

Gender Deception and The False Equation of Transgender Identity as a Moral Harm Resulting in Legal Injustice

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Introduction

Gender deception is a legal concept that refers to transgender individuals not disclosing their transgender identity, which, if done before engaging in sexual activities, has the chance to result in criminal sexual offence charges. This has not been observed often as a charge due to transgender people being a small minority of the population, around 0.5% of census correspondents identified as such in the Gender identity, England and Wales: Census 2021; however, it was observed this year. The legal precedent of gender deception was recently used again in the courts in the case of Ciara Watkins, a trans woman who was accused of sexually assaulting a man, due to a failure to disclose her transgender identity. This case brought back discussion of the shifting moral landscape, which has led to inconsistencies in the law and the equating of unequal offences. This paper will address the issue of inconsistency within the current law and examine how policy can be utilised to reduce the discrimination currently present.

What is the problem?

There is a legal inconsistency currently with how transgender identity is viewed when compared to other elements of the law. The first instance of what the modern legal system understands as gender deception comes from the case of *R v McNally* (2013). In this case, the defendant presented' as a boy while engaging in sexual relations with a girl on several occasions. They went to jail for three years as a result and will forever have sex crimes connected to their name.

There is no legal difference between failure to disclose your sex at birth and deliberate deception, which creates levels of fault in the deception that are not accounted for. In new guidance issued in 2024, the Crown Prosecution Service reaffirmed this decision.

This is not reflected in other offences in the same capacity, which could be seen as a form of discrimination. Transgender identity is the only protected characteristic that maintains this standard; no other outlined identity, such as religion or disability status, needs to be disclosed in such a manner. When one group is subjected to standards that differ from those of others to their detriment, discrimination is at play. The UK has even been questioned on this before, with academics such as Alex Sharpe bringing forth the claim that the current law violates the ECHR (European Convention on Human Rights), particularly section 8, the right to privacy, and section 14, the right not to face discrimination (Sharpe, 2024).

In addition, there's a problematic false equivalence drawn by the current law between the disclosure of STD status and Transgender identity. The only other status that is required to be disclosed, other than transgender identity, to affirm consent is STD status. Transmission of STDs can cause tangible harm to an individual through consequential health complications. However, even in cases

where harm is observed, as established in *R v Dica*, only harm offenses can be prosecuted if a lack of knowledgeable consent is demonstrated. Meanwhile, greater crimes can be prosecuted regarding gender identity, such as sexual offences, despite no physical harm taking place from the deception, unlike in the case of STDs. This would suggest the law views deception about STD status to a partner as less of an offence than deception surrounding an individual's sex at birth.

There is also undue pressure placed upon transgender people to possibly expose themselves to harm as a result of this. Transgender individuals still face hostility from society and threats to their safety if their identity is known. There have been transphobic attacks in recent years, including high-profile examples such as Brihanna Ghey, a transgender girl who was killed in 2023. Trans people face a security risk when 'coming out' about their gender identity and living it authentically. In a study of over 800 transgender identifying individuals, 73% said they had experienced harassment in public, and a further 10% threatening behaviour (Stephen Thomas Whittle, 2007). Furthermore, this is only in public, in the private sphere this may be observed more frequently due to the lack of social oversight. By creating a legal duty to disclose transgender identity, trans people are exposed to potential harm and at risk of being prosecuted should they fail to do so.

Current news stories regarding gender deception use language that is degrading to transgender and gender questioning individuals. The recent BBC article on Ciara Watkins has language denying the defendant's gender identity, featuring comments such as "Don't swing that way", a common allegory to homosexual relationships and attraction. Later reporting on the same case had quotes given by the victim in court, where the man described how he felt "physically sick" and as he was a "heterosexual male". These are clear displays of disgust toward trans bodies, as they refuse to acknowledge the defendants' gender identity, implying they are still a man. This is not only promoting transphobia as acceptable within the media, but also homophobia, given that the disgust described is at the concept of relationships between 'men', again pointing to the disrespect for the defendant's legitimate gender identity.

This problem has been addressed by academics previously on a transgender equality inquiry in 2015, which frequently touches on how the current law fails to give dignity to transgender identities (Sharpe, 2015). In the given evidence, it is described that there is a constant pressure put on trans people to perform assurances for their cisgender counterparts. Trans people have greater responsibilities, which are not shared by their cisgender peers, giving cisgender people a legitimacy in their identity that is not extended to trans people.

Possible solutions

This legal issue exists due to a valid concern of consent in sexual encounters; however, this results in discriminatory policy, which then possibly contradicts ECHR law. This issue can instead be addressed in other ways to prevent this inconsistency and harmful legal principle.

Firstly, there should not be an equivalence or even worse standard for transgender individuals who deceive in relation to their gender at birth and those deceiving in relation to their STD status. This can be solved through simple legislation that outlines that STD deception is a violation of consent, carrying sexual offence charges instead of harm, and no longer considering failure to disclose gender identity as a violation of consent. There are various levels of intention that the law could account for, which alleviates the burden on trans people.

YouGov shows that the majority of people think that trans people should be able to transition socially and live as their desired gender within society (Smith, 2025). This would suggest there is acceptance of transgender people to continue to enjoy their private affairs. The same poll, however, also shows people who do not know any trans people are significantly less accepting, suggesting that awareness needs to be promoted to cultivate a society where transgender individuals do not feel a need to maintain anonymity for their gender status for safety or comfort reasons. By creating a society with greater acceptance, there would not only be less expressed discontent at transgender individuals living authentically, but also at their sexuality.

This could be achieved through implementing better guidance on topics addressed in sex education within schools, specifically secondary school and upwards (those aged 11+). By then, children are at a stage where they would have likely had access to the internet, risking having a flawed view of trans people developed by harmful online rhetoric, which can lead to social ostracism or bullying of trans pupils. Instead, having a standardised attempt to more accurately depict trans people within the curriculum would likely show improvement.

There also needs to be regulations against offensive language used in the media. Perpetuating this idea that trans people can be misgendered publicly directly acts to harm trans individuals, especially those who are more vulnerable, early in their transition, who don't 'pass' as their desired gender yet. Implementation of policy here would be a delicate issue due to the current debate around free speech, however, as a basic principle, policy should strongly encourage the media to gender transgender individuals correctly in accordance with their wishes.

Conclusion

The legal inconsistency in question should be addressed because it no longer aligns with societal attitudes, which are, overall, liberal and in favour of social transition. There is a moral misalignment in the view of gender identity in law, especially in relation to STD status, which in part is perpetuated by the media. There is also an expectation on trans people to expose themselves to harm through gender identity disclosure, a dignity that is not denied to cisgender people. To combat this, a greater understanding is needed: a combination of better education in schools, legislative change to create certainty in the current law, and a more respectful depiction of trans people in media can help achieve this.

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