

20 December 2023

By email from: info@forwomen.scot
to: enquiry@copfs.gov.uk

Dear Sir/Madam,

We are writing to express concern regarding the [Guidance for prosecutors in relation to transgender accused](#), particularly in relation to vulnerable women in “sex by deception” cases, and to ask what plans there are to review and update the guidance.

The Guidance was drafted in 2014 after what COPFS [described](#) as an “in depth consultation exercise took place with Scottish Transgender Alliance and Equality Network”. Like the Equal Treatment Bench Book, which is currently being reviewed, the Guidance predominantly uses the ideological language of these organisations and does not accurately reflect the law. It states transgender people should not be dealt with in a manner that is inconsistent with their “self-declared gender identity” and, shockingly, reflects Scottish Trans views that “the presumption will be against instigation of any proceedings” for transgender people charged with sex by deception under the Sexual Offences (Scotland) Act 2009. It also incorrectly states those with Gender Recognition Certificates are immune from any such prosecution.

The Scottish criminal law, however, relies on the biological concept of sex and this is demonstrated in two cases in Scotland in recent years. In *HM Advocate v Wilson* (2013) a biological female who entered into sexual relations with two girls on the basis of claiming to be a man was [convicted](#) in the High Court of “obtaining sexual intimacy by fraud”. In a [similar case](#) of sexual assault in 2018 the Sheriff was quoted as saying: “You have shown a complete disregard for each complainer’s physical integrity and right to decide what happens to their own body. Instead, you emphasised to the social worker preparing the report your right to have sexual intercourse with a prosthetic penis and without informing either complainer of this.”

It should be noted that according to COPFS’ own [Equality Impact Assessment Record](#) this Guidance was formulated notwithstanding feedback from Police Scotland to the effect that “the policy read as unbalanced. That it was strong from perspective of the transgender accused but underwritten in relation to impact such an offence would have on a victim”.

While cases of sex by deception can involve perpetrators of either sex it is concerning that the only cases we found in the UK (10 in the last ten years) involve female perpetrators and victims. This is against a background of growing numbers of men presenting themselves as female on lesbian dating apps and a [BBC report](#) of increasing pressure on lesbians to have

sex with men who claim to be women. Organisations such as Cliniq, who published [Cruising: a trans guy's guide to the gay sex scene](#) promote the idea that females who identify as gay men need not reveal their sex to their sexual partner.

There is a fundamental misunderstanding here: the notion of “gender identity” does not replace a person’s sex, and a trans person’s rights to privacy do not override another person’s ability to consent to sexual relations. The COPFS Guidance encourages confusion, ambiguity and the presumption of rights that do not exist. It is also a worrying possibility that the Guidance is acting as a detriment to justice as those who rely on it may be giving incorrect advice to complainers or not proceeding with viable cases.

We feel it is urgent that this Guidance is corrected and would appreciate if you would consider reviewing it as soon as possible to take into consideration the experience of victims of such serious crimes.

Yours faithfully,

Trina Budge
Director, For Women Scotland