

**IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
B E T W E E N :**

CLAIM: AC-LON-2025-000781

THE KING
on the application of
SEX MATTERS **Claimant**
and
DIRECTOR OF PUBLIC PROSECUTIONS **Defendant**

EXHIBIT TCG/1 TO
WITNESS STATEMENT OF THOMAS CHARLES GUEST

This is the exhibit to the Witness Statement of THOMAS CHARLES GUEST
dated 20 February 2026 **TCG/1**

Consultation on CPS guidance on Deception as to Gender - Summary of Responses

13 December 2024

Publication Policy and Guidance Sexual offences

- [Introduction](#)
- [Background](#)
- [The consultation](#)
- [Consultation responses](#)
- [Out of scope](#)
- [Summary of Responses and revisions made](#)
- [Main themes](#)
- [Index of responses to consultation questions](#)
- [Next steps](#)
- [Conclusion](#)

Introduction

This is a summary of responses to the public consultation undertaken by the Crown Prosecution Service (CPS) on revisions to the guidance on Deception as to gender (now titled “Deception as to sex”), which is contained in chapter 6 (Consent) of the CPS guidance on Rape and Sexual Offences (RASSO).

The proposed revisions were published on 26 September 2022 and consulted on for a period of twelve weeks, ending 8 December 2022.

Background

CPS prosecution guidance is an important aspect of our work. It supplements [The Code for Crown Prosecutors](#) (the Code), supporting our prosecutors to make effective decisions in all cases. Prosecutors need the clearest possible guidance on how to assess the evidence and public interest when making charging decisions or reviewing cases. Adherence to prosecution guidance should provide a predictability, transparency and consistency of decision making across the CPS, thereby ensuring the delivery of justice.

The CPS regularly reviews and updates its legal guidance, to reflect changes in law or policy, and to provide prosecutors with more detailed or clearer guidance, or a better understanding of a particular subject matter.

Chapter 6 of the CPS guidance on RASSO addresses the issue of consent in sexual offences. The offences under sections 1-4 of the [Sexual Offences Act 2003](#) require the prosecution to prove absence of consent. Section 74 of the Act defines consent as follows: “for the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice”.

This statutory definition has been examined in a number of cases, where ostensible consent was considered not to be true consent, and consent was therefore vitiated or negated. These cases are said to give rise to the developing concept of conditional consent. Deception as to gender is one of

these areas of conditional consent. In the case of [McNally v R. \[2013\] EWCA Crim 1051](#) the Court determined that “depending on the circumstances, deception as to gender can vitiate consent”.

The revision to the guidance on Deception as to Gender is intended to address in more detail some of the complex and sensitive issues around this area of law. This will provide more support for prosecutors when dealing with these cases.

The consultation

As part of the drafting process the CPS conducted a pre-consultation with interested stakeholders. A first draft of the guidance was provided to these stakeholders and feedback was received in writing and during workshops. The feedback was considered and revisions were made. The revised document was later subjected to a public consultation.

Consultation responses

We received 409 responses in total. These included responses from:

- Organisations and interested stakeholders representing the diverse views of, for example, trans and non-binary persons, gender critical stakeholders, women’s rights groups and lesbian and gay persons
- Academics
- Police organisations
- Healthcare professionals

All of these responses have been analysed, including any received after the consultation closed.

In addition, we have considered the points raised by the think tank *Policy Exchange*, in its paper *The Crown Prosecution Service’s approach to transgenderism: legally inaccurate and ideologically captured*, dated 5/11/23.

Out of scope

We received a number of suggestions that we consider to be out of scope of the consultation and guidance. In the main, this is because they are not relevant to the purpose of the guidance, which is to highlight some of the complexities around gender identity and to assist prosecutors to make charging decisions in cases involving deception as to sex.

Examples of issues raised that we consider to be out of scope are:

- Amendment to primary legislation in order to clarify the case law.
- A formal evidence-based review and consultation which considers issues of harm to victims arising from all forms of deception as to sex, to consider what forms of deception should amount to a criminal act.
- Suggestions as to other forms of conditional consent that should vitiate consent. For instance, where a complainant discloses a latex allergy and agrees to sex on the condition that the suspect does not use a latex condom.
- Concerns relating to the volume of prosecutions for rape and the rates of conviction for rape and other sexual offences.

- The perceived lack of accurate data in the Criminal Justice System on individuals' sex and gender identity.
- Female-only spaces and female prisons.

Summary of Responses and revisions made

We have given careful consideration to all of the responses received and have made significant revisions to the final version of the guidance. The key points are covered in the following sections on *Main themes* and *Summary of changes* to the guidance.

A comprehensive summary of the responses to each question, including our comments on these and the revisions made to the guidance, is contained in the annex.

Main themes

Nature of the deception – sex and gender distinction

A large number of respondents pointed out that clarity of terms is needed, as the deception in question is one of deception as to biological sex, as recorded at birth, as opposed to gender identity. They point out that the judgment in [McNally v R. \[2013\] EWCA Crim 1051](#) (2013) dates back to a time when reference to a person's "gender" was commonly understood to be a reference to their sex (as the terms were often used interchangeably) and therefore, although the court used the word "gender", it was clearly referring to sex. For example:

- The draft guidance fails to clarify the difference between sex and gender ... Specifically, where the word 'gender' has been used to infer 'sex', the CPS must change this to reflect accuracy.
- The victim's consent is vitiated by an act of deception as to sex, not an act of deception as to gender (which logically does not happen anyway, since the person who has a Gender Recognition Certificate has by definition gone to some lengths to present themselves in their preferred gender role – they are not deceiving anyone about that).
- Sex is an objective, well understood, class across biological species. It is binary. Gender is a non-specific word, sometimes used instead of 'sex', sometimes meaning stereotypes and norms, sometimes behaviours, but it is not sex.

CPS comment

- The proposed revisions to the guidance used the same terminology as that used by the court, as we wished to use language consistent with the judgement and case law.
- We agree that although the court in McNally used the word "gender" with regard to the deception in question, it was probably referring to a deception as to sex, as there was no issue of "gender identity" in the case: the defendant in McNally was not trans or non-binary; she was female but presented as male.
- We therefore regard McNally as authority for the proposition that a deliberate deception as to the defendant's sex is capable of vitiating consent.
- We have now made this clear in the guidance, changing its title and using the term "deception as to sex", instead of "deception as to gender".

- However, we acknowledge that impersonation / deception as to identity is a potential separate line of authority: as noted in *R (Monica) v DPP (Boyling)* [2018] EWHC 3508 (Admin), McNally could be analysed as an identity or impersonation case, “given the centrality of an individual’s sexuality to her or his identity” [77].

The case of *Lawrance* – deception by failure to disclose

A number of respondents suggested that the CPS’ reading of *McNally* is incorrect. In the draft guidance we state that the court in *McNally* characterised the appellant’s actions as a deliberate deception [26] and we distinguished a deliberate or active deception from a failure to disclose, which would not vitiate consent. Many responses suggested that there is no such distinction in *McNally* and that a failure to disclose birth sex would therefore vitiate consent. For example:

- The court did not make this distinction between “deliberate” deception and “failure to disclose” and did not say that only “active” deception falls within the scope of section 74.
- The distinction between ‘active deception’ and ‘failure to disclose’ is false. The judgment in *McNally* was clear that ‘failure to disclose’ may vitiate consent, yet the draft guidance suggests that it cannot.
- The difference between active deception and nondisclosure is meaningless.
- Any trans person who is living as another ‘gender’ (not that there is such a thing, but will be appearing as if the other sex) is well aware of the fact. Thus it is not a question of (1) Has there been active or deliberate deception by the suspect? Every trans person who is accused of assault will say ‘I truly believe’ I am of the sex (gender) I am presenting, therefore I am not deceiving anyone. However, they cannot claim to be unaware of their actual sex, or the sex on their original birth certificate.

A number of respondents took the view that following the case of [R. v Lawrance \[2020\] EWCA Crim 971](#) there is no longer a distinction to be drawn between a deliberate deception and a failure to disclose.

CPS comment

- We regard our reading of *McNally* as correct. The court in *McNally* characterised the appellant’s actions as a deliberate deception [26], having noted a distinction in case law between a failure to disclose and deliberate deception, in particular in [R v B \[2006\] EWCA Crim 2945](#) (where a failure to disclose HIV status did not vitiate consent).
- However, we have re-examined *Lawrance* (where it was held that deception as to fertility did not vitiate consent), and we take the view that it qualifies *McNally* in relation to the type of deception that is capable of vitiating consent.
- In giving judgment Burnett LCJ stated: “it makes no difference to the issue of consent whether, as in this case, there was an express deception or, as in the case of [R v. B](#), a failure to disclose” [41]. The court also observed that: “deceit and deception are very slippery concepts which, at one end of the spectrum, may result from a clear short lie, through more obscure utterances, obfuscation or evasion, to conduct designed to convey an unspoken false impression. In this area it is difficult to draw clear principled lines which could distinguish a deceit resulting from one course from another” [40].

- The principle that emerges from Lawrance is that consent can be vitiated by an express deception or by a failure to disclose.
- The criminal law practitioner textbooks Archbold and Blackstones do not specifically address whether Lawrance qualifies McNally (although Blackstones does suggest that Lawrence qualifies R v B, in that an express deception about HIV status will not vitiate consent following Lawrence (B3.52, 2024 Ed.)) However, the commentary in Rook and Ward on Sexual Offences (6th Ed.) is in accordance with our reading of Lawrance: *Until the decision of the Court of Appeal in [Lawrance](#), [McNally](#) was seen as confirming by implication that only an active deception (as opposed to a failure to disclose) falls within the scope of s.74 ... However, the Court of Appeal in [Lawrance](#) took the view that it makes no difference whether there was an express deception or a failure to disclose ... this aspect of the decision in Lawrance brings welcome clarity [1.249].*
- Commentary in *Smith, Hogan & Ormerod's Criminal Law* (17th Ed.) also supports this view: *McNally appeared to confirm that only active deception (and not failure to disclose) falls within the scope of s74, although the distinction between these two might be difficult to draw. This must now be doubted given that the Lord Chief Justice in Lawrance declared that "it makes no difference to the issue of consent whether, as in this case, there was an express deception or, as in the case of B, a failure to disclose". This statement is surprising given that this distinction appears to have been crucial in both McNally and B. However, the Lord Chief Justice's clarification is welcome: what should really matter is the exercise of choice, which presupposes sufficient information to make an informed choice. [821]*
- We have amended the guidance accordingly.

No case law on trans and non-binary suspects

Some respondents suggested that the guidance goes beyond the case law on deception as to sex, by applying it more favourably to trans persons, in a way that it would not be applied to non-trans suspects (persons whose gender identity is the same as their birth sex are sometimes referred to as "cisgender" but for clarity they are referred to in this document as "non-trans", unless we are quoting from a response). Some such views include the assertion that all gender identity is per se a deception as to sex. For example:

- The guidance treats a suspect's gender identity as a relevant, or even determinative, factor in establishing whether a deliberate deception as to sex has occurred. Whether it is right, desirable or workable for this position to be brought into law is an undoubtedly important issue. It remains, however, un-litigated and unlegislated. Embedding a preferred view on the matter into policy in this way represents an overreach on the part of the CPS so startling that it could be described as an attempt to usurp the function of Parliament.
- The scope of deceptions capable of vitiating consent to sexual activity is already extremely narrow; this guidance would limit that scope further, and exclusively to the benefit of trans-identified suspects. In doing so, it would reduce the level of protection afforded to victims whose consent has been obtained by deception as to the accused's sex.

Other respondents, who read the *McNally* judgment as being about deception as to identity rather than sex, take the opposing view. They argue that once a person is genuinely living in a new gender identity, that person cannot be said to be acting deceptively, and they have no duty or responsibility

to disclose their birth sex; therefore, such persons cannot be said to come within the McNally judgement and be subject to prosecution. For example:

- In my view, this is to adopt an unnecessarily pro-prosecution interpretation of Leveson LJ's judgment in *McNally*. As the proposed guidance notes, Justine McNally was considered to be a 'girl' who 'pretended' to be a 'boy.' ... The scenarios referred to in the proposed guidance relate to trans men or women who are not 'pretending' and even encompass individuals in possession of a GRC. It is less than clear the *McNally* judgment extends this far.
- The Guidance should make it clear that, as a practical matter, it is difficult to apply the idea of 'active deception' to trans individuals, because their gender identity is not an act of deception, but a reflection of their deep sense of gender identity.

CPS comment

- To date, there have been no cases considered by the appellate courts involving a trans or non-binary defendant that address the issue of deception as to sex and / or gender identity.
- It is arguable that *McNally* and the other authorities do not conclusively address the position in relation to trans and non-binary suspects. The question remains whether the sexual nature of the act is different where the complainant is deceived into believing that the defendant is not trans or non-binary; and, if so, whether different considerations apply. This has not been determined.
- As stated above, the LCJ in handing down the judgment in *R (Monica) v DPP (Boyling)* [2018] EWHC 3508 (Admin), agreed that *McNally* could be analysed as an identity or impersonation case.
- Although impersonation and deception as to identity is a potential separate line of authority, pending any further clarification from the appellate courts, our view is that the guidance must necessarily focus on deception as to sex, on which McNally provides a clear line of authority.
- We have therefore expressly addressed this issue in the guidance, with reference to the case law.

The test to be applied in cases of deception as to sex

Some respondents helpfully suggested the appropriate test to be applied in these cases. We have set out in the guidance the general principles on conditional consent that emerge from the case law and summarised these principles:

- For consent to be vitiated by a deception falling within section 74, the deception must be closely connected with the sexual act or the sexual nature of the activity, rather than its consequences or the broader circumstances in which the sexual act takes place.
- Any novel circumstances must be considered by reference to the statutory definition, namely whether the alleged victim has agreed by choice and has the freedom and capacity to make that choice.
- Consent can be vitiated by an express deception or by a failure to disclose.

In light of these principles, we have made clear in the guidance the test to be applied when considering whether a deception as to sex vitiates consent:

- Whether a deception as to (however that deception is operated) is sufficiently closely connected to the performance of the sexual act that the complainant cannot be said to have made a free choice to participate in it.

We have also clarified the principles to be applied in cases involving trans or non-binary suspects:

- Depending upon the circumstances of the case, a trans or non-binary person (including those who have a Gender Recognition Certificate (GRC) and / or have had gender reassignment) may deceive a complainant as to their sex if they choose not to disclose that they are trans / non-binary, or if they make a deliberate false assertion or lie in respect of their sex and / or gender identity.
- By reference to section 74, the test to be applied is whether the non-disclosure or representation is so closely connected with the sexual nature of the relevant act that it deprived the complainant of their freedom to choose whether to have sexual relations with the suspect.

Summary of changes to the guidance

The key revisions that have been made to the guidance are:

- The guidance, including the title, refers to “deception as to sex” instead of “deception as to gender”.
- It is made clear that the principles in the guidance apply to all cases of deception as to sex, whether the suspect is non-trans, trans or non-binary.
- There are a number of revisions to the language used in the guidance, including some explanations of words and concepts, such as “gender identity”, “gender dysphoria” and “birth sex”.
- More background information on trans and non-binary persons is provided, to assist prosecutors to make more informed decisions.
- The section on the Gender Recognition Certificate explains that since many trans persons do not obtain a GRC, and non-binary persons and those under 18 years old are not eligible for a GRC, possession of a GRC is unlikely to be of relevance in most cases.
- There is a new, extensive section on McNally and the case law on conditional consent. This section clarifies that consent may be vitiated by an express deception or by a failure to disclose; it explains the application of McNally to trans and non-binary suspects; and it sets out the test to be applied in cases of deception as to sex, including cases involving trans or non-binary suspects.
- There are extensive revisions to the section on Evidential considerations. These include:
 - Examples of the types of issues that may arise in cases.
 - The three stages regarding the question of deception have been modified and the first stage has been amended so that it focuses on the condition of the complainant’s choice.
 - Examples are provided to help explain possible conditions of the complainant’s choice and whether a condition may be sufficiently closely connected with the

sexual nature of the relevant act to be capable of depriving the complainant of freedom to choose.

- We have clarified that there is no onus or responsibility on a complainant to confirm or discover the sex or gender identity of the suspect, and we have made extensive revisions to the factors to consider in relation to whether the complainant was deceived (stage 2).
- The section on *Public interest considerations* has been revised to focus on the key public interest questions at paragraph 4.14 of the Code.

Index of responses to consultation questions

The consultation questions are set out below, each containing a link to a summary of responses received to that question, together with CPS comments.

Under each consultation question we have addressed the main points that emerged in the responses, whether as a response to that question or another.

- [Question 1: 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.](#)
- [Question 2: 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?](#)
- [Question 3: Do you agree with the evidential considerations that prosecutors must consider? If not, please identify what should be added, removed, or amended.](#)
- [Question 4: Do you agree with the three stages that should be considered when prosecutors are considering the of deception as to gender?](#)
- [Question 5: Do you agree with the public interest factors that are listed?](#)
- [Question 6: Are there any further factors in favour of prosecution that should be included?](#)
- [Question 7: Are there any further factors tending against prosecution that should be included?](#)
- [Question 8: Do you have any other feedback you wish to share around how the revised guidance could be improved?](#)

Next Steps

The final revised guidance has now been placed in [chapter 6 \(Consent\) of the CPS RASSO guidance](#) and will be published on 12 December 2024, together with this Summary of Responses.

The guidance does not represent a change in the law.

Conclusion

We are very grateful to everyone who responded to the consultation. We are content that the responses have led us to make changes that have resulted in a clearer, improved guidance.

Question 1: 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.

Appropriate language & definitions

We received a large number of suggestions on the use of language and definitions in the guidance. This was unsurprising, as we had already acknowledged in the draft guidance that there are no universally agreed definitions and the use of specific words can be contested. Trans stakeholders were concerned that we use language that is consistent with their own use of language; while many objected to language that they characterised as “ideological”, “deliberately obtuse” and “full of jargon”. Some respondents requested that the language be in plain English with clear definitions, while others commended the sensitive use of language in the guidance.

CPS comment

- We agree that the language, terminology and any definitions in the guidance need to be clear.
- There were a number of useful suggestions and we have amended words and descriptions of terms (without suggesting that our descriptions are accepted definitions) where we think it improves the clarity of the text.
- It is not our intention, or the role of the CPS, to enter into the debate around the “correct” terminology to be used. We have tried to use words that explain the relevant concepts as clearly as possible, with the aim of assisting prosecutors to apply the law to the facts and circumstances of a particular case.
- We are also mindful of the need to be sensitive and respectful in our use of language.

Examples of some of the changes we have made:

- As stated above, we now refer to “deception as to sex” instead of “deception as to gender”.
- As explained below, we now generally refer to “birth sex” and “sex recorded at birth” rather than “sex assigned at birth”, although we acknowledge that this is sometimes referred to as “sex assigned at birth”, and we use the term in relation to intersex, or variations in sex characteristics (VSC) individuals.
- We have clarified that there can be a difference between a person’s birth sex and a person’s legal sex, which can be changed by a Gender Recognition Certificate.
- We refer to how someone “experiences” their gender, which is preferred by many trans persons / organisations, as well as how they are “perceived”, to explain “gender identity”.
- To clarify the meaning of “vitiating” for the wider public, we have added “negated” in brackets.
- With regard to “gender dysphoria”, we have clarified that this does not imply that every trans person experiences discomfort or distress.
- The guidance no longer refers to “trans minors”, as a number of respondents pointed out that this is problematic, since young people experiencing gender dysphoria may not identify as trans indefinitely.

Examples of some suggested changes we have not made:

- We disagree that we should not use both “male”/ “man” and “female”/ “woman” in the guidance, as the use of these words is appropriate for the context, such as “sex recorded as male” and “trans man”.
- Some respondents asked us not to use “gender dysphoria” but instead to use “gender incongruence”, as “gender dysphoria” is outdated and disrespectful. We have used both terms, as “gender dysphoria” is still referred to by NHS websites and by the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5-TR)* (March 2022) (see American Psychiatric Association website). However, we clarify that their meaning is different: “Gender incongruence” refers to an incongruence or incompatibility between a person’s gender identity and their birth sex. “Gender dysphoria” is a medical diagnosis recognised by the NHS, where a person experiences discomfort or distress, which is related to the incongruity between their birth sex and their gender identity (this is not to suggest that every trans person experiences discomfort or distress).
- We have not dispensed with the term “gender identity”, as suggested by some respondents, as this is useful to clarify the difference between “gender” and “sex”.

Sex “assigned at birth”

A particular concern of a number of respondents was the reference to sex “assigned at birth” because they considered the term to be linked to “transgender ideology”, inaccurate and inappropriate for neutral guidance. Some point out that sex is not assigned but is observed in utero or at birth or, identified by way of clinical tests. Examples of comments received:

- “Assigned at birth” is a clinically redundant phrase ... co-opted by political lobbyists from the historical treatment of the tiny proportion of babies born with ambiguous genitalia.
- The language reeks of ideological capture - sex is observed at birth, sometimes before.
- “Sex assigned at birth” should be replaced by “sex observed and recorded at birth based on material reality”.
- The use of the term ‘assigned at birth’ is contentious and should be replaced with legal sex at birth.
- The use of ‘assigned’ appears to suggest that ‘sex’ is somehow an artificial label given at birth rather than being the biological basis of mammalian species of which we are one.

CPS comment

- The use of the term “sex assigned at birth” was intended to refer to the birth sex of a person to distinguish it from gender identity. We agree that sex is observed at birth, or identified by way of a clinical test, and then is recorded or assigned. All of these terms may therefore be considered correct.
- We do not agree that the term “assigned at birth” is ideologically biased or outdated: for instance, the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5-TR)* (March 2022) uses the term “assigned gender” when defining gender dysphoria (see American Psychiatric Association website).
- To ensure clarity, we have amended the guidance to explain that the guidance uses the term “sex” to refer to birth sex, which is arguably more accessible to prosecutors and the public than “sex assigned at birth”. We further explain that: *Birth sex refers to the sex that is*

recorded or registered at the time of birth. This is identified by observation of the infant by a midwife, nurse or doctor or, in some instances, by clinical tests, before being recorded.

Question 2: 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?

The guidance puts an undue onus on complainants

A number of respondents were of the view that the guidance puts responsibility on complainants to discover the sex of the suspect, when there should be no such responsibility at all. Examples of these responses are:

- There should be no onus on a complainant to discover or confirm the gender status of their sexual partner before they can be afforded legal protection.
- The first question places responsibility on complainants for establishing whether a sexual partner was deceiving them about his or her sex... The question of whether prospective sexual partners are not the sex in which they present themselves is probably unlikely to occur to most people, especially if they are unfamiliar with the phenomenon of transgenderism.
- Where a trans individual knows (or ought reasonably to know) that the complainant is consenting based on a particular understanding of their gender history, and that they do not match that understanding, continuing would be a culpable violation of the complainant's sexual choice and autonomy. Put bluntly, there can be no right to violate the sexual choice of another in this way.
- Overall there seems to be an undue burden on the victim in the draft guidance to prove deception.
- Placing an onus on complainants would be unlawful.

CPS comment

- The draft guidance was not intended to put any onus or responsibility on complainants to confirm the sex or gender identity of the suspect, and we recognise that there is no such obligation in law.
- In light of the comments received, we have reconsidered the section on whether the complainant was deceived, including the way in which the factors are worded. We have now made it explicit that there is no onus or responsibility on complainants. Rather, prosecutors are asked to focus on what the evidence reveals about the complainant's knowledge or belief of the suspect's sex and / or gender identity: see Question 4, stage 2 for more detail.

Offender-centric approach

A number of respondents criticised the advice that prosecutors should use an "offender-centric approach" to assessing the evidence, some saying that it ignores the rights or interests of the complainant. For instance:

- This 'offender-centric approach' is not consistent with the international human rights legal framework as it relates to violence against women and girls. The framework recommends an

approach centred around victims that promotes their participation, agency and autonomy. We believe that the CPS should ensure that the perspectives and experiences of the complainant are prioritised wherever possible, and that the consideration of a suspect's motivations and behaviours is never at the expense of the aim of preventing violence against women and girls.

- The guidance is “offender-centric” since it argues that whether there is a crime of deception, depends on whether the 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.
- I think it is wholly wrong to look at the actions of suspect before, during and after the incident to fully understand the circumstances and context of the alleged attack in this particular context.
- The term ‘offender centric’ is inappropriate given the context of the offences: sexual assault. This rather contradicts CPS policy concerning the need for a victim centred approach in general and may be considered particularly unsuitable within this context.

CPS response

- Most of these comments appear to be based on a misunderstanding of the “offender-centric approach”. This is the approach advised more generally in the Rape and Serious Sexual Offences (RASSO) Guidance. It involves looking closely at the actions of the suspect before, during and after the alleged assault, so that the main focus is on the actions of the suspect, who is the person under investigation, rather than the complainant, who is not.
- However, in these cases there is necessarily some focus on the complainant, to assess whether the suspect's sex and / or gender identity was a condition of the complainant's choice or consent, and whether the complainant was deceived and did not consent.
- To avoid any confusion, we have removed references to an “offender-centric approach” from this part of the guidance, although prosecutors will be aware from the wider RASSO guidance that this is the general approach to be taken in cases of sexual offending.

The guidance should consider its impact on gay victims

Some respondents suggested that the guidance fails to give sufficient consideration to its impact on gay victims, or that it discriminates against them. For example:

- I consider the CPS proposal to be, inter alia, homophobic: if a trans woman were to deceive a lesbian woman, for example, your proposal appears to suggest that if the trans woman 'genuinely' believed themselves to be 'female' then that would mitigate the offence ... I am at a loss how to articulate what a violation of the lesbian woman's human dignity this would be.
- Lesbian dating sites are populated by men claiming to be lesbians and online images can be altered in order that they appear female.
- Women are less able to defend themselves against men as they are stronger, so a trans identified male would be able to overpower a woman, so lesbians would potentially be put at risk if there were no legal ramifications of deceit ... it could potentially become more common.

- This obfuscation of language is particularly dangerous for women and girls, for whom a person of the opposite sex has a penis, therefore exposing a girl to the risk of unwanted penetration ('rape') and unwanted pregnancy. Same-sex attracted girls and women (lesbians) have a right to know the sex of a prospective sexual partner.
- We are concerned that the proposed guidance seems to entirely neglect homosexual men in circumstances where they may be at risk of sex by deception. We would urge the Service to rapidly acquaint itself with the practice of "stealthing" (trans identified females entering single sex male sexual spaces), concealing their genitals and engaging in sexual contact with unwitting homosexual males.
- Sexual orientation should be included as it is highly relevant to this issue in relation to consent of which sexes you would consider consenting to sex with. Deliberate violation of someone's sexual orientation as a protected characteristic, should also be a reason to consider prosecution.

CPS comment

- We do not agree that the guidance is homophobic or discriminates against gay people who may be victims of sexual offences.
- The guidance takes into consideration the protected characteristic of sexual orientation (as well as other protected characteristics).
- The principles set out in the guidance are applicable to all suspects and complainants, whatever their sexual orientation. Therefore, deception as to sex that involves a complainant who is lesbian or gay may, depending on the circumstances, vitiate consent.
- We have now explained in the section on *Evidential Considerations* that prosecutors should look for evidence relating to a complainant's freedom of choice and whether this was deprived, so as to vitiate consent. The guidance explains that freedom of choice will involve the ability of the complainant to agree to sexual encounters based on what they see as important i.e. whether the suspect's sex and / or gender identity was a condition of the complainant's choice or consent. To demonstrate this, we provide several examples, one of which relates to the choice of a female complainant to only have sexual relations with a non-trans female ie this relates to same-sex attracted girls and women (lesbians).

Evidential considerations discriminate against trans persons

A number of respondents gave reasons why they consider the evidential factors in the guidance to be unfairly balanced against trans people. For instance:

- The guidance needs to provide clarity that if the complainant only wanted to have intercourse with cisgender people of a certain gender, the onus is on them to have expressed what they were specifically seeking and/or seeking to avoid... the guidance places the burden of confirming the complainant's conception of gender on the accused.
- The guidance makes no mention as to a complainant's need to discover or confirm the gender status of a suspect, thus, it is difficult to understand where a balance has been struck. It may be worth making this assumption explicit, particularly if the gender status of the suspect would be an important factor in assessing if the complainant was deceived.

- Some people may have no 'evidence' of their gender identity. They may deem it unsafe to disclose it at home, at school or in the workplace owing to significant discrimination that trans people face.
- There are many other likely considerations (why some trans people may not always be living in their true gender identity), including a desire not to suffer a family or relationship breakdown, fear of losing employment, fear of exclusion from a close-knit community or a place of worship.
- For transgender people who change their gender (legally or socially), there is a well known "chicken and egg" problem. If, for example, a transgender man still has visible feminine breasts, that person may think it reasonable - to meet the conditions of the GRA - to conceal themselves, even (or especially) in acts of courtship. Reading the guidance, it seems that this might put some people in a double bind, where they are simultaneously encouraged to be open about their birth gender or sex characteristics by this guidance, while being encouraged to conceal them by the law (to acquire a GRC). Personally, I believe the problem is more with the law than with this guidance, but this is of course beyond your remit, but in the meantime, guidance should more clearly recognise that the GRC process encourages behaviour which may be regarded as "deceptive".
- The factors/evidence do not strike the right balance and instead put trans people in danger of unfounded and unlawful prosecution.
- Currently the guidance places unnecessary emphasis on a suspect 'proving' their gender identity.

CPS comment

- We disagree that the evidential considerations put trans persons at risk of unlawful prosecution. The guidance is intended to ensure that the case law is applied appropriately to trans and non-binary suspects. However, as we recognise in the section on *Main themes*, there is no appellate courts authority on trans or non-binary suspects.
- In light of our analysis of *Lawrance* and the other case law, we have made substantial revisions to the evidential considerations. A number of the new factors we have added are intended to assist prosecutors to make decisions in respect of trans and non-binary suspects, to ensure that they look for evidence of deception that deprives the complainant of freedom of choice. For instance:
 - Prosecutors will need to ascertain whether the suspect's sex and / or gender identity was a matter of importance to the complainant ie was it a condition of the complainant's choice or consent. This may be expressly stated or inferred from all the facts.
 - The degree to which the trans or non-binary identity of the suspect is apparent.
 - The attitude of the suspect to revealing their sex, including concerns over any potential adverse impacts.
 - The opinion of the complainant towards trans people and the suspect's knowledge of their opinion.
 - The nature and power balance of the relationship.

- We agree that it will assist prosecutor decision-making to have an understanding of the experiences of trans and non-binary persons, so that alleged offending is placed in context. We have therefore added some additional text to the introductory paragraphs, to provide further background information. For instance:
 - Text to indicate that persons applying for a GRC, who are required to live in their acquired gender for 2 years, may think it necessary to conceal their sex.
 - Text to explain that some trans people may be wary of revealing their sex due to social stigma, transphobia and safety considerations, which may produce high levels of anxiety; and that others may not openly identify as trans in everyday life, such as at home, at school or in the workplace for fear of a family or relationship breakdown, losing employment, or exclusion from a close-knit community or a place of worship.

Different gender identities

One respondent stressed that it is important to recognise that there are sexual identities which are not male or female in the usual way (intersex):

- While these are not legally recognised, they are real and a part of everyday life for a large number of people. As an example of this, I am an intersex person (from birth) with both male and female sexual characteristics. While I always communicate this to potential sexual partners, the language required is often not readily understood unless explained in detail. This is complex, highly private, and not particularly romantic. CPS guidance should raise awareness of people like me and understand that most gender non-conforming and intersex people have a gender/sex presentation which is inherently confusing or complex, through no fault of their own. It is also important to recognise that discrimination against such people is very common, and finding romantic and/or sexual partners who are respectful and understanding of this is extremely challenging.

CPS comment

- We agree that it is important for prosecutors to understand that there are various gender identities. We have therefore amended the guidance to distinguish more clearly between trans, non-binary and intersex persons.
- We have also included text to explain the inherent difficulties faced by intersex persons, as described above.

Whether trans persons should have to disclose their birth sex / trans identity

There were numerous opposing views on the issue whether a trans person should have to disclose their sex.

A number of respondents suggested that the rights of trans persons to live in their affirmed gender do not extend to non-disclosure of their trans status to sexual partners. For instance:

- However much a person has a right to live in a gender identity in civic life, this cannot extend to private life, as it simply isn't true that trans people are of the other sex.
- Being 'trans' is a subjective state (just as religious or philosophical belief, or nationality etc). There are negative rights (not to be interfered with, not to discriminate against, etc), but there is no right to have a sexual relationship with anyone ... without consent.

- In saying “there is no duty to disclose gender identity” the current guidance in fact encourages sex by deception. There is no general duty in social situations, but if someone is becoming involved in a situation involving sexual intimacy, they do have a duty to be candid about their sex if they are to obtain free consent.
- This proposal ... creates a loophole which could be exploited by bad actors, which in the long run can only damage those living with dysphoria.
- Many people do not adhere to belief in gender identity. For them, knowing the biological sex of another person is key to their consent to sexual intercourse, regardless of the other person's self-perception.
- Gender identity is not above biological sex. Anything where an individual is not being truthful of the materiality of their biology is deception.

However, many other respondents considered it the right of trans persons to never disclose their sex / trans identity to sexual partners and objected to the guidance suggesting that in some circumstances this may necessary. For example:

- This places a duty on transgender people which is not incumbent on many other groups of people who may also not disclose information which their partner may, or may not, wish to know. In effect is treats trans people as a special class of people for whom the notion of sexual contact is so extraordinary as to necessitate a much higher level of consideration and evidence in order to consent.
- Non-disclosure of trans identity is not inherently deceptive. There are various factors why a trans defendant may not disclose, for example maintaining their own privacy, past trauma, defendant may believe claimant is happy to date or be intimate with trans partner, they may believe it is so obvious that they are trans that disclosure is not necessary.
- Language of “discover and confirm” implies something inherently deceptive about trans people, with cisgender people seen as “the default” rather than onus being on people to not make assumptions about someone’s assigned sex at birth.
- Given the fluidity of gender identity at any given time, it may be difficult to evaluate the veracity of a claim that a person who has made an affirmative statement that they were (or were not) trans made the statement in the knowledge that it was false, without disproportionate interference with that person’s rights to private and family life under Article 8 of the European Convention on Human Rights.
- Guidance needs to make clear how gender history is relevant.
- There may be barriers such as risk of harm as to why transgender people may not want to disclose.

CPS comment

- As explained in the section on *Main themes*, the case of *Lawrance* clarifies that a failure to disclose one’s sex may amount to a deception as to sex. Since there is no specific case law on trans or non-binary suspects, a failure by a trans or non-binary person to disclose their sex / trans identity may, depending on the circumstances, amount to a deception that deprives the complainant of freedom to choose and so vitiate any consent.

- The final version of the guidance therefore clearly sets out the case law and the tests to be applied in cases involving trans and non-binary suspects, which include a failure to disclose sex / trans identity.

The guidance puts an undue emphasis on trans suspects as deviant

A number of respondents observed that the guidance focusses almost wholly on trans suspects, to the exclusion of non-trans suspects, and that this is misleading and prejudicial to trans persons. For example:

- The focus on transgender people is misleading, as McNally was committed by a cisgender woman ... the group is already marginalised ...the repeated focus on trans people should be amended.
- The guidance ... perpetuates the myth that trans people are sexual deviants, predators, and criminals.
- The guidance leaves aside the case of true deception - a person who is one gender deceptively pretending to be another for purposes of sexual gratification - and concentrating on transgender people with a GRC, the guidance effectively criminalises trans people in a way in which cisgender people are not.

CPS comment

- We accept that the guidance provides detailed information on trans and non-binary suspects. However, this is because the question of whether there has been a deception is more complex and nuanced when the suspect is trans. We therefore wish to assist prosecutors to apply the correct legal test, to take into account relevant considerations and to make consistent decisions in these cases.
- The final version of the guidance has been amended to make it clearer that these cases do not only involve trans suspects:
 - *Introduction: Although much of this guidance contains information on trans and non-binary suspects, this is because questions of deception and consent may involve more complex issues where the suspect is trans or non-binary. However, the guidance does not intend to suggest that most such offences are committed by trans or non-binary persons nor that trans and non-binary people are pre-dispositioned to be deceptive. In many cases, the suspect will be non-trans ie a woman purporting to be a man or vice versa.*
 - *Evidential considerations section: The principles set out in this section apply to all cases, whether the suspect is non-trans, trans or non-binary.*
- We have also now clarified in the guidance that the appellate courts have not explicitly addressed deception as to sex involving trans or non-binary suspects.

Question 3: Do you agree with the evidential considerations that prosecutors must consider? If not, please identify what should be added, removed, or amended.

We have placed all responses to Q3 under Q2 or Q4, as they addressed issues more relevant to those questions.

Question 4: Do you agree with the three stages that should be considered when prosecutors are considering the question of deception as to gender?

The three stages and their order

There was generally no objection to having a three-stage approach to considering the question of deception. However, some respondents suggested that the first and second stages should be reversed, and another respondent suggested re-framing the questions around the complainant's freedom to choose, rather than the suspect's deception. For example:

- It is not clear why, even before establishing that anyone has been deceived, the first stage question relates to the culpability of the suspect ... Why investigate the suspect's blameworthiness before identifying anything for which to blame the suspect?
- Each of these three questions investigates a potentially material consideration but ... the order in which they are posed is illogical.
- I suggest that the focus on deliberate deception be removed from the proposed guidance on the issue of consent in gender cases.

CPS comment

- We have re-considered the three-stage approach to the question of deception so that it is more focussed on the complainant's freedom to choose, in accordance with the legal test to be applied (see the section on Main Themes). The three stages have been revised as follows:
 1. Was there a condition of the complainant's choice or consent sufficiently closely connected with the sexual nature of the relevant act to be capable of depriving the complainant of freedom to choose? If so, consider the second question.
 2. Was the complainant deceived in relation to this condition and deprived of their freedom to choose, and therefore did not consent? If so, consider the third question.
 3. Did the suspect reasonably believe the complainant consented?
- We have added text to explain that the issues in the case may vary, which is why it may assist to consider the question of deception in three stages, even though these may overlap to various degrees.
- We do not agree that there should be no focus on the suspect's deception, as this is part of the legal test.

Stage 1 - Has there been an active or deliberate deception by the suspect?

(This relates to stage 1 in the draft guidance consulted on. Stage 1 in the revised guidance relates to a condition of the complainant's choice or consent.)

Deliberate deception / failure to disclose

A number of respondents suggested that it is irrelevant whether the deception is deliberate. For example:

- Where the suspect knows that their gender history is important to the complainant's choice, knows they are mistaken, but has not actively hidden this fact or presented themselves in a deliberately misleading way... In this situation they would still be showing a knowing

disregard for the sexual autonomy of the complainant of the kind sexual offences are designed to protect against.

- Gender identity cannot override deception as to sex. Trans people know what sex they are. Not disclosing this to their sexual partners, amounts to deception as to sex.
- Without knowledge of the others' biological sex, the complainant cannot reasonably consent. Failure to disclose biological sex is deception because it is failure to disclose a material fact.

CPS comment

- As explained above, in light of *Lawrance* a failure to disclose may amount to deception as to sex and the guidance has been amended accordingly.

Whether evidence of gender identity is relevant to the issue of deception

The draft guidance suggested that if a suspect genuinely perceives their gender identity to be different to their birth sex or if their gender identity is in a state of flux and/or emerging, this may be evidence there was not a deliberate deception.

A number of respondents disagreed, suggesting that perception as to gender identity has no relevance to the issue of deception, while others suggested that that if a person is living in a new (affirmed) gender, this should itself be considered a deception. For example:

- Gender identity has no bearing on the question of whether deception as to sex is deliberate, no more than any other subjective or metaphysical self-perception of a suspect would.
- A suspect's perception of their gender identity, steps they have taken to live in their new identity, or the acquisition of a GRC, are not relevant to the objective assessment of whether the suspect has deceived the complainant about their sex.
- A belief that biological sex is of no importance, or that it is of subordinate importance to a person's gender identity, does not alter the fact that every person knows their own sex... A person (with or without a GRC) who is "living as a man" or "living as a woman" may be presumed to be engaged in a deliberate deception, namely that they seek to "pass" as the opposite sex.
- A person can have a genuine belief that they have a gender identity that is incongruent with their sex, whilst still knowing what sex they are, and whilst taking steps to deceive another person about their sex.
- How strongly a suspect believes in their gender identity should not be relevant. We cannot change our sex, as opposed to gender.

However, other respondents agreed that evidence of a suspect's perception or experience of their gender identity may be evidence there was not a deliberate deception. For example:

- The Guidance should make it clear that, as a practical matter, it is difficult to apply the idea of 'active deception' to trans individuals, because their gender identity is not an act of deception, but a reflection of their deep sense of gender identity.
- Regarding the statement: 'if a suspect genuinely perceives their gender identity to be different to their birth assigned sex or if their gender identity is in state of flux and/or

emerging, this may be evidence that there was not deliberate deception’ - may be helpful to ensure steps are taken to ascertain the suspect’s position on this to assess any degree of ‘active and deliberate deception’.

CPS comment

- As explained above, we have amended the guidance in light of Lawrance, to clarify that the principles to be applied in cases involving trans and non-binary suspects are:
 - Depending upon the circumstances of the case, a trans or non-binary person (including those who have a GRC and / or have had gender reassignment) may deceive a complainant as to their sex if they choose not to disclose that they are trans / non-binary, or if they make a deliberate false assertion or lie in respect of their sex and / or gender identity.
 - By reference to section 74, the test to be applied is whether the non-disclosure or representation is so closely connected with the sexual nature of the relevant act that it deprived the complainant of their freedom to choose whether or not to have sexual relations with the suspect.
- In order to apply this test, prosecutors will need to consider all relevant facts which, depending on the circumstances of the case, may include for instance whether the suspect is trans or non-binary, or whether there has been any gender reassignment.
- Accordingly, although we have revised the factors to consider in relation to the question of deception (now at stage 2), we have retained factors relating to evidence of the suspect’s gender identity and whether there has been gender reassignment treatment.
- We have not suggested whether such factors point towards or away from the complainant having been deceived because the relevance of a suspect’s gender identity or gender reassignment to the issues in a case will depend on the specific condition of the complainant’s choice or consent. For instance, the complainant may consent to sexual relations with a trans person on condition that they have or have not had gender reassignment.

False assertions and lies

There were a number of responses that objected to the guidance suggesting that there may be a deliberate deception (and the suspect is not likely to reasonably believe the complainant consented) if the suspect lies or makes a false assertion in relation to whether they are trans. Respondents pointed out that there may be reasons for lying unconnected to obtaining consent for sexual purposes. Further, if the complainant asked a direct question about whether the suspect were trans, it would be evidence that they are suspicious and therefore not deceived. For example:

- In my view, this puts the matter too strongly. In particular, it fails to recognise lying or misrepresentation may be motivated by reasons other than a desire to become sexually intimate with another person. For example, a trans man suspect may have no reason to think disclosure of his gender identity would be a sexual deal-breaker yet, choose not to disclose for reasons of privacy and/or because he would experience disclosure as traumatic. The difficulty with this part of the proposed guidance is that it encourages prosecutors to conclude a lack of reasonable belief from the mere fact of active deception. This problem is

exacerbated by cultural stereotypes that present trans men (and women) as undesirable and as only capable of sexually intimacy with cis people via practices of stealth.

- Firstly, the reason a person may lie about their gender identity for reasons other than a desire to become sexually intimate with another person. Disclosing your gender history/sex assigned at birth may often be something private to a person or traumatic to speak about openly. In addition, the way in which a question may be asked can affect the answer. For example, many trans men consider themselves to be ‘biologically male’ and trans women ‘biologically female.’ Therefore, a question asked in a certain way could expose them to an allegation of lying when actually they are telling their truth.
- In relation to the question of whether the complainant was deceived, the examples of lies provided in the proposed guidance involve hypothetical suspect responses to hypothetical complainant questions. These questions, if asked, might be viewed as raising an important issue concerning complainant knowledge, or at least suspicion, concerning the gender history of a potential sexual partner. After all, it seems counter-intuitive to think anybody would ask a question like – are you a trans man? Or, are you biologically female? – without at least suspecting the answer might be in the affirmative.
- If a suspect were asked the hypothetical question, “are you a trans man or a trans woman”, it would suggest that a complainant possessed evidence or suspicion about the gender history of a potential sexual partner.

CPS comment

- We consider that there are circumstances when a trans or non-binary person may deliberately deceive a sexual partner as to their sex and / or gender identity and therefore vitiate consent. The clearest example of this is a deliberate lie or false assertion in relation to their sex or whether they are trans.
- As stated above, the test to be applied is whether the non-disclosure or representation is so closely connected with the sexual nature of the relevant act that it deprived the complainant of their freedom to choose whether or not to have sexual relations with the suspect. Each case will turn on its own facts.
- However, we recognise that there are many reasons why trans persons may not reveal their birth sex or trans identity. We have therefore addressed this in the section on Trans and non-binary persons – experiences. For example:
 - Many people who have transitioned may not regard themselves as trans, but simply as a man or a woman.
 - To acquire a Gender Recognition Certificate (see below), a person is required to live in the acquired gender for 2 years. To meet this condition, some may think it necessary to conceal their sex.
 - Some trans people may be wary of revealing their birth sex due to social stigma, transphobia or safety considerations, which may produce high levels of anxiety.
 - Other trans persons may not openly identify as trans in everyday life, such as at home, at school or in the workplace, for fear of a family or relationship breakdown, losing employment, or exclusion from a close-knit community or a place of worship.

- We accept that if a complainant expresses doubts or asks questions of the suspect in relation to their gender identity, this may be relevant evidence of the complainant's suspicion or knowledge and whether they were deceived. We have therefore reflected this in the text at stage 2 of the 3-stage approach to evidential considerations, indicating that the weight to give such evidence, especially suspicion, would depend on all the circumstances of the case.

Gender Recognition Certificate

Some respondents suggested that possession of a GRC should not protect trans suspects from prosecution as a deception still occurs. For example:

- The obtaining of a GRC is irrelevant to the question of whether a victim was deceived, yet CPS staff are required to take this into account in the defendant's favour. It is important to note that a person can obtain a GRC through payment of a small fee, assessment by a medic, but is not required to take any permanent steps to alter their bodily appearance. It's 'merely' an administrative process.
- 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.
- Holding a GRC does not confer the right to sexual access to other people and it infringes on the human rights of other people to create legal guidance that assumes that it does
- Possession of a GRC or steps taken to live as per gender identity should have no bearing as these could be done for nefarious reasons - including for sex by deception.

However, other respondents suggested that although possession of a GRC may be a relevant consideration, the guidance should not place undue emphasis on this, as it may wrongly imply that trans persons who do not possess a GRC do not fully identify as trans. Further, a number of respondents pointed out that accessing the relevant services can take a number of years. For example:

- Possession of a GRC may be a relevant circumstantial factor when determining whether criminal deception has taken place, and the guidance needs to make clear how this may or may not be relevant, but it should not be given undue weight.
- A trans woman does not need to have a GRC in order to describe herself as a woman, and similarly for a trans man ... if the trans person does not have a GRC no deception has occurred when they describe themselves as being of their new gender. Too much emphasis on a GRC by the prosecution could carry the suggestion to a jury that deception has occurred in those scenarios.
- NHS delays may make it difficult or unlikely that young trans person would have been able to acquire GRC before being charged with deception.
- Those under 18 cannot apply for a GRC and under current legal rules a successful application requires, as the proposed guidance notes, a two year waiting period and, of course, it should be recognised that time starts running only once a trans person is accepted into a gender identity clinic.
- For under 18s it currently takes over 3 years to access an initial appointment at the Gender Identity Development Service.

- Account needs to be taken that not all people (especially young people) who identify with a different gender to one assigned by birth are able to take steps to live consistently with their gender identity and/or acquire a new legal or administrative gender. Not accessible for a variety of factors (money, lack of safety, low support network, etc).

CPS comment

- Given these responses, we accept that although in some cases possession of a GRC may be relevant evidence, it is unlikely to be determinative. Moreover, it would be incorrect to give the impression that a trans or non-binary person's gender identity should be questioned or considered inauthentic if they have not obtained a certificate. We have therefore removed reference to possession of a GRC from the stage 2 (was the complainant deceived?) factors to consider.
- We have revised the background section on Gender Recognition Certificate to indicate that possession of a GRC is unlikely to be relevant in most cases. We also emphasise that many trans people do not obtain a GRC for various reasons, for example: persons under 18 and persons with gender identities outside the gender binary, including non-binary, are not eligible for a GRC; and some persons may not wish to obtain a medical diagnosis of gender dysphoria, a precondition for a GRC.

Prosthetic devices

One respondent suggested that when assessing whether there has been a deception, prosecutors should consider the use of a prosthetic device without the complainant being aware, as this has been a factor in several prosecutions to date. The respondent observed that while this might be viewed as vitiating consent, prosecutors should recognise the implausibility of claiming not to be able to distinguish between a prosthetic device and a penis.

CPS guidance

We agree and we have added the following factor to stage 2 of the *Evidential Considerations: Use of a prosthetic device without the complainant being aware. The complainant's inexperience in sexual relationships may be relevant to whether or not they were aware.*

Stage 2 - Was the complainant deceived and therefore did not consent?

(This relates to stage 2 in the draft guidance consulted on, which is similar to stage 2 in the revised guidance)

Relevance of the factors listed for consideration

Some respondents considered a number of the factors at stage 2 to be irrelevant to the complainant's actual knowledge of the suspect's sex and / or gender identity; other respondents suggested that the focus should be on the conditions of the complainant's choice relating to the suspect's sex and / or gender identity, rather than on deceit; whilst many objected to what they perceived as victim blaming. For example:

- The issue of the complainant failing to take available steps to discover or confirm the suspect's gender status similarly cannot have direct relevance to the fact of whether the complainant was operating on the basis of a mistaken premise. Expecting complainants to take such active steps would again place responsibility where the law does not place it, and lead to under-prosecution.

- The suggestion that a complainant may have been exploring their own sexuality will only have relevance if they were aware of the suspect's sex at the time they consented. If they were not, their exploration or otherwise is irrelevant and this should therefore not be a consideration.
- This indicates ignorance on the part of the CPS of the ways in which coercive control, lack of self-confidence, etc, operate. Individuals may be 'gaslighted', or afraid to contradict, or fearful of losing love and affection.
- It would ... be helpful for the guidance to reiterate that the focus of these considerations must be as possible evidence of the actual conditions of the complainant's choice, and the general believability of their account.
- The legal question concerning consent in the gender context is whether the complainant agreed to the sexual activity on the basis of a crucial premise about the other party's gender which is in fact not the case. Where this is so, there is no consent. This question does not leave room for consideration of whether the complainant could or should have done more to correct or discover the mistake themselves.
- It is unacceptable to suggest that a lesbian, having had online interaction with someone claiming to be a lesbian and thus assuming them to be female (given that this is what the word lesbian has always meant), should have realised the person was actually male.
- For young people in particular there is a genuine fear of being seen as 'transphobic.'
- The guidance is sexist towards women/young girls by implying that they brought it on themselves.
- Apply these same questions to a rape case, and you're victim blaming - the reference to alcohol is blatant.
- The advice slips into victim blaming where it asks CPS staff to assess whether a victim "closed their eyes" to evidence.

Other respondents agreed that the factors should relate to whether the complainant was deceived. For instance:

- There should be more focus on whether the victim has been deceived.
- Perhaps more should be said about the possibility that a complainant may have engaged in self-deception.
- It seems counter-intuitive to think anybody would ask a question like – are you a trans man? Or, are you biologically female? – without at least suspecting the answer might be in the affirmative.

CPS response

- As stated above (Question 2), the draft guidance was not intended to put any onus or responsibility on complainants to confirm the sex of the suspect, and we recognise that there is no such obligation in law.
- In light of the comments received, we have reconsidered this section, including the way in which the factors are worded.

- We have now made it explicit that there is no onus or responsibility on complainants. We make clear that focus should be on:
 - Whether the deception deprived the complainant of their freedom to choose whether or not to have sexual relations with the suspect.
 - Evidence that establishes whether the suspect's sex and / or gender identity was a matter of importance to the complainant ie was it a condition of the complainant's choice or consent? and
 - Evidence that supports the credibility of the complainant's account.
- We indicate that what is relevant is the complainant's actual knowledge or belief of the suspect's sex at the time of the alleged offending, rather than what the complainant might have discovered if they had made certain enquiries.
- We have removed the factor on whether the complainant closed their eyes to the obvious or wilfully ignored aspects of the suspect's gender.
- We have removed the reference to whether the complainant had an opportunity to discover or confirm the gender of the suspect but chose not to avail themselves of the opportunity.
- We agree that a complainant exploring their own sexuality is only relevant if they were aware of the suspect's sex, and we have amended the guidance to clarify this.
- We have added text to indicate that prosecutors should consider whether a complainant has been subject to any controlling or coercive behaviour by the suspect and the impact this may have had on the complainant, such as being afraid to question or contradict the suspect. We indicate that where there is evidence of this nature, it is more likely that the suspect has deceived the complainant.
- We have explained that a complainant may not wish to question the suspect too much about their suspicion over the suspect's sex and / or gender identity, for fear of being seen as transphobic.
- We have added other factors, which are explained elsewhere.
- We have not deleted the reference to alcohol, as this is relevant where intoxication by alcohol or drugs affects the complainant's capacity and freedom to consent.

Complainants with learning difficulties and neurobiological differences

Some respondents explained that complainants who have learning difficulties or neurobiological differences, including autism, may genuinely believe that, for example, a man (whose birth sex is male) who says he is a woman (trans woman) is someone whose birth sex is female.

CPS response

- We have reflected this in the stage 2 factors, to indicate that such persons may more easily be deceived, and therefore lack the choice or freedom to consent.

Stage 3 - Did the suspect reasonably believe that the complainant consented?

(This stage is the same in the revised guidance as in the draft guidance consulted on.)

Where a suspect fails to disclose their sex and deceives the complainant, is it possible that they reasonably believe that the complainant consented?

Some respondents suggested that a trans person could never reasonably believe that a complainant had consented. Examples include:

- If a suspect is a transperson, they can never ‘reasonably believe’ the complainant consented (particularly to genital contact) without explicitly telling them their identity. They can only ‘reasonably believe’ that they indeed ‘pass’ as the other sex - and this would be the proof that they did not tell the complainant.
- 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.
- If someone uses deception then there is no intent to obtain consent, no matter how long the passage of time between initial deception and sexual activity.

However, one respondent agreed that there are circumstances where the suspect may have a reasonable belief in consent:

- For example, it might be the case that while the suspect is aware of the complainant’s mistake (because they induced it), they are not (reasonably) aware of the issue’s importance to the complainant at the time.

CPS comment

- We agree that in some situations it will be less likely that the suspect held a reasonable belief that the complainant consented. These will include where there is evidence of coercion, manipulation, or exploitation of the complainant, and where there is a deliberate deception, such as a lie or false assertion about their sex or trans identity, which is closely connected with the sexual nature of the relevant act. These are covered in the guidance.
- However, we consider that there may be circumstances where, despite a complainant being deceived, the suspect reasonably believes that they consented. We have therefore set out a number of factors at stage 3 that may be relevant to assessing this question.
- Factors that we have added to this section include:
 - Many of the factors to be considered at stage 2 (was the complainant deceived), which may also be relevant to stage 3.
 - There may be circumstances where the suspect fails to disclose their sex or trans identity but reasonably believes that the complainant was aware of it due, for instance, to the degree to which it is apparent, the length or nature and circumstances of their relationship, or their communications.
 - The suspect may admit that the complainant was unaware of their sex and / or gender identity but claim that they believed it was not a matter of importance to the complainant i.e. a condition of the complainant’s choice or consent. Whether the suspect has a reasonable belief that the complainant consented in these circumstances will depend on all the evidence.

Question 5: Do you agree with the public interest factors that are listed?

Streamlined section on the public interest

We have reconsidered this section and streamlined it, so that it focuses on the public interest considerations set out at paragraph 4.14 of The Code, which are applicable to all offences. In particular, we have highlighted the following considerations that may be relevant:

- **Seriousness:** Sexual offending is by its nature serious. The prosecutor will assess seriousness on the specific facts of the case.
- **Culpability:** This will require an assessment of the suspect's culpable acts and omissions and may consider whether the conduct was planned or involved exploitation, manipulation or grooming.
- **Circumstances of and harm to the victim:** This will consider relevant matters such as whether there was an abuse of trust and the relationship in general between suspect and victim.
- **Suspect's age and maturity:** Prosecutors should consider the CPS guidance on Children as Suspects and Defendants and chapter 13 (Sexual Offences and Youths) of the CPS Rape and Sexual Offences Legal Guidance.

The age of the suspect should not be a factor

A number of respondents objected to age and maturity being a factor for whether to prosecute. For instance:

- The age of the suspect should not be a factor, as to date most of the defendants in deception as to gender cases have been relatively young, teenagers or in their early to mid-20s.
- Why is there inconsistency with all other law on age of legal responsibility? The proposal does not correlate with the age of consent for sexual intercourse, and sets a dangerous precedent, especially for sexual offences, by suggesting the age of legal responsibility should be higher.
- Young people who are exploring their gender identity need to know that a transgender identity does not allow them to lie about their sex or to override other people's consent.

CPS comment

- We disagree that age should not be a factor, as the suspect's age and maturity is a public interest factor in relation to all types of offending, under paragraph 4.14(d) of the Code: the younger the suspect, the less likely it is that a prosecution is required.
- However, this is only one factor that prosecutors must consider, and it does not preclude a prosecution.
- As stated above, we have provided links in this section to documents that prosecutors should consider in relation to age and maturity.

Suspect exploits, coerces, threatens, manipulates or grooms the victim

There was general agreement that a prosecution should be more likely where: a suspect exploits, coerces, threatens, manipulates or grooms the victim; there is an abuse of trust; there is a significant disparity in age or maturity.

CPS comment

- These factors will be relevant and considered under the broad headings of “seriousness”, “culpability” and “harm”, and many of them are explicitly referred to.

Age of complainant

- One respondent suggested that the guidance seems to suggest a prosecution might only be considered in the public interest if the complainant is young: this implies that adult women, including elderly women, have no right to expect that a person should not lie about their sex for the purposes of obtaining sexual gratification.
- Another respondent recommended that in view of the seriousness of the offence, the age of the complainant be added to the public interest test section. The fact that a complainant was under the age of consent (16) at the time of the alleged sexual activity is highly relevant to the seriousness of the offence.

CPS response

- We do not agree that the guidance suggests that a prosecution might only be considered in the public interest if the complainant is young.
- However, depending on the circumstances, the age of the complainant may be taken into account under the broad public interest factors listed, in particular where there is a significant disparity in the age or maturity of the suspect and the complainant, as this may make the offence more serious.

Duration of relationship / deception

- Some respondents objected to the duration of the relationship /deception being a factor that makes the offence more serious and a prosecution more likely, as it is inconsistent with the factor that suggests the amount of contact may be relevant to assessing whether the complainant was aware of the suspect’s sex.

CPS response

- We have removed this factor from the final version, as consideration will need to be given to the particular circumstances of the duration of a relationship / deception.

Out of court disposals

- One respondent objected to the guidance suggesting that an out-of-court disposal may be an appropriate disposal in some cases, stating that “out-of-court disposals are for low-level crime and antisocial behaviour - rape by deception is quite another level of crime”.

CPS response

The guidance covers all sexual offences that require the prosecution to prove absence of consent, not only rape: see sections 1-4 of the [Sexual Offences Act 2003](#). These include sexual assault and there may be cases of minor sexual assault where, depending on the circumstances, an out-of-court disposal could provide an appropriate response to the offender and the seriousness and consequences of the offending.

We have now removed reference to out-of-court disposals from the streamlined section on the public interest but in appropriate cases these may be considered, pursuant to paragraphs 4.10 and 7.1-7.2 of the Code.

The steps the suspect has taken to live consistent with their gender identity, including whether they have obtained or taken steps to obtain a GRC

Some respondents questioned the relevance of this factor. Examples include:

- The degree to which someone has taken steps to live in their assumed gender is irrelevant.
- There are no public interest factors in prosecutors choosing the ideology of ‘gender identity’ (a ‘soul-like’ quality that is unscientific and not disprovable) over the ideology of ‘material reality’.
- A suspect’s success or consistency (or otherwise) in conforming to stereotypes of dress or behaviour has no relevance to the public interest test.
- Where the evidence of the “genuineness” of the suspects gender identity does not change the fact that a crucial premise was not satisfied (and hence there would be no offence at all), the harm to sexual autonomy is not reduced. The offence remains serious.
- The way individual trans-identified people choose to live their lives is not relevant to the public interest. Crimes have either been committed or they have not.
- I don’t believe the suspect or defendant’s self-perception of their gender is relevant.

However, other respondents agreed with the factor but thought it should not favour those who have obtained a GRC over those who have not. For example:

- Non-binary people are unable to obtain a GRC, leaving them at risk of prosecution due to legal barriers.

CPS response

- We have re-considered this factor and we have not included it in the final version of the guidance.
- One of the factors at stage 2 of the evidential considerations is whether the suspect’s gender identity was different to their sex at the time of the alleged offence, and we agree it is not additionally required as a public interest factor.

Question 6: Are there any further factors in favour of prosecution that should be included?

Defendant took deliberate steps to conceal their sex

One respondent suggested that if the suspect took deliberate steps to conceal their sex, then the complexity and planning behind those steps should be taken into account. Another suggested that a knowing violation of the complainant’s choice (as opposed to an unreasonable belief that the complainant consented), is a factor tending to increase the seriousness of the offence, and in favour of prosecution.

CPS comment

- We agree that the culpability of the suspect, including whether the conduct was planned, is a relevant factor to be taken into account and the revised public interest section reflects this.
- However, we have not specified ways of carrying out a deception, or differentiated culpability on the basis of whether the suspect had an unreasonable belief, as there is a spectrum of deceitful behaviour and the prosecutor will need to consider culpability on a case by case basis.

Question 7: Are there any further factors tending against prosecution that should be included?

Autism and learning disabilities

One respondent suggested that a suspect's autism or learning disability may be included:

- The ideology that pushes slogans saying that trans people can actually become the opposite sex is very confusing for those who are not neurotypical and are prone to fixed thinking.

CPS response

- Paragraph 4.14 of The Code for Crown Prosecutors states that prosecutors should consider whether the suspect was affected by any significant mental ill health or disability at the time of the offence, when assessing their level of culpability. This may include autism or learning disabilities, so we do not consider it necessary to add a bespoke public interest factor in the guidance.

Question 8: Do you have any other feedback you wish to share around how the revised guidance could be improved?

Deception as to sex may be considered under s.76 Sexual Offences Act 2003

One respondent suggested that the guidance should advise prosecutors to rely on section 76 of the Sexual Offences Act 2003, in relation to the circumstance that "the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act", so that it would be conclusively presumed by a court that the complainant did not consent to the relevant act, and that the defendant did not reasonably believe that the complainant consented to it.

CPS comment

- We consider it unlikely that deception as to sex would fall within the ambit of section 76, noting that the courts have already ruled that it falls within section s74 of the Act.
- As the CPS RASSO guidance, chapter 6, notes: the Court in *R v Bingham* [2013] EWCA Crim 823 held that section 76 was to be strictly construed, as it removes from an accused their only line of defence to a serious criminal charge, and that it would be a rare case in which section 76 would be applied.
- In *R (Monica) v DPP (Boyling)* [2018] EWHC 3508 (Admin), the Divisional Court conducted an extensive review of the existing case law and held that the conclusive presumptions contained in section 76 should be given a stringent construction. For this section to apply, the operative deception – which by section 76(2) must be an intentional deception – must relate to the nature or purpose of the relevant sexual act. Examples include where the victim believes they are undergoing medical or surgical treatment.

ECHR rights

Some respondents suggested that the guidance fails to properly consider the rights of complainants under the European Convention on Human Rights (ECHR). For example:

- There is no meaningful balance of A8 rights (right to respect for private and family life): the guidance views these rights exclusively through the prism of the deceiver's experience without any apparent regard for that of the deceived.
- 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.
- Rape and sexual assault carried out or enabled by agents of the state are clear infringements of Article 3.
- To the extent that the guidance precludes or impedes a positive charging decision on an unlawful basis, it runs contrary to Article 3 (prohibition of inhuman or degrading treatment) amounting to a failure by the State to meet those obligations.
- A decision not to prosecute based on the legal errors in this guidance would engage the Article 8 and 14 rights (prohibition of discrimination) of complainants, since the vast majority of complainants in such allegations are female.
- The guidance creates an asymmetry in the approach to charging as between those suspects who identify as trans (or claim to) and those who do not, engaging the Article 14 rights of suspects who do not identify as trans in respect of their protection under Article 7 (no punishment without law).
- As much as a person has a right to live in a gender identity in civic life, this cannot extend to private life, as it simply is not true that trans people are of the other sex.
- The process of accurately identifying rights to a private and family life as they relate to trans identified suspects has been made significantly more difficult by the way in which the guidance creates a single cohort of people with different legal statuses. Those with a GRC fall under Article 9(1) of the UK GDPR, and s.7 of the Equality Act 2010 (gender reassignment). Those without a GRC but who are "proposing to undergo, undergoing or ha[ve] undergone a process (or part of a process) for the purpose of reassigning [their] sex by changing physiological or other attributes of sex" fall under s.7 EA 2010. Those who have not undergone, and do not propose to undergo, any process of sex reassignment but who assert a gender identity different from their sex do not fall into the scope of either provision. None of the categories are entitled to an enhanced right to privacy, and the latter two have no access to the data processing limitations of Article 9(1) of the UK GDPR.
- These changes have serious implications for the rights of women under the ECHR ... Implementing them is likely to further diminish public confidence in the prosecution of rape and other related sexual offences.

Other respondents suggested that the guidance may interfere with the Convention rights of trans persons:

- The CPS is proposing guidance which effectively strips all trans people of their rights under articles 8 and 15 of the HRA on a completely spurious and unsubstantiated hypothetical scenario involving a transgender person not disclosing their gender history when not only is

there no legal obligation to do so, but in the case of a transgender person with a GRC, their rights not to disclose are enshrined in the GRA (2004) and the GRA (section 9) explicitly states that the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

- Given the fluidity of gender identity at any given time, it may be difficult to evaluate the veracity of a claim that a person who has made an affirmative statement that they were (or were not) trans made the statement in the knowledge that it was false, without disproportionate interference with that person's rights to private and family life under Article 8 of the European Convention on Human Rights.

CPS response

- The CPS is subject to the requirement in section 6 of the Human Rights Act 1998 (HRA 1998) to act compatibly with Convention rights. In accordance with paragraph 2.10 of the Code, prosecutors must apply the principles of the ECHR, in accordance with the HRA 1998, at each stage of a case.
- We consider that the revised guidance is compatible with the Convention rights of complainants and suspects.
- The guidance provides a framework to assist prosecutors to make consistent charging decisions in accordance with the law, which does not distinguish between persons who are non-trans, trans or non-binary in relation to deception as to sex.

Equality rights

Some respondents questioned whether the CPS had complied with the Public Sector Equality Duty (PSED) under the Equality Act 2010 in drafting the revisions to the guidance, suggesting that an undue emphasis was put on the protected characteristic of gender reassignment or on trans persons generally, to the detriment of persons with other protected characteristics. For example:

- As a public body, the CPS is subject to the Public Sector Equality Duty (PSED), incorporating the duty to foster good relations between those who share a protected characteristic and those who do not. This applies to all protected characteristics and not just the only one that the CPS appears to be focused on, that is, gender reassignment. The CPS has failed in this duty in its approach to the proposed guidance and the consultation itself.
- There is no reason why a trans identified suspect (or a suspect claiming to identify as trans) should have an enhanced right to privacy where another suspect would not. Such a proposition enjoys no support from s.22 GRA, the Data Protection Act 2018, the Equality Act 2010, the Human Rights Act 1998 or any case law.

One respondent suggested that the guidance discriminates against non-binary persons:

- Non-binary gender people are, as stated in the guidance, not recognised under law. The question therefore arises as to the basis on which deception would be based. One assumes it would have to pertain to birth-assigned sex – however there are people who genuinely foreground different genders at different times depending on circumstance of internal feeling. Deception in this case would legally privilege birth assigned sex over gender – something which the Gender Recognition Act and Equality Act were specifically designed not to do.

Another respondent suggested that the guidance should explicitly address the issue of protected characteristics:

- The guidance should acknowledge the fact that it is likely that the complainant and/or the suspect will be in possession of at least one relevant protected characteristic under the Equality Act 2010, such as gender reassignment, sex and sexual orientation; and that it should clarify what may constitute direct or indirect discrimination against either the complainant or the suspect.

CPS comment

- When drafting the proposed revisions and final version of the guidance, we have had due regard to the need to achieve the objectives set out under s149 of the Equality Act 2010.
- We have consciously considered the need to pursue the aims of the PSED, in relation to persons with the protected characteristics of sex, sexual orientation, gender reassignment, gender-critical philosophical beliefs, disability and age. The public consultation was one means by which we sought to comply with our obligation.
- Prosecutors are aware that under the Code for Crown Prosecutors, they are bound by the duties set out in equality legislation.
- We are confident that the final guidance is drafted in accordance with the law and that the approach set out for prosecutors will ensure that there is no discrimination against any suspects or complainants with protected characteristics.
- We trust that the consultation process and the explanations provided in this summary of consultation responses will assist to foster good relations between people who share and people who do not share a relevant protected characteristic.

CPS Trans Equality Statement

A few respondents objected to the reference in the guidance to the *CPS Trans Equality Statement*, perceiving its contents as confusing, inaccurate, or biased against complainants. For instance:

- The approach to language use which is set out in the *Trans Equality Statement* potentially creates confusion for those involved in the criminal justice process, may result in considerable distress for victims of crime.
- Complainants may perceive the CPS' use of preferred pronouns as trivialising their allegations of deception.
- There are circumstances where it would not be appropriate to use the affirmed gender of a defendant, in accordance with the *CPS Trans Equality Statement*, such as where the perpetrator seeks to use the court process to exert control over a victim.
- Reference is made to the *CPS Trans Equality Statement* but not the *Guide for victims of rape or serious sexual assault*.

CPS response

- The draft guidance indicated that there will be some cases, such as where deception as to sex is a live issue, where it is necessary and relevant to the particular legal proceedings for a person's birth sex or their trans history to be disclosed. We have now added that it may be

acceptable for a witness (for example, a victim of sexual violence) to refer to a trans person by pronouns matching their birth sex.

- The guidance on deception as to sex does not refer to the CPS guidance on Rape and sexual offences, as it is contained within chapter 6 of that guidance.

The CPS is adopting an ideological position

A number of respondents regarded the guidance as evidence of the CPS adopting an ideological position aligned with those of the trans persons and organisations. Examples of such comments:

- This is a fundamental failing by the CPS, which it now appears more interested in virtue signalling positions in the contentious gender debate than in protecting victims of sex crime by deception.
- The proposed guidance invites lawyers tasked with making charging decisions to take account of matters which are irrelevant, prejudicial, unreliable and ideological.
- The guidance reflects a political position with which the CPS has allied itself.
- In your overview of CPS policies in the 'Trans Equality Statement 2019' and the 'Judges Equal Treatment Bench Book' the effect of Stonewall consultation is in evidence, as both documents demonstrate a bias towards a belief in gender identity over biological reality.
- We are concerned that the 'offender-centric' nature of these proposed prosecution guidelines could open the door to undue pressure or influence from transgender activists to provide 'training' for prosecutors.

CPS comment

- The CPS acknowledges the ongoing public debate about the rights of trans persons and the rights and protections of women and lesbian and gay persons. We also recognise that guidance on potential sexual offending by trans persons will invariably attract strong opinions on both sides of the debate. Clearly, the CPS is impartial in this matter. It is not our intention to enter the debate or to align our guidance with an ideological position. Indeed, that would be outside the powers of the DPP and the CPS.
- The role of CPS prosecutors is clearly outlined in the Code, a public document, issued by the Director of Public Prosecutions, which sets out the general principles prosecutors should follow when they make decisions on cases. The Code stresses that prosecutors are independent [2.1], and that *when making decisions they must not let any personal views about the ethnic or national origin, gender (sex), disability, age, religion or belief, sexual orientation or gender identity of the suspect, defendant, victim or any witness influence their decisions. Neither must they be motivated by political considerations. Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction* [2.7].
- The same considerations apply when drafting CPS guidance and these have been borne in mind when drafting and consulting on this guidance.
- As a result of the consultation, we have made significant revisions to the guidance, which is now more fully informed by the views of the public, interested stakeholders, academics and the healthcare profession.

Concerns about CPS transparency

A number of respondents expressed concern over a perceived lack of transparency by the CPS, relating to which groups were involved in pre-consultation workshops. For example:

- I worry that this is due to the lobbying by various pressure groups and that the CPS and indeed various other agencies seem to be unduly influenced by these lobby groups.
- From start to finish there is clear influence from lobby groups and plain disregard for existing law which is disturbing, given the level of decision making within our legal systems the CPS has.
- The guidance should be withdrawn (as should the existing guidance which appears to have been heavily influenced by Stonewall).
- The document describes 'trans' as "an umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth". This is the wording of the Stonewall definition and appears to indicate that the CPS is adopting the ideology promoted by that organisation.

CPS response

- The CPS regularly engages with a broad spectrum of stakeholders. Their knowledge and experience provide the CPS with invaluable perspectives, which inform the development and revision of CPS guidance.
- However, stakeholders do not have any direct influence over CPS guidance or decision making. As stated above, prosecutors are independent and must not be affected by improper or undue pressure or influence from any source. This applies equally to the drafting of CPS guidance.
- In response to a freedom of information request, the CPS has provided the names of organisations with which it consulted in pre-consultation workshops on revisions to this guidance. The organisations from whom the CPS sought feedback represented diverse views.
- More importantly, the guidance was subsequently put out to a public consultation, so that any organisation or member of the public could provide views, and the final version of the guidance has been informed by those views and has undergone many further revisions.