

GUIDANCE FOR PROSECUTORS IN RELATION TO TRANSGENDER ACCUSED

Introduction

Diverse communities are greatly valued in Scotland and COPFS recognises that the general principles of equality, fairness and access to justice apply to all communities that have contact with the criminal justice system, including those within the Transgender community

This guidance sets out:

- (i) guidance to prosecutors in relation to transgender accused generally
- (ii) guidance on how prosecutors should deal with cases where it is alleged a transgender accused has committed a sexual offence involving non disclosure of their birth gender
- (iii) factors prosecutors should consider in deciding whether a criminal offence has been committed and whether to prosecute

Background

According to current figures it can be estimated that around 250 people in Scotland have received Gender Recognition Certificates and a further 250-500 transgender people are eligible for Gender Recognition Certificates but have not applied for them. In addition, over 200 further transgender people in Scotland are currently in the early stages of transition and receiving NHS medical assistance. It is unclear how many transgender people in Scotland present part-time in a different gender without accessing any medical assistance.

“Transgender” is an umbrella term for people whose gender identity and/or gender expression differs from gender assumptions made about them when they were born. The term may include, but is not limited to, transsexual people and those who see themselves as not clearly fitting into a male or female identity. A glossary of terms is provided at **Annex A** to assist Deputes.

An important distinction is to be made between a person’s sexuality and their gender identity and the two should not be confused or conflated. Gender identity is who you are, a person’s deeply felt internal and individual self-defined gender, which may or may not correspond with the gender they were assigned at birth, whereas sexual orientation is to whom, if anyone, you are attracted to. It is important therefore to bear in mind that transgender people span all communities, cultures, races, ages, genders and sexual orientations.

Gender reassignment is a protected characteristic in terms of the Equality Act 2010. Section 7 defines a person having the protected characteristic of gender reassignment “if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of

reassigning the person's sex by changing physiological or other attributes of sex". Unlike the Gender Recognition Act 2004 there is no requirement for a person to be diagnosed with gender dysphoria in order to fall within the definition. Persons falling within the definition in section 7 are protected from direct and indirect discrimination and harassment in a range of areas such as in work, the provision of services and in the exercise of public functions.

COPFS has a duty to have due regard as part of our obligations under that legislation to:

- Eliminate discrimination, victimisation, harassment or other unlawful conduct that is prohibited
- Advance equality of opportunity between people who share a characteristic and those who do not
- Foster good relations between people who share a relevant protected characteristic and those who do not.

In recognition of our duty in terms of the Equality Act 2010, our wider commitment to equality and diversity issues and that some particularly sensitive and complex considerations exist for prosecutors dealing with a transgender accused, this guidance is produced to provide assistance generally and specific guidance in relation to transgender accused who are reported to COPFS in relation to sexual offences to ensure appropriate and informed prosecutorial decisions are made.

Although there is increasing public awareness of transgender issues unfortunately there is still a significant social stigma associated with non-conventional gender behaviour or cross-gender identity which can lead to social isolation for many transgender people. Social stigma takes many forms, from experiencing personal violence or abuse in the home and in public arenas, to job or home loss, financial difficulties, loss of contact with families and communities, and to having great difficulties in personal relationships.

As such, transgender people may face a daily dilemma – whether to be open about their gender identity not matching the gender they were assigned at birth and risk prejudice, discrimination and the adverse judgements of others, or to keep the issue hidden and face accusations of cover-up, dishonesty and a lack of candour. Many transgender people are deeply fearful of the consequences of "coming out".

It is important to recognise that every transgender person is different. Some people transition from one gender to another with ease and others do not. Some people will transition to live full-time in their self-defined gender identity while others may live in their self-defined gender part-time. Also many transgender people will make the transition from their birth gender to living in their self-defined gender identity over a period of time and in stages. For example, particularly in younger transgender people, they may use the internet or social media to communicate with others in accordance with their self-defined gender identity as this offers a degree of anonymity and protection. Having gained confidence and

become more comfortable expressing their gender identity they may then disclose to a small group of confidants before taking any official steps to transition to live fully in their self-defined gender. Many younger transgender people either choose not to, or cannot fully transition because of their age, lack of financial means and/or lack of autonomy from their family. Similarly older transgender people may fear losing their job and/or family if they permanently transition to live in their self-defined gender. Despite the difficulties they face transitioning to express their gender identity full-time, most transgender people in such situations will none-the-less view their self-defined gender identity as being their intrinsic identity rather than their birth gender. It is therefore particularly important that prosecutors consider all available facts and circumstances when considering any report submitted and have a full appreciation of the relevant background.

The decision of a transgender individual to disclose their birth gender to others is a deeply personal and sensitive one. In the overwhelming majority of cases this will be a decision that does not come to the attention of the Police or COPFS. However, there may be some instances where an allegation of a sexual offence is made in respect of a transgender person where one of the issues to be considered is that the transgender person did not disclose their birth gender which was subsequently found out by the complainant. Such cases are likely to be very rare but this guidance provides assistance to prosecutors in relation to how to approach such cases in order to ensure an appropriate and consistent approach is adopted.

The Gender Recognition Act 2004

Within the UK, a transgender person can change the gender on any of their identity documents, except their birth certificate, at any time during their transition. However, their birth gender as formally recorded on their birth certificate is only changed once they have been granted a Gender Recognition Certificate (GRC).

The Gender Recognition process in the UK does not require applicants to have undergone any surgery as part of their transition.

It should also be noted that UK law permits people to change their name at any time and without any special permission or process. This applies to everyone, including people who transition.

There are strict rules governing the requirements for granting of a Gender Recognition Certificate. In order to apply for a certificate, the person must:

- be at least 18 years of age;
- demonstrate that they have received a medical diagnosis of gender dysphoria;

- have lived permanently in their 'acquired gender' for two years; and
- intend to continue doing so until death.

Section 22 of the Act provides that it is a criminal offence for a person who has acquired information about a person's gender recognition history in an official capacity to disclose the information to any other person. The privacy provisions apply in most circumstances where the information is received by someone acting in an official capacity. The exceptions are very narrowly drawn, so it should generally be assumed that if you are an employer, manager or colleague; or if you are working in any capacity for an official body or service provider, the law will apply.

It should be noted however that Section 22 sets out a series of exceptions, where disclosure is lawful – These exceptions include where the disclosure is: in accordance with an order of court or tribunal; for the purpose of instituting, or otherwise for the purpose of, proceedings before a court or tribunal; for the purpose of preventing or investigating crime. Where such information is to be placed before a court or tribunal it will be done in as sensitive a way as possible in accordance with the principles of this policy.

Prosecutors should be aware that many transgender persons will not obtain a GRC for a variety of reasons including reasons of age, lack of awareness of the existence of GRCs, or because they are not willing or able to be diagnosed with gender dysphoria by a UK gender identity specialist medical practitioner. Nevertheless they may be living permanently in their self-defined gender rather than in their birth gender and may have changed the gender on identity documents other than their birth certificate.

Guidance to prosecutors in relation to transgender accused generally

Leading evidence of an accused's gender history

Only where it is essential for the proof of a charge should evidence be led to establish the gender history of the accused (e.g to account for descriptions of clothing given by witnesses or other issues as to identification).

Even in many cases in which a transgender individual is accused of a sexual offence, their gender history will not be relevant to proof of the offence. (e.g. cases of indecent communications)

Transgender people should not be dealt with in a manner that is inconsistent with their self-defined gender identity. Therefore, prosecutors should ensure that the language used, to or about transgender people, should reflect how they identify and self-describe. This applies to the title and first and other names as well as the personal pronoun used to refer to them.

The accused's name on warrants, complaints, petitions, indictments and any associated paperwork should be the name which the accused chooses to be addressed by. This should include any schedule of previous convictions. If a schedule of previous convictions refers to a previous gender status in anyway, for instance by including reference to an alias in the previous gender, then prosecutors should ensure these are suitably redacted. The police should ensure that relevant information regarding the accused's self-defined gender identity is provided in any report to COPFS and if this information is not contained within the SPR then this should be raised with the Reporting Officer.

In some circumstances an accused may have made the decision to start presenting in their self-defined gender identity in the period between the date of the offence and the date of the trial. In those cases, similar considerations require to be addressed by prosecutors and paperwork may require to be amended and re-issued or be suitably redacted.

Any documents, for example passport or driving licence, which still show the gender assigned at birth as opposed to having been reissued to show the gender in which the person has started to live should not be unnecessarily disclosed. If there is no alternative, care must be taken to limit disclosure of the previous name and gender.

Guidance for prosecutors in relation to alleged sexual offences involving transgender accused

As highlighted above the numbers of cases are likely to be extremely small and of those cases reported the gender history of the accused may well not be particularly relevant to a prosecutor deciding that (a) a sufficiency of evidence exists and (b) whether it is in the public interest to instigate proceedings, although prosecutors should always be mindful of the general considerations outlined above to ensure a transgender accused is dealt with appropriately and with sensitivity according to their self-defined gender identity.

That said, in a small number of cases the gender history will be a relevant consideration for prosecutors, for instance where a complainer subsequently learns of the birth gender of a transgender person they have had sexual contact with and alleges that had they been aware of this they would not have consented to the sexual contact.

Although in those circumstances the gender history and gender identity of a transgender accused will be a relevant consideration for prosecutors this will not mean that a prosecution will necessarily follow. This will just be one of a number of factors a prosecutor will consider and prosecutors will have to carefully balance the rights of complainers and the rights of the accused.

Ultimately the role of the prosecutor is to properly apply the criminal law of Scotland and prosecute individuals **where it is in the public interest to do so**; taking account of all the circumstances and available evidence in a case, the rights of victims to be protected by the law, the rights of the

accused, and Convention rights. In terms of Section 57(2) of the Scotland Act 1998 the Lord Advocate, as a member of the Scottish Executive, has no power to do any act incompatible with any rights under the European Convention on Human Rights.

European Convention on Human Rights

Article 8(1) of the Convention provides that:

“Everyone has the right to respect for their private life, family life, home and correspondence”.

The approach taken by the Grand chamber of the European Court of Human Rights in *Goodwin v UK* (2002) 35 E.H.R.R 18 was that the general principle was of non-disclosure of gender history this being an intimate part of personal identity. Any departure from this general principle would have to meet the test set out in Article 8(2).

In terms of Article 8(2) any interference would have to be:

- in accordance with law – to have some basis in domestic law and be compatible with the rule of law in that it is adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual- if need be- with appropriate advice – to regulate his conduct.
- in pursuit of a legitimate aim which includes “the prevention of disorder or crime” and “the protection of the rights and freedoms of others”
- necessary in a democratic society. This will be so when it answers a pressing social need, if it is proportionate and the reasons given for it are relevant and sufficient

In sexual cases reported involving a Transgender accused it is likely that Article 8 rights will arise both in relation to the accused person and the complainer and careful consideration of these rights will accordingly be necessary.

It will be important for Prosecutors to bear in mind when considering the rights of the accused that the decision of a transgender individual to disclose their gender history to others is a deeply personal and sensitive one. In the early stages of a person transitioning, particularly where that person is young and lacks the confidence that comes with maturity to deal with such deeply personal issues, they may find it extremely difficult to discuss their gender history openly with others. Equally, a transgender person who has lived in their self-defined gender identity for a considerable period of time (whether or not they have obtained a gender recognition certificate and whether or not they have undergone any medical intervention or surgery) will identify with their self-defined gender only and may not see any need to disclose their birth gender to others.

Where a transgender person has received a Gender Recognition Certificate, their legal gender will therefore match their self-defined gender identity and, per the Grand chamber judgement of the European Court of Human Rights case in *Goodwin v UK*

(2002) 35 E.H.R.R 18 their right to keep private their gender history is legally established.

A fact sheet with the most up to date information produced by the European Court of Human Rights on Gender identity issues is attached to this guidance at Annex B to assist prosecutors.

The Scottish Transgender Alliance recommends to transgender people that it is generally safer to advise a potential partner of their gender history before they commence a sexual relationship. However, this is of course a personal choice of any individual and will likely depend at what stage of transition an individual is.

That said, the feelings of any complainer and their rights to sexual autonomy must also be carefully balanced by prosecutors and it is recognised that the discovery of a person's gender history in such circumstances may cause great upset both psychologically and emotionally and will therefore impact heavily on a complainer. This impact may be compounded where the complainer is of a relatively young age.

Sexual Offences (Scotland) Act 2009

The Sexual Offences (Scotland) Act 2009 created a number of new statutory sexual offences. Some relevant considerations for prosecutors in terms of this legislation are:

- The legislation is drafted in a gender neutral way and definitions of "penis" and "vagina" includes those that are surgically constructed;
- in general, all sexual offences directed against adults of full capacity require proof that the complainer did not consent and that the accused had no reasonable belief that the complainer consented;
- consent is defined as "free agreement";
- in terms of section 13(2) free agreement is presumed to be absent in a number of circumstances including "(d) where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct.." This presumption is likely to be interpreted narrowly by the courts and examples of where this has been held to apply include where an accused falsely states that the act is a medical procedure – Baillie v HMA 2007 SCCR 26.
- Where the statutory presumptions set out in section 13(2) do not apply it is necessary to prove that there was no consent and no reasonable belief in consent in the normal way

There may be cases where a complainer complains that they did not freely agree to the conduct because they were mistaken as a result of deception as to the nature or purpose of the conduct, having subsequently learnt of the birth gender of the accused which was not disclosed to them prior to the sexual conduct taking place.

This situation was considered by the Court of Appeal in England in *Justine McNally v R* [2013] EWCA Crim 1051. The circumstances of that case were that the appellant met the complainer initially on-line through a social networking game. At that time the complainer was aged between 12 and 13 years and the appellant was aged 13. The appellant used a male avatar called Scott and the complainer believed that she was communicating with a boy called Scott Hill from Glasgow. A relationship developed over a period of 3 ½ years via the internet. The complainer referred to the appellant as her boyfriend and they both talked of getting married. As they got older the relationship began to have sexual content and they would have phone sex during which the appellant talked about what he wanted to do to her. The complainer understood the appellant to be referring to his penis in these conversations. The appellant visited the complainer just after her 16th birthday and presented as a boy and was wearing male clothing. Over a number of visits there was sexual contact between the two and the appellant performed oral sex on the complainer and digitally penetrated her. On the final visit however, the complainer's mother confronted the appellant saying that she was really a girl. The appellant then showed the complainer a facebook profile in the name of Justine McNally but explained that the appellant wanted to have a sex change in the future. The complainer said she felt physically sick and was in shock at the discovery although told the appellant that if she had been told from the start she wouldn't have judged the appellant. The relationship ended and the complainer's mother made a complaint to the appellant's school and the police then became involved. The complainer said that she had consented to the sex acts because she believed she was engaging in them with a boy called Scott. The appellant pled guilty to a number of sexual assaults under the Sexual Offences Act 2003. In the appellant's appeal against conviction it was argued on the appellant's behalf that deception as to gender could not vitiate consent in the same way as age, marital status or wealth could not as they were all deceptions as to qualities or attributes and could be distinguished from cases where deceptions related to the features of the sexual act itself. The Court of Appeal rejected that analysis stating at paragraphs 26 and 27:

"Thus while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or 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 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 appellant's deception.

It follows from the foregoing analysis that we conclude that, depending on the circumstances, deception as to gender can vitiate consent"

Prosecutors should bear this decision in mind which is relevant though not binding and is only persuasive authority.

It is important that Prosecutors should recognise that a transgender accused may not consider there has been any deception at all because

they simply do not identify with the gender assigned at birth but rather identify with a different gender and therefore often there may be no intention to deceive. Accordingly there would not be the necessary mens rea present to give rise to a criminal offence. Whether the necessary mens rea is present will depend on facts and circumstances, even in the McNally decision the court recognised that much will depend on the circumstances whether a criminal offence has been committed. There should be no assumption made that there has been a deliberate deception simply because the person's birth gender has not been disclosed and it will be necessary for Prosecutors to carefully consider all the facts and circumstances in assessing whether 1. a criminal offence has been committed – that there was intentional deception such that consent would be vitiated and 2. that in all of the circumstances it is in the public interest to instigate proceedings.

Where a transgender person has received a Gender Recognition Certificate, their legal gender will therefore match their self-defined gender identity and, per *Goodwin v. UK* (2002) 35 E.H.R.R 18 their right to keep private their gender history is legally established.

Consequently, where a person who has received a Gender Recognition Certificate keeps their gender history private, there can be no mens rea of intention to deceive.

Factors prosecutors should consider in deciding whether a criminal offence has been committed and whether to prosecute

Factors relevant to the complainer;

1. Age and any vulnerabilities of the complainer
2. Capacity and understanding (including whether the complainer has a learning disability)
3. Development, both physical and emotional
4. Impact, including any harm, the offence has had on the complainer
5. Views/attitude of the complainer in relation to proceedings
6. Whether the nature of the sexual act that took place was the same as that to which the complainer consented to.

In general where the complainer is of young age and/or immaturity and where there is evidence they have been targeted because of this or any other vulnerability then this will weigh towards instigating proceedings.

The impact of the offence and the views of the complainer will always be a relevant consideration however prosecutors should be aware that because of the stigma associated generally by society in relation to transgender issues a complainer may feel a degree of pressure initially to make a complaint and this view may change over time. It is therefore imperative that all complainers in such cases are precognosed and that their views and attitudes are sought before any proceedings are instigated in order that prosecutors are in possession of the full facts.

Factors relevant to accused;

1. Risk posed to the public of sexual offending
2. Previous convictions of a sexual nature
3. Whether there has been any further similar incidents either before or since the date of the offence
4. Age and maturity
5. The accused's self-defined gender identity and the measures undertaken by them to live in accordance with this. As stated above some transgender accused will not have taken official steps or undergone any diagnosis or medical intervention to live in their self-defined gender identity. However it will be relevant to consider whether nonetheless the accused has started to transition to live in accordance with their self-defined gender identity, for example regularly dressing according to that gender identity. In addition, it will of course be a relevant factor if the accused has attempted to access medical or social transgender support or has changed any of their identification documents (passport, driver's licence, bank details) or has made an application for a Gender Recognition Certificate
6. Any power imbalance between the parties, including attempts to secure secrecy, aggression, manipulation, coercion or bribery
7. Any evidence suggestive of grooming
8. The number of complainers
9. The accused's attitude to the alleged offences
10. Capacity and understanding (including whether the accused has a learning disability)
11. Whether the nature of the sexual act that took place was the same as that to which the complainer consented to.

In general where the nature of the sexual act that took place is not the same as that to which the complainer consented to this will weigh towards instigating proceedings particularly where the conduct forms part of a picture of predatory sexual behaviour.

Otherwise, where it is clear that the accused identifies with a different gender to their birth gender then the presumption will be against instigation of any proceedings as there will be insufficient evidence to demonstrate the necessary mens rea of intention to deceive.

Circumstances of the offence;

1. The nature and level of the relevant sexual activity
2. Any evidence of the use of force, exploitation, coercion, threat, grooming or manipulation
3. The nature and duration of the relationship

In recognition of the complex issues that may arise where allegations of sexual offences are made against a transgender accused all such cases must be referred to the Federation Sexual

Offences Team (SOT) for marking and reporting to the National Sexual Crimes Unit (NSCU) for instructions. All cases of this type must be reported to NSCU by way of an Initial Report. An accused must not be placed on either summary complaint or petition without Crown Counsel having instructed this.

In terms of our duties under the Equality Act 2010 to transgender persons it is important that COPFS treats transgender accused fairly and appropriately and acts in a way to eliminate discrimination and to promote equality and foster good relations. Given our duties and the complex issues that can arise in relation to transgender accused it is important that as an organisation COPFS can identify and monitor transgender equality issues. Accurate data will enable COPFS to identify if there is any disproportionality in relation to transgender accused and to take action to address any identified issues. Therefore, any prosecutor who deals with a case involving a transgender accused should make contact with those dealing with Equality and Diversity issues within Policy Division, Crown Office who can provide further guidance, if needed, and will maintain a database of cases with a view to improving our ability to deal with issues involving this community more effectively.

Annex A

Definitions

Gender Dysphoria	A recognised medical condition where a person experiences distress about their birth gender not corresponding with their gender identity.
Gender Expression	A person's external gender-related appearance including clothing, speech and mannerisms.
Gender Identity	A person's deeply felt internal and individual experience of gender, which may or may not correspond with their birth gender
Transition	The process of reassigning social gender role, biological sex characteristics and/or legal gender to correspond with the self-defined gender identity. Transition is also known as Gender Reassignment. A person's individual process may or may not include any medical diagnosis of gender dysphoria or any medical hormone treatment or surgeries.
Non-binary People	People who see themselves as not clearly fitting into a male or female identity and therefore are positioned out-with the traditional man/woman gender binary. Such people may instead self-identify as having complex or fluid gender identities or as having no gender.
Trans Men	People assigned female at birth who self-identify as men and are undergoing, or have undergone, transition from female to male in order to live as men for the rest of their lives.
Trans Women	People assigned male at birth who self-identify as women and are undergoing, or have undergone, transition from male to female in order to live as women for the rest of their lives.
Transgender People	A diverse range of people whose gender identity and/or gender expression do not correspond with the gender they were assigned at birth. This includes, but is not limited to: transsexual people and non-binary people.
Transsexual People	People who intend to undergo, are undergoing or have undergone any part of a process of transition from male to female or from female to male.