

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

Content warning: This document contains references to rape and sexual assault throughout and discussion of allegations of gender deception which readers may find upsetting.

Full details of the consultation can be found on the [CPS website](#).

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.

Mostly yes. We would highlight concerns about the the following: *“while “gender” tends to refer to social or cultural differences and the way in which an individual perceives themselves.”* and *“If a suspect genuinely perceives their gender identity to be different to their birth assigned sex”*

We would argue that someone’s gender is not simply a matter of perception, but rather someone’s true and authentic identity. If a person perceives themselves to be a man, we would suggest that this means that they *are* a man. Therefore we would propose an amendment to say that where a person’s *‘gender refers to the way in which an individual identifies’* and *‘if a suspect genuinely identifies their gender as different to their birth assigned sex’*

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?

In our responses to questions 3, 5 and 7, we would like to highlight some concerns with the evidential stages. In particular, as a charity that support young trans and gender diverse people, we are concerned that many of the recent prosecutions for sex crimes on the basis of deception as to gender affect young people.

We also wish to highlight concerns about the language of ‘discover and confirm’ the gender status of a suspect. The language of discovery implies that something inherently deceptive about trans people, with cisgender people seen as ‘the default’ rather than the onus being on people to not make assumptions about someone’s assigned sex at birth.

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

Under evidential stage 1, the proposed guidance suggests the following examples might constitute 'active deception' under the McNally ruling: "where a suspect falsely asserts that their gender identity is the same as their birth gender/assigned biological sex; or lies in response to questions about their gender history; or denies being a trans man or a trans woman."

The proposals stated Justine McNally was considered to be a 'girl' who pretended to be a 'boy' yet the scenarios related to trans men or trans women, who are not pretending to be the gender with which they identify.

Even if a trans person lies about their gender history or assigned sex at birth, they remain an authentic man. We would argue therefore that someone's gender history should not be considered material to the case and that the proposed guidance misrepresents the ruling on McNally where the defendant asserted both at trial and on appeal that she was a girl. A non transgender person would not be considered under obligation to disclose medical history (such as hormone treatments or surgery) which may affect their sexual biology.

We would note the line stating that "For example, where a suspect falsely asserts that their gender identity is the same as their birth gender/assigned biological sex; or lies in response to questions about their gender history; or denies being a trans man or a trans woman"

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.

Furthermore, 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.

We also have concerns about the type of evidence which may assist to establish how the suspect perceived their identity: We suggest that a GRC is not 'strong' evidence as the majority of trans people do not acquire one.

Considering the relative youth of defendants prosecuted for sex crime on the basis of deception as to gender (Gemma Barker (2012) 19, Justine McNally (2013) 17, Chris Wilson (2013) 20, Gayle Newland (2015) 25, Kyran Lee Mason (2015) 25, and Jason Staines (2016) 23). Under current legislation, those under 18 cannot apply for a GRC and requires a person to have lived in their acquired gender for two years.

With the current delays to accessing healthcare and a gender dysphoria diagnosis within the NHS for trans people, it is very unlikely that a young trans person charged with a sex crime for deception as to gender would have been able to acquire a GRC, even if they wanted to.

We would also suggest that a young person may have no 'evidence' of their gender identity. It remains commonplace that a young person may deem it unsafe to disclose their gender identity in the home, at school or in the workplace owing to the significant discrimination that trans people face, and as a result they may not have access to documentation to evidence their gender.

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

Yes.

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

"The steps the suspect has taken to live consistent with their gender identity" will vary significantly between trans people. As previously mentioned, under 18s currently wait over 3 years to access an initial appointment at the Gender Identity Development Service (GIDS) meaning taking medical steps is not always possible. In addition, the proposed guidelines detailed in the Interim Service Specification for specialist gender dysphoria services for children and young people explicitly state that social transition (changing your name, clothing, mannerisms and pronouns) in adolescents should not be encouraged unless there is a diagnosis of gender dysphoria (itself a requirement to access a GRC). In this specification, GPs are asked to initiate local safeguarding protocols if an under 18 is accessing medication from a private provider, placing further barriers in the way of a young person taking steps to live consistent with their gender identity.

Similarly, many trans people may feel unable to take steps to transition if they do not feel safe in their transgender identity in their workplace or educational institution.

While we welcome the reference to eligibility and context, we believe there could be further acknowledgement of the significant challenges, especially amongst trans young people, in accessing a GRC.

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

No.

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

We would like to again highlight the point rightly made in the guidance stating that "a person's gender identity or affirmed gender is not dependent upon them obtaining a GRC and the vast majority of trans people do not obtain a GRC." We believe that considering the points made above relating to the existing barriers and long waits for trans young people and adults to secure the diagnosis of gender dysphoria necessary to access a GRC, even if a young person wanted to take steps to have their gender legally recognised, it is highly unlikely they would be able to access a GRC.

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

No