Transgender Inquiry Side-Steps Urgent Issue of ‘Gender Fraud’

Yesterday, the government’s Women and Equalities Commitee released its long-awaited report on transgender equality[[1]](#footnote-1) The report is generally very positive in identifying a range of serious problems faced by transgender people and in making some important recommendations (especially in relation to healthcare provision, prison reform, depathologisation, and legal recognition of trans youth (16/17 year olds) and non-binary people). However, the committee side-stepped the important issue of prosecutions for ‘gender fraud,’ despite receiving written submissions on this subject. Accordingly, an important opportunity to address the travesty of such prosecutions has been missed.

In this article, I want to focus on a neglected feature of such prosecutions, one that raises broader criminal justice issues. According to the Code for Crown Prosecutors, prosecutors must, before pursuing a charge, “be satisfied that there is sufficient evidence to provide a realistic prospect of conviction”[[2]](#footnote-2) and a case that does not meet this test “must not proceed, no matter how serious or sensitive it may be.” And yet, it would seem that ‘seriousness’ and ‘sensitivity,’ especially in relation to sexual offences, may, at least on some occasions, be overriding the need to be satisfied in evidential terms that a realistic prospect of conviction exists. Certainly, a number of criminal barristers have expressed concern over this issue. However, we do not need to deal in anecdote. Rather, we have at hand a set of recent cases that surely test consistent application of CPS guidelines.

These cases are the so-called ‘gender fraud’ cases (*R v Barker* [2012]; *R v McNally* [2013]; *R v Wilson* [2013]; *R v Newland* [2015]; *R v Lee (Mason)* [2015]) which have generated a great deal of media attention and public concern. Indeed, judging by conversations on social media and readers’ comments on articles published on the subject, the public’s response to the bringing of prosecutions of this kind has, overwhelmingly, been one of disbelief. In this regard, the most intriguing and perhaps pressing question becomes: *how were prosecutions possible?* The obvious answer to this question is that sexual offence complaints were made, properly investigated by the police, and taken seriously by the CPS. Moreover, the bringing of complaints and CPS prosecutorial decision-making might be said to have been vindicated by the convictions achieved in all cases.

And yet, something about these prosecutions continues to linger, to jar, to unsettle. For the general public, this ‘something’ appears to be the highly implausible nature of the complainants’ versions of the facts in many of the cases prosecuted. It seems reasonable to ask therefore, why did the implausibility of complainant evidence not preclude CPS decisions to prosecute? In order to address this question, we need to consider the Code for Crown Prosecutors, which is used in order to determine whether prosecution is appropriate in any given case. As already noted, “prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction.” To conclude that this test is met requires a conclusion that “an objective, impartial and reasonable jury … or judge … properly directed and acting in accordance with law, is more likely than not to convict the defendant of the charge alleged.” More specifically, prosecutors are directed to “consider whether there are any reasons to question the reliability of the evidence, including its accuracy or integrity” and “whether there are any reasons to doubt the credibility of the evidence.”

In thinking about questions of complainant ‘reliability’ and ‘credibility’ let us recall some of the evidence put forward in two of the cases. In the Gayle Newland case, the complainant, who claimed to believe Newland was a man, admitted having sex with Newland on a least ten occasions and spending over one hundred hours in her company. She was apparently ‘blind’ to the truth about Newland’s gender identity due to a blindfold worn on all occasions at the defendant’s request. Her other senses, apparently, also deserted her. Thus her sense of touch proved insensitive to the female contours of Gayle Newland’s body, while her sense of hearing proved impervious to Newland’s voice which falls within the female range.

In the earlier case of Gemma Barker, complainant evidence is even more incredible. Thus one of the complainants, who knew Gemma Barker previously as Gemma, claimed not to realise that she had been sexually intimate with Barker even though she had dated Barker in different “guises” and under different pseudonyms. Thus after the termination of a sexually intimate relationship with Luke Jones (Barker) the complainant became sexually intimate with Connor McCormack (Barker) and at all times claimed to remain ignorant of the fact that Barker, Jones and McCormack were one and the same person. Of course, all of the complainants in these cases might have been “very gullible and naive,” as was most recently asserted by prosecuting counsel in the Newland case.

But what you have to ask yourself is this: do these versions of the facts not provide “reasons to doubt the credibility of the [complainant’s] evidence”? Can it really be said that “an objective, impartial and reasonable jury … or judge [as opposed to one that is antipathetic toward those at the sexual and gender margins]… is more likely than not to convict the defendant of the charge alleged?” Thus, for example, in the Newland case, is it more likely, as Newland alleged, that a complaint was made in the service of lesbian denial or that the complainant remained oblivious to obvious facts? The fact that Gayle Newland was convicted by a jury should not distract us from this important threshold question regarding the credibility of evidence. That is, her conviction does not establish that ‘objectivity,’ ‘impartiality’ and ‘reasonableness’ pointed to the likelihood of conviction at the time the CPS weighed the evidence. To conclude otherwise is to put the cart before the proverbial horse.

By the same token, and in the specific context of transgender defendants, CPS guidelines place undue emphasis, in determining the issue of consent, on steps taken to authenticate gender identity. Thus the guidelines require investigation of “what steps, if any, [a transgender defendant] has taken to live as his/her chosen identity” and “what steps, if any, he/she has taken to acquire a new gender status.” Such factors ought to have no place in prosecutorial decision-making. Their presence however, indicates that a decision to prosecute is more likely in circumstances where a defendant has not taken steps, or is considered to have taken insufficient steps, to live as his/her chosen gender. In this respect, CPS guidelines demonstrate profound ignorance of the difficulties faced by transitioning people, especially those lacking supportive communities and appropriate resources. In addition to rendering prosecution more likely, these particular ‘evidential’ considerations serve to embed the notion that transgender people’s assertions of gender identity are always suspect, and require authentication.

Part of the problem with ‘gender fraud’ prosecutions lies in the contrast between state sympathy expressed toward those at the heteronormative centre and state skepticism adopted toward others. This is not a new problem. Those at the margins have always encountered difficulty in translating their experiences into believable stories. In some respects, this problem is analogous to the false allegation by a white woman that she was raped by a black man, a problem particularly apparent in the US throughout much of the twentieth century.[[3]](#footnote-3) To the extent that a society, at any given historical moment, considers a consensual encounter of this kind to be inappropriate, wrong, and perhaps even scandalous for the woman concerned, the less likely that a questionable complaint will be filtered out and the more likely a conviction will be sustained. In other words, if we exchange the racism, which is so much a part of this particular and regrettable history, for the cissexism and homophobia that are surely part of any explanation of prosecutions for ‘gender fraud,’ then we might begin to make progress in relation to our understanding of this issue. In any event, a review of CPS guidelines, and their application, is urgently needed.

Alex Sharpe, Professor of Law, Keele University

1. <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/39002.htm> [↑](#footnote-ref-1)
2. <https://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html> [↑](#footnote-ref-2)
3. Lisa Lindquist Dorr, *White Women, Rape, and the Politics of Race in Virginia* 1900-1960 (University of North Carolina Press, 2004). [↑](#footnote-ref-3)