

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/2 TO
WITNESS STATEMENT OF THOMAS CHARLES GUEST

This is the exhibit to the Witness Statement of THOMAS CHARLES GUEST
dated 20 February 2026 **TCG/2**

[TCG/2]

This version reflects the guidance that the CPS intend to publish following these proceedings (albeit this version identifies in tracked changes any amendments from the original guidance published following the consultation). Red text identifies replacement wording intended to be included (the original wording has been retained in ~~strike-out-text~~ beneath). Text identified in yellow highlight reflects wordings which the CPS indicated to the Claimant it would remove following the PAP protocol process, but which upon reflection it intends to retain for the reasons given in the witness statement of Mr Guest.

Deception as to sex

All cases involving deception as to sex must be referred to the CCP for prior approval of a decision to charge or NFA and consultation on subsequent decisions which terminate proceedings or substantially alter the charge.

As with all cases, prosecutors must approach cases involving an alleged deception as to sex on the basis of the specific evidence and circumstances revealed by the police investigation.

However, the following information may assist by way of background for prosecutors to understand the context of such a case.

Although the words “sex” and “gender” may be used interchangeably, to refer to the state of being male or female, sex tends to refer to biological sex (sometimes referred to as “sex assigned at birth”) ~~or legal recognition~~, while gender is commonly used to refer to social or cultural differences or the way in which someone is perceived or experiences themselves (commonly known as “gender identity”). This guidance uses the term “sex” to refer to biological sex and “gender” to refer to gender identity.

A person’s gender identity might be the same as their biological sex (sometimes referred to as “cisgender” but for clarity referred to in this guidance as “non-trans”) or different to their biological sex (transgender / trans or non-binary).

Deception as to biological sex may be relevant to the issue of whether consent to sexual activity was vitiated (negated). Cases in which deception as to biological sex is

a live issue may involve either a suspect who is non-trans or a suspect who is trans or non-binary.

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 i.e. a woman purporting to be a man or vice versa.

Biological sex

Biological 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.

Intersex, or variations in sex characteristics (VSC), are individuals born with any of several sex characteristics that do not fit typical binary notions of male or female bodies but are assigned a male or female sex at birth. Their Intersex / VSC condition may present itself at birth or may only become apparent later in life, for example during puberty, depending on the condition. Intersex people may or may not see themselves as having a trans or non-binary gender identity.

Gender incongruence and gender dysphoria

“Gender incongruence” refers to an incongruence or incompatibility between a person’s gender identity and their **biological** 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 **biological** sex and their gender identity (this is not to suggest that every trans person experiences discomfort or distress). The NHS offers treatment to alleviate the distress, such as counselling, hormone therapy or surgery. Although gender dysphoria is not a mental illness, the sense of unease or dissatisfaction associated with gender dysphoria may be so

intense it can lead to depression and anxiety and have a harmful impact on daily life. Where there is evidence that a suspect or defendant is suffering from a mental health condition or disorder, prosecutors should refer to the CPS guidance on [Mental Health: Suspects and Defendants](#).

Trans and non-binary persons – identities

We are aware that terminology and language used in relation to the recognition of people's identity may depend on the context of its use. Some people may define some terms differently to us. We have tried to use terminology that is generally accepted. No offence or omission is intended.

Transgender or trans is an overarching term used to describe people who have a gender identity that is different to their [biological](#) sex. For example, a trans man is someone whose sex was recorded as female at birth but lives and identifies as a man; and a trans woman is someone whose sex was recorded as male at birth but lives and identifies as a woman.

Trans people may describe themselves using one or more of a wide variety of terms, including transgender, transsexual (even though many now consider this an outdated term), agender (without gender), gender fluid (fluctuating between genders or not having a fixed gender) and genderqueer (often associated with a rejection or subversion of conventional gender categories).

Non-binary people do not identify as a man or a woman but as both or neither. They may or may not consider themselves to be trans.

Gender identity is not the same as sexual orientation; trans people may consider themselves to be heterosexual, gay, lesbian, bisexual, pansexual, asexual or aromantic, amongst other sexual orientations.

Trans and non-binary persons - experiences

How a trans or non-binary person experiences and expresses their gender can be a complex issue. The decision on whether to prosecute must be based on the evidence

in each individual case, but the following information is provided for background context, as it may assist prosecutors to make more informed decisions:

- Many people who have transitioned may not regard themselves as trans, but simply as a man or a woman.
- Gender identity can be fluid and/or emergent for some persons, particularly for young persons, who may be exploring the nature of their identity and/or sexuality, or for non-binary people, who may identify as a man and a woman or neither.
- A person whose gender identity isn't the same as their sex may express their gender through their speech, dress, gestures, mannerisms etc, without this being a fabrication, a performance or a deception. (It is important to recognise that non-trans people may also have a multitude of ways to express themselves, even if their gender identity is the same as their sex.)
- 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 [biological](#) 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.
- Intersex / VSC persons may have particular difficulties in communicating their sex to potential sexual partners, as their gender/sex presentation is inherently complex. The language required may not be readily understood unless explained in detail, which they may consider inappropriate.

Gender Recognition Certificate

The Gender Recognition Act 2004 (GRA) provides individuals with the opportunity to be legally recognised in their affirmed gender identity by obtaining a Gender Recognition Certificate (GRC).

Under section 9 GRA, where a GRC is issued to a person, the person's gender becomes for "all purposes" the acquired gender subject to any provision made by the GRA or any other enactment or subordinate legislation. However, the phrase "all purposes" referred to in section 9 means for all "legal purposes" and section 9 should not be read as imposing recognition of the acquired gender in private, non-legal contexts. The effect of rule 9 on the operation of any other statute must be considered in light of the wording, context and policy of the statute in question.

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.

For these reasons, a trans or non-binary person's gender identity should not be considered inauthentic if they have not obtained a certificate.

Although possession of a GRC is therefore unlikely to be relevant in most cases, where it may be a relevant evidential consideration, prosecutors should request information from the police.

Prosecutors should be aware that section 22 of the GRA makes it an offence for a person who has obtained "protected information" in an official capacity to disclose that information to any other person without the individual's consent. Protected information is information about a person's application for legal recognition of their affirmed gender or, if they have legal recognition, their history of transition. There are a number of exceptions to section 22 and prosecutors should ensure the information is used only in these contexts, where applicable:

- S.22 (4)(d): the disclosure is in accordance with an order of a court or tribunal
- S.22 (4)(e): the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal

- S.22(4)(f): the disclosure is for the purpose of preventing or investigating crime.

Addressing trans persons - terminology

In accordance with the CPS Trans Equality Statement prosecutors should address trans victims, witnesses, suspects and defendants according to their affirmed gender and name, using that gender and related pronouns in all documentation and in the courtroom, except where this may lead to unfairness. If in doubt, the matter should be raised with the Court in the absence of the jury. ~~However, as recognised in chapter 12 of the [Equal Treatment Bench Book](#), there may be occasions where a person's sex or their history of transition is relevant to the particular legal proceedings and so may be disclosed. There will also be situations where it is appropriate for a witness (for example, a victim of sexual violence or assault by a trans person) to refer to a trans person by pronouns matching their birth sex. In cases where deception as to sex is a live issue such disclosure will clearly be necessary.~~

However, as recognised in chapter 12 of the [Equal Treatment Bench Book](#), there may be occasions where a person's sex or their history of transition is relevant to the particular legal proceedings and so may be disclosed. In cases where deception as to sex is a live issue such disclosure will clearly be necessary. There will also be situations where it is appropriate for a prosecutor or a witness (for example, a victim of sexual violence or assault by a trans person) to refer to a trans person by pronouns matching their birth sex.

R v McNally

The Court of Appeal in [McNally v R \[2013\] EWCA Crim 1051](#) determined that “depending on the circumstances, deception as to gender can vitiate consent” [27]. McNally was a teenage girl who impersonated a teenage boy when engaging in various forms of penetrative activity with the complainant, during four separate meetings.

Under [section 74 Sexual Offences Act 2003](#) a person consents to the relevant sexual activity if they agree by choice, and have the freedom and capacity to make that choice. In McNally, the complainant's consent was vitiated because she chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception [26].

Application of McNally to trans and non-binary suspects

The defendant in McNally **did not claim in her defence to be** trans or non-binary; she was female but presented as male. To date, there have been no cases considered by the appellate courts involving a trans or non-binary defendant that address this issue.

Although the court in McNally used the word "gender" with regard to the deception in question, it was **therefore** referring to a deception as to sex, as there was no issue of "gender identity" in the case. However, as noted in [R \(Monica\) v DPP \(Boyling\) \[2018\] EWHC 3508 \(Admin\) \(see below\)](#), McNally could be analysed as an identity or impersonation case.

McNally is therefore authority for the proposition that a deliberate deception as to the defendant's sex is so connected to the nature of the sexual activity that, depending on the circumstances, it is capable of vitiating consent.

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.

Although impersonation / deception as to identity is a potential separate line of authority, this guidance necessarily focuses on deception as to sex, on which McNally provides a clear line of authority, pending any further clarification from the appellate courts.

Other case law

In *Monica* the Divisional Court conducted an extensive review of the existing case law. In a judgement handed down by Burnett LCJ, the Court accepted that there was no defined list of circumstances which were capable of vitiating consent for the purposes of section 74. The correct approach was derived from the following cases:

- [Assange v Sweden \[2011\] EWHC 2849 \(Admin\)](#): “What may be derived from *Assange* is that deception which is closely connected with ‘the nature or purpose of the act’, because it relates to sexual intercourse itself rather than the broad circumstances surrounding it, is capable of negating a complainant’s free exercise of choice for the purposes of [section 74 of the 2003 Act](#)” [72].
- In [R \(F\) v DPP \[2013\] EWHC 945 \(Admin\)](#) Judge LCJ stated that “What *Assange* underlines is that “choice” is crucial to the issue of “consent” ... The evidence relating to “choice” and the “freedom” to make any particular choice must be approached in a broad common-sense way” [26]. In respect of *R (F)* Burnett LCJ commented, “Although there was no deception as to the nature and purpose of the sexual act, the deception was closely connected with it.”
- *McNally*: Burnett LCJ commented, “it is clear that the court was holding that the deception ... did relate to the sexual nature of this activity.” He also agreed that *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 subsequent case of [R v Lawrance \[2020\] EWCA Crim 971](#) qualified *McNally* in relation to the type of deception that is capable of vitiating consent.

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, in *Lawrance* (where it was held that deception as to fertility did not vitiate 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].

From these authorities, the following principles emerge:

- 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.
- Therefore, the test to be applied is whether a deception (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.

Accordingly, the current principles to be applied in cases involving trans or 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 to have sexual relations with the suspect.

Evidential considerations

The principles set out in this section apply to all cases, whether the suspect is non-trans, trans or non-binary.

The issues in a case involving an allegation of deception as to sex may vary. For example:

- A female non-trans suspect, who is alleged to have impersonated a male, may claim that the complainant was a lesbian who consented to have sex with her, knowing the suspect was female.
- A trans suspect may claim that they disclosed their gender identity and / or sex to the complainant, who disputes it.
- A non-trans or trans suspect may accept that there was no express disclosure but claim that the complainant must have known the suspect's gender identity and / or sex, due to the suspect's appearance and / or the nature of their relationship and communications.
- A non-trans or trans suspect may claim they reasonably believed that the complainant consented because the complainant attached no importance to the gender identity and / or sex of their sexual partners.

It may assist to consider the question of deception in three stages, even though these may overlap to various degrees, depending on the issues in the case:

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?

1. Was there a condition of the complainant's choice or consent sufficiently closely connected with the sexual nature of the relevant act?

The condition

Freedom of choice will involve the ability of the complainant to agree to sexual encounters based on what they see as important. Therefore, prosecutors will need to ascertain whether the suspect's sex and / or gender identity was a matter of importance to the complainant i.e. was it a condition of the complainant's choice or consent? **This is exclusively a subjective question and** may be expressly stated or inferred from all the facts.

For instance, a female complainant may choose to have sexual relations with only one of the following persons, or a combination of any of them (this list is not exhaustive):

- A person whose sex is male and gender identity is male (a non-trans man).
- A person whose sex is female and gender identity is female (a non-trans woman).
- A person whose sex is male but lives and identifies as female (a trans woman).
- A person whose sex is female but lives and identifies as male (a trans man).
- A person whose sex is female but lives and identifies as male and has had an operation to create male genitalia (a trans man who has had gender reassignment surgery).

Closely connected with the sexual nature of the relevant act

The condition of importance to the complainant needs to be sufficiently closely connected with the sexual nature of the relevant act to be capable of depriving them of freedom to choose.

For instance, depending on the circumstances:

- If the complainant chose to have sexual relations with a person whose sex is male and gender identity is male i.e. a non-trans male, it is likely that this condition is sufficiently closely connected with the sexual nature of the relevant act.
- If the complainant asserts that they were prepared to have sexual relations with a trans person but only if they possessed a GRC, ~~it is doubtful that~~ such a

condition is **not** sufficiently closely connected with the sexual nature of the relevant act to be capable of depriving the complainant of freedom to choose, as it ~~more likely~~ relates to the broad circumstances surrounding it.

2. Was the complainant deceived in relation to this condition and deprived of their freedom to choose, and therefore did not consent?

Prosecutors should look for evidence relating to the complainant's freedom of choice, and whether this was undermined.

Evidence that the suspect failed to disclose their sex and / or gender identity may be sufficient, depending on the circumstances of the case. But other evidence may be necessary.

The deception (whether by way of a lie, false assertion or failure to disclose) needs to relate to the condition of the complainant's choice or consent. **For example, if the complainant chose to have sexual relations with a trans man on condition that they had undergone gender reassignment, there may be a relevant deception if the trans man falsely asserts that he has had gender reassignment (or fails to disclose that he has not). Use of a prosthetic device of which the complainant is unaware would be further evidence of deceit of this nature.**

There is no onus or responsibility on a complainant to confirm or discover the sex or gender identity of the suspect. What is relevant is the complainant's actual knowledge or belief (or lack thereof) of the suspect's sex and / or gender identity at the time of the alleged offending, rather than what the complainant might have discovered if they had made certain enquiries.

Even though there may be no disclosure or a false assertion or denial by the suspect, the complainant may nonetheless become aware of the sex and / or gender identity of the suspect, whether by way of shared experiences, communications, physical appearance and speech, or a combination of such factors.

The following factors may be relevant to these issues of deception and freedom to choose, together with any others identified on the facts of the case. Some factors

clearly relate only to trans and non-binary suspects but most can be applied to all suspects:

- Whether the suspect targeted, manipulated or exploited the complainant, or exerted control or coercion during their relationship. This may result in the complainant being afraid to question or contradict the suspect, too willing to accept false assertions or denials, or fearful of losing love or affection. Where there is evidence of this nature, it is more likely that the suspect has deceived the complainant.
- The complainant's particular characteristics and life experiences, and how these may have impacted on their relationship with the suspect and their understanding of the suspect's gender identity or sex. For instance, a complainant who is young, immature, vulnerable, suffering from learning difficulties or neurological differences including autism, or inexperienced in sexual relationships, may more easily be deceived, especially where there is a disparity in age or maturity between the suspect and the complainant.
- An express false assertion or lie. This would include, for instance: a false assertion or lie relating to the suspect's sex or history of transition; or a denial that the suspect is a trans man or a trans woman.
- ~~• Whether the suspect's gender identity was different to their sex at the time of the alleged offence.~~
- Whether there has been gender reassignment treatment.
- The degree to which the sex or trans or non-binary identity of the suspect is apparent or otherwise.
- ~~• The attitude of the suspect to revealing their sex, including concerns over any potential adverse impacts.~~
- 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.
- The opinion of the complainant towards lesbian / gay / trans people etc (the specific sexual orientation or gender identity that is relevant will depend on the facts of the case) and the suspect's knowledge of their opinion.
- The nature and power balance of the relationship.

- The length of the relationship. In particular, whether the amount and nature of the contact, including communications between the suspect and the complainant, is consistent with the complainant not knowing the suspect's sex and / or gender identity and being deceived.
- The nature of and the circumstances in which the sexual act took place.
- Evidence that the complainant expressed doubts, asked questions, or made assertions relating to the suspect's sex and / or gender identity, which may indicate that the complainant was aware or suspicious of the suspect's sex and / or gender identity but nevertheless chose to consent to the sexual act. However, the weight to give such evidence, especially suspicion, would depend on all the circumstances of the case. For instance, the complainant may not wish to question the suspect too closely for fear of being seen as transphobic.
- ~~Evidence that the complainant was exploring their own sexuality at the time of the alleged offending, if it is consistent with them being aware of the suspect's sex and / or gender identity.~~

In addition to the issue of deception, prosecutors should consider whether there are any other factors that may affect the complainant's capacity and freedom to consent, such as intoxication by alcohol or drugs.

3. Did the suspect reasonably believe that the complainant consented?

If a complainant is deceived and did not consent, the next stage is to consider whether the suspect reasonably believed in consent to sexual activity.

Prosecutors should examine the facts and circumstances of the suspect's claim and consider what steps the suspect has taken to satisfy themselves that the complainant was aware of their gender identity and / or sex and that they consented to the sexual act.

When addressing this question, the following factors should be considered, together with any others relevant to the facts of the case:

- Many of the factors listed above at stage 2 may be relevant. For instance, even though the suspect fails to disclose their sex and / or gender identity they may reasonably believe the complainant consented due to: the degree to which the sex, trans or non-binary identity of the suspect is apparent; the opinion of the complainant towards lesbian / gay / trans people etc (depending on which is relevant to the case) and the suspect's knowledge of their opinion; the length and nature of the relationship or their communications; the nature of and the circumstances in which the sexual act took place; evidence that the complainant expressed doubts, asked questions, or made assertions relating to the suspect's sex and / or gender identity; evidence that the complainant was exploring their own sexuality.
- Where there is evidence of coercion, manipulation, or exploitation of the complainant, it is less likely that the suspect held a reasonable belief.
- Where there has been a deliberate deception by the suspect, it might be evidence that they know the matter is of importance to the complainant and a condition of consent. In these circumstances, it is less likely that the suspect held a reasonable belief.
- 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.
- There may be circumstances where the suspect deceives the complainant initially but, because of the long passage of time between the initial deception and the sexual activity during which, for instance, the suspect and complainant meet and interact on numerous occasions, the suspect reasonably believes that the deception no longer operates on the complainant. Such circumstances may also be relevant where several sexual offences are alleged over a period of time.

Public Interest considerations

It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour.

When considering the public interest stage of the Full Code Test, prosecutors must consider the questions set out at paragraph 4.14 of [The Code for Crown Prosecutors](#) (the Code).

Some considerations which may be relevant include:

- **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 [Children as Suspects and Defendants](#) and [chapter 13 \(Sexual Offences and Youths\)](#) of the CPS Rape and Sexual Offences legal guidance.