**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

1. 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”.
2. 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”.
3. 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.
4. 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.
5. The public interest factors that should be considered when reviewing these cases have also been expanded to give clearer guidance to prosecutors.
6. 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

1. 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

1. It would be helpful if you could give your feedback using our online form (see below) for ease of analysis.
2. Once you have completed the response form, please return it to [Gender.Consultation@cps.gov.uk](mailto:Gender.Consultation@cps.gov.uk) by midnight on 18 December 2022.
3. 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

1. Please include your name, organisation (if applicable), postal address, telephone number and email address in any response.
2. 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**

Name:

Organisation (if applicable):

Address:

Telephone:

E-mail:

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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.** |
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| **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?** |
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| **Q3: Do you agree with the evidential considerations that prosecutors must consider? If not, please identify what should be added, removed, or amended.** |
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| **Q4: Do you agree with the three stages that should be considered when prosecutors are considering the question of deception as to gender?** |
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| **Q5: Do you agree with the public interest factors that are listed?** |
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| **Q6: Are there any further factors in favour of prosecution that should be included?** |
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| **Q7: Are there any further factors tending against prosecution that should be included?** |
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| **Q8: Do you have any other feedback you wish to share around how the revised guidance could be improved?** |
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**How did you hear about this consultation?**

* National press
* Television or Radio
* Specialist press (e.g. Law Society Gazette)
* CPS Website
* SPA Website
* Other website
* CPS Twitter feed
* Other Twitter feed (or social networking site)