

The Crown Prosecution Service's approach to transgenderism

Legally inaccurate and ideologically captured

Maureen O'Hara



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Maureen O'Hara is a senior lecturer in law and a former solicitor. She has a particular interest in law and policy relating to violence against women and to child safeguarding. Maureen is the author of the Policy Exchange publication *Transgenderism and policy capture in the criminal justice system: Why criminal justice policy needs to prioritise sex over 'gender identity'*.

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Endorsements

‘This concerning report outlines a lack of proper process and accountability that should lie at the heart of any guidelines developed and issued by the CPS. The issue of gender is a deeply sensitive area. To reflect gender identity beliefs as a set of undisputed facts is not only mistaken but it comes at a huge cost – especially to the women and children that the criminal law should be there to protect. This report points out that failing to support a partner’s feelings about their gender is not equivalent to a form of domestic abuse, which is a serious offence.

The report also highlights other instances where the overt influence of gender identity ideology is clear, such as in the proposed legal guidance on deception as to sex. Given the highly contentious nature of these issues, the CPS should think again about the influence of gender identity ideology on its policies.’

Rt Hon Sir Robert Buckland KBE KC MP, former Lord Chancellor and Secretary of State for Justice

‘This timely paper shows that in respect of gender identity the CPS has lost its way and risks losing the plot entirely. Vulnerable women now face prosecution for the ‘crime’ of failing financially to support a transitioning male partner or address that person by their new preferred female name, i.e. not conforming with their partner’s demands. Has the CPS forgotten that in 2021 its guidance to prosecutors recognised that women are primarily the victims of controlling and coercive behaviour by male partners? Secondly, the author makes a strong case that the proposed guidelines in respect of deception as to sexual identity by transgender persons will risk decisions being wrongly made not to prosecute persons for rape and other serious sexual Offences.

This wake up call also asks rightly for review of the whole Criminal Justice system’s extraordinary policy of treating any male as a woman if he so asserts. Not only does this demean the usually female complainant but it results in the dangerous misrecording of crimes by men as if by women. Government must respond now.’

Lord Sandhurst KC, Chair of Research, Society of Conservative Lawyers, former Chair of the Bar Council

‘This paper raises very serious concerns about the impartiality and independence of the Crown Prosecution Service when dealing with the highly sensitive issue of the treatment of transgender persons. It appears to have adopted uncritically the controversial views of Stonewall.’

Sir Patrick Elias, former Lord Justice of Appeal

Foreword

Charles Wide K.C.

It is hard to overstate the importance of the Crown Prosecution Service doing its job properly. Its decisions change the lives of members of the public caught up in the criminal law (principally, as accusers, accused, or witnesses) and have real impact on society more generally. If the CPS's view of the law is mistaken or confused, or if its judgement of the public interest is inappropriately influenced by contentious political or cultural issues, the harm goes wider than that to the participants in a particular case. For the system of criminal justice to work as it should, the CPS must have the confidence of the general public.

The CPS issues a Code for Crown Prosecutors, supplemented by 'legal guidance' – the latter extends beyond strictly legal issues into strategies of investigation and prosecution and includes societal, cultural, and psychological commentary. Particular care needs to be taken in drafting such documents. Bureaucratic guidance is too easily confused with what the law actually is and social theories may be controversial, wrong, or of no application in a particular case. In this closely argued Policy Exchange report, academic lawyer, Maureen O'Hara, examines Annex D of the CPS guidance relating to domestic abuse, in so far as it concerns 'gender identity' and 'trans and non-binary victims'. She makes the case that it contains both a muddled exposition of the criminal law and indications of 'ideological capture', in particular, signs that the CPS has been unduly influenced by the campaigning charity, Stonewall. She then finds this theme illustrated by the content of proposed legal guidance relating to sexual offences involving deception, which has been issued by the CPS for consultation.

'Domestic abuse' is not a specific crime in English law. The relevant offences are to be found in a variety of statutes. Crimes committed in the context of domestic abuse present the police and CPS with formidable difficulties. These offences are prevalent, can ruin lives, put children at risk, and can be hard to prove, especially where witnesses are reluctant, due to emotional pressure or fear. It is right that those involved (on all sides) in such cases should be alive to the particular challenges that they present. This includes the need for balance: to suffer domestic abuse is a dreadful experience; to be wrongly accused of crime in a domestic context has serious consequences. Maureen O'Hara argues that the guidance fails adequately to acknowledge the complex interplay of relationships where a family member self-identifies as transgender (seeming, for example, to place a legal burden on other members of the family to give active, including financial, support and affirmation) and also fails properly

to distinguish between behaviour which is criminal and that which is not. She goes on to raise the issue of whether this is due to a degree of 'ideological capture' of the CPS.

Attention is drawn to the CPS's Trans Equality Statement; CPS involvement (with others, including Stonewall) with contentious Schools Guidance (now withdrawn); and to the astonishing fact of CPS membership (until September 2021) of Stonewall's Diversity Champions scheme. Reference is also made to the use of particular 'concepts and language' in CPS documents. It is certainly dispiriting to find, in Annex D, the (to many, objectionable) expression 'cisgender' and the repeatedly discredited cliché of sex being 'assigned' – as if sex were a matter of opinion, imposed on a new born baby by a third party.

In too many areas of public life, issues of the kind raised by Maureen O'Hara in this report are greeted with a helpless shrug and the hope that, with time, they will just go away. She and Policy Exchange are to be commended for bringing them into the light. She concludes with a series of specific policy recommendations, in relation to the CPS, Annex D, and the 'wider criminal justice context' (having identified questionable guidance for the judiciary, Police Services, and Prison and Probation Service). The Director of Public Prosecutions, the head of the CPS, is by law 'under the superintendence' of the Attorney General, who will doubtless read this report with great interest.

Introduction

The Crown Prosecution Service (CPS) prosecutes alleged criminal offences in England and Wales on behalf of the state. The CPS decides which cases should be prosecuted and determines the appropriate charges in more serious or complex cases, on which it also advises the police during the early stages of investigation. The CPS issues the *Code for Crown Prosecutors* (the Code), which governs its work. It also issues legal guidance, which is intended to guide prosecutors in their decision-making and their application of the Code.

In December 2022 the CPS updated its legal guidance on domestic abuse. Annex D of the updated guidance gives examples of “how trans and non-binary people may be abused by intimate partners or family members”.

The content of Annex D and some of the language it uses suggest that the CPS has adopted a belief in the concept of ‘gender identity’ as if it were a universally accepted fact rather than a highly political, controversial theory. Annex D fails to take account of the fact that both gender identity beliefs and gender critical beliefs are protected beliefs under the Equality Act 2010. This was established in the case of *Forstater v CGD*¹, in which the Employment Appeal Tribunal (EAT) stated that the core of “gender critical belief” is that sex is biological and immutable. The EAT described “gender identity belief” as the belief that “everyone has a gender identity which may be different to their sex at birth and which effectively trumps sex so that trans men are men and transwomen are women.” (para.107). This report uses the term “gender identity theory” to refer to these beliefs.

Some of the examples set out in Annex D suggest that the CPS’ adoption of gender identity theory has led the organisation to take the view that the partners and family members of those who identify as transgender must unquestioningly support their transition, and that not doing so is inherently abusive. Annex D misstates the law. The examples of domestic abuse which it includes fail to distinguish clearly between types of behaviour which are criminal and those which are not. This may lead the partners and family members of those who identify as transgender to believe that they are breaking the law when this is not the case. It could also lead some prosecutors to give erroneous advice to the police and to misapply the law when initiating prosecutions.

This report examines the problems with the content of Annex D and briefly outlines the criminal law as it relates to domestic abuse. It goes on to explore the indications that the problems with Annex D have come about due to ideological capture within the CPS and discusses examples of other documents produced by the CPS which are rooted in gender identity theory, and which misstate the law. This includes the CPS’ proposed legal guidance on sexual offences involving ‘deception as to gender’, in relation to which the CPS opened a consultation In September 2022.

1. *Forstater v CGD Europe and Others*
UKEAT/0105/20/JOJ [114]-[115]

Annex D of the Crown Prosecution Services' Legal Guidance, Domestic Abuse

Annex D of the CPS' 'Legal Guidance, Domestic Abuse',² which is entitled 'Impacts of Domestic Abuse', states that it "...seeks to highlight the different impacts of domestic abuse on people from a range of communities and groups, and the particular considerations that prosecutors will need to bear in mind."

One section of Annex D discusses "Trans and non-binary victims". This section is framed by the language and concepts of gender identity theory. It uses contested terms, such as "cisgender", as if there were broad agreement about their use, and presents aspects of gender identity theory, such as the idea that sex is "assigned", as if they were fact. For example, it states:

"Gender identity is not the same as anatomical sex. Gender identity is what you know your gender to be and can only be decided by the individual for themselves. Gender identity might be the same as assigned sex (cisgender) or different to assigned sex (trans). Gender identity is not the same as sexuality; trans and non-binary people identify as heterosexual, gay, lesbian, bisexual, pansexual, asexual, and aromantic³, amongst other identities."

This expresses a partisan stance in relation to current debates about the law's approach to the categories of sex and "gender identity", which takes no account of the existence of gender critical beliefs. This stance is reflected in some aspects of the understanding of domestic abuse which is set out in the guidance.

The examples of domestic abuse against "trans and non-binary people" given in Annex D include "Withholding money for transitioning" and "Refusing to use their preferred name or pronouns". (The full list of examples is set out in Appendix 1 of this publication.)

The actions described in the two examples given above do not constitute criminal offences. The guidance is not setting out the law as it is. Rather, it is drafted in a partisan way which implies that the partners and family members of people who identify as transgender are obliged to support their transition under threat of criminal penalties. The example relating to the use of preferred pronouns and names amounts in effect to an attempt to compel the partners and family member of those who identify as transgender to express gender identity beliefs.

2. Crown Prosecution Service, 'Legal Guidance, Domestic Abuse', 05 December 2022 <https://www.cps.gov.uk/legal-guidance/domestic-abuse>

3. This should probably read 'aromantic'. Stonewall states that 'aromantic' or 'aro' is "an umbrella term used by people who don't typically experience romantic attraction." The spelling error is in the original. <https://www.stonewall.org.uk/about-us/news/5-things-you-should-know-about-aromantic-people>

Annex D takes no account of the potential emotional impact of a person's transition on their partners or children, or other family members. Many people will find the transition of a partner or family member emotionally painful. If they have children with the transitioner, the emotional effects of the transition on their children may be particularly difficult to deal with. If the partner of a transitioner uses preferred names and pronouns this will put pressure on children to do the same.

The two quotations below, from the website of Trans Widows Voices⁴, are from former partners of trans-identifying males. They show how difficult and painful a partner's transition can be.

"My ex-partner told me early in our relationship that he was neither male nor female, but also that his thoughts were purely "psychological". I was like a frog in a pot of increasingly hot water, looking on with concern but a false sense of security as the hormones were taken and the breasts grew, until the day he was referred to as "she" by a mutual friend, and the gates of hell opened."

(Cecilia's Story: Respite)

"I have spent the last nine years supporting my child into adulthood helping them⁵ slowly coming to terms with what their Dad is going through and helping them to understand. At the same time trying to keep their confidence up so that they never feel that his choice is anything to do with them or anything they have done... And I will continue to call him a him, because no matter how he presents he will always be male. Women cannot father. Humans cannot change sex."

(Jessica's Story: Acceptance with One Exception)

The provisions of the Gender Recognition Act 2004⁶, under which applicants may be granted a Gender Recognition Certificate (GRC) which will mean that they will be treated as the "acquired gender" for most (but not all) legal purposes, recognise that the granting of a GRC to one partner fundamentally changes the nature of a relationship in a way that the other partner may not accept. In the eyes of the law, it will change a heterosexual relationship to a homosexual relationship and vice-versa. Section 4A of the Act states that applicants who have an interim GRC will not be granted a full GRC unless their spouse or civil partner consents to the relationship continuing after it is granted. Without such consent, a GRC will not be granted unless and until the marriage or civil partnership is ended.

For some partners and ex-partners of those who decide to transition, it is important that the history of the relationship is recognised and recorded accurately. In their response to the Women and Equalities Select Committee's Call for Evidence on the Gender Recognition Act in 2020⁷, Trans Widows' Voices quoted the following statements from women in support of maintaining the section 4A provisions:

"a transwidow should not have her life lied about, and therefore ... an

4. Trans Widows Voices, 'Our Voices', <https://www.transwidowsvoices.org/our-voices>

5. Jessica refers to her child as 'them' to help maintain the child's anonymity.

6. The Gender Recognition Act 2004 requires an application to change legal 'gender' to be supported by a diagnosis of gender dysphoria, with a report from a registered medical practitioner or psychologist practising in the field of gender dysphoria, and an additional report from a medical practitioner who may or may not practice in that field. It also requires the applicant to have lived as the other 'gender' for a minimum of two years. The application must be accepted by a Gender Recognition Panel, which is made up of members who have legal and medical qualifications.

7. Trans Widows Voices, 'Trans Widows Voices response to the Women and Equalities Select Committee Call for Evidence on the Gender Recognition Act', November 2020, Written evidence submitted by Trans Widows Voices [GRA0344], <https://committees.parliament.uk/writtenevidence/16197/pdf/>

application for a GRC should be automatic ground for granting a divorce, as well as an annulment. . .”

“After all has settled, my biggest bugbear is that I married a man and my [marriage] certificate has a man’s name, however my decree absolute shows me divorcing a woman. I realise this is petty but it rages me.”

For children whose parent has transitioned, being able to accurately describe the history of their relationship with that parent is often important. The account below, from the website of the organisation Children of Transitioners, was written by the now adult child of a trans-identifying male.

“Ironically, when he was going in for his operation I told friends at school that ‘my mother’ would be away for a while in hospital. At least one of them assumed it was for a hysterectomy. But now I am angry that I had to pretend my real mother didn’t exist. I wish I hadn’t felt obliged to disrespect my mother like that.”⁸

(The Invisible Mother)

In their written evidence⁹ to the Women and Equalities Select Committee’s Call for Evidence on the Gender Recognition Act, Children of Transitioners stated:

“Our father transitions and wants to be called a woman. Sometimes he wants to be called ‘mother’. Whether we want to cooperate with this or not should be up to us.

Official bodies should not seek to censor us or suppress our speech when we talk about our real lived experiences in the language, we choose.”

It is not the role of the state to require partners and family members to use the language with which a trans-identifying person wishes to be described. The CPS’ approach amounts to an attempt to compel the partners and family members of those who are trans-identified to express a belief in ‘gender identity’ which they may not hold. Articles 9 and 10 of the European Convention on Human Rights protect the right not to be obliged to manifest beliefs that one does not hold, as stated in the case of *Lee v Ashers Baking Co.*¹⁰ The right not to be compelled to express a belief is well established in the case law of the European Court of Human Rights.

As with the CPS’ approach to the use of preferred pronouns and names, the CPS’ claim that withholding money for transition can amount to a criminal offence has no foundation in law. The law places no obligations on a spouse, civil partner, co-habitant or other partner to support a person’s transition financially. The same is true of parents and other family members.

In the quotation below the former wife of a trans-identifying male discusses her then husband’s use of the family’s money for transition, which she appears to have been unable to prevent. Annex D implies that

8. Children of Transitioners, ‘The Invisible Mother’, 29 August 2019 <https://childrenof-transitioners.org/2019/08/29/the-invisible-mother/>

9. Children of Transitioners, ‘Written evidence submitted by Children of Transitioners [GRA0815], November 2020 <https://committees.parliament.uk/writtenevidence/16837/pdf/>

10. [2018] UKSC 49

trying to prevent it could potentially amount to economic abuse.

“After the transgender announcement, the neglect became worse, and it was very obvious how irrelevant our children and I were to my spouse in this newfound quest. And then the massive expenses began to rack up: clothing, wigs, electrolysis and waxing, voice training. Eventually I realized that this stressful situation, where I had no idea what my husband would demand to do next or what the next broken promise might be, it was physically killing me and I needed to leave... All of this transformation came at a very high price for myself and our children, both financially and emotionally.”¹¹

(Mary Joan's Story: Paying the Price)

Annex D directs readers to a guide (the Brighton and Hove guide)¹² written and produced by the Brighton and Hove LGBT Domestic Violence and Abuse Working Group. This is a voluntary organisation which does not claim any specialist knowledge of the law. The Brighton and Hove guide includes a list of examples of what it describes as abuse under the heading “Using someone's gender identity to abuse”. The two examples given in the CPS' Annex D which are discussed here are also included in the Brighton and Hove guide. Most of the examples used by the CPS appear to be directly taken from that guide or to be adapted from it.

The Brighton and Hove guide is not intended to be legal guidance. The behaviour described in some of the examples it gives would clearly constitute criminal offences, but many of the actions the guide describes would not. It is not surprising that a voluntary sector organisation's general guidance about the kinds of behaviour which may constitute domestic abuse should fail to distinguish clearly between what is and what is not criminal. However, for the CPS, a public prosecuting body, to insert the examples given in this guide into its own legal guidance without making this distinction demonstrates a lack of due diligence. The fact that the CPS has uncritically adopted the content of a document produced by an LGBT voluntary organisation in this way suggests ideological capture within the CPS.

The law relating to domestic abuse

There is a broad statutory definition of domestic abuse contained in the Domestic Abuse Act 2021. The definition relates to situations in which the victim and perpetrator of any abuse are aged sixteen or over.

Subsection 1(3) of this Act states that behaviour is “abusive” if it consists of any of the following—

- (a) physical or sexual abuse;
- (b) violent or threatening behaviour;
- (c) controlling or coercive behaviour;
- (d) economic abuse;
- (e) psychological, emotional or other abuse; and it does not matter whether the behaviour consists of a single incident or a

11. Trans Widows' Voices, 'Our voices', <https://www.transwidowsvoices.org/our-voices>

12. LGBT Domestic Violence and Abuse Working Group, *Domestic Violence A resource for trans people in Brighton and Hove*, January 2011 <https://avaproject.org.uk/wp-content/uploads/2016/03/Domestic-Violence-a-resource-for-trans-people-in-Brighton-and-Hove.pdf>

course of conduct.

Subsection 1(4) of the Act defines “economic abuse” as any behaviour that has a substantial adverse effect on a victim’s ability to acquire, use or maintain money or other property, or to obtain goods or services.

The Domestic Abuse Act’s definition is intended to provide broad guidance as to what constitutes domestic abuse. It does not create specific criminal offences. There is no criminal offence of domestic abuse as such, and not all forms of domestic abuse amount to criminal offences. There are a range of criminal offences which may be involved in domestic abuse, depending on the nature of the abuse. These offences are set out in a variety of other statutes. They include forms of threatening and physically violent behaviour set out in the Offences Against the Persons Act 1861, sexual offences set out in the Sexual Offences Act 2003, and the offence of controlling or coercive behaviour in an intimate or family relationship, which is set out in section 76 of the Serious Crime Act 2015.

Neither of the two Annex D examples under discussion here involve the use of physical or sexual violence, and therefore the criminal offence the CPS has in mind in relation to them would seem to be that of controlling or coercive behaviour in an intimate or family relationship. This offence occurs where an offender repeatedly or continuously engages in behaviour that is controlling or coercive towards another person (B) over the age of sixteen to whom they are “personally connected”.¹³ The behaviour must have a “serious effect” on that person. The offender must either have known that it would have a serious effect, or it must be concluded that the offender “ought to have known”. This is assessed on an objective standard, which essentially means that a reasonable person would have known. Behaviour is defined as having a “serious effect” on B if it causes B to fear, on at least two occasions, that violence will be used against him or her, or it causes B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities.

In some circumstances withholding money comes within the definition of economic abuse in the Domestic Abuse Act. It may also be part of a pattern of coercive and controlling behaviour which would meet the definitions contained in the Serious Crime Act, in which case it would be an element of that criminal offence.

The Domestic Abuse Act’s definition of economic abuse is generally interpreted as meaning control by a perpetrator of domestic abuse of a partner or family member’s money or other assets, control of their ability to earn money, and/or the withholding of material necessities. The organisation Surviving Economic Abuse (SEA), a UK-wide charity which raises awareness of economic abuse, defines it as follows:

“Economic abuse can include exerting control over income, spending, bank accounts, bills and borrowing. It can also include controlling access to and use of things like transport and technology, which allow us to work and stay connected, as well as property and daily essentials like food and clothing. It can include destroying items and refusing to contribute to household costs.”¹⁴

13. Section 76 (2) of the Serious Crime Act states that “A and B are “personally connected” if—

(a) A is in an intimate personal relationship with B, or

(b) A and B live together and—

(i) they are members of the same family, or

(ii) they have previously been in an intimate personal relationship with each other.”

14. Surviving Economic Abuse (SEA) <https://survivingeconomicabuse.org/>

Withholding money for transition does not come within the definition of controlling and coercive behaviour since it will not give rise to fear of violence and cannot reasonably be seen as causing “serious alarm or distress which has a substantial adverse effect” on usual day-to-day activities. It is not economic abuse as defined by the Domestic Abuse Act since it will not have “a substantial adverse effect” on the transitioner’s ability to acquire, use or maintain money or other property, or to obtain goods or services in the common meaning of this phrase.

Expecting a partner or family member to fund transition could be seen as indicating a sense of entitlement which might lead to abusive behaviour in some circumstances. In its list of examples of controlling behaviour, the Brighton and Hove guide includes “Controlling your finances or feeling entitled to your financial support.” This example is not referred to in the CPS’ guidance. The example above from Mary Joan about her former husband’s expenditure on transition could be seen as constituting abuse on his part which might potentially be criminal if it formed part of a wider pattern of coercive and controlling behaviour which fulfilled the requirements discussed above. Had Mary Joan been able to withhold the money for this expenditure, that would hardly constitute abuse.

Refusing to use preferred pronouns and names would not come within the definition of controlling and coercive behaviour. It would not cause a trans-identified person to fear violence. While it may lead to some distress, it is not reasonable to assume that, on an objective standard, it would cause serious alarm or distress which has a substantial adverse effect on a person’s usual day-to-day activities.

Discussing the right to freedom of belief under Article 9 of the European Convention on Human Rights, the EAT in the case of *Forstater* stated that the paramount guiding principle in assessing any belief is that it is not for the court to inquire into its “validity” by some objective standard. The freedom to hold whatever belief one likes requires the state to remain neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and trying to ensure that groups who hold opposing beliefs tolerate each other. This principle does not apply to beliefs which are akin to totalitarianism, which are liable to be excluded from the protection of rights under Articles 9 and 10 of the European Convention by virtue of Article 17 of the Convention.¹⁵

This principle that the state should remain broadly neutral as between competing beliefs also applies to the CPS, which carries out its work on behalf of the state.

Annex D indicates that, rather than remaining neutral in relation to gender identity beliefs and gender critical beliefs, the CPS has adopted a highly partisan ideological approach based on gender identity theory. Annex D is not setting out the law as it is. It is drafted in a partisan way which implies that the partners and family members of people who identify as transgender are obliged to support their transition under threat of criminal sanction. This type of partisan approach is contained in CPS documents other than Annex D, which are discussed below.

¹⁵ Article 17 states that nothing in the Convention may be interpreted as implying any right to engage in any activity or perform any act aimed at the destruction of Convention rights or freedoms.

The ideological capture of the Crown Prosecution Service

The CPS Code for Crown Prosecutors states,

“The independence of the prosecutor is central to the criminal justice system of a democratic society. Prosecutors are independent from persons or agencies that are not part of the prosecution decision-making process. CPS prosecutors are also independent from the police and other investigators. Prosecutors 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.” (para. 2.1)¹⁶

The concepts and language of gender identity theory permeate the policy documents on which much current practice within the CPS relating to transgenderism is based. They reflect a set of beliefs in which self-declared ‘gender identity’ takes precedence over biological sex. Self-declaration of ‘gender identity’ has not been adopted in law in England and Wales. The proposal that it should be adopted was explicitly rejected by the government in 2020. Nevertheless, in recent years self-declaration of ‘gender identity’ has been adopted as policy by the CPS and most key criminal justice institutions, such as the Police and Probation Services, and the courts. The adoption of gender identity theory by the CPS appears to have come about largely as the result of policy capture, as it is a widely contested set of beliefs which have been adopted without public scrutiny or approval. This suggests that policies may have been affected by “improper or undue pressure or influence”, contrary to the CPS Code.

The CPS has published a *Trans Equality Statement*,¹⁷ the stated aim of which is “to provide a brief overview of key CPS commitments to Trans equality to sustain the confidence of communities.” In relation to the use of names and pronouns, the document states,

“Prosecutors should address Trans victims, witnesses and defendants according to their affirmed gender and name, using that gender and related pronouns in all documentation and in the courtroom.”

The CPS applies this guidance even in relation to defendants charged with rape, although the statutory definition of rape means that it is an offence which can only be committed by a biological male.¹⁸

The practice of addressing witnesses according to their “affirmed gender” has also been adopted by the Police Service and the judiciary. This is discussed in detail in a Policy Exchange publication¹⁹ which was

16. Crown Prosecution Service, *Code for Crown Prosecutors*, 26 October 2018 <https://www.cps.gov.uk/publication/code-crown-prosecutors>

17. Crown Prosecution Service, *Trans Equality Statement*, 01 July 2019, <https://www.cps.gov.uk/publication/trans-equality-statement>

18. Section 1 Sexual Offences Act 2003 - Rape

(1)A person (A) commits an offence if—

(a)he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b)B does not consent to the penetration, and

(c)A does not reasonably believe that B consents.

19. Maureen O'Hara, *Transgenderism and policy capture in the criminal justice system*

Why criminal justice policy needs to prioritise sex over 'gender identity', Policy Exchange, 30 May 2022

<https://policyexchange.org.uk/publication/transgenderism-and-policy-capture-in-the-criminal-justice-system/>

published in 2022.

The Trans Equality Statement makes no distinction between those who identify as transgender who have a GRC and those who do not. It includes identities which are not recognised in law in its definition of 'gender identity', which is as follows:

“Gender identity is one of the most commonly used terms to acknowledge the gender spectrum. It includes those who identify as male and female and incorporates intersex, gender nonconforming or gender variance, for example those who might identify as nongender, non-binary or gender fluid as well as those within the gender reassignment definition in the Equality Act 2010.”

It is not clear how this broad CPS definition of 'gender identity' is, or could be, put into practice at an operational level. However, the Trans Equality Statement makes it clear that the CPS is recording biologically male defendants who identify as transgender as women.

CPS data relating to the sex of those prosecuted for rape was published by the Office for National Statistics in 2018.²⁰ It indicates that 436 of those who were prosecuted for rape between 2012 and 2018 were recorded as women. The proportion of rape defendants classified as women during this seven-year period varied between 1.2 per cent and 1.8 per cent each year. Data published by the CPS in 2020 showed that, of 2,102 defendants prosecuted for rape in 2019-20, the CPS had recorded 2,064 defendants as male (98.2%), and 27 as female (1.3%). The CPS report stated that “Gender was not recorded for eleven defendants.”²¹

Some of these defendants who were recorded as female may have been women charged as accessories to rapes committed by men, but in view of CPS recording policy it seems likely that some would have been trans-identifying males.

The CPS' practice of recording defendants according to their “acquired gender” rather than their sex is concerning both because it leads to inaccurate data recording, and because of its potential impact on those who report alleged offences. Particularly for complainants who are alleging that sexual and violent offences have been committed against them, it will be confusing and distressing if prosecution and defence lawyers refer to alleged perpetrators who are trans-identifying using their preferred pronouns when the complainant perceives them in terms of their sex. Complainants may feel pressurised to use the preferred pronouns themselves, although guidance for judges contained in the Equal Treatment Bench Book, which is discussed below, states that they are not required to do so. The confusion and distress which the use of biologically inaccurate preferred pronouns can cause complainants may affect their ability to give clear and accurate accounts, particularly while being cross-examined in court, which is usually an extremely stressful experience.

20. Office for National Statistics, 'Sexual offending: Crown Prosecution Service appendix tables', 13 December 2018 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/sexualoffendingcrownprosecutionserviceappendix-tables>

21. Crown Prosecution Service, 'Key facts about how the CPS prosecutes allegations of rape', 19 October 2020 <https://www.cps.gov.uk/publication/key-facts-about-how-CPS-prosecutes-allegations-rape>

The CPS' former relationship with Stonewall

The Organisation for Economic Co-operation and Development (OECD) has defined policy capture as,

“...the process of consistently or repeatedly directing public policy decisions away from the public interest towards the interest of a specific interest group or person. Capture is the opposite of inclusive and fair policy-making, and always undermines core democratic values. The capture of public decisions can be achieved through a wide variety of illegal instruments, such as bribery, but also through legal channels, such as lobbying and financial support to political parties and political campaigns. Undue influence can also be exercised without the direct involvement of public decision-makers, by manipulating the information provided to them, or establishing close social or emotional ties with them.”²²

One way in which policy changes can be brought about without public scrutiny is through the provision of training and consultancy. Horrocks²³ has described the ways in which ‘experts’ who provide consultancy can use their influence to capture policy when they are perceived by the organisations who commission them as possessing very specialised forms of expertise which are not shared by staff within the commissioning organisations. Arguably this creates a power imbalance which facilitates policy capture by those perceived as experts, particularly where organisations seen as having expertise can confer awards on their client organisations.

The CPS was previously a member of the Stonewall Diversity Champions programme. Employers pay to participate in this programme and receive advice and training from Stonewall on developing and implementing their inclusion and diversity policies. Members of the scheme are entered into Stonewall’s Workplace Equality Index, and are then benchmarked against other organisations by Stonewall, who compile an annual list of the top 100 of these employers. Inclusion in this list depends on being a member of the Diversity Champions Scheme and implementing policies which are aligned with Stonewall’s values. Stonewall has called for the Gender Recognition Act to be amended to remove all of the current assessment processes relating to applications to change legal ‘gender’, and to enable people to do so by a process of self-declaration; and for the removal of the exceptions in the Equality Act 2010 which allow for the maintenance of single-sex services based on biological sex.²⁴

The CPS’ former relationship with Stonewall, from which it withdrew

22. OECD, OECD Public Governance Reviews, ‘Preventing Policy Capture: Integrity in Public Decision-making’ (2017), 9 https://read.oecd-ilibrary.org/governance/preventing-policy-capture_9789264065239-en#page9

23. Ivan Horrocks, ‘Experts’ and E-Government: Power, influence and the capture of a policy domain in the UK’, *Information, Communication & Society* (2009) 12 (1) 110-127 <https://doi.org/10.1080/13691180802109030>

24. Stonewall, ‘Women and Equalities Select Committee Inquiry on Transgender Equality’, 27 August 2015 <https://www.stonewall.org.uk/cy/node/9461>

in September 2021, seems to have been a significant factor in shaping previous CPS guidance which inaccurately described the law. This was guidance the CPS published for secondary schools in 2020 (the Schools Guidance).²⁵

The Schools Guidance was issued in conjunction with the National Police Chiefs' Council and NASUWT The Teachers' Union, as well as Stonewall, Gendered Intelligence and other organisations. It directed teachers to the websites of Stonewall, Gendered Intelligence, and a number of other organisations which actively promote or support gender identity theory. The Schools Guidance conflated 'hate crimes'²⁶ with 'non-crime hate incidents',²⁷ which are not criminal offences, and included a list of "categories of anti-LGBT+ hate crime or LGBT+ hate incidents" without clearly distinguishing between them. The types of behaviour listed included "ostracising and excluding" others from friendship groups because of actual or perceived sexual orientation or trans identity, as well as rejecting someone or not wanting to work with them for these reasons. The term "rejecting", which is open to wide interpretation, was not explained. The Schools Guidance could have led children to believe that not supporting another student's transgender identification is a criminal offence.

Annex D has repeated this pattern of publishing misleading guidance which conflates criminal offences with behaviour which is not criminal, and potentially leads members of the public to believe they may be committing criminal offences when this is not the case. Unlike the Schools Guidance, Annex D is legal guidance for prosecutors, and it could lead prosecutors to misapply the law.

The Schools Guidance was previously available online but it appears to have been taken down. Sarah Phillimore, a barrister with expertise in child safeguarding, reviewed it while it was publicly available. She states,

*"...there is an alarming list of behaviour, some of which is trivial or undefined which is offered as examples of 'hate'... Given that the guidance is very clear about how seriously such 'hate crimes' and incidents should be taken, I am worried that a clear incentive is being set up here to encourage students to report one another's behaviour or for a teacher to feel under pressure to refer it on to the police."*²⁸

In April 2020 a 14-year-old girl supported by her mother, who acted as her litigation friend, threatened a judicial review of the CPS in relation to the Schools Guidance. The pre-action letter from the young woman's solicitors²⁹ stated,

"As regards the guidance our client is particularly concerned if she:

- excluded a trans-girl (biological male) from the girls only friendship group*
- sought to exclude a trans-girl (biological male) from the girls toilets*
- expressed her disagreement with trans-gender ideology. She believes that a*

25. Crown Prosecution Service, 'Commentary on the LGBT Bullying and Hate Crime Schools Project Classroom activities and guidance for teachers', 2020. (This is no longer publicly available). Excerpts can be found in Sarah Phillimore, 'The Crown Prosecution Service in the Classroom' (Child Protection Resource, 29 January 2020) <https://childprotectionresource.online/the-crown-prosecution-service-in-the-classroom/>

26. There is no specific offence of 'hate crime' in English law. However section 66 Sentencing Act 2020 imposes a duty on courts, when considering the seriousness of an offence for sentencing purposes, to treat as an aggravating factor that either at the time of committing the offence, or immediately before or after doing so, the offender demonstrated hostility towards the victim based on the victim being (or being presumed to be) transgender; or the offence was motivated (wholly or partly) by hostility towards persons who are transgender. The section 66 provisions also apply to hostility based on race, religion, disability and sexual orientation.

27. The Home Office Statutory Guidance 'Non-Crime Hate Incidents: Code of Practice on the Recording and Retention of Personal Data (accessible)', 3 June 2023, defines a non-crime hate incident as "an incident or alleged incident which involves or is alleged to involve an act by a person ('the subject') which is perceived by a person other than the subject to be motivated - wholly or partly - by hostility or prejudice towards persons with a particular characteristic." <https://www.gov.uk/government/publications/non-crime-hate-incidents-code-of-practice/non-crime-hate-incidents-code-of-practice-on-the-recording-and-retention-of-personal-data-accessible#definitions>

28. Sarah Phillimore, *Op.cit* (25)

29. Sinclairslaw, Pre-Action Protocol Letter for Judicial Review, 03 April 2020 https://safeschoolsallianceuk.net/wp-content/uploads/2020/04/cps-pre-action-protocol-letter-03.04.20_z.pdf

person is the sex that is observed at birth and that this cannot be changed. It is a matter of biological fact. Gender is a social construct.

- makes contact with groups who advise and campaign for women's sex-based rights and if she shares their information within the school setting (for example A Women's Place, Transgender Trend and Safe Schools Alliance UK).

Our client fears that under the Guidance she could be prosecuted for any of the aforementioned speech/actions.”

Following the pre-action letter, the CPS withdrew the Schools Guidance and said it would be reviewed. After this decision the young woman made an application to judicially review the CPS' participation in Stonewall's Diversity Champions programme, on the basis that the CPS could not carry out a fair review of the Schools Guidance while it remained in this programme.³⁰The organisation Safe Schools Alliance UK organised crowd-funding for the judicial review application. They reported that on the day of the hearing the CPS stated in court that the Schools Guidance had been permanently withdrawn. The judge then refused permission for the judicial review to proceed.³¹

The CPS seems to have taken pains to avoid public scrutiny of the Schools Guidance, which initially was not made available to parents. As soon as it was challenged, the CPS withdrew it for review, and then withdrew it altogether when the organisation's relationship with Stonewall was called into question. If the CPS was confident that its involvement in this Guidance and its relationship with Stonewall were appropriate to its role, it is difficult to see why it avoided scrutiny in this way.

The influence of gender identity theory on the CPS seems to have led the organisation to take a partisan approach which has resulted in the conflation of criminal and non-criminal behaviour within both Annex D and the Schools Guidance.

Gender identity theory's influence can also be seen in the CPS' proposed legal guidance on the law relating to deception as to gender, which is discussed below. In common with Annex D, the content of this proposed guidance suggests that withdrawing from the Stonewall Diversity Champions programme has not led to significant change in the CPS' approach to matters of 'gender identity' and sex, and that the organisation remains ideologically captured by gender identity theory.

30. Fiona Hamilton, 'Girl seeks judicial review of Crown Prosecution Service transgender 'bias'' (*The Times*, 8 January 2021) <https://www.thetimes.co.uk/article/girl-seeks-judicial-review-of-crown-prosecution-service-transgender-bias-97ckpxj2q>

31. Safe Schools Alliance UK, 'Help support a teenage girl challenge CPS LGBT+ hate crime guidance, 09 February 2021' <https://www.crowdjustice.com/case/challenge-cps-schools-guidance/>

The CPS' 'Deception as to gender' consultation

In September 2022 the CPS opened a consultation on proposed revisions to chapter six of its legal guidance about rape and serious sexual offences.³² Chapter six relates to situations in which a person is alleged to have deceived a sexual partner about his or her biological sex. Where this type of deception occurs, the sexual activity involved constitutes a sexual assault because the deception renders invalid any consent which has been given.

The term 'deception as to gender' is used in both the CPS' consultation and the leading case of *R v Justine McNally*³³ which is discussed below. However, the deception involved in this area of law is in fact deception as to biological sex, and therefore the phrase 'deception as to sex' is used in this report.

Like the CPS' legal guidance on domestic abuse and the Schools Guidance discussed above, the proposed CPS guidance about deception as to sex is framed by the concepts and language of gender identity theory. For example, the introduction to the proposed guidance states,

"Cases in which deception as to gender is a live issue may involve a suspect whose gender identity differs from the sex they were assigned at birth."

As noted by a group of doctors writing to *The Lancet* in 2018,

*"...sex is not assigned – chromosomal sex is determined at conception and immutable. A newborn's phenotypic sex, established in utero, merely becomes apparent after birth, with intersex being a rare exception."*³⁴

The proposed guidance misstates the law in many respects, and it is focussed on the subjective perceptions, or claimed perceptions, of trans-identifying suspects to a degree which potentially undermines objective decision-making on the part of prosecutors.

The law on deception as to sex

The definition of 'consent' as it relates to sexual activity is set out in section 74 of the Sexual Offences Act 2003, which says,

"For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

Section 76 of the Sexual Offences Act sets out two circumstances in which it will be conclusively presumed that a complainant in a trial for alleged sexual offences did not consent to the relevant sexual act and that the

32. Crown Prosecution Service, 'Deception as to Gender: proposed revision to CPS legal guidance on Rape and Serious Sexual Offences (RASSO), Chapter 6 – Consent', 26 September 2022 <https://www.cps.gov.uk/publication/deception-gender-proposed-revision-cps-legal-guidance-rape-and-serious-sexual-offences>

33. [2013] EWCA Crim 1051

34. Richard Byng, Susan Bewley, Damian Clifford, Margaret McCartney, 'Gender-questioning children deserve better science', (2018) *The Lancet*, Vol. 392, Issue 10163 [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)32223-2/fulltext?rss=yes%20](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)32223-2/fulltext?rss=yes%20)

defendant did not believe that the complainant consented. One of these circumstances is that “the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act.” Deception as to sex may potentially come within either this provision or within section 74.

In the case of *R v Justine McNally* the Court of Appeal dismissed an appeal against a conviction for assault by penetration, contrary to section 2 of the Sexual Offences Act 2003³⁵. The appellant, Justine McNally, was a young woman who had a relationship with another young woman, M, in which McNally had presented as a young man called “Scott Hill”. The decision in this case came within section 74.

The statement below from Lord Justice Leveson encapsulates the Court of Appeal’s approach to deception as to sex. It is clear from the judgment as a whole and from the facts of the case that Lord Justice Leveson uses the term ‘gender’ as a synonym for sex. The deception which McNally was found to have carried out was deception as to her biological sex. She was found to have deceived the complainant because she had led the complainant to believe that she was a boy when she was in reality a biological female.

“Thus while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male. Assuming the facts to be proved as alleged, M chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the defendant’s deception... It follows from the foregoing analysis that we conclude that, depending on the circumstances, deception as to gender can vitiate consent.” (paras 26 & 27)

The proposed CPS legal guidance

The proposed guidance states that the question of deception can be considered in the following three stages:

1. Has there been active or deliberate deception by the suspect? If not, the deception will not fall within the scope of s74 of the Act and consent will not be vitiated. However, if there is a deliberate deception, consider the second question.
2. Was the complainant deceived and therefore did not consent? If so, consider the third question.
3. Did the suspect reasonably believe the complainant consented?

The approach of the CPS’ proposed guidance to the first two stages, or questions, raises serious concerns, which are discussed below.

35. Section 2 Sexual Offences Act 2003 - Assault by penetration

(1) A person (A) commits an offence if—
 (a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
 (b) the penetration is sexual,
 (c) B does not consent to the penetration, and
 (d) A does not reasonably believe that B consents.

Stage 1: The assessment of possible deception

The suggestion in the stage 1 question that the deception will not fall within the scope of section 74 unless it is “active” or “deliberate” misstates the law. The guidance misinterprets the judgment in *McNally* in suggesting that it made distinctions between “active deception”, “deliberate deception” and what it refers to as “failure to disclose” in respect of deception as to sex. The guidance states that,

“The Court of Appeal in R v Justine McNally [2013] EWCA Crim 1051 determined that “depending on the circumstances, deception as to gender can vitiate consent” [27]. In McNally, the court characterised the appellant’s actions as a deliberate deception [26], rather than a failure to disclose, confirming that active deception as to gender falls within the scope of s74 of the Sexual Offences Act 2003.”

This wording suggests that only “deliberate” or “active” deception vitiates consent, and that “failure to disclose” does not vitiate consent because it does not come within the definition of “deception” used by the court in *McNally*. However, the court did not make this distinction between “deliberate” deception and “failure to disclose” and did not say that only “active” deception falls within the scope of section 74.

In relation to the question of deception, the proposed guidance states,

“There is no duty to disclose gender history, but in some circumstances suspects who are living in a new gender identity at the time of the alleged offending (as opposed to falsely purporting to be a different gender), including those who have obtained a GRC, may still be capable of actively deceiving a complainant as to such matters relating to their gender. 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.”

While it is the case that there is no general duty placed on those who identify as transgender to disclose their sex, that does not mean that a failure to disclose it will not amount to deception in the context of a sexual encounter or relationship. The suggestion in this paragraph that only “active” forms of deception such as making an explicit inaccurate statement or lying in response to a question are likely to be seen as vitiating consent where a suspect is “living in a new gender identity” has no basis in law.

The proposed guidance relating to the question of whether there has been a deception also states,

“If a suspect genuinely perceives their gender identity to be different to their birth assigned sex or if their gender identity is in a state of flux and/or emerging, this may be evidence there was not a deliberate deception.

The following type of evidence may assist to establish how the suspect perceived their identity:

- The steps the suspect has taken to live consistent with their gender identity.
- The steps the suspect has taken to acquire a new legal or administrative gender recognition.

Possession of a GRC proves that an individual has been legally recognised in their affirmed gender and is strong evidence to show that the individual is living in their affirmed gender. However, 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..."

This suggests that CPS prosecutors should base their assessment largely on suspects' subjective perceptions of their "gender identity" and the steps they have taken to live in way which is "consistent" with it. It also suggests that the possession of a Gender Recognition Certificate is relevant to the assessment, which is also suggested elsewhere in the proposed guidance. These considerations are not relevant to the objective assessment of whether the suspect has deceived the complainant about his or her sex.

However suspects may perceive their 'gender identity', and whatever steps they have taken to "live in" this identity, they know what their sex is. For someone to misrepresent their 'gender identity' as their sex is deception, whether it is done actively or passively.

The organisation Legal Feminist submitted a response to the CPS' consultation³⁶ which was written by a multidisciplinary team of lawyers headed by Sarah Vine KC, who specialises in criminal law. This submission states,

"The guidance treats a suspect's gender identity as a relevant, or even determinative, factor in establishing whether a deliberate deception as to sex has occurred. Whether it is right, desirable or workable for this position to be brought into law is an undoubtedly important issue. It remains, however, unlitigated and unlegislated. Embedding a preferred view on the matter into policy in this way represents an overreach on the part of the CPS so startling that it could be described as an attempt to usurp the function of Parliament. The effect of the guidance is to interpret and apply the substantive law as though it had been changed in a number of respects, all of which are so significant that they would require binding judicial authority at the very least, if not primary legislation. This goes far beyond the CPS's duty to apply the law and trespasses unambiguously into the territory of making law. It is frustrating the legislative function conferred on the CPS and is ultra vires."³⁷

Stage 2: Was the complainant deceived and therefore did not consent?

The proposed guidance states that, when assessing the complainant's account, the following non-exhaustive list of questions should be considered, depending on the circumstances of the case:

- 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

36. Legal Feminist, 'Response by Legal Feminist to Consultation on the Deception as to Gender section in the Rape and Serious Sexual Offences (RASSO) legal guidance', 16 December 2022, para 36 <https://www.legalfeminist.org.uk/2022/12/16/response-by-legal-feminist-to-consultation-on-the-deception-as-to-gender-section-in-the-rape-and-serious-sexual-offences-rasso-legal-guidance/>

37. The term *ultra vires* refers to an act or decision which is beyond the legal power of the person or institution making it. Such an act or decision by a public body is a ground for judicial review.

- gender of the suspect but chose not to avail themselves of the opportunity?
- 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?
 - Is there any evidence that the complainant was exploring their own sexuality at the time of the alleged offending?
 - 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.

The first question places responsibility on complainants for establishing whether a sexual partner was deceiving them about his or her sex, or rather establishing this at an earlier stage, since they would only be likely to make a complaint to the police after they had established it. The law does not place such a responsibility on complainants.

The question of whether prospective sexual partners are not the sex in which they present themselves is probably unlikely to occur to most people, especially if they are unfamiliar with the phenomenon of transgenderism. Including this question in the proposed guidance effectively suggests that prosecutors should take a sceptical approach to complainants who say they were deceived; and encourages prosecutors to potentially see complainants as at least partially responsible where a deception has taken place. This approach is contrary to the 'offender-centric' approach which the proposed guidance claims to take, and which is the approach the CPS and the Police Service take in relation to all allegations of sexual offending. One of the reasons for this approach is to attempt to avoid the kinds of stereotyping of complainants in sexual offence cases which has historically impeded objective decision-making about whether to proceed with prosecutions. This stereotyping is discussed in the CPS document 'Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes'.³⁸

In its 'Rape Strategy Update',³⁹ published in February 2022, the CPS stated:

"Police investigators and CPS prosecutors are asked to place the primary focus on the actions and behaviour of the suspect when conducting rape investigations and prosecuting these cases – a so-called 'offender-centric approach'. This approach is at the heart of the Joint National Action Plan that the CPS co-delivers with police partners."

The question in the proposed guidance which asks if there is evidence that the complainant was "exploring their own sexuality at the time of the alleged offending" potentially encourages the use of stereotypical thinking about complainants. Its relevance to the question of deception is not explained. In their submission to the consultation, the Gay Men's Network stated,

38. Crown Prosecution Service, 'Rape and Sexual Offences - Annex A: Tackling Rape Myths and Stereotypes, Legal Guidance, Sexual offences', 21 May 2021 <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-annex-tackling-rape-myths-and-stereotypes>

39. Crown Prosecution Service, 'Rape strategy Update, Publication, Sexual offences', 22 February 2022 <https://www.cps.gov.uk/publication/rape-strategy-update>

“We are concerned that the suggestion that a victim was “exploring their own sexuality at the time of the alleged offending” will disproportionately disadvantage homosexuals. The phrase “exploring” in this context most often relates to experimenting with homosexuality...”⁴⁰

The CPS' focus on placing responsibility on complainants is expressed very clearly in the second question which those responding to the consultation are asked to address, which is:

“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 law, there is no such “onus” on complainants. The relevant questions are whether a complainant was in fact deceived about the suspect's sex, and the related question of whether the complainant consented to the sexual activity. If the complainant was deceived, any apparent consent would be vitiated. It is not clear what the CPS means by “the rights of trans persons to live fully in their new gender identity”. However, it is clear in law that any such rights do not include the right to deceive sexual partners about their sex.

The proposed guidance's failure to address section 76 of the Sexual Offences Act 2003

In relation to most sexual offences⁴¹ there are four elements which must be proven. These are:

1. That the relevant sexual act took place;
2. That the defendant acted intentionally;
3. That the complainant did not consent to the act; and
4. That the defendant did not reasonably believe that the complainant consented.

As stated above, section 76 of the Sexual Offences Act 2003 sets out two circumstances in which it will be conclusively presumed by a court that the complainant did not consent to the relevant act, and that the defendant did not reasonably believe that the complainant consented to it. One of these circumstances is that “the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act”. If it is proved that a relevant sexual act took place and also proved that the defendant deceived the complainant as to the “nature and purpose” of that act, there is no requirement for the prosecution to prove that the complainant did not consent to the act, or that the defendant did not reasonably believe that the complainant consented, because these two elements of the offence will be conclusively presumed to be present.

In trials for most sexual offences the general definition of consent

40. Gay Men's Network, 'Deception as to Biological Sex in Cases of Rape and Serious Sexual Offences, Response to the Crown Prosecution Service consultation', November 2022, para 46b https://static1.squarespace.com/static/6200252604e9795287de2ada/t/636a7c64e-bf018723719f151/1667923047685/CPS_Response_Branded.pdf

41. There are some sexual offences in which the absence of consent is not an element of the offence, such as offences against children under the age of sixteen, who cannot give valid consent to sexual activity.

contained in section 74 of the Sexual Offences Act will be applied. Section 74 was applied in the leading case of *McNally*, which is discussed above. Section 76 was not applied by the Court of Appeal as the prosecution had not relied on section 76 in the Crown Court. However, Lord Justice Leveson clearly took the view that deception as to sex constitutes deception as to the nature of the sexual act in stating:

“Thus while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male.”

Since section 76 was not relied on in *McNally*, this case did not set a precedent in relation to the applicability of section 76 to cases involving sex by deception. However, Lord Justice Leveson's comments suggest that section 76 is potentially applicable in this type of case.

The courts take a strict approach to section 76, because where it applies it removes the potential for a defendant to argue reasonable belief in consent since it is conclusively presumed that reasonable belief in consent was not present.

In the case of *R v Bingham*⁴², a sexual offences case which related to deception but not deception as to sex, Lady Justice Hallett said,

“Where, as here, a statutory provision effectively removes from an accused his only line of defence to a serious criminal charge it must be strictly construed... it will be a rare case in which s.76 should be applied.”

Lord Justice Leveson's statement in *McNally* that deception as to sex amounts to deception as to the nature of the relevant sexual acts suggests that this type of deception is a type of “rare case” in which section 76 could be applied.

However, the CPS does not discuss the potential applicability of section 76 anywhere in its proposed guidance, which is entirely focussed on the application of section 74.

This is a significant omission. Crown prosecutors need to consider the potential applicability of section 76 in deception as to sex cases when making decisions about their prosecution strategies, and CPS legal guidance in this area should assist them in doing so.

It may be that this omission can be explained by the focus in the proposed guidance on the perceptions of trans-identifying suspects and defendants, and the way in which it tends to encourage a sceptical approach to complainants' accounts.

Under section 76 a defendant's intentional deception as to the nature or purpose of the sexual act will be sufficient to secure a conviction. This does not sit well with the way in which the proposed guidance inappropriately places an onus on the complainant “to discover or confirm the gender status of the suspect”.

42. [2013] EWCA Crim 823

The proposed guidance's recommendations about language use

The proposed guidance states,

“In accordance with the CPS Trans Equality Statement prosecutors should address trans victims, witnesses, suspects and defendants according to their affirmed gender and name, using that gender and related pronouns in all documentation and in the courtroom. However, as recognised in chapter 12 of the Equal Treatment Bench Book 2021, there may be occasions where it is necessary and relevant to the particular legal proceedings for a person's gender at birth or their transgender history to be disclosed. In cases where deception as to gender is a live issue such disclosure will clearly be necessary. Prosecutors reviewing sexual offence cases involving trans people need to be aware of, and sensitive to, all the relevant circumstances. Prosecutors should avoid making assumptions and should ensure the police supply as much information as possible to properly inform their decision making and ensure that correct terminology is used for each individual.”

As discussed above, the approach to language use which is set out in the Trans Equality Statement potentially creates confusion for those involved in the criminal justice process, may result in considerable distress for victims of crime, and leads to inaccurate data recording. In relation to the prosecution of deception as to sex allegations, the CPS' approach to language use may cause particular confusion for complainants, since the basis of their allegation is that they were deceived about the sex of the suspect or defendant. They may perceive the CPS' use of preferred pronouns as trivialising their allegations of deception.

This is not a problem which is confined to the CPS. The use of preferred pronouns and the recording of 'gender identity' rather than sex is now common practice within criminal justice institutions. While guidance for judges contained in the Equal Treatment Bench Book⁴³ explicitly recognises that it may not be appropriate to ask complainants in sexual offences trials to use the preferred pronouns of trans-identifying defendants, this does not solve all the problems which complainants face in relation to language use, since the complainant may be the only person involved in the criminal justice process who is using pronouns which refer to sex rather than 'gender identity', whether this is in a courtroom or during police investigations. The Equal Treatment Bench Book is discussed in more detail in Appendix 2.

The CPS' lack of transparency about the organisations which contributed to the proposed guidance

The introduction to the CPS' consultation states,

“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

43. Judicial College, *Equal Treatment Bench Book*, February 2021 edition, April 2023 revision <https://www.judiciary.uk/wp-content/uploads/2023/06/Equal-Treatment-Bench-Book-April-2023-revision.pdf>

and feedback was provided in writing and during workshops. The feedback was considered, and revisions were made.”

No information about these interested groups is given in the consultation document. The human rights organisation Sex Matters and an individual named Gill Rimmer filed Freedom of Information (FOI) requests asking for the names of those who participated in the pre-consultation. The CPS responded⁴⁴ to each request stating that they had concluded that the balance of public interest favoured withholding this information.

The CPS acknowledged that,

“There is a clear public interest in the disclosure of information that would inform the applicant and public about how the CPS is dealing with the matter and increase accountability and transparency generally.”

However, they went on to say,

“Disclosure of this information would inevitably prejudice the CPS to effectively conduct consultations in the future. Disclosing the information requested would be likely to discourage organisations from participating in CPS consultations in the future, particularly on issues where they may be drawn into controversy. If disclosed, it would be likely to inhibit those involved in future workshops and consultation to express themselves openly. It is vital that all can provide free and frank exchange of views regarding their deliberations without fear that those outcomes or conversations will be released into the public domain. This process is likely to be inhibited if the identity of the organisations became known.”

Gill Rimmer requested that the CPS conduct an internal review of their decision not to disclose the information requested. The internal review concluded that the information was correctly withheld under section 36(2)(b)(ii) and section 36(2)(c) of the Freedom of Information Act 2000, as releasing the information would be likely to prejudice the effective conduct of public affairs.

Gill Rimmer referred the CPS' refusal to provide the information to the Information Commissioner's Office (ICO). An ICO case officer was assigned on 20 June 2023. In a [decision notice](#) dated 01 September 2023 the Information Commissioner stated that the balance of the public interest favours disclosure of the information which Gill Rimmer requested. The Commissioner requires the CPS to disclose the information subject to appropriate redactions for information exempt under section 40(2) of the Freedom of Information Act, which relates to personal data. The Commissioner's decision can be appealed to the First-Tier Tribunal (Information Rights) by either party. Notice of any appeal must be served on the Tribunal within 28 calendar days of the date on which the decision notice was sent. The correspondence relating to Gill Rimmer's FOI request is set out [here](#).

The CPS' lack of transparency about the organisations and individuals who are influencing the content of CPS legal guidance is concerning, particularly in view of the influence of organisations such as Stonewall on the creation of the CPS' Schools Guidance discussed above. If the CPS

44. Crown Prosecution Service, 'Section 17 Notice under the Freedom of Information Act, Withholding Information' https://www.whatdotheyknow.com/request/902289/response/2235495/attach/3/Section%2017%20Notice%2010828.pdf?cookie_passthrough=1

views its relationship with the organisations which influenced the pre-consultation as appropriate to its role as a public prosecuting body, it is difficult to see why the wish to keep their identities confidential should over-ride what the CPS describes as the public interest in increasing its “accountability and transparency generally”. The CPS’ lack of accountability and transparency about who influences its work relating to what is a highly contested area of law and policy is a matter of serious public concern.

Conclusion

The CPS documents discussed in this report are symptomatic of a wider ideological capture within the CPS, which has adopted and is promoting a very partisan view about the nature of sex and 'gender identity'. In a context in which the law's approach to these matters is the subject of considerable public debate, the CPS appears to have allied itself with groups and individuals who represent only one side of this debate.

In the case of Annex D, this ideological capture has led the CPS to publish legal guidance which describes the law inaccurately. The proposed legal guidance on deception as to sex also contains inaccuracies about the law and includes proposals which the CPS does not have the authority to make. If these proposals are adopted, the CPS may be vulnerable to judicial review. The contents of both these documents suggests that the CPS is now so in thrall to gender identity theory that, in this area of law, it may be losing sight of its core purposes.

Policy Recommendations

Recommendations relating to Annex D

The CPS should withdraw Annex D's section on 'Trans and non-binary victims' and re-write it so that it is aligned with the law and clearly differentiates between the following:

1. Behaviour which may be distressing to complainants, but which does not constitute a criminal offence;
2. Behaviour which would clearly constitute a criminal offence;
3. Behaviour which could potentially constitute part of a pattern of coercive and controlling behaviour in an intimate or family relationship under the provisions of section 76 of the Serious Crime Act 2015.

In addition, the link to the Brighton and Hove guide should be removed from Annex D in order to avoid confusion about what types of behaviour do and do not constitute criminal offences.

Recommendations relating to the broader work of the CPS

The Attorney General is responsible to Parliament for the work of the CPS. In view of the extent to which gender identity theory appears to be influencing CPS legal guidance as it relates to transgenderism, we recommend that the Attorney General conducts a review of the CPS' existing and proposed legal guidance and other documents in this area, and the approach to policy which is influencing them.

We suggest that this review should include the following:

1. Withdrawing and re-writing all guidance, proposed guidance, and other documents in this area which are not aligned with the law and/or which express a partisan ideological approach;
2. Making searching enquiries as to how CPS legal guidance and policy in this area came about;
3. Finding out which organisations and individuals the CPS has consulted about the content of its legal guidance and policy in this area, and making this information public;
4. Exploring ways of widening the range of groups and individuals whom the CPS consults in the future, so that they include those with gender critical beliefs and not only those who adopt gender identity beliefs;

5. Exploring whether the ideological approach expressed in legal guidance and policy documents may have affected CPS decision-making in respect of prosecutions, and if so in what ways;
6. Exploring the steps which need to be taken to ensure that the CPS approaches its work with complete political neutrality.

Recommendations relating to the wider criminal justice context

There needs to be a wider review of policy and practice within criminal justice institutions in relation to their approach to the categories of 'gender identity' and biological sex. Proposals for such a review are set out below. More detailed proposals can be found in the Policy Exchange publication noted above.⁴⁵

Ending *de facto* self-declaration of 'gender identity'

The policies of the Crown Prosecution Service, the Police Service, and the Prison and Probation Services, as well as guidance for the judiciary, should all be reviewed with the aim of ending the practice of *de facto* self-declaration of 'gender identity' which has been introduced without public scrutiny, and bring the practices of these criminal justice institutions into alignment with the law.

This review should involve consultation with a wide range of organisations and individuals. Criminal justice institutions seem to have developed their current policies in consultation with a very narrow range of organisations, all or most of whom adopt gender identity theory and advocate for self-declaration of 'gender identity'. Future consultation should involve a range of organisations, including those representing women's interests and holding gender critical views.

Ending the compelled use of language based on 'gender identity' within the criminal justice system

The rights of everyone not to be compelled to use forms of speech which are based on 'gender identity' rather than biological sex should be respected.

When interviewing complainants/victims of crime, suspects, defendants and other witnesses, police officers and prosecutors should acknowledge their right to use the pronouns and forms of address which are appropriate to the biological sex of the people to whom they are referring.

Guidance for judges in the *Equal Treatment Bench Book* should be amended to reflect the right of all witnesses in both criminal and civil proceedings to refer to others in a way which aligns with those persons' biological sex.

Where trans-identifying suspects or defendants hold GRCs, the requirement in section 9(1) of the Gender Recognition Act to treat them according to their 'acquired gender' for legal purposes may require judges, lawyers and others involved in court proceedings in an official capacity to use their preferred pronouns and forms of address (where pronouns and forms of address are used). However, policy and practice

45. Maureen O'Hara, *Op.cit* (19)

should acknowledge that this provision places no requirement on others to do so.

Recording criminal justice data on the basis of sex

The Police Service, the Crown Prosecution Service, the courts, and the Prison and Probation Services should record all suspects, defendants, offenders and complainants on the basis of their biological sex rather than their 'gender identity'.

Where an individual holds a GRC, they should also record this fact separately.

All these institutions should be able to establish whether or not a trans-identifying suspect, defendant, offender or complainant holds a GRC in order to appropriately maintain accurate records.

It appears that in some cases this information is not being recorded due to institutions taking a very cautious approach in their interpretation of the prohibition of disclosure of 'protected information' about those who hold a Gender Recognition Certificate under section 22 of the Gender Recognition Act. However, this caution seems not to be justified in view of section 22 (4) of the Act.⁴⁶ To the extent that it is believed that section 22 is a genuine bar to recording the possession of a GRC for the purposes of effective and legitimate data recording by criminal justice institutions, the Act should be amended accordingly.

46. Section 22 (4) states that disclosing protected information will not be a criminal offence where:

(d) the disclosure is in accordance with an order of a court or tribunal,

(e) the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal,

(f) the disclosure is for the purpose of preventing or investigating crime.

Appendix 1

Excerpt from Annex D of the Crown Prosecution Services'

'Legal Guidance, Domestic Abuse', 05 December 2022

Trans and non-binary victims

Gender identity is not the same as anatomical sex. Gender identity is what you know your gender to be and can only be decided by the individual for themselves. Gender identity might be the same as assigned sex (cisgender) or different to assigned sex (trans). Gender identity is not the same as sexuality; trans and non-binary people identify as heterosexual, gay, lesbian, bisexual, pansexual, asexual, and aromatic, amongst other identities.

Trans people know their gender to be different to that which they were assigned at birth. 'Trans' is an umbrella terms which some non-binary people feel part of, but not all. Many trans people have a binary gender identity (male or female) but not all. Some will have taken, or been given the opportunity to take, steps to align their bodies, dress, name, pronoun, and social identity to be congruent with who they know themselves to be. Prosecutors should be aware that this process - called 'transitioning' - is not easy and can take many years. For some trans people, it is not medically or socially possible to transition and some may not want to in any event.

Please refer to Rape and Sexual Offences - Chapter 5: Issues relevant to particular groups of people for further information. (<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-5-issues-relevant-particular-groups-people>)

Trans and non-binary people can experience domestic abuse regardless of the gender identity of either person. Trans and non-binary people can be subjected to unique forms of domestic abuse linked to their trans or non-binary identity, including some that mirror those of LGB communities. Therefore, this segment should be read in conjunction with sexual orientation. Although not an exhausted list, some examples of how trans and non-binary people may be abused by intimate partners or family members include (see also; Domestic Violence: A resource for trans

people in Brighton and Hove): <https://avaproject.org.uk/wp-content/uploads/2016/03/Domestic-Violence-a-resource-for-trans-people-in-Brighton-and-Hove.pdf>

- Using the process of transitioning or “coming out” as a form of control
- Threatening or sharing pre-transition images
- Body shaming or criticising the victim for not being “a real man/woman” if they have not undergone reassignment surgery
- Minimise or disregard the abuse by blaming the victim’s “perception” on their hormones
- Physically assaulting surgically or medically altered body parts
- Withholding money for transitioning
- Targeting sexual or emotional abuse towards parts of the body they are ashamed of or forcing the victim to expose scars
- Refusing to use their preferred name or pronoun
- Destroying medication or clothes

Domestic abuse is traumatic for all victims, however trans and non-binary people can experience additional barriers to disclosing abuse or accessing support.

Additionally, for trans and non-binary victims, they often struggle to get access to refuges, while non-binary individuals, who were assigned female at birth (AFAB), may be forced to be “closeted” to avoid removal from places of safety. Where victims are able to access safe accommodation, staff are specially trained to recognise their needs and support services required to provide appropriate protection.

Appendix 2

The Equal Treatment Bench Book's guidance for judges

The approach of the CPS to gender identity theory cannot be fully understood in isolation from the approaches of other criminal justice institutions such as the Police Service and the courts. The approaches of all three of these institutions are discussed in detail in this Policy Exchange [publication](#), which was published in 2022.

The CPS always needs to consider the approach of the courts when carrying out its work in relation to any area of criminal law. Guidance for judges contained in the *Equal Treatment Bench Book* (the ETBB) therefore has a significant impact on the work of the CPS. This appendix discusses some of the key aspects of the ETBB's guidance as it relates to transgenderism.

The ETBB is published by the Judicial College, who carry out training for the judiciary on behalf of the Lord Chief Justice. Its stated purpose is to guide judges in treating all participants in court proceedings fairly.

In December 2021 a new interim version of the ETBB was published. Its guidance on 'Trans People' in chapter 12 included significant amendments which took account of some of the criticisms of earlier versions.

These criticisms came mainly from practising lawyers and legal academics, and related to broadly four areas, which were compulsion in relation to the use of the preferred pronouns and modes of address of trans-identifying parties to court proceedings; the adoption of tenets of gender identity theory as if they were fact; the implementation of self- definition of 'gender identity' in court proceedings; and the lack of transparency about who contributes to the ETBB's content.

Some of these criticisms were expressed in Thomas Chacko's [publication](#) for Policy Exchange in July 2021. This publication focussed mainly on the application of the ETTB in civil proceedings.

In August 2021 a group of legal practitioners and academics wrote to the Lord Chief Justice expressing concerns about the previous ETBB guidance. The Lord Chief Justice passed the letter to the ETBB's Editorial Panel for consideration. The text of the letter is set out below. Some signatories' names have been removed because they did not want them made public.

The December 2021 version of the ETBB appears to have taken some of the concerns the letter raised into account, particularly in relation to the treatment of witnesses giving evidence about their experiences of sexual and domestic violence.

In relation to the use of preferred pronouns, the previous version of the

ETBB, published in February 2021, stated:

“It is important to respect a person’s gender identity by using appropriate terms of address, names and pronouns. Everyone is entitled to respect for their gender identity, private life and personal dignity.” (p. 325)

Neither the February 2021 version of the ETBB, nor previous versions which included this requirement, provided any guidance about how it should be implemented in practice. There was no discussion in the guidance about how judges should treat witnesses who perceive defendants in terms of their sex rather than their ‘gender identity’.

The December 2021 interim version of the ETBB recognised for the first time that permitting witnesses to refer to those who identify as transgender using pronouns which align with their biological sex may be required in the interests of justice. Paragraph 26 of chapter 12 of this guidance included the following:

“There may be situations where the rights of a witness to refer to a trans person by pronouns matching their gender assigned at birth, or to otherwise reveal a person’s trans status, clash with the trans person’s right to privacy. It is important to identify such potential difficulties in advance, preferably at a case management [1] stage, but otherwise at the outset of the hearing. A decision would then have to be made regarding how to proceed, bearing in mind factors such as:

...Why the witness is unwilling or unable to give evidence in a way which maintains the trans person’s privacy. For example, a victim of domestic abuse or sexual violence at the hands of a trans person may understandably describe the alleged perpetrator and use pronouns consistent with their gender assigned at birth because that is in accordance with the victim’s experience and perception of the events. Artificial steps such as requiring a victim to modify his/her language to disguise this risks interfering with his/her ability to give evidence of a traumatic event.”

... There will be occasions when, after these and other relevant factors have been considered, the interests of justice require that a witness or party may refer to the trans person using their former pronouns or name.”

This revision was a significant step forward in relation to the treatment of complaints who give evidence in proceedings involving allegations of sexual violence and domestic abuse. However, its beneficial effects are arguably limited by the fact that lawyers and judges, and others attending court in a professional capacity, will generally still be using the preferred pronouns of defendants, which is likely to be confusing and distressing for complaints and other witnesses who perceive defendants in terms of their sex.

The other concerns relating to the ETBB which are outlined above remain. The guidance continues to incorporate self-declaration of ‘gender identity’ and to adopt many of the tenets of gender identity theory as

fact; and there is still a lack of transparency about who contributes to the ETBB's content.

The most recent version of the ETTB is the April 2023 revision of the February 2021 edition, which can be found [here](#). Paragraph 26 of chapter 12 has not been amended since the December 2021 revision.

Text of a lawyers' letter to the Lord Chief Justice about the *Equal Treatment Bench Book*, August 2021

The Right Honourable
The Lord Chief Justice of England and Wales
Royal Courts of Justice
Strand
London
WC2A 2LL

27th August 2021

Dear Lord Chief Justice,

The Judicial College's *Equal Treatment Bench Book*

We are a group of practising lawyers and legal academics. We are writing in a personal capacity to express our concerns about the implications for witnesses in both criminal and civil proceedings of the guidance on 'Trans People' in chapter 12 of the Judicial College's *Equal Treatment Bench Book*.

Judges are interpreting this guidance as requiring them to compel witnesses to use the preferred pronouns of defendants who identify as transgender. We are particularly concerned about the implications of this guidance for adult and child complainants at criminal trials relating to violent and sexual offence, and for parties in family proceedings who are giving evidence about their experiences of domestic abuse.

The *Bench Book* states,

"It is important to respect a person's gender identity by using appropriate terms of address, names and pronouns." (page 325)

No guidance is given about how this requirement should be carried out in practice in relation to witnesses other than those who identify as transgender, or about how judges should treat witnesses who perceive defendants in terms of their sex rather than their "gender identity". The guidance is written as if the use of a defendant's preferred pronouns is simply a neutral administrative matter which will have no detrimental effects on witnesses, or on court proceedings.

This has particularly serious implications for witnesses who are giving evidence about traumatic events, such as being subjected to physical and sexual violence. The *Bench Book* guidance does not address the impact on these witnesses of being required to describe a defendant in criminal proceedings, or an alleged perpetrator of domestic abuse in family

proceedings, in ways which amount to a denial of their own perceptions of reality. This is despite the fact that special measures which recognise the particular difficulties which these witnesses may face in giving evidence at court are provided in section 16 and 17 of the Youth Justice and Criminal Evidence Act 1999 in relation to criminal proceedings, and in sections 63 and 64 of the Domestic Abuse Act 2021 in relation to victims of domestic abuse giving evidence in family and other civil proceedings.

The account below was given by Maria MacLachlan, who was assaulted in 2017. One of her attackers, Tara Wolf, who self-defines as a 'trans woman', was convicted of assault by beating in April 2018. MacLachlan has stated:

“My experience of court was much worse than the assault...I was asked “as a matter of courtesy” to refer to my assailant as either “she” or the “defendant”. I have never been able to think of any of my assailants as women because, at the time of the assault, they all looked and behaved very much like men and I had no idea any of them identified as women... I tried to refer to him as the “the defendant” but using a noun instead of a pronoun is an unnatural way to speak. It was while I was having to relive the assault and answer questions about it while watching it on video that I skipped back to using “he” and earned a rebuke from the judge. I responded that I thought of the defendant “who is male, as a male”. The judge never explained why I was expected to be courteous to the person who had assaulted me or why I wasn't allowed to narrate what had happened from my own perspective, given that I was under oath.” (Julie Moss, 'Interview: Maria MacLachlan on the GRA and the aftermath of her assault at Speakers' Corner', *Feminist Current*, 21 June 2018, <https://www.feministcurrent.com/2018/06/21/interview-maria-maclachlan-gra-aftermath-assault-speakers-corner/>)

The authors of the *Bench Book* appear not to have considered the interaction between its guidance and guidance in *Achieving Best Evidence in Criminal Proceedings* (ABE). ABE states that judges have a responsibility to ensure that all witnesses are enabled to give their best evidence, and that that they must strike a balance under Article 6 of the European Convention on Human Rights between protecting the defendant's right to a fair trial and ensuring that witnesses are enabled to give evidence to the best of their ability. It requires judges to “...have regard to the reasonable interests of witnesses, particularly those who are in court to give distressing evidence, as they are entitled to be protected from avoidable distress in doing so.” (p.134)

The logic of the *Bench Book* guidance is that a complainant in a rape trial can be required to call a defendant who has raped her (or him) “she”, and to use female possessive pronouns to refer to the defendant's body parts. This could also apply to child witnesses and vulnerable adult witnesses. The guidance does not consider how a child or an adult with learning disabilities might experience an instruction from an authority figure like a judge to refer to a biological male as “she”. The right to accurately describe the sex of those who have assaulted them is crucially important

to the ability of victims of violent and sexual offences to report violence and give evidence at court. Compelling witnesses to describe a defendant in ways which amount to a denial of their own perceptions of reality therefore undermines access to justice.

The use of pronouns and forms of address which reflect a person's 'gender identity' rather than their sex is not simply a matter of social courtesy. For many people it is an expression of a political belief with which they profoundly disagree, and which they consider to be harmful to the rights of women, and to society as a whole. The *Bench Book* guidance is effectively promoting the imposition of a form of compelled speech, which is an infringement of witnesses' rights to freedom of thought, conscience and religion, and freedom of expression, under articles 9 and 10 of the European Convention on Human Rights respectively. Both these articles protect the right not to be obliged to manifest beliefs that one does not hold, as stated in the case of *Lee v Ashers Baking Co* [2018] UKSC 49. The right not to be compelled to express a political belief is well established in the case law of the European Court of Human Rights.

The courts have an obligation to balance the rights of defendants and witnesses in criminal trials, and to balance the rights of parties to civil proceedings. However, the *Bench Book* guidance prioritises the wishes and feelings of those who identify as transgender and includes no guidance for judges about balancing rights. The use of this guidance potentially impedes witnesses' ability to give accurate and coherent evidence, particularly where giving evidence requires them to recall traumatic events. This cannot reasonably be said to be a proportionate means of achieving the *Bench Book's* stated aims, and therefore its interference with witnesses' Convention rights is not justified.

The *Bench Book* guidance appears to be founded on what the Employment Appeal Tribunal in *Forstater v CGD Europe and others* (UKEAT/0105/20/JOJ) described as 'gender identity belief' (paragraph 108). This is the belief that "everyone has a gender identity which may be different to their sex at birth and which effectively trumps sex so that trans men are men and transwomen are women" (paragraph 107). The Tribunal found that the Claimant's lack of 'gender identity belief' was protected under Article 9 (1) ECHR and therefore within section 10 Equality Act 2010; as was her 'gender-critical belief', the core of which is that sex is biologically immutable (paragraphs 14 and 15). The Tribunal noted that this belief is in accordance with the current law (paragraph 115) and is shared by many people (paragraph 52).

The *Bench Book* guidance is not aligned with the Gender Recognition Act's provisions relating to the recognition of 'gender identity'. It states that,

"It should be possible to recognise a person's gender identity...for nearly all court and tribunal purposes regardless of whether they have obtained legal recognition of their gender by way of a Gender Recognition Certificate." (page 326)

This effectively introduces self-definition of 'gender identity' into the

conduct of court proceedings. However, such self-definition has not been incorporated into law in this jurisdiction. Proposals to amend the Gender Recognition Act to incorporate self-definition have been the subject of a public consultation, following which the government decided not to introduce these proposals into law. In advising judges to incorporate self-definition of ‘gender identity’ into the conduct of court proceedings, the Bench Book effectively advises judges to go beyond the law.

The Bench Book’s approach has been introduced without public consultation, and in the absence of any established public consensus. The *Law Society Gazette* has reported that, when asked to identify the organisations who assisted in the development of this guidance, the Judicial College stated that it was “not in the public interest to make public the names of those involved in this work.” (Melanie Newman, ‘Warning over transgender guidance to judges’, *The Law Society Gazette*, 24 February 2020, <https://www.lawgazette.co.uk/news/warning-over-transgender-guidance-to-judges/5103196.article>)

We find this lack of transparency about the influences on such an important document very concerning, particularly as the document is not aligned with current law.

There appears to be increasing concern about the Bench Book’s guidance in this area outside of the legal profession, such that the think tank Policy Exchange has recently published a document written by barrister Thomas Chacko which suggests the guidance is in need of urgent revision. We attach a copy of this publication.

We ask that a review of this guidance be conducted with a view to amending it to ensure that it reflects the law, and that it takes account of the obligation to achieve an appropriate balance between the rights of all witnesses in court proceedings.

Yours sincerely,

Rosemary Auchmuty, Professor of Law
Sue Bruce, Solicitor
Thomas Chacko, Barrister
Naomi Cunningham, Barrister
Peter Daly, Solicitor
Eileen Fingleton, Solicitor
Francis Hoar, Barrister
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