit involves deceit about sex, not about “gender status”. Presumably the question relates to legally deemed sex (which may be altered by a Gender Recognition Certificate). However, sex recorded for this legal purpose is not a person’s actual sex, which remains relevant for sexual consent.

The guidance goes on to state:

**“Possession of a GRC proves that an individual has been legally recognised in their affirmed gender and is strong evidence to show that the individual is living in their affirmed gender.”**

This is a fundamental misunderstanding of the purpose of a GRC. It is not a government certificate that turns a straight man into a lesbian, or a gay man into a straight man, for the purpose of sexual relations with others. Other people have their own sexual orientation and boundaries, and their free consent is not overridden by a government certificate.

As the case of McNally found:

**“Thus while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of the**

acts is, on any common sense view, **different where the complainant is deliberately deceived by a defendant into believing that the latter is a male.**

Assuming the facts to be proved as alleged, M chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception." (paragraph 26)

The possession of a government certificate that supports this deception does not in any common-sense view change the sexual nature of the encounter for the victim.

**The CPS and the guidance should be absolutely clear that a Gender Recognition Certificate does not confer a right to deceive people in relation to consent to engage in sexual activities.**

### Question 3: Evidential considerations

**Do you agree with the evidential considerations that prosecutors must consider? If not, please identify what should be added, removed, or amended.**

This section should be completely redrafted. It is based on a misreading of the judgment in McNally and seeks to distinguish between deliberate deception about one's sex, and "failure to disclose".

This is based on the case of [R v EB \[2006\] EWCA Crim 2945, \[2007\] 1 WLR 1567](#). Here failure to disclose HIV status was not considered to vitiate consent. However, learning a person's HIV status and their sex are not similar things in practice, since one is sensitive personal medical information and the other is ordinary social information. A person who says "I am a woman" or female or a lesbian or a straight woman when they are actually male is not failing to disclose their sex but making a false statement about it.

Whether someone is male or female is a binary, and is generally common knowledge. If someone claims to be female they are denying being male (and vice versa). This is not a matter of formal disclosure but assumed from a range of physical and social cues. Ordinary words such as "he" and "she", "Mr" and "Ms" are accepted as claims regarding a person's sex.

These cues can be mimicked, as the guidance states:

**"A person whose gender identity isn't the same as their sex assigned at birth may express their gender through their speech, dress, gestures, mannerisms etc, without regarding this as a fabrication, a performance or a deception."**

A person who presents themselves as a member of the opposite sex may be more or less convincing depending on their physiology, age and degree of effort, any alcohol or drug consumption, the degree of sexual experience of the person with whom they are seeking to engage in sexual relations, and the intimacy and lighting of the situation.

The guidance argues that whether this is deception depends on whether a suspect “genuinely perceives their gender identity to be different to their birth assigned sex”, rather than whether the other person was in fact deceived as to their sex.

The reasoning in the guidance is back to front. What the suspect believes about their gender identity is irrelevant. They know what their sex is and whether they have been honest about it to the complainant. They may have taken steps to conceal and dissemble about their sex, such as (for a male defendant):

- using words about themselves such as woman, female, she and a female name on social media or dating sites, or in person
- using words about themselves such as lesbian (if attracted to women) or straight (if attracted to men)
- claiming to be a woman and/or female
- wearing women’s clothing
- wearing make-up and adopting a feminine hairstyle
- taking female sex hormones
- having feminising surgery
- changing administrative documents to appear to be a woman.

The guidance would view these as “steps the suspect has taken to live consistent with their gender identity” and as evidence *against* deception. Thus the steps that a person may take to give a false impression about their sex are the very steps that the guidance views as evidence of the genuineness of their “gender identity”. The better and more convincing the deception, the more the guidance suggests it should be excused.

This whole section reflects the overall misunderstanding apparent in the guidance that the salient characteristic to which the deception relates is “gender identity” and not sex.

At the same time, it puts the onus on the complainant to understand concepts of gender ideology that are likely to be incomprehensible to many people.

“There is no duty to disclose gender history, but in some circumstances suspects who are living in a new gender identity at the time of the alleged offending (as opposed to falsely purporting to be a different gender), including those who have obtained a GRC, may still be capable of actively deceiving a complainant as to such matters relating to their gender. For example, where a suspect falsely asserts that their gender identity is the same as their birth gender/assigned biological sex; or lies in response to questions about their gender history; or denies being a trans man or a trans woman.”



According to this logic, the fact that a man has said “I am a woman” or “I am female” is not a false assertion, as long as you understand the words “woman” and “female” as being expressions of identity rather than sex.

Similarly, a woman going to a gay bathhouse and presenting herself as a gay man in order to attempt sexual acts with gay men would not be attempting deception. Unless a sexual partner thinks to ask about such a person’s “gender history”, they have not been deceived.

The guidance asks CPS staff to assess whether a victim “closed their eyes” to evidence. Nothing is said as to the devastating effects this type of offending could have on a victim’s confidence, sense of self or psychological well-being.

Furthermore, chapter 5 (‘Issues relevant to particular groups of people’) highlights that gender identity is completely subjective:

“Gender identity is what you know your gender to be and can only be decided by the individual for themselves.... Trans people are those who know their gender to be different to that which they were assigned at birth.”

Thus, as the CPS’s own guidance makes clear, there is no way of telling whether someone is genuinely or falsely asserting an internal feeling of gender identity, and no reason to think that the experience of the person who is deceived about the person’s sex is less violating.

## Question 4: Three stages

**Do you agree with the three stages that should be considered when prosecutors are considering the question of deception as to gender?**

The first two stages would make some sense if they were accurately communicated in relation to sex, and if the distinction between deliberate and non-deliberate deception were removed.

The two steps would then be:

1. Has there been deception by the suspect about their sex?
2. Was the complainant deceived and therefore did not consent?

When framed in this way, it is not clear how a complainant could be deceived and tricked into having sex if the perpetrator of the deception “reasonably believed” the victim knew the person’s sex and consented. If this belief was in fact reasonable, it would necessarily be the case that the complainant was not in fact deceived.

It is within the power of the perpetrator either to honestly and clearly state their sex, or to obfuscate or confuse it with statements about gender identity, as this guidance does.

The framing of the guidance seems to encourage people to try to get away with sex by deception, rather than making clear that it is irresponsible and abusive to deceive people into non-consensual sexual situations and relationships.

How can young people be expected to understand consent if the CPS's own guidance undermines clarity, and suggests to people who identify as transgender that they do not need to be honest about their sex with prospective sexual partners?

## Question 5: Public interest factors

### Do you agree with the public interest factors that are listed?

We agree that the offence is more serious where the suspect exploits, coerces, threatens, manipulates or grooms the victim, where there is an abuse of trust and where there is a significant disparity in age or maturity.

We think it is incoherent to state that the "steps the suspect has taken to live consistent with their gender identity" and whether they have obtained a GRC have any bearing on this. These steps taken to appear more like the opposite sex, or to gain official status as the opposite sex, can be used for manipulation and grooming.

People should be free to wear what they want, dress how they choose and express themselves as they wish. There is a mechanism which allows those suffering from gender dysphoria to change their legal sex for the purposes of marriage, death and pensions. However, none of this gives anyone licence to undertake sex by deception.

The draft guidance states: "the longer the deception practiced [sic] on the victim, the more serious the offending." However, the earlier section states that if the deception has gone on for a long time the complainant should not be believed. Even a single act of sexual assault or rape can be extremely damaging to the victim, especially where it is combined with this victim-blaming attitude.

Although we agree that a young adult might not be prosecuted because of their lack of maturity, young adults also need to be protected from making bad decisions. Children can be a safeguarding risk to themselves and others if they have been taught to ignore consent. Trans-identifying young people themselves are being subjected to deception, grooming and manipulation by being told that it is possible to change sex, and that girls can identify as gay boys, and boys as lesbians.

For example, in 2017 Cliniq, a social enterprise that provides health services to trans-identified people, published *Cruising: a trans guy's guide to the gay sex scene*, funded by Public Health England. This booklet told young trans-identifying females to explore the "whole new world of gay sex, hook-up apps, barebacking cultures, scenes and sex parties", and stated that "deciding

if and when to tell people you are trans can be tricky. Some guys might not tell their sex partners.” Saunas and clubs often have a men-only policy, it acknowledged, but “some [trans] guys choose to go stealth if it is possible for them”.<sup>10</sup> This is quasi-official guidance encouraging sex by deception.

It should be made clear to young people who are exploring their gender identity that adopting a transgender identity does not give them licence to lie about their sex or to override other people’s consent. Furthermore, they should be taught the facts about sexual orientation, namely that it is related to sex, not to gender identity.

It can be the case that people are not fully deceived about a person’s sex but are institutionally encouraged to treat that person as if they were the opposite sex. For example, Girlguiding now admits boys who identify as girls, and allows those boys to share tents with girls while keeping this information from parents. It also admits adult men who identify as women and treats them as if they were women.

Telling children and young people to lie about and keep secrets about the sex of their peers, teachers and other adults is a recipe for exploitation and grooming. For example, consider the case of David Orton, who identified as a woman and befriended a young girl and her family “and was trusted to be alone with her because of the 25-year-old’s gender status”. Orton groomed and sexually abused her and got her pregnant when she was aged 14. This is an example of someone who does not “pass” as a woman, but who was treated as one.<sup>11</sup>

There have been reports of lesbians being pressured to “accept the idea that a penis can be a female sex organ” and to accept trans-identified males as lesbians.<sup>12</sup> For example, one lesbian who responded to a survey of gender-critical opinion recounts:

“I was horrified at men approaching me on lesbian dating sites. Most of them didn’t declare this and I worked it out. I felt humiliated and a bit scared that I might have met someone in person without knowing they were biological men. It chilled me to the bone. I can now spot them and block them, but it was unpleasant and degrading for me at the time.”<sup>13</sup>

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<sup>10</sup> Clinique (2017). *Cruising: a trans guy’s guide to the gay sex scene*.

<sup>11</sup> Mail Online (2022). ‘Transgender paedophile, 25, who identified as a woman won family’s trust to groom 14-year-old girl and got her pregnant’.

<sup>12</sup> BBC News (2021). ‘The lesbians who feel pressured to have sex and relationships with trans women’.

<sup>13</sup> The Gender Dissidents Survey (2021). ‘I was horrified at men approaching me on lesbian dating sites’.

In another survey of gender-critical lesbians, a third of those who used dating sites report being approached by males identifying as women.<sup>14</sup> A woman described feeling violated when she realised the person she had shared intimate messages with online was “a man”.

Several young women explained how they were pressured to accept male self-identified lesbians as sexual partners:

“After I came out as a lesbian, I went on many dates/entered relationships with transwomen because the culture I was in said if I didn’t do that I was evil and should be banished from everything. I knew I wasn’t attracted to them but internalised the idea that it was because of my ‘transmisogyny’ and that if I dated them for long enough I could start to be attracted to them. It was DIY conversion therapy.”

Young women feel pressured to sleep with transwomen to prove they are “not transphobic” or “not a TERF” (trans-exclusionary radical feminist):

“I thought I would be called a transphobe or that it would be wrong of me to turn down a transwoman who wanted to exchange nude pictures.”

One describes a clear example of rape.

“The man I went on a date with, unknowingly, was mutual friends with people I knew, he threatened to out me as a terf and risk my job if I refused to sleep with him. I was too young to argue and had been brainwashed by queer theory so he was a ‘woman’ even if every fibre of my being was screaming throughout so I agree to go home with him. He used physical force when I changed my mind upon seeing his penis and raped me.”

The idea that clear statements regarding a person’s sex are “transphobic” or “hate speech” puts pressure on others to accept gender self-identification in place of sex.<sup>15</sup> In schools, sexual orientation is being described in terms of being attracted to different “genders” rather than different sexes.

All of this contributes to an atmosphere of coercion. The right response is not necessarily a large increase in individual prosecutions, but rather clear and consistent communication on consent and the meaning of “sex” by the CPS, police, education authorities and voluntary sector.

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<sup>14</sup> Angela C. Wilde (2019). *Lesbians at Ground Zero: How transgenderism is conquering the lesbian body*.

<sup>15</sup> Julie Bindel (2022). ‘QC compares lesbians refusing sex with transwomen to apartheid’, *UnHerd*.

Stonewall has stated:

“Recent ‘sex by deception’ cases involving trans people and gender identity issues have revealed an alarming lack of clarity around trans people’s rights and obligations to disclose or not disclose their trans history to their sexual partners. These cases demonstrate that it is possible for non-disclosure of a person’s trans status to impair the validity of consent. This leaves a great many trans individuals at risk of prosecution for a criminal offence.”<sup>16</sup>

This CPS’s guidance should not contribute further to this lack of clarity, which puts trans people and those they engage with at risk. It should make clear that:

- there are two sexes, and sex is immutable and salient throughout people’s lives
- trans people’s rights do not extend to the right to have sexual relations with people without free consent
- everyone has a basic obligation to be honest about what sex they are with their sexual partners.

## Question 8: Other feedback

**Do you have any other feedback you wish to share around how the revised guidance could be improved?**

Cases where a person succeeds in deceiving someone, in person, that they are actually the opposite sex are likely to continue to be rare. However, it is important to make clear the principle that sexual consent and boundaries in relation to biological sex are legitimate.

Online contacts are riskier, since it is easier to convincingly pose as a member of the opposite sex when not in person. Several of the existing sex-by-deception cases start with online contacts. Male sex offenders have been known to use female identities online to engage with potential victims for the purposes of grooming.

In physical spaces, sex-based rules are important safeguards and should be able to be communicated clearly and enforced without ambiguity or fear. This is important for the safeguarding of children, including gender-questioning and trans-identifying children and young people.

Guidance to police, courts and prosecutors that they must use preferred pronouns and respect gender identities are inappropriate where sex by deception is at issue. Witnesses and all those involved in the justice system must be able to refer clearly and unambiguously to people’s sex.

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<sup>16</sup> Stonewall (2017). *A vision for change*.

Institutional deception and coercion about a person's sex can turn ordinary situations such as changing rooms, showers, searches and intimate medical examinations into situations that enable sexual assault, voyeurism or exposure. Autogynephilia (a man's sexual arousal at the thought of himself as female) is a common paraphilia and is associated with cross-dressing and transgender identities. It must be recognised that when a woman says that she wants a female doctor, or expects a female police officer, or wishes to be in a female-only space when undressing, this means sex, not gender identity.

For transgender people to be fairly and safely employed in jobs such as the police, prison service, health and social care they must not be forced into situations of sexual assault by a system that seeks only to validate gender identity and not to recognise privacy and consent based on sex. It is not fair on anyone to force transgender people to commit what would properly be viewed as sexual assault as a condition of employment.

The rights and privacy of transgender people can and should be respected, but not by undermining the consent of others.

Workplaces and organisations that brand clarity about biological sex "hateful" are workplaces that do not respect consent (see, for example, the materials circulated by the Pride in Prisons and Probation Network at the Ministry of Justice).<sup>17</sup> Organisations that do not respect consent have no place delivering relationship and sex education.

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<sup>17</sup> Sex Matters (2022). 'Mass harassment in HM Prisons and Probation Service'.