Consultation on the Deception as to Gender section in the Rape and Serious Sexual Offences (RASSO) legal guidance

Introduction

1. The CPS is conducting a public consultation on a proposed revision to its legal guidance on Rape and Serious Sexual Offences (RASSO), specifically chapter 6 consent, the section on deception as to gender. The purpose of the consultation is to provide interested persons with an opportunity to provide comments and to ensure the final version of the guidance is informed by as wide a range of views as possible. The revised guidance may be accessed via the link below.

2. The proposed revision is intended to provide guidance to prosecutors when dealing with cases in which deception as to gender is a live issue. In October 2020 the CPS published interim updated RASSO guidance which included a section on deception as to gender. This guidance was subject to public consultation and in May 2021 the final guidance was published.

3. The CPS regularly reviews and updates our legal guidance to ensure it supports our prosecutors. A review of the RASSO guidance identified that further direction could be provided in the deception as to gender section, to assist prosecutors with understanding the law in this complex area. Adherence to these guidelines will ensure that there is a predictability, transparency and consistency of decision making across the CPS.

4. As part of the drafting process the CPS has conducted a pre-consultation with interested groups. A first draft of the guidance was provided to these groups and feedback was provided in writing and during workshops. The feedback was considered, and revisions were made.

Background

5. The Sexual Offences Act 2003 (the Act) came into force on 1 May 2004. 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".

6. Since the Act came in to force the Court of Appeal has considered the interpretation of section 74 in a number of cases. In the case of *R v Justine McNally* [2013] EWCA Crim 1051 the Court determined that "depending on the circumstances, deception as to gender can vitiate consent".

7. Our legal guidance is an important aspect of our work and provides support to our prosecutors to make effective Code compliant decisions in all cases, thereby helping to ensure the delivery of justice. Crown Prosecutors to whom the decision-making function is delegated need to be given the clearest possible guidance about the legal test that they must apply when making charging decisions or reviewing cases. The police, who apply the Code when exercising an important discretion as to whether to bring a case to the attention of the Crown Prosecutors for a charging decision, also need guidance to ensure a fair and consistent approach to these difficult and sensitive cases.

8. These cases involve complex and sensitive decision making. The main changes relate to the section on evidential considerations. This section now contains much more detailed guidance on how prosecutors should assess the evidence in these cases. The aim is to alert prosecutors to the various complexities of gender identity, so that they are properly considered, where relevant, to the issues in any case being reviewed. The guidance also sets out a three staged approach that prosecutors should adopt when considering the question of deception as to gender. The guidance outlines questions that should be asked at each stage and relevant factors that should be considered.

9. The public interest factors that should be considered when reviewing these cases have also been expanded to give clearer guidance to prosecutors.

10. After the consultation closing date, we will consider every individual response received. A summary of the consultation responses and the final version of the revised guidance will be published on the CPS website in accordance with the Government's guidelines.

Consultation Questions

11. The consultation seeks your views on the following questions:
    - 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 question 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?

How to Respond

12. It would be helpful if you could give your feedback using our online form (see below) for ease of analysis.

13. Once you have completed the response form, please return it to Gender.Consultation@cps.gov.uk by midnight on 18 December 2022.

14. We would prefer electronic submissions if possible but, if you would rather submit your feedback in hard copy please use the response form and return it by the same date, to:

    Deception as to Gender Guidance Consultation
    Senior Policy Advisor
    Crown Prosecution Service
    10th Floor 102 Petty France
    London SW1H 9EA

15. Please include your name, organisation (if applicable), postal address, telephone number and email address in any response.

16. We look forward to receiving your response.

Link to revised Deception as to Gender Guidance

RESPONSE TEMPLATE FOR CPS CONSULTATION ON DECEPTION AS TO GENDER GUIDANCE

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Q1: Do you think that the language used is appropriate and sensitive to the issues addressed? If not, please identify concerns and share how it can be improved.
No. The language used is insufficiently sensitive to biological reality. It isn't enough to say that "sex" 'tends to refer to biological differences'. The prosecution guidelines need to acknowledge the precise root and nature of these biological differences. Sex is binary, fixed at birth and rooted in chromosomes. Para. 114 of the judgment handed down by the Employment Appeals Tribunal in the Forstater case in June 2021 is relevant here: "The leading case is still Corbett v Corbett [1971] P 83 at 104D-G, 106B0D and 107A per Ormrod J. Its effect was considered by the House of Lords in Chief Constable of West Yorkshire Police v A (No.2) [2005] 1 AC 51." https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf https://sex-matters.org/wp-content/uploads/2021/01/Corbett-v-Corbett-1.pdf The Forstater judgment found that Corbett v Corbett was more important than the Gender Recognition Act in defining sex. Section 9 of the Gender Recognition Act says possession of a Gender Recognition Certificate means 'the person's gender becomes for all purposes the acquired gender' – which is not 'sex at birth'. https://www.legislation.gov.uk/ukpga/2004/7/section/9 "The sex they were assigned at birth" is medically and legally incorrect language. Midwives perceive a baby's sex at birth, they do not assign a sex. The entire reason that rape cases involving deception matter is that the perpetrator is alleged to

have deceived the victim as to their true sex.

The prosecution guidelines casually state that sex and gender are often used interchangeably. Whilst this is at times true, the scientific definition of sex cited above, as based on chromosomes, is recognised in law, and therefore the prosecution guidelines should be amended to refer to 'deception as to biological sex'.

It is relevant that Paragraph 12 of chapter 12 of the revised December 2021 version of the Equal Treatment Bench Book acknowledges witnesses' right to refer to transgender-identifying individuals using the pronouns fitting with their biological sex. The prosecution guidelines for deception as to sex/gender need to be more closely aligned with the ETBB in spirit, as this would foster an atmosphere where witnesses are less likely to be intimidated.

https://www.judiciary.uk/wp-content/uploads/2021/12/Equal_Treatment_Bench_Book_December_2021_interim_update.pdf

At the same time these prosecution guidelines need to be amended to take into account the fact that some victims will be under the age of consent (16). This means they cannot legally consent to any sexual activity. The prosecution guidelines should be amended otherwise assumptions about under-16s 'consenting' to sexual activity with adults who deceive them about their true sex will start to be made in the criminal justice system.

Q2: 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?

This is not the appropriate balance to strike. These cases about 'deception as to gender' (or 'rape by stealth') are not primarily about balancing individuals' supposed right to live according to one's self-identified gender versus some putative duty arbitrarily ascribed to victims. There are several reasons for this:

1) It is not possible for someone to consent to sexual behaviour unless the truth about the biological sex of the other partner has been provided. The biological sex of the person engaged in sexual behaviour is central to the nature and significance of that behaviour.
2) It is wrong to assume from the outset that all defendants in deception as to sex cases identify as transgender persons. At the time of their attacks none of five individuals found

guilty in the UK courts identified as transgender persons. All were biological women, several of their victims were teenage girls, some under the age of consent.

There have been five cases of deception as to sex/gender in UK courts: Christine Wilson (2008, 2010), Gemma Barker (2009-2010), Justine McNally (2011), Fiona Manson/Kyran Lee (2012), Gayle Newland (2015)

Christine Wilson's victims were two 15-year old girls
https://www.heraldscotland.com/news/13099578.anger-sex-fraud-woman-avoids-prison/
https://www.telegraph.co.uk/news/uknews/crime/9982142/Teenage-victim-of-woman-who-pretended-to-be-a-man-speaks-out.html
Gemma Barker's victims were 15- and 16-year old girls
https://www.dailymail.co.uk/news/article-2110430/Gemma-Barker-jailed-Vctims-girl-dressed-boy-date-speak-anguish.html
https://www.thesun.co.uk/news/429783/boy-girl-groper-gemma-barker-ruined-my-life/
https://www.mirror.co.uk/news/real-life-stories/agony-of-teen-victims-of-gemma-barker-752654
https://www.dailymail.co.uk/news/article-2111535/Gemma-Barker-Jessica-Sayers-duped-dating-2-boys-realising-SAME-GIRL.html
Justine McNally's victim was a 16-year old girl
https://metro.co.uk/2013/03/21/teenage-girl-who-posed-as-boy-for-sex-jailed-3554841/
https://en.wikipedia.org/wiki/McNally_v_R
https://www.mirror.co.uk/news/uk-news/schoolgirl-justine-mcnally-freed-after-1947851
https://www.mirror.co.uk/news/uk-news/fake-penis-sex-attack-womans-6819911
https://www.mirror.co.uk/news/uk-news/fake-penis-woman-who-tricked-7813338
https://www.bbc.co.uk/news/uk-england-lincolnshire-35105980

3) Victims of sex crimes have no *a priori* duty towards perpetrators. In line with this principle, there should be no presumption that victims of deception as to sex, including teenagers under the legal age of consent have any duty to 'discover or confirm the gender status of the suspect'. Under-16s cannot legally consent to sexual activity in the first place.

Likewise, the balance in the draft prosecution guidelines is not appropriate regarding disclosure of information about a defendant's transgender status. Section 22 of the Gender Recognition Act does, as is conceded, allow for authorities to obtain information about a person's legal status (possession of a Gender Recognition Certificate, or application for one). This should be stated at the start of the section of the prosecution guidelines on the Gender Recognition Act.

Q3: Do you agree with the evidential considerations that prosecutors must consider? If not, please identify what should be added, removed, or amended.

The draft prosecution guidelines' claim that prosecutors 'should adopt an offender-centric approach' is too ambiguous. This is because it omits the scenario whereby an alleged offender who does not identify as transgender is accused of having engaged in deception in order to obtain 'consent' to sexual behaviour from a victim.

This offender-centric approach also assumes uncritically that living over time in a chosen gender could only ever have positive motives (such as personal self-fulfilment and self-expression), and never have been motivated by a perpetrator's desire to deceive others into sexual encounters.

The available estimates for transgender offenders in the prison estate is that a disproportionate number have been convicted of sexual offences. The criminal justice system needs prosecutors to be free to ask probing questions in court cases to be able to ascertain the true motives of defendants for identifying as the opposite sex/gender.

In light of these shortcomings, we consider the description of the draft prosecution guidelines' approach as 'offender-centric' to be a subtle distortion of that term. The definition of the term given by the CPS in February 2022 focuses narrowly on behaviour.

"An offender-centric approach means looking closely at the actions of the suspect before, during and after the alleged assault, so that their behaviour is the focus of the investigation."

https://www.cps.gov.uk/sites/default/files/documents/publications/Rape-Strategy-Update-2022-annotated.pdf

The draft prosecution guidelines exploit this narrowness by uncritically assuming that gender change can never have negative motivations, such as targeting individuals for deception as to sex/gender. This means that prosecutors will be wrongly discouraged from probing the motives of defendants in cases of deception as to sex/gender.

The use of the case of Justine McNally is problematic overall, due to allowing that deception as to sex/gender only vitiates consent in some circumstances. The very act and process of attempting to live in the preferred or opposite sex/gender necessarily involves taking concrete steps to conceal the true biological sex of a person from others. It is deceptive as such. The only possible reason for a person to withhold information about their transgender status (or intention to undergo gender reassignment) can be fear that the desired sexual partner would withdraw their consent in response. Deception as to sex is the fundamental issue at hand. All deception as to sex vitiates consent.

It is worth noting that the draft prosecution guidelines do not provide a coherent test for proving

the genuineness of the alleged offender's intention to live permanently as a member of their chosen gender. The claim that 'a person's gender identity is not dependent upon them obtaining a GRC' undermines the need for disclosure of a Gender Recognition Certificate on the part of the alleged offender.

The four matters listed under "how the suspect perceived their gender at the time of the offence" are subjective, and could function as lines of defence for alleged offenders given that the guidelines have been drafted to be offender-centric. They lean too much towards assuming without evidence that alleged offenders have been deceptive as to their sex 'for safety reasons', which remain unexplained. There is no warrant for foreclosing inquiry into the full range of motivations that such offenders might have. The language of 'safety reasons' could be construed as implying that the victim is somehow making the alleged offender feel 'unsafe' by bringing the case to court, thus risking a situation where victims are cast as the problem.

In light of these considerations, we recommend that the prosecution guidelines be redrafted to be victim-centric, rather than offender-centric.

Q4: Do you agree with the three stages that should be considered when prosecutors are considering the question of deception as to gender?

Regarding stage 1 on 'active or deliberate deception', the problem here is that 'gender identity' is prioritised at the expense of the moral duty to tell the truth about people's biological sex. The United Kingdom does not have a gender self-identification law, as the previous government rejected proposals to liberalise the Gender Recognition Act. There is therefore no warrant for prioritising fluid gender identities in these prosecution guidelines.

The proposed offender-centric approach is insufficient by itself to allow prosecutors 'to determine whether the suspect targeted, manipulated or exploited the complainant, or exerted control or coercion during their relationship.' Evidence from the alleged victim and any other evidence from witnesses, direct or indirect, will be required. Given that these kinds of offences often involve meeting online, evidence from internet platforms and devices will also be required.

Re: question 2, the suggested questions for prosecutors all tend towards encouraging them to blame the victim

Here we address each question separately:

"Has the complainant closed their eyes to the obvious or wilfully ignored aspects of the suspect's

gender? For instance, did the complainant have an opportunity to discover or confirm the gender of the suspect but chose not to avail themselves of the opportunity?"

Given that under question 1, the paragraph on 'how the suspect perceived their gender identity at the time' is full of ambiguities and contradictions, it is unreasonable for prosecutors to be advised to ask 'has the complainant closed their eyes to the obvious?'. Nothing appears obvious in a framework which allows for fluid gender identity and prioritises the absolute right of individuals to live according to self-identified gender.

Suggesting that prosecutors ask whether complainants have 'wilfully ignored aspects of the suspect's gender' is a highly ambiguous statement. It puts the onus on the alleged victim to discover the truth about the sex of the alleged perpetrator, something that a self-identified transgender perpetrator would want to conceal. This opens the door to blaming the victim for the perpetrator's actions.

"Is the amount and nature of the contact, including communications between the suspect and the complainant, consistent with the complainant not knowing the suspect's gender and being deceived?"

It is unclear how the amount of contact between the two parties could in and of itself reveal information as to whether the complainant knew the true biological sex of the alleged perpetrator. We recommend removing the words 'the amount and' from this question.

"Is there any evidence that the complainant was exploring their own sexuality at the time of the alleged offending?"

The Crown Prosecution Service needs to explain precisely why prosecutors should ask this question. Exploring one's sexuality typically refers to a person's alleged insecurity about same-sex sexual orientation. It is used at times to excuse sexual offences. There is in reality no morally objective excuse for deception as to sex. In particular we must emphasise that such an excuse cannot apply where the complainant was under the age of consent (16) at the time of the sexual encounter.

"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."

This statement needs to be amended to state clearly and unequivocally that if the complainant was under 16 at the time that sexual activity took place, they were legally incapable of consenting, and that as such, none of these other factors apply in such cases.

Regarding question 3, there is no warrant for assuming *a priori* as this draft does, that the suspect 'did not reasonably believe that the complainant consented' in certain scenarios. Only investigating individual cases can lead to such a statement.
It is possible for a perpetrator to have deceived a victim whilst assuming cynically that the victim had consented to sexual activity with the personal invented by the perpetrator.

Q5: Do you agree with the public interest factors that are listed?

In view of the seriousness of the offence, we recommend that the age of the complainant (alleged victim) be added to the public interest test. 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.
It is unclear what 'the nature and level of the sexual activity' means.
'Maturity' is not a relevant consideration for the public interest test. It is a subtle way of undermining the principle of the age of consent to sexual activity in law. We strongly recommend removing it altogether.
'Age and maturity of the suspect' is clearly being used here to excuse young adults who are found to have committed sexual offences, and to keep them out of prison when they should be imprisoned. It also looks like an attempt to imply that the legal age of responsibility for sexual offences should be higher than it is. As most offenders in these deception as to sex/gender cases are under the age of 25, the statement that 'young adults continue to mature until their mid-twenties' is a thinly-veiled excuse to keep these types of offenders out of prison altogether.
It is unreasonable to add to the public interest test the question as to whether the complainant 'entered into sexual activity willingly', having already eroded the legal notion of consent by ignoring the age of consent and prioritising a fictional absolute right to live in a self-identified gender.
We note in this respect the use of the term 'unwillingly' in chapter 6 of the CPS legal guidance on rape and sexual offences, with reference to children, published in 2021.
"Not all grooming will vitiate consent. In R v Sean Robinson [2011] EWCA Crim 1916, the Court Appeal held that in circumstances where, due to immaturity, the complainant does not, or may not, have the capacity to understand the full significance of what she is doing, and in particular, where there is evidence of acceptance or acquiescence, **then it would be open to the jury to infer**

she unwillingly went along with the acts, which she did not in fact wish to engage in. This judgment highlights aspects of the evidence in this case which, it was said, could be relied on to infer the acquiescence or acceptance of the complainant rather than positive consent."
https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent
The current proposed prosecution guidelines manipulate this distinction between 'unwilling' and non-consenting victims (which exists due to the victims being under the age of consent), by turning it on its head so that deeming a victim to have 'entered into sexual activity willingly' takes precedence over whether or not the victim was above the legal age of consent (16).
We strongly recommend the removal of the factor of 'Whether the complainant entered into sexual activity willingly.'

Q6: Are there any further factors in favour of prosecution that should be included?

The age of the complainant at the time of the alleged sexual activity should be included.
We recommend that all cases involving activity where one party is under the age of consent (16) be considered for prosecution.
It is relevant that in all five cases of deception as to sex/gender, the offenders appear to have assumed that their victims were heterosexual and could therefore be deceived into having (pseudo)-heterosexual relations with them. The question therefore arises as to what offenders' motivations could be in such cases.
As there is a legal right to determine one's sexual orientation (under Article 14 ECHR), cases of deception as to sex arguably infringe upon this, due to offenders deceiving victims into pseudo-heterosexual activities which in reality are disguised same-sex sexual activities. None of these victims would have consented to same-sex sexual activities had this been what was openly asked of them.
It is relevant here that the rate of prosecution for sexual offences is already very low. As they stand these guidelines risk lowering the rate still further given that they erode consideration for the age of consent, imply a need to raise the age of legal responsibility for sexual offences, and are offender-centric. All these things would reduce public trust in the criminal justice system.

Q7: Are there any further factors tending against prosecution that should be included?

No

Q8: Do you have any other feedback you wish to share around how the revised guidance could be improved?
The Code for Crown Prosecutors states that prosecutors must be independent "and must be free to carry out their professional duties without political interference and must not be affected by improper or undue pressure or influence from any source." 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.

How did you hear about this consultation?

- Other website