

RESEARCH ARTICLE

# European human rights law and the legality of sex offence prosecutions based on deception as to gender history

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## Abstract

This paper considers the legality of the UK practice of prosecuting trans people for sexual offences on the basis of deception as to gender history, a practice unknown in other member states. It argues that such prosecutions may constitute an unjustified violation of Article 8 of the European Convention on Human Rights. Moreover, it argues that where criminal prosecution falls within the scope of Article 8 but is viewed as objectively justified under Article 8(2), it may constitute a violation of Article 14. The paper will proceed as follows. Part 2 will provide some background context regarding prosecution of trans people for deception as to gender history in the UK. Part 3 will set out the current law pertaining to sexual fraud in England and Wales. Part 4 will present two arguments as to why prosecutions based on current English law, or Crown Prosecution Service interpretations of it, may violate Article 8: (1) a right to respect for privacy is undermined by lack of legal certainty regarding the threshold of criminal liability; and (2) deception as to gender history ought not to be considered a material deception serving to vitiate consent as a matter of law. Part 5 will consider the issue of potential discrimination under Article 14.

**Keywords:** human rights; gender history; sexual fraud; Article 8; Article 14

## Introduction

This paper considers the legality under the European Convention on Human Rights (ECHR) of the UK practice of prosecuting trans people for sexual offences on the basis of deception as to gender history. While there appears to be no evidence of this practice in other member states,<sup>1</sup> at least five prosecutions of this kind have been brought in the UK since 2012,<sup>2</sup> while a further five gender fraud prosecutions have been brought against lesbian, gay or otherwise gender non-conforming people.<sup>3</sup>

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<sup>1</sup>Despite extensive research, the author has been unable to find examples of prosecutions of this kind in other member states.

<sup>2</sup>*R v Chris Wilson* (7 March 2015, unreported), Edinburgh High Court; *R v Kyran Lee (Mason)* (16 December 2015, unreported), Lincoln Crown Court; *R v Jason Staines* (24 March 2016, unreported), Bristol Crown Court; *R v Carlos Delacruz* (5 September 2018, unreported), Edinburgh Sheriff Court; *R v Tarjit Singh* (27 July 2022, unreported), Snaresbrook Crown Court.

<sup>3</sup>*R v Gemma Barker* (5 March 2012, unreported), Guildford Crown Court; *R v Justine McNally* [2013] EWCA Crim 1051; *R v Gayle Newland* (15 September 2015, unreported), Chester Crown Court; *R v Newland* (29 June 2017, unreported), Manchester Crown Court; *R v Duarte Xavier* (9 November 2018, unreported), Kingston Crown Court; *R v Georgia Bilham* (14 June 2023, unreported), Chester Crown Court.

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The paper focuses on trans people, as its central argument distinguishes ‘deception as to gender history’ from ‘deception as to gender identity’. A trans person may deceive another regarding their gender history, but not their gender identity. Conversely, cases involving lesbians or gay men may involve deception as to gender identity. The paper will argue that prosecutions for deception as to gender history ought to be viewed as constituting an unjustified violation of Article 8, and where criminal prosecution falls within the scope of Article 8 but is viewed as objectively justified under Article 8(2), as constituting a violation of Article 14.

My argument does not focus on the question of consent. Rather, it focuses on a prior question, namely, is the deception ‘legally material’? Only if deception is considered ‘legally material’ does the issue of consent arise. As is well known, the courts have long taken the view that numerous deceptions are not legally material.<sup>4</sup> Accordingly, the argument to be made, one that considers the importance of privacy and equality rights as well as sexual autonomy, is that trans people’s gender histories ought *not* to be viewed as legally material. Of course, it might be said that a judicial conclusion of fact non-materiality is tantamount to a conclusion that consent was not vitiated. Indeed, and unfortunately, judges often talk in this way.<sup>5</sup> However, my aim is not to deny absence of consent. Rather, it is to argue that it ought not to matter in the absence of a deception that is considered legally material. English common law stands squarely behind the proposition that many (perhaps most) deceptions should be viewed as non-material. Extending such a view to the gender histories of trans people is perhaps more difficult but it is the argument to be made in this paper. However, my argument differs from the approach taken by the courts on the question of materiality in an important respect. The courts insist that knowledge of lack of consent is irrelevant where deception pertains to facts considered legally immaterial. Here, my argument does not offer a defence of non-disclosure or active deception by trans people in all circumstances. Rather, the argument is confined to circumstances where there has been no clear communication regarding dealbreakers, albeit that this likely accounts for the majority, if not all, of sexually intimate cis/trans scenarios given that the scope of consent ‘is often vague, unclear or indeterminate’.<sup>6</sup>

The paper proceeds as follows. Part 1 provides some background context regarding prosecution of trans people for deception as to gender history in the UK. Part 2 sets out the current law pertaining to sexual fraud in England and Wales. Part 3 presents two arguments as to why prosecutions based on current English law, or Crown Prosecution Service (CPS) interpretations of it, might be viewed as violating Article 8: (1) a right to respect for privacy is undermined by lack of legal certainty regarding the threshold of criminal liability; and (2) deception as to gender history (as opposed to gender identity) ought not to be considered a material deception as a matter of law. Part 4 considers the issue of potential discrimination under Article 14 given that no cis person<sup>7</sup> has been prosecuted for deception as to gender history.

## 1. Background context

Prosecution for sexual fraud in the UK is relatively rare. This is especially so in circumstances where the complainant has not made her consent to sex conditional in some way. Indeed, excepting cases of

<sup>4</sup>R v *Lawrance* [2020] EWCA Crim 971, para 34. See also *McNally*, above n 3, para 25.

<sup>5</sup>*McNally*, above n 3, per Leveson J, para 25.

<sup>6</sup>V Tadros ‘Beyond the scope of consent’ (2022) 50(4) *Philosophy and Public Affairs* 430, 433.

<sup>7</sup>I will use the term cis to mean ‘cissexual’ unless otherwise specified. Julia Serano distinguishes between cissexual and cisgender. The former term refers to people whose sense of being a man or woman is aligned with their birth-designated sex, whereas the latter refers to people who are comfortable with gendered norms that have been socially constructed to arise from birth-designated sex. The distinction is helpful because at least some cissexuals are not cisgender: *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (Berkeley, CA: Seal Press, 2007) p 33. The term cissexual has been used by the ECtHR in *Hämäläinen v Finland* Application No 37359/09, 16 July 2014, in paras 101, 104–106, 111–112 of the main judgment and in paras 18–19 of the joint dissenting opinion by Judges Sajo, Keller and Lemmens.

‘conditional consent’<sup>8</sup> and cases where coercion and fraud co-exist,<sup>9</sup> it would seem that nearly all recent cases have involved prosecution on the basis of deception as to gender.<sup>10</sup> All these prosecutions have been brought against LGBTQ people.<sup>11</sup> Prior to 2012, there was only one such prosecution.<sup>12</sup> Since that time there have been at least ten.<sup>13</sup> All but one of these cases involve defendants who, irrespective of their present gender identity, were assigned female at birth,<sup>14</sup> and complainants who identify as cis women and as having a heterosexual orientation.<sup>15</sup> Excepting the *Xavier* case, all complainants were young women aged 15–27, while the defendants were also young, aged between 17 and 32. All defendants were convicted and, with the exceptions of Kryan Lee (Mason) and Chris Wilson,<sup>16</sup> received custodial sentences of between 24 months and 15 years. All were placed on the Sex Offenders Register, some for life.

At least five defendants prosecuted for deception as to gender (Chris Wilson, Kyran Lee, Jason Staines, Carlos Delacruz and Tarjit Singh) identified and lived as trans men for long periods of time prior to the events leading to charge. Others appear to be lesbian, gay or otherwise gender non-conforming. As already noted, the focus of this paper lies with trans people, given that the argument to be presented relies on a clear distinction between deception as to gender identity and deception as to gender history. The main difficulty with prosecutions of trans men, as well as potential future prosecutions – at least for the purposes of an Article 8 analysis – is that, while all five prosecutions and convictions might be justified for other reasons, such as threats or use of violence<sup>17</sup> or non-consensual use of a prosthetic device, the legal emphasis and ultimately the primary basis for convictions appears to have been non-disclosure of gender history.

This was rendered especially clear in the Scottish case of *Wilson*. Thus, Lord Bannatyne made clear in his sentencing judgment that Chris Wilson’s deception ‘lay in not disclosing ... biological sex’.<sup>18</sup> It is also apparent in the *Singh* case, where the judge stated that the defendant deceived the complainants by ‘not truly revealing’ he was born biologically female.<sup>19</sup> It will be argued that non-disclosure ought not to be considered legally material in the absence of clear communication by the other sexual party as to the importance of cis status or biological sex. As we will see, English sexual fraud law does not consider sexual autonomy to be an absolute right. Rather, sexual autonomy only assumes priority in circumstances where deception pertains to facts considered legally material. Accordingly, this prior question of fact materiality, and its legal construction, become central to prosecution of trans people and to the Article 8 issue.

<sup>8</sup>*Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) (condom use); *R (on the application of F) v DPP* [2013] EWHC 945 (Admin) (non-ejaculation); *Lawrance*, above n 4 (fertility status).

<sup>9</sup>*R v Jhetta* [2007] EWCA Crim 1699.

<sup>10</sup>*Monica v DPP* [2018] EWHC 3508 (QBD) provides an exception. However, the deception in this case was found to be non-material.

<sup>11</sup>*R v Devonald* [2008] EWCA Crim 527 might be considered an exception. However, the court viewed deception in this case as going to the purpose of the sex act and not gender identity. In this case, a father pretended on the internet to be a 22-year-old woman in order to seduce a young man to masturbate in front of a webcam as revenge for what he believed to have been the man’s mistreatment of his daughter. The father intended to use the recorded images to humiliate the young man.

<sup>12</sup>*R v Jennifer Saunders* (12 October 1991, unreported), Doncaster Crown Court.

<sup>13</sup>Above notes 2 and 3.

<sup>14</sup>None of the defendants who are trans men had undertaken gender confirmation surgery prior to the bringing of charges.

<sup>15</sup>The exception is *Xavier*, above n 3. In this case, a 33-year-old gay man was convicted of six counts of causing a person to engage in sexual activity without consent contrary to s 4 of the Sexual Offences Act 2003. All four complainants were (ostensibly) heterosexual men aged between 26–45.

<sup>16</sup>Above n 2.

<sup>17</sup>Prosecutions might also have been justified in some cases on the basis of the minority of complainants. However, no charges of sex with a minor were brought in any of the trans cases considered in this paper.

<sup>18</sup>A copy of Lord Bannatyne’s sentencing judgment is on file with the author.

<sup>19</sup>S Corbishley ‘Trans man lied about prosthetic penis to get women to have sex with him’ (*The Metro*, 27 July 2022), <https://metro.co.uk/2022/07/27/man-who-tricked-women-into-having-sex-with-strap-on-jailed-for-13-years-17078500/> (last accessed 122 May 2024).

## 2. The current law of sexual fraud

In prosecuting cases of deception as to gender, as with all cases of sexual fraud, prosecutors must prove that: (1) the relevant sex acts took place; (2) there was deception of a type capable of vitiating consent as a matter of law; (3) such a deception operated on the complainant thereby vitiating her consent; and (4) the defendant lacked a reasonable belief in the complainant's consent. For the purposes of this paper it is only (2) that needs to be considered because it is the development of the law in relation to (2) and CPS prosecutorial guidelines developed around this body of law that open up the possibility for legal challenge under Articles 8 and 14. Thus, the analysis that follows does not focus on whether complainants consented or whether the defendant had a reasonable belief in consent, but rather on whether deception ought to be considered legally material.

In relation to this question of whether deception is legally material, the Court of Appeal in *R v Lawrance* noted that the 'but for' test is insufficient to resolve the question of fact materiality.<sup>20</sup> That is, deception is not rendered material simply because the complainant would not have become sexually intimate with the defendant had she known in advance facts she considers important.<sup>21</sup> As already explained, sexual autonomy is not an absolute right in this area of the law. Nor is the matter left to jury discretion. Rather, there are all kinds of lies that will be considered non-material. These include lies about marital status, political or religious views, social status, employment and wealth<sup>22</sup> and likely also include lies about ethnicity,<sup>23</sup> criminal offending history, and drug use. There are numerous other examples that would fall foul of this initial threshold question. Indeed, even in cases where police officers have infiltrated environmental and other activist groups and become sexually involved with women members who insisted they would not have consented had they not been deceived,<sup>24</sup> English courts have viewed the deception as non-material. The reason why is that they have confined material deceptions to those they consider 'closely connected to the nature or purpose of the sexual intercourse rather than the broad circumstances surrounding it'.<sup>25</sup>

This approach to determining whether deceptions should be considered legally material, one traceable to the nineteenth century case of *R v Flattery*,<sup>26</sup> has received support in *R v Linekar*,<sup>27</sup> *Assange*<sup>28</sup> and *Monica v DPP*,<sup>29</sup> and most recently in *R v Lawrance*.<sup>30</sup> As the court in *Monica* stated, this governing principle 'has never been applied to deceptions which are *not* closely connected to the performance of the sexual act'.<sup>31</sup> Of course, this does not mean that application of this principle will always produce predictable or desirable outcomes. Thus, in *Assange* and *R v (on the application of F)*,<sup>32</sup> deceptions regarding condom use and ejaculation respectively were held to be closely connected to the sexual act, whereas in *Lawrance*, deception as to fertility was not. The important point is that

<sup>20</sup>*Lawrance*, above n 4, para 34.

<sup>21</sup>However, there is academic support for a subjective understanding of fact materiality based on arguments around complainant sexual autonomy: see J Herring 'Mistaken sex' (2005) *Criminal Law Review* 511; T Dougherty 'Sex, lies and consent' (2013) 123 *Ethics* 717.

<sup>22</sup>*Lawrance*, above n 4, para 34. See also *McNally*, above n 3, para 25.

<sup>23</sup>However, prosecutions for deception as to ethnicity have occurred in other jurisdictions, especially Israel: *Sabbar Kashur v State of Israel* [2012] CrimA 5734/10 Takdin (Isr), Nevo Legal Database.

<sup>24</sup>*Monica*, above n 10.

<sup>25</sup>*Lawrance*, above n 4, para 35. This language is found in s 76 of the Sexual Offences Act 2003, which puts a modified version of the common law category of *fraud in the factum* on a statutory footing. However, where the courts have found a 'close connection', they have tended to find consent lacking on the basis of the general consent provision in s 74. Their reticence to resort to s 76 is due to the fact that s 76(1)(b) triggers a conclusive presumption 'that the defendant did not believe that the complainant consented to the relevant act', thereby precluding a mens rea defence: *Assange*, above n 8, para 87.

<sup>26</sup>[1877] 2 QBD 410.

<sup>27</sup>[1995] QB 250.

<sup>28</sup>Above n 8.

<sup>29</sup>Above n 10, para 72.

<sup>30</sup>Above n 4.

<sup>31</sup>Above n 10, para 80 (emphasis added).

<sup>32</sup>Above n 8.

the courts have proved reluctant to interpret ‘close connection’ expansively. As we will see, this proves important for the argument I will make in Part 4.

While prosecutions based on active forms of deception, such as lying, may also violate Article 8, because deception may be motivated by self-preservation rather than knowledge of non-consent, the argument is stronger in relation to prosecutions in cases of non-disclosure. Until recently, it was far from clear that non-disclosure of information alone might be considered legally material. While some past prosecutions of trans men appear to have been based on non-disclosure of gender history, as already noted above, a series of Court of Appeal cases have placed emphasis on an act/omission distinction in the context of establishing liability for sexual fraud. Thus in *R v Dica* the Court of Appeal made clear that non-disclosure of HIV+ status did not vitiate consent for the purposes of rape, albeit the case considered liability under the Offences Against the Person Act 1861.<sup>33</sup> In *R v EB*, the Court of Appeal had to consider the same point on a rape charge. Latham LJ rejected the argument that non-disclosure vitiated consent stating:

As a matter of law, the fact that the appellant may not have 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.<sup>34</sup>

This approach appears to have met with approval in *Assange*<sup>35</sup> and, more notably, by the Court of Appeal in *McNally*. In *McNally*, Leveson LJ made it clear that, in his view, ‘there was no question of any deception’ on the facts of *EB*. Indeed, the Court of Appeal’s upholding of *McNally*’s conviction appears to rest precisely on the finding that *McNally* had *actively* deceived the complainant.<sup>36</sup> However, in *Lawrance*, the Court of Appeal expressed the view that material deceptions include both ‘express deception [and] failure to disclose’.<sup>37</sup> However, in recent proposed revisions to legal guidance on ‘Deception as to Gender’, the CPS expressed the view that ‘there is no duty to disclose gender history’.<sup>38</sup> While this statement might be viewed as in conflict with *Lawrance*, the statement in *Lawrance* was obiter, given that the facts of the case involved active deception and required no analysis of non-disclosure. Nevertheless, and while some legal ambiguity remains, the possibility that non-disclosure of gender history per se might ground future prosecutions appears more likely post-*Lawrance*. Indeed, and irrespective of *Lawrance*, a danger persists that the act/omission distinction – to the extent that it still has legal force – may break down too easily in trans cases where gender performance, dress and/or name change, for example, might be considered active.<sup>39</sup>

Further, while non-disclosure of information may constitute a material deception as a matter of English law, it is less certain whether deception as to gender history as opposed to deception as to gender identity can do so, irrespective of the form deception takes. *Lawrance* did not address this issue and the Court of Appeal in *McNally* appears to have focused on the fact that Justine *McNally* was a girl who pretended to be a boy, that is, it focused on the fact that her deception went to gender identity. Given the distinction between deception as to gender identity and deception as to gender history foregrounded in this paper, Leveson LJ’s analysis in *McNally* might not be thought to present a difficulty. However, in his judgment His Honour stated that ‘the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived into believing that the

<sup>33</sup>[2004] EWCA Crim 1103, para 39.

<sup>34</sup>[2006] EWCA Crim 2945, para 21 (emphasis added).

<sup>35</sup>Above n 8, at para 90.

<sup>36</sup>Above n 3, paras 19–27.

<sup>37</sup>Above n 4, para 41.

<sup>38</sup>Deception as to Gender: Proposed Revision to CPS Legal Guidance on Rape and Serious Sexual Offences (RASSO), Chapter 6 – Consent’, <https://www.cps.gov.uk/publication/deception-gender-proposed-revision-cps-legal-guidance-rape-and-serious-sexual-offences> (26 September 2022) (last accessed 22 May 2024).

<sup>39</sup>A Sharpe ‘Expanding liability for sexual fraud through the concept of “active deception”: a flawed approach’ (2016) 80(1) *Journal of Criminal Law* 28.

[perpetrator] is male'.<sup>40</sup> There are at least two ways of interpreting this statement. First, it might be argued that His Honour was drawing a distinction between deception as to gender identity (material) and deception as to gender history (non-material). On this reading, his use of the word 'male', and 'male and female' in the preceding sentence, are not to be equated with biological sex. Terms like male and female, man and woman, and sex and gender are often used interchangeably in law.<sup>41</sup> Moreover, trans men and women with Gender Recognition Certificates are respectively male and female in law 'for all purposes'.<sup>42</sup> However, it is far from clear that this is a correct interpretation. At best, it can be said that trans people who choose not to disclose their gender histories are left uncertain as to whether they are breaking the law. Second, the statement might be interpreted to mean that the use of the word 'male' indicates biological sex. This interpretation would mean that deception as to gender history, as well as deception as to gender identity, is considered legally material.

Moreover, this second interpretation appears to be implicit in the recent CPS proposed revisions. Thus, the proposed revisions suggest that the following examples might constitute material deceptions: 'where a suspect falsely asserts that their gender identity is the same as their birth gender/assigned biological sex; or lies in response to questions about their gender history; or denies being a trans man or a trans woman'.<sup>43</sup> While no example of deception by way of omission is offered, it is argued in Part 4 that all these types of deception, as well as non-disclosure, ought not to be viewed as legally material in the absence of clear communication of the importance of cis status or biological sex. Moreover, it will be argued that prosecution on the basis of deception as to gender history may constitute an unjustified violation of Article 8. This argument does not depend on whether deception is active or not, but it is contended that the argument is stronger in cases of omission.

### 3. The argument: prosecution based on deception as to gender history violates Articles 8 and 14 (a) Article 8(1): scope

This Part of the paper will first consider the question of whether Article 8 is engaged ('the scope question') before proceeding to the crux of all Article 8 arguments, namely, the state's ability to justify violations in particular circumstances ('the proportionality question'). According to Article 8(1), 'everyone has the right to respect for his private and family life, his home and his correspondence'. In terms of determining the scope of Article 8, the content of the phrase 'private and family life' has been interpreted widely.<sup>44</sup> The fact that gender identity is covered by Article 8 is well established.<sup>45</sup> The Strasbourg court has long recognised trans people's right to self-determination.<sup>46</sup> That is, it has recognised that the freedom to define one's own gender identity is a fundamental aspect of privacy.<sup>47</sup> Indeed, in *AP Garçon, Nicot v France*, the ECtHR insisted that the freedom to define one's gender identity is one of the most essential elements of the right.<sup>48</sup> The right of trans people to physical and moral security has also been emphasised,<sup>49</sup> as has their 'physical and social identity'.<sup>50</sup>

<sup>40</sup>Above n 3, para 26.

<sup>41</sup>S Cowan et al 'Sex and gender equality law and policy: a response to Murray, Hunter Blackburn and Mackenzie' (2020) Scottish Affairs 1.

<sup>42</sup>Gender Recognition Act 2004, s 9.

<sup>43</sup>Above n 38.

<sup>44</sup>See, for example, *X and Y v the Netherlands* Application No 8976/80, 26 March 1985, para 22; *Mikulic v Croatia* Application No 53176/99, 7 February 2002, para 53; *Pretty v United Kingdom* Application No 2346/02, 29 April 2002, para 66.

<sup>45</sup>*B v France* Application No 57/1990/248/319, 24 January 1992; *Goodwin and I v United Kingdom* Application No 28957/95, 11 July 2002; *AP Garçon and Nicot v France* Application Nos 79885/12, 52471/13 and 52596/13, 6 April 2017.

<sup>46</sup>*Van Kück v Germany* Application No 35968/97, 12 June 2003, para 69; *Schlumpf v Switzerland* Application No 29002/06, 5 June 2009, para 100.

<sup>47</sup>*Van Kück*, above n 46, para 73; *YY v Turkey* Application No 14793/08, 10 March 2015, para 102.

<sup>48</sup>Above n 45, para 93.

<sup>49</sup>*Goodwin*, above n 45, para 90; *Van Kück*, above n 46, para 69; *Schlumpf*, above n 46; *YY*, above n 47, para 58.

<sup>50</sup>*YY*, above n 47, para 56.

Article 8 also protects the right of trans people to ‘personal development and the right to establish and develop relationships with other human beings and the outside world’.<sup>51</sup> Indeed, in interpreting the scope of Article 8, the English courts have stated that personal autonomy should make a person ‘master of all those facts about his own identity’,<sup>52</sup> and that ‘protection of human autonomy and dignity’ includes ‘the right to control the dissemination of information about one’s private life’.<sup>53</sup>

Moreover, and importantly, the rights recognised apply to all trans people, irrespective of whether they have undergone gender confirmation surgery.<sup>54</sup> Further, given the present context, it should be recognised that control of information concerning one’s sexual life has been noted to be ‘a most intimate aspect of private life’.<sup>55</sup> In other words, the right to respect for privacy is not confined to spatial privacy, to sovereignty over the physical and psychological self. It also encompasses informational privacy, the right to control personal information about oneself. This emphasis on control of information, perhaps especially in the sexual realm, is as it should be. After all, as Thomas Nagel has insisted, ‘the boundary between what we reveal and what we do not, and some control over the boundary, are among the most important attributes of our humanity’.<sup>56</sup> In developing his argument, Nagel insists that ‘reticence and limits on disclosure and acknowledgment are part of every type of human relation, including the most intimate’.<sup>57</sup>

In order to establish scope, it is necessary to show that the state has or likely will interfere with the exercise of a person’s right to respect for his private or family life and, if so, that it has had, or is likely to have, consequences of such gravity as potentially to engage Article 8. In other words, violation must be considered ‘serious’.<sup>58</sup> Given the importance the court places on personal autonomy, this does not establish an especially high threshold. It is obvious that criminal prosecution of trans people for deception as to gender history constitutes an interference with a right to privacy and that the interference is sufficiently grave for establishing scope. Unlike cases where defendants pretend to be of a different gender, prosecutions for deceptions as to gender history punish not those who trick complainants regarding their actual gender identity, but those who prefer not to share highly personal information concerning their gender histories and/or pre- or post-surgical bodies. Prosecutions of this latter type may therefore be incompatible with Article 8, a view taken by the Law Commission as long ago as 2000.<sup>59</sup> Moreover, while it is acknowledged that the Law Commission confined its comments to those trans people who, unlike the defendants in the cases under consideration, have undertaken gender confirmation surgery,<sup>60</sup> the Strasbourg court has made it clear that surgery is not a condition of

<sup>51</sup>*Schlumpf*, above n 46, para 77.

<sup>52</sup>*R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, para 21.

<sup>53</sup>*Campbell v MGN Ltd* [2004] 2 AC 457, para 51.

<sup>54</sup>*AP Garçon*, above n 45, paras 94–95; *SV v Italy* Application No 55216/08, 11 October 2018, paras 56–58.

<sup>55</sup>*Dudgeon v United Kingdom* Application No 7525/76, 22 October 1981, para 52.

<sup>56</sup>T Nagel ‘Concealment and exposure’ (1998) 27(1) *Philosophy and Public Affairs* 3, 4.

<sup>57</sup>*Ibid*, at 5

<sup>58</sup>*Goodwin*, above n 45, para 73.

<sup>59</sup>Law Commission *Consent in Sex Offences: A Policy Paper: Appendix C of Setting the Boundaries* vol 2 (London: Home Office, 2000) para 5.32. It is difficult to account for the series of UK prosecutions of trans and other gender nonconforming people since 2012 or why the CPS appears out of step with the Law Commission. Answers to such questions require further investigation. However, at least three factors present themselves as potentially relevant: (i) the impact of feminist advocacy around sexual violence on criminal justice actor decision-making; (ii) a recent intensification of what Viviana Zelizer has referred to as the ‘sacralisation of childhood’ (*Pricing the Priceless Child: The Changing Value of Children* (Princeton, NJ: Princeton University Press, 1994) ch 1); and (iii) the fact that the first in the series of prosecutions correlates with a perceived need to get tough on sex offending in the aftermath of the 2012 Savile Inquiry. Certainly, the idea that sexual or gender deviants have trespassed on childhood innocence proves to be a consistent feature of reportage of the cases. Thus, while none of the cases involved inter-generationality, the media consistently framed them in terms of innocent teenage ‘girls’ and the ‘women’ who ‘groomed’ and ‘preyed’ on them: A Moore ‘Shame on you: the role of shame, disgust and humiliation in media representations of “gender fraud” cases’ (2016) 21(2) *Sociological Research Online* 10.

<sup>60</sup>Law Commission, *ibid*, para 5.33. It should be noted that several trans men defendants indicated a desire to undergo gender confirmation surgery and that their relative youth, along with chronic delays in UK trans healthcare, made it unlikely that any of them would have had a Gender Recognition Certificate at the time of the offences.

protection under the Convention.<sup>61</sup> In the present context, as we are dealing with criminal prosecution, it is the state's negative obligations under Article 8 that come to the fore. Moreover, it is not necessary that an individual be prosecuted in order that she might avail herself of Article 8. On the contrary, the very existence of current laws and their likely interpretation by prosecutors is such that 'they continuously and directly affect'<sup>62</sup> the private lives of trans people. Moreover, while in *Dudgeon*, 'no proceedings seem to have been brought in recent years',<sup>63</sup> this is patently not the case with regard to prosecution of trans people for deception as to gender history.

**(b) Article 8(2): legality and proportionality**

It seems clear that prosecution of trans people for deception as to gender history engages Article 8. However, as is well known, a state can justify violation under Article 8(2). To do so, it must show that the interference by a public authority is:

in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Thus Article 8(2) contains two requirements. First, interference with respect for the right to privacy must be in accordance with law and second, there must be 'an objective justification for the interference'.<sup>64</sup> Let us consider these two issues in turn.

The phrase 'in accordance with the law' contained within Article 8(2) requires more than duly enacted law. It requires that laws conform to the principle of legal certainty. This in turn requires that laws are both accessible and, most importantly for present purposes, foreseeable.<sup>65</sup> As the court made clear in the *Sunday Times* case, lawfulness requires laws or rules that are accessible and are formulated in such a way and with sufficient precision that an individual is able 'to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.<sup>66</sup> While the court initially only applied this analysis to the language of Articles 9–11 ('provided for by law'), rather than Article 8 ('in accordance with the law'),<sup>67</sup> it subsequently extended it to the right to respect for privacy.<sup>68</sup>

This requirement of legal certainty is especially important in the context of criminal law given the potential consequences of legal uncertainty for citizens. That is, while legal certainty is important in relation to legal rules generally, it is particularly so where prosecution and punishment are possible consequences.<sup>69</sup> Of course, there are limits to legal certainty. As the court made clear, 'consequences need not be foreseeable with absolute certainty'.<sup>70</sup> Importantly, given the focus of this paper, the court has made clear that the requirement of legal certainty is not confined to statutory provisions. Rather, it has been explicitly stated to apply to the common law.<sup>71</sup>

In the context of deception as to gender prosecutions, it can be argued that the legal requirements of accessibility and foreseeability are not met because it is unclear whether material deception is

<sup>61</sup>*AP Garçon*, above n 45.

<sup>62</sup>*Dudgeon*, above n 55, para 41.

<sup>63</sup>*Ibid*, para 41.

<sup>64</sup>*Ibid*, paras 51–53.

<sup>65</sup>*Sunday Times v United Kingdom* Application No 6538/74, 26 April 1979.

<sup>66</sup>*Ibid*, para 49.

<sup>67</sup>*Sunday Times*, above n 65, paras 46–53.

<sup>68</sup>*Silver and others v United Kingdom* Application Nos 5947/72, 6205/73, 7052/875, 7061/75, 7107/75, and 7136/75, 25 March 1983, para 85; *Hasan and Chaush v Bulgaria* Application No 30985/96, 26 October 2000, para 84.

<sup>69</sup>J Gardner 'Introduction to Hart' in HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 2nd edn, 2008) p xxxvi.

<sup>70</sup>*Sunday Times*, above n 65, para 49.

<sup>71</sup>*Ibid*, para 47.



limited to gender identity or extends to gender history.<sup>72</sup> Uncertainty stems from ambiguity in Leveson LJ's judgment in *McNally*. It also arises because there have been no prosecutions of trans men other than in circumstances where it was alleged a prosthetic device was used without the complainant's consent. While some English courts appear to have relied on non-disclosure of gender history in justifying convictions, as noted in Part 3, it remains unclear whether prosecutions would have been brought had deception been limited in this way.

The problem is compounded by the way the CPS approaches the issue. As we saw in Part 3, proposed revisions to prosecutorial guidelines interpret *McNally* as permitting prosecutions in circumstances 'where a suspect falsely asserts that their gender identity is the same as their birth gender/assigned biological sex; or lies in response to questions about their gender history; or denies being a trans man or a trans woman'.<sup>73</sup> In other words, the CPS appears to view deception as to gender history as sufficient in bringing future prosecutions. Given this state of affairs, sexually active trans people are placed in a precarious position. If they want to be certain of remaining on the right side of the law, they must disclose highly personal information to potential sexual partners in advance of intimacy. Legal uncertainty surrounding whether, and in what circumstances, liability arises supports the argument that prosecution of trans people for deception as to gender history may violate Article 8 in ways that test Article 8(2).

As already noted, the court seeks to balance a claimant's right to respect for privacy against the other interests set out in Article 8(2). Measures taken by the state in furtherance of these other interests cannot be regarded as 'necessary in a democratic society' unless there is a 'pressing social need'<sup>74</sup> for interference and it is 'proportionate to the legitimate aim pursued'.<sup>75</sup> Ultimately, and as noted in *Goodwin*, a fair balance has 'to be struck between the general interest of the community and the interests of the individual'.<sup>76</sup> In the present context, two of the grounds enumerated in Article 8(2) assume relevance, namely, 'the prevention of crime and disorder' and 'the protection of the rights and freedoms of others'. However, it is really the second of these grounds that is key because it is only if it is concluded that the rights and freedoms of others require criminalisation of deception as to gender history that the first ground assumes significance. Accordingly, the central issue that arises is whether the interest of the state and/or the other sexual party in knowing historical facts about gender outweighs a trans person's right to privacy.

Thus, assuming prosecution for deception as to gender history is 'in accordance with the law', it must also be shown to be proportionate and necessary in the circumstances to the aim of protecting citizens against sexual fraud. This involves the court in making a qualitative decision regarding the merits of the relevant domestic law and its application. Of course, in making such determinations, states enjoy a margin of appreciation. That is, and subject to the court's supervision, states enjoy a measure of discretion.<sup>77</sup> The margin afforded to states has been interpreted narrowly or widely depending on the facts of each case. In particular, where the court characterises the significance of the right in question to be fundamental, a narrower interpretation is appropriate; the margin will be limited where 'a particularly important facet of an individual's identity or existence is at stake'.<sup>78</sup> Conversely, where 'there is no consensus within the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues', a wide margin will be considered appropriate.<sup>79</sup>

<sup>72</sup>While the focus here lies with Art 8, the same reasoning might be relied on to argue that Art 7 is also potentially engaged. This is because Art 7 requires a legal basis that is both accessible and foreseeable in order to impose sentence. However, there is insufficient space to develop this argument here.

<sup>73</sup>'Deception as to Gender', above n 38.

<sup>74</sup>*Dudgeon*, above n 55, para 51.

<sup>75</sup>*Ibid*, paras 51–53.

<sup>76</sup>*Goodwin*, above n 45, para 72.

<sup>77</sup>*Handyside v United Kingdom* Application No 5493/72 A/24, 7 December 1976, paras 48–49.

<sup>78</sup>*Evans v United Kingdom* Application No 6339/05, 10 April 2007, para 77.

<sup>79</sup>*Ibid*, para 77.

A wide margin is also likely to be granted where ‘the State is required to strike a balance between competing private and public interests or Convention rights’.<sup>80</sup>

In cases involving trans claimants, the margin of appreciation has operated to defeat legal gender recognition claims in a series of cases prior to *Goodwin v UK*.<sup>81</sup> In this case, the court found the claimant’s Article 8 rights to be unjustifiably violated. However, in other contexts, such as parental rights<sup>82</sup> and marriage,<sup>83</sup> the margin has continued to thwart trans rights claims.<sup>84</sup> In the present context, the value placed on respect for personal identity should be viewed as especially high given that we are dealing with the criminal law and its attendant consequences for liberty – ie the higher level of scrutiny that normally attends interference with a most intimate aspect of private life ought to apply in the present context. Indeed, in many of the complex and sensitive cases where the court has adopted a more cautious approach to recognising trans rights, preferring to grant a wider margin of discretion to states, the negative consequences of this approach for trans people have been more limited. Thus, in *Hämäläinen*,<sup>85</sup> the Finnish state required a trans woman applicant to divorce or convert her relationship with her wife into a registered partnership. While marriage, as distinct from a registered partnership, was important to both spouses, the impact is relatively limited. Equally, in *OH and GH*,<sup>86</sup> while the German state refused to record OH, a trans man, as the father of GH, it did so in circumstances where only a very limited number of state officials were entitled to request a copy of GH’s birth certificate. Conversely, the consequences of prosecution and conviction for deception as to gender history might be viewed as catastrophic: media persecution,<sup>87</sup> custodial sentences, and sex offender registration, often for life.

Moreover, in most of the trans cases where the court has preferred a wide margin, lack of ‘community consensus’ has tended to be a feature of the court’s analysis.<sup>88</sup> Yet, in contrast to the sometimes familiar scenario where many, perhaps most, other member states are not at odds with the violating state in terms of legal rules and/or norms surrounding the challenged law or practice, the opposite appears to be true in the context of prosecutions for deception as to gender history. Indeed, the UK appears to be an outlier. That is, no other Council of Europe member state appears to have prosecuted its citizens for deception as to gender history, or indeed deception as to gender more generally. A state that finds itself on its own, as the UK did through permitting the use of corporal punishment, risks an adverse judgment.<sup>89</sup> Of the other 45 member states, 31 criminalise rape and sexual assault *only* in circumstances where force is used or threatened,<sup>90</sup> and in just over a third of these states,

<sup>80</sup>*Odièvre v France* Application No 42326/98, 13 February 2003, paras 44–49; *Fretté v France* Application No 36515/97, 26 February 2002, para 42.

<sup>81</sup>*Rees v United Kingdom* Application No 9532/81, 17 October 1986; *Cossey v United Kingdom* Application No 10843/84, 27 September 1990; *X, Y & Z v United Kingdom* Application No 21830/93, 22 April 1997; *Sheffield and Horsham v United Kingdom* Application Nos 31-32/1997/815-816/1018-1019, 30 July 1998.

<sup>82</sup>*OH and GH v Germany* Application Nos 53568/18 and 54741/18, 25 June 2019. See also *AH and Others v Germany* Application No 7246/20, 4 April 2023.

<sup>83</sup>*Hämäläinen*, above n 7, para 109.

<sup>84</sup>See also *Y v France* Application No 76888/17, 31 January 2023, albeit the claimant in this case was intersex.

<sup>85</sup>Above n 7.

<sup>86</sup>Above n 82.

<sup>87</sup>Moore, above n 59.

<sup>88</sup>*Cossey*, above n 81, para 40, *Sheffield and Horsham*, above n 81, para 58; *X, Y & Z*, above n 81, para 44; *Hämäläinen*, above n 7; *OH* above n 82.

<sup>89</sup>*Tyrer v UK* Application No 5856/72, 25 April 1978.

<sup>90</sup>Albania (Criminal Code, Art 102); Andorra (Criminal Code, s 144); Austria (Criminal Code, ss 201 and 202); Azerbaijan (Criminal Code, Art 108); Bulgaria (Criminal Code, Art 152); Croatia (Criminal Code, Art 188); Czech Republic (Criminal Code, ss 185–87 and 198); Denmark (Criminal Code, s 216); Estonia (Criminal Code, Arts 141–143); Finland (Criminal Code, ch 20, s 1); Georgia (Criminal Code, Art 137); Greece (Criminal Code, Arts 336–338); Hungary (Criminal Code, s 197); Latvia (Criminal Code, s 159); Liechtenstein (Criminal Code, ss 200–201); Lithuania (Criminal Code, s 149); Macedonia (Criminal Code, Art 186); Malta (Criminal Code, Art 412C); Moldova (Criminal Code, Art 171); Montenegro (Criminal Code, Art 204); the Netherlands (Criminal Code, Art 242); Norway (General Civil Penal Code, s 191); Portugal (Criminal Code, Art 164); Romania (Criminal Code, Art 217(1)); Serbia (Criminal Code, Arts 178–179); Slovakia

where the complainant lacks capacity or is in ‘a state of helplessness’.<sup>91</sup> Of the remaining 14 member states, only Belgium, Ireland, Luxembourg, Monaco, Poland and San Marino draft their consent provisions widely enough to cover rape/sexual assault by deception, and only Poland and San Marino explicitly use the words ‘deceit/deception’.<sup>92</sup>

The remaining member states criminalise deception only in very specific circumstances. Cyprus criminalises deception only where a defendant impersonates a woman’s husband.<sup>93</sup> Iceland criminalises deception only in relation to marital status.<sup>94</sup> Bosnia and Herzegovina and Armenia criminalise deception only in relation to sex and other forms of human trafficking.<sup>95</sup> Germany only explicitly criminalises deception in circumstances of ‘human-trafficking for the purpose of sexual exploitation’.<sup>96</sup> However, since 2016, it does criminalise sexual acts in circumstances where an offender ‘exploits an element of surprise’.<sup>97</sup> However, the word ‘surprise’, as German criminal law scholar, Tatjana Hörnle, emphasises, refers to situations where ‘a sexual touching happens quickly, without the victim’s prior awareness of what is coming’,<sup>98</sup> rather than to deception in the sense of lying or non-disclosure. Indeed, ‘German criminal law does not prohibit deceptions that influence persons’ motives for deciding in favour of sexual acts’.<sup>99</sup> While ‘the mental attitude called “will” ... must be present ... it does not matter why’.<sup>100</sup> Nevertheless, Hörnle notes that there may be scope for criminalising deception under German law if the accused ‘performed a different sexual act’ to the one agreed to by the parties.<sup>101</sup> This might be thought to open up the possibility for a *McNally*-style analysis. However, Hörnle has interpreted ‘different sexual act’ to be limited to scenarios where prior communication had made it clear the sexual act performed was not covered.<sup>102</sup> Certainly, relevant German case law appears to be limited to decisions replicating *Assange*<sup>103</sup> and *R (on the application of F)*.<sup>104</sup>

In France too, sexual offences can be committed by ‘surprise’.<sup>105</sup> The scope of the term under French law has generally been confined to cases involving vulnerable persons with mental disorders,<sup>106</sup> victims who were asleep,<sup>107</sup> or unconscious due to alcohol or prescribed/proscribed drugs,<sup>108</sup> and sex occasioned through bogus medical examinations.<sup>109</sup> In the only case bearing relevance to the issues considered in this paper, the Court of Cassation held that ‘surprise’ applied to an overweight sixty-eight year old man who misrepresented himself on a dating site as a handsome thirty-seven year old.<sup>110</sup> The Italian Criminal Code explicitly criminalises ‘impersonation’.<sup>111</sup> This is quite different

(Criminal Code, Art 199); Slovenia (Criminal Code, Art 170); Sweden (Criminal Code, ch 6, s 1); Switzerland (Criminal Code, Arts 190–191); Turkey (Criminal Code, Art 102) and Ukraine (Criminal Code, Arts 152–153).

<sup>91</sup>Estonia, Georgia, Hungary, Latvia, Lithuania, Moldova, Norway, Romania, Serbia, Slovakia, Switzerland and Turkey.

<sup>92</sup>Belgium (Criminal Code, Art 375); Ireland (Criminal Law (Rape) Act 1981, s 2); Luxembourg (Criminal Code, Art 375); Monaco (Criminal Code, Art 260); Poland (Criminal Code, Art 197), San Marino (Criminal Code, Art 171).

<sup>93</sup>Cyprus (Criminal Code, s 144).

<sup>94</sup>Iceland (Criminal Code, Art 199).

<sup>95</sup>Bosnia and Herzegovina (Criminal Code, Art 186); Armenia (Criminal Code, Art 132).

<sup>96</sup>German Criminal Code STGB, c 13 s 232(2)(1).

<sup>97</sup>*Ibid*, s 177(2)(3).

<sup>98</sup>T Hörnle ‘The new German law on sexual assault’ in T Hörnle (ed) *Sexual Assault: Law Reform in Comparative Perspective* (Oxford: Oxford University Press, 2023) pp 141–162, 142.

<sup>99</sup>*Ibid*, p 156.

<sup>100</sup>*Ibid*, p 156.

<sup>101</sup>*Ibid*, p 157.

<sup>102</sup>*Ibid*.

<sup>103</sup>Kammergericht Berlin BeckRS 2020, 18243.

<sup>104</sup>Oberlandesgericht Hamm BeckRS 2020, 4047.

<sup>105</sup>French Penal Code, Art 222-23.

<sup>106</sup>Crim, 8 June 1994, *Bull*, crim No 226; 25 October 1994; 27 November 1996, No 96-83.954.

<sup>107</sup>Crim, 21 March 2007, No 06-83.458; 28 March 2012, No 10-87.678.

<sup>108</sup>Crim, 9 October 2012, No 12-85.141; 16 March 2016, No 15-87.750; 28 June 2016, No 16-82.661.

<sup>109</sup>Crim, 25 October 1994; Ass Plén, 14 février 2003, No 96-80.088.

<sup>110</sup>Crim, 23 Janvier 2019, No 18-82.883, P+B.

<sup>111</sup>Italian Criminal Code, part 2, s 609.

however, from deception as to gender history. Impersonation refers, for example, to a defendant who impersonates a woman's husband or another person known personally to her. However, convictions have been sustained in cases where the defendant deceived the victim by pretending to be a qualified doctor,<sup>112</sup> and where the defendant deceived the victim regarding future benefits, including the offer of employment.<sup>113</sup> In Spain deception is only criminalised when used in the context of trafficking,<sup>114</sup> or prostitution,<sup>115</sup> or where the victim is aged between 16 and 18.<sup>116</sup> This latter offence, which has a maximum prison sentence of three years, might therefore be used in relation to cases like *Wilson*, *Staines*, and in relation to one complainant in *Singh*, but not in relation to cases like *Lee (Mason)* and *Delacruz*.<sup>117</sup>

What is important to emphasise is that, while there is some scope, at least in eight member states,<sup>118</sup> to bring prosecutions for deception as to gender history, there are, as yet, no recorded cases. Further, where defendants have been convicted of sexual fraud in other member states, no compelling issues of privacy arise. Conversely, prosecutions for deception as to gender history raise significant privacy issues. Crucially, the UK appears to prosecute on the basis of legal norms absent in other member states, legal norms that have had, and are likely to continue to have, the consequence of interfering significantly with the private sexual lives of trans people. It is true that the legal systems of England, Wales and Northern Ireland are based on common law, and that Scotland's legal system is partly based on common law, and that sexual fraud laws appear to be more typical in common law legal systems. However, with the exception of Israel,<sup>119</sup> and a couple of United States cases from the 1990s,<sup>120</sup> there have been no prosecutions for deception as to gender history in the common law world outside the UK. In other words, even if the court chose to consider the margin of discretion against this common law background, the UK would still emerge as an outlier, especially in the contemporary common law world.

However, while maintaining privacy in sexual contexts is an important interest, especially for trans people given the consequences of disclosing gender history,<sup>121</sup> and while the court's jurisprudence on 'community consensus' might be viewed as swinging a proportionality calculus toward a conclusion of unjustified violation of Article 8, it is necessary to acknowledge the private interests of cis sexual partners. However, to conclude that the interests of cis sexual partners, the community and/or the state outweigh the interests of trans people in this context would, in order to be convincing, require a demonstration that sexual intimacy between trans people and cis people, in circumstances where the latter are unaware of the former's gender histories, undermines the sexual autonomy of, and/or is harmful to, cis sexual partners.

### (c) *Sexual autonomy*

Protecting the sexual autonomy of citizens, especially women, clearly constitutes a pressing social need and a legitimate state aim. Moreover, the Strasbourg court has rightly emphasised that sexual violence against women undermines essential aspects of private life, including 'physical and moral integrity', and that state criminal laws are required to satisfy Article 8.<sup>122</sup> Indeed, the court has characterised

<sup>112</sup>Cass 17.04.2013 No 20754, CED 255907; Cass 6.05.2010 No 20568, CED 247492.

<sup>113</sup>Cass 15.01.2001; Cass Pen Sez. III 21.09.2017.

<sup>114</sup>Spanish Criminal Code, tit VII BIS, s 177 bis.

<sup>115</sup>Spanish Criminal Code, tit VIII, c V, s 188.

<sup>116</sup>Spanish Criminal Code, c II, s 182.

<sup>117</sup>Above n 2.

<sup>118</sup>Belgium, France, Ireland, Luxembourg, Monaco, Poland, San Marino, and Spain.

<sup>119</sup>*Israel v Alkobi* [2003] IsrDC 3341 (3); *Israel v Jane Doe* [2007] Indictment, CrimC (Kfar Saba) 2372/07 unpub.

<sup>120</sup>*People v Clark*, No. 1994CR003290 (Colo Dist Ct 16 February 1996); *State v Wheatley*, No 97-1-50056-6 (Wash Superior Ct 13 May 1997).

<sup>121</sup>See below note 127.

<sup>122</sup>*X and Y v Netherlands*, above n 44. See also *MC v Bulgaria* Application No 39272/98, 4 December 2003. In relation to domestic violence, see *Bevacqua v Bulgaria* Application No 71127/0, 12 June 2008.

rape as torture under Article 3 where perpetrators have been state actors.<sup>123</sup> Accordingly, in balancing rights, the court is likely to pay particular attention to the situation and sexual autonomy of cis women. This is as it should be. However, the relevant jurisprudence considers sexual violence against women, not sexual encounters where a woman lacks perfect information about a person she desires. It may be that the court would agree with Jonathan Herring, who has expressed the view that a trans person's right to privacy 'must be subservient to the right to sexual integrity of their [cis] partner'.<sup>124</sup>

The argument presented here, however, is that the necessary balancing act ought to lead us to a different conclusion. First, we should recognise that in balancing interests, privacy is not trans people's only interest. Their sexual autonomy is also at stake. After all, their sexual autonomy is connected to their right to informational privacy. That is, reticence about, or revelation of, facts about the body, its history and/or surgical alteration are directly linked to experiences of sexuality and pleasure. Second, sexual autonomy is not an absolute right and the pursuit of a legitimate state aim needs to be proportionate. It is arguably disproportionate because it is not clear whether sexual autonomy is violated in cases where a trans person does not disclose their gender history. Thus, we might view such forms of intimacy as consistent with sexual autonomy. This is not only because intimacy is desired and desire is directed to the person standing before the complainant. It is also because there is no relevant gap between the defendant's gender identity and the gender identity of the complainant's object of desire.

Third, if sexual autonomy is violated in the above circumstances, it may not be violated in a way that ought to resonate in law. As the English courts have made clear, material deceptions are limited to those considered 'closely connected to the nature or purpose of the sexual intercourse rather than the broad circumstances surrounding it'.<sup>125</sup> My argument is that, in the absence of clear communication as to the importance of cis status or biological sex, actual sex and agreed sex ought not to be viewed as sufficiently different in cases where a trans person has lied about or not disclosed their gender history. Rather, gender history ought to be considered part of the 'broad circumstances' surrounding sex.<sup>126</sup> In making this case let us turn to some concrete examples. To begin with, let us consider the example of a cis man who has penetrative sexual intercourse with a trans woman who has had gender confirmation surgery – albeit no prosecution of this kind has occurred so far in the UK.<sup>127</sup> In my view, this example provides, perhaps, the clearest example of proximity between agreed sex and actual sex. The sexual act, penile-vaginal intercourse, is essentially the same irrespective of whether the woman is trans or cis. Indeed, the argument is strengthened by the fact that section 79(3) of the Sexual Offences Act 2003 states that '[r]eferences to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery)'. The same analysis ought to apply to sexual intimacy between a trans woman who has undertaken gender confirmation surgery and a cis woman, though again no case of this kind has been prosecuted in the UK. If the suspect were a trans man who had penetrative intercourse with a cis woman by means of a penile implant or an external pump, the same conclusion ought to apply. Penile implants and/or use of an external pump to achieve erection is not uncommon among the cis male population.<sup>128</sup> It seems perverse to distinguish between cis and trans heterosex in these circumstances.

However, the argument can hold even in the case of trans people who have not undertaken surgery. If we take the example of sexual intimacy between a cis woman and a trans man who has not had surgery (and therefore the facts of all trans cases prosecuted in the UK), if the cis woman is penetrated,

<sup>123</sup>*Aydin v Turkey* Application No 57/1996/676/866, 25 September 1997.

<sup>124</sup>Herring, above n 21, at 523.

<sup>125</sup>*Lawrance*, above n 4, para 35.

<sup>126</sup>In making this argument I draw on the work of Victor Tadros, above n 6.

<sup>127</sup>While an adequate explanation of this fact requires proper empirical investigation, it may be accounted for, at least in part, by extra-judicial solutions resorted to by 'affronted' men. Certainly, violence against trans women, in sexual and other contexts, is well documented and pervasive: K Blondeel et al 'Violence motivated by perception of sexual orientation and gender identity: a systematic review' (2018) 96 *Bulletin of the World Health Organisation* 29–41.

<sup>128</sup>M Preto et al 'The frontier of penile implants in phalloplasty: is the ZSI475 FTM what we have been waiting for?' (2021) 33 *Int J Impot Res* 779.

it will either be digitally, orally or by means of a prosthetic device. In each case, where she is aware of the means of penetration, the mechanics of actual sex will not be sufficiently different from agreed sex. It might be objected that, although a trans man is a man, he is not the kind of man the complainant considered him to be, and that *kind* matters in determining the question of fact materiality. Implicit in this view, one which the court ought to resist, is the idea of a hierarchy of men in which trans men occupy a low position. In contrast, in cases of authentic gender identity we ought to conclude that deception, and more especially non-disclosure, be considered non-material in law.

Finally, while recognising that all the complainants were young cis women, and that sexual relations take place within a field of power saturated by gender, the court should also recognise that all the defendants were assigned female at birth and have also had to negotiate these gendered relations from an early age. In this respect, the kind of asymmetry of power that might be assumed in the context of cis heterosex is lacking. Rather, what we have is complainants and defendants who were in late adolescence/early adulthood and who have both been subjected to the same or similar socialisation patterns. Indeed, the kind of power asymmetry that the court would rightly be concerned about is difficult to identify in relation to trans women. After all, trans women, by definition, ‘choose’ to live their lives on the wrong side of an unequal gendered power relationship, and increasingly are transitioning earlier thereby undergoing female socialisation while minors.

#### (d) Harm

In balancing the right to respect for private life against the rights and freedoms of others it is also necessary to engage in a harm calculus. If Article 8(2) is to be successfully relied on by the state it should be shown that potential or actual harm to cis people produced by deception as to gender history is: (a) significant; and (b) outweighs the harms to trans people associated with disclosing gender history. Without the possibility of significant consequential harm it is difficult to see why a right to know gender history should operate as a trump card in the context of desire-led intimacy. According to the testimony of complainants in the cases that have come before the English courts, harm suffered appears to consist in feelings of distress, disgust and/or revulsion.<sup>129</sup> These embodied and visceral responses to discovery of gender history require attention. As intersectional feminist, Sara Ahmed, has emphasised, emotions are cultural practices, not psychological states. They presuppose ‘investment in social norms’.<sup>130</sup> The social norms in operation are cis norms and the harms arising are inextricably tied up with these norms. In other words, harms experienced are, at least in part, the product of the low status we accord trans people in legal and cultural terms.

While these harms are nevertheless real and not to be trivialised, their origins ought to make us cautious in assessing their significance for the purposes of the normative question of determining the materiality of deception. In any event, it remains necessary to balance them against the harms to trans people associated with disclosure of gender history. Disclosing gender history is not an act undertaken without risks. Coming out as trans exposes a person to considerable and well-documented physical risks,<sup>131</sup> a point noted recently by Lady Hale.<sup>132</sup> Indeed, studies in the US have found trans people to be four times as likely to be victimised than cis people, and trans women to have significantly higher rates of violent victimisation (86.1/1000) than cis women (23.7/1000),<sup>133</sup> while the UK charity, Stonewall, found 41% of trans people had experienced a hate crime incident in the previous 12 months because of their gender identity.<sup>134</sup>

<sup>129</sup>Sharpe, above n 39, at 86–87.

<sup>130</sup>S Ahmed *The Cultural Politics of Emotion* (Edinburgh: Edinburgh University Press, 2004) p 196.

<sup>131</sup>Above n 127.

<sup>132</sup>*R (on the application of C) v Secretary of State for Work and Pensions* [2017] UKSC 72, para 72.

<sup>133</sup>AR Flores et al ‘Gender identity disparities in criminal victimisation: national crime victimization survey, 2017–2018’ (2021) 111(4) *American Journal of Public Health* 726–729.

<sup>134</sup>Stonewall *LGBT in Britain: Trans Report* (London: Stonewall, 2018).

In addition to the not inconsiderable physical risks associated with disclosing gender history, we also need to recognise its psychological and emotional impact. For many trans people, having to disclose their gender histories, their earlier or present gonadal or genital condition, as well as a history of coerced gender performance can be a source of pain and trauma. Moreover, in analysing an Article 8 claim, it is contended that, in addition to considering the physical and psychological costs of disclosure, the court ought to recognise how criminalising deception as to gender history produces stigma through reproducing the idea that trans people occupy a low position in a gender hierarchy. It is well documented that structurally produced stigma affects the physical and mental health of trans people, as well as limiting their employment opportunities and access to healthcare and housing.<sup>135</sup> Moreover, and of particular importance, we should recognise that deception operates as a cultural trope through which trans people are comprehended in cis society. In this respect, criminal prosecution bears not only a punitive function. It also contributes to the perpetuation of the demeaning idea that trans people are duplicitous, that is, ontologically deceptive.<sup>136</sup> Therefore, while not denying the reality of complainant experiences, we might view a balancing of harms to favour trans people.

None of this is to say that the privacy rights of trans people can never be qualified. Clearly they can, and have been, as already noted, and as recently demonstrated in *OH and GH v Germany*.<sup>137</sup> In this case, the interest of the trans applicant's child was considered paramount and, along with other factors, led the court to convey a wide margin of appreciation on the German state. Privacy might be limited in other ways. For example, the court might find exclusion of trans women from women's sport to be justified under Article 8(2) on the basis of fairness and the safety of other competitors.<sup>138</sup> However, establishing proportionality in the context of criminal prosecution for deception as to gender history might prove more difficult. This is because the court would have to: (1) deal with cases of desire-led intimacy between adults; (2) balance interests in circumstances where prosecution for any kind of sexual fraud in the UK is rare, and in the absence of coercion or an express condition almost non-existent; (3) recognise an empirical situation where only trans people have been prosecuted for deception as to gender history; and (4) contrast (3) with what appears to be a de facto European consensus against prosecution on this basis. In short, the court might be amenable to an argument against prosecution in these circumstances based on a lack of proportionality. However, even if we conclude that Article 8, though violated, is not violated in ways that can be shown to be unjustified under Article 8(2), it is arguable that prosecutions of trans people violate Article 14 considered in conjunction with Article 8.

#### **(e) Article 14: prosecution as discriminatory**

Article 14 prohibits discrimination in the enjoyment of 'rights and freedoms set forth in the Convention'. It is therefore a parasitic right. A finding under Article 14 requires only that another article is engaged. It does not require proof that there has been a substantive violation of that other article.<sup>139</sup> As already argued, English criminal law and/or CPS practice engage Article 8. It is in conjunction with Article 8 that a possible unjustified breach of Article 14 will be considered. While positive state obligations have been recognised under Article 14, in conjunction with Article 8,<sup>140</sup> the focus here lies with the state's negative obligations, that is, with arbitrary, and discriminatory, interference with the right to respect for private life. Thus, if the court were to find state action justified under Article 8(2) on the basis that it had balanced relevant interests appropriately, it might consider the same action to fall foul of Article 14 on the basis that the balancing act does not require the state to

<sup>135</sup>JM White Hughto et al 'Transgender stigma and health: a critical review of stigma determinants, mechanisms, and interventions' (2015) 147 *Social Science & Medicine* 222.

<sup>136</sup>TM Bettcher 'Evil deceivers and make believers: on transphobic violence and the politics of illusion' (2007) 22 *Hypatia* 43.

<sup>137</sup>Above n 82.

<sup>138</sup>The Equality Act 2010, s 195 permits discrimination on this basis.

<sup>139</sup>*Carson and others v United Kingdom* Application No 42184/05, 16 March 2010, para 63.

<sup>140</sup>*Pla and Puncernau v Austria* Application No 69498/01, 13 July 2004, para 59.

discriminate against trans people. In terms of scope, the phrase ‘other status’ in Article 14 has clearly been interpreted by the court to include gender identity.<sup>141</sup> Moreover, and importantly, the court has made clear that rights recognised apply to all trans people, irrespective of whether they have undergone gender confirmation surgery.<sup>142</sup> Nor does inclusion within the phrase ‘other status’ depend on possession of a Gender Recognition Certificate. Were this the case, trans people living in states without legal gender recognition, as well as those yet to acquire such a certificate due to healthcare delays or minority, would be stripped of their legal rights under the Convention.

When deciding discrimination cases, the court asks two questions: (1) has there been a difference in treatment of persons in analogous or relevantly similar situations?<sup>143</sup> and (2) if so, is the different treatment objectively justified? Objective justification translates into the pursuit of a legitimate aim by the state and its use of means reasonably proportionate to this aim. In relation to the nature of the discrimination, the argument is that prosecution for deception as to gender history may constitute indirect discrimination. The court has held that ‘a general policy or measure that has disproportionately prejudicial effects on a particular group’ may constitute indirect discrimination even though ‘it is not specifically aimed at that group’ or ‘result[s] from a de facto situation’.<sup>144</sup> Given that it is only trans people who have been prosecuted for deception as to gender history, this might be viewed as a de facto situation. The state would, no doubt, argue that there is no intention to discriminate and that the CPS reviews all complaints made in an impartial way. However, as is well-established, indirect discrimination claims do not require proof of wrongful intent.<sup>145</sup> Rather, the legal focus and basis for liability (subject to justification) rests with the effects of a policy, practice or situation.

To be clear, there is no specific legislation targeting trans people. Nor does case law single out this particular gender minority. Rather, what we have is legal doctrine that perhaps criminalises deception as to gender history (there is legal uncertainty on this point, as discussed in Part 3), and prosecutorial guidelines and practice that appear to settle on trans people as the exclusive locus of prosecution in relation to this form of deception. The effect of this has been, and is, to treat trans people differently. While this may not be an explicit policy, it would appear to operate as one in practice. Indeed, prosecutorial guidelines, both current<sup>146</sup> and proposed,<sup>147</sup> appear to frame deception as to gender as an exclusively cis-trans phenomenon in which the former are imagined to be victims and the latter perpetrators.

However, different treatment, though a necessary condition, is not a sufficient condition for establishing discrimination under Article 14. It is also necessary that a person or group receiving preferential treatment occupy an analogous or relevantly similar situation to the claimant.<sup>148</sup> For not every difference in treatment will constitute a violation of Article 14. The court has clarified that this requires ‘taking into account the elements that characterise th[e] circumstances [of persons subjected to different treatment] in the particular context’.<sup>149</sup> In the present context, the appropriate comparator should be a cissexual person, a term recognised by the court.<sup>150</sup> For example, in the case of a trans man, the appropriate comparator would be a cis man. However, even if the court took what I consider to be the counterintuitive view that a cis woman is the more appropriate comparator in this example, the

<sup>141</sup>*Identoba and Others v Georgia* Application No 73235/12, 12 May 2015, para 96.

<sup>142</sup>*AP Garçon*, above n 45, paras 94–95; *SV*, above n 54, paras 56–58.

<sup>143</sup>*Molla Sali v Greece* Application No 20452/14, 19 December 2018, para 133.

<sup>144</sup>*DH and Others v the Czech Republic* Application No 57325/00, 13 November 2007, para 175. See also *Oršuš and Others v Croatia* Application No 15766/03, 17 July 2008.

<sup>145</sup>*Biao v Denmark* Application No 38590/10, 24 May 2016, para 103; *DH*, above n 144, para 184.

<sup>146</sup>‘Rape and sexual offences – Chapter 6: Consent – Deception as to Gender’, available at <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> (21 May 2021) (last accessed 22 May 2024).

<sup>147</sup>‘Deception as to Gender’, above n 38.

<sup>148</sup>*Sheffield and Horsham*, above n 81, para 75.

<sup>149</sup>*Fábián v Hungary* Application No 78117/13, 5 September 2017, para 121.

<sup>150</sup>*Hämäläinen*, above n 7.



difference in treatment would remain the same, given that no cis person has been prosecuted for deception as to gender history.

It should be acknowledged that the court has, in some cases, exhibited resistance to recognising a cis comparator. Thus, in *Hämäläinen v Finland*, the court rejected the argument that cis couples were a relevant comparator for a trans woman claimant who was required by Finnish legislation to divorce her wife or convert her marriage into a registered partnership in order to obtain legal gender recognition.<sup>151</sup> However, in relation to prosecutions for deception as to gender history, differences in treatment are clearly related to gender identity. After all, only trans people have been prosecuted on this basis. Despite this prosecution pattern, cis people are in an analogous position to trans people because they are capable of being prosecuted for deception as to gender history. Like trans people, cis people participate in the sexual life world, and have a private life, one that includes historical facts about gender. Thus, cis people might not disclose or lie about the fact that they have had cosmetic surgeries, and/or, in the case of cis women, an abortion. Indeed, there are all kinds of facts that might be considered to bear a gendered character, ones that might be considered important to some sexual partners. Of course, readers may think such gendered facts to be legally immaterial. I agree. The argument presented here is that we ought to view the gender histories of trans people in the same way. The fact that there may be some resistance to this argument demonstrates, in my view, not its weakness, but the power of cisnormativity to condition ethical thinking around moments of cis/trans intimacy.<sup>152</sup>

Thus prosecutions for deception as to gender history might constitute a 'practice' that is discriminatory against trans people because, although cis people might, in principle, be prosecuted, it is only trans people who have been prosecuted, and are likely in the future to be prosecuted, under this subcategory of gender deception. This clearly puts any sexually active trans person who wishes to maintain privacy regarding their gender history at a disadvantage. It impacts how trans people conduct themselves in sexual relations in ways highly unlikely to apply to their cis counterparts. This prosecutorial practice is compounded by CPS guidelines that appear to presuppose that those charged in the future with sex offences based on deception as to gender will be trans.<sup>153</sup>

If we accept that these facts constitute different treatment under Article 14 and that an appropriate comparator exists, the state is nevertheless accorded a margin of appreciation and can objectively justify different treatment where it occurs in the pursuit of a legitimate aim and where the means adopted are reasonably proportionate to this aim. However, the scope of the margin will vary according to the circumstances, the subject-matter and the background of the case.<sup>154</sup> The analysis to be followed here is very similar to the court's analysis in relation to Article 8, and this will involve greater scrutiny where differences in treatment are based on gender identity.<sup>155</sup> While criminal prosecution for deception as to gender history might be justified, given the serious nature of sexual offences and an understandable concern for the sexual autonomy of complainants, an exclusive focus on trans people as the object of prosecution is more difficult to justify. Moreover, as with Article 8, the 'community consensus' consideration does not support a wide margin in the present context. As already noted, the UK appears to be an outlier with regard to the criminalisation of deception as to gender history. In other words, in a case of this kind, the state would be inviting the court to endorse not only bad law and/or policy, but bad law and/or policy that no other member state appears to adopt.

## Conclusion

This paper has considered the legality of the practice of prosecuting trans people for sex offences on the basis of deception as to gender history. It argued that this practice, and the threat of future

<sup>151</sup>Ibid, paras 111–112.

<sup>152</sup>Sharpe, above n 39, ch 6.

<sup>153</sup>'Deception as to Gender', above n 38.

<sup>154</sup>*Molla Sali*, above n 143, para 136; *Stummer v Austria* Application No 37452/02, 7 July 2011, para 88; *Burden v the United Kingdom* Application No 13378/05, 29 April 2008, para 60; *Carson and others*, above n 139, para 61.

<sup>155</sup>*Hämäläinen*, above n 7, para 67; *AP Garçon*, above n 45, para 121.

prosecution, fall within the scope of the privacy right under Article 8 and that the state may find it difficult to justify violation under Article 8(2). In relation to violation, it argued that Article 8 is undermined because of lack of legal certainty regarding the threshold of criminal liability and because deception as to gender history (as opposed to gender identity) ought not to be considered a material deception as a matter of law. Article 8(2) enables a state to justify violation on the basis of, *inter alia*, ‘protecting the rights and freedoms of others’. However, the proportionality exercise was viewed as not favouring the state once proper consideration is given, in particular, to appropriate limits to sexual autonomy in sexual fraud contexts and to the need to balance harms arising for the respective sexual parties. These arguments are strengthened by the fact that deception under English law does not appear to be confined to active deception.

It was also argued, given the strong likelihood that Article 8 would be considered to be engaged, that prosecution may constitute a violation of Article 14. Specifically, it was argued that prosecution constitutes indirect discrimination on the basis that as a result of law and/or prosecutorial practice and/or policy there exists a *de facto* situation where prosecutions for deception as to gender history have been brought, and are likely in the future to be brought, exclusively against trans people. Finally, and in relation to both Article 8 and Article 14, prosecution for deception as to gender history is at odds with what appears to be a European community consensus.