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## ‘GENDER FRAUD’:

### WHERE DO WE GO FROM HERE?

*Penelope Childs*<sup>1</sup>

#### **Abstract:**

This paper outlines work in progress that examines liability for sex offences involving ‘gender fraud’ and asks how things might be viewed differently from a transnormative perspective. It considers vitiation of consent by active deception as to gender and by non-disclosure of gender history and asks what implications recent case law might have for the transgender community.

**Keywords:** trans, transgender, sex and gender, sexual offences, deception, consent

#### **Introduction**

The lives of transgender people have featured recently across a range of media from television shows like ‘Boy Meets Girl’ and ‘Transparent’ to documentaries exploring issues facing transgender adults and children. Interest in the trans-community, fuelled perhaps by media reports involving high profile transgender people such as Caitlyn Jenner, has seemingly increased and within the last few months the broadsheets have published a variety of trans-related features.<sup>2</sup> Moreover Stonewall recently announced that it would be including trans people within its remit for the first time, fighting for equality and respect around gender identity alongside sexuality.<sup>3</sup>

Increased media coverage has led to increased public awareness but sadly, not all news is good news as witnessed in the recent reports of the plight of transwomen detained in male prisons, including Vicky Thompson who committed suicide whilst serving a prison sentence

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<sup>2</sup> These include Ford, T., ‘Just call me they,’ *The Guardian Weekend*, 8 August 2015; Machell, B., ‘The Transgender Kids,’ *The Times Magazine*, 29 August 2015; Kleeman, J., ‘Boys will be girls will be boys,’ *The Guardian Weekend*, 12 September 2015; Morris, A., ‘My husband is now my wife,’ *The Times Magazine*, 7 November 2015.

<sup>3</sup> Until recently Stonewall had been only a lesbian, gay and bisexual rights campaigning organisation. In February this year, Stonewall has publicly apologised for the harm caused by not having previously represented the trans-community and now strives to be trans-inclusive. For its current strategy, see ‘*Trans People and Stonewall: Campaigning for Lesbian, Gay, Bisexual and Trans Equality*,’ (2015, Stonewall) <http://www.stonewall.org.uk/our-work/campaigns/trans-equality> accessed 12 November 2015

in Leeds.<sup>4</sup> It is estimated that there are around 80 transgender prisoners in the UK<sup>5</sup> and the Thompson tragedy prompted calls for a review of their treatment in the criminal justice system. Reconsideration of Ministry of Justice (MoJ) Guidelines that placed Thompson and other transwomen<sup>6</sup> in men's prisons is now underway.<sup>7</sup>

Transmen caught up in the criminal justice system have also featured in the news lately in a series of prosecutions for engaging in sexual acts without revealing their gender history to sexual partners. This note aims to raise questions emerging from these cases and, in particular, to ask what implications the decisions have for young sexually active transgender people. It also seeks to highlight concerns arising from the cisnormativity - the assumption that people have a gender identity that is the same as their biological sex - that can be seen to inform the law in this area.

It is helpful to start with a brief note on terminology before considering the implications of the cases.<sup>8</sup> The terms trans and transgender are used here to denote someone whose gender identity differs from that ordinarily associated with their sex designated at birth. Thus a transgender man was assigned female at birth but identifies and lives as a man. Cisgender denotes those who are non-trans, so for example a cisgender woman would be female assigned at birth. Some trans people undergo or intend to undergo gender reassignment and, where this is surgical, may be referred to as pre-operative or post-operative transsexuals. However, it is important to be clear from the outset that not all trans people wish to undergo gender reassignment surgery or hormone treatment to live their identified gender. Moreover some transgender people are non-binary (gender queer, gender variant,

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<sup>4</sup> 21 year old Vicky Thompson had previously threatened to kill herself if sent to a men's prison. She identified as female since her teens but had not undergone gender reassignment surgery nor obtained a Gender Recognition Certificate (GRC). She was therefore treated in law as her sex assigned at birth which was male and so was placed in a men's facility. This was despite a discretion in the Ministry of Justice (MoJ) policy guidelines which allows acquired gender to be taken into account in placing offenders even if there is no GRC.

<sup>5</sup> The MoJ has not previously monitored the numbers of trans prisoners but the government has now committed to do so: <http://www.theguardian.com/society/2015/nov/20/government-provide-transgender-prisoner-numbers-vicky-thompson>

<sup>6</sup> Just weeks before Thompson's suicide, another transwoman, Tara Hudson, had been transferred from an all-male prison following a campaign by trans-activists. <http://www.bbc.co.uk/news/uk-england-34675778>

Hudson has lived all her adult life as a woman, started gender reassignment treatment at 20 but, like Thompson, had no GRC. Two weeks after Thompson's suicide another transwoman, Joanne Latham, was found hanged in her cell in an all-male prison. <http://www.bbc.co.uk/news/uk-england-beds-bucks-herts-34972221>

<sup>7</sup> Grimwood, G., *Transgender Prisoners*, (HoC Briefing Paper No 07420, 4 December 2015).

<sup>8</sup> For further definitions and helpful glossaries, see Mitchell, M. and Howarth, C., *Trans Research Review* (2009, Equality and Human Rights Commission) at pp. i-ii and *Trans People and Stonewall*, at p.23.

gender fluid etc.) which describes people whose gender identities do not fit into the gender binary of male or female at all.<sup>9</sup>

## 1. Cases of Gender Fraud

The discussion about the case law which follows focuses primarily on the appeal decision in *R v McNally*.<sup>10</sup> At the time of the alleged offences McNally was a transgender boy in a sexual relationship with a cisgender girl to whom he had not revealed his gender history. There was evidence that he identified as a boy both before and at the time of the offences and so McNally is referred to as 'he' in this note although the pronoun 'she' is used throughout most of the judgment in the case itself.<sup>11</sup> McNally was convicted of having sex without his partner's consent which was vitiated by the deception as to gender and was sentenced to three years in a young offenders' institution and placed on the sex offenders register. Earlier cases include that of Gemma Barker who received a two and a half year sentence in 2012 for sexual assault on two cisgender girls whilst 'disguising herself as a boy'<sup>12</sup> and the 2013 Scottish case of Chris Wilson who was female designated at birth but had lived as a man since childhood. Wilson was convicted on a guilty plea for 'obtaining sexual intimacy by fraud' with two cisgender girls based on having 'lied' about his gender.<sup>13</sup>

More recent cases reported in the media include that of Kyran Lee, a transman who is awaiting sentence this month having pleaded guilty to a number of sexual offences arising out of sexual intimacy with two ciswomen<sup>14</sup> and the case of Gayle Newland who was sentenced to eight years in November for posing as a man to have sex with another woman. This is not, on the face of it, a transgender case although Newland was described by the judge as having an issue with 'blurred gender lines'.<sup>15</sup> The case is of interest because it raises a number of issues about active deception, including through Newland's use of a prosthetic penis and, more importantly for current purposes, it also raises concerns about

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<sup>9</sup> This is, of necessity, a thumbnail sketch of terms used in this paper. It is not possible here to do justice to the discussion and debate around what it means to be trans. For an examination of the wider issues, including the impact that trans existence has on law and on an understanding of sex and gender (and on feminist theory), see, for example, Whittle, S., *Respect and Equality: transsexual and transgender rights* (2002, Cavendish Publishing Ltd) and Gross, A., 'Gender Outlaws before the Law: The Courts of the Borderland,' (2009) 32 *Harvard Journal of Law and Gender*, pp.165-231.

<sup>10</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>11</sup> McNally apparently now identifies as female on which see Sharpe, A., 'Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent,' [2014] *Criminal Law Review*, pp.207-223

<sup>12</sup> <http://www.bbc.co.uk/news/uk-england-surrey-17256641>

<sup>13</sup> <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-22078298>

<sup>14</sup> <http://www.telegraph.co.uk/news/uknews/law-and-order/11959495/Woman-posed-as-a-single-father-to-con-Facebook-friend-into-sex.html>

<sup>15</sup> *R v Newland* (Chester Crown Court 12/11/15) <https://www.judiciary.gov.uk/wp-content/uploads/2015/11/r-v-newlandsentencing.pdf>.

the impact of heteronormativity on judicial thinking.<sup>16</sup> The pervasive nature of heteronormativity and the homophobic attitudes that inform decision making in transgender cases are well documented<sup>17</sup> and whilst these attitudes are often implicit, just occasionally, explicit statements can be found in cases that are so spectacularly homophobic and transphobic as to leave readers somewhat bemused and speechless. For example, the judge who sentenced transman Jimmy Saunders to six years imprisonment for sexual assault on two young women in 1991, is reported as having said: 'You have called into question their whole sexual identity ... and I suspect both girls would rather have been actually raped by some young man than have happened to them what you did.'<sup>18</sup>

Before examining the case law further, it is worth briefly providing the context within which to place a discussion about the legal treatment of transgender people. It would be churlish not to acknowledge that we have come a long way since the 1970s when the law refused to recognise transgender identity at all. And so in *Corbett v Corbett*<sup>19</sup> the marriage of cisman, Arthur Corbett, to post-operative transwoman, April Ashley, was declared a nullity because 'sex' which was 'determined at birth' could not be changed and legally Ashley remained male.<sup>20</sup> Gone too are the days when 'cisgender men could ... rape [transwomen] with impunity'<sup>21</sup> because transwomen were not legally women and so not capable of being raped. So times have changed and now, for example, the Sexual Offences Act 2003 specifically provides for trans-rape,<sup>22</sup> whilst the Equality Act 2010 renders discrimination based on gender reassignment unlawful<sup>23</sup> and the Gender Recognition Act 2004 enables legal

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<sup>16</sup> Concerns about the implications of the decision in respect of gender fraud and its potential impact on the trans-community have also been raised. See, for example, Pegg, S., 'Guilty verdict in sex deception case may be bad news for people transitioning to a new gender,' *The Conversation*, 16 September 2015, <http://theconversation.com/guilty-verdict-in-sex-deception-case-may-be-bad-news-for-people-transitioning-to-a-new-gender-47617> (accessed 30 November 2015); Sharpe, A., 'Deceit or Disappointment: "Gender Fraud" Revisited,' 6 October 2015, <https://inherentlyhuman.wordpress.com/2015/10/06/deceit-or-disappointment-gender-fraud-revisited/> (accessed 30 November 2015) and Scott, M., 'The Gayle Newland sentence sets a dangerous precedent for transgender rights,' *The Telegraph*, 13 November 2015, <http://www.telegraph.co.uk/news/uknews/crime/11993361/The-Gayle-Newland-sentence-sets-a-dangerous-precedent-for-transgender-rights.html> (accessed 10 December 2015).

<sup>17</sup> See, for example, Sharpe, 'Criminalising sexual intimacy, pp.207-223; Tran, S., and Glazer, E., 'Transgenderless,' (2012) 35 *Harvard Journal of Law and Gender*, pp.399-407; Whittle, *Respect and Equality*, and Gross, 'Gender Outlaws before the Law'.

<sup>18</sup> *R v Saunders* (unreported 12 October 1991 Doncaster Crown Court) cited in Gross, 'Gender Outlaws before the law' p.207 and Sharpe, 'Criminalising sexual intimacy' p.222.

<sup>19</sup> *Corbett v Corbett* [1971] 2 All ER 33.

<sup>20</sup> And, of course, at the time only heterosexual marriage was recognised.

<sup>21</sup> Sharpe, A., 'Constructing Trans-Cis Sexual Intimacy as Rape: A Novel Cis-Sexist Genre,' 23 October 2013, <https://inherentlyhuman.wordpress.com/2013/10/23/constructing-trans-cis-sexual-intimacy-as-rape-a-novel-cis-sexist-genre/>

<sup>22</sup> Section 79(3) Sexual Offences Act 2003 provides for body parts to include those surgically constructed through gender reassignment surgery.

<sup>23</sup> Section 7 adds gender reassignment to the list of 'protected characteristics'.

recognition of one's preferred gender. But this is not to suggest that we have come far enough as the criminal cases on trans/cis sexual relationships demonstrate. However, before their significance can be fully appreciated it is necessary to explain the effect of the Gender Recognition Act. This Act, which was introduced in response to a finding that the UK was in violation of Art.8 of the European Convention on Human Rights (ECHR) for failing to recognise post-operative transgender identity,<sup>24</sup> enables trans people to obtain a Gender Recognition Certificate (GRC) which gives legal recognition of acquired gender 'for all legal purposes'.<sup>25</sup> Although the Act does not go as far as the law in Denmark and the Republic of Ireland where gender recognition is based on self-identification<sup>26</sup> it goes further than other jurisdictions and does not, for example, require gender reassignment or sterilisation before recognition will be granted.<sup>27</sup> It does, however, require a diagnosis of gender dysphoria, a medical term for the condition experienced by someone when there is a mismatch between their biological sex and gender identity.<sup>28</sup> To obtain a GRC then, the applicant must be aged 18 or over, be diagnosed with gender dysphoria, and have lived in their acquired gender for at least two years and intend to live in that gender for the rest of their life.<sup>29</sup> So before turning to the criminal law cases it is worth reiterating that a GRC enables, for example, someone assigned female at birth to be legally recognised as male and can be granted to someone who has not undergone gender reassignment. To put it in its simplest form this means that the law recognises that a woman can have a penis and that some men do not have a penis but may have a vagina.<sup>30</sup>

And so now we can turn to the case of McNally, the young transman who was female assigned at birth but who, at the time the offences were charged, identified as a man. McNally had not obtained a GRC nor undergone gender reassignment surgery but had expressed a wish to do so. He formed an internet relationship with a cisgender girl which eventually became a sexual relationship once she had reached the age of consent. The case proceeded on the basis that McNally's teenage sexual partner had been deceived into

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<sup>24</sup> *Goodwin v UK* [2002] 35 EHRR 18.

<sup>25</sup> Section 9 Gender Recognition Act 2004.

<sup>26</sup> The Danish law was introduced in 2014 ('World must follow Denmark's example after landmark transgender law,' *Amnesty International News*, 12 June 2014 <http://www.amnestyusa.org/news/news-item/world-must-follow-denmark-s-example-after-landmark-transgender-law> accessed 28 January 2015) and in the Republic of Ireland in July this year.

<sup>27</sup> For an examination of the Act see Dunne, P., 'Ten years of gender recognition in the United Kingdom: still a "model for reform"?' *Public Law*, pp.530-539.

<sup>28</sup> This has to be diagnosed by a medical or psychological expert. The requirement is controversial and opposed for a number of reasons including discrimination, restricted access and for the 'continued "pathologisation" of transgender identities': Dunne, 'Ten years of gender recognition,' p.538.

<sup>29</sup> The GRA is therefore based on the notion of binary gender and so protects only what Trans and Glazer call 'perfect gender-nonconformists' and not non-binary trans people: '*Transgenderless*' p.399.

<sup>30</sup> Whilst recognising the phallogocentric nature of this description, it has been chosen to highlight aspects of the analysis of the impact of the decision in McNally.

thinking that she was having sex with a boy when, in law, McNally was a girl. McNally was charged with six counts of assault by penetration contrary to s.2 of the Sexual Offences Act 2003 and the issue for determination was whether or not there had been consent to the sexual acts that had taken place. The conclusive and evidential presumptions about lack of consent under ss76 and 75 of the Act were dismissed as not being relevant and so the case was decided on the basis of the definition of consent under s74. This provides that: 'a person consents if he agrees by choice and has the freedom and capacity to make that choice.' McNally's conviction was then upheld on the basis that the complainant's consent to the acts had been vitiated because the deliberate deception as to gender had deprived her of the freedom to choose whether or not to have sex with a girl.

## **2 The Implications of the Case Law**

What follows are a series of questions that arise from the decision in McNally, most of which are the subject of work in progress. Whilst many of these dispute the grounds on which liability might arise for active deception as to gender or for non-disclosure of gender history they are not intended to call into question the importance of protecting the sexual autonomy of complainants.

### ***Deception as to the nature of the act?***

It was not suggested that s76 of the Act applied to the facts of McNally. Section 76(2)(a) provides for the rebuttal of consent in cases of intentional deceit as to the nature or purpose of the act. It is easy to imagine cases where this would apply in the current context, as for example, on the facts of Newland where the complainant was actively deceived about the physical act taking place. However, it was not suggested that s76 applied to the facts of McNally where the deception had only been as to gender and not about the nature of the acts themselves. This is some comfort since deceptions about nature or purpose engage the conclusive presumption of lack of consent and of mens rea, leaving no room for evidence that the sexual partner did, in fact, consent or that the trans person reasonably believed that she did.

Having decided that the issue of consent was to be determined under s74 and not s76 Leveson L.J. went on to say that 'the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant in to believing that the latter is male.'<sup>31</sup> So in what way might there be a deception as to the sexual nature of the act? After all digital penetration is digital penetration whatever the gender of the

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<sup>31</sup> *R v McNally* [2013] EWCA Crim 1051 at [26].

penetrator and its purpose, sexual gratification, remains the same. If we accept the premise that the complainant was deceived about McNally's gender and so was, in the court's view, having sex with a girl, it is hard to escape the conclusion that the only way in which the sexual nature of the act differs is in its expression of homosexual rather than heterosexual desire. This then begins to become problematic for the way in which consent and non-consent are construed because heteronormative assumptions and homophobia may inform how they are perceived.

### ***Deception as to identity?***

The other conclusive presumption in s76 covers impersonation and it would, hopefully, be unarguable that by presenting as a boy whilst legally still a girl a trans-boy had obtained consent by impersonating someone (a boy) known personally to the complainant.<sup>32</sup> The notion of deception as to identity is also relevant to the common law governing consent to non-sexual offences. So if deception as to gender destroys freedom to choose under the Sexual Offences Act, might it also operate as a deception about the identity of the actor thus destroying consent to a non-sexual touching. This raises a whole set of questions about the relevance, if any, of gender to non-sexual touching and about the relationship between mistake or deception as to attributes and those as to identity.<sup>33</sup>

### ***Deception as to gender?***

There is a debate about the extent to which other forms of deception, that fall outside s76, should be permitted to vitiate consent.<sup>34</sup> The details are beyond the scope of this paper but the theoretical and practical issues raised within the different strands of the debate provide a backdrop for determining whether lying about gender should be singled out from other lies that have no impact on the legal validity of consent. In addition to questioning whether lies about gender ought to 'count' it is by no means clear, returning to the case of McNally, that there was in fact any active deception as to gender. There is, for example, an illuminating analysis of how cisnormativity and cisgender perspectives informed the decision about what 'counted' as deception in McNally.<sup>35</sup>

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<sup>32</sup> Not least because he is not impersonating a boy, he is a boy (see below).

<sup>33</sup> *R v Richardson* [1999] Q.B. 444.

<sup>34</sup> See for example, Herring, J., 'Mistaken Sex,' [2005] *Criminal Law Review*, pp.511-524; Gross, H., 'Rape, moralism, and human rights,' [2007] *Criminal Law Review*, pp.220-227; Williams, R., 'Deception, mistake and vitiation of the victim's consent,' (2008) 1124 *Law Quarterly Review*, pp.132-159; Spencer, J.R., 'Sex by deception,' (2013) 9 *Archbold Review*, pp.6-9; and Laird, K., 'Rapist or rogue? Deception, consent and the Sexual Offences Act 2003,' [2014] *Criminal Law Review*, pp.492-510.

<sup>35</sup> Sharpe, 'Criminalising sexual intimacy' p.217.



Furthermore McNally is described in the case as making ‘herself look like a boy’.<sup>36</sup> This raises a further question about the nature of the deception which is also apparent in the way that other trans cases have been described. So is a trans boy really a girl ‘in disguise’<sup>37</sup> or a girl ‘posing as’ a boy<sup>38</sup> and does it make a difference if the boy has a GRC? Is it possible to interpret McNally as being based on the notion that transgender boys are not real boys? If so, this would be to deny trans identity altogether.<sup>39</sup> It would also bring criminal law into potential conflict with the underlying premise of the Gender Recognition Act. And what if a trans man has a GRC? It is to be hoped that this would be an end to the matter because the trans man is then legally a man.<sup>40</sup> But what if he is a man without a penis? There is some support in the judgment for a reading that suggests the ‘true’ nature of McNally’s deception was about anatomy in which case the GRC may be neither here nor there though gender reassignment surgery might be.

So are we really talking about gender at all or has the court slipped back into thinking about gender as biology? Is it possible to read McNally as a case of a trans boy deceiving his partner into thinking that she is having sex with a cis boy? If so, biology, in the sense of chromosomes rather than anatomy, rears its head. This is also where the need to reveal gender history comes from because the only way to avoid this ‘deception’ would be to declare one’s transgender identity. This would be far reaching as it might be incumbent on all transgender men whether or not they have a GRC.<sup>41</sup>

### ***Deception or non-disclosure?***

In other contexts, the case law supports a distinction between active deception which might prevent true consent from being given and simple non-disclosure which does not.<sup>42</sup> That said, the distinction is not always easy to establish, as the categorisation of McNally’s conduct demonstrates, and the concern for the trans community is that non-disclosure becomes de facto deception. Moreover, there are strong and convincing arguments against imposing a duty to disclose in the context of transgender history not only because of the risk of harm this might cause but also because of its potentially discriminatory nature.<sup>43</sup>

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<sup>36</sup> *R v McNally* [2013] EWCA Crim 1051 at [30].

<sup>37</sup> As Gemma Barker was described <http://www.bbc.co.uk/news/uk-england-surrey-17256641>

<sup>38</sup> As Chris Wilson was described <http://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-22078298>

<sup>39</sup> For a discussion about why ‘coupling transgender with impersonation...is to misunderstand the phenomenon of transgender and its ontology’ see Sharpe, ‘Criminalising sexual intimacy’ pp.214-215

<sup>40</sup> Though it is by no means clear that this would be the case, see Pegg, ‘Guilty verdict in sex deception case’ and Scott, ‘The Gayle Newland sentence’

<sup>41</sup> Thus calling into question a conflict in legal policy

<sup>42</sup> *R v B* [2006] EWCA Crim 2945 and *Assange v Sweden* [2011] EWHC 2849

<sup>43</sup> The arguments are explored in detail in Sharpe, ‘Criminalising sexual intimacy,’ pp.219-223

Finally, if there were a need to disclose gender history, might this be obviated by obtaining a GRC? Even if this were the case, requiring disclosure or a GRC presents a number of difficulties not least for transgender adolescents.<sup>44</sup> Putting aside arguments about the appropriateness of the age limit on applications for a GRC<sup>45</sup> the fact that it cannot be obtained until the age of 18 means that a sexually active trans person aged between 16-18 would have no choice but to disclose or run the risk of prosecution. To remain untouched by the criminal justice system, this particular group of transgender people may therefore be forced to choose between running the very real risks of disclosure or remaining sexually inactive until they reach the age of 18, two years after the age of consent for cis-gendered teenagers.<sup>46</sup>

## **Conclusion**

The recent case law involving the prosecution of transgender defendants for what has been described as 'active deception' as to gender identity has given rise to a range of serious concerns. These not only relate to the way in which the law has been applied in a potentially contradictory fashion but also to the way in which cisnormativity and transphobia may have impacted on an understanding of the issues involved. The implications of the case law for the trans community, and in particular for young trans people, are potentially far reaching but at the moment the law is uncertain which just makes matters worse.

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<sup>44</sup> It is not intended to explore the difficulties here but these and the issues of impact on young trans people is the subject of contemporary research.

<sup>45</sup> see Dunne, 'Ten years of gender recognition,' pp.535-538

<sup>46</sup> Which in turn raises questions of discrimination under Art.14 of the ECHR.