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Neutral Citation Number: [2026] EWHC 2449 (Admin)

Case No: AC-2025-LON-000781

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 September 2026

Before :

PRESIDENT OF THE KING'S BENCH DIVISION

THE HON. MRS JUSTICE HEATHER WILLIAMS DBE

Between :

The KING (on the application of SEX MATTERS)

Claimant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

Sarah Vine KC & Christopher Knight KC (instructed by Bhatt Murphy) for the Claimant
Clair Dobbin KC & Ruby Shrimpton (instructed by The Crown Prosecution Service) for the
Defendant

Hearing dates: 8 & 9 July 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 25 September 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Victoria Sharp, P.:

1. This is the judgment of the Court.

Introduction

2. The claimant challenges the legality of guidance issued by the Director of Public Prosecutions (“DPP”) to specialist Crown Prosecutors who prosecute rape and sexual assault cases. The relevant part of the guidance is entitled *Deception as to Sex* (“the Deception Guidance”) and forms part of the Rape and Sexual Offences (“RASSO”) legal guidance. The core of the claimant’s case is that the Deception Guidance is legally flawed because it is premised on the basis that a suspect’s deception as to their asserted gender identity is capable of vitiating the complainant’s consent to sexual activity under section 74 of the Sexual Offences Act 2003 (“the SOA”).
3. The claimant relies upon two specific grounds of challenge:
 - i) Ground 1: The Deception Guidance is wrong in law in that a deception as to “gender identity” (in contrast to a deception as to the suspect’s sex) is not capable of vitiating consent for the purposes of section 74 SOA because it is not sufficiently closely related to the nature, purpose, or performance of the sexual act itself. As such, it is within category (i) of the unlawful policies identified by the Supreme Court in para 46 of *R(A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931 (“*R(A)*”);
 - ii) Ground 2: In terms of deceptions as to gender identity, the Deception Guidance is so unclear as to what may be legally relevant to a Crown Prosecutor’s decision-making and at what stage of the analysis, that it presents a misleading picture of the true legal position and, as such, comes within category (iii) of the unlawful policies identified in para 46 of *R(A)*.
4. Linden J granted the claimant permission to apply for judicial review on 22 December 2025. The issue of standing had not been raised by the defendant at that stage.
5. In summary, the defendant’s response to the claimant’s grounds is as follows:
 - i) Ground 1: the Deception Guidance reveals no error of law. There is no authority for the claimant’s principal proposition that a deception as to gender identity is incapable of vitiating consent. The law is not as definitive as the claimant contends and it would be an error to present the guidance as though it were. The Deception Guidance reflects the complexities of the law as it stands; and whether consent is vitiated by deception is a highly fact-sensitive question;
 - ii) Ground 2: read as a whole, the Deception Guidance does not present a misleading or confusing picture of the legal position. It must be assessed in its context: it does not purport to be exhaustive as to the law, rather it provides a legally accurate framework to assist Crown Prosecutors when deciding whether to prosecute in particular cases; and

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- iii) The claimant lacks the necessary legal standing to bring this claim, as Sex Matters does not represent the interests of those affected by the Deception Guidance (victims of crime or defendants). Accordingly, it does not meet the requirement of having a “sufficient interest” in the subject matter of the claim.
6. We emphasise at the outset that this judgment is solely concerned with addressing the legal issues we have just summarised. The claimant campaigns on matters of sex in law and policy in the United Kingdom, based on its position that biological sex is real and immutable (a view sometimes termed “gender critical”). There are others, including in the trans community, who hold different views. It is not the role of this Court to express any opinion, one way or the other, on the merits of this wider, often polarised, debate. Our judgment should not be read as providing support for or diminishing the views of either side in this debate.
7. As we explain in “The facts and circumstances” section of this judgment, there have been various published versions and draft versions of the Deception Guidance. The most recent version of the Deception Guidance was published on 26 June 2026 (“the June 2026 version”). If the claimant succeeds on Ground 1, the relief sought is a quashing order which, necessarily, would be directed against the June 2026 version. If Ground 2 is established, the claimant argues that declaratory relief should be granted, again directed at the June 2026 version. However, the parties’ earlier communications led to a draft amended version of the Deception Guidance which was provided by the defendant on 6 June 2025. He then provided a further version, altered in two respects, on 20 February 2026. These drafts reflected a number of the claimant’s concerns and the defendant’s intention is that these changes will be reflected in a further version of the guidance published after this Court has given judgment. Accordingly, the parties focused their submissions on the draft amended version of the Deception Guidance, on the basis that it would be academic and unnecessary to trouble the Court with text that will be changed in any event.
8. As it is the legality of the Deception Guidance that we are addressing, save where we indicate otherwise, we will use the terms “sex” and “gender” in the way they are used in that document. In this regard, the Guidance says:
- “...sex tends to refer to biological sex (sometimes referred to as ‘sex assigned at birth’) while gender is commonly used to refer to social or cultural differences or the way in which someone is perceived or experiences themselves (commonly known as ‘gender identity’). This guidance uses the term ‘sex’ to refer to biological sex and ‘gender’ to refer to gender identity.
- A person’s gender identity might be the same as their biological sex (sometimes referred to as ‘cisgender’ but for clarity referred to in this guidance as ‘non-trans’) or different to their biological sex (transgender / trans or non-binary).”
9. The claim is supported by witness statements from Maya Forstater, the Chief Executive Officer of Sex Matters, dated 4 July 2025 (“Forstater 1”) and 13 March 2026 (“Forstater 2”); and a statement dated 3 July 2026 from Dennis Kavanagh, a Director of the Gay Men’s Network. The defendant’s evidence comprises witness statements from Thomas Guest, interim Deputy Director in the Policy Directorate of the Crown Prosecution

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Service (“CPS”) dated 20 February 2026 (“Guest 1”) and 9 March 2026 (“Guest 2”); and a statement dated 30 June 2026 from Annie Taylor, Head of Policy (Legal) in the Policy Directorate of the CPS (“Taylor 1”).

10. The facts and circumstances are set out at paras 11 to 37; the legal framework is set out at paras 38 to 100; the parties’ submissions are set out at paras 101 to 120 and our analysis and conclusions at paras 121 to 163.

The facts and circumstances

The claimant

11. Forstater 1 and Forstater 2 explain that Sex Matters was founded in October 2020 and became a registered charity in April 2024. The organisation campaigns for clarity on sex in law and policy in the United Kingdom. Its objectives are to promote human rights where they relate to biological sex, advance education about sex and the law and promote the sound administration of the law in relation to sex and equality. Its work is based on the premise that sex is real, immutable, and important in some contexts. The organisation has published over 40 reports and research briefings and responded to more than 30 government consultations in a range of law and policy areas. The issue of consent to sexual activity is one of its concerns.

The Code for Crown Prosecutors

12. Under section 10(1) of the Prosecution of Offences Act 1985, the DPP is required to issue a Code for Crown Prosecutors “giving guidance on general principles to be applied by” prosecutors in determining whether proceedings for an offence should be brought and what charges should be preferred. The Code sets out the two-stage Full Code Test for the prosecution of offences. The first stage, the evidential stage, requires the prosecutor to be satisfied, on an objective assessment of the evidence, including the potential defence, that there is sufficient evidence to provide a realistic prospect of conviction. If the case satisfies the evidential stage, the prosecutor proceeds to the public interest stage.
13. The DPP issues guidance supplementing the Code for Crown Prosecutors, in order to assist prosecutors with what the law is in areas of particular complexity and/or sensitivity. This includes the RASSO legal guidance, which consists of a number of chapters. Para 2.10 of the Code states that prosecutors “must comply with...the policies and guidance of the CPS issued by the DPP, unless it is determined that there are exceptional circumstances”.

The consultation and the December 2024 guidance

14. On 21 May 2021, in the light of the Court of Appeal’s decision in *R v McNally* [2013] EWCA Crim 1051, [2014] QB 593 (paras 54-55 below) the CPS published a new chapter, *Deception as to Gender*, as part of the RASSO guidance. Following an internal review and a pre-consultation with various interested groups, an amended version of this guidance was then published for public consultation on 26 September 2022. The CPS website indicated that the proposed revisions to this guidance were intended to address in more detail some of the complex and sensitive issues around this area of law and to provide more support for prosecutors dealing with these cases. Guest 1 explains

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that the consultation received 409 responses, expressing a wide range of diverse views. Both Sex Matters and the Gay Men’s Network provided responses.

15. On 13 December 2024, a revised version of the Deception Guidance was published, now entitled *Deception as to Sex*, along with a document summarising the responses to the consultation. The latter explained that the title had been changed because references in *McNally* to “gender” were clearly references to “sex”, given the facts of the case (para 54 below) and the judgment was given at a time when the two words were often used interchangeably.
16. The claimant considered that the December 2024 revised version of the Deception Guidance had alleviated some of its concerns, whereas others remained. Accordingly, on 21 February 2025, the claimant sent a pre-action protocol letter to the DPP highlighting the respects in which it was said that the guidance was unlawful and/or inaccurate. As limitation was approaching, the parties agreed to a short post-issue stay to allow for service of the substantive protocol response. The claim was issued on 12 March 2025, and the Court approved the application for a stay. The stay was subsequently extended by consent when it emerged that the Supreme Court would shortly hand down judgment in the *For Women Scotland v The Scottish Ministers* litigation.

The draft amended guidance

17. On 9 May 2025, the DPP responded to the protocol letter and served an amended draft of the guidance. On 14 May 2025, the claimant wrote to the DPP pointing out that the implications of the Supreme Court’s judgment had not been addressed. This led to the parties agreeing a further Court approved stay and the DPP’s final protocol response was served on 6 June 2025, alongside a further draft amended version of the Deception Guidance, which accepted a number of the points that had been raised by Sex Matters. After considering this version, the claimant filed and served its Statement of Facts and Grounds, contending that the Deception Guidance was unlawful. Guest 1 then exhibited a slightly amended version of this draft revised guidance at TCG/2, with Mr Guest explaining that, upon reflection, he had decided to reinstate two passages that had been deleted from the June 2025 version. Guest 1 indicated that the CPS intend to publish the TCG/2 version of the Deception Guidance at the conclusion of these proceedings.
18. We will set out the material parts of the TCG/2 version of the Deception Guidance as this is the version of the text which Grounds 1 and 2 are focused on (for the reason explained at para 7 above). For ease of later cross-reference, we have highlighted in bold the text that the claimant takes particular issue with.
19. The first section of the document says that prosecutors must approach cases involving an alleged deception as to sex on the basis of the specific evidence and circumstances revealed by the police investigation. It then indicates, “the following information may assist by way of background for prosecutors to understand the context of such a case”. The passage on terminology which we quoted at para 8 above appears next. The text then continues:

“Deception as to biological sex may be relevant to the issue of whether consent to sexual activity was vitiated (negated). Cases in which deception as to biological sex is a live issue may

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involve either a suspect who is non-trans or a suspect who is trans or non-binary.

Although much of this guidance contains information on trans and non-binary suspects, this is because **questions of deception and consent may involve more complex issues where the suspect is trans or non-binary**. However, this guidance does not intend to suggest that most such offences are committed by trans or non-binary persons nor that trans and non-binary people are pre-dispositioned to be deceptive.

In many cases, the suspect will be non-trans i.e. a woman purporting to be a man or vice-versa.”

20. The Deception Guidance states that “biological sex” refers to the sex that is recorded or registered at the time of birth; and it then addresses intersex or variations in sex characteristics (“VSC”) individuals and the meaning of various terms including “gender incongruence” and “gender dysphoria”. The section that follows is headed “Trans and non-binary persons – identities”. It says that the guidance has tried to use terminology that is generally accepted. It explains that transgender or trans is an overarching term used to describe people who have a gender identity that is different from their biological sex; that non-binary people do not identify as a man or a woman but as both or neither; and that gender identity is not the same as sexual orientation.
21. The claimant takes issue with the entirety of the bullet points that appear in the next section, which is entitled, “Trans and non-binary persons – experiences”. The text is as follows:

“How a trans or non-binary person experiences and expresses their gender can be a complex issue. The decision on whether to prosecute must be based on the evidence in each individual case, but the following information is provided for background context, as it may assist prosecutors to make more informed decisions:

- **Many people who have transitioned may not regard themselves as trans, but simply as a man or a woman.**
- **Gender identity can be fluid and/or emergent for some persons, particularly for young persons, who may be exploring the nature of their identity and/or sexuality, or for non-binary people, who may identify as a man and a woman or neither.**
- **A person whose gender identity isn’t the same as their sex may express their gender through their speech, dress, gestures, mannerisms etc, without this being a fabrication, a performance or a deception. (It is important to recognise that non-trans people may also have a multitude of ways to express themselves, even if their gender identity is the same as their sex.)**
- **To acquire a Gender Recognition Certificate (see below), a person is required to live in the acquired gender for 2 years.**

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To meet this condition, some may think it necessary to conceal their sex.

- Some trans people may be wary of revealing their biological sex due to social stigma, transphobia or safety considerations, which may produce high levels of anxiety.**
- Other trans persons may not openly identify as trans in everyday life, such as at home, at school or in the workplace, for fear of a family or relationship breakdown, losing employment, or exclusion from a close-knit community or a place of worship.**
- Intersex / VSC persons may have particular difficulties in communicating their sex to potential sexual partners, as their gender/sex presentation is inherently complex. The language required may not be readily understood unless explained in detail, which they may consider inappropriate.”**

22. The next part of the Deception Guidance explains the criteria for obtaining a Gender Recognition Certificate (“GRC”) under the Gender Recognition Act 2004. There is then a section on the terminology to use when addressing trans people.
23. The Deception Guidance refers to the Court of Appeal’s decision in *McNally* (paras 54-55 below) and to section 74 of the SOA (para 38 below). The claimant accepts that the first two paragraphs are an accurate summary of *McNally*. Under the heading “Application of McNally to trans and non-binary suspects” the text then includes the following:

“The defendant in *McNally* did not claim in her defence to be trans or non-binary; she was female but presented as male. To date, there have been no cases considered by the appellate courts involving a trans or non-binary defendant that address this issue.

Although the court in *McNally* used the word “gender” with regard to the deception in question, it was therefore referring to a deception as to sex, as there was no issue of “gender identity” in the case. However, as noted in *R (Monica) v DPP (Boyling)* [2018] EWHC 3508 (Admin)... *McNally* could be analysed as an identity or impersonation case.

McNally is therefore authority for the proposition that a deliberate deception as to the defendant’s sex is so connected to the nature of the sexual activity that, depending on the circumstances, it is capable of vitiating consent.

It is arguable that *McNally* and the other authorities do not conclusively address the position in relation to trans and non-binary suspects. The question remains whether the sexual nature of the act is different where the complainant is deceived into believing that the defendant is not trans or non-binary; and, if so, whether different considerations apply.

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Although impersonation / deception as to identity is a potential separate line of authority, this guidance necessarily focuses on deception as to sex, on which McNally provides a clear line of authority, pending any further clarification from the appellate courts.”

24. The Deception Guidance then summarises a number of the authorities that we review from para 43 below. No issue is taken with that summary. The text continues:

“From these authorities, the following principles emerge:

- For consent to be vitiated by a deception falling within section 74, the deception must be closely connected with the sexual act or the sexual nature of the activity rather than its consequences or the broader circumstances in which the sexual act takes place.
- Any novel circumstances must be considered by reference to the statutory definition, namely whether the alleged victim has agreed by choice and has the freedom and capacity to make that choice.
- Consent can be vitiated by an express deception or by a failure to disclose.
- Therefore, the test to be applied is whether a deception (however that deception is operated) is sufficiently closely connected to the performance of the sexual act that the complainant cannot be said to have made a free choice to participate in it.

Accordingly, the current principles to be applied in cases involving trans or non-binary suspects are:

- **Depending upon the circumstances of the case, a trans or non-binary person (including those who have a GRC and / or have had gender reassignment) may deceive a complainant as to their sex if they choose not to disclose that they are trans / non-binary, or if they make a deliberate false assertion or lie in respect of their sex and / or gender identity.**
- By reference to section 74, the test to be applied is whether the non-disclosure or representation is so closely connected with the sexual nature of the relevant act that it deprived the complainant of their freedom to choose whether to have sexual relations with the suspect.”

25. The section that follows is headed “Evidential considerations” and says:

“The principles set out in this section apply to all cases, whether the suspect is non-trans, trans or non-binary.

The issues in a case involving an allegation of deception as to sex may vary. For example:

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- A female non-trans suspect, who is alleged to have impersonated a male, may claim that the complainant was a lesbian who consented to have sex with her, knowing the suspect was female.
- **A trans suspect may claim that they disclosed their gender identity and / or sex to the complainant, who disputes it.**
- **A non-trans or trans suspect may accept that there was no express disclosure but claim that the complainant must have known the suspect's gender identity and / or sex, due to the suspect's appearance and / or the nature of their relationship and communications.**
- **A non-trans or trans suspect may claim they reasonably believed that the complainant consented because the complainant attached no importance to the gender identity and / or sex of their sexual partners."**

26. The Deception Guidance then indicates that it "may assist to consider the question of deception in three stages, even though these may overlap to various degrees, depending on the issues in the case". The claimant does not dispute the formulation of the three questions but takes issue with some of the explanatory text that then appears under Stages 1 and 2 in particular. The three stages are:

- "1. Was there a condition of the complainant's choice or consent sufficiently closely connected with the sexual nature of the relevant act to be capable of depriving the complainant of freedom to choose? If so, consider the second question.
2. Was the complainant deceived in relation to this condition and deprived of their freedom to choose, and therefore did not consent? If so, consider the third question.
3. Did the suspect reasonably believe the complainant consented?"

27. The text that appears under Stage 1 is as follows:

"The condition

Freedom of choice will involve the ability of the complainant to agree to sexual encounters based on what they see as important. Therefore, prosecutors will need to ascertain whether the suspect's **sex and / or gender identity was a matter of importance to the complainant** i.e. was it a condition of the complainant's choice or consent? This is exclusively a subjective question and may be expressly stated or inferred from all the facts.

For instance, **a female complainant may choose to have sexual relations with only one of the following persons, or a combination of any of them (this list is not exhaustive):**

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- **A person whose sex is male and gender identity is male (a non-trans man).**
- **A person whose sex is female and gender identity is female (a non-trans woman).**
- **A person whose sex is male but lives and identifies as female (a trans woman).**
- **A person whose sex is female but lives and identifies as male (a trans man).**
- **A person whose sex is female but lives and identifies as male and has had an operation to create male genitalia (a trans man who has had gender reassignment surgery).**

Closely connected with the sexual nature of the relevant act

The condition of importance to the complainant needs to be sufficiently closely connected with the sexual nature of the relevant act to be capable of depriving them of freedom to choose.

For instance, depending on the circumstances:

- If the complainant chose to have sexual relations with **a person whose sex is male and gender identity is male** i.e. a non-trans male, it is likely that this condition is sufficiently closely connected with the sexual nature of the relevant act.
- If the complainant asserts that they were prepared to have sexual relations with a trans person but only if they possessed a GRC, such a condition is not sufficiently closely connected with the sexual nature of the relevant act to be capable of depriving the complainant of freedom to choose, as it relates to the broad circumstances surrounding it.”

The bolded passage in the above text comprising five bullet points is one of the two passages that was reinstated in the TCG/2 version (para 17 above).

28. The text that appears under the Stage 2 heading states:

“Prosecutors should look for evidence relating to the complainant’s freedom of choice, and whether this was undermined.

Evidence that the suspect failed to disclose their **sex and / or gender identity** may be sufficient, depending on the circumstances of the case. But other evidence may be necessary.

The deception (whether by way of a lie, false assertion or failure to disclose) needs to relate to the condition of the complainant’s choice or consent. **For example, if the complainant chose to have sexual relations with a trans man on condition that they had undergone gender reassignment, there may be a relevant**

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deception if the trans man falsely asserts that he has had gender reassignment (or fails to disclose that he has not). Use of a prosthetic device of which the complainant is unaware would be further evidence of deceit of this nature.

There is no onus or responsibility on a complainant to confirm or discover the **sex or gender identity** of the suspect. What is relevant is the complainant's actual knowledge or belief (or lack thereof) of the suspect's **sex and / or gender identity** at the time of the alleged offending, rather than what the complainant might have discovered if they had made certain enquiries.

Even though there may be no disclosure or a false assertion or denial by the suspect, the complainant may nonetheless become aware of the **sex and / or gender identity** of the suspect, whether by way of shared experiences, communications, physical appearance and speech, or a combination of such factors.

The following factors may be relevant to these issues of deception and freedom to choose, together with any others identified on the facts of the case. Some factors clearly relate only to trans and non-binary suspects but most can be applied to all suspects:

- Whether the suspect targeted, manipulated or exploited the complainant, or exerted control or coercion during their relationship. This may result in the complainant being afraid to question or contradict the suspect, too willing to accept false assertions or denials, or fearful of losing love or affection. Where there is evidence of this nature, it is more likely that the suspect has deceived the complainant.
- The complainant's particular characteristics and **life experiences, and how these may have impacted on their relationship with the suspect and their understanding of the suspect's gender identity or sex**. For instance, a complainant who is young, immature, vulnerable, suffering from learning difficulties or neurological differences including autism, or inexperienced in sexual relationships, may more easily be deceived, especially where there is a disparity in age or maturity between the suspect and the complainant.
- An express false assertion or lie. This would include, for instance: a false assertion or lie relating to the suspect's sex or history of transition; or a denial that the suspect is a trans man or a trans woman.
- Whether there has been gender reassignment treatment.

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- **The degree to which the sex or trans or non-binary identity of the suspect is apparent or otherwise.**
- The attitude of the suspect to revealing their sex.
- **Use of a prosthetic device without the complainant being aware.** The complainant's inexperience in sexual relationships may be relevant to whether or not they were aware.
- **The opinion of the complainant towards lesbian / gay / trans people etc (the specific sexual orientation or gender identity that is relevant will depend on the facts of the case) and the suspect's knowledge of their opinion.**
- The nature and power balance of the relationship.
- The length of the relationship. In particular, whether the amount and nature of the contact, including communications between the suspect and the complainant, is consistent with the complainant not knowing the suspect's **sex and / or gender identity** and being deceived.
- The nature of and the circumstances in which the sexual act took place.
- Evidence that the complainant expressed doubts, asked questions, or made assertions relating to the suspect's **sex and / or gender identity**, which may indicate that the complainant was aware or suspicious of the suspect's **sex and / or gender identity** but nevertheless chose to consent to the sexual act. However, the weight to give such evidence, especially suspicion, would depend on all the circumstances of the case. For instance, the complainant may not wish to question the suspect too closely for fear of being seen as transphobic.

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."

29. The text relating to Stage 3 explains that if the complainant is deceived and did not consent, the next step is to consider whether the suspect reasonably believed in consent to sexual activity. Prosecutors should examine the facts and circumstances of the suspect's claim and consider what the suspect did to satisfy themselves that the complainant was aware of their gender identity and/or sex and that they consented to the sexual act. A bullet point list of factors to be considered appears, along with the indication that prosecutors should also consider any other factors relevant to the facts of the case. The claimant accepts that matters connected to the gender identity of the suspect, such as the presentation of the suspect and the complainant's response to that presentation, may be relevant to the Stage 3 assessment of whether the suspect

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reasonably believed that the complainant consented. However, the claimant objects to the continued use of the “**sex and/or gender identity**” formulation and to the indication that “**the degree to which the sex, trans or non-binary identity of the suspect is apparent**” is a relevant factor.

30. Lastly, the Deception Guidance addresses “Public Interest considerations”. Four bullet points identify “some considerations which may be relevant”, including an assessment of the suspect’s culpability.

The June 2026 version

31. As explained in Taylor 1, all chapters of the RASSO guidance were republished on 26 June 2026 following a programme of work within the CPS Policy Directorate to update the guidance. The chapter structure of the guidance was also altered, with a view to improving accessibility. The *Deception as to Sex* section which was previously in Chapter 6 in the version of the guidance published on 13 December 2024, has now been moved to Chapter 10. Chapter 10 has been updated elsewhere to include reference to the Court of Appeal’s recent decision in *R v BVA* [2025] EWCA Crim 1359, [2026] 1 WLR 621 (“*BVA*”) (paras 68-72 below). The text of the *Deception as to Sex* section remains as it was in the 13 December 2024 version.

Charging decisions made by the CPS

32. Guest 1 explains that all Chief Crown Prosecutors were asked to indicate the number of times that charging decisions have been made in conditional consent cases since the December 2024 publication of the revised Deception Guidance. Mr Guest says there have been approximately 28 decisions to charge and 26 decisions not to charge. Almost all of these cases concerned allegations of deception involving the use of a condom or ejaculation during intercourse. He identified three cases in which a deception as to gender / sex was alleged (para 36 below). He says that, so far as he is aware, these figures are consistent with the pattern of cases since 2011. Mr Guest also says that part of his role involves issues about existing guidance being escalated to him, but he has not had any concerns from prosecutors about the Deception Guidance referred to him.
33. Mr Guest’s inquiries also identified one case, *R v H*, where the conviction was based on a deception as to gender rather than a deception as to sex. This case pre-dates the December 2024 revision of the guidance. Both parties addressed this case in some detail, and we summarise the circumstances as they are set out in the Crown’s Sentencing Note, adopting the ciphers (JH for the defendant and GF for the complainant) and the pronouns that are used in that document.
34. JH pleaded guilty to two counts of sexual assault and one count of assault by penetration and was sentenced in September 2021 to 24 months’ imprisonment suspended for two years. JH and GF had a brief relationship, which began online. GF was heterosexual. JH sent photographs to GF in which she was dressed in a manner that most would understand to be male in appearance. The messages became sexualised and photographs were sent of JH wearing boxer shorts with what appeared to be an erect penis shape. JH asked GF how she felt about a female to male sex change. This led to GF asking a number of questions, including whether JH had “a real penis”. JH’s responses were intended to convince GF that JH was a post-operative male; reference was made to an operation she had undergone two years earlier in Thailand to construct a penis; and JH

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said that other than having injections to make her voice deeper, her transition to a male was complete. The two met in person and JH made further references to the sex change. On the second occasion when JH visited GF's home, JH performed oral sex upon GF. On a subsequent occasion, JH again performed oral sex upon GF. On both occasions JH did not permit any touching by GF. On the latter occasion they also had penetrative sex with GF on her hands and knees. She felt something entering her vagina and whilst she could not see what it was, at the time she believed this was JH's penis. It subsequently emerged that JH was female and had never undertaken gender reassignment. GF had been deceived into believing she was in a relationship with someone who had undergone gender reassignment surgery. GF said she would never have had a sexual relationship with a woman and that she felt betrayed and violated.

35. Accordingly, this was a case where GF was not deceived as to sex, as she knew the person she was having sex with was born female, but as to gender, as she wrongly believed that JH now had a male gender identity. The deception also had an anatomical element: GF was led to believe that JH had undergone surgery to construct a penis, a part of the body surgically constructed through gender reassignment surgery of the kind referred to in section 79(3) SOA (para 41 below).
36. Guest 1 also summarises the three post-December 2024 cases in which a deception as to sex or gender identity was alleged. Case 1 involved a trans man as the suspect and a gay man as the complainant. They met for sexual activity on an online platform. The CPS decided not to charge as there was insufficient evidence that a deception as to gender identity had taken place, in light of communications between the two and a continuation of the sexual activity after the complainant had learnt that the suspect was a trans man. Case 2 involved a female victim and a suspect who was biologically female but identified as male. The suspect lied to the victim about wearing a binder to conceal breasts and the victim was misled into believing that the suspect was a male. This was a case about a deception as to sex, rather than one as to gender identity. Charges of assault by penetration and sexual assault were preferred and the defendant pleaded guilty. Case 3 involves a female victim and a female suspect. The suspect introduced the victim to the suspect's fictional 15-year-old nephew, and the victim believed a relationship was developing with the nephew. The suspect took the victim to a hotel where the victim says she believed she was engaging in sexual activity with the male nephew, rather than the suspect. Accordingly, the allegation is of a deception as to sex. The case is ongoing.

The claimant's involvement in other litigation

37. Forstater 1 indicates that Sex Matters was granted permission to intervene in *CV and MED v France* (Application Nos 13948/21 and 14333/21), a case before the European Court of Human Rights concerning an application to register a male-born person as the mother of a child conceived with that person's sperm. The claimant was also granted permission to intervene in *Higgs v Farmor's School* [2025] EWCA Civ 109 (a belief discrimination case) and *For Women Scotland v The Scottish Ministers* [2025] UKSC 16, [2026] AC 315 ("*For Women Scotland*"). Forstater 2 explains that, more recently, the claimant was granted permission to intervene in *R (GLP) v Equality and Human Rights Commission* [2026] EWHC 279 (Admin), a case challenging the interim update issued by the Commission following the *For Women Scotland* judgment. The claimant brought an application for judicial review in respect of the admissions policy at the Hampstead Heath bathing ponds: *R (Sex Matters) v City of London Corporation* [2026]

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EWHC 149 (Admin) (“the Hampstead Heath ponds case”; see para 100 below). Earlier this year, Sex Matters was granted permission to bring a claim for judicial review against the National Police Chiefs’ Council and the British Transport Police concerning the lawfulness of consensual strip searches of trans-identifying detainees where the searching officer is not of the same biological sex as the detainee (*R (Sex Matters) v The National Police Chiefs’ Council* [2026] EWHC 1954 (Admin)).

The legal framework**When consent to sexual activity is vitiated by deception***The statutory provisions*

38. Section 74 SOA applies to the offences created by sections 1 – 4 of the Act. It provides:

“Consent

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

39. Section 75 SOA identifies a number of evidential presumptions, the effect of which is that where the relevant circumstances are proved to exist, the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether they consented; and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether they reasonably believed it. The evidential presumptions are listed in subsection (2). They are not relevant to the issues raised in this case.

40. Section 76 SOA is headed “Conclusive presumptions about consent” and provides:

“(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed –

- (a) that the complainant did not consent to the relevant act, and
- (b) that the defendant did not believe that the complainant consented to the relevant act.

(2) The circumstances are that -

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

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41. For the purposes of section 75 and 76, the “relevant act” is defined by section 77. For example, for the offence of rape, the relevant act is “the defendant intentionally penetrating, with his penis...another person (‘the complainant’)”. Section 79(3) SOA provides that “references to a part of the body include references to a part surgically constructed (in particular through gender reassignment surgery)”.

The case law

42. The previous legislation, the Sexual Offences Act 1956, did not include a statutory definition of “consent”. At that stage, there were only two categories of conduct that the case law recognised as vitiating consent; deception as to the nature of the act and deception as to the identity of the defendant (para 58 below). The wording of the SOA suggests that these two established categories were reflected in the conclusive presumptions enacted in section 76(2)(a) and (b). This leaves questions as to the scope of section 74 SOA and its relationship with section 76; in particular, the extent to which the potentially broader language of section 74 encompasses circumstances beyond those referred to in section 76 or those closely associated with it. As our chronological summary of the section 74 case law underscores, the appellate decisions, each made on their own particular (and often relatively unusual) facts, do not speak with one voice on these topics and they are not easy to reconcile.
43. In *R v EB* [2006] EWCA Crim 2945, [2007] 1 WLR 1567 (Latham LJ, Henriques and Gloster JJ) the defendant, who was charged with raping the complainant, had not informed her of his HIV-positive status. The trial judge ruled that the defendant’s HIV status was relevant to whether the complainant had consented, as defined in section 74 SOA. The Court of Appeal allowed the defendant’s appeal against his conviction, holding, as a matter of law, the fact the defendant had not disclosed his HIV status “is not a matter which could in any way be relevant to the issue of consent under section 74...in relation to the sexual activity in this case” (paras 17 and 21). There had been no express deception and Latham LJ observed that a failure to disclose HIV status “seems to us to be a matter which requires debate, not in a court of law but as a matter of public and social policy”. He continued that the extent to which such activity should result in charges such as rape, as opposed to a tailor-made charge of deception in relation to particular sexual activity, was “a matter properly for public debate” (para 20).
44. *R v Jheeta* [2007] EWCA Crim 1699, [2008] 1 WLR 2582 was the first appellate case to discuss the relationship between sections 74 and 76 SOA. The defendant, who had been in a sexual relationship with the complainant, sent her multiple texts purporting to be from a succession of police officers. The messages referred to fictitious investigations and told the complainant she should have sexual intercourse with the defendant and would be liable to a fine if she did not do so. The complainant, who would otherwise have broken off the relationship, complied. The defendant admitted to police that the complainant had not truly consented to intercourse. He pleaded guilty to a number of offences, including rape, following counsel’s advice that his conduct came within section 76(2)(a) SOA. He subsequently appealed.
45. The Court of Appeal (Sir Igor Judge P, Simon J and Judge Goldsack QC) observed that as section 76 raised presumptions that were conclusive of the issue of consent, and thus, where intercourse is proved, conclusive of guilt, they “require the most stringent scrutiny” (para 23). As section 76 is limited to the “act” to which it is said to apply, in cases of rape, subsection (2)(a) is relevant “only to the comparatively rare cases where

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the defendant deliberately deceives the complainant about the *nature or purpose* of one or other form of intercourse” (emphasis in the original). Beyond this type of case, assuming section 75 has no application, the issue of consent is to be addressed under section 74 (para 24).

46. On the facts of *Jheeta*, the complainant was not deceived as to the nature or purpose of intercourse but deceived as to the situation in which she found herself; and, accordingly, section 76(2)(a) had no application (para 28). Nonetheless, the Court had “no reservations” that the complainant was not consenting to intercourse for the purposes of section 74. Under the pressure imposed on her by the defendant’s complicated and unpleasant scheme, she had not made a free choice or consented for the purposes of the SOA (para 29).
47. *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) (“*Assange*”) concerned an appeal against an order for extradition pursuant to a European Arrest Warrant (“EAW”) relating to four offences including rape. One of the grounds of appeal was that the conduct described in the EAW would not have amounted to the domestic law offence of rape. It was alleged that the appellant had sexual intercourse with the complainant, AA, without a condom after she had made clear that her consent was given on the basis that a condom would be used. The appellant argued that as AA had consented to sexual intercourse and as that was the relevant act, the failure to use a condom had not changed the nature of the act she had agreed to.
48. The Divisional Court (Sir John Thomas P and Ouseley J) rejected this contention, citing *Jheeta* as “instructive” (para 85). The Court said that section 76 had no application, and the question of consent was to be determined by reference to section 74:
- “86....It would plainly be open to a jury to hold that, if AA had made clear that she would only consent to sexual intercourse if Mr Assange used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom without her consent. His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount to an offence under the Sexual Offences Act 2003, whatever the position may have been prior to the Act.”
49. The Court recognised the actions in question were not deceptive as to “the nature or quality of the act” (sic; the wording of section 76(2)(a) is “the nature or purpose of the act”) but it was arguable that “sexual intercourse without a condom is different to sexual intercourse with a condom, given the presence of a physical barrier; a perceived difference in the degree of intimacy, the risks of disease and the prevention of a pregnancy”, so that the materiality of the condom could be determined under section 74, rather than section 76 (para 87). The Court rejected the suggestion that a deception that was not within section 76 could not be taken into account for the purposes of section 74, commenting that it would be “extraordinary” if Parliament had legislated in these terms (para 88). The Court continued:

90.... If the conduct of the defendant is not within s.76, that does not preclude reliance on s.74. *R v B* goes no further than deciding

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that failure to disclose HIV infection is not of itself relevant to consent under s.74. *R v B* does not permit Mr Assange to contend that, if he deceived AA as to whether he was using a condom or one that he had not damaged, that was irrelevant to the issue of AA's consent to sexual intercourse as a matter of the law of England and Wales or his belief in her consent. On each of those issues, it is clear that it is the prosecution case she did not consent and he had no or no reasonable belief in that consent. Those are issues to which s.74 and not s.76 is relevant; there is nothing in *R v B* which compels any other conclusion..."

50. The Court went on to hold that the rape offence described in the EAW was clearly an offence under the law of England and Wales (para 91).
51. In *R (F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin), [2014] QB 581 ("*R(F)*") the claimant successfully judicially reviewed the DPP's decision not to initiate a prosecution on the basis that her account, even if believed, was insufficient to establish a realistic prospect of conviction. The claimant consented to her husband having sexual intercourse with her on the basis that he would withdraw before ejaculating. During intercourse, her husband told her he would be ejaculating within her vagina "because you are my wife and I'll do it if I want". He ejaculated before she could do anything about it and she became pregnant as a result.
52. The Divisional Court (Lord Judge CJ, Fulford, Sweeney JJ) considered the evidence could establish that: the claimant consented on the clear understanding her husband would not ejaculate within her vagina; she believed he intended to withdraw before ejaculation; this was the only basis on which she was prepared to have sexual intercourse with him; and her husband had an undisclosed intention that he would ejaculate within her vagina (para 25). The Court analysed the circumstances as follows:

"26. In law, the question which arises is whether this factual structure can give rise to a conviction for rape. Did the claimant consent to this penetration? She did so, provided, in the language of s.74 of the 2003 Act, she agreed by choice, when she had the freedom and capacity to make the choice. *What Assange underlines is that 'choice' is crucial to the issue of 'consent'*, and indeed we underline that the statutory definition of consent provided in s.74 applies equally to s.1(1)(c) as it does to s.1(1)(b). *The evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad commonsense way.* If before penetration began the intervener had made up his mind that he would penetrate and ejaculate within the claimant's vagina, or even, because "penetration is a continuing act from entry to withdrawal" (see s.79(2) of the 2003 Act) he decided that he would not withdraw at all, just because he deemed the claimant subservient to his control, *she was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based.* Accordingly, her consent was negated. Contrary to her wishes, and knowing that she would not have consented, and did not consent to penetration or the continuation of penetration if she had any

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inkling of his intention, he deliberately ejaculated within her vagina. In law, this combination of circumstances falls within the statutory definition of rape.” (Emphasis added.)

53. We pause our summary of the case law to note the following: in both *Jheeta* and *R(F)* the Court emphasised the importance of the complainant’s freedom of choice; the deception in *Jheeta* was not as to the act of sexual intercourse itself but as to the situation in which the complainant found herself; the reasoning in both *Assange* and *R(F)* focused on what it was that the complainant had consented to; and none of these cases contained the articulation of a requirement for there to be a close connection between the deception and the act of sexual intercourse nor any statement that section 74 fell to be interpreted by reference to the scope of section 76.
54. As we have noted, the parties are agreed that *R v McNally* concerned a deception as to sex, although the language of “gender” was used in the Court’s judgment (para 15 above). The defendant, who was female, conducted an internet relationship with a girl, M, starting when they were 12 – 13 years old. The defendant purported to be a boy called S. When the defendant was 17 and M was 16, the defendant, presenting as a boy, visited the complainant and sexual conduct took place, including oral and digital penetration. M told police that she considered herself heterosexual, that she had consented to the sexual acts because she believed they were with a boy called S and she would not have consented had she known the truth. Having pleaded guilty to six counts of assault by sexual penetration, contrary to section 2 SOA, the defendant appealed the convictions, arguing that her deception could not vitiate M’s consent.
55. The Court of Appeal (Leveson LJ, Kenneth Parker, Stewart JJ) dismissed the appeal. After reviewing the earlier authorities, the Court rejected the argument that deception as to gender was analogous to deceptions as to qualities or attributes such as age, marital status, wealth or HIV-status, saying:

“24. We reject this analysis. First and foremost, *EB* was not saying that HIV status could not vitiate consent if, for example, the complainant had been positively assured that the defendant was not HIV positive: it left the issue open. As Mr McGuinness for the Crown contends, the argument that in *Assange* and *R(F)* the deceptions were as to the features of the act is not sustainable: the wearing of a condom and ejaculation are irrelevant to the definition of rape and are not 'features' of the offence and no such rationale is suggested. In the last two cases, it was alleged that the victim had consented on the basis of a premise that, at the time of the consent, was false (namely, in one case, that her partner would wear a condom and, in the second, that he would ejaculate outside her body).

25. In reality, some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent. *In our judgment, Lord Judge's observation that "the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad commonsense way" identifies the route through the dilemma.*

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26. *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 commonsense 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 appellant's deception.

27. It follows from the foregoing analysis that we conclude that, depending on the circumstances, deception as to gender can vitiate consent..." (Emphasis added.)

56. In *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin), [2019] QB 1019 ("*Monica*") the Divisional Court (Lord Burnett of Maldon CJ, Jay J) identified the "close connection" test; an approach that, arguably, involves a narrower interpretation of section 74 than the authorities we have just summarised.
57. The claimant was an environmental activist who had a sexual relationship with an undercover police officer, while he was posing as an activist. She was unaware of the officer's real identity and would not have consented to sexual activity with him if she had known the truth. The rape allegation was governed by section 1 of the Sexual Offences Act 1956 (as amended in 1976 and 1994). The CPS reviewing lawyer addressed the position under the 1956 Act but also considered the SOA case law to see if it assisted with the meaning of consent. She decided the evidence did not provide a realistic prospect of conviction because the deception underlying the relationship was not such as could vitiate consent for the purposes of offences of rape. The Court rejected the claimant's application for judicial review, in which it was argued that the wrong test had been applied to the issue of consent.
58. The Court indicated it would take the same approach as the reviewing lawyer in terms of considering both the 1956 Act and the subsequent case law, observing that this approach assumed the SOA did no more than restate the earlier meaning of "consent", when there was no decided case on this point and there was a possible indication in *Assange* that the SOA had made a difference (para 48). The Court held the reviewing lawyer was right to conclude that the jurisprudence from 1888 to 2004 established only two species of conduct that vitiated apparent consent, first as to the nature of the sexual act, and secondly as to the identity of the perpetrator (paras 18 and 65). From para 66 onwards, the Court considered the SOA case law. The Court noted the ratio of *Assange* was that the types of deception capable of negating consent were wider than the narrow deceptions identified in the earlier case law that were reflected in the terms of section 76 (para 71). The Court did not have to decide whether section 74 had changed the law or whether the underlying common law understanding of consent had continued to develop (paras 71 and 72).
59. The Court then explained the principle it extracted from *Assange*, characterising it as a "modest extension" of the way in which the law examines consent:

"72. What may be derived from *Assange* is that deception which is closely connected with 'the nature or purpose of the act',

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because it relates to sexual intercourse itself rather than the broad circumstances surrounding it, is capable of negating a complainant's free exercise of choice for the purposes of section 74 of the 2003 Act."

60. The Court considered this analysis was also in keeping with the other authorities. Whilst there was no deception as to the nature and purpose of the sexual act in *R(F)*, the deception was closely connected with it (para 75). In *McNally*, the deception did not relate to the nature or purpose of the act but did relate to the sexual nature of the activity (para 76). The ratio of the case was that "as a matter of common sense, there was all the difference in the world between sexual activity with a boy and similar activity with a girl" (para 81). In addition, the Court expressed agreement with the reviewing lawyer's view that *McNally* "could be analysed as an identity or impersonation case, given the centrality of an individual's sexuality to her or his identity" (para 77).
61. In terms of where the parameters lay for the purposes of section 74, the Divisional Court said:

"80. An appeal to 'broad common sense' in the application of any law does not relieve a court from the obligation of identifying the boundaries within which a jury will be asked to bring to bear their common sense and experience of life. For that reason, when considering the governing principle or approach, it is necessary to examine how it has been applied by the courts to date. *It has never been applied to deceptions which are not closely connected to the performance of the sexual act, or are intrinsically so fundamental, owing to that connection, that they can be treated as cases of impersonation.*

82. There may be subtle metaphysical distinctions... between 'identity', 'attributes' and 'qualities'. There is obviously force underlying the contention that many embark upon sexual relationships for reasons unconnected with or at least well beyond the physical attractions of the intended partner. That is a reflection of human nature and the reality that different things are important to different people...In our view, the CPS lawyer was correct in approaching her decision on the basis that the claimant's case involves not just a step but a leap in the way in which consent is interpreted..." (Emphasis added.)

62. The Divisional Court's endorsement of the reviewing lawyer's decision was unsurprising. However, the "close connection" test was arguably more restrictive than the approach identified in the earlier authorities. We do not read the decisions in *Assange* or *R(F)* as being based on, or at least confined to, the proposition that the deception as to the wearing of the condom / to withdrawal before ejaculation was closely connected to the act of sexual intercourse itself. Additionally, this analysis does not account for the decision in *Jheeta*. We also observe that the desirability of taking "a broad commonsense" approach was said in *R(F)* in reference to the assessment of "the evidence relating to 'choice' and to 'freedom'", rather than as a suggestion that "commonsense" should define the parameters of section 74.

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63. The next decision, *R v Lawrance* [2020] EWCA Crim 971, [2020] 1 WLR 5025, adopted the Divisional Court's narrow "close connection" approach. We do not find the outcome easy to reconcile with the decisions in *Jheeta*, *Assange* or *R(F)*, as we return to at para 124 below. We should make clear that we are, of course, bound by the decisions of the Court of Appeal in *Lawrance* and *BVA*. Our observations are directed only to the difficulty of extracting from the authorities a single, predictable test; a difficulty which the Court of Appeal itself acknowledged in *BVA* (para 70 below).
64. The defendant and the complainant had sexual intercourse after meeting on a dating website. The complainant alleged that before having sex, the defendant had assured her that he had had a vasectomy and after having received this assurance she agreed to have unprotected sex with him, when she otherwise would have insisted upon him wearing a condom. The next morning the defendant admitted this was a lie. The complainant subsequently found out that she was pregnant. The defendant appealed against his conviction for rape on the basis that the complainant's consent had not been vitiated by his deception.
65. The Court of Appeal (Lord Burnett of Maldon CJ, Cutts, Tipples JJ) identified the question raised by the appeal as "can a lie about fertility negate ostensible consent?" (para 1). The Court reviewed *Assange*, *R (F)*, *McNally*, and *Monica*. Whilst the jury had accepted that the complainant relied on the defendant's deception and would not have consented to unprotected sexual intercourse had she thought him to be fertile, the Court emphasised that the "but for" test is insufficient to vitiate consent. The Court then set out its reasoning as follows:

"34...There may be many circumstances in which a complainant is deceived about a matter which is central to her choice to have sexual intercourse. *Monica* was an example, but they can be multiplied: lies concerning marital status or being in a committed relationship; lies about political or religious views; lies about status, employment or wealth are such examples. A bigamist does not commit rape or sexual assault upon his or her spouse despite the fundamental deception involved. The consent of the deceived second spouse, even if it would not have been forthcoming had the truth been known, does not vitiate consent for the purposes of sexual offending. Neither is the consent of a sex worker vitiated if the client never intends to pay.

35. *The question is whether a lie as to fertility is so closely connected to the nature or purpose of sexual intercourse rather than the broad circumstances surrounding it that it is capable of negating consent. Is it closely connected to the performance of the sexual act?*

36. In our opinion, a lie about fertility is different from a lie about whether a condom is being worn during sex, different from engaging in intercourse not intending to withdraw having promised to do so and different from engaging in sexual activity having misrepresented one's gender.

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37. Unlike the woman in *Assange*, or in *R(F)*, the complainant agreed to sexual intercourse with the appellant without imposing any physical restrictions. She agreed both to penetration of her vagina and to ejaculation without the protection of a condom. *In so doing she was deceived about the nature or quality of the ejaculate and therefore of the risks and possible consequences of unprotected intercourse. The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it.* We should add that the question of consent could not be affected by whether pregnancy followed or not; and neither could it be affected by the gender of the person who was guilty of deceit. On the prosecution case, a woman who lied about her fertility in circumstances where the man would not otherwise have consented to sexual intercourse would be in the same position, albeit guilty of a different sexual offence.

38. *In terms of section 74 of the 2003 Act, the complainant was not deprived by the appellant's lie of the freedom to choose whether to have the sexual intercourse which occurred.* (Emphasis added.)

66. The Court went on to clarify that whether there was an express deception or a failure to disclose made no difference to the issue of consent; the question was whether the lie “was sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it” (para 41).
67. Whilst emphasising that any novel circumstances must be considered by reference to the statutory definition in section 74, the Court concluded “there is no sign that Parliament intended a sea change in the meaning of consent when it legislated in 2003” (para 42). Given the respective terms of sections 74 and 76 and the analysis in *Jheeta* and in *Assange*, the basis for this view is not entirely clear. The Court went on to note that both the Law Commission and the Criminal Law Revision Committee had drawn attention to “the acute difficulties in dealing with the circumstances where someone has been tricked into consenting to sexual contact as a result of misrepresentations” (para 42).
68. The outcome in the most recent appellate case, *BVA* (Lady Carr of Walton-on-the-Hill CJ, Bryan J, Judge Lucking KC), suggests a more expansive approach to section 74 SOA that seems to be more in keeping with some of the earlier authorities than with *Lawrance*. The appeal raised the question of whether lack of consent to the filming of sexual touching was capable of negating consent that was given to the sexual touching (para 1).
69. The appellant was convicted of multiple offences including sexual assault, contrary to section 3(1) SOA and voyeurism, contrary to section 67(3). He had filmed himself touching the complainant’s naked breasts while she was asleep. During the trial, the complainant accepted she may have allowed the appellant to touch her in a sexual manner while she slept. However, she insisted that she would never have done so if she knew he intended to film his actions. The Court rejected the appellant’s argument that,

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as a matter of law, the filming of the sexual touching was not capable of negating the consent to the sexual touching.

70. After summarising the earlier cases, the Court observed that they were “not necessarily always easy to reconcile, and there may be no bright lines to draw” (para 45). However, the Court drew the following “basic propositions of law” from the authorities (characterised by Ms Dobbin KC as an attempted “synthesis” of these disparate decisions):

- “i) There is no material difference for present purposes between an express deception or, as here, a failure to disclose (*Lawrance* at para 41);
- ii) The ‘but for’ test is insufficient of itself to vitiate consent (*Lawrance* at para 34);
- iii) Consent is capable of being negated as a matter of law if the deception (or failure to disclose) relates to the sexual activity itself rather than the broad circumstances surrounding it (*Monica* at para 72). The issue is whether the relevant matter was sufficiently closely connected to the sexual activity (by reference to its nature, purpose and performance), rather than the broad circumstances surrounding it (*Lawrance* at paras 35 and 41);
- iv) Broad common sense has a role to play in finding the answer but does not relieve a court from the obligation of identifying the boundaries within which a jury should be asked to bear its common sense (*R(F)* at para 26; *McNally* at para 26; *Monica* at para 82 approved in *Lawrance* at para 33). So, a vitiating deception is not limited to the strict (narrow) physical performance of the act (see, for example, the facts of *McNally*).”

71. Having emphasised that “choice is crucial to the issue of consent” (para 47), the Court concluded the Judge had been right to find that the defendant’s failure to disclose the intended filming was capable of negating the complainant’s consent. The crux of the Court’s reasoning was as follows:

“48....The filming was intimately connected to the performance of the sexual activity, here touching. The filming was temporally and proximally connected to the touching: the filming started and stopped alongside the touching; the phone on which the film was being recorded was held right up close to C2’s face and breasts...

49.The filming was also integral to the sexual touching. If not the sole purpose, then a central purpose of the sexual touching was to film the sexual activity...What was being created was a pornographic video for the appellant’s immediate and potentially future sexual gratification (and potentially the gratification of

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others) ...it transformed what might otherwise have been a transient sexual touching into a permanent medium which could be watched in the future.

50....the filming here was far more closely connected to the sexual activity in question than, for example, the (background) fertility status or health status of the offender (*Lawrance; B*).

52....Using the terminology of section 74, non-disclosure would deprive C2 of the freedom to make the relevant choice. It is a conclusion that also accords with a broad common sense (yet principled) approach to the facts.”

72. Lastly, the Court of Appeal stressed that it had reached this conclusion on the particular facts of the case and that there could be other cases where a failure to disclose filming of sexual activity would not vitiate consent, where “for example the filming is no more than a background circumstance and an aggravating factor” (para 54).

Academic articles

73. The lack of legal clarity in this area is reflected in the numerous academic articles that have been written about when deceptions will negate consent to sexual activity and the appellate cases we have just reviewed. We will refer to a few examples to give a flavour.
74. In his article, *Rape and deception (again)* [2020] Crim LR 877, written after the *Lawrance* decision, David Ormerod observes that the cases decided since the SOA came into force concerning the use of deception in procuring consent to sexual acts “reveal inconsistency in outcomes and general incoherence”. He comments that *Lawrance* “does not render any easier the prosecutor’s task in determining which deceptive conduct reported by complainants constitutes rape”. He questions whether *Lawrance* correctly interpreted the relationship between sections 74 and 76 SOA, emphasising that in *Assange* the Court was clear that section 76 does not provide exhaustively for the types of deception that can negate consent. He emphasises “Parliament’s clear choice to adopt an open textured test of consent” in section 74, although recognising the difficulty of drawing a principled line in terms of deceptive conduct that will or will not vitiate consent under section 74. He concludes that the “range and sensitivity of the policy issues” renders them “ill-suited to resolution by even the Supreme Court. The subject seems ideally suited to a review by the Law Commission”.
75. In his recent editorial, *Deceptions that induce sexual activity: the need for reform* [2026] Crim LR 1, 1-3, Jonathan Rogers opines that a deception that there will be no filming of the sexual act (*BVA*) seems about as “closely connected” to intimate sexual activity as a deception that a man is incapable of impregnation (*Lawrance*), in terms of “the impact upon the complainant and temporal proximity”. He refers to “the mess” that has arisen from the combined case law of *McNally*, *Lawrance* and *BVA* and suggests that *McNally* and *Lawrance* are irreconcilable. Whilst a suitable certified question could be heard by the Supreme Court, he considers that new legislation is the better solution, potentially by identifying a new separate offence of sex by deception. (Schedule 7 of SOA abolished the 1956 Act offence of procuring sexual intercourse by false pretences.)

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76. In her article, *Sustained identity deceptions: Reforming the Relationship between Sexual Consent, Deception and Mistake* (2023) Criminal Law Reform Now Network pp. 19-27, Caroline Derry considers that there should be a separate offence of obtaining sexual consent by sustained and intentional identity deception. She argues that an extended deception creates a different kind of harm; and also, that the law “over-criminalises” gender fraud (in the sense of where the defendant is understood by the complainant to be male but has female genitalia, or vice versa). She criticises what she describes as “inconsistent and hair-splitting distinctions, to limit criminal liability to deception as to the physical or sexual nature of the immediate sexual act”.

The Law Commission

77. In September 2025, the Law Commission announced that as part of its 14th Programme of Law Reform (Law Com No 421) it would be undertaking a “thorough review of the law of consent to provide greater predictability and to modernise the criminal law in England and Wales”. The project has not yet started, but in explaining the reasons for the review, the Commission said that the law “remains unsettled, incoherent, and unpredictable” and that “faced with unusual fact patterns, the courts have, for example, struggled to achieve a consistent answer to questions about the effect of deceit on consent”.

Challenges to policies*The general principles*

78. The parties accept that the meaning of the Deception Guidance is an objective question for the Court: *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 WLR 4317 at para 19 and *R (The Duke of Sussex) v Secretary of State for the Home Department* [2025] EWCA Civ 548, [2025] 4 WLR 66 at para 63.
79. The standards to be applied when the Court is asked to conduct a judicial review of the contents of a policy document or statement of practice were addressed by the Supreme Court in *R(A)*. Lord Sales JSC and Lord Burnett of Maldon CJ (with whom Lord Reed PSC, Lord Lloyd-Jones and Lord Briggs JJSC agreed) concluded that the correct approach was identified by the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (“*Gillick*”) (para 38). It was best encapsulated in Lord Scarman’s formulation at p.181 that the question was whether the guidance “permits or encourages unlawful conduct” (reading “permits” in the proper way as “sanction” or “positively approve”) and by adapting Lord Templeman’s words “does the policy in question authorise or approve unlawful conduct by those to whom it is directed?”
80. Lord Sales and Lord Burnett explained that the test was straightforward to apply; it called for a comparison of what the relevant law required and what the policy statement said regarding what the person should do; if the policy directed them to act in a way which contradicts the law, it is unlawful (para 41).
81. At para 46, Lord Sales and Lord Burnett identified three types of cases where a policy may be found to be unlawful “by reason of what it says or omits to say about the law when giving guidance for others”, as follows:

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“(i)...where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (ie the type of case under consideration in *Gillick*...); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position.”

82. Lord Sales and Lord Burnett went on to address the sorts of circumstances that would come within category (iii). They referred to their earlier citation (at para 45) of a passage from Rose LJ’s judgment in *R (Bayer plc) v NHS Darlington Clinical Commissioning Group* [2020] EWCA Civ 449; [2020] PTSR 1153 where he observed that most of the case law dealing with policy challenges concerned policy or guidance issued by the Secretary of State to his or her staff explaining the legal framework in which they performed their functions, where “there can be no question of those who are expected to implement the policy taking independent legal advice and making up their own minds as to what the law is”. Their Lordships said:

“In a case of the type described by Rose LJ, where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis.”

83. Lord Sales and Lord Burnett added that in a category (iii) case, it would not usually be incumbent on the person promulgating the policy to go into full detail about how a discretion should be exercised in every case; and that much would depend upon the particular context in which the policy was to be used (para 47).
84. The Courts have subsequently recognised that the three categories identified in *R(A)* are not intended to impose “a rigid categorisation upon types of unlawful cases” but that it will “usually be helpful to make use of the categories of cases identified by the Supreme Court...as a guide when considering whether written policy or guidance is unlawful”: Cavanagh J in *R (Timson) v Secretary of State for Work and Pensions* [2022] EWHC 2392 (Admin) at para 143, endorsed by the Court of Appeal in *R (British Medical Association) v General Medical Council* [2026] EWCA Civ 143 at para 108.

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The DPP's policies and guidance

85. In *R (Nicklinson) and another v Ministry of Justice and others* [2014] UKSC 38, [2015] AC 657 (“*Nicklinson*”) one of the claimants sought an order against the DPP requiring her to clarify her policy statement identifying the circumstances that would be taken into account when deciding whether to consent to a prosecution under section 2(1) of the Suicide Act 1961 against a person who, on compassionate grounds, assisted a person to commit suicide. By a majority, the Supreme Court allowed an appeal from the order of the Court of Appeal directing the DPP to clarify her policy. Lord Neuberger of Abbotsbury PSC emphasised a number of points that are germane to the present case:
- i) The role of the DPP is constitutionally limited; it cannot be to make the law, let alone to change the law, rather her role is to decide how much guidance her policy can properly give with regards to prosecutions under section 2(1) of the 1961 Act (para 139);
 - ii) Any policy which the DPP has must be applied after the event. In these circumstances, it is inevitable that policies issued by the DPP have to retain a degree of flexibility: each case is to be assessed after the event by reference to its own particular facts (para 139);
 - iii) Given their respective constitutional positions, it is one thing for the Court to decide that the DPP must publish a policy, and quite another for the Court to dictate what should be in that policy (para 141);
 - iv) The purpose of the DPP in publishing a code or policy is not to enable those who wish to commit a crime to know in advance whether they will get away with it. It is to ensure that, as far as is possible, the DPP’s policy is publicly available so that everyone knows what it is and can see whether it is being applied consistently (para 141); and
 - v) It would not be right for a Court, in effect, to dictate to the DPP what her policy should be (para 141).
86. In a similar vein, Lord Hughes JSC (at para 272) emphasised the distinction between decisions whether or not to prosecute, made on the basis of the particular factual circumstances of the individual case and the position when the DPP is asked to state in advance when a particular form of behaviour will result in prosecution and when it will not or may not:

“Then she is in immediate peril of crossing a constitutional Rubicon. She is in danger of doing one of two things. First she is likely to create an advance exemption from the law for a particular group of potential offenders. Second, she is likely in effect to modify the law as laid down in statute or at common law. She has no power to do either of these things. Both are a breach of her constitutional position. She is the head of a branch of the Executive, albeit one with the degree of independence of a non-ministerial government department.”

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87. *R (End Violence against Women Coalition) v Director of Public Prosecutions* [2021] EWCA Civ 350, [2021] 1 WLR 5829 (“*End Violence against Women*”) concerned an unsuccessful challenge to the DPP’s amendments to guidance for prosecutors concerning whether to prosecute allegations of serious sexual offending. The DPP accepted that the revised guidance was amenable to judicial review and that if it was wrong in law, “then the court should say so” (para 68). Ms Dobbin KC indicated that the DPP accepted these propositions for the purposes of the present case.

Standing

88. Section 31(3) of the Senior Courts Act 1981 provides:

“No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless –

- (a) It considers that the applicant has a sufficient interest in the matter to which the application relates...”

89. Standing may have to be considered at the substantive stage, even if permission to apply for judicial review has been granted: *R (Good Law Project Limited and another) v The Prime Minister and another* [2022] EWHC 298 (Admin) (“*Good Law Project*”) at para 17.
90. We will summarise the case law on what amounts to “a sufficient interest” for the purposes of section 31(3)(a), with particular reference to challenges brought by organisations who are said to be litigating in the public interest.
91. In *AXA General Insurance Ltd and others v HM Advocate and others* [2011] UKSC 46, [2012] 1 AC 868 (“*AXA*”) the Supreme Court considered rule 58.8(2) of the Rules of the Court of Session 1994, deciding that in the context of an application to the court’s supervisory jurisdiction, the requirement to be “directly affected” was analogous to the sufficiency of interest requirement in England and Wales. Lord Reed JSC observed (at para 170) that in some contexts it was appropriate to require an applicant for judicial review to demonstrate that they had a particular interest in the matter complained of. However:

“In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say ‘might’, because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court...Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant’s bringing a particular application before the court, and thus as conferring standing,

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depends therefore upon the context and in particular upon what will best serve the purposes of judicial review in that context.”

92. Lord Hope DPSC said that a personal interest need not be shown if the individual “is acting in the public interests and can genuinely say that the issue directly affects the section of the public that he seeks to represent” (para 63).
93. In *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51 (“*Walton*”) Lord Reed referred to para 63 of Lord Hope’s judgment in *AXA*, commenting:
- “92. As is clear from that passage, a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates...A busybody is someone who interferes in something with which he has no legitimate concern. The circumstances which justify the conclusion that a person is affected by the matter to which the application relates, or has a reasonable concern in it, or is on the other hand interfering in a matter with which he has no legitimate concern, will plainly differ from one case to another, depending upon the particular context and the grounds of the application. As Lord Hope DPSC made plain in the final sentence, there are circumstances in which a personal interest need not be shown.”
94. The case concerned a planning decision relating to a road building scheme, where Schedule 2 to the Roads (Scotland) Act 1984 prescribed that the challenge could be brought by a “person aggrieved”. In this context, Lord Reed said it was apparent from the authorities that persons will ordinarily be regarded as “aggrieved” if they had made objections or representations as part of the procedure which preceded the decision challenged and their complaint is that the decision was not properly made (para 86).
95. *R (McCourt) v The Parole Board for England and Wales* [2020] EWHC 2320 (Admin) (“*McCourt*”) concerned a challenge brought by the victim’s mother to the Parole Board’s decision to release the man who murdered her from prison. The Divisional Court (Macur LJ and Chamberlain J) described the following passage from para 24.26 of Auburn, Moffett & Sharland, *Judicial Review: Principles and Procedure* (Oxford, 2013) as “an accurate high level summary of the law on standing” (paras 31 to 32):
- “The courts have adopted an increasingly liberal approach to both individuals and groups bringing judicial review claims in the public interest. If an individual or group seeking to represent the public interest demonstrates that they have a real and genuine interest in the decision under challenge, they are likely to have standing to bring a claim, although other factors to consider in this context will include the merits of the claim, the existence of better placed challengers, and the nature and the reputation of the individual or organisation in question.”
96. Having identified a number of cases that provided support for this summary, the Court also noted that there were cases in which the standing requirement had been more

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restrictively interpreted (para 33). At para 43, the Court summarised the position as follows:

“What counts as a ‘sufficient interest’...will vary depending on what the rule of law requires in the particular context of the decision under challenge. For some decisions...it may not be possible to identify any class of persons, or any class of persons within the jurisdiction, who are more affected than the public at large. In other cases, the direct impact of the challenged measure falls on a class whose members are likely to lack the financial and organisational resources required to litigate. This is one reason why organisations like the Child Poverty Action Group, the Joint Council for the Welfare of Immigrants and the Howard League for Penal Reform (to name a few) have sought to challenge measures of general application in areas falling within their purview, for the most part without dispute as to their standing. Another reason is that a suitably expert organisation may be better placed to present arguments about the impact of policy on the affected class as a whole, rather than one individual in particular.”

97. The case law was reviewed by the Divisional Court (Singh LJ and Swift J) in *Good Law Project Limited*. The Court referred to para 25-023 of Professor Paul Craig’s *Administrative Law* (9th edition, 2021), in turn referencing Professor Peter Cane’s thesis that there are three kinds of group challenge: “associational”, “surrogate” and “public interest”. Associational standing is typified by an organisation suing on behalf of its members. Surrogate standing covers cases where a pressure group represents the interests of others, who may not be well placed to bring the action. Public interest standing is asserted “by those claiming to represent the wider public interest, rather than merely that of a group with an identifiable membership” (para 20). The Court referred to examples of judicial review challenges brought by NGOs “in their fields of interest”, observing that what was important “in all such cases of which we are aware” is that the NGO concerned “did have a particular interest and in a sense was representative of an identifiable group in society which was affected by the decision or policy in question” (para 21).
98. The Court went on to hold that the Runnymede Trust had standing in relation to the public sector equality duty challenge, but the Good Law Project (“GLP”) did not (paras 55 to 59). The statement of objects in the GLP’s Articles of Association was so widely drawn that if they were sufficient to confer standing in this case, it would be tantamount to saying that the GLP had standing to bring judicial review proceedings in any public law case. Furthermore, the Runnymede Trust, an organisation which existed specifically to promote racial equality, was the obviously better-placed claimant for these purposes.
99. In *R (Luton Landlords & Letting Agents Limited) v Luton Borough Council* [2026] EWCA Civ 35 (“*Luton Landlords*”), in which the Supreme Court subsequently refused permission to appeal in February 2026, Lewis LJ (giving the leading judgment) suggested that the phrase “associational standing” was perhaps unhelpful as it did not fully reflect the basis upon which the body concerned had standing. He continued:

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“45....Claims may also be brought by pressure groups who may be particularly active, and have particular expertise, in a particular area (such as environmental groups or social welfare groups) or be formed to campaign on particular national or local issues. They may have sufficient interest to bring a claim to challenge a particular measure, particularly if they have established expertise in an area....

46. There may be instances where a measure or decision affects the public generally, not merely a particular individual or even a group of individuals. In appropriate cases, the courts have held that an individual, or a group, may bring a claim because there is a serious issue of public importance which needs to be addressed (see the observations of Lord Reed in *Axa General Insurance Ltd. v HM Advocate*... at paragraph 170). It is also relevant to note that the courts have adopted an increasingly liberal approach to standing in such cases.”

100. The Hampstead Heath ponds case concerned a challenge brought by Sex Matters to the admission arrangements at two of the open-air swimming pools on Hampstead Heath on the basis that they constituted direct discrimination and/or indirect discrimination under the Equality Act 2010. Lieven J concluded that Sex Matters did not have standing to bring the claim as there were better-placed individuals who were directly and personally affected by the decisions under challenge who would be able to bring individual claims for discrimination in the County Court (paras 55 to 65). However, on Sex Matters’ application to the Court of Appeal, Elisabeth Laing LJ decided that the Judge’s conclusion was arguably wrong and granted permission to apply for judicial review and remitted the substantive judicial review claim to the Administrative Court.

The claimant’s submissions

101. Ms Vine KC submitted that the Deception Guidance is flawed by a category (i) legal error in the sense identified in *R(A)* because it is premised on the basis that a deception as to gender identity is capable of vitiating consent to sexual activity (Ground 1). The governing principle, as identified in *Monica* and in *Lawrance*, is that consent is not vitiated for the purposes of section 74 SOA unless it is connected to the physical performance of the sexual act or to impersonation. An assertion of a person’s gender identity – other than where it reveals or obscures the person’s sex – is legally irrelevant to the operation of section 74. Gender identity is not sufficiently closely related to the physical performance of the sexual act itself, and it is a matter of subjective belief which is incapable of independent verification. It is part of the broad circumstances surrounding the sexual act and is analogous to the deception in *Monica*, rather than the situation in *McNally*.
102. Whilst the Deception Guidance did not purport to be an exhaustive statement of the law in this area, this did not relieve the DPP of the need to state the law accurately. Crown Prosecutors are expected to treat the guidance as legally correct and to follow it. In addition, people are likely to turn to the guidance to ensure that they do not commit a serious sexual offence.

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103. The Deception Guidance fails to accurately reflect the law as it advises Crown Prosecutors that a suspect's asserted gender identity is or may be relevant to the validity of the complainant's consent and it presents sex and gender identity as separate, legally equivalent conditions in respect of consent. The Deception Guidance positively induces Crown Prosecutors to err in law by treating gender identity as legally relevant to the section 74 test and as this error is so central to the document as a whole, the guidance should be quashed outright.
104. Ms Vine argued that the DPP had failed to show how a deception as to gender identity could be sufficiently closely connected to the sexual act. She said that an examination of *R v H* (paras 33-35 above) was instructive and that JH was wrongly convicted of the two offences of sexual assault. The injury caused must be integral to the nature, purpose or performance of the sexual act in question; it was not enough that the deception had persuaded the complainant to enter into the sexual relationship. GF knew she was engaging in sexual activity with a woman and the physical nature of the act of oral sex was not changed by the fact that JH had not undergone gender re-assignment surgery, as she claimed. Unlike *McNally*, the sexual nature of the act was not altered. By contrast, JH was rightly convicted of the offence of assault by penetration, as the act of physical penetration was different to the act GF had consented to; she had been led to believe she would be penetrated by a pseudo-penis.
105. Ms Vine submitted that even if we did not uphold Ground 1, the Deception Guidance came within category (iii) of the types of unlawful policies identified in *R(A)* as, read objectively, it presents so many obstacles to its comprehensibility, that it conveys an imprecise and misleading picture of the true legal position in relation to deceptions as to gender identity.
106. The Deception Guidance persistently conflates sex with gender in the repeated use of the portmanteau term "sex and / or gender identity", in a way that invites misinterpretation and which will foreseeably lead to Crown Prosecutors wrongly treating the two as interchangeable.
107. Ms Vine drew attention to the broad way in which the expression "gender identity" was used in the guidance (para 8 above), contending that even if a deception as to gender re-assignment surgery could potentially vitiate consent under section 74, as in *R v H* (contrary to her primary submission), this was only a small sub-set of gender identity. The Deception Guidance is flawed in failing to distinguish between the various sub-sets of deception as to gender identity that might arise and this imprecision will likely cause confusion for prosecutors.
108. Ms Vine submitted that a person who obscured their sex and presented as the opposite sex was potentially engaging in a form of deception and their motivation for doing so was irrelevant to the question of criminal liability. The more persuasively a person presents as the opposite sex, the greater the imperative for them to be candid about their concealed sex. Ms Vine accepted that the effect of her submissions was that there must be candour about a person's biological sex when they were proposing to engage in sexual activity; this was the price that the law exacts for consent to be genuinely free in this highly sensitive context.
109. Ms Vine also said that a number of passages in the Deception Guidance are wrongly premised on the basis that there is a legally relevant difference between trans and non-

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trans suspects. She argued that the section of the Deception Guidance headed “Trans and non-binary persons – experiences” (para 21 above) effectively advises prosecutors that because of their particular life experiences, culpability was less likely to attach to trans and non-binary people in circumstances where a non-trans suspect would be considered culpable. Further, that this section of the document adopts a surprisingly and uniquely sympathetic tone, focusing on personal difficulties that trans suspects may have encountered, in a manner that was quite different from the way that suspects are usually referred to in CPS guidance.

110. Mr Knight KC addressed us on standing. He said the claim raised important issues which this Court had found to be arguable (in granting permission to apply for judicial review). The core alleged error in the Deception Guidance was the failure to properly distinguish between sex and gender identity and their respective relevance to the section 74 test. Whilst the claimant was not involved in the prosecution of sexual offences, it did have a particular expertise as regards the boundaries of sex and gender, indeed this was its core purpose, as described in Forstater 1 and 2 and as reflected in its charitable objects, organisational framework document and its mission statement. Sex Matters had responded in detail to the CPS’ consultation on the guidance and the CPS had already accepted a number of the points it had raised and revised the proposed text of the guidance accordingly. Furthermore, Sex Matters had an established track record as an intervener and as a claimant in litigation (para 37 above).
111. Mr Knight took issue with the defendant’s contention that there were better placed challengers. As Mr Guest’s inquiries showed, cases involving deceptions as to gender identity only arise rarely (para 32 above). When they do, the focus will be on the circumstances of the particular case, not on the overall effect of the passages in the Deception Guidance that refer to gender identity. This case provided a better vehicle for testing the consistency of the guidance with the law precisely because it was not concerned with a particular set of facts.

The defendant’s submissions

112. Ms Dobbin KC submitted that the Deception Guidance correctly states the law. There was no authority that supported the claimant’s central proposition that a deception as to gender identity could never vitiate consent for the purposes of section 74 SOA. This was an area where it was difficult to discern a unifying theme from the authorities; they were difficult to reconcile and there were unresolved questions as to the relationship between sections 74 and 76. The legal position was less definitive than Ms Vine suggested and the cases showed that this was a highly fact-sensitive field. It was not for the DPP to be prescriptive or to make law; it would be wrong for him to produce guidance setting out bright lines when those lines had not been identified by the Courts. In *BVA* the Court had stated in terms that a vitiating deception was not limited to the physical performance of the sexual act. The Deception Guidance correctly states the current legal position and, rightly, leaves open the question of whether a deception as to gender identity falls to be treated in the same way as *McNally* (para 23 above), depending on the particular circumstances.
113. Ms Dobbin disputed the claimant’s contention that a deception as to gender identity was analogous to the complainant’s political beliefs in *Monica*. She said there was a qualitative difference between that situation and a deception which impacted on the complainant’s sexual identity and which may be fundamental to their belief as to who

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they are. She submitted that *R v H* was correctly decided and that it was hard to draw a line between *McNally* and *R v H*. In *R v H*, a heterosexual woman, GF, had embarked on a relationship with JH, a person she considered to be a man and whom she believed had the sexual organ of a man. Ms Vine's argument that JH "was always a woman" reflected the claimant's ideological belief that sex remains immutable, but it did not reflect the perception of the complainant. The circumstances met the "close connection" test. Furthermore, GF had engaged in sexual activity with JH on the basis of a very specific belief and this illustrated how a fact sensitive assessment was required.

114. Ms Dobbin emphasised that in this uncertain area it would be dangerous for this Court to accept the claimant's invitation to state hard-edged principles of law in the abstract; whereas all of the previous cases (whether appeals against convictions or judicial reviews of decisions not to prosecute) involved an ex post facto consideration of a particular factual nexus.
115. Whilst Ms Dobbin accepted that the Deception Guidance should be quashed if it contained a clear legal error, she suggested that a situation where specialist lawyers were applying the law to a particular set of facts and deciding whether a prosecution was warranted, fell outside the circumstances envisaged by *R(A)*'s category (iii). The Deception Guidance was expository, identifying the principles to be drawn from the section 74 authorities and the factors that may bear on the prosecutor's fact-sensitive assessment, rather than prescribing outcomes for defined classes of case. Ms Dobbin contrasted the position with *R (MXK) v Secretary of State for the Home Department* [2023] EWHC 1272 (Admin) ("*MXK*"), which concerned a successful challenge to the Secretary of State's policy on the use of examination and detention powers in Schedule 2 to the Immigration Act 1971 in relation to those with limited leave to remain who had outstanding NHS debts. The policy was issued to non-legally trained immigration officers and purported to give them comprehensive instructions on how to exercise their legal powers.
116. In the alternative, Ms Dobbin submitted that if it was right to apply the *R(A)* categories to the Deception Guidance, the threshold for unlawfulness was a high one and a policy would not be found to transgress it simply because it might have been better drafted. She argued that the Deception Guidance needs to be read as a whole, that it faithfully reflects the law and does not mislead; that it is sufficiently clear and enables Crown Prosecutors to conduct a fact-sensitive assessment as to whether a particular case involving gender identity comes within section 74. The guidance is not intended to be used by the public to regulate their own conduct.
117. Ms Dobbin did not accept that the use of the portmanteau term conflates sex and gender identity or conveys that the two are legally equivalent. The Deception Guidance simply allows for the possibility that cases of deceit as to gender identity may properly lead to a prosecution. Ms Dobbin also disputed that the tone of the guidance is inappropriate. The text aims to make prosecutors aware of the kinds of situations and complexities involving trans or non-binary people that they might encounter; it does not say that these sorts of cases should not be prosecuted. The "Experiences" section was intended to provide background, and the text does not suggest that the existence of any of the circumstances referred to means there is no deception capable of vitiating consent or that it will not be in the public interest to prosecute.

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118. Ms Dobbin said the claimant's position that there must be candour about biological sex for sexual activity to be deemed consensual did not represent the law. The far-reaching implication is that a trans person could not lawfully kiss a willing partner on a dancefloor without first disclosing their birth sex, against the contingency that the partner might have attached importance to it.
119. Ms Dobbin said that as permission to apply for judicial review had been granted, she accepted that questions of standing went to the grant of relief rather than to the merits of Grounds 1 or 2. She also accepted that the claimant has a sincere, committed interest in issues relating to sex and gender. However, she pointed out that Sex Matters has no special expertise or experience in relation to sexual offences and it does not represent the interests of particular groups of suspects or victims or potential suspects or victims, unlike the majority of past cases involving challenges to policies issued by the DPP, including *Nicklinson* and *End Violence against Women*. The observation in *Walton* about those who had responded to earlier consultations was highly context specific (para 94 above) and as the CPS had received over 400 responses to the consultation on the proposed new guidance, this was not a safe basis to find that there was standing to bring an application for judicial review. The claimant did not represent the public interest in general but a particular viewpoint that, whilst legitimate, was hotly contested by other groups who held legitimate but opposing views.
120. Ms Dobbin submitted that there were better placed challengers, namely those affected by decisions to prosecute / not to prosecute in cases of consent to sexual activity that was allegedly obtained by deception. A defendant would have the opportunity to challenge the applicability of section 74 SOA in the criminal proceedings, and a disappointed complainant could judicially review a decision not to prosecute. In both of these situations, there would be a specific factual matrix before the Court.

Analysis and conclusions**Introductory**

121. As permission to apply for judicial review has been granted, we will address the substantive grounds before turning to the question of the claimant's standing. The parties agreed that we should adopt this approach.

Ground 1*Guidance issued by the DPP*

122. We begin our analysis by reminding ourselves that it is not the role of the DPP to make the law or to modify the law; to do so would be a breach of his constitutional position (paras 85-86 above). Guidance is issued by the DPP to assist prosecutors as to the *existing* state of the law in areas of particular complexity or sensitivity (para 13 above). On any view, the question of when a suspect's deception will vitiate a complainant's consent to sexual activity is a highly complex and sensitive area.

Whether a deception as to gender identity can vitiate consent to sexual activity

123. For the reasons we explain below, we reject the claimant's argument that a deception as to gender identity is incapable of vitiating consent for the purposes of section 74

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SOA and that the Deception Guidance is wrong in law because it incorrectly gives the impression that such a deception may do so and conflates deceptions as to gender identity with deceptions as to sex.

124. No appellate case has so far considered a deception as to gender identity in the context of section 74 SOA. As our review of the case law shows, the appellate authorities are difficult to reconcile, so that outcomes in particular cases are hard to predict with any confidence. Three examples suffice. First, it is not easy to see why a deception as to whether a condom will be worn, with its obvious risk of an unplanned pregnancy, is capable of negating consent (*Assange*) but a deception as to fertility, entailing a similar risk, is not (*Lawrance*); in both instances the deception might be thought fundamental to the activity the complainant believed she was consenting to, and the prevention of pregnancy was one of the factors specifically referred to in *Assange* (para 49 above). Secondly, as we have noted, it is hard to see how the decision in *Jheeta* is compatible with the approach identified in *Monica* and applied in *Lawrance*. Thirdly, in contrast to the emphasis in *Lawrance* on the physical performance of the sexual act, the Court in *BVA* held that a deception as to the filming of the act negated consent on the particular facts.
125. The decisions are highly fact-sensitive and, as was said in *BVA*, “there may be no bright lines to draw” (para 70 above). The law is still developing in this area.
126. Ms Vine submitted that *Lawrance* and *BVA* have clearly identified the test: whether the deception is sufficiently closely connected to the sexual activity (by reference to its nature, purpose and performance), rather than the broad circumstances surrounding it (paras 65 and 70 above). But the contrasting outcomes in those two cases underscore the continuing unpredictability in this area, and there is an inbuilt elasticity both in the word “sufficiently” and in the emphasis placed upon broad commonsense in *BVA* (para 71 above).
127. Underlying these uncertainties are unresolved questions as to the relationship between sections 74 and 76 SOA, and whether the “close connection” test identified in *Monica* and endorsed in *Lawrance* in fact reflects the statutory scheme (see David Ormerod, para 74 above). The current state of the law has attracted trenchant academic criticism (paras 73-76) and was described by the Law Commission in 2025 as “unsettled, incoherent, and unpredictable” (para 77 above). This is an area of law that would benefit considerably from consideration by the Supreme Court in an appropriate case.
128. In these circumstances and in light of the myriad factual situations that could arise, it would be dangerous and undesirable for the DPP to take too prescriptive an approach in his guidance as to whether deceptions as to gender identity are capable of negating consent or, if they are, in what circumstances section 74 could apply. Equally, it would be dangerous and undesirable for this Court to give a hard-edged in-principle ruling that deceptions as to gender identity are incapable of vitiating consent under section 74 SOA in any circumstances, when the current state of the case law does not warrant such a bright line approach and we are not in a position to anticipate all of the many factual scenarios that might arise.
129. In the absence of any specific, supporting authority, Ms Vine’s submission that deceptions as to gender identity cannot negate consent to sexual activity rests very largely on contentions as to how the “close connection” test is to be applied. However,

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the law is not as definitive as she suggests. We have already noted the potential flexibility of this test, as is well illustrated by the Court's decision in *BVA*. Furthermore, Ms Vine's argument that consent is not vitiated unless it is connected to the performance of the sexual act itself (or to impersonation) is not borne out by the authorities. First, as the Court acknowledged in *McNally*, the physical acts of digital penetration in that case were the same whether they were perpetrated by a male or a female, but the deception in that case meant that "the sexual nature of the act" was different (para 55 above). How that imprecise concept will be applied in subsequent cases remains to be seen. Secondly, the claimant's argument becomes all the more difficult after *BVA* (decided after these proceedings were issued), where, as we have already explained, the deception was connected to the filming, not to the physical performance of the sexual act and the Court expressly held that a vitiating deception is "not limited to the strict (narrow) physical performance of the act" (para 70 above).

130. Ms Vine disputed the proposition that *R v H* provided an illustration of how a deception as to gender identity could negate consent (para 104 above). However, we accept Ms Dobbin's analysis of the circumstances of that case (para 113 above). The fact that the physical nature of the oral sex was the same whether or not JH had undergone gender re-assignment surgery, is not necessarily determinative, as it was not in relation to the digital penetration in *McNally*. For the reasons identified by Ms Dobbin, we are not prepared to conclude that this was not a deception as to the "sexual nature" of that activity. Furthermore, we consider it to be highly artificial and unduly technical to suggest that the sexual assaults in relation to the two episodes of oral sex were wrongly prosecuted, but JH was rightly convicted of the assault by penetration because of GF's particular belief as to the object that she was penetrated with.
131. We recognise that *R v H* was disposed of by a plea of guilty in the Crown Court (para 34 above). It is not, therefore, an authority on the point and we do not treat it as such. Nonetheless, it provides a useful example of how a deception as to gender identity could negate the complainant's consent. We reject as unrealistic Ms Vine's fallback suggestion that, at most, this should be viewed as a deception as to gender re-assignment surgery and that the Deception Guidance should limit any reference to deceptions as to gender identity to that particular sub-set. The deception practised on GF was not confined to the question of surgery: it extended to JH's entire presentation as a man who had completed a transition, of which the claimed surgery was only one element (para 34 above). Rather, *R v H* provides an illustration of the range of situations that may arise, the fact sensitive nature of each case and that these cannot be comprehensively anticipated in advance.
132. A further potential example of a deception as to gender identity which *might* negate consent is where a male suspect misled a lesbian complainant that he was living in a female identity, and she agreed to the non-penetrative sexual activity that then took place on the basis of this deception. We emphasise that we do not say that consent *would* be negated in such circumstances and doubtless much would depend on the particular facts, but we cannot say at this stage that such a scenario could *never* vitiate consent for the purposes of section 74.
133. We do not accept Ms Vine's analogy with *Monica* (para 101 above), essentially for the reasons identified by Ms Dobbin (para 113 above).

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134. In her skeleton argument, Ms Vine also drew support from para 204 of *For Women Scotland* where the Supreme Court observed, “People are not sexually oriented towards those in possession of a [gender recognition] certificate”, submitting that, in the same way, people are not sexually orientated towards beliefs, including a person’s belief as to their gender identity. However, this does not assist her argument. The Supreme Court was addressing specific issues of statutory construction under the Equality Act 2010, not the impact of section 74 SOA upon ostensible consent and we are concerned with much broader circumstances than deceptions about whether a person has a GRC.

The terms of the guidance

135. Having identified the current legal position as to deceptions as to gender identity and section 74 SOA, we turn to the text of the Deception Guidance to see if it does contain an erroneous statement of the law in this area (paras 81-82 above). For the reasons we explain below, we conclude that it does not.
136. We do not see any difficulty with the statement that “questions of deception and consent may involve more complex issues where the suspect is trans or non-binary” (para 19 above). Ms Vine said it erroneously suggested that there could be a legally relevant difference between a trans and a non-trans suspect. However, this is a statement of fact rather than a statement of law, and it is self-evidently true: issues of complexity are likely to arise in such circumstances. In any event, given that we have accepted that deceptions as to gender identity may be capable of negating consent to sexual activity, the statement is not inaccurate.
137. In terms of its articulation of the legal position, the claimant accepts that the Deception Guidance accurately summarises the reasoning in *McNally* (para 23 above). Given our assessment of the current state of the case law, the text is correct to say it is “*arguable* that *McNally* and the other authorities do not conclusively address the position in relation to trans and non-binary suspects” (emphasis added) and we note the measured way in which this is worded. The guidance does not tell prosecutors that a deception as to gender identity *will* negate consent and nor does it positively encourage them to prosecute such a case. The guidance then correctly identifies the question to be asked, post-*McNally*, namely “whether the sexual nature of the act is different”. Next, the Deception Guidance accurately summarises the case law, as the claimant accepts (para 24 above). The text then identifies four general principles that emerge from the authorities in a series of bullet points. Again, Ms Vine accepts that this is a correct statement of the law (para 24 above). The claimant takes exception to the first of the two bullet points that follow, which are directed to trans or non-binary suspects, but this is an appropriately caveated proposition that “depending upon the circumstances of the case” a trans or non-binary person may deceive a complainant as to their sex.
138. The following section headed “Evidential considerations” simply seeks to give examples of the “issues” that “may” arise in a case. Again, the text does not direct or encourage prosecutors to arrive at any particular conclusion. Part of the claimant’s objection to this section (as with various other parts of the guidance) is that gender identity and sex are treated as legally equivalent. We do not accept this. The listed examples of circumstances that may arise simply recognise that such situations may occur in relation to the suspect’s sex or in relation to their gender identity (for example, as to whether they disclosed this to the complainant). Importantly, the guidance does

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not suggest that the two scenarios are legally identical or that the same decision as to whether to prosecute should follow in both instances.

139. The claimant takes no issue with the formulation of the three-staged questions which the Deception Guidance then sets out as an approach which may assist prosecutors (para 26 above).
140. We have already addressed Ms Vine's central objection to the paragraphs that then appear under "Stage 1", namely that it is premised on the basis that a deception as to gender identity is capable of vitiating consent. The first part of the text simply refers to identifying any condition that the complainant placed upon their consent and the wording then makes clear that this is to be assessed by reference to the "close connection" test.
141. Apart from the alleged conflation of gender identity and sex (which we have already considered and rejected), the main objection to the text that appears under "Stage 2" is the use of an example that is drawn from the facts of *R v H*. We have already explained why we reject Ms Vine's argument that JH was wrongly convicted of two of the offences (para 130 above). We will return to the remaining contentions advanced in relation to this part of the guidance when we address Ground 2.
142. Accordingly, we reject the proposition that the Deception Guidance is wrong in law in contemplating that a deception as to gender identity could vitiate consent for the purpose of section 74 SOA. We consider that the guidance carefully reflects the complexity of the law in this area as it stands and the need for a fact sensitive assessment to be made in any given case. The guidance rightly reflects the difficulty of drawing up abstract rules in the absence of concrete factual situations.

Ground 2*Introductory*

143. Ms Vine submitted that even if we rejected Ground 1, the Deception Guidance falls within category (iii) of the kinds of unlawful policies identified in *R(A)* because, read objectively, it conveys an imprecise and misleading picture of the true legal position in relation to deceptions as to gender identity (para 105 above).

The applicability of R(A) and category (iii)

144. We accept that for the purposes of determining Ground 2 we should assess the lawfulness of the Deception Guidance by reference to the circumstances described as category (iii) in *R(A)* (para 81 above). Lord Sales and Lord Burnett did not purport to lay down an exhaustive account of the situations in which category (iii) could apply but they helpfully identified some indicators (para 82 above). Category (iii) is directed at a policy which "purports ... to provide a full account of the legal position". We recognise that the Deception Guidance does not purport to be a comprehensive statement of the law. But it does purport to identify the principles that emerge from the section 74 authorities and the test that prosecutors are to apply (para 24 above); and it is detailed guidance which the DPP has issued to his staff (Crown Prosecutors) and which they are under a duty to follow (para 13 above). Lord Sales and Lord Burnett also made clear that, even in a category (iii) case, it will not usually be incumbent on the author of the

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policy to go into full detail about how a discretion should be exercised in every case (para 83 above); the question is whether what is said, read as a whole, presents a misleading picture of the law. The fact that prosecutors may well do their own additional legal research does not appear to us to materially distinguish the present situation from those envisaged in *R(A)*. The fact that prosecutors are required to comply with the guidance is particularly significant, given the Supreme Court's emphasis upon whether the policy *directs* those to whom it is addressed to act in a particular way (paras 79-80 above). The Court in *R(A)* identified clear tests that are relatively straightforward to employ; we see no reason why they should not apply in this instance. The existence of some points of factual distinction between the present situation and that in *MXK* does not assist Ms Dobbin's argument (para 115 above).

The terms of the guidance

145. In assessing the contents of the Deception Guidance, we bear in mind that the document needs to be read objectively and considered as a whole. We also bear in mind the context, namely that this document is directed to specialist Crown Prosecutors who will be deciding whether to charge a suspect / continue with criminal proceedings against a suspect accused of sexual offending. The guidance is not written with a view to enabling members of the public to read it in order to regulate their conduct in a way that avoids committing a crime (para 85 above).
146. We have already concluded under Ground 1 that the guidance correctly identifies the applicable legal principles in this area and does not misstate the law in terms of the possibility of a deception as to gender identity vitiating consent to sexual activity for the purposes of section 74 SOA. Although Ms Vine submitted that Ground 2 is a free-standing ground, a number of the points she advanced under this heading are in fact dependent upon the Court accepting her central premise that deceptions as to gender identity can never vitiate consent; a position we have rejected. In addition, we have already addressed her contentions that the guidance wrongly conflates sex and gender identity by repeated use of the portmanteau term; and that the text incorrectly suggests that questions of deception and consent may involve more complex issues where the suspect is trans or non-binary (paras 136 and 138 above). We turn to the criticisms of the guidance that we have not yet considered.
147. Ms Vine's skeleton argument raises a number of specific concerns about some of the bullet points that appear in the "Stage 2" section of the guidance (para 28 above). Stage 2 is concerned with whether the complainant was deceived in relation to the condition they placed on their consent and if so, whether it deprived them of their freedom to choose. As regards the second bullet point, we do not see why the complainant's "life experiences and how these may have impacted on their relationship with the suspect and their understanding of the suspect's gender identity or sex" is necessarily irrelevant to the question of whether they were deceived. The same applies to the fifth bullet point ("the degree to which the sex or trans or non-binary identity of the suspect is apparent or otherwise"). Ms Vine's objection to the seventh bullet point ("use of a prosthetic device without the complainant being aware") rests on the core submission we have already rejected, namely that a material deception can only relate to the performance of the sexual act itself. Lastly, in relation to the eighth bullet point ("the opinion of the complainant towards lesbian / gay / trans people..."), we find it a little harder to see how this factor would bear on the question of whether the complainant was deceived (as opposed to Stage 1 of the inquiry) but we cannot say that this is impossible; in any

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event, this is simply one of twelve factors that are given as examples of matters that may be relevant to Stage 2 of the inquiry.

148. The only concern raised by the claimant in relation to the text that appears under Stage 3 (other than the complaint about conflation that we have already addressed) is the indication that “the degree to which the sex, trans or non-binary identity of the suspect is apparent” may be relevant to whether the suspect reasonably believed the complainant consented (para 29 above). This statement is unobjectionable in light of the conclusion we have reached in relation to Ground 1.
149. Lastly, we turn to the “Trans and non-binary persons – experiences” part of the guidance (para 21 above). We do find the contents of this part of the document and in particular the focus on points that seek to contextualise or explain the experiences of trans and non-binary persons surprising given the context, namely that the person under consideration is a suspect in respect of an allegation or allegations of sexual offending and the Crown Prosecutors are using this guidance in determining whether they should be prosecuted. The document is not intended to be an equalities policy or a social commentary on difficulties that may be faced by trans or non-binary persons. We doubt the relevance of the inclusion of this section, at least in this form. The effect is that the passage reads as though its subject were a vulnerable person in need of protection, rather than a suspect whose conduct is under scrutiny. We see considerable force in Ms Vine’s submission that the tone of this section is unusually sympathetic for a document of this kind (para 109 above). We wish to be clear that this does not, in our judgment, render the Deception Guidance unlawful. As we explain below, the passage does not misstate the law and, read in its context, it does not present a misleading picture of the law. But the DPP may wish to reconsider whether material of this kind, in this form and in this position within the document, is appropriate in guidance whose purpose is to assist prosecutors in deciding whether a suspect should be charged.
150. However, the question for us is not whether we would have written the guidance in identical terms if we were preparing the text, but whether the document contains a misstatement of the law or, read as a whole, it presents a misleading picture of the true legal position (para 81 above). We do not consider that it does.
151. This section appears within the first few pages of the Deception Guidance, where various introductory matters are addressed, including: the terminology used in the guidance; an outline of various conditions, including gender dysphoria; a summary of the legal position regarding GRCs; and the terminology to be employed when prosecutors are addressing trans persons. This text does not appear in and is not cross-referenced in the sections of the guidance which identify the relevant legal principles, the evidential considerations and the factors that may be relevant at each of the three stages of the determination as to whether there is sufficient evidence to prosecute. Furthermore, the bullet points that Ms Vine highlighted are prefaced by the statement that the decision on whether to prosecute must be based on the evidence in each individual case and that the following information is provided for “background context”. As Ms Dobbin pointed out, there is no suggestion that the existence of any of the circumstances that are then described has or may have the effect that there is no deception capable of vitiating consent or that it will not be in the public interest to prosecute. Indeed, such an impression is unlikely to be gleaned as it would be wholly inconsistent with the sections of the guidance that then follow, which explicitly recognise that a deception as to gender identity may be capable of vitiating consent.

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152. Whilst we are not to be taken as suggesting that this factor alone would save the guidance if it did present a misleading picture of the legal position (contrary to the conclusion we have just expressed), we note for completeness that there is no evidence that the terms of the Deception Guidance are causing any difficulty or confusion for Crown Prosecutors in practice (para 32 above).
153. Accordingly, we also reject Ground 2 of the claimant's challenge.

Standing

154. As we have rejected both of the claimant's grounds of challenge, it follows that we will dismiss the claim. However, we address the question of standing (relatively briefly) for completeness.
155. If we had concluded that either or both of Grounds 1 and 2 were well-founded, we would not have dismissed the claim / refused relief on the basis that the claimant lacked standing to bring the claim. We bear in mind the principles identified in the case law that we have summarised at paras 88-100 above. Our conclusion in this regard is based on the cumulative effect of the following factors:
- i) We accept that the claimant charity has a genuine interest in and particular experience in relation to the boundaries of sex and gender and that this lies at the heart of its objects and activities, as Mr Knight submitted (para 110 above);
 - ii) Whilst we accept Ms Dobbin's point that not every one of the 409 respondents to the CPS consultation would necessarily have standing in a case of this nature and that Lord Reed's observation in *Walton* was made in a particular context (para 119 above), the claimant not only responded to the consultation but engaged in detailed pre-action correspondence with the defendant – a process which led to the DPP agreeing to make various changes to the text of the guidance;
 - iii) The issues raised by this claim are ones of public importance in relation to which the claimant has "a reasonable concern" (*Walton*, para 93 above); "a real and genuine interest in the [policy] under challenge" (*McCourt*, para 95 above); and has been "particularly active" and has "particular expertise" (*Luton Landlords*, para 99 above) in the subject matter in question. We accept Mr Knight's submission that the case law does not require that a claimant who asserts standing on the public interest basis must show that their view commands universal or even majority support;
 - iv) Although the claimant does not have an expertise in criminal prosecution as Ms Dobbin pointed out, it is well placed to bring this particular challenge which is entirely focused on the way in which the guidance deals with deceptions as to gender identity. Nor do we consider that the defendant's suggestion of better placed challengers (para 120 above) undermines this. A defendant in criminal proceedings, or a disappointed complainant seeking to challenge a decision not to prosecute, would be confined to the facts of their own case and there is no obvious individual who could bring a challenge of the breadth of the present one;

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- v) In light of the nature and extent of the claimant's challenge, which raised objection to multiple passages in the Deception Guidance, this claim was an appropriate vehicle for considering those concerns and for testing the consistency of the guidance with the law. The issues we have been asked to consider are likely to be wider than those that would arise in respect of a legal challenge to a particular conviction or decision not to prosecute;
- vi) Permission to apply for judicial review was granted and no objection to the claimant's standing was taken by the defendant at that stage, although we accept that this factor carries limited weight given that standing may be revisited at the substantive hearing (para 89 above); and
- vii) The claimant has an established track record as an intervener and claimant in litigation concerning matters relating to sex and gender (para 37 above).

The outcome

- 156. For the reasons we have explained at paras 123-134 above, we do not accept that a suspect's deception as to their gender identity is incapable of vitiating consent to sexual activity for the purposes of section 74 SOA whatever the circumstances. In order to avoid any misunderstanding, we emphasise that our decision goes no further than that. We do *not* conclude that a deception as to gender identity *will* negate a complainant's consent to sexual activity; whether or not a particular deception has that effect will fall for consideration on the basis of the circumstances and evidence in the case in question. However, on the current state of the law we cannot conclude in advance of such cases arising that a deception as to gender identity could *never* negate a complainant's consent and it would be unwise and inappropriate for us to do so.
- 157. It follows that we have rejected the claimant's Ground 1. The DPP's Deception Guidance does not wrongly state the law in this regard (paras 135-142 above).
- 158. We have also rejected the claimant's Ground 2, as the DPP's guidance does not present a misleading picture of the true legal position, as we have explained at paras 145-153 above.
- 159. Accordingly, we will dismiss the claim.
- 160. For the avoidance of doubt, our conclusions on Grounds 1 and 2 have been reached by reference to the TCG/2 text of the Deception Guidance, which is the text on which the parties focused their submissions and which the defendant intends to publish (paras 7 and 17-18 above). The parties did not invite us to consider separately the text of the June 2026 version, which the defendant intends to replace, and we have not done so.
- 161. If we had decided that Grounds 1 and/or 2 were well-founded (which we have not), we would have accepted that the claimant had sufficient standing for the purposes of this claim (para 155 above).
- 162. We have given the parties an opportunity to address consequential matters in writing.

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163. As we did at the hearing, we end by paying tribute to the very high quality of the submissions that were made by both parties; they were of considerable assistance to the court.