



Ministry  
of Justice



The Right Honourable  
**Elizabeth Truss MP**  
Lord Chancellor & Secretary  
of State for Justice

Rt Hon Fiona Mactaggart MP  
House of Commons  
London  
SW1A 0AA

MoJ ref: MC37225

28 September 2016

Dear Fiona

### SEXUAL OFFENCES ACT 2003

Thank you for your email of 8 September, to the Rt Hon Justine Greening MP, Secretary of State for Education and Minister for Women and Equalities, on behalf of your constituents. Your email has been transferred to the Ministry of Justice which has responsibility for the law in this area.

Your constituents are concerned that the Sexual Offences Act 2003 can be misinterpreted and wrongfully prejudiced against transgender people and in need of reform. The government does not agree with that view.

The Sexual Offences Act 2003 followed a full and extensive consultation, *Setting The Boundaries*, and significantly modernised and strengthened the laws on sexual offences in England and Wales, mainly to provide extra protection to children and adults from sexual abuse and sexual exploitation. It is respected across the world.

The 2003 Act amalgamated and replaced elements of the Sexual Offences Act 1956, the Indecency with Children Act 1960 and the Sex Offenders Act 1997. It was the first major overhaul of sexual offences legislation for more than a century and set out a strong, clear and modern approach to this sensitive area of the law. The Act provides a range of offences and robust sentences to deal with this serious offending. All of these offences can potentially be committed by any individual regardless of their sexuality, and can depending on the circumstances and the elements of the offence be committed by individuals of any gender.

The Crown Prosecution Service (CPS) makes decisions whether to charge suspects with a criminal offence. The CPS must do so once a case has been referred by the police for a charging decision in the circumstances set out in the Director's Guidance on Charging. Each case is considered on its facts and merits and will only be prosecuted if it meets both stages of the Full Code Test as set out in the Code for Crown Prosecutors (the Code).

The first stage is the evidential stage. In order to prosecute, a prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against the suspect on the charge under consideration. The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of the defence, and any other information that the suspect has put forward, or on which they might rely.

This is a different test from the one that the criminal courts themselves must apply. The court may only convict if it is sure that the defendant is guilty. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

The second stage is the public interest stage. It does not automatically follow that if there is sufficient evidence, there will always be a prosecution. Prosecutors must go on to consider whether a prosecution is required in the public interest by assessing the factors set out in paragraph 4.12 of the Code in accordance with the terms of the Code.

The prosecutor also takes into account the relevant CPS legal guidance. The CPS has issued guidance on rape and sexual offences which assists on a range of topics. This includes the issue of consent, which is covered in chapter 3.

In deciding whether to prosecute for rape or other non-consensual sexual offences the prosecution need to prove that at the time the particular sexual act took place:

- The complainant did not consent to that sexual act; and
- The defendant did not reasonably believe that the complainant consented.

Section 74 of the 2003 Act provides that a person consents, for the purposes of the Act, "if he agrees by choice, and has the freedom and capacity to make that choice." The Court has held that "the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad common sense way".

Certain deceptions perpetrated by a suspect on a complainant can have a bearing on the issue of consent. Section 76 of the 2003 Act creates conclusive presumptions as to both the complainant's lack of consent and the defendant's lack of reasonable belief in consent in one of two situations, namely where:

- i. The defendant intentionally deceives the complainant as to the nature or purpose of the relevant act [for example, a deception that a sexual act is necessary as part of a medical procedure]; and
- ii. The defendant intentionally induces the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

The senior courts have considered the significance of deceptions which do not fall under section 76 under the terms of section 74 i.e. whether the complainant was deprived of a free choice as a result of any such deception. These cases are referred to in the CPS Legal Guidance as "conditional consent" cases. These are cases in which it is said that ostensible consent was not true consent, either:

- Because of a material deception perpetrated on the complainant by the suspect (other than one which falls within section 76); or
- Because the suspect failed to comply with a condition which the complainant imposed on the giving of his/her consent (which involves a deception by the suspect from the moment he/she made decision not to comply with the condition).

One such case was *R v McNally* [2013] EWCA Crim 1051 where the allegation was that the defendant deceived the complainant as to her gender. The Court of Appeal held that the deception in question was capable of nullifying consent as it deprived the complainant of a free choice under section 74.

Such cases were decided on their own facts; it does not follow that consent is nullified in every case where there has been such a deception. The facts and context of the individual case would have to be carefully considered. It is in this context that there have been prosecutions for "gender fraud".

However, non-disclosure of gender or gender identity does not, on its own, nullify consent. All the facts and circumstances of any case featuring such non-disclosure would need to be scrutinised. A prosecutor would then have to decide whether there is sufficient evidence under the Code that:

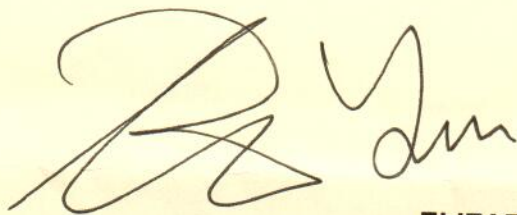
- The complainant did not consent i.e. that there was a material deception which meant in the circumstances that he/she was deprived a free choice; and
- The suspect did not reasonably believe that the complainant consented.

As the CPS Legal Guidance states, in the light of the developing concept of conditional consent and the absence of a clear authority as to how far it extends, all proposed decisions in such cases – whether to charge or not – must be referred to the Director’s Legal Advisor [DLA] for authorisation. This provides a safeguard to make sure the law and guidance is properly and consistently applied.

Furthermore, at the end of Chapter 3 of the Legal Guidance on rape and sexual offences there is a section entitled “Transgender Suspects”. This provides guidance on how prosecutors should approach issues in respect of such suspects, both when considering the evidential and public interest stages of the Code. The DLA must take such guidance into account when deciding conditional consent cases.

Thank you again for your letter.

Best wishes,

A handwritten signature in black ink, appearing to read 'Elizabeth Truss', written in a cursive style.

**ELIZABETH TRUSS MP**