

# The New CPS ‘Deception as to Sex’ Guidance: The Implications for Sexually Active Trans People

The Journal of Criminal Law  
2025, Vol. 89(5-6) 265–278  
© The Author(s) 2025



Article reuse guidelines:  
sagepub.com/journals-permissions  
DOI: 10.1177/00220183251375782  
journals.sagepub.com/home/clj



**Jonathan Herring**

Exeter College, University of Oxford

**Alex Sharpe** 

School of Law, University of Warwick

## Introduction

The latest CPS guidance on consent was published in late 2024, after a draft and consultation report.<sup>1</sup> Just over 5 years ago, Rape Crisis produced their report entitled the Decriminalization of Rape.<sup>2</sup> While a provocatively exaggerated claim, the exaggeration is limited. Only a tiny number of rapes result in a conviction. In 2024, 69,184 rapes were reported to the police, but only 2.6% led to a charge and only 1220 to a conviction.<sup>3</sup> Although it is worth noting that just over half of rape cases lead to a conviction. Given we know only 1 in 6 rapes are reported to the police,<sup>4</sup> less than 3 in 1000 are leading to a conviction. Guidance from the CPS on effective prosecution of this epidemic of sexual violence is welcome, particularly on the troublesome concept of consent, which is at the heart of most prosecution and charging decisions.

It is therefore somewhat bizarre that nearly 60% of the guidance (4788 words out of 8164 words) is dedicated to a section entitled ‘deception as to sex’. Whatever fascination cases of ‘gender fraud’ may hold it is hard to understand why, given the huge problems with rape prosecution and the severe impact of sexual violence against women, these cases deserve the considerable attention they have received. Of course, the topic of the definition of sex/gender has dominated certain social media spaces and has received disproportionate attention in broader public discourses, but it remains striking that of all the deceptions that might be used to obtain/facilitate sex, it is those pertaining to ‘gender fraud’ (now renamed ‘deception as to sex’) which preoccupy the guidance.<sup>5</sup>

1. ‘Deception as to Sex’ in *Rape and Sexual Offences – Chapter 6: Consent*, (Crown Prosecution Service, 2024) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> [accessed 4 June 2025].
2. ‘The Decriminalisation of Rape: Why the Justice System is Failing Survivors and what needs To Change,’ (Rape Crisis England and Wales 2020).
3. H. Evenett, *Rape: Levels of Prosecutions* (London, House of Lords Library, 2025) 2.
4. *ibid*, 2.
5. The CPS guidance offers the explanation that it is ‘because questions of deception and consent may involve more complex issues where the suspect is trans or non-binary’. Whether they do so is perhaps debateable. What is clear however, is that, with exception of *R v Devonald* [2008] EWCA Crim 527, most recent cases brought for sexual fraud have been prosecutions for gender

### Corresponding author:

Alex Sharpe, Professor of Law, School of Law, University of Warwick, CV4 7AL.

Email: alex.sharpe@warwick.ac.uk

Be that as it may, clearly the CPS felt the issue needed careful consideration. We suggest that guidance of this kind offered by the CPS might helpfully achieve three goals. First, it might offer an accurate summary of the current law to guide prosecutors in determining the likelihood of success. In doing that we might expect the guidance to highlight areas where the law was unclear as, again, that is important in assessing the likelihood of success for a prosecution. Second, the guidance might offer clear advice for prosecutors in determining whether it would be appropriate to prosecute. Third, the guidance might provide members of the public who may be affected with advice on how they need to behave in order to avoid prosecution. We think this guidance fails, especially in relation to the first and third of these goals.

In Parts 2 and 3 of this article, we highlight how the first goal of accurately stating the law is missed in two ways: the relevance of the act/omission distinction and whether ‘deception as to sex’ covers deception as to gender history as well as deception as to gender identity. In Part 4, we explain how the second and third goals are not met: the guidance fails to offer clear advice for prosecutors seeking to decide whether to prosecute and members of the public wishing to avoid prosecution. We do this by considering four hypothetical scenarios in order to assess how CPS decision-making might play out in the future based on the new guidance generally and, in particular, on the three evidential stages the guidance lays out and in relation to which decision-making is to proceed. One of the difficulties that arises here is that the CPS detail a panoply of factors for consideration without providing a clear steer as to how prosecutors should weigh these various, and often competing, considerations, a problem that may lead to a default cisnormative interpretation of events. In considering our hypothetical scenarios, we will consider many of these factors (those pertinent to the scenarios) and endeavour to make a sensible assessment.

## The Act/Omission Distinction

The first of the two legal issues is the question of whether a distinction in this context is drawn between a case where a defendant actively deceives the complainant by making an untrue or misleading statement and a case where the defendant fails to correct a mistaken belief/assumption made by the claimant.

The CPS initially indicated they believed that distinction to be significant and that they would not prosecute ‘gender fraud’ cases which rested on an omission (failure to disclose).<sup>6</sup> However, in their current guidance, they take the view that the Court of Appeal in *Lawrance*<sup>7</sup> had determined that omissions can count as material deceptions, meaning the distinction between a failure to disclose and an active deception was not fundamental. The CPS guidance states: ‘It matters not whether the suspect deliberately withholds information or states an explicit untruth’. In this Part, we question their assertion that *Lawrance* resolves legal ambiguity on the point.

If we start with the decision in *Lawrance*, we think the position of the current law is far less clear than the CPS suggest. The first point to note is that *Lawrance* itself was a case involving an active deception, rather than a failure to disclose. Indeed, in the opening lines, the Court identifies the question at hand: ‘Can a lie about fertility negate ostensible consent?’<sup>8</sup> So any discussion about failure to disclose was clearly obiter.

---

fraud and all of these have been brought against LGBTQ people and especially trans men: *R v Gemma Barker* 5/3/12 (Unrept, Guildford Crown Court); *R v Chris Wilson* 7/3/15 (Unrept, Edinburgh High Court); *R v Justine McNally* [2013] EWCA Crim 1051; *R v Gayle Newland* 15/9/15 (Unrept, Chester Crown Court); *R v Kyran Lee (Mason)* 16/12/15 (Unrept, Lincoln Crown Court); *R v Jason Staines* 24/3/16 (Unrept, Bristol Crown Court); *R v Newland* 29/6/17 (Unrept, Manchester Crown Court); *R v Carlos Delacruz* 5/9/18 (Unrept, Edinburgh Sheriff Court); *R v Duarte Xavier* 9/11/18 (Unrept, Kingston Crown Court); *R v Tarjit Singh* 27/7/22 (Unrept, Snaresbrook Crown Court); *R v Georgia Bilham* 14/6/23 (Unrept, Chester Crown Court).

6. A. Sharpe, ‘Deception as to Gender’: A Review of Proposed Revisions to CPS Legal Guidance on Rape and Serious Sexual Offences’ (2024) 89(1) *Journal of Criminal Law* 29.

7. [2020] EWCA Crim 971.

8. *ibid.*, at [1].

The obiter passages that discuss the issue are as follows:

Yet 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.

In our view, in any event, 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. The issue is whether the appellant's lie was sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it.<sup>9</sup>

We make three points about this discussion. First, the argument is based on the suggestion that the distinction between active deception and a failure to disclose is 'very slippery' and that 'it is difficult to draw clear principled lines' between the concepts. This is a surprising claim. It is a distinction that is drawn in the Sexual Offences Act itself. Section 76 creates a presumption of no consent in a case where:

- (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
- (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

Both of these presumptions appear to require a positive act, certainly in the case of (b), where an impersonation is required. So, the distinction between deception and a failure to disclose is built into the Act.

Further the distinction between an act and an omission is built into the foundation of criminal law itself. As is well known in English and Welsh criminal law generally, an omission does not attract criminal liability unless there is a duty to act or a specific statutory offence covering it.<sup>10</sup> This is also reflected in the Fraud Act 2006 which draws a distinction between fraud by false representation (section 2) and fraud by failing to disclose information (section 3).

While it is true that the precise line between an act and an omission (an active deception and a failure to disclose) can be difficult to draw, it is one that is foundational in the criminal law. The slipperiness of the distinction seems not greater here than in any other context. Accordingly, that does not provide an argument for doing away with the distinction in this context.

Second, the claim it makes 'no difference' whether there was an express declaration or a failure to disclose seems implausible. As already indicated, the general law is willing to punish failures to disclose but only where there is a duty to make that disclosure. In other words, an omission and act can both lead to liability, but only in cases where in the case of the omission there is a duty to disclose. Where there is a duty in the case of an omission, there is an important question of whether the duty has been breached. It may be the court believes that there always is a duty to disclose information which is 'sufficiently closely connected to the performance of the sexual act'. That would require much more explanation and would need to raise a further question, namely, whether in a particular case the duty was breached.<sup>11</sup> In particular, an acknowledgement that where a disclosure would risk a serious harm or requires a breach of the defendant's human rights, non-disclosure might not breach the duty; in the same way, a person under a duty to rescue would not breach their duty if it would be dangerous to attempt the rescue. Certainly, there are special issues that arise in the non-disclosure cases that do not in an 'active fraud case'.

9. *ibid.*, at [40–41].

10. A. Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 LQR 424.

11. For a discussion of the kinds of issues that would need to be considered see Alex Sharpe, 'European human rights law and the legality of sex offence prosecutions based on deception as to gender history' (2024) 44(4) *Legal Studies* 631–648.

Third, these *obiter dicta* in *Lawrance* must stand alongside *obiter dicta* pointing the other way in other cases. In *McNally*,<sup>12</sup> the Court of Appeal appeared to place weight on the distinction between an active deception and a failure to disclose. For example, in their discussion of cases involving virus transmission it was stated

*EB* was not saying that HIV status could not vitiate consent if, for example, the complainant had been positively assured that the defendant was not HIV positive: it left the issue open.

Elsewhere there are references to *Assange*<sup>13</sup> which the Court of Appeal in *McNally* emphasised involved an ‘active’ deception. Indeed, the Court of Appeal in *EB*<sup>14</sup> emphasised the discussion was about a failure to disclose HIV status (rather than an active deception) again indicating they understood the distinction to be fundamental. So, it seems, at best, there are conflicting views among the Court of Appeal discussions of the issue. Certainly, it seems to be a stretch to say *Lawrance* in *obiter* comments has settled the issue. To rest the guidance on a debatable interpretation of the law (without making that clear, especially where that interpretation serves to undermine the liberty of the subject) is unfortunate.

## Deception as to Sex: Does it Cover Only Gender Identity or Also Gender History

The second legal issue is that the CPS appears to accept that the current law makes it clear that deceptions (active or otherwise) can negate consent in relation to both gender identity and gender history. Thus, they note in their guidance that ‘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’. We accept that the current law as set out in *McNally* does cover deceptions as to gender identity but are far from clear the current law covers gender history.

By ‘gender identity’ we refer to a person’s own understanding of their gender as a man, woman or as non-binary. In simple terms this might be reflected in the pronouns they wish to be used or how they wish to be understood by another person. In contrast, gender history refers to the sex a person was recorded as having at birth, what surgery or other medical interventions they may have undertaken, and whether they have obtained a gender recognition certificate or otherwise sought to have a legal change made in relation to the recording of their sex/gender.

Gender histories, of course, may differ. For example, a person may be registered as male at birth, then transition to female, but later revert to adopting a male identity.<sup>15</sup> Or, in a more common scenario, a person may have been assigned male at birth, but now identify as female, but not wish to disclose to their partner the details of their history (what medical interventions, if any, they may have had or their precise legal status or how they were recorded at birth). While both of these cases entail a possible deception as to gender history, neither involves deception as to gender identity. This serves to highlight the importance of the distinction we draw and the lack of legal clarity on the point, a matter to which we now turn.

In *McNally* Sir Brian Leveson P described the case as one where the complainant ‘chose to have sexual encounters with a boy and her preference (her freedom whether or not to have a sexual encounter with a girl) was removed by the appellant’s deception’.<sup>16</sup> And he concluded that the nature of the sexual act was

12. [2013] EWCA Crim 1051.

13. *Julian Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

14. [2006] EWCA Crim 2945.

15. We are not suggesting this is a common practice, and we note that at least some incidence of it is likely to be inexplicable in terms of experiences of transphobia and cissexism.

16. *McNally*, above n. 5 at [26].

‘on any common-sense view, different where the complainant is deliberately deceived by the defendant into believing that the latter is male’.<sup>17</sup> There are at least two ways of interpreting His Honour’s statements and the difference may prove crucial to the question of liability for trans suspects. First, it might be argued that he was drawing a distinction between deception as to gender identity (material) and deception as to gender history (non-material). That is, Justine McNally’s deception perhaps lay in the fact that she was a girl who pretended to be a boy (deception as to gender identity). In contrast, the court might have been willing to view a trans man who made no pretense about his gender identity, but who either lied about or failed to disclose his gender history, to have committed either no deception or a non-material deception.

On this reading, use of the words ‘boy’ and ‘girl’ and ‘male’ in the quoted parts of his judgment are not to be equated with biological sex. Terms like male and female, man and woman, and sex and gender are often used interchangeably in law.<sup>18</sup> Moreover, trans men and women with Gender Recognition Certificates are, respectively, male and female in law ‘for all purposes’.<sup>19</sup> While there are some exceptions to the comprehensiveness of this recognition,<sup>20</sup> including for the purposes of some provisions of the Equality Act 2010, as decided recently by the Supreme Court,<sup>21</sup> this does not affect criminal law either directly or by necessary implication.<sup>22</sup>

Alternatively, the statement might be interpreted to mean that the use of the word ‘male’ indicates biological sex. This interpretation would mean that deception as to gender history, as well as deception as to gender identity, is considered legally material. This is the CPS’s view. As they state in their guidance, ‘McNally is therefore authority for the proposition that a deliberate deception as to the defendant’s sex [a term they define elsewhere in their guidance as “birth sex”] is so connected to the nature of the sexual activity that, depending on the circumstances, it is capable of vitiating consent’. In our view, this statement is questionable for at least two reasons. First, as we have indicated, it is far from clear *McNally* is authority for the proposition outlined. As we argue, *McNally* might plausibly be interpreted as limited in its application to deception as to gender identity. Our view is supported by the fact that Justine McNally ‘was not trans or non-binary’ and the fact ‘there have been no cases considered by the appellate courts involving a trans or non-binary defendant that address this issue’, points noted by the CPS in their guidance.

Second, in addition to legal uncertainty surrounding the significance of the gender identity/gender history distinction in law, there is also ambiguity concerning whether gender history is sufficiently connected to the nature of the sexual activity. As is well-known, a distinction between deceptions that are closely connected to sex acts and those that are considered merely part of the broader circumstances surrounding it, has long been established by the courts,<sup>23</sup> and was recently affirmed and developed by *Lawrance*.<sup>24</sup> However, less clear is the CPS guidance claim that ‘McNally is 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 ... it is capable of vitiating consent’. After all, as Beatrice Krebs has suggested, in applying this test, the

17. *ibid.*, at [25].

18. S. Cowan and others, ‘Sex and Gender Equality Law and Policy: A Response to Murray, Hunter Blackburn and Mackenzie’ (2020) *Scottish Affairs* 1.

19. Gender Recognition Act, 2004, s. 9.

20. For example, a transgender person will remain the mother/father of any existing child despite the grant of a recognition certificate (s. 12) and will be prohibited from participating in competitive sport where a restriction is considered necessary either to ensure fair competition or the safety of other competitors (s. 19).

21. *For Women Scotland v The Scottish Ministers* [2025] UKSC 16.

22. We recognise that s. 20 of the Gender Recognition Act 2004 creates an exception in relation to ‘gender-specific offences’. This provision appears designed to ensure a trans woman with a penis cannot avoid a rape conviction on the basis that she is legally female. However, we do not think this provision has implications for determining the law in relation to deception as to gender history. Rather, it simply ensures that trans women who have a penis can be convicted of penile-vaginal/anal/oral rape.

23. *R v Flattery* 2 QBD 410; *R v Linekar* [1995] QB 250; *Assange* [2011] EWHC 2849; *Monica v DPP* [2018] EWHC 3508 (QBD).

24. [2020] EWCA Crim 971 at [14].

court is asking whether the deception relates to ‘the mechanics’ of the act.<sup>25</sup> That is why a deception as to fertility in *Lawrance* itself was insufficiently material. It did not impact, the Court thought, the physicality of the act. Similarly, the Court of Appeal has explained that ‘lies concerning marital status or being in a committed relationship; lies about political or religious views; lies about status, employment or wealth’<sup>26</sup> will not be sufficiently material. By contrast, the deceptions in *Assange and R v (on the application of F)*, deceptions regarding condom use and ejaculation respectively were held to be closely connected to the sexual act. Accordingly, it seems unlikely that a belief about the anatomy of the defendant many years ago; or the official recording of their birth will relate to the ‘mechanics’ of the act. Conversely, we accept that deceptions/non-disclosure pertaining to the use of a prosthesis would be covered.

Enough has been said, we think, to at least conclude that under the current law, while deception as to gender identity is material, it is unclear whether a deception as to gender history is and if it is which aspects of gender history must be included. The CPS guidance is, therefore, unduly confident in suggesting that current law clearly states that:

a trans or non-binary person ... 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.

So far we have been considering the first of the goals we set out for the CPS guidance: that it is based on an accurate statement of the law. We now turn to the second and third goals: to consider whether the guidance offers sufficiently clear advice for prosecutors determining whether to prosecute a case of ‘deception as to sex’ and for members of the public (especially sexually active trans people) wishing to know whether any behaviour is likely to result in a prosecution. We do this by considering four hypothetical scenarios.

## Hypothetical Scenarios

The following scenarios assume that gender fraud can be committed by omission and that fraud extends to deception as to gender history as well as deception as to gender identity. In other words, we proceed on the basis of the worst possible (and current CPS) interpretation of relevant legal doctrine (considered above) and we consider on this basis how a series of hypothetical scenarios might play out in the future. We will analysis each scenario according to the CPS’s recently revised three-pronged evidential approach for determining whether to prosecute. This involves answering the following three questions, all of which must be answered in the affirmative if a prosecution is to be brought:

1. Was there a condition of the complainant’s choice or consent sufficiently closely connected with the sexual nature of the relevant act?
2. If so, was the complainant deceived in relation to this condition and deprived of their freedom to choose, and therefore did not consent?
3. If so, did the suspect reasonably believe that the complainant consented?

## Scenario I

Tom, a 28-year-old trans man, who transitioned socially and hormonally 5 years ago, and who had phalloplastic surgery 2 years ago, met David, a 30-year-old cis man, in a trans-friendly, queer bar.

25. B. Krebs, ‘Rape, Consent and a Lie about Fertility: *R v Lawrance* [2020] EWCA Crim 971’ (2020) 84(6) *Journal of Criminal Law* 622.

26. *R v Lawrance*, above n. 24 at [34].

After some flirtation and a couple of beers, they went to David's city apartment where David anally penetrated Tom. Both men enjoyed the sex, though both viewed it as hook-up sex and neither wished to meet the other again. Some months later David discovered from a friend that Tom is a trans man. David felt deceived and reported the matter to the police, informing them that he would not have had sex with Tom had he known Tom was a trans man. David did not lay down an express condition regarding biological sex or cis status. Nor did he ask any questions or make any statements that might have led Tom to think David had an issue with trans men as sexual partners. Tom, who has a healthy queer sex life, preferred not to disclose his gender history in the context of hook-ups, because he wanted to have great sex, not a therapy session, and because he wanted to maintain his privacy. When questioned, Tom told the police that he had no reason to believe that David did not consent and that he had had sex on multiple occasions with gay men, sometimes disclosing his trans status, sometimes not, but never experiencing any objection.

### *Was There a Condition of David's Choice or Consent Sufficiently Closely Connected with the Sexual Nature of the Relevant Act?*

The word 'condition' is not confined to an express condition, but rather covers a counter-factual claim by X that they would not have had sex with Y had they known in advance some fact about Y. Therefore, in view of David's counter-factual claim, Tom's not being trans would appear to be a condition of sex in the scenario. Further, given the CPS's view that such a condition would be sufficiently closely connected with the sexual nature of the relevant act this would suggest that question 1 is to be answered in the affirmative on the hypothetical facts and indeed, in all cases where a trans person does not disclose their biological sex or trans status prior to intimacy. The CPS Guidance statement that '[f]reedom of choice will involve the ability of the complainant to agree to sexual encounters based on what they see as important' would seem to reinforce this view. However, on the question of what is *important* to a complainant, the guidance states that, in the absence of an express statement, it is 'to be inferred from all the facts'. Accordingly, it seems clear that more is required for a decision to prosecute than a counter-factual claim. Otherwise, the counter-factual claim (which is perhaps an inevitable feature of these types of cases) would resolve the matter without the need to consider any other facts.

Thus, while the CPS, relying on their interpretation of *McNally*, consider trans status to be a material fact, that is, something sufficiently closely connected with the sexual nature of the act, the question of whether this was important to David cannot be reduced to David's after the fact assertion that it was. In terms of the hypothetical scenario, the importance of Tom's trans status to David might be doubted. Facts that support this view include the fact that Tom and David met in a trans-friendly, queer bar; the fact that David (while under no obligation to make inquiry)<sup>27</sup> laid down no condition regarding biological sex; and that he neither did nor said anything that might be viewed as communicating to Tom the importance of Tom's biological sex. If such considerations are to count, then whether Tom's trans status was important might be viewed as questionable. In reality, it may be difficult to identify a reason why David would make the counter-factual claim that he does other than it is true. One possibility might be that he was embarrassed when his intimate relations with a trans man came to public attention, though there is no evidence of this on the hypothetical facts in scenario 1. On other facts, such as where cis-trans intimacy takes place in the context of a long-standing relationship, it is possible that a cis person might make such a claim out of spite or to punish a trans person (in the same way one spouse might accuse the other of physical and/or sexual abuse of children in a family law dispute over custody and financial settlement).

---

27. Above n. 1.

### *If So, Was David Deceived in Relation to This Condition and Deprived of His Freedom to Choose, and Therefore Did Not Consent?*

If we accept that trans status was important to David and this condition was sufficiently closely connected with the sexual nature of the act, this does not mean that David was deceived at the time of intimacy. In addressing this issue, the CPS in their guidance state that '[e]vidence 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 reason the CPS use the word *may* rather than *will*, and the reason that *circumstances* might operate to trump a view that non-disclosure of trans status leads to a conclusion that a complainant was deceived under evidential stage 2, is that the CPS envisage situations where, although a complainant was deceived, the deception no longer operated by the time of the relevant sex acts. This possibility is addressed in the guidance through a series of enumerated factors including the following:

- (i) *Whether there has been gender reassignment treatment.* The evidential significance of this factor, though it is not made clear in the guidance, appears to be that an appreciation of trans status is much more likely in the absence of medical interventions, especially where a relationship is lengthy and sexual intimacy not infrequent.
- (ii) *The degree to which the sex or trans or non-binary identity of the suspect is apparent or otherwise.* The evidential significance of this factor seems clear, namely, the less likely a trans person is to be read as cis in normative terms, the harder it will be to satisfy evidential stage 2.
- (iii) *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'.*
- (iv) *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'.*

All of these factors raise a question mark concerning whether deception operated on a complainant at the relevant time. However, on the facts of hypothetical scenario 1, none of these considerations appear to apply. That is, Tom had had phalloplastic surgery; there is no suggestion that he is likely to be read as trans (indeed quite the opposite given the facts including the period of time he had been taking testosterone); the relationship was fleeting; and David asked no questions nor made any assertions. Curiously however, given that evidential stage 2 pertains to determining whether a deception operated on a complainant, the CPS guidance notes as relevant, '[t]he attitude of the suspect to revealing their sex, including concerns over any potential adverse impacts'. Unless this factor is to be viewed as superfluous (which would beg a question regarding its inclusion), it appears to suggest that the evidential analysis to be adopted here requires more than consideration of whether a complainant operated under a mistaken belief. It appears to also require consideration of the suspect's motivation for non-disclosure. If this is correct then Tom's desire to maintain privacy might assume significance, albeit no other 'adverse impacts' are described by Tom. If the CPS take the view that Tom's non-disclosure constituted a deception which operated on David, then whether a prosecution would be brought would depend on evidential stage 3.

### *If So, Did Tom Reasonably Believe That David Consented?*

While this evidential stage requires considering what steps a 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, this cannot be taken to imply a requirement to disclose trans status or to ask a complainant whether they object to having sex with trans people, a requirement that would be tantamount to a form of

institutionalised outing. As much is evident from several of the factors enumerated in the guidance for question 3, as well as in the guidance for question 2, much of which is noted to be again relevant. While the CPS guidance states that '[w]here 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' and that '[in] these circumstances, it is less likely that the suspect held a reasonable belief', Tom committed no deliberate deception by way of either act or omission. His intention was not to deceive but to protect his privacy. Moreover, he may, as the guidance notes, 'admit that the complainant was unaware of [his] sex and/or gender identity but claim that [he] believed it was not a matter of importance to the complainant'. In support of this claim, Tom might point to the fact that he met David in a trans-friendly queer bar and assumed that David's presence in the bar suggested an awareness of the presence of trans men (albeit many would be read as cis) and that he did not have an issue with trans sexual partners. Moreover, given the much higher likelihood of encountering a sexual partner in such a bar who might be (unbeknownst to others) trans, a prosecutor might conclude that it was reasonable for Tom to believe that trans status was not a condition and that David consented. Further, Tom's belief in David's consent might be viewed as supported by the fact that he had had sex on multiple occasions with gay men, sometimes disclosing his trans status, sometimes not, but never experiencing any objection. In any event, these would be factors to be weighed. It is difficult to say with confidence, but there is certainly a case for arguing that Tom's belief in consent was reasonable on the hypothetical facts in scenario 1.

## Scenario 2

Ash, a 19-year-old trans man, met Victoria, an 18-year-old cis woman, at the University of Bristol, where both were second-year undergraduate students. Their relationship lasted 6 months, during which time they spent the majority of their free time together, either alone or with university friends. Ash transitioned socially while he was in his final year at school. He is five-foot-four in height and had not yet commenced hormone treatment because he was waiting to be seen by an NHS gender identity specialist. Ash wore jeans, baggy sweatshirts and baseball caps of various colours. In the colder months he wore beanies. Early in their relationship, two of Victoria's female friends told Victoria that they thought Ash was a woman. Victoria, who was very attracted to Ash, refused to countenance this suggestion and it led to a falling out with her two friends. In the early months of their relationship sexual intimacy was confined to kissing and hugging, but later Ash performed oral and digital sex on Victoria on at least four occasions. The relationship ended after Victoria's parents visited her during term time and took her and Ash out for lunch at a local restaurant. Victoria's parents did not say anything in front of Ash, but afterwards her mother asked Victoria if she was a lesbian. Victoria denied being a lesbian and subsequently broke off her relationship with Ash. She then reported the matter to the police, informing them that she would not have had sex with Ash had she known Ash was a trans man. When questioned, Ash told the police that he had no reason to believe that Victoria did not consent. He explained to the police that he had assumed Victoria knew from the start that he was trans, given that he did not think he was likely to be read as cis and because he had received a lot of transphobic abuse on campus from other students that seemed to confirm the same.

### *Was There a Condition of Victoria's Choice or Consent Sufficiently Closely Connected With the Sexual Nature of the Relevant Act?*

As with the previous hypothetical scenario, Victoria's counter-factual claim might lead the prosecution to conclude that Ash's biological sex status was important to her. However, once again, the *importance* of sex, in the absence of an express statement, it is 'to be inferred from all the facts'. On the facts of this scenario, the prosecution ought to consider the possibility that cis status was not important to Victoria. The argument here would be that Victoria knew all along, or at least at a time prior to intimacy, that

Ash was trans. In determining the question of importance, the prosecution should consider whether Ash was likely to be read as cis at the time of the relevant acts. If not, a claim that cis status bore importance for Victoria is likely to lack credibility. Evidence supporting the view that Ash was unlikely to be read as cis include: his evidence that he did not believe people would read him as cis, a view confirmed by transphobic abuse he received at university; the fact that he was only five-foot-four and had not yet commenced testosterone; the fact that two of Victoria's friends had insisted Ash was a woman; the fact that her mother thought Ash was a woman; and the fact that a complaint to the police was only made after Victoria's mother inquired about her sexual orientation. Indeed, in relation to this latter point, it may be appropriate to consider the possibility, noted by the CPS guidance, 'that the complainant was exploring their own sexuality at the time of the alleged offending'.<sup>28</sup>

Of course, the prosecution should recognise that Victoria was young and should consider the possibility that she may be 'immature' or 'inexperienced'.<sup>29</sup> Nevertheless, the facts detailed above suggest, in our view, that serious doubt exists regarding whether evidential stage 1 would be viewed as satisfied on these facts.

### *If So, Was Victoria Deceived in Relation to This Condition and Deprived of Her Freedom to Choose, and Therefore Did Not Consent?*

If we accept that cis or biological sex status was important to Victoria, the facts of the hypothetical scenario, as already made clear, cast significant doubt as to whether the deception was operative. Reasons for doubt include all of the facts detailed above in the context of evidential stage 1 (Ash's belief people were unlikely to read him as cis; the confirming transphobic abuse; his five-foot-four stature; his non-commencement of testosterone; the statements made by Victoria's friends and mother about Ash; and the fact a complaint was only made after parental inquiry about Victoria's sexual orientation), facts that might be considered to apply with added force in the context of a relationship of 6 months duration and one involving numerous occasions of sexual intimacy. We might also note that Ash has not had any gender affirming procedures, an issue to which the CPS guidance draws attention. In particular, the presence of birth genitalia might, given the difficulty in concealing them in intimate contexts, be viewed as inconsistent with operative deception. However, if the view were taken that Victoria did not know Ash was trans and that biological sex status was important to her, then the prosecution would still need to consider whether Ash's belief in consent was reasonable.

### *If So, Did Ash Reasonably Believe That Victoria Consented?*

While Ash took no steps to satisfy himself that Victoria was aware of his trans status he appears not to have done so, at least on his evidence, because he assumed Victoria must have known he was trans from the beginning on account of it being obvious, or close to obvious, and especially by the time sexual intimacies took place. The prosecution will need to make an assessment of how Ash is likely to be read in his sweatshirts and baseball caps/beanies. They ought also to recognise that the reasonableness of his belief is strengthened by the fact that it was not his alone. Rather, it was shared by two of Victoria's friends, her mother, and all those who hurled transphobic slurs at him at university. It should also be noted that none of these readings of sex/gender had the benefit of the telescopic lens available to Victoria given the duration and intimacy of her relationship with Ash. Moreover, while the CPS guidance notes that where there is deliberate deception, 'it is less likely the suspect held a reasonable belief', there is no evidence of deliberate deception on these facts.

---

28. Above n. 1.

29. Above n. 1.

### Scenario 3

Pippa, a 26-year-old trans woman, who had been on cross-sex hormones since she was 16, and who was on the NHS waiting list for gender affirming genital surgery, went to a night club with friends. While there, Cecil, a 40-year-old cis man, approached her and chatted her up. They agreed to go on a date at a local restaurant the following week. During the date, the conversation turned to the political topic of the day, trans rights. Cecil said that he supported trans rights and that people should live and let live. However, he added that, while he found some trans women very attractive, he always dated women with a view to marriage and the possibility of biological children, and therefore he would never date a trans woman. In the weeks that followed, Pippa and Cecil met on several occasions, usually at Pippa's apartment and on two occasions Pippa performed oral sex on Cecil. She told Cecil that she did not want him to penetrate her until she knew him better. One day, Cecil entered Pippa's bathroom and discovered her naked. He later informed the police that he would not have had sex with Pippa had he known she was a trans woman.

#### *Was There a Condition of Cecil's Choice or Consent Sufficiently Closely Connected With the Sexual Nature of the Relevant Act?*

On these facts, it is clear there was a relevant condition. Indeed, Cecil laid down an express condition regarding cis or biological sex status. However, the issue on these hypothetical facts is not whether there was a condition, expressed or otherwise, but whether the condition was 'sufficiently closely connected with the sexual nature of the relevant act'. In our view, it is arguable whether Cecil's condition is proximate to sex. While the CPS guidance states that, '[i]f the complainant chose to have sexual relations with a person whose sex is [female] and gender identity is [female] i.e. a non-trans [female], it is likely that this condition is sufficiently closely connected with the sexual nature of the relevant act', it also states that '[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 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'.

Working with these examples, we might liken the irrelevance of a GRC to sex to the irrelevance of marriage and a desire for biological children to sex. While the latter are important to Cecil, as they are too many people, they are, in our view, not sufficiently proximate to sexual acts. In both cases, we might view the conditions as pertaining to circumstances and therefore as inconsistent with establishing evidential stage 1. However, we recognise that a prosecutor might take the view that there is an important difference between the facts of our hypothetical scenario and the CPS guidance example pertaining to a GRC. That is, a prosecutor might place emphasis on the fact that in the CPS example there is a willingness to have sex with at least some trans people (albeit only a tiny proportion given very few trans people have a GRC),<sup>30</sup> whereas in our scenario there is not. However, in our view, the only reason the CPS example makes sense is because the condition, and therefore non-consent, cannot be viewed as relevant to sex acts. We contend that while a complainant's sexual preference to have sex only with a trans woman in possession of a GRC is different to a sexual preference to have sex with a woman who has the capacity to produce biological children, what is common to both instances is a lack of proximity between the condition and the ensuing sexual acts. That is to say, it appears from the facts that Cecil would have had sex with Pippa if she possessed a reproductive capacity to have biological children. In other words, it is

---

30. According to figures from the Ministry of Justice, a total of 8,464 GRCs had been granted up to the end of March 2024 ('Gender Recognition Certificates: key numbers and trends,' *The Evening Standard*, 17 April 2025 <https://www.standard.co.uk/news/crime/ian-jones-b1222985.html>) [accessed 4 June 2025].

Pippa's reproductive capacity (or lack thereof) and not her trans status that is key here and this fact pertains not to sex acts but to circumstances.

An analogy is perhaps instructive here. Imagine if Rosemary, a cis woman, who was unable to have biological children due to removal of her womb and ovaries, had been sitting opposite to Cecil on the date instead of Pippa. If, despite his statements, she chose not to disclose facts about her reproductive capacity it seems very clear that a court would view this as a matter of legally irrelevant circumstance, even though it seems clear from Cecil's statements that he would not have had sex with Rosemary because she also would be unable to meet his condition. Indeed, the Court of Appeal's decision in *Lawrance* (where the defendant lied about having had a vasectomy) would seem to rule out the prospect of a prosecution in the case of Rosemary. The only way to arrive at a different conclusion in the case of Pippa, in our view, would be to insist that a condition that rules out a whole class of people (trans women) rather than only some (cis women lacking reproductive capacity) should be viewed as legally significant in terms of the question of proximity. If this is an argument to be made, we remain unpersuaded.

### *If So, Was Cecil Deceived in Relation to This Condition and Deprived of Him Freedom to Choose, and Therefore Did Not Consent?*

If we are mistaken in relation to our analysis of evidential stage 1, we acknowledge that evidential stage 2 is met on the facts.

### *If So, Did Pippa Reasonably Believe That Cecil Consented?*

We do not think a case for reasonable belief can be made on the facts of this scenario.

## **Scenario 4**

Krish, a 23-year-old trans man, who social transitioned at 13 and had been on cross-sex hormones since he was 17, and who used breast binders, met Cindy, a 21-year-old cis woman, at their place of work. After a first date, a picnic in a local park, they began meeting regularly over a 6-month period. During this period, they did not have sex because Cindy was a Quaker who did not believe in sex before marriage. However, they kissed and cuddled whenever they met. On one occasion, the conversation included a discussion of their adolescent years. Cindy explained that she was a gymnast at her all-girl's school and had captained their hockey team. Krish, who had been very sports oriented at his all-girl's school, said that he went to a co-ed school where he captained the boy's football team. He made this statement partly to impress Cindy, as he realised she valued sport, but mainly because telling the truth would have revealed his trans status. After 6 months of dating Krish, Cindy learned from another work colleague that Krish was trans. She informed the police that she would not have become intimate with Krish had she known he was trans. When questioned, Krish told the police that he believed Cindy would have consented to the intimacy that took place irrespective of whether she knew he was trans. He also volunteered the statement: 'I knew Cindy was a Quaker and that sex before marriage was off the table, but the Quakers are one of the most pro-LGBTQ religious groups, so I never thought that my being trans would be an issue in itself. I just wanted to protect my privacy'.

### *Was There a Condition of Cindy's Choice or Consent Sufficiently Closely Connected With the Sexual Nature of the Relevant Act?*

While Cindy did not communicate a condition, nor ask any direct questions about sex status, it seems clear that biological sex was a condition for her. While CPS guidance on the question of what is *important* to a complainant, states that, in the absence of an express statement, it is 'to be inferred from all the facts',

there appear to be no facts in the scenario that might be relied on to challenge the importance of biological sex to Cindy. However, whether Cindy's condition is sufficiently closely connected with the sexual nature of the relevant act appears arguable on the facts as her condition is less obviously linked to the mechanics of sex.<sup>31</sup> That is, it is far from clear that kissing and/or cuddling would suffice.

### *If So, Was Cindy Deceived in Relation to This Condition and Deprived of Her Freedom to Choose, and Therefore Did Not Consent?*

There appears to be no basis for arguing that Cindy was not deceived on the facts. The deception lay in not disclosing biological sex and in making a false statement to conceal it, or as the CPS guidance puts it, in 'mak[ing] a deliberate false assertion or lie in respect of their sex and/or gender identity'.

### *If So, Did Krish Reasonably Believe That Cindy Consented?*

In our view, there appears to be a proper basis for arguing that Krish had a reasonable belief Cindy consented. In the first place, neither his non-disclosure nor his lie about the school he attended can be taken as clear evidence of knowledge or suspicion that Cindy would not have consented had she known. In both instances, Krish's primary motivation, at least on his evidence, was to protect his privacy. Of course, another motivation was to impress Cindy. But there appears to be no evidence that Krish thought his trans status was a deal-breaker. On the contrary, Krish appears to have been aware that the Quakers are one of the more pro-LGBTQ religious denominations and he perhaps honestly believed that the deal-breaker for Cindy was pre-marital sex, not trans status. The question is whether his belief can be considered reasonable. In our view, there is at least a case for arguing that it can.

## **Conclusion**

In this article, we have considered recent CPS guidance on 'deception as to sex'. We noted that guidance of this kind should offer an accurate summary of the current law to guide prosecutors in determining the likelihood of success, provide clear advice for prosecutors in determining whether it would be appropriate to prosecute, and provide members of the public who may be affected with advice on how they need to behave in order to avoid prosecution. In relation to the first and third of these goals, in particular, we think, and for the reasons discussed, that the guidance fails. In relation to law, we take the view that the CPS assert as decided law what is in fact moot. In the final part of the article, we presumed the law to be as conceived by the CPS and we applied their three evidential stage process of decision-making to a series of hypothetical scenarios in order to see how they might play out in the future. In our view, a successful defence, in the case of trans or non-binary defendants, is most likely in cases where there is cogent evidence that a deception no longer operated on a complainant and/or where there is enough evidence of the reasonableness of the defendant's belief in consent. Of course, each case will always depend on its specific facts, an approach endorsed by the CPS Guidance, and our application of the three evidential stage process to our hypothetical scenarios may be disputed. In our view, if this is the case, it is so, at least in part, due to the failure of the CPS to provide guidance that is more tailor-made to resolving so-called 'deception as to sex' cases.

---

31. However, we note that Gemma Barker was convicted of two counts of sexual assault on the basis of kissing and cuddling in 2012 (above n. 5).


**Declaration of Conflicting Interests**

The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

**Funding**

The authors received no financial support for the research, authorship, and/or publication of this article.

**ORCID iD**

Alex Sharpe  <https://orcid.org/0000-0002-4797-6823>