

Attitudes of non-binary people towards legal sex recognition in England and

Wales: An empirical investigation into reform of the Gender Recognition Act 2004

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Abstract

This research investigates the attitudes and experiences of non-binary people towards legal sex recognition and reform in England and Wales. The thesis focuses on the Gender Recognition Act 2004 (GRA) which was pioneering at the time of its introduction. However, it has since been subject to criticism based on intrusive and burdensome requirements, and the lack of provision for non-binary identities.

The thesis provides an original contribution to the existing scholarship on legal sex recognition by adopting a distinctly non-binary centred approach. The thesis presents empirical data on non-binary attitudes towards 'macro-reform options', namely additional sex options in law and/or decertification where the sex marker is removed from the birth certificate. Moreover, in recognising that non-binary people may still seek recognition of a preferred binary sex marker, this thesis also addresses a notable gap in the scholarship by presenting empirical findings on attitudes towards individual requirements of the GRA. Each chapter considers recommendations for reform according to a combined normative framework of critical realism and non-ideal theorising with a focus on policy-in-context. Seven individual reform recommendations are proposed which would essentially provide for legal sex recognition based on self-determination and introduce a third sex option.

These proposals are analysed according to a human dignity-based conception of rights. The relationship between human dignity and non-binary rights has received relatively little scholarly attention, despite the role that dignity has played in developing trans rights across Europe. The empirical findings are contextualised within this

dignity-based framework to draw out their significance further and to illustrate the opportunities of this framework for non-binary rights claims.

The thesis concludes by calling for the seven reform recommendations to be adopted as they represent a fair balance between policy considerations and the need to provide non-binary populations with conditions which recognise their equal and intrinsic dignity.

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Abbreviations

Abbreviation	Explanation
GRA	Gender Recognition Act 2004
LGR	Legal Gender Recognition
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)
ECtHR	European Court of Human Rights
HRA	Human Rights Act 1998
GRP	Gender Recognition Panel
GRC	Gender Recognition Certificate
EA	Equality Act 2010
LGBTQ+	An umbrella term referring to those who identify as non-heterosexual and/or non-cisgender.
UDHR	Universal Declaration of Human Rights
Independent Expert (SOGI)	United Nations Independent Expert on Sexual Orientation and Gender Identity
GIC	Gender Identity Clinic
DHSC	Department for Health and Social Care
WEC	Women and Equalities Committee
ICCPR	International Covenant on Civil and Political Rights
IACtHR	Inter-American Court of Human Rights
GEO	Government Equalities Office

1 Introduction

1.1 An introduction to legal sex recognition

A person's legal sex status impacts the attribution of certain rights and responsibilities in law.¹ The first formal certification of this status typically follows from the observation of external genitalia in the postnatal period. This information is usually registered with the Registrar within forty-two days of birth.² In England and Wales, this status is recorded on the birth certificate as male or female, and is known as a person's legal sex which will often remain without change across the course of a person's life.³ In England and Wales, prior to April 2005, a person's legal sex was exclusively determined at birth and could not be changed.⁴ This prevented transgender (trans) people – people who do not identify with the sex they were assigned at birth⁵ – from being able to receive formal recognition of their gender identity.⁶

¹ A selection of some areas impacted by legal sex are usefully summarised by the Government in HM Courts and Tribunals Service, 'T455 The General Guide for all Users' (Gov.UK 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/981444/t455-eng.pdf>accessed 11 December 2021.

² Births and Deaths Registration Act 1953, s 4.

³ It is important to acknowledge at this stage that terminology related to sex and gender is contested. See chapter 1.6 on terminology.

⁴ *Corbett v Corbett* [1971] P 83, [1970] 2 All ER 33. See also Alex Sharpe, 'English Transgender Law Reform and the Spectre of Corbett' (2002) 10 *Feminist Legal Studies* 65 – 89.

⁵ This contrasts with cisgender (cis), referring to people who do identify with the sex they were assigned at birth: B Lee Aultman, 'Cisgender' (2014) 1(1-2) *Transgender Studies Quarterly* 19 – 272, 61 – 62. See chapter 1.6 on terminology.

⁶ See generally: Alex Sharpe, 'Anglo-Australian Judicial Approaches to Transsexuality: Discontinuities, Continuities and Wider Issues at Stake' (1997) 6(1) *Social & Legal Studies: An International Journal* 23–50; Alex Sharpe, 'English Transgender Law Reform and the Spectre of Corbett' (2002) 10 *Feminist Legal Studies* 65 – 89.

In July 2002, the Grand Chamber of the European Court of Human Rights (ECtHR) heard the case of Ms Christine Goodwin, a ‘post-operative transsexual’⁷ who argued that the UK Government’s refusal to provide any route to legal recognition was a violation of the European Convention on Human Rights (ECHR).⁸ In previous case law on legal sex recognition involving the UK, the Court had generally deferred to the State’s margin of appreciation.⁹ However, in *Goodwin* the ECtHR found that the UK had breached Article 8 (right to respect for private and family life) and Article 12 (right to marry) of the Convention.¹⁰ Providing for legal recognition of gender identity was no longer within the margin of appreciation, though states retained wide discretion in setting the preconditions for that right.¹¹

Less than a year later in *Bellinger v Bellinger*,¹² the House of Lords was tasked with determining the validity of a marriage between the claimant who was a ‘male-to-female transsexual’¹³ (Mrs Bellinger) and her partner Mr Bellinger. The court declined to interpret Mrs Bellinger as being a woman within the meaning of section 11(c) of the Matrimonial Causes Act 1973 (MCA).¹⁴ Instead, the court issued a declaration of

⁷ Some people would contest the wording of this. I am using this as the language that was used in the case itself. This wording is significant because the court found a right to legal recognition for a specific subgroup of trans people (namely post-operative trans people), rather than a more general right for other trans and non-binary people. See chapter 1.6 on terminology.

⁸ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [3].

⁹ *Rees v United Kingdom* [1986] ECHR 11; *Cossey v United Kingdom* [1990] ECHR 21; *Sheffield and Horsham v the United Kingdom* [1990] ECHR 21. Cf. *B v France App no 13343/87* (ECtHR, 25 March 1992) where the Court found a violation of Article 8 after France did not provide for legal sex recognition for a ‘transsexual woman’. The case was distinguished from the UK cases on the basis of differences between the UK and French civil register systems.

¹⁰ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [93], [104].

¹¹ *ibid* [93].

¹² *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467.

¹³ See chapter 1.6 on terminology.

¹⁴ *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 [49] (Lord Nicholls).

incompatibility¹⁵ between section 11(c) MCA, and Articles 8 and 12 ECHR.¹⁶ The *Goodwin* and *Bellinger* cases imposed domestic pressure and an international obligation on the UK Government to allow (some¹⁷) trans people to receive legal recognition of their gender identity.¹⁸ The Gender Recognition Bill was subsequently presented to the UK Parliament and received royal assent on 1 July 2004.¹⁹

The Gender Recognition Act 2004 (GRA) makes provision for a change in legal sex status to accord with someone's gender identity and outlines the legal requirements necessary to satisfy this change.²⁰ If successful, applicants are issued with a Gender Recognition Certificate (GRC) to the effect that their 'gender becomes for all purposes the acquired gender'.²¹ The GRA was welcomed as world-leading at the time of its introduction,²² particularly as it did not impose any physical medical requirements on applicants.²³ Despite not generally being considered world-leading anymore,²⁴ the

¹⁵ Human Rights Act 1998, s 4.

¹⁶ *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 [55] (Lord Nicholls).

¹⁷ See n 7.

¹⁸ For a helpful summary of the key cases leading to the introduction of the GRA, see Explanatory Notes to the Gender Recognition Act 2004, para 7.

¹⁹ See generally: Kenneth Norrie, 'Bellinger v Bellinger, the House of Lords and the Gender Recognition Bill' (2004) 8(1) *Edinburgh Law Review* 93 – 99; Kenneth Norrie, 'When girl meets boy: The Gender Recognition Bill and its effects' (2004) 49(4) *Journal of the Law Society of Scotland* 26 – 27.

²⁰ Gender Recognition Act 2004, introductory text.

²¹ *ibid* s 9(1).

²² Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) para 30.

²³ This contrasts with other European states, see generally: Isabel C Jaramillo and Laura Carlson (eds), *Trans Rights and Wrongs: A Comparative Study of Legal Reform Concerning Trans Persons* (Springer 2021).

²⁴ In the most recent ILGA Map of LGBT+ rights in Europe, the UK has dropped from 10th to 14th place partly because of legal sex recognition: ILGA Europe, 'Rainbow Europe Map and Index 2022' (ILGA 2022) <<https://www.ilga-europe.org/report/rainbow-europe-2022/>> accessed 13 August 2022.

GRA is not unusual compared to many other European jurisdictions who also make provision for a change in legal sex, subject to various requirements.²⁵

In recent years, legal sex recognition systems across Europe have attracted criticism and policy interest in several states, including within the UK.²⁶ Across Europe there has been growing criticism of the various pre-conditions imposed on prospective applicants, with some states deciding to remove such requirements and instead provide for a system based on self-identification of legal sex via a simple administrative process.²⁷ Soft law instruments and human rights actors across the world have called on states to provide individuals with the ability to have their official documents amended to reflect their gender identity based on the principle of self-determination.²⁸ In November 2017, the Inter-American Court of Human Rights (IACtHR) also issued an advisory opinion calling for all individuals to have the right to have their name and official documents amended in light of their gender identity on the basis of self-determination.²⁹ Nevertheless, many European states, including England and Wales,

²⁵ See generally: Jens Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2017) and Isabel C Jaramillo and Laura Carlson (eds), *Trans Rights and Wrongs: A Comparative study of legal reform concerning trans persons* (Springer 2021); TGEU, 'Trans Rights Map Europe and Central Asia 2022' (TGEU 2022) <<https://tgeu.org/trans-rights-map-2022/>> accessed 10 August 2022.

²⁶ The focus of this thesis is England and Wales but it worth noting that there has been a parallel consultation process happening in Scotland over the past few years. This process in Scotland, and proposals for reform, are referred to throughout this thesis as it has engaged similar issues to the England and Wales process.

²⁷ See (e.g.) Denmark (2014), Ireland (2015), Malta (2015), Norway (2016), Belgium (2017), Luxembourg (2018), Portugal (2018), Iceland (2019). Further afield, see (e.g.) Argentina (2012), Greece (2017), Chile (2018), Uruguay (2018).

²⁸ Victor Madrigal-Borloz (IE SOGI), *Report on Gender Identity* (United Nations 2018); Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018) 39.

²⁹ *Inter-American Court of Human Rights, Advisory Opinion OC-24/17* (IACtHR 24 November 2017).

retain several requirements. Most controversially, this has included medical requirements such as those evidencing a psychiatric diagnosis. Despite the psychiatric diagnosis requirement forming the focal point of a public consultation into the GRA in England and Wales,³⁰ the UK Government in 2020 confirmed that this requirement would be retained.³¹ Other requirements in the England and Wales system have also contributed to the criticism of the GRA as imposing an invasive and costly burden, though the UK Government rejected reform to most of these requirements too.³²

Another aspect of legal sex recognition which has attracted attention in England and Wales, as well as other jurisdictions in Europe, is the number of legal sex options available to trans people. The Council of Europe have called on states to 'consider including a third gender option in identity documents for those who seek it' (2015)³³ and also to 'ensure, wherever gender classifications are in use by public authorities, that a range of options are available for all people' (2017).³⁴ Some jurisdictions provide for recognition beyond the binary in some capacity, including Denmark (2014), Malta

³⁰ The medical diagnosis is described as being the 'frontier' of trans rights in Jens Scherpe and Peter Dunne, 'Comparative Analysis and Recommendations' in Jens Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2017) 652.

³¹ Cf Scotland: Gender Recognition Reform (Scotland) Bill 2022, s 4.

³² Though they did announce that they would be reducing the application fee and digitising the process, see: Gov.UK, 'Press release: government responds to Gender Recognition Act consultation' (Gov.UK 22 September 2020) <<https://www.gov.uk/government/news/government-responds-to-gender-recognition-act-consultation>>accessed 10 March 2022; Gov.UK, 'Press release: Gender Recognition Certificate fee reduced' (Gov.UK 4 May 2021) <<https://www.gov.uk/government/news/gender-recognition-certificate-fee-reduced>>accessed 10 March 2022.

³³ Council of Europe, *Resolution 2048* (Council of Europe 2015) para 6.2.4

³⁴ Council of Europe, *Resolution 2191* (Council of Europe 2017) para 7.3.3.

(2015), Iceland (2021), Netherlands (2018), Austria (2018), Germany (2019).³⁵ Nevertheless, the vast majority of European jurisdictions, including England and Wales, only provide for two legal sex options of male or female.³⁶ This binary focus excludes people who do not consider themselves as fitting into that framework. Notably, there have been growing calls for recognition to be extended to non-binary trans people who do not identify wholly and solely as men or women.³⁷

1.2 An introduction to non-binary people

There is no robust data on the number of trans people in the UK.³⁸ The Government Equalities Office estimated in 2018 that there were approximately 200,000 – 500,000

³⁵ See also beyond Europe: New Zealand (2005), Australia (2011), India (2014), Nepal (2015), Pakistan (2017), and Canada (2017). Though this list also includes passport sex markers, which has a related but distinct process to birth certificate sex in the UK.

³⁶ TGEU, 'Trans Rights Map Index: Europe and Central Asia 2021' (TGEU 2021) <<https://tgeu.org/wp-content/uploads/2021/05/tgeu-trans-rights-map-2021-fast-facts-en.pdf>> accessed 26 February 2022. See also Directorate-General for Justice and Consumers, *Legal gender recognition in the EU: The journeys of trans people* (European Commission 2020).

³⁷ Non-binary legal recognition has been advocated for by other groups too, including intersex people. Intersex people are those who are born with sex characteristics which are not wholly male or female. See generally: Jens M Scherpe, Anatol Dutta and Tobias Helms (eds), *The Legal Status of Intersex Persons* (Intersentia 2018). However while non-binary and intersex interests sometimes overlap, the conflation between intersex and non-binary groups is problematic as it overlooks unique challenges and experiences of intersex people, see Morgan Carpenter, 'The "Normalization" of Intersex Bodies and "Othering" of Intersex Identities in Australia' (2018) 15 *Journal of Bioethical Inquiry* 487 – 495; Fae Garland and Mitchell Travis, 'Queering the Queer/Non-Queer Binary: Problematizing the "I" in LGBTI+' in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021).

³⁸ This might be improved following publication of the 2021 Census in England and Wales as the Office for National Statistics included a gender identity question (albeit optional). This was in addition to asking respondents what their sex was and allowed people to specify their gender identity (for example, as non-binary). See Office for National Statistics, 'Census 2021: Paper questions help' (ONS 2021) <<https://census.gov.uk/help/how-to-answer-questions/paper-questions-help#individual-questions-21---30>> accessed 13 December 2021.

trans people in the UK,³⁹ while Stonewall suggests a figure of 600, 000, representing 1% of the population.⁴⁰ There is also uncertainty surrounding the number of people identifying as non-binary in the UK, largely because of the lack of robust data on the trans population in general, and because the non-binary community are a small and sometimes hidden population.⁴¹ In 2015, a large scale survey of the transgender population in the US indicated that around 35% of trans people may identify as non-binary.⁴² Recent empirical evidence in the UK suggests that the proportion of trans people identifying as non-binary could be even higher than that observed in the 2015 US study. In the UK Government's nationwide LGBT Survey in 2018, roughly half (52%) of the trans sample - nearly 7% of the total sample - identified as non-binary.⁴³ This figure was described by the UK Government as 'larger than we might have thought'.⁴⁴ If the proportions of the National LGBT Survey sample were representative of the UK trans community,⁴⁵ this could indicate that between 104,000 - 260,000

³⁹ Government Equalities Office, 'Trans People in the UK' (Government Equalities Office 2018)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf>accessed 13 December 2021.

⁴⁰ Stonewall, 'The Truth about Trans' (Stonewall 2017)

<[https://www.stonewall.org.uk/truth-about-](https://www.stonewall.org.uk/truth-about-trans#:~:text=That%20would%20mean%20about%20600%2C000,population%20of%20over%2060%20million)

trans#:~:text=That%20would%20mean%20about%20600%2C000,population%20of%20over%2060%20million>accessed 2 February 2021.

⁴¹ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) paras 137 – 138.

⁴² In the US it has been suggested that around 35% of individuals who identify as trans may be non-binary, see Sandy James and others, *The report of the 2015 US transgender survey* (National Center for Transgender Equality 2016).

⁴³ Government Equalities Office, *National LGBT Survey: Research Report* (GEO 2018) 19. Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) para 138.

⁴⁴ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) paras 137 – 138. See also: Jos Twist and Natasja M de Graaf, 'Gender diversity and non-binary presentations in young people attending the United Kingdom's National Gender Identity Development Service' (2019) 24(2) *Clinical Child Psychology and Psychiatry* 277 – 290.

⁴⁵ The UK LGBT Survey received 108, 100 valid responses in total and 14,320 trans respondents, which is impressive for a hard-to-reach population such as LGBTQ+

(Government Equalities Office (GEO)) or 312,000 (Stonewall) people in the UK could identify as non-binary. These figures would be relatively consistent with Titman's estimation in 2014 that 0.4% of the UK population⁴⁶ may identify as non-binary.⁴⁷ Consequently, even though the non-binary population represents a relatively small proportion of the total UK population, they make up a sizeable portion of the trans community which is in itself a considerable group of individuals whose perceptions and interests deserve attention.

Empirical research also suggests that younger people are more likely to identify as non-binary.⁴⁸ In the National LGBT Survey, 57% of trans respondents under 35 years old identified as non-binary compared with 36% of those aged 35 or over.⁴⁹ While non-binary people may be more likely to be younger, non-binary identities are not a new phenomenon. The existence of non-binary gender identities historically can arguably be traced through queer populations in the UK, such as the English mollies. This group

people. This was the largest sample of trans people on legal sex recognition to date (Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) 23). Demographic data indicated that participants were generally representative of the population in terms of ethnic groups and place of residence, though less representative of people with disabilities, religion or belief, education, and personal income.

⁴⁶ This would have equated to around 250,000 people at the time of the estimation. See ONS, 'Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid 2014' (ONS 2014) <<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/2015-06-25>> accessed 13 December 2021.

⁴⁷ Nat Titman, 'How many people in the United Kingdom are nonbinary?' (*Practical Androgyny* 2014) <<https://practicalandrogyny.com/2014/12/16/how-many-people-in-the-uk-are-nonbinary/>> accessed 13 November 2019.

⁴⁸ Andreas Koehler, Jana Eyssel and Timo Nieder. 'Genders and Individual Treatment Progress in (Non-)Binary Trans Individuals' (2018) 15(1) *Journal of Sexual Medicine* 102-113.

⁴⁹ Government Equalities Office, *National LGBT Survey: Research Report* (GEO 2018) 15.

did not identify as non-binary explicitly, but evolving cultural and linguistic intelligibility arguably provides a lens through which to view their identities and experiences.⁵⁰ Rather than being a new phenomenon, arguably the increased visibility and cultural intelligibility of non-binary identities has captured experiences which previously may have had other names or were less visible.⁵¹ This visibility has been propounded by celebrities who have spoken openly about their non-binary identity in recent years, such as Miley Cyrus, Jonathan Van Ness and Sam Smith.⁵² Outside the UK, other populations have been cited by scholars as further evidence of non-binary identities existing in various contexts historically and cross-culturally,⁵³ including (for example)

⁵⁰ Ben Vincent and Ana Manzano, 'History and Cultural Diversity' in Christina Richards, Walter Pierre Bouman and Meg-John Barker (eds), *Genderqueer and non-binary genders* (Palgrave Macmillan 2017); Susan Stryker, *Transgender history* (Seal Press 2008); Stephen Whittle, 'Gender fucking or fucking gender?' in Iain Morland and Dino Willox (eds), *Queer Theory* (Bloomsbury Publishing 2017).

⁵¹ Ben Vincent and Ana Manzano, 'History and Cultural Diversity' in Christina Richards, Walter Pierre Bouman and Meg-John Barker (eds), *Genderqueer and non-binary genders* (Palgrave Macmillan 2017); Chassitty Fiani and Christine Serpe, 'Non-binary Identity and the Double-Edged Sword of Globalization' in J Michael Ryan (ed), *Trans Lives in a Globalizing World: Rights, Identities, and Politics* (Routledge 2020).

⁵² Time, 'Miley Cyrus: Transgender Rights, Gender Fluidity, Bisexuality Interview' (*TIME* 2015) <<https://time.com/3918308/miley-cyrus-transgender-rights-instapride/>>accessed 8 April 2020; Out, 'Queer Eye's Jonathan Van Ness: I'm Nonbinary' (*Out* 2019) <<https://www.out.com/lifestyle/2019/6/10/queer-eyes-jonathan-van-ness-im-nonbinary>>accessed 8 April 2020; BBC News, 'Sam Smith comes out as non-binary: 'I'm not male or female' (*BBC News* 2019) <<https://www.bbc.co.uk/news/newsbeat-47612616>>accessed 13 November 2019.

⁵³ Other examples include femminielli (Italy), sworn virgins (Albania), Chuckchi (Siberia), Bakla (Philippines), Quariwarmi (Peru), Kathoey (Thailand), Waria (Indonesia), Machi (Chile) and cross-cultural eunuchs. See Ben Vincent and Ana Manzano, 'History and Cultural Diversity' in Christina Richards, Walter Pierre Bouman and Meg-John Barker (eds), *Genderqueer and non-binary genders* (Palgrave Macmillan 2017).

the Hijra,⁵⁴ and two-spirit people.⁵⁵ However, there remains a need for caution in generalising non-binary narratives of gender diversity in the Global North to other historical and cultural settings. Some scholars argue that Western definitions of trans identity are inappropriate and inaccurate when applied to the Hijras,⁵⁶ and that they should only be understood through a 'broader sociocultural lens comprising the formal and informal institutional structures that are inherent in the non-Western context'.⁵⁷ Nevertheless, at least in the UK context, while non-binary populations are generally younger, non-binary experiences of gender identity may not necessarily be a new phenomenon.

Research also suggests that there is considerable diversity within the trans population with binary and non-binary groups reporting different experiences and attitudes across a range of issues.⁵⁸ Non-binary people in the UK report lower life satisfaction

⁵⁴ Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (University of Chicago Press 2005); Rahul Rao, 'Hijra' in Gita Dharampal-Frick and others (eds), *Key Concepts in Modern Indian Studies* (NYU Press 2015); Jessica Hinchy, *Governing gender and sexuality in colonial India: the Hijra, c.1850 – 1900* (Cambridge University Press 2019).

⁵⁵ Two spirit is an umbrella term, with a more specific term often used depending on the group. See generally: Sarah Hunt, *An introduction to the health of two-spirit people: historical, contemporary and emergent issues* (National Collaborating Centre for Aboriginal Health 2016) 11; Carolyn Epple, 'Coming to terms with Navajo Nádleehí: a critique of Berdache, "gay," "alternate gender," and "two-spirit"' (1998) 25(2) *American Ethnologist* 267–90.

⁵⁶ Serena Nanda, *Neither man nor woman: The Hijras of India* (Wadsworth 1999); Vinay Lal, 'Not this, not that: The Hijras of India and the cultural politics of sexuality' (1999) 61 *Social Text* 119–140; Gayatri Reddy, *With Respect to Sex: Negotiating Hijra identity in South India* (Yoda Press 2006).

⁵⁷ Saatvika Rai and Josephine Kipgen, 'Gender Nonconformance in Non-Western Contexts: Hijras in India' (Oxford Research Encyclopaedia of Politics 2020) <<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1197>> accessed 13 August 2022.

⁵⁸ And potentially differences within sub-categories like age groups, see: Asia Burgwal and others, 'Health disparities between binary and non-binary trans people: A community driven survey' (2019) 20(2-3) *International Journal of Transgenderism* 218 – 229.

compared to the general population⁵⁹ and a heightened fear of being open about their gender identity compared with other trans people.⁶⁰ They are less likely to have accessed or tried to access public healthcare services,⁶¹ and more likely to say that their GP had not been supportive compared with binary trans groups.⁶² Differences are also reflected in gender identity services, which provide specialist care including psychological care, diagnoses of gender dysphoria, and social care.⁶³ Where 33.6% of trans men and 41.7% of trans women had not accessed gender-related health services, an overwhelming 86.8% of non-binary people had not accessed these services.⁶⁴ This is not only potentially an issue of discrimination or accessibility, but also an issue of preference, as a smaller proportion of non-binary people seek gender-related healthcare.⁶⁵ These differences in healthcare engagement are important for legal sex recognition because the GRA requires a gender dysphoria diagnosis. If non-binary people are not engaging with the national health services which provide gender dysphoria diagnoses, they are also not engaging with the most common avenues to receiving a GRC.⁶⁶ It also potentially raises the question of whether the GRA

⁵⁹ Government Equalities Office, *National LGBT Survey: Research Report* (GEO 2018) 10.

⁶⁰ *ibid* 33, 53 – 54.

⁶¹ *ibid* 164. Non-binary people were also found to have an increased risk of mental health issues in the US see Sandy James and others, *The report of the 2015 US transgender survey* (National Center for Transgender Equality 2016).

⁶² Government Equalities Office, *National LGBT Survey: Research Report* (GEO 2018) 184.

⁶³ *ibid* 19.

⁶⁴ *ibid*.

⁶⁵ Ayden Scheim and Greta Bauer, 'Sex and gender diversity among transgender persons in Ontario, Canada: Results from a respondent-driven sampling survey' (2015) 52(1) *Journal of Sex Research* 1–14.

⁶⁶ To receive a diagnosis of gender dysphoria from the National Health Service (NHS) and therefore satisfy a key requirement of the GRA, an individual must be assessed in a specialist clinic. Trans people can alternatively access medical diagnoses through private healthcare providers, though many are unable to access this given the costs involved.

fundamentally misunderstands non-binary (and binary) trans experiences by adopting a medicalised understanding of gender diversity.⁶⁷

1.3 The legal provisions of the GRA and public consultations on reform

Under section 9(1), following the issuance of a GRC, the 'person's gender becomes for all purposes the acquired gender⁶⁸ (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)'.⁶⁹ This does not affect 'things done, or events occurring, before the certificate is issued'.⁷⁰ The effect of section 9(1) is further limited insofar as it is subject to provision made by the GRA or 'any other enactment or any subordinate legislation'.⁷¹ The body responsible for determining GRC applications is the Gender Recognition Panel (GRP, 'the Panel'),⁷² which is a tribunal comprised of legal⁷³ and/or medical members.⁷⁴ The Panel must be satisfied that certain requirements are fulfilled before granting a GRC. This thesis is primarily concerned with requirements for the Standard Track because it is the most common route used,

⁶⁷ Sharon Cowan, 'Looking Back (To)wards the Body: Medicalization and the GRA' (2009) 18(2) *Social & Legal Studies* 247 -252; Sally Hines, 'Recognising Diversity? The gender recognition act and transgender citizenship' in Sally Hines and Tam Sangers (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010).

⁶⁸ See chapter 1.6 on terminology for the rationale behind adopting this wording.

⁶⁹ Gender Recognition Act 2004, s 9(1).

⁷⁰ *ibid* s 9(2).

⁷¹ *ibid* s 9(3). For discussion of related issues see chapters 2.4.2 and 2.5.1.

⁷² Gender Recognition Act 2004, s 1(3), s 1(4) gives effect to schedule 1 which details the specifics of a GRP.

⁷³ Gender Recognition Act 2004, sch 1, s1(2)(a) defines legal members as persons who have a 'relevant legal qualification'.

⁷⁴ Gender Recognition Act 2004, sch 1, s1(2)(b) defines medical members as persons who are registered medical practitioners or chartered psychologists.

though the GRA also provides for two other tracks, namely Overseas and Alternative.⁷⁵

Section 2 of the 2004 Act outlines three key requirements (the 'section 2 requirements'), including that an applicant has or has had gender dysphoria,⁷⁶ that an applicant has lived in their acquired gender for at least two years,⁷⁷ and that they intend to live in their acquired gender until death.⁷⁸ The section 2 requirements are evidenced in different ways. The gender dysphoria diagnosis must be evidenced by reports from a registered medical practitioner (or chartered psychologist) practising in the field of gender dysphoria *and* another registered medical practitioner (who does not necessarily have to practise in that field) (s 3(1)). These reports are known as Report A and Report B, with Report A including details of the diagnosis of gender dysphoria (s 3(2)), and Report B detailing whether the applicant has undergone or is undergoing any treatment for the purposes of modifying sexual characteristics (s 3(3)(a)), or whether they have any such treatment planned or prescribed for the future (s 3(3)(b)). Guidance from the HM Courts and Tribunals Service stipulates that if the applicant has not undergone surgery one of the reports must explain why.⁷⁹

⁷⁵ On Overseas Track see: Gender Recognition Act 2004, s 1(1)(b). On Alternative Track see: Gender Recognition Act 2004, s3A as amended by Marriage (Same Sex Couples) Act 2013, sch 5, para 17.

⁷⁶ Gender Recognition Act 2004, s 2(1)(a).

⁷⁷ *ibid* s 2(1)(b).

⁷⁸ *ibid* s 2(1)(c).

⁷⁹ HM Courts & Tribunal Service, *T451 Guidance on completing the Standard Application Form for a Gender Recognition Certificate* (Crown 2021) 14.

The requirement to have lived for two years in the acquired gender under section 2(1)(b) is evidenced by the medical reports,⁸⁰ a statutory declaration⁸¹ and other supporting evidence in the application form.⁸² There is no exhaustive list of the types of supporting evidence needed, but it may include (for example) passport, driving licence, bank documents, and utility bills.⁸³ The intention to live in the acquired gender until death (s 2(1)(c)) is also evidenced through the medical reports⁸⁴ and statutory declaration.⁸⁵

Aside from the section 2 requirements, there are other pre-conditions to obtaining a GRC, including a minimum age limit, an application fee, and a spousal consent requirement. An application for a GRC can only be made by someone who is aged 18 years or older,⁸⁶ so trans and non-binary children and adolescents cannot change their legal sex.⁸⁷ The GRA also makes provision for an application fee,⁸⁸ which was £140

⁸⁰ HHJ Michael Harris, 'President's Guidance No.1: Evidential requirements for applications under section 1(1)(a) of the Gender Recognition Act 2004' (Gov. UK 2005)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961491/t492-presidents-guide.pdf>accessed 10 March 2022.

⁸¹ Gender Recognition Act 2004, s 3(4).

⁸² HM Courts & Tribunal Service, *T451 Guidance on completing the Standard Application Form for a Gender Recognition Certificate* (Crown 2021).

⁸³ *ibid* 12.

⁸⁴ HHJ Michael Harris, 'President's Guidance No.1: Evidential requirements for applications under section 1(1)(a) of the Gender Recognition Act 2004' (Gov. UK 2005)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961491/t492-presidents-guide.pdf>accessed 10 March 2022.

⁸⁵ Gender Recognition Act 2004, s 3(4).

⁸⁶ *ibid* s 1(1).

⁸⁷ See generally Peter Dunne, 'Transgender Children and the law' (2017) 1 Family Law 123 – 124.

⁸⁸ Gender Recognition Act 2004, s 7.

before being reduced to £5 in 2021.⁸⁹ It applies to all applicants except those who qualify for a fee remission or reduced fee.⁹⁰ The spousal consent requirement refers to the additional evidential conditions for applicants who are in a marriage or civil partnership. The spouse or civil partner of an applicant must issue a statutory declaration of consent for their marriage or civil partnership to continue before a full GRC is issued.⁹¹ If no consent is given, an interim GRC is issued which can provide grounds for annulment of the marriage or civil partnership.⁹²

A turning point in mainstream political interest in the GRA was prompted by the Women and Equalities Committee's (WEC) Transgender Equality Inquiry in 2015 – 2016.⁹³ The headline conclusion from this inquiry was that the GRA 'was pioneering but is now outdated'.⁹⁴ The Committee highlighted the diagnosis requirement as particularly problematic, stating that 'the medicalised approach regarding mental-health diagnosis pathologises trans identities; as such, it runs contrary to the dignity and personal autonomy of applicants'.⁹⁵ Other requirements also attracted criticism

⁸⁹ At the time of data collection, the application fee was £140, however the survey was drafted in a way to account for this, see chapter 7.6.1. HM Courts and Tribunals Service, *T455: The General Guide for all Users* (Crown 2021) 9.

⁹⁰ HM Courts and Tribunals Service, *T455: The General Guide for all Users* (Crown 2021) 9; HM Courts and Tribunals Service, *Apply for help with fees* (Gov.UK 2021).

⁹¹ Gender Recognition Act 2004, s 4A(2)(d) as amended by the Marriage (Same Sex Couples) Act 2013 and the Civil Partnership (Opposite-sex Couples) Regulations 2019.

⁹² Gender Recognition Act 2004, s 4A (as amended by the Marriage (Same Sex Couples) Act 2013; Civil Partnership (Opposite-sex Couples) Regulations 2019); HM Courts & Tribunals Service, *The General Guide for all Users T455: Gender Recognition Act 2004* (2019) 9.

⁹³ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015).

⁹⁴ *ibid* 3.

⁹⁵ *ibid*.

which will be outlined below.⁹⁶ The issues of non-binary recognition was ‘beyond the scope’ of the inquiry,⁹⁷ though the Committee called on the Government to ‘look into the need to create a legal category for those people with a gender identity outside of the binary and the full implications of this’.⁹⁸

In July 2016, the Government announced their intention to review the GRA ‘to tackle unnecessary bureaucracy and to assess the need for medical checks’⁹⁹ within the GRA. The following year the Government launched the National LGBT Survey,¹⁰⁰ receiving over 14,000 responses from trans and non-binary people.¹⁰¹ The findings largely confirmed the findings from the Transgender Equality Inquiry, showing a broad dissatisfaction with the GRA as an intrusive, costly, humiliating and administratively burdensome process.¹⁰² The Government eventually published a public consultation on the GRA which was open from July until October in 2018.¹⁰³ The public consultation sought views on how the Government ‘might make it easier for trans people to achieve legal recognition’.¹⁰⁴

⁹⁶ E.g. proof and spousal consent: Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) paras 32 – 71.

⁹⁷ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) para 31.

⁹⁸ *ibid.*

⁹⁹ Government Equalities Office, *Government Response to the Women and Equalities Committee Report on Transgender Equality, Cm 930* (Government Equalities Office 2016) 5.

¹⁰⁰ Government Equalities Office, *National LGBT Survey: Research report* (GEO, July 2018).

¹⁰¹ *ibid* 16.

¹⁰² *ibid* 212 – 214.

¹⁰³ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018).

¹⁰⁴ *ibid* 2.

1.3.1 The scope of the public consultation

The public consultation sought respondents' attitudes primarily on the current requirements of the GRA,¹⁰⁵ though there were also questions related to the Equality Act 2010 (EA)¹⁰⁶ and non-binary recognition.¹⁰⁷ At the time, the Government said that they were considering removing the gender dysphoria diagnosis and streamlining other parts of the process, but that 'no firm decisions' on the eventual approach had been made.¹⁰⁸ The Government stated that they were not considering reform to the EA. However, some women's groups had raised concerns over the interactions between the GRA and the EA, particularly the position of trans women in accessing single- and separate-sex services.¹⁰⁹ Consequently, the Government used the consultation to gather views on this topic.¹¹⁰ The public consultation also included an 'open question'¹¹¹ about non-binary legal recognition but the Government made it clear that they were not proposing that legal recognition be extended to non-binary people.¹¹² The Government described this question as supplementary to a future

¹⁰⁵ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) Annex B.

¹⁰⁶ For the questions asked on the EA, see Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) Annex B. For the findings related to questions on the EA, see Government Equalities Office, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 93 – 124.

¹⁰⁷ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) para 136, Annex B.

¹⁰⁸ *ibid* 2.

¹⁰⁹ Women and Equalities Committee, *Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission, Tenth Report of Session 2017 – 19, HC 1470* (House of Commons 2019) paras 156 – 190.

¹¹⁰ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018), Ministerial foreword.

¹¹¹ *ibid* 12.

¹¹² *ibid* 52.

planned call for evidence on non-binary people¹¹³ and that their intention at this stage was to ‘merely [seek] initial views on [the] complex issue’¹¹⁴ of non-binary recognition.

Non-binary legal recognition was therefore rejected early in this consultation process.¹¹⁵ This is regrettable given the growing social and legal visibility of non-binary identities,¹¹⁶ and the awareness that non-binary people experience multiple difficulties and barriers in their private and public lives.¹¹⁷ The increasing visibility of non-binary identities has been reflected in the growing number of case law in recent years. The UK Employment Tribunal and Upper Tribunal have recently held that non-binary people may be protected against discrimination under the protected characteristic of ‘gender reassignment’ in the EA,¹¹⁸ and that a non-binary gender identity could form

¹¹³ *ibid* 12.

¹¹⁴ *ibid* 52. The complexities of non-binary recognition cited by the Government include the ‘many potential implications for the law and public-service provision,’ see Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) 12. Similar reasons were also cited by the Scottish Government in their rejection of non-binary recognition: Scottish Government, ‘Gender Reform Act Consultation and non-binary people legal recognition: FOI release’ (Scottish Government 2019) <<https://www.gov.scot/publications/foi-201900009146/>>accessed 27 April 2020.

¹¹⁵ Despite the Scottish Government also rejecting non-binary recognition (see n 114 above), they have taken steps to address issues facing non-binary people in Scotland by setting up a non-binary working group: Scottish Government, ‘Non-binary Working Group’ (Gov.scot 2022) <<https://www.gov.scot/groups/non-binary-working-group/>>accessed 13 August 2022.

¹¹⁶ E.g. *Mx M (gender identity – HJ (Iran) – terminology) El Salvador* [2020] UKUT 313 (IAC); *Taylor v Jaguar Land Rover Ltd* [2020] UKET 1304471/2018; *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56. See generally: Christina Richards, Walter Pierre Bouman and Meg-John Barker (eds), *Genderqueer and non-binary genders* (Palgrave Macmillan 2017).

¹¹⁷ Government Equalities Office, *National LGBT Survey: Research Report* (GEO 2018); Vic Valentine, *Non-binary people’s experiences in the UK* (Scottish Trans Equality Network 2016) 68 – 80.

¹¹⁸ *Taylor v Jaguar Land Rover Ltd* [2020] UKET 1304471/2018. It is worth noting that this was a first instance, non-binding decision.

the basis of an asylum claim.¹¹⁹ The UK Supreme Court has also heard, but rejected, arguments that a person's non-gendered identity should be recognised on their passport in the form of an 'X' marker.¹²⁰ The Crown Prosecution Service has also stated that non-binary identities may be included under the definition of 'transgender identity' for the purposes of hate crime legislation.¹²¹ Despite this, the public consultation failed to account for a primary concern of a population which has experienced significant difficulties by virtue of a binary legal structure. This is despite social data and research on non-binary communities showing various difficulties in public and social life,¹²² and the wider context of comparative law developments and evolving human rights standards towards legal sex recognition.¹²³ Moreover, while the Government have cited concerns that non-binary recognition may cause legal uncertainty,¹²⁴ they failed to use the public consultation as a means to properly investigate these issues in much greater detail. From an early stage, then, the public consultation process was arguably only ever going to produce reform recommendations which, at best, would have been insufficient and outdated for non-binary populations.

¹¹⁹ *Mx M (gender identity – HJ (Iran) – terminology) El Salvador* [2020] UKUT 313 (IAC); *Taylor v Jaguar Land Rover Ltd* [2020] UKET 1304471/2018

¹²⁰ *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56.

¹²¹ Crown Prosecution Service, *Hate Crime: Public Statement on Prosecuting Homophobic, Biphobic and Transphobic Hate Crime* (August 2017) 3.

¹²² Vic Valentine, *Non-binary people's experiences in the UK* (Scottish Trans Equality Network 2016) 68 – 80; Government Equalities Office, *National LGBT Survey: Research Report* (GEO Office 2018).

¹²³ For example, Resolution 2048 of the Council of Europe which calls on member states to 'consider including a third gender option in identity documents for those who seek it': Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) para 6.2.4.

¹²⁴ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) 12; UK Government and Parliament, 'Petitions: Make non-binary a legally recognised gender identity in the UK' (UK Government and Parliament 2021)

<<https://petition.parliament.uk/petitions/580220>>accessed 14 March 2022.

1.3.2 The outcome of the consultation

The public consultation received 102,818 valid responses,¹²⁵ from cisgender (cis) and transgender individuals,¹²⁶ and a range of groups and organisations.¹²⁷ Most respondents supported reforming the GRA.¹²⁸ The majority were in favour of removing or reforming key requirements of the GRA, including the gender dysphoria diagnosis,¹²⁹ proof of living in acquired gender (also known as ‘real life experience (RLE)’),¹³⁰ statutory declaration of intention to live in the acquired gender until death,¹³¹ application fee,¹³² and spousal consent.¹³³ Most respondents were also in favour of making changes to the GRA to accommodate non-binary individuals.¹³⁴

¹²⁵ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 7.

¹²⁶ See n 5 on use of cisgender and/or chapter 1.6 on terminology.

¹²⁷ For a breakdown of the organisational responses, see Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 21 – 23.

¹²⁸ Though there was a notable difference in responses from Stonewall and Fair Play for Women, see Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 21 – 23.

¹²⁹ 64.1% respondents said that there should not be a requirement of a diagnosis of gender dysphoria, see Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 41 – 42.

¹³⁰ 78.6% felt that there should not be this requirement, see Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 52 – 58.

¹³¹ 83.5% were in favour of retaining the statutory declaration requirement, though 52.8% of these respondents did not agree with the wording of the current declaration that the applicant must intend to ‘live permanently in the acquired gender until death’, see Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 59 – 64.

¹³² 58.5% felt that application fee should be removed, see Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 69 – 73.

¹³³ 84.9% disagreed with the spousal consent requirement, see Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 65 – 68.

¹³⁴ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 130 – 134.

The public consultation attracted political, media and scholarly interest,¹³⁵ with much of the public discourse focused on the extent to which GRA reform might adversely affect cis women's rights.¹³⁶ In response to the public consultation, the Government rejected major reform to the GRA. They argued that the current 'checks and balances' in the system (i.e. the current requirements) were 'proportionate'¹³⁷ and that the balance struck in the legislation was correct.¹³⁸ However, they did announce that they would be reducing the application fee from £140 to £5 and digitising the system.¹³⁹

1.4 Questions remaining after the public consultation

The public consultation process was criticised for being delayed and facilitating an increasingly 'toxic' discourse surrounding trans people.¹⁴⁰ The public consultation also

¹³⁵ Stephen Whittle and Fiona Simkiss, 'A perfect storm: the UK Government's failed consultation on the Gender Recognition Act 2004' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender Sexuality and the Law* (Edward Elgar Publishing 2020); Luke Armitage, 'Explaining backlash to trans and non-binary genders in the context of UK Gender Recognition Act reform' (2020) *Journal of the International Network for Sexual Ethics and Politics* 11 – 35.

¹³⁶ See chapter 2.4. For a general overview of the campaigning during the public consultation process see Fair Play for Women, 'Looking back at the 2018 GRA consultation and Fair Play for Women campaign' (FPFW 2019) <<https://fairplayforwomen.com/gra/>>accessed 3 January 2021. See also Fair Play for Women, 'Written evidence submitted by Fair Play for Women [GRA0851]' (UK Parliament 2020) <<https://committees.parliament.uk/writtenevidence/16877/pdf/>>accessed 30 August 2022.

¹³⁷ Gov.UK, 'Press release: government responds to Gender Recognition Act consultation' (Gov.UK 22 September 2020) <<https://www.gov.uk/government/news/government-responds-to-gender-recognition-act-consultation>>accessed 10 March 2022.

¹³⁸ *ibid.*

¹³⁹ *ibid.*; Gov.UK, 'Press release: Gender Recognition Certificate fee reduced' (Gov.UK 4 May 2021) <<https://www.gov.uk/government/news/gender-recognition-certificate-fee-reduced>>accessed 10 March 2022.

¹⁴⁰ Stephen Whittle and Fiona Simkiss, 'A perfect storm: the UK Government's failed consultation on the Gender Recognition Act 2004' in Chris Ashford and Alexander

left questions remaining with regards to non-binary people beyond issues of non-binary legal recognition.¹⁴¹ Non-binary people often still have a preferred binary sex marker, which is usually not the one which was assigned at birth. It is presumed that non-binary people's interest in legal recognition is limited to the number of options available, however non-binary people may still desire or seek recognition of a binary marker using the GRA process. They may use it to obtain recognition which does not reflect their non-binary identity but is considered more accurate than their assigned legal sex. Consequently, non-binary people who try to obtain a GRC may face difficulties which may not be experienced at all - or in the same way - as binary trans people. Despite this, the public consultation did not report findings specifically on non-binary people's attitudes towards specific requirements.¹⁴² Furthermore, in the UK National LGBT Survey, only binary trans responses to questions on legal sex recognition were reported.¹⁴³ Therefore, it remains unknown what the specific attitudes of non-binary populations to the GRA preconditions are. This is a problem because without distinguishing between the responses from the two groups, the experiences and perceptions of non-binary people are at risk of being conflated with binary trans people, and further perpetuating a homogenous narrative of the trans community.¹⁴⁴ This makes it difficult for policymakers to understand the potentially unique experiences of a group of people who – while they cannot obtain non-binary

Maine (eds), *Research Handbook on Gender Sexuality and the Law* (Edward Elgar Publishing 2020). See also chapter 2.4.

¹⁴¹ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) 19 – 20, 69 – 70.

¹⁴² Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020).

¹⁴³ Government Equalities Office, *National LGBT Survey: Research Report* (GEO 2018) 217 – 221.

¹⁴⁴ See problems with presuming a homogenous narrative within the trans community in the healthcare context: Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Bristol Policy Press 2021).

recognition – may nevertheless use the GRA to obtain recognition of a legal identity which is more accurate or more consistent with their lives or experience of gender identity.

Furthermore, as mentioned above, macro-reform (including legal recognition for non-binary people) was not given proper consideration. This was a missed opportunity to capitalise on the number of responses and engagement of expert witnesses and stakeholders in the public consultation.¹⁴⁵ The Government could have used the public consultation to address the lack of information on the case for reform for non-binary recognition, which was identified as a problem by the Government as early as 2016¹⁴⁶ and continues to be cited as justification for rejecting reform.¹⁴⁷ However, even where there was mention of non-binary recognition, this was accompanied by references to a single ‘third, or non-binary, gender’.¹⁴⁸ There was no apparent recognition of alternative reform options beyond a third sex option, including (for example) multiple additional sex options or even removing sex from the birth certificate.¹⁴⁹

¹⁴⁵ Flora Renz, ‘Genders that don’t matter: Non-binary people and the Gender Recognition Act’ in Senthorun Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021).

¹⁴⁶ Government Equalities Office, *Government Response to the Women and Equalities Committee Report on Transgender Equality, Cm 9301* (Government Equalities Office 2016) 11.

¹⁴⁷ *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 [54] (Lord Reed P); Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) 12.

¹⁴⁸ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) 52.

¹⁴⁹ See chapter 2.5.2.

1.5 Research focus and research questions

The preceding outline of legal sex recognition in England and Wales,¹⁵⁰ especially the public consultation, is important because it is the context within which this project was designed and conducted. The growing policy interest in legal sex recognition and the questions remaining after the public consultation regarding non-binary people, were particularly influential to the research design. The public consultation highlighted the need to understand more about the way that legal sex recognition impacts non-binary people as a distinct group from binary trans people. It therefore also indicated a potential need to consider whether (and if so, how), the GRA should be reformed to better accommodate their needs and lived experiences of gender identity. This research project is therefore primarily a reform-focused project. I understand this to mean that my thesis is primarily concerned with forwarding proposals for legislative reform of the GRA, made in light of, and with reference to, wider policy and policy implications in a social context. In analysing the GRA, I also take into consideration various policy concerns and arguments made in relation to the requirements. I will expand on how this relates to other elements of my analytical framework in chapter 3. This background (along with the existing literature¹⁵¹) informed the design of the following four research questions:

1. To what extent do non-binary people support reform to the GRA?
 - a. To what extent do binary and non-binary people differ in their support for reform?
2. What are the reasons non-binary people give for support (or lack thereof)?

¹⁵⁰ The process related to GRA reform in Scotland was/is distinct, see: Scottish Parliament, 'Gender Recognition Reform (Scotland) Bill' (Scottish Parliament 2022) <<https://www.parliament.scot/bills-and-laws/bills/gender-recognition-reform-scotland-bill>>accessed 13 August 2022.

¹⁵¹ See chapter 2.5.

3. Should the GRA be reformed in light of the attitudes of non-binary people?
4. How should the GRA be reformed in light of the attitudes of non-binary people?

It is useful to think of these research questions as split in two halves between research questions 1 and 2, and research questions 3 and 4. Research questions 1 and 2 are directed towards describing, explaining, and interpreting non-binary people's attitudes towards legal sex recognition and reform. Research questions 3 and 4 then introduce evaluative and prescriptive normative dimensions, in assessing the quality¹⁵² of the law on legal sex recognition, followed by a determination of what could be done to improve it for non-binary people (if anything).¹⁵³ There is a relationship between the two halves, in that the findings from research questions 1 and 2 inform the evaluation and prescription involved in answering research questions 3 and 4. Further information on my methodological and normative framework is outlined in Chapter 3.

1.6 Terminology

Terminology related to identity evolves over time, and what may currently be considered common phrasing now may be considered uncommon, contested, or insensitive in the future. It is also possible that terminology that is rarely used now (or considered insensitive) may later be reclaimed.¹⁵⁴ I also accept that certain terms and

¹⁵² I am using 'quality' here to refer to the positive and negative aspects of the law in questions. As acknowledged, these judgements rely on various normative assumptions. The relevant methodological and normative frameworks are outlined in chapter 3.

¹⁵³ Wibren Van der Burg, 'The merits of law: An argumentative framework for evaluative judgements and normative recommendations in legal research' (2017) 17(1) Erasmus Working Paper Series on Jurisprudence and Socio-Legal Studies 1 – 38; Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) 2 Law and Method 1 – 17, 6– 7.

¹⁵⁴ See e.g. reclamation of the word 'queer': Erin Rand, *Reclaiming Queer: Activist and Academic Rhetorics of Resistance* (University of Alabama 2014); Anthony

phrases I use in this thesis may be contested. I will therefore briefly outline and justify how I use certain key terms in this thesis. Where applicable, I will highlight in the footnotes further readings related to these wider debates.

In this thesis I understand macro-reform options as including the introduction of an additional third sex option, the introduction of multiple additional sex options, and decertification as removing the sex marker from the birth certificate. I understand micro reform as referring to reform or removal of specific individual requirements of the GRA, such as (e.g.) the gender dysphoria requirement.

I am using 'sex' to refer to the biological and physical characteristics of individuals,¹⁵⁵ which tend to differentiate human beings as male or female.¹⁵⁶ This status is usually assigned at birth following observation of external genitalia.¹⁵⁷ However it is also important to note that male and female sex characteristics are not mutually exclusive and some people may possess both or neither.¹⁵⁸ Meanwhile, gender is used to refer

Slagle, 'In Defense of Queer Nation: From Identity Politics to a Politics of Difference' 59(2) (1995) *Western Journal of Communication* 85 – 102, 94.

¹⁵⁵ This distinction is not to imply a naturalness or inevitability of sex. However, I am using this distinction to recognise the materiality of sex, while also recognising how our ideas and perceptions of sex are determined by social construction: Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Routledge 1993).

¹⁵⁶ But not always: See Anne Fausto-Sterling, 'Five Sexes: Why Male and Female Are Not Enough' (1993) 3-4 *The Sciences* 20 – 24, 20–21. See generally Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York Basic Books 2000); Alice Domurat Dreger, *Hermaphrodites and the Medical Invention of Sex* (Harvard University Press 1998).

¹⁵⁷ Some feminists criticise the use of sex assigned at birth and would prefer to use 'sex observed at birth'. However, this only captures one element (external genitalia) of sex, rather than other aspects which may or may not align along binary lines with the external genitalia.

¹⁵⁸ I am referring to sex characteristics of 'male' and 'female' as this is often the language used and it is also the phrasing adopted by the Organisation Intersex International Europe (OIIEurope), see: OIIEurope, 'About' (OIIEurope 2012 – 2022) <<https://www.oii-europe.org/about/>> accessed 11 July 2022. It is also worth noting that

to the socially constructed characteristics of men and women,¹⁵⁹ including expected roles, attributes, activities, and behaviours.¹⁶⁰ Gender identity is an individual's inner, personal sense of having a particular gender.¹⁶¹ Gender expression refers to the presentation of an individual's gender through (for example) clothes, cosmetics, speech, and/or names.¹⁶² Someone's gender expression may not conform to their gender identity.¹⁶³

Transgender (trans) is an umbrella term referring to people who do not identify with the sex they were assigned at birth.¹⁶⁴ This contrasts with cisgender (cis), which refers to people who do identify with the sex they were assigned at birth. Some people consider the term cisgender to be offensive.¹⁶⁵ However, to use transgender for certain

some scholars argue that sex may be socially constructed too, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (originally published 1990, Routledge 2006). This argument has often (mistakenly) been understood as suggesting that sex is not a material reality, see e.g. Sheila Jeffreys, 'The queer disappearance of lesbians: Sexuality in the academy' (1994) 17(5) *Women's Studies International Forum* 459–472. For Butler's reply to this interpretation, see Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Routledge 1993).

¹⁵⁹ It could also be argued that there are socially constructed gender roles and norms which are expected of non-binary people too.

¹⁶⁰ Directorate-General for Justice and Consumers, *Legal gender recognition in the EU: The journeys of trans people* (European Commission 2020) vii; World Health Organisation, *Gender and health* (World Health Organisation 2021).

¹⁶¹ Yogyakarta Principles, *Principles on the application of international human rights law in relation to sexual orientation and gender identity* (Yogyakarta Principles 2007) 6.

¹⁶² Yogyakarta Principles, *Principles on the application of international human rights law in relation to sexual orientation and gender identity* (Yogyakarta Principles 2007) 6; Directorate General for Justice, *Trans and intersex equality: Discrimination on the grounds of sex, gender identity and gender expression* (EU Commission 2021) 12 – 13.

¹⁶³ *ibid.*

¹⁶⁴ Directorate General for Justice, *Trans and intersex equality: Discrimination on the grounds of sex, gender identity and gender expression* (EU Commission 2021) 12 – 13.

¹⁶⁵ Fair Play for Women, 'Key facts: What does cisgender mean?' (FPFW 2021) <<https://fairplayforwomen.com/resources/key-facts/>> accessed 19 December 2021.

people without a corresponding term for cisgender people would arguably imply that cisgender people were the neutral or objective norm from which transgender people deviate.

The terminology used in this thesis in part reflects the context within which it is written, namely England between 2019 – 2022. I attempt to avoid phrases which are insensitive, though for legal precision sometimes adopt potentially insensitive language. For example, while ‘transsexual’ or ‘acquired gender’ may be considered offensive terms,¹⁶⁶ they are used in primary legal sources including case law (*Goodwin*)¹⁶⁷ and legislation (GRA) so I will also adopt that language.

Furthermore, it is common for scholars and others to refer to legal gender rather than legal sex. Indeed, the GRA itself often refers to gender, rather than legal sex. However, in this thesis I understand legal sex as referring to the specific sex designation on the birth certificate or GRC. This is distinguishable from sex in law, which is a broader reference to where sex is recognised in law in a given scenario, which does not always correspond to legal sex.¹⁶⁸ In this thesis I also respect group and personal preferences as far as possible including the use of preferred pronouns, gender identities, and/or group descriptions. For example, some people consider ‘trans-exclusionary radical feminism’ or ‘TERF’ to be a slur,¹⁶⁹ so I will refer to gender-critical feminism instead.

¹⁶⁶ Flora Renz, ‘Genders that don’t matter: Non-binary people and the Gender Recognition Act’ in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021) 146 -147.

¹⁶⁷ *Christine Goodwin v United Kingdom* [2002] ECHR 588

¹⁶⁸ This is engaged with in greater detail in chapter 2.3.

¹⁶⁹ Meghan Murphy, ‘TERF’ isn’t just a slur, it’s hate speech (Feminist Current 2017) <<https://www.feministcurrent.com/2017/09/21/terf-isnt-slur-hate-speech/>> accessed 8 March 2022. See also Ben Vincent, Sonja Erikainen and Ruth Pearce (eds), ‘TERF

A final point worth addressing is how I am defining non-binary people. I am defining non-binary people as a subgroup of the trans population who do not identify wholly and solely as men or women. Throughout this thesis, a distinction is made between non-binary and binary trans people, with binary trans people those who do identify wholly and solely as (trans) men or women. Some people may describe their gender identity in more nuanced ways than a clear distinction between binary or non-binary, for example as a non-binary man or as non-gendered.¹⁷⁰ For example, the applicant in one of the most high-profile cases concerning non-binary recognition in the UK - Elan-Cane - identifies as non-gendered and uses the pronouns 'per'.¹⁷¹ As such, trans (and cis) people may use a range of personal pronouns without it corresponding to an expected gender identity or gender expression. However, for legibility and data analysis purposes, I distinguish between those who identify as wholly and solely men and women (binary trans), and those who (at least some of the time) do not identify as wholly and solely men or women. Consequently, for the purposes of this thesis a non-binary man would be understood as non-binary.

1.7 Chapter outline

Chapter 2 has two distinct focuses. The first half is dedicated to addressing preliminary issues of legal sex and GRA reform, including (a) assessing the legitimacy of the State's interest in sex, (b) mapping the interpretation of sex in law, and (c)

Wars: Feminism and the fight for transgender futures' (2020) 68(4) Sociological Review 677 – 890.

¹⁷⁰ Helana Darwin, 'Challenging the cisgender/transgender binary: Nonbinary people and the transgender label' (2020) 34(3) Gender & Society 357 – 380.

¹⁷¹ *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 WLR 133.

introducing gender-critical feminism and its applications to GRA reform. These discussions are important for contextualising issues related to GRA reform, but they are also substantively relevant for proportionality considerations throughout the thesis. The second half outlines the three general areas of existing scholarship where I envisage this thesis making an original contribution, including on criticism of the GRA, non-binary recognition and decertification, and literature which engages with European human rights law on legal sex recognition. This chapter concludes that the primary original contribution of this thesis is in the distinctly non-binary focus for each of these three areas of scholarship.

Chapter 3 outlines the methodological framework of this research project. An empirical, mixed methods research design was adopted, including an online survey and semi-structured interviews as the selected methods for data collection. This chapter also stipulates the normative framework which is comprised of three components, namely critical realism, non-ideal theorising, and a dignity-based conception of rights. Two of these – critical realism and non-ideal theorising – predominantly guide the commentary and analysis in relation to the empirical data on each requirement and reform option in the chapters. The last – a dignity-based conception of rights – is used to provide a separate analysis in Chapter 8 on my proposed reform recommendations.

Chapter 4 presents empirical findings on the reform option of decertification which was very popular among non-binary participants. However, there were also concerns that this reform option was unrealistic and while there was a perception that decertification could transform social attitudes towards gender, it is argued that such

claims must be approached with caution. This chapter concludes that decertification is not proposed for reform.

Chapter 5 presents empirical data on non-binary legal recognition reform options, namely a third additional sex option or multiple additional sex options. Participants were supportive of non-binary legal recognition, highlighting practical and symbolic reasons in favour of its introduction. Overall, participants felt that multiple sex options would be more inclusive, but there were problems with this option related to its uncertainty and potential disruption. This chapter proposes that a third sex option should be recommended for reform.

The rest of the thesis turns to current requirements of the GRA. **Chapter 6** addresses the gender dysphoria requirement which was very unpopular with non-binary people and was considered harmful in positioning gender diversity as an illness. This chapter proposes that the gender dysphoria requirement is removed. **Chapter 7** presents an analysis of findings related to the statutory declaration, proof, Gender Recognition Panel, spousal consent, and application fee requirements. Each of these requirements attracted criticism on practical and symbolic bases, and participants were generally supportive of reform. Each requirement engaged slightly different issues and policy considerations, though many participants reflected a frustration at the requirements for expecting a binary, rigid narrative of gender identity, and for subjecting non-binary populations to an unfair standard of proof. This chapter proposes the retention of the statutory declaration but with new wording; the removal of the proof requirement; the removal of the GRP with application processing powers delegated to the Registrar

General of England and Wales; the replacement of a spousal consent requirement with a spousal notification; and the removal of the application fee.

Chapter 8 opens up the discussion to consider issues and themes from the proposed reform recommendations in light of a dignity-based conception of rights. The purpose of this discussion is to draw out the deeper significance of my empirical findings and use them to shape the contours of an improved framework for rights to legal recognition for non-binary populations. This chapter maps the roots of dignity in law and illustrates how a dignity-framework was adopted in *Goodwin* to ground the right to legal recognition for ‘post-operative transsexuals’.¹⁷² The chapter then applies this framework to issues of non-binary recognition and pre-conditions of recognition, and identifies areas where this framework needs reconceptualising to better account for the non-binary perspective. The chapter concludes by arguing that this new dignity-based framework could be useful in articulating and conceptualising claims related to legal recognition for non-binary populations.

Chapter 9 outlines my final recommendations for reform which would involve introducing a system of self-identification and provide for non-binary recognition in the form of a third sex option. This chapter summarises how these reform recommendations may remedy some of the most prominent current problems with the law. I also summarise my position on two key counter arguments to GRA reform, including the extent to which these recommendations are likely to cause disruption and the degree to which these recommendations provide for suitable ‘checks and

¹⁷² See chapter 1.6 on terminology.

balances¹⁷³ within the system. **Chapter 10** concludes by underlining the key contributions of the thesis in providing a non-binary focused account of GRA reform. It also outlines the limitations of the project which could be addressed in future research including a greater focus on children and young non-binary populations, and/or exploring how other demographical information (e.g. race, ethnicity, religion, education, socio-economic status) may impact attitudes towards GRA reform. The thesis concludes by emphasising the importance of accounting for the non-binary perspective in research on legal sex recognition and how this can be used in the future when policymakers will most likely return to consider GRA reform once again.

¹⁷³ Gov.UK, 'Press release: government responds to Gender Recognition Act consultation' (Gov.UK 22 September 2020)
<<https://www.gov.uk/government/news/government-responds-to-gender-recognition-act-consultation>>accessed 10 March 2022.

2 Scope and existing literature

2.1 Introduction to the chapter

This chapter has two different focuses. The first half deals with preliminary topics of fundamental importance to issues of legal sex which require substantive consideration.

First, considerations of reform prompt the question of why the State might claim to have an interest in a legal status of sex and if so, whether these interests are legitimate. This section is not a discussion of the legitimacy of the *mode* of legal sex certification, such as whether it is legitimate to record it on the birth certificate or not. This discussion instead intends to address where (and why) the law might have an interest in recognising sex in a given context, for example, whether it is legitimate for the law to recognise sex for the purposes of protecting against discrimination. The discussion is therefore relatively abstract and at a high level of generality. This is an important discussion for the thesis because it addresses the preliminary question of whether we need the law to recognise sex at all. These issues then feed into subsequent discussions on the preferred mode of recognition and issues related to decertification of this status from the birth certificate. It is also relevant for proportionality considerations of certain requirements of the GRA. If the State's interest in regulating sex status is compelling, we might consider the State to have a wider margin to set pre-conditions on how they recognise and regulate this status. Section 2.2 of this chapter concludes that there are limited but compelling legitimate reasons why the State might claim an interest in sex, which then merits moving to the second level issue of how the State might recognise this status. However, it would still be important to recognise from a pragmatic perspective that, even if the State did not

have an apparently legitimate interest, it nevertheless still does record and recognise sex which would warrant further consideration of how it imposes such regulation.

Second, in section 2.3, the chapter briefly maps the ways in which sex has been interpreted in law. This discussion shows that while legal sex is understood as the sex marker on the birth certificate or GRC, the way that sex has been interpreted in law indicates that there is not one, single definition of sex in law which applies across all contexts. It is argued that this is beneficial as a fixed definition of sex in law would be impractical and would fail to recognise the importance of context in a given scenario.

Third, in section 2.4 the final preliminary topic of substantive consideration is an introduction to tensions surrounding gender-critical feminism and GRA reform. This section includes an introduction to gender-critical feminism and the implications of GRA reform on issues relating to single- and separate-sex services. This section concludes that while GRA reform (in particular, self-determination) has attracted fierce debate in relation to cis women's rights, such reform would not impact on the operation of single- and separate-sex services.

The second half of the chapter focuses on carving out the original contributions of this thesis to the existing relevant literature. The three areas of relevant literature where I envisage this thesis making an original contribution are criticisms of the GRA, discussions of non-binary recognition and decertification, and literature which engages a European human rights law dimension on legal sex recognition. The overriding originality of this thesis is the distinct focus on non-binary populations and GRA reform.

2.2 Addressing the State's interest in sex

There are a range of possible reasons why the state might claim an interest in sex.¹⁷⁴ One reason why the state might claim an interest is simply because it always has done.¹⁷⁵ The historical interest in sex presents it as a presumed common-sense interest which many people therefore expect to be of interest to the State. However, this is a relatively unconvincing interest for the State, as a presumption of the importance of something does not mean this presumption cannot or should not be reassessed, or interrogated, at a later point.¹⁷⁶ The state may also claim an interest in sex because it is seen to reflect biological reality.¹⁷⁷ Arguably, the (supposedly) fixed and unambiguous status of sex, and specifically the binary categories of male and female, should be reflected in law.¹⁷⁸ However, while most people are born with female or male characteristics, some people are not.¹⁷⁹ Therefore, it is not an absolute biological reality that sex is either male or female.¹⁸⁰ Similarly, scholars have

¹⁷⁴ Feminist jurisprudence has long analysed the role and status of sex/gender in law. There are a wide range of approaches to feminist legal studies but for a selection of influential and introductory texts see (e.g.) Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) University of Chicago Legal Forum 139 - 167; Martha Fineman, 'Feminist Legal Theory' (2005) 13(1) Journal of Gender, Social Policy and the Law 13 – 23; Catherine A MacKinnon, 'Feminist, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8(4) Signs: Chicago University Press 635 – 658; Andrea Dworkin, *Intercourse* (originally published 1987, Basic Books 2007); Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen and Unwin 1990).

¹⁷⁵ Peter Robert Dunne, 'The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation' (DPhil thesis, Trinity College Dublin 2018) 49 – 51.

¹⁷⁶ *ibid.*

¹⁷⁷ It is worth repeating that adopting intersex experiences for the purposes of trans rights should be treated with caution: Morgan Carpenter, 'The Normalization of Intersex Bodies and "Othering" of Intersex Identities in Australia' (2018) 15 Journal of Bioethical Inquiry 487 – 495.

¹⁷⁸ Julie Greenberg, 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41 Arizona Law Review 265 – 328.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

questioned the accuracy of framing sex as a biological reality, highlighting the influence of social and cultural factors on the construction of sex.¹⁸¹ This is not to suggest that sex is not a material reality, but rather to show how additional factors beyond biology or physiology bring certain material realities into existence.¹⁸² In addition, even when we accept materiality of sex (while rejecting its binary nature), this would not necessarily justify the State recognising or regulating it, without additional reasons as to why those sexual characteristics might need to distribute certain rights or benefits in a particular way. This potential justification also arguably underestimates the role of law as a powerful discourse which is implicated in the regulation and creation of certain 'truths' which are as much cultural and social as they are biological.¹⁸³ Furthermore, the supposed predominant interest of law in biological reality can be questioned, as in certain areas the law clearly departs from an interest in biological reality and truth, e.g. where it confers legal personhood to corporate entities.¹⁸⁴ The State's legitimisation of biological untruths in certain areas arguably undermines the extent to which 'biological truth' can, on its own, be considered a legitimate interest for the State.

¹⁸¹ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (originally published 1990, Routledge 2006).

¹⁸² Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Routledge 1993).

¹⁸³ Carol Smart, 'Law's Power, the Sexed Body, and Feminist Discourse' (1990) 17(2) *Journal of Law and Society* 194 – 210, 198 – 200.

¹⁸⁴ Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66(3) *Modern Law Review* 346 – 367, 348; Davina Cooper, 'Towards an adventurous institutional politics: The prefigurative 'as if' and the reposing of what's real' (2010) 68(5) *The Sociological Review* 893–916, 901.

Other potential interests relate to crime prevention and prosecution. In terms of crime prevention this might include (for example) to protect national security,¹⁸⁵ and to prevent fraud and identity laundering,¹⁸⁶ on the basis that sex provides a relatively stable and reliable way to identify individual people.¹⁸⁷ However, this arguably overestimates the coherence and reliability of sex¹⁸⁸ while underestimating the harms of administrative governance based on population data for marginalized populations.¹⁸⁹ Such assumptions may also overlook the role of technology in offering more accurate means of verifying identity.¹⁹⁰

In terms of crime prosecution, sex may also be a relevant interest for the State in prosecuting certain crimes. Under the Sexual Offences Act 2003, the perpetrator is presumed to adopt masculine pronouns,¹⁹¹ stating that a person is defined as committing rape where ‘*he* intentionally penetrates the vagina, anus or mouth of another [...] with *his penis*’.¹⁹² The Female Genital Mutilation Act 2003, also adopts masculine pronouns in defining a person who commits the offence of female genital mutilation while the victim is presumed to be a ‘girl’.¹⁹³ Under section 1(1), the Act

¹⁸⁵ *R (Elan-Cane) v Secretary of state for the Home Department* [2018] EWHC 1530 (Admin) [52] (Baker J).

¹⁸⁶ Theodore Bennett, ‘“No Man’s Land”: non-binary sex identification in Australian Law and Policy’ (2014) 37(3) *University of South Wales Law Journal* 847 – 873, 864.

¹⁸⁷ *R (Elan-Cane) v Secretary of state for the Home Department* [2018] EWHC 1530 (Admin) [52] (Baker J).

¹⁸⁸ Theodore Bennett, ‘“No man’s land”: Non-binary sex identification in Australian law and policy’ (2014) 37(3) *University of New South Wales Law Journal* 847–873, 848; Dean Spade, ‘Documenting gender’ (2008) 59(1) *Hastings Law Journal* 731–842, 803.

¹⁸⁹ *ibid* 731.

¹⁹⁰ Dylan Amy Davis, ‘The normativity of recognition: Non-binary gender markers in Australian law and policy’ (2017) 24 *Advances in Gender Research* 227-250.

¹⁹¹ Sexual Offences Act 2003, s 1.

¹⁹² *ibid* s 1(a) (emphasis added).

¹⁹³ Female Genital Mutilation Act 2003, s 1(1).

reads that a person is guilty if ‘*he* excises, infibulates or otherwise mutilates the whole or any part of a *girl’s* labia majora, labia minora or clitoris’.¹⁹⁴ In both instances, the law appears to presume that the sexual characteristics of the perpetrator and/or victim may also correspond to a particular gender identity and/or pronouns. On the one hand, it could be argued that this presumption is inaccurate because not all victims and perpetrators of these crimes will have corresponding sex characteristics and gender identities/pronouns.¹⁹⁵ Arguably, in line with legislative drafting conventions,¹⁹⁶ the law could retain references to specific sex characteristics for the purposes of defining the *actus reus* of the offence, but adopt a gender-silent approach to pronouns (e.g. using the singular ‘they’) where this does not appear to have a direct relevance to establishing liability.¹⁹⁷

On the other hand, it could be argued that, as women and girls are disproportionately at a greater risk of sexual violence, the law should reflect the gendered nature of such crimes.¹⁹⁸ Arguably by failing to recognise the gendered nature of crimes, strategic essentialism for women and girls could be obscured and undermined.¹⁹⁹ However, the

¹⁹⁴ *ibid* (emphasis added).

¹⁹⁵ See generally: Moira Dustin, ‘Female Genital Mutilation/ Cutting in the UK’ (2010) 17(1) *European Journal of Women’s Studies* 7–23.

¹⁹⁶ Office of the Parliamentary Counsel, ‘Drafting Guidance’ (Gov.UK 2020) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892409/OPC_drafting_guidance_June_2020-1.pdf> accessed 4 February 2022.

¹⁹⁷ Donald L Revell and Jessica Vapnek, ‘Gender-Silent Legislative Drafting in a Non-Binary World’ (2021) 48 *Capital Law Review* 103 - 147, 136.

¹⁹⁸ This raises interesting questions related to the utilitarian functions of law in whether it should account for all / most people, see generally: Mirko Bagaric, ‘A Utilitarian Argument: Laying the Foundation for a Coherent System of Law’ (2002) 10 *Otago Law Rev* 163 – 180.

¹⁹⁹ Lena Holzer, ‘Smashing the Binary? A new era of legal gender registration in the Yogyakarta Principles Plus 10’ (2020) 1 *International Journal of Gender Sexuality and Law* 98 - 133, 123.

extent to which this helps women to collectively organise is at least debatable and while it may be desirable to socially recognise the gendered nature of certain crimes (though this is subject to contestation²⁰⁰), there still remains the question of whether this presents *the State* with a sufficient interest. This is particularly questionable considering that the personal gender identity or pronouns of a victim or perpetrator does not have any material impact on the ability to establish criminal liability in these instances. Nevertheless, while the mode of the State's recognition of sex in such instances may be considered problematic because of its binary approach and the assumption of particular gender identities/pronouns, it may arguably have a sufficient interest in recognising the sexual characteristics of an individual in such cases.

Another potentially compelling State interest in sex for the purposes of crime relates to the calls to make misogyny a hate crime,²⁰¹ so it could be recognised as an aggravating factor in sentencing and increase formal records of misogynistic crime.²⁰² Proposals for this have been rejected so far, but it is attracting more attention from policymakers and governments.²⁰³ The ability to recognise and prosecute crimes

²⁰⁰ Liz Kelly and Nicole Westmarland, 'Naming and defining domestic violence: Lessons from research with violent men' (2016) 112(1) *Feminist Review* 113–127, 118.

²⁰¹ Rajeev Syal, 'Ministers to reject making misogyny a hate crime in England and Wales' (*The Guardian* 2022)

<<https://www.theguardian.com/society/2022/feb/21/ministers-to-reject-making-misogyny-a-hate-in-england-and-wales-police-bill>>accessed 10 March 2022.

²⁰² College of Policing, 'Hate Crime (Misogyny) Bill presented to Parliament' (CP 2022) <<https://www.college.police.uk/article/hate-crime-misogyny-bill-presented-parliament>>accessed 10 March 2022.

²⁰³ James Matthews, 'Scotland: Misogyny could be made a hate crime under new recommendations' (*Sky News* 2022) <<https://news.sky.com/story/scotland-misogyny-could-be-made-a-hate-crime-in-under-new-recommendations-12560606>>accessed 10 March 2022; House of Lords Library, 'Misogyny: a new hate crime?' (UK parliament 2021) <<https://lordslibrary.parliament.uk/misogyny-a-new-hate-crime/>>accessed 10 March 2022.

which are motivated by sex could allow the State to deliver policy aims and prosecute offences effectively so as to protect the public, similar to other crimes aggravated by personal attributes.²⁰⁴ The definition and relevance of sex and/or gender identity to this hypothetical legislation would be subject to considerable debate. The utility of a distinction between sex characteristics and gender identity in this context may be less compelling, as instances of discrimination often implicate both in interrelated and complex ways.²⁰⁵ This theme will be expanded on in greater detail below but for the purposes of this section, while the law's current recognition of sex for the purposes of prevention and prosecution of crime may be questionable, this is one example where there may be a compelling reason for the State to recognise sex. This does not presuppose the mode of recognition and/or whether this status should be a singular fixed status, but it does indicate that recognition of sex could serve a legitimate role in law.

The State has historically used sex to distribute certain rights and benefits differently. This has included to prevent marginalised or oppressed groups from participating equally in society and public life, for example to prohibit women from certain voting and employment rights, to limit rights of trans and homosexual people from accessing marriage rights, and to criminalise homosexual sexual conduct. Where the State's interest in sex for the distribution of rights and benefits has been to further inequalities, this appears to be a particularly illegitimate aim as it is inconsistent with the principles of equality and non-discrimination in a modern liberal democratic State. Unsurprisingly

²⁰⁴ E.g. race or religion, see Sentencing Act 2020, s 66.

²⁰⁵ Sharon Cowan and others, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie' (2020) *Scottish Affairs* 1 – 20, 5.

then, the relevance of sex to distribute rights and benefits is generally decreasing.²⁰⁶ For example, while sex was previously a distinguishing factor for social security provisions, there are no formal distinctions based on this anymore.²⁰⁷ Since the equalising of laws for civil partnership and same-sex marriage, sex also has limited, if any, material relevance to these unions.²⁰⁸

Nevertheless, while the law can be used to further inequality by recognising sex, it is also able to remedy such inequalities through (e.g.) recognising sex in instances of discrimination to prevent and redress such instances of discrimination. Under section 11, the Equality Act 2010 provides for the protected characteristic of sex, which can form the basis of four types of discrimination claim, including direct, indirect, harassment and victimisation.²⁰⁹ Direct discrimination in this instance would cover situations where someone is treated 'less favourably'²¹⁰ than a person of the 'opposite sex'.²¹¹ This might happen where (e.g.) a woman is not hired for a job because the

²⁰⁶ Office of the Parliamentary Counsel, 'Drafting Guidance' (Gov.UK 2020) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892409/OPC_drafting_guidance_June_2020-1.pdf>accessed 4 February 2022.

²⁰⁷ From 2018 the State Pension age was equalised (BBC News, 'Landmark day for state pension equality' (BBC News 2018) <<https://www.bbc.co.uk/news/business-46101343>>accessed 11 April 2021). See also the Department for Work and Pensions who describe their Universal Credit policy as 'gender-neutral' (Department for Work and Pensions, 'Impact Assessment: Universal Credit' (Department for Work and Pensions 2012)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/220177/universal-credit-wr2011-ia.pdf>accessed 11 April 2021.

²⁰⁸ Though there are some technical differences including solemnization see: Marriage Act 1949, s 26 and Marriage (Same Sex Couples) Act 2013, s 2. For comment and critique see Paul Johnson, Robert Vanderbeck and Silvia Falcetta, *Religious marriage of same-sex couples: A report on places of worship in England and Wales registered for the solemnization of same-sex marriage* (White Rose university consortium 2017).

²⁰⁹ Equality Act 2010, ch 4.

²¹⁰ *ibid* s 13.

²¹¹ *ibid*.

employer assumes that women do not have the strength to do the job.²¹² Similarly, the law may distribute certain rights and benefits on the basis of sex to recognise specific needs or inequalities of a particular population. This might include recognising sex so as to require public authorities to meet a stipulated representation quota on a public board.²¹³ This potential interest of the State in these instances appears compelling and in line with principles of substantive equality, which recognises that the law may need to go beyond the right to equal treatment to recognise and address the ‘distributional, recognition, structural, and exclusive wrongs’²¹⁴ that certain groups face.

In a similar vein, the law may use sex to distribute rights and benefits according to certain physiological processes such as pregnancy and childbirth. This might include (e.g.) maternity rights and benefits, health provision, and fertility treatment.²¹⁵ Such provision appears equally in line with principles of substantive equality and to the extent that the law attempts to redress discrimination or vulnerabilities related to physiological processes associated with sex, this does appear to be a legitimate aim. However, similar to the criminal offences above, the law often presumes that the presence of certain sex characteristics and/or bodily functions necessarily correspond to a particular sex status.²¹⁶ Arguably while the State might have an interest in ascertaining (e.g.) who the gestational parent to a child for the purposes of certain

²¹² Explanatory Notes to the Equality Act 2010, para 63.

²¹³ Gender Representation Public Boards (Scotland) Act 2018.

²¹⁴ Sandra Fredman ‘Substantive equality revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712-738, 738.

²¹⁵ E.g. The Maternity and Parental Leave etc. Regulations 1999; Human Fertilisation and Embryology Act 2008.

²¹⁶ Ministerial and other Maternity Allowances Act 2021, s 1(1).

rights,²¹⁷ whether a sex status is necessary to achieve that aim is questionable.²¹⁸ The extent to which the law recognises sex in these instances, and the impact of this on trans people is subject to criticism.²¹⁹ Nevertheless, the aim of redressing certain vulnerabilities associated with physiological processes does appear to be legitimate, even if the mode of recognising sex for these purposes is subject to contestation.

To summarise, this brief discussion on the potential interests of the State in sex sought to demonstrate that there are potentially compelling interests for the State in sex. The extent to which sex and/or gender identity is relevant in a given scenario, and the mode of recognising these characteristics for the purposes of law, is subject to debate. The former point, which relates to how sex is interpreted in law, will be addressed in section 2.3 below. The latter – on the mode of recognition of the legal sex status – forms a central focus of this thesis. However, at a high level of generality, it is argued that in some areas, (e.g.) to protect against discrimination or vulnerabilities, it may be necessary for the law to recognise sex. Certain potential interests of the State are less compelling, such as where sex is recognised because of the historical presumption of its importance or just because it purports to recognise a biological reality. While certain physiological processes might warrant additional legal rights and protections, the law's interest in a 'biological reality' on its own is unconvincing. However, the State's interest

²¹⁷ Though see: Zaina Mahmoud and Elizabeth Chloe Romanis, 'On Gestation and Motherhood' (2022) *Medical Law Review* 1- 32.

²¹⁸ On birth registration generally see *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2021] Fam 77 and Liam Davis, 'Deconstructing tradition: Trans reproduction and the need to reform birth registration in England and Wales' (2020) 22(1-2) *International Journal of Transgender Health* 179 – 190.

²¹⁹ Liam Davis, 'Deconstructing tradition: Trans reproduction and the need to reform birth registration in England and Wales' (2020) 22(1-2) *International Journal of Transgender Health* 179 – 190.

in sex is most compelling where the law seeks to redress substantive inequalities that exist between certain groups. In such instances, the State's failure to recognise sex might further marginalise certain populations who are disadvantaged or unrepresented in certain contexts. These issues feed into various discussions throughout the thesis but they also indicate a need to briefly assess how sex has been interpreted in law, which I will now address.

2.3 The interpretation of sex in law

The discussion above outlined possible legitimate aims of the State in recognising sex in law. English law refers to a concept of legal sex which is generally understood as the sex status recorded on the birth certificate or GRC. However, the way that sex is interpreted in law does not always reflect this definition and others have observed that there is no single definition of sex in law which is applied in all contexts.²²⁰ This does not undermine the significance of legal sex status on the birth certificate but counters the presumption that there is – or should be – one fixed conception of sex which translates across all areas of legal governance. I will now briefly explore some high-profile interpretations of sex in law.²²¹ The purpose of the discussion for this thesis is that it (1) provides useful context for how sex in law is understood, and (2) shows that legal sex as recorded on the birth certificate or GRC is not the only means to determine someone's rights in law (nor should it be). This latter point is important in considering the proportionality of GRA reform as it shows that allowing a greater number of people

²²⁰ *Fair Play for Women v National Records of Scotland* [2022] CSOH 20 [34] (Sandison LJ); Sharon Cowan and others, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie' (2020) *Scottish Affairs* 1 – 20, 1 – 2.

²²¹ In this section I draw on materials from Scottish courts too, as case law in this area is relatively limited though there have been very relevant judgments in recent years in Scotland.

to access a change to legal sex would not fundamentally prevent the law from taking a context-specific approach to the interpretation of sex where necessary.

In some contexts, the law has interpreted sex as referring to a biological, immutable characteristic, clearly distinguishable from psycho-social factors or gender identity. In the case of *Corbett*, Mr Corbett sought to have his marriage to Mrs Corbett (April Ashley), the respondent, annulled on the basis that the latter was born a man. As marriage and civil partnerships were not available for those considered to be of the same legal sex, their marriage was void according to Mr Corbett.²²² Mr Justice Ormrod held that sex was biological and fixed at birth constituting chromosomal, gonadal, and genital factors.²²³ In determining sex for the purposes of marriage, any operative intervention should be ignored.²²⁴ On this basis, the respondent was held to not be a woman for the purposes of marriage. *Bellinger* followed this interpretation in 2003 with regards to section 11(c) of the Matrimonial Causes Act 1973. While the Court in *Bellinger* made a declaration of incompatibility with regards to the rights-compatibility of the law, it also made it clear that without legislative intervention, the common law could not be interpreted in such a way as to recognise a person of one sex later becoming recognised as a person of the opposite sex.²²⁵

Some have argued that *Corbett* is still good law on determining legal sex,²²⁶ and in *Forstater*, the Employment Appeal Tribunal described *Corbett* as still the 'law of the

²²² *Corbett v Corbett* [1971] P 83, [1970] 2 All ER 33, 83 (Ormrod J).

²²³ *ibid.*

²²⁴ *ibid.*

²²⁵ *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 (Lord Nicholls) [36].

²²⁶ Culture, Tourism, Europe and External Affairs Committee, *Official Report 06 December 2018* (Scottish Parliament 2018) 5 – 6 (Professor Rosa Freedman).

land'²²⁷ and that despite the GRA, the 'immutability of sex' under common law remains.²²⁸ However, this position is subject to criticism. First, the *Corbett* test was confined to considering the sex of Ashley for the purposes of English marriage law in 1970. Ormrod J specified in his judgment that his job was to determine what was meant by the 'word "woman" in the context of a marriage', and that he was not concerned to 'determine the "legal sex" of the respondent at large'.²²⁹ A similar comment on the context-specific nature of the judgment was made by Lord Nicholls in *Bellinger* to the same effect.²³⁰ Second, it overlooks the significance of the GRA in providing for the possibility that biological sex for the purposes of law is mutable, at least under certain circumstances.²³¹

In light of the GRA, sex in law has also been interpreted as referring to legal sex, that is sex as recorded on the birth certificate or on the GRC. This was the position adopted by Swift LJ in *Fair Play for Women*, who argued that sex for the purposes of the Census Act 1920²³² and the Census (England and Wales) Order 2020²³³ were references to a 'person's sex as recognised by law'.²³⁴ Nevertheless, this judgment cannot be considered indicative of a definition of sex for the purposes of law with applicability in all scenarios. Mr Justice Swift's judgment was confined to considering

²²⁷ *Forstater v CGD Europe* [2021] UKEAT/0105/20, [2022] ICR 1 [115] (Choudhury J).

²²⁸ *Ibid.*

²²⁹ *Corbett v Corbett* [1971] P 83, [1970] 2 All ER 33, 106 (Ormrod J).

²³⁰ *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 [32] (Lord Nicholls). See also *Fair Play for Women v National Records of Scotland* [2022] CSOH 20 [39] (Lord Sandison).

²³¹ Gender Recognition Act 2004, s 9.

²³² Schedule to the Census Act 1920, para 1.

²³³ Census (England and Wales) Order 2020, sch 2, para 8.

²³⁴ *R (Fair Play for Women) v UK Statistics Authority and the Minister for the Cabinet Office* [2021] EWHC 940 (Admin) [17] (Swift J).

sex for the purposes of the 1920 Act and 2020 Order and was not based on full argument or with the assistance of intervention from any interested party. This was a point highlighted by Lord Sandison in a similar case concerning the Scottish Census.²³⁵ In that case, Lord Sandison rejected the proposition that the law provides for the determination of sex for all purposes as it was registered at birth.²³⁶ Lord Sandison also said he did not consider it possible, in the context of the 1920 Act, that ‘a reference in statute to “sex” falls to be read, definitively or even presumptively, as a reference to a person’s sex as recorded in a birth certificate or GRC, or by extension, to biological sex only’.²³⁷ This case is from the Scottish courts, though it did consider similar materials and laws as in the England and Wales case, so does provide relevant insight into the variable interpretation of sex in law.

Another area providing relevant insight into the understanding of sex in law is the Equality Act. Under section 11, sex is a protected characteristic which is only defined as ‘reference to a man or to a woman’.²³⁸ According to section 212, a man is defined as ‘a male of any age’ while a woman is defined as ‘a female of any age’.²³⁹ The reference to ‘male’ and ‘female’ have led some to argue that these definitions are based on biological sex.²⁴⁰ This was apparently the position taken by Lady Dorrian in

²³⁵ *Fair Play for Women v National Records of Scotland* [2022] CSOH 20 [36] (Lord Sandison).

²³⁶ *ibid* [39] (Lord Sandison).

²³⁷ *ibid* [47] (Lord Sandison).

²³⁸ Equality Act 2010, s 11(a).

²³⁹ *ibid* s 212(1).

²⁴⁰ Kath Murray and Lucy Hunter Blackburn, ‘Losing Sight of Women’s Rights: The Unregulated Introduction of Gender Self-Identification as a Case Study of Policy Capture in Scotland’ (2019) 28(3) *Scottish Affairs* 262 – 289. See also evidence from Naomi Cunningham and Karon Monaghan: Equalities, Human Rights and Civil Justice Committee, ‘Meeting Tuesday 14th June 2022’ (Scottish Parliament 2022) <<https://www.scottishparliament.tv/meeting/equalities-human-rights-and-civil-justice-committee-june-14-2022>> accessed 20 August 2022.

another Scottish case concerning the Gender Representation on Public Boards Act (Scotland) which set a 50% objective for gender representation of women on public boards.²⁴¹ Under section 2 of that Act, a woman was defined to include a woman with the protected characteristic of gender reassignment (i.e. a trans woman).²⁴² At paragraph 36, Lady Dorrian stated that provisions made with regard to the protected characteristic of sex, for a 'female of any age,'²⁴³ 'by definition exclude those who are biologically male'.²⁴⁴ Similar to the cases noted above, this case was also based on very specific facts and circumstances, in particular concerning the legislative competence of the Scottish Parliament to combine the two protected characteristics of sex and gender reassignment under the EA as a reserved matter.²⁴⁵ It would therefore be inappropriate to generalise Lady Dorrian's assessment here to the broader context of the EA. This would also be undesirable because while it is assumed that male and female are references to sex, the Act does not specifically define 'male' or 'female' beyond section 212. Notably, it does not specify which elements of sex may be relevant to such a determination including chromosomal, hormonal, genitalia, or other aspects of a person's identity, such as psycho-social factors.²⁴⁶

Moreover, it is problematic to assume that the EA's use of 'male' and 'female' were intended as specifically sex-related terms in place of 'gendered' terms like woman and man. This is because the distinction between sexed and gendered terms is not

²⁴¹ Explanatory Notes to the Gender Representation on Public Boards (Scotland) Act 2018.

²⁴² Gender Representation on Public Boards (Scotland) Act 2018, s 2.

²⁴³ Equality Act 2020, s 212(1).

²⁴⁴ *For Women Scotland v the Lord Advocate and the Scottish Ministers* [2022] CSIH 4 [36] (Lady Dorrian).

²⁴⁵ *Ibid* [38] (Lady Dorrian).

²⁴⁶ Sharon Cowan and others, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie' (2020) *Scottish Affairs* 1 – 20, 5.

followed elsewhere within the Act. For example, in the Explanatory Notes,²⁴⁷ the examples of permissible separate services use woman/man and female/male interchangeably, without apparent distinction. In providing the example of a cancer cervical screening service, it refers to ‘women’ only needing the service rather than opting to use the word females. Arguably, if the EA intended woman/man to refer to gender, and female/male to refer to sex, then they would have used this distinction in the Explanatory Notes too.²⁴⁸ The supposed distinction is also not followed elsewhere in law, including under section 9(1) GRA, where there is reference to ‘male gender’ and ‘female gender’, indicating that male and female can also be descriptors of gender, in addition to a potential description of a person’s sex.²⁴⁹ Elsewhere, the EA actually provides for the possibility of an open-ended meaning of sex under section 7, where in reference to the protected characteristic of gender reassignment, the Act refers to ‘physiological or *other attributes of sex*’.²⁵⁰ Arguably, rather than providing for a clear, unambiguous definition of sex, the Act does appear to provide for the possibility of sex being interpreted according to (an apparently unlimited) number of factors beyond biology.²⁵¹

The possibility of context-specific interpretations of sex in law is criticised by some who argue that legal certainty demands a clear (and often biologically based) definition of sex. However, it is worth noting that a return to the determination of sex akin to

²⁴⁷ Explanatory Notes to the Equality Act, paras 737 – 738.

²⁴⁸ *ibid.*

²⁴⁹ Gender Recognition Act 2004, s 9(1).

²⁵⁰ Equality Act 2010, s 7(1) (emphasis added).

²⁵¹ Sharon Cowan and others, ‘Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie’ (2020) *Scottish Affairs* 1 – 20, 4.

Corbett would be incompatible with the ECHR's judgment in *Goodwin* in 2002,²⁵² which effectively held that assigning sex at birth without a means to change that with reference to gender identity is incompatible with Article 8 ECHR.²⁵³ Moreover, it is also undesirable to attempt to separate sex from gender in law from a pragmatic perspective. This is the case with discrimination where sex and gender are often implicated and 'interrelated'.²⁵⁴ This was observed in early case law on sex discrimination, for example in *P & S v Cornwall*, the Sex Discrimination Act 1975 was interpreted to include prevention against discrimination on the basis of gender reassignment.²⁵⁵ Under the EA, while gender reassignment is a separate protected characteristic to sex, protection from sex discrimination includes discrimination on the basis of gender stereotypes and norms.²⁵⁶ Direct sex discrimination under the EA may also be founded on the basis of perceived sex,²⁵⁷ again representing an area where sex under the Act does not – and cannot²⁵⁸ – be understood by reference to biological

²⁵² Is it also worth noting here the case of *AP Garçon, Nicot v France* which recognise that 'sterilisation surgery or [...] treatment which, on account of its nature and intensity, entailed a very high probability of sterility' are incompatible with Article 8 ECHR, meaning it would also be unlawful for the state to require bodily changes to adhere to the *Corbett* definition of sex: *AP Garçon, Nicot v France* [2017] ECHR 338 [120] and *X and Y v Romania* [2021] ECHR 41.

²⁵³ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [93].

²⁵⁴ Sharon Cowan and others, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie' (2020) *Scottish Affairs* 1 – 20, 5.

²⁵⁵ *P & S v Cornwall County Council C-13/94* [1996] IRLR 347.

²⁵⁶ *Burden v Chief Constable of Hampshire Constabulary* (2015) WL 12591122.

²⁵⁷ Equality Act 2010, s 13.

²⁵⁸ For example, a purely sex-based understanding of sex discrimination would overlook Cowan and others' point that, trans women see a slight decrease in earning after transitioning, and no change (or a slight increase) for trans men. See Kristen Schilt and Matthew Wiswall, 'Before and after: Gender transitions, human capital and workplace experiences' (2008) 8(1) *The BE Journal of Economic Analysis & Policy* 1-28, as cited in Sharon Cowan and others, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie' (2020) *Scottish Affairs* 1 – 20, 3.

sex alone.²⁵⁹ To attempt to distinguish between issues of sex and gender in such instances would arguably be artificial and hinder attempts to protect people against discrimination which often implicates both.

Furthermore, the medical determination of sex, even excluding psycho-social factors, is not settled and is unlikely to be in the future. As seen in the context of the EA and Lady Dorrian's dicta, even where people reference biological sex, it is unclear which aspects of sex they are referring to and how an incongruence between these factors could be resolved by the law. Even Ormrod J in *Corbett* acknowledged potential inconsistencies with his test, acknowledging that there were 'real difficulties' where those factors of sex – chromosomal, gonadal and genital – are not congruent.²⁶⁰ He goes on to suggest, obiter, that in such instances, 'greater weight would probably be given to the genital criteria than to the other two',²⁶¹ without substantiating why this should be the case. As such, it is undesirable for legal concepts to 'remain static in meaning, in the hope that society will do the same'.²⁶² Rather than providing clarity or legal certainty, attempts to define sex in law reproduce further confusion and inconsistency.

The WEC recently called on the Government to update its language in law in relation to sex and gender, as well as update official guidance which conflates sex and

²⁵⁹ Kath Murray and Lucy Hunter Blackburn, 'Losing sight of women's rights: The unregulated introduction of gender self-identification as a case study of policy capture in Scotland' (2019) 28(3) *Scottish Affairs* 262 – 289, 265.

²⁶⁰ *Corbett v Corbett* [1971] P 83, [1970] 2 All ER 33, 106 (Ormrod J).

²⁶¹ *Ibid.*

²⁶² Sharon Cowan and others, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie' (2020) *Scottish Affairs* 1 – 20, 4.

gender.²⁶³ The Government committed to reviewing its approach to legislative drafting on sex and gender,²⁶⁴ but ultimately rejected amending the GRA or the EA on this basis, describing such a move as not ‘necessary or proportionate’.²⁶⁵ They noted that sex and gender are often used in a context-specific way, and particularly with reference to international and multilateral work, it would ‘not be material to insist on a technical differentiation’.²⁶⁶ This is important because not only does a context-specific approach allow for the law to accommodate evolving medical science, but also the changes in relative importance placed on sex and/or gender to different social and legal contexts. The law tackles questions related to parenthood and birth registration,²⁶⁷ discrimination, single-sex services, communal accommodation, public board representation, data collection, and the gender pay gap. A single, fixed definition of sex, to be applied in each of these situations would be impractical, undesirable, and would fail to recognise the nuance of human experience in relation to sex and gendered experience.²⁶⁸ The discussion in section 2.2 above reflects this variability. Where the courts have had to settle a dispute by defining sex for a particular purpose, they have appeared to prefer either a biological and/or legal definition of sex (i.e. by reference to sex characteristics or the birth certificate/GRC), though these cases are not generalisable and instead rely heavily on the specific context. Most of the time,

²⁶³ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) para 178.

²⁶⁴ Women and Equalities Committee, *Reform of the Gender Recognition Act: Government response to the Committee’s Third Report, Fifth Special Report of Session 21 – 22, HC 129* (House of Commons 2022) paras 45 – 48.

²⁶⁵ *ibid* paras 47 – 48.

²⁶⁶ *ibid*.

²⁶⁷ *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2021] Fam 77.

²⁶⁸ For related discussion see: Ben Collier and Sharon Cowan, ‘Queer Conflicts, Concept Capture and Category Co-Option: The Importance of Context in the State Collection and Recording of Sex/Gender Data’ (2022) 31(5) *Social and Legal Studies* 746 – 772.

this context-specific approach is unproblematic, particularly as in reality, many places, services and people navigate public life on the basis of the self-identification of sex. For example, when using toilets and changing rooms, most of the time a self-identification approach is adopted rather than having to provide proof of one's birth certificate or GRC, and/or establishing one's sex characteristics. Nevertheless, where the law must settle a dispute by providing for a specific definition for a particular problem, it is reasonable that it considers the context and particulars of that scenario. While the merits of the law's demarcation of sex in law in these instances will remain subject to contestation and debate, arguably this is the most effective solution which recognises the interrelated relationship of sex and gender, and the drawbacks of strictly defining sex.

2.4 Gender-critical feminism and GRA reform

The aim of section 2.3 above was to demonstrate that there are no single, agreed definitions of sex in law and that a context-specific approach has its merits. A context-specific approach is also consistent with the ability of the law to provide for a change to legal sex status on the birth certificate, but to also provide for exceptions to this where legal sex status does not automatically entitle someone to certain rights associated with that sex. While I argue that there are benefits to a flexible, context-specific approach to defining sex in law, others fiercely reject this.²⁶⁹ This next section will now turn to introduce gender-critical feminism, which has been one of the most high-profile schools of thought in discourse surrounding GRA reform in the UK context

²⁶⁹ Kath Murray and Lucy Hunter Blackburn, 'Losing Sight of Women's Rights: The Unregulated Introduction of Gender Self-identification as a Case Study of Policy Capture in Scotland' (2019) 28(3) *Scottish Affairs* 262–289; Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (Routledge 2014).

in recent years. It is this school of thought which is particularly opposed to the law's understanding of sex as incorporating issues beyond a binary, biologically based categorisation. I will outline the key tensions in relation to GRA reform, in particular the contention that self-identification will harm (cisgender) women's rights. This section concludes by arguing that such reform would not negatively impact on the rights of cisgender women.

2.4.1 Introduction to gender-critical feminism

The recent policy interest in the GRA has amplified concerns around the perceived conflict of rights between cis women and trans people. While such concerns are not new,²⁷⁰ they have become a particularly prominent theme in the public discourse and legal scholarship since proposals to reform the GRA were announced.²⁷¹ Many of these arguments stem from gender-critical feminism, a school of thought inspired by second-wave radical feminism.²⁷² Raymond's *The Transsexual Empire: The Making of the She-Male* (1979) is an early example of this branch of feminism which has been followed by others like Jeffreys who consider gender to be a harmful ideological tool to undermine cis women's rights.²⁷³ Trans people, in their view, reproduce gender

²⁷⁰ Sheila Jeffreys, 'They know it when they see it: The UK Gender Recognition Act 2004' (2008) 10(2) *British Journal of Politics and International Relations* 328 – 345.

²⁷¹ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018); Scottish Government, *Review of the Gender Recognition Act 2004: A Consultation* (Scottish Government 2017).

²⁷² For a general commentary on second-wave feminism see: Susan Archer Mann and Douglas J Huffman, 'The Decentering of Second Wave Feminism and the Rise of the Third Wave' (2005) 69(1) *Science and Society* 56 – 91.

²⁷³ Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (Routledge 2014). See also Germaine Greer, *The Whole Woman* (originally published 1999, Transworld Publishers 2007).

norms and therefore contribute to the oppression of cis women.²⁷⁴ According to gender-critical feminism, women are a sex-based class with clear, biologically based criterion, while gender identity is an 'imprecise and unverifiable idea' which cannot, or should not, determine access to the ontological category of woman.²⁷⁵

Gender-critical feminism has been criticised as 'simplifying and twisting basic feminist premises'²⁷⁶ such as that of the distinction between sex and gendered identity without recognising the way that the two interrelate. This is not to deny the materiality of sex, but it oversimplifies the role that the 'language of culture' plays in understanding the body.²⁷⁷ Moreover, the notion that trans people reproduce gender normativity overlooks how all people – cis and trans – engage in transgressing, reproducing and subverting gender in a range of ways.²⁷⁸ While trans people are positioned as particularly 'guilty' of reproducing gender, Stone counters this, arguing that trans people represent a transgression of gender norms, opening up new possibilities for gendered existence.²⁷⁹

²⁷⁴ Janice Raymond, *The Transsexual Empire: The Making of the She-Male* (originally published 1979, Teachers College Press 1994); Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (Routledge 2014).

²⁷⁵ Holly Lawford-Smith, *Gender-critical feminism* (Oxford University Press 2022) 106.

²⁷⁶ Maria Victoria Carrera-Fernandez and Renee DePalma, 'Feminism will be transinclusive or it will not be: Why do two cis-hetero woman educators support transfeminism?' (2020) 68(4) *The Sociological Review Monographs* 745 – 762.

²⁷⁷ *ibid* 751.

²⁷⁸ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (originally published 1990, Routledge 2006); Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Routledge 1993).

²⁷⁹ Sandy Stone 'The Empire Strikes Back: A Posttranssexual Manifesto' (1992) 2(29) *Camera Obscura: Feminism, Culture and Media Studies* 150 – 176.

The adoption of a critical stance towards ‘gender identity ideology’²⁸⁰ has meant that many (though not all²⁸¹) issues raised by gender-critical feminists are in the context of trans issues. Gender-critical feminism has generated a high profile in the UK in recent years because of the GRA public consultations both in England and Wales, and in Scotland. Its popularity has also been bolstered by endorsements from prominent British figures in the UK, such as author J. K. Rowling.²⁸² However, gender-critical concerns related to the GRA have existed far before the recent public consultation process. In 2008, Jeffreys criticised the Act as, ‘[giving] credence to the notion that “gender” exists and is a reasonable basis for social organisation rather than a social construction which founds the subordination of women’.²⁸³ She noted concerns that the 2004 Act would impact on services like ‘domestic violence refuges, rape phone-line training and sheltered accommodation’ in the 2008 article.²⁸⁴ While noting that services to support women were already operating according to trans-inclusivity, Jeffreys argued that access for trans women will be ‘greatly facilitated by the GRA’.²⁸⁵

More recent criticism of GRA reform, particularly proposals of self-identification, echoed these points of contention from Jeffreys related to single- and separate-sex services, like domestic violence refuges. This is despite the 2004 Act and GRA reform being substantively different in nature. For example, while the 2004 Act introduced a

²⁸⁰ Holly Lawford-Smith, *Gender-critical feminism* (Oxford University Press 2022).

²⁸¹ *Ibid.*

²⁸² JK Rowling, ‘J.K. Rowling Writes about Her Reasons for Speaking out on Sex and Gender Issues’ (JK Rowling 2020) <<https://www.jkrowling.com/opinions/j-k-rowling-writes-about-her-reasons-for-speaking-out-on-sex-and-gender-issues/>>accessed 20 August 2022.

²⁸³ Sheila Jeffreys, ‘They know it when they see it: The UK Gender Recognition Act 2004’ (2008) 10(2) *British Journal of Politics and International Relations* 328 – 345, 342.

²⁸⁴ *ibid.*

²⁸⁵ *ibid.*

new ability to change legal sex with reference to gender identity, self-identification does not create a new ability to change legal sex, rather it just reforms the mode to changing it. Therefore, while opposition is directed towards self-identification on the basis that it allows for legal rights to be determined according to gender identity rather than sex,²⁸⁶ this is criticism aimed at the original 2004 Act itself rather than self-identification. There are various counter arguments to this, including that such a position overlooks that there is an international obligation on the UK to provide for legal sex recognition for trans people;²⁸⁷ that there is an interplay between sex *and* gender in misogyny;²⁸⁸ that it fails to account for the multiple and intersecting oppressions affecting women;²⁸⁹ and from a strategic point of view it fails to recognise the shared interests of feminist and trans politics.²⁹⁰ Nevertheless, arguments along these lines have persisted in the context of GRA reform and while some acknowledge that self-identification does not change the already accepted ability of a person to change their legal sex, they nevertheless argue that it represents a wider ‘policy drift’ where greater emphasis is placed on gender identity rather than sex.²⁹¹ Some of these broader concerns related to what GRA reform might represent are difficult to engage with, often

²⁸⁶ Kath Murray and Lucy Hunter Blackburn, ‘Losing Sight of Women’s Rights: The Unregulated Introduction of Gender Self-identification as a Case Study of Policy Capture in Scotland’ (2019) 28(3) *Scottish Affairs* 262–289; Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (Routledge 2014); Kathleen Stock, *Material Girls: Why Reality Matters for Feminism* (Fleet 2021).

²⁸⁷ *Christine Goodwin v United Kingdom* [2002] ECHR 588.

²⁸⁸ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (originally published 1990, Routledge 2006).

²⁸⁹ Barbara Smith, *Home Girls: A Black Feminist Anthology* (Kitchen Table/Women of Color Press 1983) xxxii.

²⁹⁰ Dean Spade, ‘Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy’ in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006).

²⁹¹ Kath Murray and Lucy Hunter Blackburn, ‘Losing Sight of Women’s Rights: The Unregulated Introduction of Gender Self-identification as a Case Study of Policy Capture in Scotland’ (2019) 28(3) *Scottish Affairs* 262–289.

because they confuse self-identification with legal sex recognition in general, and/or they often do not reference specific rights in question which are perceived to be impacted by self-identification.

It is beyond the scope of the thesis to engage in an exhaustive analysis of gender-critical feminism in relation to trans people and/or law reform. Though, others have already begun this work.²⁹² However, single- and separate-sex services have been a high-profile area of contention, and it is worth exploring this issue further to address how GRA reform, specifically self-identification, might impact on the provision of these services. The issue of the impact of non-binary recognition and/or decertification on such rights are dealt with separately in the relevant chapters.

2.4.2 Single- and separate-sex services

Single- and separate-sex spaces are considered important as they serve the general aim of protecting the privacy of service users from those of the ‘opposite’ sex.²⁹³ They are said to recognise that ‘women suffer violence from men and need places where they can be removed from the possibility of that violence’.²⁹⁴ These spaces also purport to provide women with the ability to ‘reasonably seek the company of others and [find] strength in that company without the presence of men’.²⁹⁵

²⁹² Aleardo Zanghellini, ‘Philosophical Problems with the Gender-Critical Feminist Argument Against Trans Inclusion’ (2020) SAGE Open 1 – 14.

²⁹³ Peter Dunne, ‘(Trans)Forming Single-Gender Services and Communal Accommodations’ (2017) 26(5) Social and Legal Studies 537 – 561.

²⁹⁴ Sheila Jeffreys, ‘They know it when they see it: The UK Gender Recognition Act 2004’ (2008) 10(2) British Journal of Politics and International Relations 328 – 345, 342.

²⁹⁵ *ibid.*

The EA brought together several pieces of legislation on discrimination law into one Act and protects people from discrimination in relation to nine protected characteristics which include gender reassignment (s 7) and sex (s 11).²⁹⁶ The EA protects against direct discrimination (i.e. treating someone less favourably because of a protected characteristic²⁹⁷) and indirect discrimination (i.e. acting in a way which puts someone with a protected characteristic at a particular disadvantage²⁹⁸). Direct discrimination cannot be justified and is always unlawful, whereas indirect discrimination may be lawful if it can be shown that the indirectly discriminatory measure was a proportionate means of achieving a legitimate aim.²⁹⁹ The Act also protects against harassment (i.e. where a person engages in unwanted conduct relating to a protected characteristic and the conduct has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment³⁰⁰) and victimisation (i.e. treating someone less favourably because they have made a complaint or otherwise been involved in proceedings under the EA³⁰¹).

The Act generally prohibits discriminatory treatment based on sex, though there are exceptions to this, including the provision of single- or separate-sex services.³⁰² A separate-sex service refers to one which is provided to both sexes, but separately or

²⁹⁶ Equality and Human Rights Commission, 'What is the Equality Act?' (EHRC 2022) <<https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act>>accessed 13 August 2022.

²⁹⁷ Equality Act 2010, s 13.

²⁹⁸ *ibid* s 19.

²⁹⁹ *ibid* s19 (2)(d).

³⁰⁰ *ibid* s 26.

³⁰¹ *ibid* s 27.

³⁰² *ibid* sch 3, para 27.

differently, e.g. providing separate homeless hostels for men and women.³⁰³ A single-sex service is one in which a service is provided to one sex only, e.g. a women-only support unit for survivors of domestic violence even if there is no parallel service for men because of insufficient demand.³⁰⁴ This means that, for the purposes of the EA, sex discrimination may be allowed in order to establish separate- or single-sex services for men and women,³⁰⁵ but only where the limited provision is a 'proportionate means of achieving a legitimate aim'.³⁰⁶ Examples of permissible services cited in the Explanatory Notes include a fathers support group to be established by a private nursery because of insufficient attendance by men at the parents group; separate male and female hospital wards; and a cervical cancer screening service.³⁰⁷ Bull has suggested that the provision of single- and separate-sex services do not require service users to 'justify' their needs or desires for such services.³⁰⁸ However the law does require that service providers demonstrate a legitimate aim, (e.g.) reasons or privacy, decency, to prevent trauma, or to ensure health and safety,³⁰⁹ through which the separate- or single-sex service is a proportionate way of achieving this aim.³¹⁰

³⁰³ Equality and Human Rights Commission, *Guidance: Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions* (EHRC April 2022) 6.

³⁰⁴ *ibid* 7.

³⁰⁵ Equality Act 2010, sch 3, para 27.

³⁰⁶ *ibid* para 27(1)(b).

³⁰⁷ Explanatory Notes to the Equality Act 2010, paras 737 – 738.

³⁰⁸ Rebecca Bull, 'Single Sex Services: 10 Reasons why the Statutory Code should now be updated' (Legal Feminist 2022)

<<https://www.legalfeminist.org.uk/2022/04/07/single-sex-services-10-reasons-why-the-statutory-code-should-now-be-updated/>>accessed 13 August 2022.

³⁰⁹ Equality and Human Rights Commission, *Guidance: Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions* (EHRC April 2022) 4.

³¹⁰ Equality Act 2010, sch 3, para 27(1)(b).

While there has been some case law engaging with the meaning of sex under the EA, the meaning of sex for the purposes of single- and separate-sex services is subject to debate. A commonly held view is that sex refers to biological sex except where someone has a GRC.³¹¹ This is the view shared by the Equality and Human Rights Commission (EHRC) in its most recent guidance from April 2022, which specifies that sex under the EA refers to a person's biological sex which ordinarily corresponds to their birth certificate.³¹² In the EHRC's April 2022 Guidance on services, the EHRC state that they use the term 'biological sex' because 'this is how legal sex is defined under the Equality Act for people who do not have a GRC.'³¹³ According to this, a trans person can change their legal sex by obtaining a GRC, but a person who does not have a GRC retains the sex recorded on their birth certificate for the purposes of the Act.³¹⁴ Consequently, if a single- or separate-sex service is established under the EA, then access to that service would, in law, be different for a trans woman³¹⁵ who has a GRC compared to a trans woman who does not have a GRC. Asteriti and Bull similarly argue that a 'transwoman without a GRC is still legally male, holding the same rights with regards to the sex exceptions in the EA as men'.³¹⁶ Therefore, the argument

³¹¹ This was also a view shared with the Scottish Parliament by Karon Monaghan: Equalities, Human Rights and Civil Justice Committee, 'Meeting Tuesday 14th June 2022' (Scottish Parliament 2022) <<https://www.scottishparliament.tv/meeting/equalities-human-rights-and-civil-justice-committee-june-14-2022>>accessed 20 August 2022.

³¹² Equality and Human Rights Commission, *Guidance: Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions* (EHRC April 2022).

³¹³ *ibid* 3.

³¹⁴ Equality and Human Rights Commission, *Guidance: Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions* (EHRC April 2022).

³¹⁵ I am using the example of trans women because this is the most commonly used example.

³¹⁶ Alessandra Asteriti and Rebecca Bull, 'Gender Self-Declaration and Women's Rights: How Self Identification Undermines Women's Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, "Will Gender Self-Declaration Undermine

follows that, if you remove barriers to obtaining a GRC, and it is easier for more people to change their legal sex, then this arguably allows for a larger, undefined group/s of people to legally access single- or separate-sex services.³¹⁷ This legal analysis would suggest that obtaining a GRC does, as a matter of law, create a presumptive right to enter certain single- or separate-sex services, and others (without a GRC) do not.

However, this reading omits to consider the wider operation of the EA and in particular, the protected characteristic of gender reassignment. Under section 7, the EA provides for gender reassignment as a protected characteristic, which applies to a person who is ‘proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex’.³¹⁸ The Act refers to those holding this protected characteristic as ‘transsexual,’ though in the Employment Tribunal it has also been interpreted broadly to include those with non-binary gender identities.³¹⁹ An individual does not have to have a GRC or any medical checks to be entitled to protection under this protected characteristic.³²⁰ In the 2011 Statutory Code, the EHRC stated that if a service provider provides single- or separate-sex services, they should treat ‘transsexual’ people according to the gender role in which they present.³²¹ Scholars

Women’s Rights and Lead to an Increase in Harms? (2020) 83(3) MLR 539” (2020) MLRForum 003 <<https://www.modernlawreview.co.uk/asteriti-bull-sharpe/>> accessed 20 July 2022.

³¹⁷ This was a core part of the reasoning of the EHRC, see Baroness Kishwer Falkner, *Letter to Shona Robison, Cabinet Secretary for Social Justice, Housing and Local Government* (EHRC 26 January 2022).

³¹⁸ Equality Act 2010, s 7.

³¹⁹ *Taylor v Jaguar Land Rover Ltd* [2020] UKET 1304471/2018.

³²⁰ Equality and Human Rights Commission, *Guidance: Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions* (EHRC April 2022).

³²¹ Equality and Human Rights Commission, *Services, public functions and associations: Statutory Code of Practice* (EHRC 2011) para 13.57.

have also argued that a trans person without a GRC cannot be automatically excluded from accessing a single- or separate-sex service which corresponds to their gender identity.³²² The EHRC's 2022 guidance also indicates that trans people – with or without a GRC – cannot be automatically excluded from a single- or separate-sex service.³²³ The guidance states that 'limiting or modifying access to, or excluding a trans person from, the separate- or single-sex service of the gender in which they present might be unlawful if you cannot show such action is a proportionate means of achieving a legitimate aim'.³²⁴ Therefore, by virtue of the protected characteristic of gender reassignment – *not a GRC* – a trans person is entitled to be treated according to their gender identity for the purposes of single- and separate-sex services unless this can be objectively justified.

Nevertheless, it must also be noted that the EHRC provides guidance on the EA, and while it is influential, its interpretation is not binding. While the protected characteristic of gender reassignment protects against the outright rejection of a trans person from a separate- or single-sex service according to their gender identity, some have argued that this may be indirectly discriminatory against certain groups of cis women. Indeed, Asteriti and Bull appear to invert the general protection against exclusion of trans people from single- and separate-sex services, to suggest that if 'transwomen should

³²² Women and Equalities Committee, *Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission: Tenth Report of Session 2017 – 19, HC 1470* (House of Commons 2019); Alex Sharpe and Peter Dunne, 'Gym Use and Changing Rooms: the illegality and chilling effect of (trans)gender segregation' (Oxford Human Rights Hub 2019) <<https://ohrh.law.ox.ac.uk/gym-use-and-changing-rooms-the-illegality-and-chilling-effect-of-transgender-segregation/>> accessed 8 March 2022.

³²³ Equality and Human Rights Commission, *Guidance: Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions* (EHRC April 2022) 4.

³²⁴ *ibid.*

be granted access to female-only spaces, there needs to be a more cogent articulation of the objective justification for the choice of disapplying the EA sex exceptions'.³²⁵ This argument is based on the premise that if a transwoman without a GRC is legally a man, then a service provider should treat them as a male for the provision of single- or separate-sex services.³²⁶ It is argued that to fail to do so could constitute indirect sex discrimination. In May 2022, a case was brought against Survivors Network, the only rape crisis centre in Sussex, to argue that by not excluding trans people, a single-sex service for survivors of rape was indirectly discriminatory towards a cis woman survivor of rape who experiences a trauma-response to people who she perceives to be male. Sarah Summers, the claimant, first used the service in 2021 where she reportedly had a positive experience until September of that year when a trans woman joined the group, resulting in Ms Summers feeling 'deeply uncomfortable'. Ms Summer's argues that the trans-inclusive policy is indirectly discriminatory because it puts women with her experience at a particular disadvantage which cannot be justified.³²⁷

However, even if it is accepted that people like Ms Summers may be at a particular disadvantage, and the policy is indirectly discriminatory, such indirect discrimination may still be permissible if the Survivors Network can show that it is a 'proportionate

³²⁵ Alessandra Asteriti and Rebecca Bull, 'Gender Self-Declaration and Women's Rights: How Self Identification Undermines Women's Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, "Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms? (2020) 83(3) MLR 539"' (2020) MLRForum 003 <<https://www.modernlawreview.co.uk/asteriti-bull-sharpe/>> accessed 20 July 2022.

³²⁶ *ibid.*

³²⁷ Other claims include harassment and victimisation under Equality Act 2010, s 26 – 27.

means of achieving a legitimate aim'.³²⁸ In this case this might include (e.g.), that the single- and separate-sex service provisions under the EA are permissive (not obligatory); the legal obligation to protect against discrimination on the basis of gender reassignment;³²⁹ the EHRC guidance stating that excluding a person with this protected characteristic from separate- and single-sex services must be objectively justified;³³⁰ the desire to provide a trans-inclusive service to accommodate trans survivors of sexual violence,³³¹ especially given the additional barriers faced by trans people in accessing crisis programmes;³³² and that the Network already offered alternative, one-to-one services for those uncomfortable with group sessions.³³³

Arguably, it is more desirable for service providers to have discretion in deciding whether to operate a trans-inclusive single- or separate-sex service. This is arguably the balance which the EA currently provides for, by allowing service providers to operate a trans-inclusive service but also balancing this with the possibility to exclude trans people where this can be objectively justified. Pursuant to schedule 3 of the Act, discrimination against people with the protected characteristic of gender reassignment

³²⁸ Equality Act 2010, s 19 (2)(d).

³²⁹ *ibid* s 7.

³³⁰ Equality and Human Rights Commission, *Guidance: Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions* (EHRC April 2022).

³³¹ Sonja J Ellis, Louis Bailey and Jay McNeil, 'Transphobic victimisation and perceptions of future risk: a large-scale study of the experiences of trans people in the UK' (2016) 7(3) *Psychology & Sexuality* 211-224.

³³² Kristie L Seelman, 'Unequal Treatment of Transgender Individuals in Domestic Violence and Rape Crisis Programs' (2015) 41(3) *Journal of Social Service Research* 307-325.

³³³ Didlaw, 'Sarah Summers: Press Release 3 May 2022' (Didlaw 2022) <<https://didlaw.com/sarah-summers-press-release-3-may-2022>> accessed 12 August 2022. NB: while the one-to-one services had a long waiting list, this appears more of an issue of funding than meaning that a legal obligation should be provided on Survivors Network to provide services in a particular way.

may be permitted in relation to separate- and single-sex services³³⁴ where exclusion is a proportionate means of achieving a legitimate aim.³³⁵ The example given in the explanatory notes is:

A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.³³⁶

Similar examples are provided in the 2022 EHRC guidance including domestic violence refuges and group-counselling sessions. Therefore, even if someone has the protected characteristic of gender reassignment, they can still be lawfully excluded from these services where this is objectively justified. These exceptions have been criticised for potentially placing trans people at risk of being asked intrusive questions and being subjected to gender policing. This was seen in the 2011 EHRC Statutory Code, which advised service providers that where a trans person is ‘visually and for all practical purposes indistinguishable from a non-transsexual person of that gender’³³⁷ they should be treated according to their acquired gender unless there are strong reasons to the contrary. The reference to being ‘visually’ indistinguishable from cisgender people is unfortunate, as it creates a hierarchy between trans people who can, or want to, ‘pass’³³⁸ and others in accessing certain legal rights. The Scottish

³³⁴ Equality Act 2010, sch 3, pt 7, s 28.

³³⁵ *ibid.*

³³⁶ Explanatory Notes to the Equality Act 2010, sch 3, pt 7, para 28.

³³⁷ Equality and Human Rights Commission, *Services, public functions and associations: Statutory Code of Practice* (EHRC 2011) para 13.59.

³³⁸ ‘Passing’ generally refers to when a trans person is perceived as their gender identity if this identity is binary. Generally it is considered that non-binary people cannot ‘pass’ as non-binary because of the entrenched nature of the gender binary. For general discussion of passing in the non-binary context see Ben Vincent, *Non-*

Transgender Alliance at the WEC Transgender Equality Inquiry, argued that the 2011 Code allowed service providers to identify users who they ‘suspect’ to be trans, and ask intrusive questions, such as their gender identity, physical sex characteristics and gender history.³³⁹ The 2022 EHRC Guidance attempts to rectify the 2011 Code, stating that assumptions should not be made about whether a person is trans or not, such as those based on appearance or clothing.³⁴⁰ As it departs from the gender stereotyping and passing privilege inherent in the 2011 Code’s guidance, this is welcome change. However there remains the question over how such trans-exclusionary exceptions can be enforced in practice, without resorting to gender policing and/or asking intrusive questions. This is illustrated by an example given in the 2022 EHRC guidance. This example referred to a community centre which had conducted a survey showing that some service users said they would not use the centre if the separate-sex toilets were open to members of the opposite sex. The guidance stated that it would therefore be lawful for the community centre to introduce an additional gender-neutral toilet and puts signs up to tell user to use the toilet according to their biological sex, or the gender-neutral toilet if they were more comfortable.³⁴¹ However, such a policy would raise several questions, including what is meant by ‘biological sex’ and which service a trans person who has undergone medical intervention would be expected to use. Jeffreys, and Asteriti and Bull, appear to suggest that certain rights for trans people

Binary Genders: Navigating Communities, Identities and Healthcare (Policy Press 2020) 29 – 30.

³³⁹ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) para 115.

³⁴⁰ Equality and Human Rights Commission, *Guidance: Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions* (EHRC April 2022) 11.

³⁴¹ *ibid* 9.

should be reserved if they '[retain] their penises and [receive] no hormone treatment'³⁴² and/or unless there is 'significant physical change'.³⁴³ Aside from the risks of reproducing gender policing and implicit hierarchies within the trans community noted above, such a position is also undesirable in that it may involve asking those suspected to be using the wrong service highly personal questions related to their sex characteristics, gender history and/or medical history. This could, in itself, arguably constitute indirect discrimination against those with the protected characteristic of gender reassignment. While Asteriti and Bull argue against what they perceive to be the compromised ability of women to 'challenge all male-bodied entrants',³⁴⁴ the policing of others' bodies in public settings is also undesirable for cis people who are gender non-conforming as well as placing trans people in a particularly vulnerable and precarious situation. Despite some arguing that women may self-exclude from services that are trans-inclusive, it is also worth noting trans people have reported self-excluding from spaces, such as toilets and changing rooms, for many years and continue to do so.³⁴⁵

³⁴² Sheila Jeffreys, 'They know it when they see it: The UK Gender Recognition Act 2004' (2008) 10(2) *British Journal of Politics and International Relations* 328 – 345, 342.

³⁴³ Alessandra Asteriti and Rebecca Bull, 'Gender Self-Declaration and Women's Rights: How Self Identification Undermines Women's Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, "Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms? (2020) 83(3) *MLR* 539"' (2020) *MLRForum* 003 <<https://www.modernlawreview.co.uk/asteriti-bull-sharpe/>> accessed 20 July 2022.

³⁴⁴ *ibid.*

³⁴⁵ For a short selection on trans self-exclusion in different contexts, see (e.g.) George Cunningham, Erin Buzuvis and Chris Mosier, 'Inclusive spaces and locker rooms for transgender athletes' (2018) 7(4) *Kinesiology Review* 365-374; Owen DW Hargie, David H Mitchell and Ian JA Somerville, "'People have a knack of making you feel excluded if they catch on to your difference": Transgender experiences of exclusion in sport' (2017) 52(2) *International Review for the Sociology of Sport* 223-239; Anniken Sørli, 'Transgender children's right to non-discrimination in schools: The case of changing-room facilities' (2020) 28(2) *International Journal of Children's Rights* 221-242.

Furthermore, while there is concern that trans inclusive services may ‘embolden male opportunists to enter single-sex spaces’,³⁴⁶ there is little empirical evidence to suggest that trans-inclusive services pose a threat to the safety of cis women. One study in the US found that trans inclusive rules related to accommodation were not related to the number of privacy and safety violations.³⁴⁷ Other European jurisdictions which have adopted self-identification have also not apparently witnessed an increased threat to cis women’s rights by virtue of reform.³⁴⁸

Moreover, while gender-neutral services are criticised by gender-critical feminists,³⁴⁹ many services already adopt policies which are trans inclusive and provide for greater privacy or all users,³⁵⁰ including services which deal with particularly vulnerable

³⁴⁶ Alessandra Asteriti and Rebecca Bull, ‘Gender Self-Declaration and Women’s Rights: How Self Identification Undermines Women’s Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, “Will Gender Self-Declaration Undermine Women’s Rights and Lead to an Increase in Harms? (2020) 83(3) MLR 539”’ (2020) MLRForum 003 <<https://www.modernlawreview.co.uk/asteriti-bull-sharpe/>>accessed 20 July 2022.

³⁴⁷ Amira Hasenbush, Andrew R Flores and Jody L Herman, ‘Gender identity non-discrimination laws in public accommodations: a review of evidence regarding safety and privacy in public restrooms, locker rooms, and changing rooms’ (2018) 16 *Sexuality Research and Social Policy* 70 – 83.

³⁴⁸ See (e.g.) Moninne Griffith and others, *Review of the Gender Recognition Act 2015: Report to the Minister for Employment Affairs and Social Protection* (Gov.ie June 2018). It is worth noting that this review was not specifically looking into the impact on cis women’s rights, though arguably if a problem of related to the law and harm to women was an apparent problem, the review would have identified or recognised it.

³⁴⁹ Alessandra Asteriti and Rebecca Bull, ‘Gender Self-Declaration and Women’s Rights: How Self Identification Undermines Women’s Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, “Will Gender Self-Declaration Undermine Women’s Rights and Lead to an Increase in Harms? (2020) 83(3) MLR 539”’ (2020) MLRForum 003 <<https://www.modernlawreview.co.uk/asteriti-bull-sharpe/>>accessed 20 July 2022.

³⁵⁰ Peter Dunne, ‘(Trans)Forming Single-Gender Services and Communal Accommodations’ (2017) 26(5) *Social and Legal Studies* 537 – 561, 548 – 549. A similar argument could also be made for schools e.g. while girls tend to perform

populations, such as those who are victims of rape and/or survivors of domestic violence. Rape Crisis Scotland do not require people to prove their sex or gender status, and instead adopt an individual needs-based assessment for each person who comes to their service.³⁵¹ Other organisations such as Women's Aid allow their centres to adopt trans inclusive policies depending on what is most appropriate for their service users.³⁵² Other service providers dealing with complex risks and vulnerable populations also adopt a nuanced, case-by-case approach, such as the Prison Service. Trans prisoners can be placed in the prison estate according to their gender identity,³⁵³ but they do not have to be irrespective of whether they have a GRC.³⁵⁴ The placement of a trans individual to a particular prison estate is subject to a risk assessment including the potential risk to the individual themselves, other prisoners in the estate, and staff.³⁵⁵ Services are therefore already dealing with questions of trans inclusion and many are successfully adopting trans-inclusive and/or context-specific policies which attempt to balance the needs of various groups.

better at single-gender schools, arguably a more appropriate solution would be to improve provision for all young people.

³⁵¹ See evidence from Rape Crisis Scotland to the Scottish Parliament: Equalities, Human Rights and Civil Justice Committee, 'Meeting Tuesday 31 May 2022' (Scottish Parliament 2022) <<https://www.scottishparliament.tv/meeting/equalities-human-rights-and-civil-justice-committee-may-31-2022>>accessed 13 August 2022.

³⁵² Women's Aid, 'Single Sex Services Statement' (Women's Aid March 2022) <<https://www.womensaid.org.uk/womens-aid-single-sex-services-statement/>>accessed 13 August 2022.

³⁵³ A High Court judgment in 2021 held that the placement of trans women in women's prisons was not unlawful: *R (FDJ) v Secretary of State for Justice* [2021] EWHC 1746 (Admin), [2021] 1 WLR 5265.

³⁵⁴ HMPPS Diversity and Inclusion Team, *The Care and Management of Individuals who are Transgender: Operational Guidance* (HM Prison and Probation Service 2020) to be read in conjunction with HM Prison and Probation Service, *Policy document: The Care and Management of Individuals who are Transgender* (Ministry of Justice 2020).

³⁵⁵ *ibid.*

While the debate surrounding single- and separate-sex services could span an entire thesis, the key point for this project is that, even if GRCs were ‘easier’ to obtain under a system of self-identification, and more people had GRCs, the exceptions related to single- and separate-sex services would remain. The most important factor in the legal analysis pertaining to single- and separate-sex services is the protected characteristic of gender reassignment for which a GRC is irrelevant.³⁵⁶ The suggestion that access to a single- or separate- sex service may be (or should be) determined by legal sex as recorded on the birth certificate or GRC fails to recognise the relevance of gender reassignment as a protected characteristic, but also arguably overlooks that such a position would be impractical. Most service providers adopt a self-identification approach and, even if identification documentation were required, birth certificates are very rarely used as a form of identification in England and Wales. Arguably a more desirable solution is to provide service providers with the discretion to determine whether they will operate a single- or separate-sex service, and whether such a service may need to exclude trans people. While trans-inclusive services have been successful, service providers have the ability to exclude trans people where objectively justified, and would continue to do so even if the GRA were replaced with a system of self-identification.

The EHRC Guidance has been referred to in this section, however, it is worth briefly outlining how the position of the EHRC has fluctuated in recent years with regards to

³⁵⁶ This was also recognised by Asteriti and Bull in Alessandra Asteriti and Rebecca Bull, ‘Gender Self-Declaration and Women’s Rights: How Self Identification Undermines Women’s Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, “Will Gender Self-Declaration Undermine Women’s Rights and Lead to an Increase in Harms? (2020) 83(3) MLR 539” (2020) MLRForum 003 <<https://www.modernlawreview.co.uk/asteriti-bull-sharpe/>> accessed 20 July 2022.

GRA reform as it provides important context into the wider confusion and anxiety surrounding the law in this area. In doing so, this also provides the opportunity to highlight other areas of concern noted in public discourse on the impact of GRA reform on cis women's rights.

2.4.3 The position of the Equality and Human Rights Commission

The EHRC were previously supportive of GRA reform in England and Wales,³⁵⁷ and Scotland.³⁵⁸ In response to Scotland's 2018 review of the law, the EHRC said that the GRA was 'far removed'³⁵⁹ from best practice on legal sex recognition and that this had a 'significant negative impact'³⁶⁰ on trans people. It stated that reform was needed to 'secure and enhance the right to legal recognition of trans people in Scotland'.³⁶¹ In 2018, responding to the UK government's public consultation on the law in England and Wales, the EHRC stated that its 'firm legal view' was that reform to the GRA would not impact single- and separate-sex provision under the EA.³⁶² This position was reaffirmed in 2020 when the EHRC stated that there was 'no reason' why simplifying the GRA process would affect these spaces and services.³⁶³ The EHRC supported

³⁵⁷ Equality and Human Rights Commission, 'Response to the Reform of the Gender Recognition Act' (EHRC October 2018)

<<https://www.equalityhumanrights.com/sites/default/files/consultation-response-gender-recognition-act-18-october-2018.pdf>>accessed 13 August 2022.

³⁵⁸ Equality and Human Rights Commission, 'Response to the Review of the Gender Recognition Act 2004 Consultation' (EHRC March 2018)

<https://www.equalityhumanrights.com/sites/default/files/gender_recognition_act.pdf>accessed 10 August 2022.

³⁵⁹ *ibid.*

³⁶⁰ *ibid.*

³⁶¹ *ibid.*

³⁶² Rebecca Hilsenrath, 'Our response to the Gender Recognition Act consultation' (EHRC October 2018) <<https://www.equalityhumanrights.com/en/our-work/blogs/our-response-gender-recognition-act-consultation>>accessed 10 August 2022.

³⁶³ *ibid.*

‘de-medicalising the process for obtaining a GRC,’³⁶⁴ arguing that legal sex recognition should not ‘perpetuate the false assumption that being trans is a mental illness and should therefore not rely on any medical diagnosis or intervention’.³⁶⁵ A briefing note in 2021 from the EHRC also called for the GRA process to be ‘simplified’ and ‘de-medicalised’ to ‘better support trans people to live their lives free from discrimination’.³⁶⁶

While the UK Government dropped plans to reform the GRA in England and Wales, the Scottish Government has proposed a draft Gender Recognition (Reform) Bill, which would institute a self-declaration model of legal sex recognition in Scotland.³⁶⁷ In contrast to their previous position on reform, in January 2022 the EHRC wrote to the Scottish Government asking it to pause plans to move towards self-declaration.³⁶⁸ They noted the increased concerns about the:

[P]otential consequences for individuals and society of extending the ability to change legal sex from a small defined group, who have demonstrated their

³⁶⁴ Equality and Human Rights Commission, ‘Response to the Reform of the Gender Recognition Act’ (EHRC October 2018) <<https://www.equalityhumanrights.com/sites/default/files/consultation-response-gender-recognition-act-18-october-2018.pdf>>accessed 13 August 2022.

³⁶⁵ *ibid.*

³⁶⁶ Equality and Human Rights Commission, ‘Strong equality and human rights laws to protect people’ (EHRC 2020) <<https://www.equalityhumanrights.com/en/briefing-2021-scottish-parliament-election/briefing-2021-scottish-parliament-election/strong>>accessed 10 August 2022.

³⁶⁷ Gender Recognition Reform (Scotland) Bill. See generally: Scottish Parliament, ‘Bills and laws: Gender Recognition Reform (Scotland) Bill’ (Scottish Parliament 2022) <<https://www.parliament.scot/bills-and-laws/bills/gender-recognition-reform-scotland-bill>>accessed 20 August 2022.

³⁶⁸ Baroness Kishwer Falkner, *Letter to Shona Robison, Cabinet Secretary for Social Justice, Housing and Local Government* (EHRC 26 January 2022).

commitment and ability to live in their acquired gender, to a wider group who identify as the opposite gender at a given point.³⁶⁹

They noted the potential consequences as related to ‘the collection and use of data, participation and drug testing in competitive sport, measures to address barriers facing women, and practices within the criminal justice system, inter alia’.³⁷⁰ They called for ‘more detailed consideration’ before reform,³⁷¹ but that their position was now that the current system was the ‘correct balanced legal framework that protects everyone’.³⁷²

The EHRC did not provide a substantive legal analysis detailing why their position had changed with regards to GRA reform, which is regrettable as, if it is accepted that self-identification is an example of best practice in international human rights standards,³⁷³ then the decision to recommend pausing reform arguably warrants a detailed empirical and/or doctrinal basis.³⁷⁴ It is also regrettable because some issues cited have no clear relationship to legal sex recognition. In addition to single- and separate-sex services (as above), a GRC has no impact on the extent to which a trans person can be excluded from sports participation. Under section 195 EA, a person with the protected characteristic of gender reassignment can be excluded from a ‘gender-affected activity’,³⁷⁵ where it is necessary to ensure fair competition or the safety of

³⁶⁹ *ibid.*

³⁷⁰ *ibid.*

³⁷¹ *ibid.*

³⁷² *ibid.*

³⁷³ Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018).

³⁷⁴ This is understood as a human rights approach, see comments from Victor Madrigal-Borloz (IE SOGI): Equalities, Human Rights and Civil Justice Committee, ‘Meeting Tuesday 21 June’ (Scottish Parliament 2022) <<https://www.scottishparliament.tv/meeting/equalities-human-rights-and-civil-justice-committee-june-21-2022>>accessed 20 August 2022.

³⁷⁵ Equality Act 2010, s 195.

competitors.³⁷⁶ While the exclusion of trans people from sports activities is subject to criticism,³⁷⁷ this is a position already provided for by law, irrespective of GRC status.³⁷⁸

Other areas cited by the EHRC are more nuanced, such as data collection, where two cases recently heard in England and Wales,³⁷⁹ and Scotland³⁸⁰ on the Census appeared to come to different conclusions. Both Governments had initially provided guidance to respondents to the census which indicated that they could answer the ‘What is your sex?’ question with reference to documentation other than the birth certificate or a GRC. In England and Wales, permission was granted by Mr Justice Swift for a full judicial review of the guidance after finding that the claimant - Fair Play for Women – had a strongly arguable case that the guidance should be changed to direct respondents to answer this question with reference to their birth certificate or GRC.³⁸¹ The guidance was changed before a full judicial review hearing to guide respondents to record the sex on their birth certificate or GRC. Meanwhile, in Scotland, the guidance which provided that respondents could answer their sex differently to what was recorded on their birth certificate or GRC, was held to be lawful.³⁸² These cases prompt questions surrounding data collection, including the purpose and function of a binary sex question in data collection methods; the active role that the

³⁷⁶ Equality Act 2010, s 195.

³⁷⁷ Erik Denison, Nadia Bevan and Ruth Jeanes, ‘Reviewing evidence of LGBTQ+ discrimination and exclusion in sport’ (2021) 24(3) Sport Management Review 389-409.

³⁷⁸ Various sports bodies already restrict trans participation, e.g. Tennis (ITF, 2018), Athletics (World Athletics 2019), Cycling (UCI, 2020), Ice Hockey (IHF, 2018), Swimming (FINA 2022), Rugby (World Rugby 2020).

³⁷⁹ *R (Fair Play for Women) v UK Statistics Authority and the Minister for the Cabinet Office* [2021] EWHC 940 (Admin).

³⁸⁰ *Fair Play for Women v National Records of Scotland* [2022] CSOH 20.

³⁸¹ *R (Fair Play for Women) v UK Statistics Authority and the Minister for the Cabinet Office* [2021] EWHC 940 (Admin) [6] (Swift J).

³⁸² *Fair Play for Women v National Records of Scotland* [2022] CSOH 20.

quantitative researcher plays in delimitating acceptable response categories and therefore producing knowledge;³⁸³ as well as how quantitative researchers should balance the need to formulate clear and unambiguous questions in a way which does not negatively impact on response rates of trans populations.³⁸⁴ Research by Ipsos Mori and ScotGen, which tested the possibility of a non-binary sex question in the census among 15, 579 participants, found that there were no significant differences in response rate or invalidation/tampering.³⁸⁵ The vast majority (99%) of a smaller subset of respondents (1530) reported that the question was not confusing.³⁸⁶ While a non-binary sex question is slightly different to the issue at hand in these cases, it does indicate that most people will answer the question on sex without issue, even if the question contains a non-binary option and, presumably, even if the guidance allows for trans people to answer according to their gender identity. Guyan argues that the decision to frame a sex question in a binary way, linked to the birth certificate, represents a broader tension within quantitative data collection.³⁸⁷ This tension indicates that more needs to be done on critically reflecting on whether the categories we use are collecting the data we want, and how to think flexibly where we know limited response options are problematic for certain populations and may affect their response rate.³⁸⁸ This does not mean that we cannot collect data on sex (including

³⁸³ See generally: Geoffrey C Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (MIT Press 2000).

³⁸⁴ Kevin Guyan, *Queer Data: Using Gender, Sex and Sexuality Data for Action* (Bloomsbury 2022).

³⁸⁵ National Records of Scotland, *Scotland's Census 2021 Sex and Gender Identity Topic Report* (NRS 2021) 45.

³⁸⁶ National Records of Scotland, *Scotland's Census 2021 Sex and Gender Identity Topic Report* (NRS 2021).

³⁸⁷ Kevin Guyan, 'Constructing a queer population? Asking about sexual orientation in Scotland's 2022 census' (2022) 31(6) *Journal of Gender Studies* 782-792.

³⁸⁸ *ibid.*

biological sex³⁸⁹) where necessary, but it does require us to consider why and how we are attempting to gather information on sex. Consequently, while the 2021 England and Wales census appears to have a direct relevance to legal sex status, this is an area which nevertheless requires further research and development on account of an increasing trans and non-binary population irrespective of whether those trans people have a GRC or not.

A broader issue with the EHRC's latest position is arguably the rhetoric engaged, such that self-identification may allow 'a wider group who identify as the opposite gender at a given point'³⁹⁰ to access recognition. This is problematic because it fails to outline exactly what the negative consequences of this may be, including whether their concerns are related to potential exploitation by cis men and/or trans people themselves. As mentioned above, there is little empirical evidence to suggest that a system of self-identification may have a direct relationship with harm or violence against others. However, it also arguably risks perpetuating the narrative that trans identities are less sincere or stable than cis identities, without recognising that many people who come to change their legal sex status have often contemplated their identity for many years. There is also the wider question of the extent to which reform to further the rights of a marginalised group should be restricted because of the

³⁸⁹ Aidan O'Neill QC was commissioned by Woman's Place UK for his legal advice on this issue and his conclusion was that 'mandatory questions relative to 'what was your sex at birth' will not constitute an unlawful intrusion into an individual's right to respect for private life...if the information is required by a public authority or a private body exercising public law functions in accordance with law, and the information is properly necessary for the achievement of a legitimate aim'. See Woman's Place UK, 'EHRC misrepresents the law on collecting sex data (WPUK 2020) <<https://womansplaceuk.org/2020/12/11/ehrc-misrepresents-the-law-on-collecting-sex-data/>>accessed 10 August 2022.

³⁹⁰ Baroness Kishwer Falkner, *Letter to Shona Robison, Cabinet Secretary for Social Justice, Housing and Local Government* (EHRC 26 January 2022).

potential actions of another, unrelated group. Arguably, even if a risk to another group were identified through empirical evidence, it would be preferable to identify mitigation strategies to reduce this harm, before still proceeding with efforts to introduce that reform.

Legal sex recognition reform is not the only issue related to trans rights in which the EHRC's position has generated controversy. Following the appointment of new chairwoman Baroness Falkner, the EHRC has been criticised for intervening in the appeal for Maya Forstater, an employee who did not have her employment contract renewed after posting gender-critical views online. The position of the EHRC in this case was that the judge in the initial hearing had erred in finding that her beliefs were not worthy of protection and that in fact her beliefs should be protected according to equality law.³⁹¹ Baroness Falkner has since spoken several times on gender-critical feminism, including her view that it is 'entirely reasonable' for people to hold and express gender-critical beliefs, and that people are able to 'believe that people who self-identify as a different sex are not the different sex that they self-identify'.³⁹² She has argued that women 'must be heard'³⁹³ on issues related to trans rights as some women express 'genuine concerns about what changes mean for the legal protections

³⁹¹ Equality and Human Rights Commission, 'Submissions on Behalf of the Commission for Equality and Human Rights in *Maya Forstater v CGD* Appeal No. UKEAT/0081/20/JOJ' (EHRC June 2021) <<https://hiyamaya.files.wordpress.com/2021/04/forstater-submissions-ehrc-final-amended.pdf>>accessed 13 August 2022.

³⁹² Oliver Wright, 'Women must be heard on transgender identity, says new equalities chief' (The Times 2021) <<https://www.thetimes.co.uk/article/women-must-be-heard-on-transgender-identity-says-new-equalities-chief-kqttljxmd>>accessed 13 August 2022.

³⁹³ *ibid.*

for their rights'.³⁹⁴ In January 2022, the EHRC also controversially recommended that the UK Government's proposed ban on conversion therapy in England and Wales – therapy aimed at changing someone's identity – not to include trans people.³⁹⁵ LGBTQ+ groups have criticised the EHRC on its new positions in relation to trans rights,³⁹⁶ and in February 2022, a coalition of LGBTQ+ charities wrote to the United Nations and the Global Alliance of National Human Rights Institutions (GANRHI) calling for a Special Review of the 'A' status afforded to the EHRC as Great Britain's National Human Rights Institution.³⁹⁷ The Government has faced accusations that its appointments of a new EHRC Chair and board members in 2020 were 'politically motivated'³⁹⁸ to forward the Government's interests and agenda.³⁹⁹ Jolyon Maugham, from the Good Law Project, said the EHRC is 'subject to a level of oversight and micro-management from the department which is just not consistent with being a UN Human

³⁹⁴ Baroness Kishwer Falkner, 'The freedom to hold a belief is something we all need to protect' (EHRC 2021) <<https://www.equalityhumanrights.com/en/our-work/blogs/freedom-hold-belief-something-we-all-need-protect>>accessed 13 August 2022.

³⁹⁵ Equality and Human Rights Commission, 'Response submitted to UK Government on banning conversion therapy' (EHRC January 2022) <<https://www.equalityhumanrights.com/sites/default/files/consultation-response-banning-conversion-therapy-26-january-2022.docx>>accessed 13 August 2022.

³⁹⁶ Consortium, 'EHRC Open letter' (Consortium 2022) <<https://www.consortium.lgbt/ehrc-open-letter/>>accessed 13 August 2022.

³⁹⁷ Stonewall Staff, 'Major LGBTQ+ organisations spark international review of the EHRC' (Stonewall 2022) <<https://www.stonewall.org.uk/about-us/news/major-lgbtq-organisations-spark-international-review-ehrc>>accessed 13 August 2022. See also Libby Brooks, 'LGBT+ groups call for EHRC to lose international status over trans stance' (The Guardian 2022) <<https://www.theguardian.com/society/2022/feb/11/lgbt-groups-call-for-anti-trans-ehrc-to-lose-international-status>>accessed 13 August 2022.

³⁹⁸ Josh Parry, 'Rights watchdog "should lose status" over trans row' (BBC News 2022) <<https://www.bbc.co.uk/news/education-60331962>>accessed 13 August 2022.

³⁹⁹ Haroon Siddique, 'EHRC undermined by pressure to support No 10 agenda, says ex-chair' (The Guardian 2021) <<https://www.theguardian.com/society/2021/jan/18/ehrc-undermined-pressure-support-no-10-agenda-david-isaac>>accessed 13 August 2022.

Rights Institution'.⁴⁰⁰ Meanwhile, the EHRC and Government have defended themselves, stating that appointments were made through a transparent process and that while the EHRC is funded by the Government Equalities Office, it operates independently of ministerial control.⁴⁰¹

The controversy surrounding the EHRC's position regarding trans rights is important to contextualise the evolving discourse on GRA reform. However, it is also relevant to this discussion on women's rights, as the position of the EHRC has contributed to the considerable anxiety surrounding GRA reform. By failing to properly substantiate their concerns, the EHRC has arguably placed trans and non-binary people in a position of uncertainty, where potentially fundamental rights may have been paused for an unspecified period of time. It may be several years before enough cases are brought before a sufficiently senior court on a sufficiently relevant point of law, and settled without further appeals pending, and/or until policymakers consider there to be a need for Parliament to legislate, to provide the clarity apparently sought by the EHRC. In light of the Government's recent statement that they have no plans to substantively reform references to sex and gender, it is unlikely that this would happen in the near future.

2.4.4 Summary

Gender-critical concerns related to GRA reform were particularly influential in the recent public consultation process in England and Wales. However, many of these concerns are more properly categorised as criticisms of the 2004 Act and the ability of

⁴⁰⁰ Josh Parry, 'Rights watchdog "should lose status" over trans row' (BBC News 2022) <<https://www.bbc.co.uk/news/education-60331962>> accessed 13 August 2022.

⁴⁰¹ *ibid.*

any person to be able to change their legal sex (which is already permitted); the operation of the EA (specifically the protected characteristic of gender reassignment); and/or more general ideological contentions surrounding language of sex and gender.

It is the application of the gender reassignment characteristic which appears most relevant for analyses related to the EA and single- and separate-sex services. Irrespective of how many people hold a GRC, sports bodies, service providers, quantitative researchers and many others, are already having to negotiate and balance interests of multiple stakeholders and diverse populations. The current provisions of the EA seek to achieve a balance between various rights-holders, and while such a balance can never be perfect, it does provide for general prohibition against discrimination (between the sexes, and between cisgender and transgender people). However, it also affords service providers the discretion to provide single- and separate-sex services which may (or may not) also exclude trans people, subject to objective justification. Consequently, it is highly unlikely that self-identification would have a substantive impact on the rights of cis women in relation to the high-profile issue of provision of single- and separate-sex services. For the purposes of this thesis, I will presume the continued operation of these provisions within law throughout my thesis. It is also worth noting that this discussion is in the context of self-identification so the impact of other reform options (e.g. non-binary recognition and decertification) on these existing laws is less clear. It does not mean that these reform options would prevent the continued operation of the effect of these legal provisions, but potentially greater attention would be needed to revise and clarify the law in certain areas. I will address these issues in the relevant chapters. I will now turn to outline the original contribution that this thesis makes to three key areas of existing literature.

2.5 Originality and contribution to scholarship

There is a significant body of scholarship which is relevant to this thesis because it addresses multiple individual requirements of the GRA, and several different macro-reform options. I have therefore identified three main themes of existing literature where I envisage my thesis providing the most direct and original contribution. The scholarship making up these themes are primarily related to legal sex recognition in England and Wales, but there is potential for broader applications of the thesis to other disciplines and jurisdictions.

The first applicable theme of scholarship is the evaluation and critique of the GRA 2004. My scholarship contributes to the already existing critiques of the GRA but adopts a focus on how non-binary people experience this Act. The second applicable theme is scholarship related to non-binary legal recognition and decertification. In this section I identify a tension in calls for reform between non-binary recognition and decertification. My thesis contributes an empirical account of non-binary people's attitudes to these different options and balances the relevant merits of these options in light of that information. The third applicable theme relates to scholarship on legal sex recognition which adopts a European human rights law dimension. While my thesis is primarily concerned with the domestic legal framework in England and Wales, my analysis in chapter 8 draws on sources of European human rights law and engages with human dignity which is a substantive legal right and value across European constitutionalism. Consequently, this thesis will contribute to the field by proposing a dignity-based framework for conceptualising non-binary rights claims in European human rights law.

2.5.1 Criticism and evaluation of the GRA: A non-binary focus

The first area of scholarship which this thesis provides a contribution to concerns the evaluation and critique of the GRA and its current requirements. In this section, I do not substantively engage with all of the debates within scholarship on specific requirements, as much of this is better saved for discussion in latter relevant chapters. The purpose of this section is to map the most notable aspects of scholarship within this theme at a high level of generality. This section forwards my contribution to this area as a distinctly non-binary focus with regards to critiques of the GRA and its current requirements.

One of the most striking aspects of the GRA when it was introduced was that it did not require applicants to undertake physical treatments in order to access recognition,⁴⁰² which was a ‘great leap forward’ for trans rights at the time of its introduction.⁴⁰³ The lack of physical requirements, and the GRA more generally, indicated a potentially significant change insofar as gender identity was now a relevant factor to the legal status of sex, where this status had previously been based on sex assigned at birth.⁴⁰⁴ This was described as representing a shift from ‘biology to sociology or psychology’⁴⁰⁵ and that the ‘body of the person [...] [was] deemed beyond the sphere of public

⁴⁰² Ralph Sandland, ‘Feminism and the Gender Recognition Act 2004’ (2005) 13 *Feminist Legal Studies* 43–66, 51; Alex Sharpe, ‘Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category’ (2007) 15 *Feminist Legal Studies* 57 – 84, 58; Sharon Cowan, ‘“Gender is no substitute for sex”: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity’ (2005) 13 *Feminist Legal Studies* 67 – 96, 76.

⁴⁰³ Alex Sharpe, ‘Gender Recognition in the UK: A Great Leap Forward’ (2009) 18 *Social & Legal Studies* 241 – 245.

⁴⁰⁴ *Corbett v Corbett* [1971] P 83, [1970] 2 All ER 33.

⁴⁰⁵ Ralph Sandland, ‘Feminism and the Gender Recognition Act 2004’ (2005) 13 *Feminist Legal Studies* 43–66, 47.

regulation'.⁴⁰⁶ However, Sharpe problematised this reading of the Act, arguing that while the Act affords primacy to gender identity in principle, the law reserves the power to 'retract its amnesty and to remember the biological "truth" about sex'.⁴⁰⁷ Sharpe describes the 'gender-history' provision under section 12 Matrimonial Causes Act as amended by the GRA as the 'most revealing aspect of the legislation' in this sense.⁴⁰⁸ Section 12(h) provides for grounds of annulment of a marriage where one person's 'gender at the time of the marriage had become the acquired gender under the [GRA]'.⁴⁰⁹ Paragraph 42 of the Explanatory Notes to the GRA states that this allows one party to seek annulment of the marriage if, at the time of marriage, they 'did not know the other was previously of another gender'.⁴¹⁰ Consequently, through rendering non-disclosure of gender history as grounds for annulment, we are said to witness the 'return of sex' in the GRA.⁴¹¹ Issues related to marriage have been particularly prominent in analyses of the GRA, primarily because these were the earliest and most obvious areas where the law retained an interest in the sex assigned at birth of a person in receipt of a GRC. While early scholarly criticism towards the need for applicants to end their marriage before receiving a GRC is less relevant since the equalising of laws related to marriage, the spousal consent has attracted similar controversy. Despite not requiring divorce or annulment, nor marriage being limited to

⁴⁰⁶ Ralph Sandland, 'Feminism and the Gender Recognition Act 2004' (2005) 13 *Feminist Legal Studies* 43–66, 52.

⁴⁰⁷ Alex Sharpe, 'Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category' (2007) 15 *Feminist Legal Studies* 57 – 84, 80 – 81.

⁴⁰⁸ *ibid* 74. See also Alex Sharpe, 'Transgender Marriage and the Legal Obligation to Disclose Gender History' (2012) 75(1) *Modern Law Review* 33–53.

⁴⁰⁹ Matrimonial Causes Act 1973, s12(h).

⁴¹⁰ Explanatory Notes to the Gender Recognition Act 2004, para 42. A similar provision for the purposes of civil partnership is also provided for under Civil Partnership Act 2004, s 50(e).

⁴¹¹ Alex Sharpe, 'Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category' (2007) 15 *Feminist Legal Studies* 57 – 84, 82.

persons of the opposite sex anymore, the spousal consent requirement arguably legitimises and propounds anxiety towards finding oneself married to a person of the same sex.⁴¹² In this sense, the continued relevance of sex within the GRA arguably represents a ‘lingering homophobia’ within the law.⁴¹³ However, the continued relevance of sex to legal status extends far beyond marriage and civil partnership. The Act contains a notable exception to the general effect of a GRC being that ‘the person’s gender becomes for all purposes the acquired gender’.⁴¹⁴ While the wording of ‘for all purposes’ is broad, the law is nevertheless able to limit this considerably by subjecting it to any provision ‘made by this Act or any other enactment or any subordinate legislation’.⁴¹⁵ The operation of other provisions, enabled through section 9(3), have been criticised for undermining the lived experiences of trans people’s identities which in turn prevents them from participating in public life according to their gender identity.⁴¹⁶ This includes exceptions provided within the original Act (e.g. s 19⁴¹⁷ sports exemptions (now repealed⁴¹⁸)) and those outside of the Act (e.g. Equality Act 2010⁴¹⁹). Nevertheless, the discussion in chapter 2.2 highlighted areas of legitimate interest for

⁴¹² Flora Renz, ‘Consenting to gender? Trans spouses after same-sex marriage’ in Daniel Monk and Nicola Barker (eds), *From Civil Partnership to Same Sex Marriage 2004 – 2014: Interdisciplinary Reflections* (Routledge 2015) 8.

⁴¹³ *ibid* 2. See also Peter Dunne, ‘(Trans) Marriage Equality? Challenging Europe’s marital “Dissolution Requirements”’ (2016) 28(4) *Child and Family Law Quarterly* 325 – 348; Peter Dunne, ‘Marriage Dissolution as a pre-requisite for legal gender recognition’ (2014) 73(3) *Cambridge Law Journal* 506 – 510.

⁴¹⁴ Gender Recognition Act 2004, s 9(1).

⁴¹⁵ *ibid* s 9(3).

⁴¹⁶ Peter Dunne, ‘(Trans)Forming Single-Gender Services and Communal Accommodations’ (2017) 26(5) *Social and Legal Studies* 537 – 561, 540.

⁴¹⁷ David McArdle, ‘Swallows and Amazons, or the Sporting Exception to the Gender Recognition Act’ (2008) 17(1) *Social and Legal Studies* 39 – 57; Peter Charlish, ‘Gender Recognition Act 2004: transsexuals in sport: a level playing field?’ (2005) 5(2) *International sports law review* 38-42.

⁴¹⁸ Equality Act 2010, sch 27, pt 1.

⁴¹⁹ Peter Dunne, ‘(Trans)Forming Single-Gender Services and Communal Accommodations’ (2017) 26(5) *Social and Legal Studies* 537 – 561.

the State in recognising sex, and in chapter 2.3 it was noted that a context-specific approach to interpreting this status may also be beneficial. As such, the law's interest in sex per se is not necessarily negative. Moreover, it is also important to interrogate the presumption that replacing sex with gender identity is unproblematic. As Cowan has argued, the replacement of sex with gender identity is ultimately limited if a binary structure of sex is merely replaced with a similarly permanent, binary, and medicalised understanding of gender identity, as under the GRA.⁴²⁰ The Act has therefore been criticised as exclusionary for those trans people that did not, or could not, assimilate to that narrative of gender identity.

Several requirements of the GRA contribute to this problematic narrative of gender identity under the Act, often in overlapping and intersecting ways. Grabham identifies the permanence of (binary) gender identification through the insistence of a life-long commitment to the acquired gender through the statutory declaration and proof requirements,⁴²¹ with no provision for those who express fluid, non-binary gender identities, nor those who 'detransition'.⁴²² Meanwhile other scholars have argued that a medicalised understanding of trans identity is reproduced through various aspects of the Act. This has included a 'real-life' test (often used in assessing eligibility for surgery) through the proof requirement,⁴²³ the relevance of surgery to the Gender

⁴²⁰ Sharon Cowan, "'Gender is no substitute for sex": A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 *Feminist Legal Studies* 67 – 96, 85, 77.

⁴²¹ Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107 - 126.

⁴²² Detransition refers to when a person who once identified as transgender no longer does.

⁴²³ Ralph Sandland, 'Feminism and the Gender Recognition Act 2004' (2005) 13 *Feminist Legal Studies* 43 - 66, n 79.

Recognition Panel's determination,⁴²⁴ and the gender dysphoria diagnosis which is arguably the most contentious aspect of the entire Act. The diagnosis requirement has been described by Davy and others as pathologising,⁴²⁵ with Scherpe and Dunne identifying it as a 'key frontier' for trans rights because it links trans identity with mental illness,⁴²⁶ and medicalises trans identities to the extent that gender variance is viewed as 'something wrong or something to be corrected'.⁴²⁷ Medicalisation exists in more subtle ways within the Act too, including the medical reports which must outline which medical treatments the applicant has had (or not had).⁴²⁸ There is therefore, according to Sharpe, still a presumption that the 'proper end of the transsexual journey' is surgery⁴²⁹ even if it is not a formal requirement.⁴³⁰

Contributions on the GRA have acknowledged the position of non-binary people often in relation to their lack of legal recognition, though there has been comparatively less

⁴²⁴ Alex Sharpe, 'A Critique of the Gender Recognition Act 2004' (2007) 4 *Bioethical Inquiry* 33 – 42.

⁴²⁵ Zowie Davy, Anniken Sørli and Amets Suess Schwend, 'Democratising diagnoses? The Role of the Depathologisation Perspective in Constructing Corporeal Trans Citizenship' (2018) 38 *Critical Social Policy* 13 – 34, 16, 21.

⁴²⁶ Jens Scherpe and Peter Dunne, 'Comparative Analysis and Recommendations' in Jens Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2017) 652.

⁴²⁷ World Professional Organisation for Transgender Health (WPATH), *WPATH Statement Concerning Cross-dressing, Gender-Nonconformity, and Gender Dysphoria* (15 July 2014). See also Zowie Davy, Anniken Sørli and Amets Suess Schwend, 'Democratising diagnoses? The Role of the Depathologisation Perspective in Constructing Corporeal Trans Citizenship' (2018) 38 *Critical Social Policy* 13 - 34 and Jens T Theilen, 'Depathologisation of Transgenderism and International Human Rights Law' (2014) 14 *Human Rights Law Review* 327 – 342.

⁴²⁸ HHJ Michael Harris, 'President's Guidance No.1: Evidential requirements for applications under section 1(1)(a) of the Gender Recognition Act 2004' (Gov. UK 2005)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961491/t492-presidents-guide.pdf>accessed 10 March 2022.

⁴²⁹ Alex Sharpe, 'A Critique of the Gender Recognition Act 2004' (2007) 4 *Bioethical Inquiry* 33-42, 39.

⁴³⁰ *ibid.*

consideration of the impact of the current requirements, and potential reform of these, from a non-binary centred perspective. If we look beyond legal studies, we can see that similarities and differences between binary and non-binary groups have been observed in other contexts such as healthcare.⁴³¹ This prompts the question of whether such similarities and differences may also be relevant to the legal scholarship on GRA reform. This is important because, despite there not yet being non-binary recognition available, non-binary people may still use a preferred binary marker and seek recognition of that marker via the GRA. Therefore, even if non-binary recognition were rejected by the Government at an early stage of a reform process (such as the 2018 process in England and Wales), it is strategically useful for scholars and activists to be prepared with information on which other areas of the Act should be prioritised for reform for non-binary populations.

Following the identification of problems with current requirements of the GRA, many scholars have advocated for the introduction of a self-identification model which allows people to change their legal sex status (often via a statutory declaration) without additional medical requirements.⁴³² Self-identification allows an individual to access legal sex recognition with relative ease, as applicants do not have to provide additional evidence or reports from external parties. They are often contrasted with medical models of sex recognition such as the GRA.⁴³³ Self-identification models do not require

⁴³¹ Asia Burgwal and others, 'Health disparities between binary and non-binary trans people: A community driven survey' (2019) 20(2-3) *International Journal of Transgenderism* 218 – 229.

⁴³² Directorate-General for Justice and Consumers, *Legal gender recognition in the EU: The journeys of trans people* (European Commission 2020) 110.

⁴³³ This distinction can be seen in Isabel C Jaramillo and Laura Carlson (eds), *Trans Rights and Wrongs: A Comparative Study of Legal Reform Concerning Trans Persons* (Springer 2021) where chapters on hard and soft medicalisation models are contrasted with self-identification.

applicants to access pathologising medical diagnoses which frame gender diversity as disordered⁴³⁴ and therefore present an individual with greater control over their formal identity.⁴³⁵ They have been described as a model of ‘best practice’⁴³⁶ and ‘optimal’⁴³⁷ for the protection of trans rights. Removing a diagnosis requirement from legal recognition would also not mean that the diagnosis could not continue to be used for medical purposes.⁴³⁸ As medical and legal transitioning serves substantively different purposes and consequences, these routes should arguably rely on different evidentiary criteria.⁴³⁹ While it could be argued that a diagnosis may be useful for medical practitioners in assessing eligibility for potentially invasive medical procedures with long-term consequences, this standard is unnecessary for legal sex recognition.

On the other hand, the strict distinction between legal and medical transitioning may also be problematic,⁴⁴⁰ in that it legitimises the power of medical professionals to gatekeep treatment,⁴⁴¹ and presumes the necessity and utility of a diagnosis model

⁴³⁴ Jens Scherpe and Peter Dunne, ‘Comparative Analysis and Recommendations’ in Jens Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2017) 623.

⁴³⁵ Valeria Venditti, ‘Gender kaleidoscope: Diffracting legal approaches to reform gender binary’ (2020) 1 *International Journal of Gender, Sexuality and Law* 56 – 75, 61.

⁴³⁶ Amnesty International, *The State Decides who I am: Lack of Recognition for Transgender People* (Amnesty International 2014) 90–91.

⁴³⁷ Peter Dunne, ‘Ten years of gender recognition in the United Kingdom: still a “model for reform”?’ (2015) *Public Law* 530 – 539; Jessica Clarke, ‘Identity and Form’ (2015) 103(4) *California Law Review* 747 – 840, 837.

⁴³⁸ This has been cited as an important consideration in the scholarship because of potential implications for access to public or reimbursed healthcare.

⁴³⁹ Jens Scherpe and Peter Dunne, ‘Comparative Analysis and Recommendations’ in Jens Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2017) 4.5.1.3.

⁴⁴⁰ Chris Dietz, ‘Governing Legal Embodiment: On the Limits of Self-Declaration’ (2018) 26(2) *Feminist Legal Studies* 185-204, 193.

⁴⁴¹ Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Policy Press 2021) 162 – 166.

within healthcare too as opposed to an informed consent model.⁴⁴² Dietz cautions against the overreliance on a strict distinction of legal transition from medical transition in policy and reform discourse. In Denmark, Dietz has argued that this has resulted in positive reform for self-identification on legal sex status but ultimately inadequate policy and legislative attention towards trans healthcare.⁴⁴³ This puts a de-facto limit on the accessibility and timeliness of the legal recognition process, as many trans people wish to begin medical transitioning before obtaining legal recognition.⁴⁴⁴ If they cannot access healthcare for several years or without incurring considerable costs, then legal recognition remains largely inaccessible.⁴⁴⁵ It is outside the scope of this thesis to address issues of trans healthcare, though for the purposes of this thesis, it is important for policymakers, scholars and activists not to overestimate the impact of legal sex reform on the lives of trans people without considering other areas of need such as healthcare.

Another area of interest within the existing scholarship, which this thesis intends to contribute to, is an account of what various reform recommendations might look like in practice. Much of the existing literature which advocates for self-identification fails to also account for existing requirements often retained as part of a self-identification model. For example, while in Ireland self-identification has been introduced, the statutory declaration retains a permanent, rigid and binary understanding of gender

⁴⁴² Judith Butler, 'Undiagnosing gender' in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 288; Zowie Davy, Anniken Sørli and Amets Suess Schwend, 'Democratising diagnoses? The role of the depathologisation perspective in constructing corporeal trans citizenship' (2018) 38(1) *Critical Social Policy* 13 – 34.

⁴⁴³ Chris Dietz, 'Governing Legal Embodiment: On the Limits of Self-Declaration' (2018) 26(2) *Feminist Legal Studies* 185-204.

⁴⁴⁴ *ibid* 195.

⁴⁴⁵ *ibid*.

identity such that applicants must declare that they ‘have a settled and solemn intention to live in the preferred gender of male/female for the rest of [their] life’.⁴⁴⁶ Many other jurisdictions employing self-identification also retain statutory declarations and/or have administrative bodies which process applications.⁴⁴⁷ Therefore, even if self-identification were proposed in England and Wales, if it retained certain aspects (e.g. the current wording of the statutory declaration) it is possible that such a system would remain inaccessible for many non-binary (and probably also binary) trans people. This study therefore proposes reform based on limiting the exclusionary effect of the process on non-binary populations which involves a more detailed assessment of reform to each individual requirement.

2.5.2 Non-binary recognition and decertification

The binary structure of legal sex under the GRA has been criticised in the scholarship since its inception. Sharpe described the Act as demonstrating a ‘reluctance to contemplate gender in non-binary ways’,⁴⁴⁸ while Cowan notes that the GRA rests on the presumption that there are ‘only two sexes and two genders, even if we are never absolutely clear as to how that distinction is to be made’.⁴⁴⁹ Soon after 2004, a third sex option was described as ‘inconceivable’ within law,⁴⁵⁰ though Sharpe argued that the binary structure of the 2004 Act would have to be addressed in future reform to

⁴⁴⁶ Social Welfare Services, *Application form for Gender Recognition Certificate GRC1* (Government of Ireland 2022).

⁴⁴⁷ Directorate-General for Justice and Consumers, *Legal gender recognition in the EU: The journeys of trans people* (European Commission 2020).

⁴⁴⁸ ‘A Critique of the Gender Recognition Act 2004’ (2007) 4 *Bioethical Inquiry* 33 – 42, 39.

⁴⁴⁹ Sharon Cowan, ‘“Gender is no substitute for sex”: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity’ (2005) 13 *Feminist Legal Studies* 67 – 96, 92.

⁴⁵⁰ Alex Sharpe, ‘A Critique of the Gender Recognition Act 2004’ (2007) 4 *Bioethical Inquiry* 33 – 42, 39.

‘create spaces for the diversity of gender identities’.⁴⁵¹ Meanwhile, Hines has also called for legal recognition to be extended to ‘all trans people’.⁴⁵²

While some scholars have advocated for a third sex option, others have observed that if we accept that a binary structure ‘unreasonably restricts people’s sexual identity into one of two sexes, it becomes hard to deny that restricting people to three identities is open to identical objections’.⁴⁵³ Furthermore, while some argue that a third sex option problematises gender normativity,⁴⁵⁴ others have cautioned how a third option could operate as a catch-all for non-normative sex and gender identities, such that it serves to ‘preserve normative ideals of male/female’.⁴⁵⁵ Instead, there have been invitations to imagine a legal discourse where the ‘continuum of sexual identities’ could be accommodated in law.⁴⁵⁶ To address the problem of ‘[channelling] gender non-conformity away from two pre-existing categories’⁴⁵⁷ to a third option, some have suggested that multiple sex options could ‘encompass a variety of identifications whilst

⁴⁵¹ *ibid* 41.

⁴⁵² Sally Hines, ‘Recognising Diversity? The Gender Recognition Act and Transgender Citizenship’ in Sally Hines and Tam Sangers (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 99 – 101.

⁴⁵³ P L Chau and Jonathan Herring, ‘Defining, Assigning and Designing Sex’ (2002) 16 *International Journal of Law, Policy and the Family* 327 – 367, 356.

⁴⁵⁴ Surya Monro, ‘Beyond Male and Female: Poststructuralism and the Spectrum of Gender’ (2005) 8(1) *International Journal of Transgenderism* 3 - 22, 15.

⁴⁵⁵ Theodore Bennett, ‘No Man’s Land: Non-Binary Sex Identification in Australian Law and Policy’ (2014) 37(3) *University of New South Wales Law Journal* 847-873, 858-859.

⁴⁵⁶ Sharon Cowan, ‘“Gender is no substitute for sex”: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity’ (2005) 13 *Feminist Legal Studies* 67 – 96, 93.

⁴⁵⁷ Flora Renz, ‘Genders that don’t matter: Non-binary people and the Gender Recognition Act’ in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021) 160.

retaining the specificity to both validate and differentiate' diverse gendered identities.⁴⁵⁸

Non-binary recognition options, including third and multiple sex options, pose difficulties though. Such proposals raise questions as to how many identities should be recognised, whether intersex people would be forced to identify with a non-normative category,⁴⁵⁹ and how people who express a gender fluid or agender identity would be accommodated within such a system.⁴⁶⁰ Arguably, though, one of the most prominent critiques of non-binary recognition is that it fails to address underlying problems with the presumed importance attached to legal sex in the first place.⁴⁶¹ This is a critique which has also been raised in relation to self-identification, in that such proposals rely on a politics of formal recognition.⁴⁶² As Wipfler has argued, such proposals 'ultimately reify sex as a natural, necessary, and defining feature of personhood to the detriment of non-binary people, gender nonconforming people, and

⁴⁵⁸ Theodore Bennett, "No Man's Land: Non-Binary Sex Identification in Australian Law and Policy." (2014) 37(3) *University of New South Wales Law Journal* 847-873, 861.

⁴⁵⁹ Fae Garland and Mitchell Travis, 'Queering the Queer/Non-Queer Binary: Problematizing the "I" in LGBTI+ in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021); Morgan Carpenter, 'The Normalization of Intersex Bodies and "Othering" of Intersex Identities in Australia' (2018) 15 *Journal of Bioethical Inquiry* 487 – 495.

⁴⁶⁰ Surya Monro, 'Beyond Male and Female: Poststructuralism and the Spectrum of Gender' (2005) 8(1) *International Journal of Transgenderism* 3-22.

⁴⁶¹ Myra J Hird, 'Gender's Nature: Intersexuality, Transsexualism and the "Sex"/"Gender" Binary' (2000) 1(3) *Feminist Theory* 347 – 364, 358; Flora Renz, 'Genders that don't matter: Non-binary people and the Gender Recognition Act' in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021) 160.

⁴⁶² Sally Hines, 'Recognising Diversity? The Gender Recognition Act and Transgender Citizenship' in Sally Hines and Tam Sangers (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 101 – 102.

all people who seek a less gender-presumptive world'.⁴⁶³ Consequently others have questioned whether 'law needs to distinguish between people on the basis of sex/gender at all'.⁴⁶⁴ Cannoot and Decoster argue that 'only a policy of abolishing mandatory (binary and/or non-binary) sex registration would be truly respectful of the right to gender identity'.⁴⁶⁵

Scholarship on removing sex from the birth certificate, also known as decertification, has become one of the most prominent themes in scholarship on legal sex recognition in England and Wales. Most contributions to the first edition of the *International Journal of Gender, Sexuality and Law* on legal sex recognition explored the notion of moving beyond a system of mandatory sex registration.⁴⁶⁶ Similarly, the *feminists@law* journal published its tenth volume as a Special Issue on the Future of Legal Gender, which

⁴⁶³ Anna James Neuman Wipfler, 'Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents' (2016) 39(2) *Harvard Journal of Law and Gender* 491 – 554, 542.

⁴⁶⁴ Sharon Cowan, "Gender is no substitute for sex": A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 *Feminist Legal Studies* 67 – 96, 93.

⁴⁶⁵ Pieter Cannoot and Mattias Decoster, 'The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary Queer, Feminist, and Human Rights Analysis' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 – 55, 49.

⁴⁶⁶ Valeria Venditti, 'Gender Kaleidoscope: Diffracting legal approaches to reform gender binary' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 56 – 75; Lila Braunschweig, 'Abolishing gender registration: a feminist defence' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 76 – 97; Pieter Cannoot and Mattias Decoster, 'The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary Queer, Feminist, and Human Rights Analysis' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 – 55; Gwyn Easterbrook-Smith, 'Change can never be complete: The legal right to self-identification and incongruous bodies' (2020) 1(1) *International Journal of Gender Sexuality and Law* 134 – 158; Davina Cooper and others, "State Regimes of Gender: Legal Aspects of Gender Identity Registration, Trans- Relevant Policies and Quality of LGBTIQ Lives": A Roundtable Discussion' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 377 - 402.

included five articles and ten commentaries drawing on research from The Future of Legal Gender (2018 – 2022) (FLaG), an ESRC-funded, multi-year interdisciplinary project investigating the ‘decertification of gender, the degendering of law and the possible implications of decertification’.⁴⁶⁷ The FLaG project adopted a prefigurative methodology, starting with decertification as a hypothetical law reform proposal, before exploring its ‘hopes, promises, challenges, and risks’.⁴⁶⁸ The project identified potential benefits of decertification as addressing social inequalities, supporting gender expression, and removing restrictions on people who want their legal sex status to be changed.⁴⁶⁹ The project also explored concerns with decertification, such as the impact of decertification on the provision of single- and separate-sex services, data collection, violence and positive action measures.⁴⁷⁰ Cooper and Renz did not consider such problems as insurmountable though, pointing out that ‘just because states withdraw from determining and assigning gender [on the birth certificate] does not mean they cannot recognise gender determinations by others’.⁴⁷¹ Consequently, while decertification raises complicated questions, it does not mean that the law would not be able to continue to recognise, and accommodate, sex and/or gender identity in

⁴⁶⁷ Davina Cooper and Flora Renz, ‘If the State Decertified Gender, What Might Happen to its Meaning and Value?’ (2016) 43(4) *Journal of Law and Society* 483-505; Davina Cooper and others, ‘The Future of Legal Gender’ (King’s College London 2020) <<https://futureoflegalgender.kcl.ac.uk>> accessed 31 August 2020.

⁴⁶⁸ Davina Cooper and others, *Abolishing legal sex status: The challenge and consequences of gender-related law reform: Final Report* (King’s College London 2022) 42. See generally Davina Cooper, ‘Towards an adventurous institutional politics: The prefigurative ‘as if’ and the reposing of what’s real’ (2020) 68(5) *Sociological Review* 893-916.

⁴⁶⁹ Davina Cooper and others, *Abolishing legal sex status: The challenge and consequences of gender-related law reform: Final Report* (King’s College London 2022) 42.

⁴⁷⁰ *ibid.*

⁴⁷¹ Davina Cooper and Flora Renz, ‘If the State Decertified Gender, What Might Happen to its Meaning and Value?’ (2016) 43(4) *Journal of Law and Society* 483 – 505, 496.

certain instances. These contributions from the Future of Legal Gender project have been particularly useful in taking decertification beyond a largely idealistic reform option by beginning to account for the practical, legal, and social consequences of decertification, including areas requiring additional reform such as the protected characteristics of sex and gender reassignment.⁴⁷²

Cooper and Renz argue that gender is often presumed to be important and binary, which could be perpetuated by the legal sex status on the birth certificate.⁴⁷³ By removing the sex marker from the birth certificate, they argue this could have potentially transformative effects on social perceptions of gender.⁴⁷⁴ This might include challenging the ‘naturalized, taken-for-granted notion of gender as a common-sense binary structure’.⁴⁷⁵ As such, decertification may serve to have a ‘liberating effect’ since the ‘biologisation, ontologization and essentialization of the differences between genders would have no legal basis anymore’.⁴⁷⁶ However, the practical, legal, and

⁴⁷² Flora Renz, ‘The challenge of same-sex provision: how many girls does a girls’ school need?’ (2020) 10(2) *feminists@law* 1 – 29; Flora Renz and Davina Cooper, ‘Reimagining Gender Through Equality Law: What Legal Thoughtways Do Religion and Disability Offer?’ (2021) 30 *Feminist Legal Studies* 129 – 155.

⁴⁷³ Davina Cooper and Flora Renz, ‘If the State Decertified Gender, What Might Happen to its Meaning and Value?’ (2016) 43(4) *Journal of Law and Society* 483 – 505, 487.

⁴⁷⁴ *ibid* 505. See also Lila Braunschweig, ‘Abolishing gender registration: a feminist defence’ (2020) 1(1) *International Journal of Gender, Sexuality and Law* 76 – 97; Pieter Cannoot and Mattias Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary Queer, Feminist, and Human Rights Analysis’ (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 – 55; Flora Renz, ‘Genders that don’t matter: Non-binary people and the Gender Recognition Act’ in Senthorun Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021).

⁴⁷⁵ Davina Cooper and Flora Renz, ‘If the State Decertified Gender, What Might Happen to its Meaning and Value?’ (2016) 43(4) *Journal of Law and Society* 483 – 505, 505.

⁴⁷⁶ Andrea Büchler and Michelle Cottier, ‘Intersexualität, Transsexualität und das Recht’ in Nina Degele and others(eds), *Queering gender - queering society* (Freiburger FrauenStudien Fritz, Freiburg i.Br 2005) 115–140, 131 as translated by

social consequences of decertification remain largely uncertain.⁴⁷⁷ Part of this uncertainty is because the meaning of decertification is variable. It can include ‘soft’⁴⁷⁸ forms of decertification such as reducing the use of sex markers in ID documents⁴⁷⁹ or reducing the prevalence of sex based distinctions in legislation.⁴⁸⁰ Hard forms of decertification might represent a fully degendered legal system, where the State does not recognise sex or gender in any setting including to protect against discrimination.⁴⁸¹ While some scholars appear to refer to hard forms of decertification,⁴⁸² most refer to softer forms where the law may still retain some legitimate interests in sex but remove it from the birth certificate.⁴⁸³ Given the

Lena Holzer, ‘Smashing the Binary? A new era of legal gender registration in the Yogyakarta Principles Plus 10’ (2020) 1 *International Journal of Gender Sexuality and Law* 98 – 133.

⁴⁷⁷ Davina Cooper and Robyn Emerton, ‘Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?’ (2020) 10(2) *feminists@law* 1 – 36, 25 – 26.

⁴⁷⁸ Davina Cooper, ‘Taking public responsibility for gender: When personal identity and institutional feminist politics meet’ (2020) 10(2) *feminists@law* 1 – 32, 1, 4; Davina Cooper and Robyn Emerton, ‘Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?’ (2020) 10(2) *feminists@law* 1 – 36, n 12.

⁴⁷⁹ Anna J Wippler, ‘Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents’ (2016) 39 *Harvard Journal of Law and Gender* 491–554.

⁴⁸⁰ Christopher Williams, ‘The End of the ‘Masculine Rule’? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland’ (2008) 29 *Statute Law Review* 139–153; Donald L Revell and Jessica Vapnek, ‘Gender-Silent Legislative Drafting in a Non-binary World’ (2020) 48 *Capital University Law Review* 103 – 147.

⁴⁸¹ Davina Cooper and Flora Renz, ‘If the State decertified gender, what might happen to its meaning and value?’ (2016) 43(4) *Journal of Law and Society* 483 – 505.

⁴⁸² Andrea Büchler and Michelle Cottier, ‘Intersexualität, Transsexualität und das Recht’ in Nina Degele and others (eds), *Queering gender - queering society* (Freiburger FrauenStudien Fritz, Freiburg i.Br 2005) 115–140, 131 as translated by Lena Holzer, ‘Smashing the Binary? A new era of legal gender registration in the Yogyakarta Principles Plus 10’ (2020) 1 *International Journal of Gender Sexuality and Law* 98 – 133.

⁴⁸³ Other entities have adopted or recommended this approach too, see Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) para 57. Davina Cooper and Robyn

differences between these models, the potential for transformative, legal, practical and social consequences of decertification arguably depend on which model of decertification is adopted. This uncertainty is problematic, as Cooper and others note that without situating decertification within a ‘broader social justice programme’,⁴⁸⁴ it carries the risk of acting as a framework through which the State withdraws from ‘taking responsibility for countering social inequality’.⁴⁸⁵ This links to the broader limitation of the promises of decertification, in that such promises risk overestimating the extent to which law and legal institutions can have a transformative effect on social attitudes towards gender diverse populations.⁴⁸⁶ While the law is a powerful discourse which gives meaning to social and cultural norms,⁴⁸⁷ it arguably cannot equally ‘undo’ those social attitudes and cultural norms. As with the issues noted on trans healthcare, this thesis cannot consider the wider question of how to address social attitudes towards trans people, except to recognise that the law and reform proposals are only one element of this.

An equally important consideration for this project is that decertification, understood in this project as removing sex from the birth certificate, is a proposal which policymakers are unlikely to fully embrace in the short-medium term.⁴⁸⁸ Despite increased scholarly

Emerton, ‘Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?’ (2020) 10(2) *feminists@law* 1 - 36

⁴⁸⁴ Davina Cooper and others, *Abolishing legal sex status: The challenge and consequences of gender-related law reform: Final Report* (King’s College London 2022) 35.

⁴⁸⁵ *ibid.*

⁴⁸⁶ Carol Smart, ‘Law’s Power, the Sexed Body, and Feminist Discourse’ (1990) 17(2) *Journal of Law and Society* 194 – 210, 198 – 200.

⁴⁸⁷ *ibid.*

⁴⁸⁸ Decertification was not considered in GRA public consultation process and the Government have made no mention of decertification even if to reject it as an option: Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018). Though there have been increased efforts to consider

efforts to explore the practical and legal consequences of decertification, it is also generally accepted that the academic contributions to this so far have been based on ‘speculative’⁴⁸⁹ inquiry and on decertification as a ‘not yet proposal’.⁴⁹⁰ Arguably, alternative options for recognition, within a certified system, could be much more likely to gain traction in the GRA reform context in England and Wales. This is not to say that decertification should not be considered as a reform option, but that as a reform-focused project, other options must also be explored. Furthermore, it is worth noting that much of the literature on decertification adopts a critical methodology which draws on themes from post-structuralist thought and queer theory.⁴⁹¹ These disruptive theories and perspectives have been valuable in problematising taken-for-granted legal concepts and regimes. However they arguably afford comparatively little weight to non-binary people’s attitudes towards legal sex recognition and how they value different reform options. They are also predominantly associated with a ‘rejection of civil rights strategies in favour of a politics of carnival, transgression, and parody which leads to deconstruction, decentring, revisionist readings, and an antiassimilationist

de-gendering law in areas, see Government Equalities Office, *Government Response to the Women and Equalities Committee Report on Transgender Equality*, Cm 9301 (Government Equalities Office 2016) 5.

⁴⁸⁹ Davina Cooper and Robyn Emerton, ‘Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?’ (2020) 10(2) *feminists@law* 1 – 36, 1.

⁴⁹⁰ Ambreena Manji, ‘Taking on the State: An African Perspective’ (2020) 10(2) *feminists@law* 1 – 6, 3 – 4.

⁴⁹¹ See generally Lila Braunschweig, ‘Abolishing gender registration: a feminist defence’ (2020) 1(1) *International Journal of Gender, Sexuality and Law* 76 – 97; Pieter Cannoot and Mattias Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary Queer, Feminist, and Human Rights Analysis’ (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 – 55; Flora Renz, ‘Genders that don’t matter: Non-binary people and the Gender Recognition Act’ in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021).

politics'.⁴⁹² The risk with this is that reform suggestions could be inadvertently paternalistic if they are based on academic judgement of what is 'good' for non-binary people, rather than their own preferences based on their lived experience. This is where the need for empirical research on reform with non-binary populations appears most evident, to assess what non-binary people want for themselves and how they assess the merits of respective reform options.

Empirical research with non-binary populations is growing and has been hugely beneficial in offering a greater understanding of non-binary people's experiences in a range of areas of life,⁴⁹³ including legal sex recognition. It has also uncovered differences between binary and non-binary people in various settings including education and healthcare. This has created a deeper understanding of the heterogeneity of the trans community and where different groups may have different (or similar⁴⁹⁴) needs or experiences.⁴⁹⁵ Hines' empirical research soon after the

⁴⁹² Arlene Stein and Ken Plummer, "I can't even think straight" "Queer" Theory and the Missing Sexual Revolution in Sociology' (1994) 12(2) *Sociological Theory* 178 - 187, 182.

⁴⁹³ See generally Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Bristol Policy Press 2021); Jessica Taylor and others, 'An exploration of the lived experiences of non-binary individuals who have presented at a gender identity clinic in the United Kingdom' (2019) 20(2-3) *International Journal of Transgenderism* 195-204; Carrie Paechter, Alex Toft and Anna Carlile, 'Non-binary young people and schools: pedagogical insights from a small-scale interview study' (2021) 29(5) *Pedagogy, Culture & Society* 695 - 713; Chassitty Fiani and Heather Han, 'Navigating identity: Experiences of binary and non-binary transgender and gender non-conforming (TGNC) adults' (2018) 20(2-3) *International Journal of Transgenderism* 181 - 194; Bethany A Jones and others, 'Mental health and quality of life in non-binary transgender adults: a case control study' (2019) 20(2-3) *International Journal of Transgenderism* 251-262.

⁴⁹⁴ Norman Anderssen and others, 'Life satisfaction and mental health among transgender students in Norway' (2020) 20 *BMC Public Health* 138.

⁴⁹⁵ In the US National Transgender Discrimination Survey, some notable differences included experiences of discrimination and healthcare, see Jack Harrison, Jaime Grant and Jody Herman, 'A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey' (2011 - 2012) 2

introduction of the 2004 Act was particularly influential in identifying that the GRA was problematic for a considerable portion of the trans community. Hines drew on data from interviews with thirty trans people, of which only three described themselves solely in binary terms of 'female/male' or 'woman/man'.⁴⁹⁶ Hines argued that the narrow and medicalised understanding of gender identity underpinning the Act was particularly problematic for her interviewees who consequently remained on the 'margins of citizenship'.⁴⁹⁷

Other research has also shown that non-binary people in the UK are supportive of reform to the GRA including to introduce non-binary recognition as well as simplifying the process as a whole.⁴⁹⁸ However there has not been research which has compared responses between binary and non-binary attitudes towards GRA reform. Non-binary responses are often subsumed within a larger cisgender and transgender sample,⁴⁹⁹ or the only group surveyed⁵⁰⁰ or are compared with a single cisgender and binary trans

LGBTQ Policy Journal at the Harvard Law School 13 – 24. For similar findings in the UK context, see Government Equalities Office, *National LGBT Survey: Research Report* (GEO 2018).

⁴⁹⁶ While participants did not identify in purely binary terms, it is worth noting that non-binary did also not appear to be a descriptor used by participants. This could have been because they did not identify as non-binary and/or because non-binary identities were less culturally intelligible. For the purposes of this thesis, though, these participants would meet the understanding of non-binary as outlined in chapter 1.6, see Sally Hines, 'What's the Difference? Bringing Particularity to Queer Studies of Transgender' (2006) 15(1) *Journal of Gender Studies* 49-66, 60.

⁴⁹⁷ Sally Hines, '(Trans)Forming Gender: Social Change and Transgender Citizenship' (2007) 12(1) *Sociological Research Online* 181-194, para 8.1.

⁴⁹⁸ Vic Valentine, *Non-binary people's experiences in the UK* (Scottish Trans Equality Network 2016) 68 – 80.

⁴⁹⁹ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018).

⁵⁰⁰ Vic Valentine, *Non-binary people's experiences in the UK* (Scottish Trans Equality Network 2016).

sample.⁵⁰¹ As such, there has not yet been direct comparison of binary and non-binary attitudes to the GRA (including current requirements) and reform under the same survey conditions.⁵⁰² The benefits of providing a direct comparison between binary and non-binary groups is that the extent of similarities and/or differences between the groups can be ascertained by testing for statistical significance. This is valuable from an intellectual perspective because it builds on scholarship in other disciplines which compares the two groups. It is also strategically valuable in identifying areas of mutual agreement between binary and non-binary groups as well as identifying areas of particular concern to non-binary people.

While empirical research with non-binary populations on various GRA reform options is generally limited, there is a notable exception to this from Peel and Newman who compared attitudes towards decertification and non-binary recognition (including third and multiple additional sex options) with non-binary people. They found that non-binary participants demonstrated a ‘large appetite for reform to the legal gender system including for reform that would introduce a third, or multiple, legal gender categories outside of female and male, and for reform to a self-identification model’.⁵⁰³ They argued that there should be ‘legal gender reform, either in the form of a third gender option or abolition of gender as a legal status’.⁵⁰⁴ This contribution provided much needed insight into potential attitudes of non-binary populations towards these

⁵⁰¹ Hannah J H Newman and Elizabeth Peel, “An Impossible dream”? Non-binary people’s perceptions of legal gender status and reform in the UK’ (2022) *Psychology and Sexuality* 1 – 15.

⁵⁰² Vic Valentine, *Non-binary people’s experiences in the UK* (Scottish Trans Equality Network 2016).

⁵⁰³ Hannah J H Newman and Elizabeth Peel, “An Impossible dream”? Non-binary people’s perceptions of legal gender status and reform in the UK’ (2022) *Psychology and Sexuality* 1 – 15, 11.

⁵⁰⁴ *ibid* 12 – 13.

reform options and in doing so, accounted for the risk of paternalism noted above. However, the empirical data was gathered as part of a much larger project on decertification and the quantitative data was primarily concerned with questions of decertification.⁵⁰⁵ The conclusions on attitudes towards decertification were drawn from quantitative data involving 193 non-binary participants.⁵⁰⁶ Meanwhile, the attitudes towards non-binary recognition (third and multiple sex options) were drawn from a qualitative data set of five interviews. While it is possible to draw conclusions across quantitative and qualitative data, arguably assessing different reform options under different survey conditions with vastly different sample sizes does present issues related to the reliability and validity of the comparative conclusions drawn.

To summarise, my thesis contributes to this theme of the scholarship in three ways. First, my thesis considers three macro-reform options, namely introducing a third sex option, introducing multiple sex options, and decertification. Second, it presents empirical data related to non-binary participants' attitudes towards these reform options under the same survey conditions. Third, it utilises a binary trans respondent group which is used for comparison with non-binary respondents.

2.5.3 European human rights law dimension

A final area of contribution that this thesis makes is in relation to the applicability of the chapter 8 analysis to European human rights law. The thesis is framed as primarily focused on England and Wales and is not in itself a human rights analysis.⁵⁰⁷ The

⁵⁰⁵ *ibid* 4.

⁵⁰⁶ *ibid*.

⁵⁰⁷ See generally Jens Theilen, 'Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition' (2018) 3 *European Human Rights Law Review* 249 - 257; Damian A Gonzalez Salzberg, *Sexuality and Transsexuality Under the*

primary motivation to incorporate a dignity analysis in chapter 8 is to draw out the deeper significance of my findings and to further my overall argument by proposing a dignity-based framework for conceptualising non-binary rights claims. In doing so, I draw on a range of concepts and materials from international law including soft law instruments and case law.

One main contribution of this thesis is the relevance of my dignity analysis to other scholarship on Article 8 ECHR specifically and trans rights generally under the ECHR. Theilen has argued that Article 8 is broad enough to accommodate non-binary claims to recognition, though the Court's analysis so far in relation to legal recognition rights is problematic for non-binary rights claims.⁵⁰⁸ Theilen highlights the problems with the ECtHR's current analysis under Article 8, such as the Court's emphasis on granting legal recognition based on understanding trans people as wanting to 'slip into the crowd'⁵⁰⁹ and not be outed⁵¹⁰ as trans. Theilen argues that non-binary rights claims require a different approach including reconceptualising the presumed rationales and interests in seeking legal recognition. Theilen argues that the conceptualisation of non-binary rights claims is crucial because it will impact on the substantive value of such rights.⁵¹¹ My thesis therefore seeks to develop this area further, by building on the various points made by Theilen, along with my empirical findings, and contextualising

European Convention on Human Rights (Hart Publishing 2019); Pieter Cannoot and Mattias Decoster, 'The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary Queer, Feminist, and Human Rights Analysis' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 – 55; Peter Dunne, *Rethinking Legal Gender Recognition* (forthcoming, Bloomsbury 2023).

⁵⁰⁸ Jens Theilen, 'Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition' (2018) 3 *European Human Rights Law Review* 249 - 257, 256.

⁵⁰⁹ *ibid.*

⁵¹⁰ 'Outed' refers to someone's trans identity being disclosed without consent.

⁵¹¹ Jens Theilen, 'Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition' (2018) 3 *European Human Rights Law Review* 249 - 257, 256.

them within a dignity-based framework. In doing so, my analysis contributes to scholarship which is exploring the relevance of non-binary claims to recognition, in particular under Article 8 ECHR.

Human dignity is a well-known concept in European human rights scholarship,⁵¹² though its status in the UK context has not attracted as much critical attention.⁵¹³ Research in relation to European human rights law and trans people has included doctrinal contributions with a policy focus,⁵¹⁴ and some scholars have noted connections between the use of human dignity and LGBTQ+ rights,⁵¹⁵ though its specific relationship to non-binary rights remains unexplored. Other researchers have adopted a post-structuralist framework which has problematised the reliance on a liberal model of human rights and associated values of (e.g.) dignity, arguing that they are of limited value to substantive justice for trans and non-binary people.⁵¹⁶

⁵¹² Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014); Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015).

⁵¹³ cf Daniel Bedford, 'Human dignity in Great Britain and Northern Ireland' in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019).

⁵¹⁴ See (e.g.) Peter Dunne, '(Trans) Marriage Equality? Challenging Europe's marital "Dissolution Requirements"' (2016) 28(4) *Child and Family Law Quarterly* 325 – 348; Jens Theilen, 'Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition' (2018) 3 *European Human Rights Law Review* 249 - 257.

⁵¹⁵ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655 – 724; Michèle Finck, 'The role of human dignity in gay rights adjudication and legislation: A comparative perspective' (2016) 14(1) *ICON* 26–53; Peter Laverack, 'The indignity of exclusion: LGBT rights, human dignity and the living tree of human rights' (2019) 2 *European Human Rights Law Review* 172 – 184.

⁵¹⁶ Damian A Gonzalez Salzberg, Pieter Cannoot and Mattias Decoster, 'The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary Queer, Feminist, and Human Rights Analysis' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 – 55, 47; Jens Theilen, 'Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition' (2018) 3 *European Human Rights Law Review* 249 - 257.

Nevertheless, while recognising that the law is a limited vehicle for wider social change, liberal human rights value such as human dignity, autonomy, liberty and equality do carry normative legal value in England and Wales and European legal orders. It is also worth noting that the right to freedom from discrimination based on gender reassignment as well as the right to legal recognition originated from European courts.⁵¹⁷ Therefore, the significance of the weight afforded to such values, and the relevance of European human rights law to trans rights development in England and Wales, should not be underestimated. While concepts like human dignity may be subject to criticism, they are also potentially very influential in efforts to further the currently limited rights of trans and non-binary people across Europe. Consequently, while the primary purpose of the thesis is not to conduct a human rights analysis, I envisage my research contributing to the existing scholarship related to European human rights law and trans and non-binary rights, as well as the emerging scholarship on dignity in England and Wales.

2.6 Summary

The first half of this chapter explored issues of contextual significance to the project, including the State's interest in sex, the interpretation of sex within law, and an introduction to gender-critical feminists' concerns towards GRA reform. In the second half I identified three themes of scholarship that I envisage my thesis as contributing to. Overall, the main originality of this thesis is the specific non-binary focus on issues of GRA reform. I will now turn to outline the methodological and normative framework of the thesis.

⁵¹⁷ This in addition to other rights, such as the prohibition on sterilisation requirements, see *AP Garçon, Nicot v France* [2017] ECHR 338.

3 Methodological and normative framework

3.1 Introduction

The research questions were outlined in chapter 1.5 but as a reminder are as follows:

1. To what extent do non-binary people support reform to the GRA?
 - a. To what extent do binary and non-binary people differ in their support for reform?
2. What are the reasons non-binary people give for support (or lack thereof)?
3. Should the GRA be reformed in light of the attitudes of non-binary people?
4. How should the GRA be reformed in light of the attitudes of non-binary people?

My research questions involve description, explanation, interpretation, evaluation, and prescription.⁵¹⁸ Research questions 1 – 2 mainly involve description and explanation. They also involve interpretation, in that in presenting this information I am required to interpret non-binary people's opinions and the relative significance of such opinions. Meanwhile, research questions 3 – 4 involve evaluation of the law, and the prescription of recommendations. Therefore, my research is engaged with normative questions of the law and my recommendations will be guided by the assumptions underpinning my methodological and normative frameworks.

The methodological framework in this research project consisted of an empirical, mixed methods design to answer the description and explanation elements of my

⁵¹⁸ I am using these distinctions as Taekema and Van der Burg have done: see Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) *Law and Method* 1 – 17; Wibren Van der Burg, 'The merits of law: An argumentative framework for evaluative judgements and normative recommendations in legal research' (2017) 17(1) *Erasmus Working Paper Series on Jurisprudence and Socio-Legal Studies* 1 – 38.

research questions. Meanwhile, a mixed normative framework of critical realism, non-ideal theory and a dignity-based conception of rights was used to interpret the findings, evaluate the law, and prescribe reform recommendations. This chapter is split into two parts to cover the methodological framework and the normative framework. The first part outlines the methodology used, including the methods, materials, sampling, and analytical techniques used to answer research questions 1 and 2. Participant information from the research is also reported in this section. The second part of the chapter outlines the normative framework, including the theories and approaches used to interpret and evaluate my findings.

3.2 Methodological framework

3.2.1 Research design

The methodological approach of this project is socio-legal which is a broad approach to law based on its mutually constitutive relationship with society.⁵¹⁹ The law is a social phenomenon⁵²⁰ meaning that the social context of the GRA, including how it is experienced by non-binary people is valuable. A socio-legal approach places legal sex recognition in context, rather than a purely doctrinal approach which may risk missing the experiential dimensions of the GRA.⁵²¹ This socio-legal approach is also

⁵¹⁹ Fiona Cownie and Anthony Bradney, 'Socio-Legal Studies: a challenge to the doctrinal approach' in Dawn Watson and Mandy Burton (eds), *Research Methods in Law* (2nd ed, Routledge 2018) 42 – 44; Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie, *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019) 4 – 5. See generally Naomi Creutzfeldt, 'Traditions of studying the social and the legal: a short introduction to the institutional and intellectual development of socio-legal studies' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019) 15 – 17.

⁵²⁰ Donald Harris, 'The Development of socio-legal studies in the United Kingdom' (1983) 3(3) *Legal Studies* 315 – 333.

⁵²¹ Naomi Creutzfeldt, 'Traditions of studying the social and the legal: a short introduction to the institutional and intellectual development of socio-legal studies' in

interdisciplinary which is beneficial in potentially maximising the benefits of concepts, theories and methodologies from other disciplines.⁵²² The importance of social context to experiential accounts of law explains the close relationship between socio-legal studies and empirical research methods.⁵²³ Empirical methods provide a mechanism in practice to systematically collect data and elevate the voices of a defined group of people through replicable means,⁵²⁴ including those who may have been historically marginalised such as non-binary people.⁵²⁵ This relates to the principle of ‘nothing about us without us’,⁵²⁶ which calls for the inclusion of voices of those ‘most affected by a policy or practice’⁵²⁷ in policy development. This is also similar to the approach of other research in recognising the importance of producing knowledge on a community

Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019) 16. Margaret Davies also explores some of the limits of positive law and its theory in Margaret Davies, ‘Doing critical-socio-legal theory’ in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019) 91. See also Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review* 12 – 36.

⁵²² Paul Roberts, ‘Interdisciplinarity in Legal Research’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017).

⁵²³ Kritzer provides insightful discussions of the development and history of empirical legal studies in Herbert Kritzer, ‘The (Nearly) Forgotten Early Empirical Research’ in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) and Herbert Kritzer, *Advanced introduction to empirical legal research* (Edward Elgar Publishing 2021).

⁵²⁴ Herbert Kritzer, *Advanced introduction to empirical legal research* (Edward Elgar Publishing 2021) 3 - 4.

⁵²⁵ Yasmine Ahmed, James Windle, and Orla Lynch, *Giving Voice to Diversity in Criminological Research: ‘Nothing about Us without Us’* (Bristol University Press 2021).

⁵²⁶ The principle of ‘nothing about us without us’ has close links with the disability rights movement, see David Werner, *Nothing about us without us* (HealthWrights 1998); James Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (University of California Press 2000).

⁵²⁷ Yasmine Ahmed, James Windle, and Orla Lynch, *Giving Voice to Diversity in Criminological Research: ‘Nothing about Us without Us’* (Bristol University Press 2021).

in conjunction with that community.⁵²⁸ This approach recognises that certain groups may be less likely to be involved in policy development for reasons such as explicit or implicit marginalization, or lack of time/resources.⁵²⁹ Non-binary people, as a subgroup within this community, are comparatively less researched within the existing literature.⁵³⁰ This is not to imply that binary trans people are privileged, as they are also vulnerable to being unaccounted for in policy development and scholarship. Nevertheless, as outlined in chapter 2.5 above, there is a need to add the accounts of non-binary people to the existing literature on GRA reform. Empirical methods were therefore considered an effective means to understand how non-binary people experience the GRA and therefore to answer research questions 1 and 2.

Assessing the extent to which non-binary people support particular reform options (research question 1) was considered most effectively answered through quantitative methods. Quantitative methods refer to the 'adoption of the natural science experiment as the model of scientific research'⁵³¹ which involves the 'quantitative measurement of the phenomena' and 'systematic control of [...] variables'.⁵³² Ascertaining the attitudes of a defined population towards a limited number of legal provisions and reform options lends itself well to quantitative measurement. Quantitative measurement is also well

⁵²⁸ Sharon Cowan, 'The Best Place in the World to Be Trans? Transgender Equality and Legal Consciousness in Scotland' in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Springer 2021); Sandra Harding, *Feminism and Methodology* (Indiana University Press 1987); Sandra Harding, *Whose Science? Whose Knowledge?* (Cornell University Press 1991).

⁵²⁹ Yasmine Ahmed, James Windle, and Orla Lynch, *Giving Voice to Diversity in Criminological Research: 'Nothing about Us without Us'* (Bristol University Press 2021).

⁵³⁰ See chapter 2.5.

⁵³¹ Martyn Hammersley, 'What is Social Research?' in Martyn Hammersley (ed), *Principles of Social and Educational Research: Block 1* (Open University Press 1993) 39.

⁵³² *ibid.*

suites to answering sub-question (a) on the extent to which two groups differ in their endorsement of various reform options, as quantitative hypothesis testing can be undertaken while controlling extraneous variables.⁵³³ This allows for an examination of whether differences observed are likely due to genuine underlying differences rather than chance. While sub-question (a)⁵³⁴ is used to guide my research, this question is not a distinct area of investigation. The data from the binary trans group is used to provide an anchor of comparison for the non-binary group⁵³⁵ and support the investigation into non-binary people specifically, rather than a more general investigation into the differences between binary and non-binary people. Where previous empirical quantitative research has either not included non-binary people, or subsumed their responses within a larger sample, sub question (a) also potentially allows other researchers to assess whether future research on legal sex recognition should continue to separate these groups if there are substantive differences.

The method selected to gather quantitative data was an online survey. An online survey is a suitable means to gather quantitative data with relative ease and convenience within limited time and financial constraints.⁵³⁶ The greater reach of an online survey and higher participation rates was also an important justification,⁵³⁷

⁵³³ See generally Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017).

⁵³⁴ Sub question (a): To what extent do binary and non-binary people differ in their support for reform?

⁵³⁵ This data could also inform methodological decisions in future socio-legal research on legal sex recognition if there are noteworthy similarities and/or differences in attitudes between groups.

⁵³⁶ Nicholas Jankowski, 'Conducting Online Surveys' (2006) 40 *Quality & Quantity* 435–456.

⁵³⁷ Raj Mehta and others, 'Comparing response rates and response content in mail versus electronic mail surveys' (1995) 37(4) *Journal of the Market Research Society* 429–439; Alan Tse and others, 'Comparing two methods of sending out

considering the relatively small number of non-binary people in the UK and their status as a hard-to-reach population.⁵³⁸

Quantitative data is, however, limited in being able to ascertain the potentially rich, varied and/or contradictory reasons that non-binary people might give for their attitudes towards legal sex recognition and reform. On the other hand, qualitative data is potentially useful in understanding non-binary people's reasoning for their preferences and distinguishing which reform options were considered most important for non-binary people and where there may be scope for compromise between reform options. Therefore, a mixed methods design - based on the combination of quantitative and qualitative empirical methods⁵³⁹ - was selected as optimal in answering the research questions.⁵⁴⁰

Interviews provide an effective means to elevate the voices of non-binary people and understand individual experience which further promotes the inclusion of non-binary voices where they may be vulnerable to marginalization. Interviews also have the potential to collect rich and detailed data which was considered important for adding greater depth and detail to the survey responses.⁵⁴¹ Further, by adopting a semi-

questionnaires: e-mail versus mail' (1995) 37(4) *Journal of the Market Research Society* 441– 446; Nicholas Jankowski, 'Conducting Online Surveys' (2006) 40 *Quality & Quantity* 435–456.

⁵³⁸ Amy Ellard-Gray and others, 'Finding the Hidden Participant: Solutions for Recruiting Hidden, Hard-to-Reach, and Vulnerable Populations' (2015) *International Journal of Qualitative Methods* 1 – 10.

⁵³⁹ For a criticism of the strict qualitative/quantitative divide see Alan Bryman, *Social Research Methods* (Oxford University Press 2016) 621 - 633.

⁵⁴⁰ See generally Sami Almalki, 'Integrating Quantitative and Qualitative Data in Mixed Methods Research—Challenges and Benefits' (2016) 5(3) *Journal of Education and Learning* 288 – 296.

⁵⁴¹ Sandy Q Qu and John Dumay, 'The qualitative research interview' (2011) 8(3) *Qualitative Research in Accounting & Management* 238 – 264.

structured approach, participants are potentially afforded greater freedom in shaping the discussions in a way that is not as limited by the researcher's perceptions while retaining an overall structure to the dialogue for the research questions.⁵⁴² Semi-structured interviews also allow the researcher to use probing questions which was considered useful here in exploring different hypothetical reform ideas with participants. Consequently, semi-structured interviews were selected to gather qualitative data and primarily address research question 2. The use of both methods together enables triangulation of methods, which can expose different and complementary pictures of legal sex recognition and reform.⁵⁴³ This helps to capitalise on the benefits of each technique and increases the potential for rich, nuanced data to be gathered.⁵⁴⁴

3.2.2 Analytical techniques

The quantitative data was analysed in SPSS – a statistical package - for descriptive statistics on the extent to which participants supported particular requirements of the GRA and reform. Both univariate and bivariate descriptive analyses were conducted. Univariate analysis gave a brief snapshot of the data collected by reporting the mean or average response of non-binary attitudes to a particular question.⁵⁴⁵ Meanwhile bivariate analysis assessed the two variables (e.g. binary and non-binary gender groups) together to explore the similarities and differences between the scores for

⁵⁴² John Carruthers, 'A Rationale for the Use of Semi-structured Interviews' (2007) 28(1) *Journal of Educational Administration* 63 – 68, 66.

⁵⁴³ Howard Lune, *Qualitative Research Methods for the Social Sciences* (Pearson Education 2016) 12.

⁵⁴⁴ John Carruthers, 'A Rationale for the Use of Semi-structured Interviews' (2007) 28(1) *Journal of Educational Administration* 63.

⁵⁴⁵ Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017) 64.

these variables.⁵⁴⁶ To establish the strength of the relationship, I used the statistical test of chi-square.⁵⁴⁷ The data was analysed using chi-square analysis to compare differences between binary and non-binary groups, and between age groups.⁵⁴⁸ The null hypotheses used for quantitative hypothesis testing were (1) that there is no relationship between gender identity and attitudes towards legal sex recognition, and (2) that there is no relationship between age and attitudes towards legal sex recognition.

Values less than .05 from the chi-square test represent a statistically significant difference between the groups. Such values indicate that there is a 95% chance of the difference being true, and less than a 5% chance that the difference arose by chance.⁵⁴⁹ This approach relies on probability theory and there is still a risk that such results are by chance, but this test allows us to assess such risk as relatively small.⁵⁵⁰ Where a statistically significant result is found between groups, the null hypothesis can be rejected, and the alternative hypothesis – that there is a relationship between either gender identity or age, and attitudes towards legal sex recognition – can be accepted. The chi-square test relies on certain basic assumptions to be fulfilled in order to be reliable.⁵⁵¹ Where these assumptions were not met, the Fisher's Exact test was used as a suitable alternative.⁵⁵²

⁵⁴⁶ *ibid.*

⁵⁴⁷ *ibid* 59.

⁵⁴⁸ Julie Pallant, *SPSS Manual* (Open University Press 2010) 217.

⁵⁴⁹ Alan Bryman, *Social Research Methods* (Oxford University Press 2016) 348.

⁵⁵⁰ *ibid.*

⁵⁵¹ Julie Pallant, *SPSS Manual* (Open University Press 2010) 217.

⁵⁵² *ibid.* See also Graham Upton, 'Fisher's Exact Test' (1992) 155(3) *Journal of the Royal Statistical Society* 395-402.

The qualitative data from the survey free-text sections and interviews were analysed using thematic analysis.⁵⁵³ Each transcript was initially analysed for general themes. Following this, a second level of detailed coding took place and data on specific requirements were drawn out and compared across other transcripts to expand on the most relevant themes further. The qualitative data was then analysed and compared with the quantitative data to further enrich the understanding of participants' attitudes to each requirement and reform to the GRA.

3.2.3 Process and Materials

3.2.3.1 Survey

The online survey was designed using Qualtrics which is an online survey platform. The survey was open to those who identified as trans and/or non-binary, were aged 16 years or over,⁵⁵⁴ and were from,⁵⁵⁵ or currently living in, the UK.⁵⁵⁶ The survey was split into eight sections: information and informed consent; demographic questions; current requirements of the GRA; reform options; reform priorities; other comments; interview details; prize draw voucher details.

⁵⁵³ See generally: Gareth Wiltshire and Noora Ronkainen, 'A realist approach to thematic analysis: making sense of qualitative data through experiential, inferential and dispositional themes' (2021) 20(2) *Journal of Critical Realism* 159-180.

⁵⁵⁴ See chapter 3.2.5.3 below.

⁵⁵⁵ Non-resident UK nationals were included as it was considered that they may have previously been through the process related to the GRA or might be reasonably considered to do so in the future.

⁵⁵⁶ The UK was the geographical limitation for participants, reflecting the territorial application of the GRA 2004 generally. Future research will have to be aware of the greater inconsistency in approaches following the Gender Recognition Reform (Scotland) Bill 2022.

Section 1: Information and informed consent

The information and informed consent section of the survey contained details about the project, including the possible benefits and risks of taking part and how data would be processed. Prospective participants were encouraged not to leave identifiable information when answering survey questions but were informed that if they did these would be anonymised. They were also informed that if they left contact details (e.g. to take part in an interview), these would be stored for up to 21 days to organise the interview and then deleted after this point. They could also request to have their details removed before this time.

Section 2: Demographic questions

Three demographic questions were asked.⁵⁵⁷ This related to the participant's gender identity, whether they were transgender or cisgender, and their age. The questions (and response options) were as follows:

- 1 What is your gender identity? (free text)
- 2 Would you say that your gender identity matches completely with the sex you were assigned at birth? (Yes / No)
- 3 Which category below includes your age? (15 or younger,⁵⁵⁸ 16 – 18, 19 – 25, 26 – 35, 36 – 45, 46 – 55, 56 – 65, 66 years +)

⁵⁵⁷ Demographic information sought was kept to a minimum in an effort to increase response rates, however future research would benefit from asking further demographic questions particularly on the lines of race, class and education etc. See chapter 10.5 on future research opportunities.

⁵⁵⁸ Those who selected this were unable to proceed further with the study, see chapter 3.2.5.3 below.

Section 3: Current requirements

Participants were asked seven questions related to current requirements of the GRA. Each question related to one requirement. The requirements were the gender dysphoria diagnosis (s 2(1)(a)); the statutory declaration of intention to live permanently in their acquired gender until death (s 2(1)(c)); the proof of living in the acquired gender for at least two years (s 2(1)(b)); the application fee (s 7); the minimum age limit (s 1(1)); the spousal consent requirement (s 4A(2)(b)); and that applications are submitted to a Gender Recognition Panel (s 1(3)).

The questions were as follows:

1. Do you think that a diagnosis of gender dysphoria should be required for a GRC?
(Yes/No/Not sure)
2. Do you think that there should be a requirement for the applicant to make a statutory declaration of intention to live permanently in their 'acquired gender' until death? (Yes/No/Not sure)
3. Do you think that applicants should have to prove that they have lived in their 'acquired gender' for a certain time period? (Yes/No/Not sure)
 - 3.1. What do you think this time period should be? (this question was shown to those who answered YES to question 3)
4. Do you think that there should be an application fee for a GRC? (Yes/No/Not sure)
 - 4.1. How much do you think this application fee should cost? (this question was shown to those who answered YES to question 4)
5. Do you think that there should be a minimum age limit for applying for a GRC?
(Yes/No/Not sure)

- 5.1. What do you think the minimum age limit should be? (this question was shown to those who answered YES to question 5)
6. Do you think that there should be a requirement that applicants have to obtain consent from their spouse/partner if they are married or in a civil partnership? (Yes/No/Not sure)
7. Do you think that there should be a requirement that the application has to be submitted to the Gender Recognition Panel? (Yes/No/Not sure)

Section 4: Reform Options

Participants were asked for their attitudes towards three separate reform options.

This included (a) a single additional 'third' sex option, (b) multiple additional sex options, and (c) removing the system of gender recognition by ceasing to record sex on the birth certificate. The questions were as follows:

- 1 Do you think that there should be a third legally recognised gender introduced to England and Wales? (Yes/No/Not sure)
- 2 Do you think that there should be a multi-gender system introduced to England and Wales? (Yes/No/Not sure)
- 3 Do you think that the system of gender recognition should be removed in England and Wales? (Yes/No/Not sure)

These questions were accompanied by text to give context to respondents who may have not heard of these reform options before or who may be unfamiliar with the phrasing used.⁵⁵⁹ Participants were then asked which of the three reform options they felt was 'best'.

⁵⁵⁹ Appendix 2.

Decertification was considered a relevant reform option to ask in the context of non-binary reform specifically because removing legal sex for all would equalise the position between binary cis and trans people, and non-binary people. Therefore, it is an option which potentially offers parity in legal sex recognition for non-binary people. This, in addition to the scholarly interest in decertification,⁵⁶⁰ meant that a question on decertification as a reform option for non-binary people was included in the survey.

Section 5: Reform priorities

Participants were provided with a list of hypothetical reform options and asked to finish the sentence 'I would be more likely to apply for a GRC if...'

- a) ...there was an option other than 'male' or 'female'."
- b) ...I didn't have to get a diagnosis of gender dysphoria."
- c) ...I didn't have to make a statutory declaration of intention to live in my 'acquired gender' until death."
- d) ...I didn't have to give proof of living in my 'acquired gender' for two years."
- e) ...I didn't have to apply to the Gender Recognition Panel."
- f) ...I didn't have to pay an application fee."
- g) ...I didn't have to wait until I was 18."
- h) ...I didn't have to get spousal consent (if married or in a civil partnership)."
- i) Not sure.
- j) Not applicable.
- k) Other (please specify)

⁵⁶⁰ See chapter 2.5.2.

Participants could select up to three options and were provided with free text space to give reasons for their choice. Option (a) did not specify a singular third or multiple additional sex options. This was intentional to allow for a broad comparison between interest in reforming the number of sex options versus different current requirements. Decertification was not included as an option because *applying for a GRC* (as per the wording of the question) presumes the existence of a system of legal sex recognition.

Section 6: Other comments

Participants were provided with free text space to highlight or explain any other issues or comments that they wanted to make about legal sex recognition.

Section 7: Interview

Participants were provided with brief information about the interviews and invited to leave their contact details if they wished to be contacted regarding participation.

Section 8: Voucher

Participants were invited to leave their contact details if they wanted to enter a prize draw as a token incentive for their participation. The prize draw provided a token financial incentive to participants with the intention of having a positive effect on response rates.⁵⁶¹ While such incentives risk being potentially exploitative,⁵⁶² where

⁵⁶¹ Eleanor Singer, 'The use of incentives to reduce nonresponse in household surveys' in Robert Groves and others (eds), *Survey Nonresponse* (John Wiley & Sons 2002) 163 – 178.

⁵⁶² Ruth Macklin, 'The paradoxical case of payment as benefit to research subjects' (1989) 11(6) *IRB Ethics and Human Research* 1–3; Paul McNeill, 'A response to Wilkinson and Moore' (1997) 11(5) *Bioethics* 390–396.

there is little risk of harm and the incentive offered is not excessive,⁵⁶³ a financial incentive can be justifiable (perhaps even necessary) for recruitment.⁵⁶⁴ Given the relatively low ethical risks involved in participation, participants were offered token financial incentives at each stage of the research project. This included a prize draw to win one of ten £10 vouchers or equivalent charitable donation for completing the survey, one £25 voucher (or equivalent charitable donation) per interview, and one £5 voucher (or equivalent charitable donation) per feedback survey.

3.2.3.2 Interview

Prospective non-binary interviewees who left their contact details in the survey were emailed with an information sheet and consent form.⁵⁶⁵ They were invited to read through these to learn more about the interviews and offered the opportunity to ask questions. If they confirmed that they wanted to take part, they were asked to return the signed consent form so that a date and time for the interview could be scheduled. An interview guide was created to guide the interviews; this guide was not shared with participants.⁵⁶⁶ The guide was split into three main categories including being non-binary; GRA and reform; and medical/healthcare as it relates to GRC process. While the interviews followed this general structure, as per the semi structured nature, some

⁵⁶³ Paul McNeill, 'A response to Wilkinson and Moore' (1997) 11(5) *Bioethics* 390–396.

⁵⁶⁴ Laura Dunn and Nora Gordon, 'Improving informed consent and enhancing recruitment for research by understanding economic behavior' (2005) 293(5) *Journal of American Medical Association* 609–612; Marisa Stones and John McMillan, 'Payment for participation in research: A pursuit for the poor?' (2010) 36 *Journal of Medical Ethics* 34–36; Martin Wilkinson and Andrew Moore, 'Inducement in research' (1997) 11 *Bioethics* 373–389.

⁵⁶⁵ Appendix 3.

⁵⁶⁶ Appendix 3.

participants were asked different questions depending on their individual experiences and the responses they provided to prior questions.

The launch of this research project coincided with the COVID-19 pandemic. On the 11 March 2020, the World Health Organisation designated COVID-19 as a pandemic.⁵⁶⁷ One week later, on Tuesday 17 March 2020, the University of Exeter formally advised all staff and researchers to work from home. Just nine days later, the Government imposed the first set of national lockdown measures in England on 26 March 2020.⁵⁶⁸ This situation posed unique challenges to the research project. The main challenge was the ability and suitability to offer or conduct face-to-face interviews. The decision to withdraw this option was made on Friday 13 March 2020, just a few days after the launch of the online survey but before the official advice to researchers at the University of Exeter. The Government had already issued advice concerning social distancing and it became apparent that non-essential face-to-face encounters should be avoided. While some observers suggest that Skype/telephone interviews may have limitations compared to face-to-face interviews,⁵⁶⁹ many consider Skype/telephone interviews to be just as effective.⁵⁷⁰ The project had already received ethical approval

⁵⁶⁷ World Health Organisation, 'Timeline of WHO'S Response to COVID-19' (WHO 2020) <<https://www.who.int/news-room/detail/29-06-2020-covidtimeline>> accessed 30 July 2020.

⁵⁶⁸ Catherine Haddon and Alex Nice, 'Boris Johnson's plan to ease coronavirus lockdown' (Institute for Government 2020) <<https://www.instituteforgovernment.org.uk/explainers/boris-johnson-plan-ease-coronavirus-lockdown>> accessed 30 July 2020.

⁵⁶⁹ Bill Gillham, *Research Interviewing: The Range of Techniques* (McGraw-Hill Education 2005); RW Shuy, 'In-person versus Telephone Interviewing' in James Holstein and Jaber Gubrium (eds) *Inside Interviewing: New Lenses, New Concerns* (Sage Publications 2003) 175–193.

⁵⁷⁰ Linda Sweet, 'Telephone interviewing: Is it compatible with interpretive phenomenological research?' (2002) 12 *Contemporary Nurse* 58–63; Alison Chapple, 'The use of telephone interviewing for qualitative research' (1999) 6(3) *Nurse Researcher* 85–93; Neil Stephens, 'Collecting data from elites and ultra-elites:

for Skype and telephone interviews, so there was no need to seek further ethical approval.⁵⁷¹

3.2.4 Sampling and recruitment

A 'call for participants' (CFP) poster was created to advertise participation in the research project. A website, Twitter account and dedicated email address were also created to establish an online identity for the project and provide prospective participants with an information sheet and contact details. Voluntary response sampling and snowball sampling were used to recruit participants.⁵⁷² The website and Twitter account were used to reach the target sample and promote the project. This resulted in the CFP poster being re-shared among trans and non-binary groups and communities. This is a potential limitation of snowball sampling as it is shared among people with similar interests and characteristics.⁵⁷³ For example, one interviewee in this study noted that they saw the CFP poster in an online support group for trans masculine people, arguably explaining the relatively large percentage of trans masculine respondents.⁵⁷⁴

The poster was also shared with a range of interested groups including Devon County Council (DCC). In January 2018, DCC were contacted to ascertain their potential

Telephone and face-to-face interviews with macroeconomists' (2007) 7 *Qualitative Research* 203–216.

⁵⁷¹ Ethics Committee reference: 201920-035. See appendix 1.

⁵⁷² Gary Dusek, Yuliya Yurova, and Cynthia Ruppel, 'Using Social Media and Targeted Snowball Sampling to Survey a Hard-to-reach Population: A Case Study' (2015) 10 *International Journal of Doctoral Studies* 279 – 299.

⁵⁷³ Jaime Waters, 'Snowball sampling: a cautionary tale involving a study of older drug users' (2015) 18(4) *International Journal of Social Research Methodology* 367-380.

⁵⁷⁴ Appendix 4.

interest in collaborating on the project, and they consequently offered their support. Collaboration is a highly desirable element of ESRC-funded research and is 'at the heart' of the South-West Doctoral Training Partnership (SWDTP).⁵⁷⁵ The importance of collaboration on research projects is to encourage relationships of knowledge exchange.⁵⁷⁶ The collaborative relationship with DCC was particularly beneficial for the recruitment of participants as DCC were able to introduce the project to the Intercom Trust which is an LGBTQ+ charity based in Devon, Cornwall, Dorset and Somerset. The Intercom Trust shared the CFP poster on their various social media channels. This was valuable in reaching the target population as well as establishing a trustworthy reputation for the project. This was particularly important as many groups declined to share recruitment information for PhD projects on social media pages given the volume of research requests many groups receive. However, the support of DCC and the Intercom Trust helped to boost participation. To maintain the collaborative spirit of the relationship, DCC have been contacted throughout the project to inform them of various milestones and share preliminary findings, though this is not obligatory nor are the findings to be used to feed into specific policy development by the council.⁵⁷⁷ This poster was also circulated via other LGBTQ+ groups, including Non-Binary London, Non-Binary Leeds, Mermaids, Non-Binary South-West, the Beaumont Society, GIRES and Trans Actual. The poster was circulated in other online groups and networks, including Bristol and Exeter Feminist

⁵⁷⁵ South West Doctoral Training Partnership, 'Collaboration and Impact' (SWDTP 2020) <<https://www.swdtp.ac.uk/collaboration/>>accessed 18 July 2020.

⁵⁷⁶ Economic and Social Research Council, 'Guidance for Collaboration' (ESRC 2020) <<https://esrc.ukri.org/collaboration/guidance-for-collaboration/>>accessed 18 July 2020

⁵⁷⁷ These preliminary findings maintained anonymity of participants.

and LGBTQ+ Societies.⁵⁷⁸ The data collection period – including survey and interviews - ended on 27th April 2020 following sampling saturation, bolstered by the inability to continue promoting the project via in-person events (as originally planned) due to the COVID-19 pandemic.

3.2.5 Participants

3.2.5.1 Survey participants

There were 140 non-binary respondents and 136 binary respondents to the survey, giving 276 total valid responses. 7 responses were invalid which included people who identified themselves as cisgender and/or as being 15 years old or younger.⁵⁷⁹ The binary and non-binary groups were generally similarly distributed across age groups. Most respondents in the non-binary and binary groups were aged between 19 and 25 years. Participants were organised into three different age groups: 16 – 25 years (young); 26 – 45 years (middle); or 46 years + (older).

Gender identity	Frequency	Valid percent
Binary	136	49.3
Non-binary	140	50.7
Total	276	100

Table 2: Participants gender identity groups (binary/non-binary)

⁵⁷⁸ As with the point above on snowball sampling, sharing the CFP in these groups may also risk having an overrepresentation of trans and non-binary people residing in the South West as these are South-west based groups.

⁵⁷⁹ See chapter 3.2.5.3 on children and young people

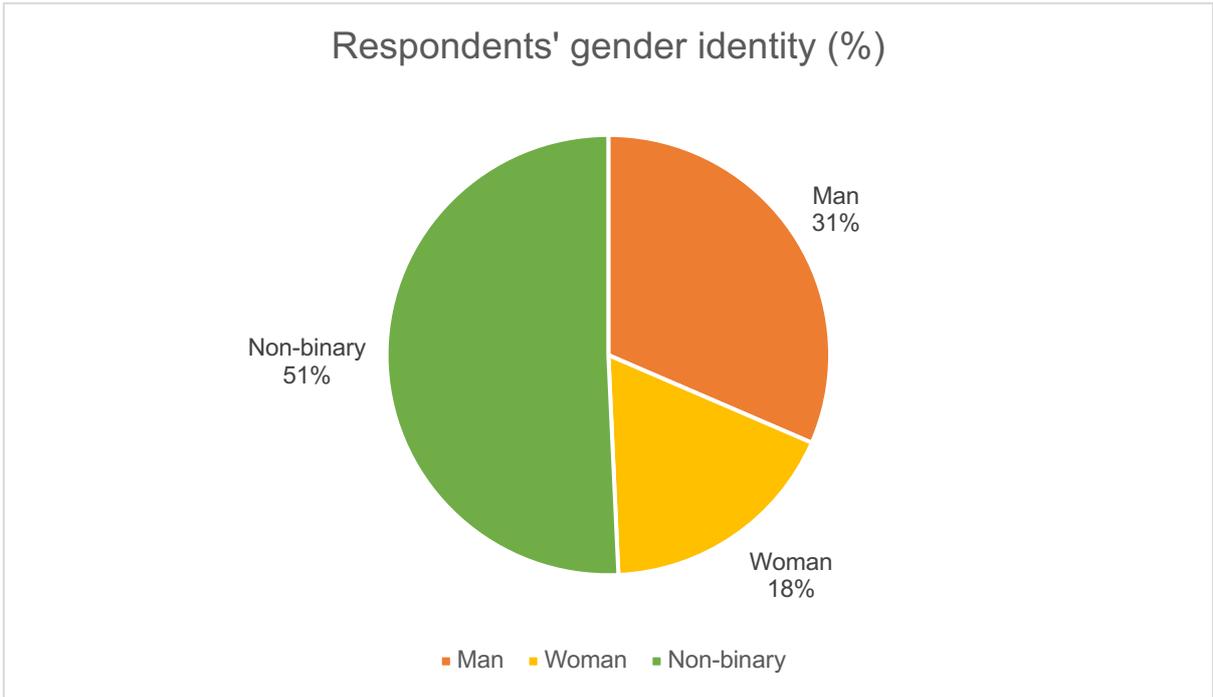


Figure 3–1 Respondents' gender identities

Non-binary respondents		
Age group	Frequency	Percent
16 – 25 years (Young)	78	55.7
26 – 45 years (Middle)	46	32.9
46 + years (Older)	16	11.4
Totals	140	100

Table 3.1. Non-binary participants by age group (n = 140)

AGE AND GENDER IDENTITY

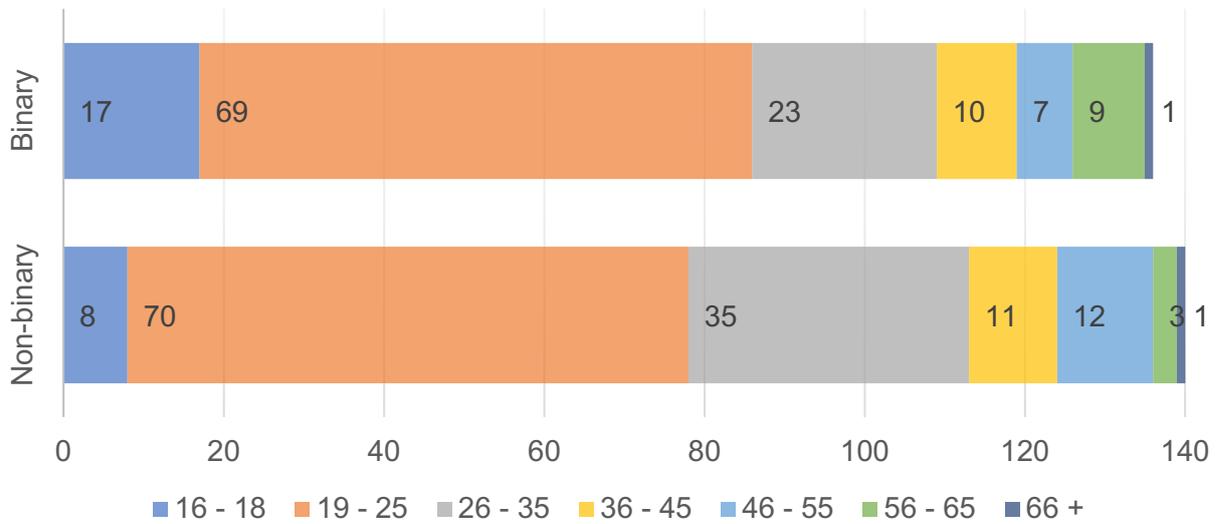


Figure 3–2. Survey participants' gender identity and age groups

3.2.5.2 Interview participants

Interviews were conducted with 21 people who self-identified as non-binary. There were 21 semi-structured interviews conducted between Tuesday 10 March and Saturday 11 April 2020. The average length of time for an interview was 48 minutes 35 seconds.

Participant no.	Gender identity	Age group	Interview time	Interview type
P1	Non-binary	46 - 55 years	58:36	Skype
P2	Gender-neutral	56 - 65 years	50:43	Skype
P3	Non-binary transmasculine	19 - 25 years	41:28	Telephone
P4	Non-binary / Proxvir	19 - 25 years	50:59	Skype
P5	Non-binary	26 – 35 years	43:09	Skype

P6	Transmasculine non-binary	19 - 25 years	56:41	Telephone
P7	Male outwardly, inward more female	19 - 25 years	33:48	Telephone
P8	Non-binary	26 - 35 years	59:24	Telephone
P9	Non-binary	19 - 25 years	36:29	Skype
P10	Non-binary	19 - 25 years	54:59	Skype
P11	Non-binary	26 - 35 years	56:49	Skype
P12	Trans/nonbinary	26 - 35 years	56:36	Telephone
P13	Agender	19 - 25 years	47:13	Telephone
P14	Non-binary	26 - 35 years	50:53	Skype
P15	Transfem / non- binary	26 - 35 years	41:41	Skype
P16	Trans masculine	26 - 35 years	41:08	Skype
P17	Non-binary	26 - 35 years	43:31	Telephone
P18	Non-binary	19 - 25 years	51:48	Skype
P19	Non-binary, in the process of trying to	26 – 35 years	N/A	Written ⁵⁸⁰

⁵⁸⁰ One participant requested undertaking a written interview because they had a disability which made processing verbal information difficult and anxiety-inducing. Web-based written interviews have been used in other disciplines and may provide a reasonable alternative where face-to-face or Skype interviews are not possible. It was considered important to accommodate this participant as far as possible as non-binary people with disabilities are a particularly hard-to-reach population. On written interviews generally, see (e.g.) Victoria Opara, Sabrina Spangsdorf and Michelle K Ryan, 'Reflecting on the use of Google Docs for online interviews: Innovation in qualitative data collection' (2021) *Qualitative Research* 1 – 18; Edgar Burns, 'Developing Email Interview Practices in Qualitative Research' (2010) 15(4) *Sociological Research Online*.

	establish a more specific identity.			
P20	Trans, Genderqueer, Other	46 - 55 years	49:54	Telephone
P21	Female / demi- female	16 - 18 years	40:15	Telephone

Table 3.2. Interview participants' demographic information (n = 21)

3.2.5.3 Children and young people, and the minimum age requirement

Issues related to young gender diverse people, including children, have attracted increasing scholarly and mainstream media attention in recent years.⁵⁸¹ This is largely related to the area of medical treatment, including the extent to which children and young people should, or should not, be able to access medical intervention.⁵⁸² 2020 and 2021 saw Keira Bell in the English courts, a 24 year old woman⁵⁸³ who received hormone blockers when she was 16 years old. She brought a judicial review claim against Tavistock and Portman NHS Trust and its Gender Identity Development

⁵⁸¹ Jenny Kleeman, 'Transgender Children: "This is who he is - I have to respect that"' (The Guardian 2015)

<<https://www.theguardian.com/society/2015/sep/12/transgender-children-have-to-respect-who-he-is>>accessed 28 August 2022; Lucy Bannerman, 'Teachers "need new gender identity rules"' (The Times 2022) <

<https://www.thetimes.co.uk/article/teachers-need-new-gender-identity-rules-rkbkr8fwf>>accessed 28 August 2022.

⁵⁸² See also (e.g.) allegations of serious misconduct against Dr Helen Webberley: BBC News, 'Transgender Care GP's fitness to practice Impaired, tribunal finds' (BBC News 2022) <<https://www.bbc.co.uk/news/uk-wales-61970235>>accessed 18 August 2022.

⁵⁸³ Keira Bell, 'Keira Bell: My Story' (Persuasion 2021)

<<https://www.persuasion.community/p/keira-bell-my-story?triedSigningIn=true>>accessed 28 August 2022.

Service. The issue at hand was whether informed consent could be given by children and young people in accessing such treatment. The High Court initially found that it was ‘highly unlikely’ that a child aged 13 or under could consent to the administration of puberty blockers, and that it was also ‘doubtful’ that a child aged 14 or 15 could understand the risks necessary to consent.⁵⁸⁴ The Court appeared to carve out an exception to the long-standing principle of *Gillick* competence, based on the House of Lords’ decision in *Gillick* which recognised that children under the age of 16 may be able to consent to medical treatment without parental knowledge or permission.⁵⁸⁵ The *Bell* ruling was subsequently overturned on appeal to the Court of Appeal,⁵⁸⁶ with Lord Justice Burnett describing the Divisional Court as having placed an ‘improper restriction’ on the *Gillick* test of competence.⁵⁸⁷ The controversy surrounding medical treatment persists, with NHS England currently undertaking a review of the Tavistock and Portman NHS foundation Trust (known as the ‘Cass review’) which manages the Gender Identity Development Service for children and adolescents.⁵⁸⁸ In July 2022,

⁵⁸⁴ *R (Bell) v The Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin), [2021] PTSR 593.

⁵⁸⁵ This is subject to the young person having a ‘sufficient understanding and intelligence to enable him or her to understand fully what is proposed,’ see *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7, [1986] AC 112, 189 (Lord Scarman). Lord Fraser also forwarded the so-called Fraser Guidelines which specifically apply to the decisions made by health professionals to administer treatment related to contraceptive health, see *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7, [1986] AC 112 174 (Lord Fraser).

⁵⁸⁶ *R (Bell) v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363, [2022] PTSR 544.

⁵⁸⁷ *ibid* [94] (Burnett LJ).

⁵⁸⁸ Kemi Badenoch MP, ‘Letter to Caroline Nokes MP regarding the Women and Equalities Committee’s inquiry into reform of the Gender Recognition Act’ (UK Parliament 21 May 2021) <<https://committees.parliament.uk/publications/6091/documents/68283/default/>> accessed 10 August 2022.

Dr Hilary Cass (leading the review) recommended that the Tavistock clinic be closed and replaced with new regional centres.⁵⁸⁹

With regards to legal sex recognition in England and Wales,⁵⁹⁰ under section 1(1) GRA, an applicant for a GRC under the Standard Track must be aged at least 18 years old. This is evidenced through the Registrar General locating an individual's original birth record to validate their age (if the birth was registered in the UK)⁵⁹¹ or by an applicant providing their original birth certificate (or other official confirmation of date of birth) if registered outside the UK.⁵⁹² Most jurisdictions which have legal sex recognition processes impose limits on gender diverse youth accessing legal recognition.⁵⁹³ In 2016, the Government made it clear that there were no plans to change the age limit. Consequently, the public consultation did not include a question on the minimum age limit.⁵⁹⁴

The medical and legal transition pathways are separate, such that legal recognition for young people would not necessarily mean that children or young people could

⁵⁸⁹ Dr Hilary Cass, 'Letter to NHS England' (July 2022) <<https://cass.independent-review.uk/publications/>>accessed 12 August 2022.

⁵⁹⁰ Cf Scotland's plans to reduce the minimum age limit to 16 years: Cabinet Secretary for Social Justice, Housing and Local Government, 'Gender Recognition Reform (Scotland) Bill: more information' (Scottish Government 2022) <<https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-more-information/>>accessed 28 August 2022.

⁵⁹¹ HM Courts and Tribunals Service, *Standard application for a Gender Recognition Certificate: T450* (Crown 2021) 4.

⁵⁹² *ibid* 5.

⁵⁹³ DG Justice and Consumers, *Legal gender recognition in the EU: the journeys of trans people towards full equality* (European Commission 2020).

⁵⁹⁴ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 141.

access medical intervention with fewer safeguards.⁵⁹⁵ Nevertheless, the balance between affirmation and safeguarding of young gender diverse people is relevant to issues of both legal and medical transitioning. Issues related to the legal recognition of gender diverse children and young people raise questions which demand in-depth and detailed attention of the holistic needs of children and young people, as well as sufficient review of the contested and emerging scientific understanding of children's development. In explaining their reasons for retaining the age limit, the UK Government explained that:

The age of 18 is widely recognised as the age at which one becomes an adult and gains full citizenship rights; we feel this is the appropriate point at which an individual should be able to make such a major decision, in their own right, on changing their legal sex. It is therefore important that under-18s are properly supported in line with their age and decision-making capabilities.⁵⁹⁶

Similarly, in 2021, the WEC recommended retaining the current minimum age limit of 18 years old.⁵⁹⁷ They argued that 18 years is an appropriate age for people to be able to consider the full impact of changing their legal sex.⁵⁹⁸ They also noted that this is 'consistent with the law relating to other long-term, legally binding undertakings'.⁵⁹⁹ However, this is subject to criticism, with some highlighting the importance of

⁵⁹⁵ This confusion between the legal and medical transition routes for children and young people was noted in some evidence presented to the Scottish Parliament which called on them to pause proposed reform to the GRA until the Cass Review was published in full in 2023, see: Equalities, Human Rights and Civil Justice Committee, *16th Meeting, Session 6* (Scottish Parliament 2022) 35 – 38.

⁵⁹⁶ Government Equalities Office, *Written evidence submitted by Government Equalities Office on behalf of HM Government [GRA2016]* (UK Parliament 2020)

⁵⁹⁷ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) para 122.

⁵⁹⁸ *ibid.*

⁵⁹⁹ *ibid.*

recognising the evolving capacities of children and young people to make decisions.⁶⁰⁰ It is also argued that legal recognition could be especially important for young people, as it helps to avoid them being outed at a time when they are first applying for different forms of identity and/or looking to start work or access higher and further education.⁶⁰¹ Young gender diverse people may require specific and additional support to realise their rights.⁶⁰² For the purposes of legal sex recognition, this may mean detailed consideration is needed of additional safeguarding factors, including ensuring that the judicial or administrative body responsible for processing applications is sufficiently resourced and prepared to offer additional support for young applicants. It is also important that processes for children and young people are designed in consultation with those groups and it is worth recalling that this study was also only open to those aged 16 or over. Participants who identified their age on the survey as 15 years or younger were unable to proceed further with the study. Consequently, while the survey did collect quantitative data related to the minimum age limit, the data did not offer sufficient insight to make a meaningful recommendation which adequately addressed the relevant considerations related to young people and legal sex recognition. Nevertheless, given the prevalence of young people within the non-binary community in the UK, the minimum age limit is an important consideration for future research in this area.

⁶⁰⁰ Peter Dunne, 'The legal recognition of transgender children' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3270387> accessed 10 March 2022.

⁶⁰¹ Equalities, Human Rights and Civil Justice Committee, *15th Meeting 2022, Session 6* (Scottish Parliament 2022) (Bruce Adamson, Children and Young People's Commissioner Scotland).

⁶⁰² *ibid.*

3.3 Normative framework

3.3.1 Introduction

Legal research is most often associated with a doctrinal approach (also known as ‘black letter’ law⁶⁰³ or ‘positive-law-oriented’⁶⁰⁴ approach) which involves looking at the law on its own terms by drawing on legal sources.⁶⁰⁵ The methodological and normative frameworks adopted are sometimes not explicitly addressed in legal scholarship as the law is presumed to provide the concepts needed to analyse the law.⁶⁰⁶ This is despite legal research often engaging in normative theorising on what the law ought to be.⁶⁰⁷ Consequently, legal scholars frequently engage in such theorising without explicitly outlining the concepts and values (external to positive law) which have been used to guide their analyses and conclusions.⁶⁰⁸ This makes it

⁶⁰³ Terry Hutchinson, ‘Doctrinal Research’ in Dawn Watson and Mandy Burton (eds), *Research Methods in Law* (2nd ed, Routledge 2018) 12.

⁶⁰⁴ Sanne Taekema, ‘Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice’ (2018) *Law and Method* 1 – 17, 3.

⁶⁰⁵ Terry Hutchinson, ‘Doctrinal Research’ in Dawn Watson and Mandy Burton (eds), *Research Methods in Law* (2nd ed, Routledge 2018) 16. See also Graham Virgo, ‘Doctrinal legal research’ in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press 2009).

⁶⁰⁶ Pauline Westerman, ‘Open or Autonomous? the Debate on Legal Methodology as a Reflection of the Debate on Law’ in Mark Van Hoecke (eds), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 90 – 91; Terry Hutchinson and Nigel Duncan, ‘Defining and describing what we do: doctrinal legal research’ (2012) 17(1) *Deakin Law Review* 83-119, 107.

⁶⁰⁷ Pauline Westerman, ‘Open or Autonomous? the Debate on Legal Methodology as a Reflection of the Debate on Law’ in Mark Van Hoecke (eds), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing 2011); Sanne Taekema, ‘Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice’ (2018) *Law and Method* 1 – 17.

⁶⁰⁸ See generally Margaret Davies, ‘Doing critical-socio-legal theory’ in Naomi Creutzfeldt, Marc Mason, Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019); Pauline Westerman, ‘Open or Autonomous? the Debate on Legal Methodology as a Reflection of the Debate on Law’ in Mark Van Hoecke (eds), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing 2011); Mike McConville, ‘Development of Empirical Techniques and Theory’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017).

potentially difficult for an external party to understand the presumptions underlying the analyses and/or recommendations.⁶⁰⁹ It also perpetuates the idea that law is a purely objective phenomenon, separated from values and social ideals.⁶¹⁰ I will therefore now address each component of my normative framework, including my definition of them and how I intend to use and apply them throughout the thesis. My normative framework comprises three components: critical realism, non-ideal theory and a dignity-based conception of rights. These components were used as analytical tools to interpret empirical data, evaluate the law, and prescribe reform recommendations.

3.3.2 Critical realism

While the juxtaposed ontological bases of quantitative and qualitative methods, i.e. positivism versus constructivism,⁶¹¹ can be beneficial, they also raise questions of how to tackle inconsistent or seemingly contradictory findings, or the need to apparently switch between ontologies.⁶¹² This thesis adopts the philosophical perspective of critical realism as a framework to present and interpret the empirical findings. Critical realism offers an alternative to positivism and constructivism which is particularly useful for mixed methods research.⁶¹³ Critical realists distinguish between three

⁶⁰⁹ Pauline Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark Van Hoecke (eds), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 94.

⁶¹⁰ Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) *Law and Method* 1 – 17, 14.

⁶¹¹ Ralph Hall, 'Mixed Methods: In Search of a Paradigm' in Thao Lê and Quynh Lê (eds), *Conducting Research in a Changing and Challenging World* (Nova 2013) 3 – 4.

⁶¹² Ralph Hall, 'Mixed Methods: In Search of a Paradigm' in Thao Lê and Quynh Lê (eds), *Conducting Research in a Changing and Challenging World* (Nova 2013) 8.

⁶¹³ Stanley Houston, 'Beyond social constructionism: critical realism and social work' (2001) 31 *British Journal of Social Work* 845–861; Phil McEvoy and David Richards, 'Critical realism: a way forward for evaluation research in nursing?' (2003) 43(4) *Journal of Advanced Nursing* 411–420; Phil McEvoy, 'A critical realist rationale for

ontological domains, namely the empirical (reality that can be experienced directly or indirectly), the actual (reality that can occur, but may not necessarily be experienced), and the structures and mechanisms that generate phenomena.⁶¹⁴ These latter ‘causal mechanisms’ are not observable, but they can be ‘inferred through a combination of empirical investigation and theory construction’.⁶¹⁵ Therefore, the empirical data in this study can be understood as feedback on the aspects of the world that are accessible (i.e. experiences of issues related to obtaining a GRC), with the simultaneous recognition that participants’ knowledge of the world is mediated by the discourses available to them.⁶¹⁶ They are therefore not necessarily objective truths, but they do represent the worldviews, perceptions and expressions of non-binary individuals. As such, these perceptions and views have the potential to be partial and misguided.⁶¹⁷ For example, the National LGBT Survey found that some aspects of the GRA process were misunderstood by a relatively significant proportion of trans respondents.⁶¹⁸ This included, for example, that 43% of trans respondents (incorrectly) thought that the GRA process involved an *interview* with the Gender Recognition Panel.⁶¹⁹ The benefit

using a combination of quantitative and qualitative methods’ (2006) 11(1) Journal of Research in Nursing 66 – 78.

⁶¹⁴ Phil McEvoy, ‘A critical realist rationale for using a combination of quantitative and qualitative methods’ (2006) 11(1) Journal of Research in Nursing 66 – 78, 69.

⁶¹⁵ *ibid.*

⁶¹⁶ Andrew Sayer, ‘Foreword: why critical realism?’ in Steve Fleetwood and Stephen Ackroyd (eds), *Critical Realist Applications in Organisation and Management Studies* (Routledge 2004); Phil McEvoy, ‘A critical realist rationale for using a combination of quantitative and qualitative methods’ (2006) 11(1) Journal of Research in Nursing 66 – 78, 68-69.

⁶¹⁷ Garry Potter and José Lopez, ‘After Postmodernism: the millennium’ in Garry Potter and José Lopez (eds), *After Postmodernism: an introduction to Critical Realism* (The Athlone Press 2001); Phil McEvoy, ‘A critical realist rationale for using a combination of quantitative and qualitative methods’ (2006) 11(1) Journal of Research in Nursing 66 – 78, 70.

⁶¹⁸ Government Equalities Office, *National LGBT Survey: Research Report* (GEO 2018) 217 – 218.

⁶¹⁹ *ibid.*

of critical realism is that it provides the theoretical and conceptual basis for the researcher to highlight where participants' attitudes on certain issues may be factually incorrect or misguided.

Similarly, a critical realist approach helps to appreciate how social context may impact certain perceptions.⁶²⁰ Trans and non-binary communities are heavily interconnected through for example online groups and forums,⁶²¹ which is beneficial for the collective solidarity of marginalised groups to share experiences and resources. However, the ease with which trans and non-binary people can share positive and negative experiences with each other can influence attitudes towards those processes, even in those who have never been through it themselves.⁶²² For example, where one non-binary person shares that their non-binary identity was not believed by a medical professional, other non-binary people may perceive medical professionals to be suspicious or sceptical towards their identity (despite having never experienced it themselves).⁶²³ Therefore, critical realism provides the researcher with the normative framework to recognise how the social context may impact upon the accounts of certain populations, and take this into account in theorising and analysing the findings.

The adoption of a critical realist lens also leads me to frame my empirical findings as influential to my policy recommendations, but not necessarily determinative of them. The subjective attitudes and experiences of non-binary people are important in

⁶²⁰ Simon J Williams, 'Beyond meaning, discourse and the empirical world: critical realist reflections on health' (2003) 1 *Social Theory and Health* 42–71, 45 – 46.

⁶²¹ Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Policy Press 2020) 170 – 171.

⁶²² *ibid.*

⁶²³ *ibid.*

providing greater insight into the issue of legal sex recognition and adhering to the 'nothing about us without us' principle. However, issues beyond the subjective accounts of non-binary populations are also taken into account such as the wider social context and policy considerations of GRA reform. I believe this is in line with a critical realist approach as it balances the significance of empirical feedback provided by research participants with the wider context in question.

3.3.3 Non-ideal theory

The second component of my normative framework comprises non-ideal theorising, which I use to make my policy recommendations. Normative theorising exists along a continuum between non-ideal and ideal theory,⁶²⁴ with a varying degree of fact sensitivity. Non-ideal theory is more 'fact sensitive' than ideal theory and takes into account more feasibility constraints or real-world facts, than ideal theory which presumes ideal conditions.⁶²⁵ Non-ideal theorising may take into account the likelihood of certain policies being adopted given social, political, economic or other factors.⁶²⁶ Both forms of theorising are useful in that non-ideal theorising may result in a more realistic or practically achievable outcome, though ideal theory can be effective in providing a utopian benchmark against which current society can be judged.⁶²⁷ As a reform-based project which is sensitive to policy concerns, the relative likelihood of different reform options attracting sufficient support to pass through the UK Parliament is an important factor to take into account for the purposes of this thesis. Therefore,

⁶²⁴ Laura Valentini, 'Ideal vs. non-ideal theory: a conceptual map' (2012) 7(9) *Philosophy Compass* 654-664, 657.

⁶²⁵ *ibid* 654-664.

⁶²⁶ *ibid*; Alexandru Volacu, 'Bridging Ideal and Non-Ideal Theory' (2018) 66(4) *Political Studies* 887 – 902, 889.

⁶²⁷ *ibid*.

my analysis adopts an approach based on non-ideal theorising, which recognises and accounts for the relative feasibility and practicality of different reform options. As a reform project, there is always a degree of idealism to recommendations,⁶²⁸ so I will be taking into account the *relative* - not absolute – likelihood of different reform options being adopted. This means a recommendation for one reform based on feasibility, does not mean that this option is likely to be adopted by policymakers, but that it may be *more likely* to be adopted than the other option/s.

One further caveat to my account of non-ideal theorising is that inputting too many factual constraints can result in the analysis operating as an ‘uncritical defence of the status quo’.⁶²⁹ A strict account of non-ideal theorising would therefore be overly restrictive for a socio-legal project based on law reform and policy change, which generally aspires to a ‘better’ state of affairs than the current law or policy in question. Therefore, my thesis weaves in a third and final component of my normative framework to balance against the potential for an uncritical defence of the status quo, namely a dignity-based conception of rights.

3.3.4 Dignity

The main aim of this project is to produce an empirical, law reform-oriented study but my research also raises deeper questions of moral and legal philosophy.⁶³⁰ A discursive and critical engagement with these issues is necessary because it can draw

⁶²⁸ The extent to which fact sensitivity should factor into normative theorising depends on the aims and research questions, see Laura Valentini, ‘Ideal vs. non-ideal theory: a conceptual map’ (2012) 7(9) *Philosophy Compass* 654-664, 662.

⁶²⁹ Laura Valentini, ‘Ideal vs. non-ideal theory: a conceptual map’ (2012) 7(9) *Philosophy Compass* 654-664, 660.

⁶³⁰ See generally: Matthew Kramer, *In the realm of legal and moral philosophy: critical encounters* (Macmillan Press 1997).

out the deeper significance of issues engaged in relation to legal sex recognition. It can also therefore ground and guide recommendations for reform based on improving the current situation for non-binary people. It is also based on recognising the importance of dignity as a foundational value in European human rights law which has legal application to England and Wales. Though it is worth noting that the inclusion of a dignity-analysis is framed as an aid to my analysis, rather than representing my thesis as being one on moral philosophy.

My understanding of dignity is outlined in chapter 8 but in general terms is grounded in Kantian philosophy which has been integral to the development of dignity in European constitutionalism. My definition of dignity is broad and incorporates issues of autonomy, equality and personal integrity. My understanding draws on Bedford's conception of dignity as important to the whole, integrated person.⁶³¹ Through this lens, I reflect on the key elements of my findings and illustrate the opportunities of a dignity-based framework for ongoing and future claims related to non-binary legal recognition.

3.4 Application of the normative framework

Throughout the thesis I primarily use critical realism and non-ideal theorising to analyse my empirical findings and offer comments and further discussion on issues raised. In presenting my findings, I offer comment where additional context may be useful or where I need to clarify points raised by participants. I will also comment in instances where participants appear to be mistaken about the operation of the law or

⁶³¹ See generally: Daniel Bedford, 'Human dignity in Great Britain and Northern Ireland' in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019).

a particular requirement. At the end of each chapter, I indicate any proposals for reform. In chapter 8, I analyse my reform proposals using a dignity-based conception of rights. In some jurisdictions, dignity is an absolute right from which there can be no derogation. However, for the purposes of this thesis, issues of dignity are balanced against other considerations in forwarding my recommendations. I outline my final recommendations for reform in chapter 9. No single component of my normative framework is wholly determinative of my reform recommendations. I will now turn to the substantive chapters of the thesis, firstly turning to present and analyse findings related to decertification.

4 Decertification

4.1 An introduction to decertification

One of the earliest accounts of systematic identity registration in England and Wales dates back to 1538 with the introduction of parish registration by Thomas Cromwell, Henry VIII's Vicar-General.⁶³² The purpose of such a system of registration was to verify the ownership and transfer of property to legal heirs and establish who was aligned with the Church of England.⁶³³ In 1837 a civil register of births was introduced in England and Wales,⁶³⁴ allowing for a system of registration separate from parish registers. The civil registration system became crucial to navigating society by the twentieth century with birth certificates needed to access the education system, collect unemployment benefits and pensions, apply for employment (through the Labour Exchanges), or use other social services provided by the State and private associations.⁶³⁵ The civil registration of births still exists today with the birth certificate potentially being used in a range of situations for identity verification. This includes to

⁶³² Simon Szreter, 'Registration of Identities in Early Modern English Parishes and Amongst the English Overseas' in Keith Breckenridge and Simon Szreter (eds), *Registration and Recognition: Documenting the Person in World History* (British Academy 2012) 67–92, 71.

⁶³³ Cromwell explained that parish registration was necessary to avoid 'contentions' arising from 'age, lineal descent, title of inheritance, legitimation of bastardy, and for knowledge, whether any person is our subject or no': Simon Szreter, 'Registration of Identities in Early Modern English Parishes and Amongst the English Overseas', in Keith Breckenridge and Simon Szreter (eds), *Registration and Recognition: Documenting the Person in World History* (Oxford, 2012), 67–92, 71. See generally Nadja Durbach, 'Private Lives, Public Records: Illegitimacy and the Birth Certificate in Twentieth-Century Britain' (2014) 25(2) *Twentieth Century British History* 305 – 326.

⁶³⁴ Nadja Durbach, 'Private Lives, Public Records: Illegitimacy and the Birth Certificate in Twentieth-Century Britain' (2014) 25(2) *Twentieth Century British History* 305 – 326, 307.

⁶³⁵ House of Commons, *Parliamentary Debates* 285 (16 February 1934) 2247-80; Nadja Durbach, 'Private Lives, Public Records: Illegitimacy and the Birth Certificate in Twentieth-Century Britain' (2014) 25(2) *Twentieth Century British History* 305 – 326, 308-309.

obtain a passport, access the education system,⁶³⁶ enter a marriage or civil partnership,⁶³⁷ apply for a driving licence,⁶³⁸ evidence right to work,⁶³⁹ and/or obtain a national insurance number.⁶⁴⁰ Many of these forms of identification, particularly the passport and national insurance number, are then needed to access further social security programmes like job seekers allowance⁶⁴¹ and/or universal credit.⁶⁴² The modern civil registration system is therefore much broader in scope than early accounts of registration which were tied to religious association, and now often provides the first formal certification of identification for an individual.

Maintaining a system of civil registration is now considered of fundamental importance for State governance and service provision.⁶⁴³ Birth registration provides people with

⁶³⁶ Only short birth certificates can be asked for as evidence, see Department for Education, 'Free school admissions: common issues' (Department for Education 2014)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/389818/Free_School_Admissions_Common_Issues.pdf>accessed 11 April 2021.

⁶³⁷ Neither of which are determined by the individual's legal sex, though it can be used as identity verification. Gov.UK, 'Marriages and civil partnerships in England and Wales' (Gov.UK 2021) <<https://www.gov.uk/marriages-civil-partnerships/documents-youll-need-to-give-notice>>accessed 11 April 2021.

⁶³⁸ Gov.UK, 'Identity documents needed for a driving licence application' (Gov.UK 2021) <<https://www.gov.uk/id-for-driving-licence>>accessed 11 April 2021.

⁶³⁹ Home Office, 'Right to Work Checklist' (Home Office 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774286/Right_to_Work_Checklist.pdf>accessed 11 April 2021.

⁶⁴⁰ Gov.UK, 'Get your National Insurance number' (Gov.UK 2021) <<https://www.gov.uk/government/publications/national-insurance-get-your-national-insurance-number-in-writing-ca5403>>accessed 11 April 2021.

⁶⁴¹ Gov.UK, 'Jobseeker's allowance' (JSA) (Gov.UK 2021) <<https://www.gov.uk/jobseekers-allowance/apply-new-style-jsa>>accessed 11 April 2021.

⁶⁴² Gov.UK, 'Universal Credit' (Gov.UK 2021) <<https://www.gov.uk/universal-credit/how-to-claim>>accessed 11 April 2021.

⁶⁴³ See, e.g., the World Health Organisation on the connection of birth registration to healthcare provision: World Health Organisation, 'Civil Registration: why counting births and deaths is important' (30 May 2014) <<https://www.who.int/news-room/fact->

the right to recognition before the law,⁶⁴⁴ and is an ‘important element of the protection and realization of all human rights’.⁶⁴⁵ It is consequently considered a fundamental right according to Article 24(2) International Covenant on Civil and Political Rights, and Article 7 of the Convention on the Rights of the Child.⁶⁴⁶

In England and Wales, the birth certificate records a range of information, including name, legal sex, and place of birth. As introduced in chapter 2, several scholars have questioned the purpose or merits of recording legal sex on the birth certificate with some calling for the decertification of sex.⁶⁴⁷ However, it was also noted that there is merit in consulting non-binary populations for their attitudes on this. This chapter therefore presents empirical findings on non-binary people’s attitudes towards decertification.

Decertification in this study is understood as removing the sex marker from the birth certificate specifically. This is distinct from degendering the law which is a broader term referring to the law’s withdrawal from recognising sex in various circumstances.⁶⁴⁸ There is overlap between the two such that if the law is increasingly degendered and therefore the relevance of sex decreases in law, then we might question the purpose or legitimacy of certification of legal sex on the birth certificate.

sheets/detail/civil-registration-why-counting-births-and-deaths-is-important>accessed 20 July 2022.

⁶⁴⁴ Human Rights Council, *UNGA Res 22/7* (9 April 2013). See also Human Rights Council, *UNGA Res 28/13* (7 April 2015); Human Rights Council, *UNGA Res 34/15* (24 March 2017).

⁶⁴⁵ Human Rights Council, *UNGA Res 34/15* (24 March 2017).

⁶⁴⁶ International Covenant on Civil and Political Rights, *UNGA 2200A (XXI)* (16 December 1966), art 24(2); Convention on the Rights of the Child, *UNGA Res 44/25* (20 November 1989) art 7.

⁶⁴⁷ Chapter 2.5.2.

⁶⁴⁸ See chapter 2.5.

Others adopt a broader understanding of decertification, where hard and soft forms are distinguished by reference to the extent that the law is 'gendered'.⁶⁴⁹ However, for the purposes of this thesis focusing on specific reform options, decertification is understood as the withdrawal of sex from the birth certificate and this was how the survey question was phrased for participants.⁶⁵⁰

The empirical findings show that non-binary participants were generally supportive of the prospect of decertification. This was mostly based on the argument from participants that there was no purpose for the State to record sex on the birth certificate and that decertification could have a positive impact on gender norms. However, participants also expressed concern at the feasibility of this reform option in the short-medium term. This chapter concludes that decertification is not proposed as a reform recommendation in this study.

4.2 Empirical findings

4.2.1 Quantitative data

Non-binary people were supportive of decertification. More than half of non-binary respondents (56.4%) felt that legal sex should be removed from the birth certificate. Meanwhile, 42.6% of the binary group supported decertification, representing a statistically significant difference between the binary and non-binary groups ($P=.02$).

⁶⁴⁹ Davina Cooper and Flora Renz, 'If the State decertified gender, what might happen to its meaning and value?' (2016) 43(4) *Journal of Law and Society* 483 – 505.

⁶⁵⁰ Appendix 2.

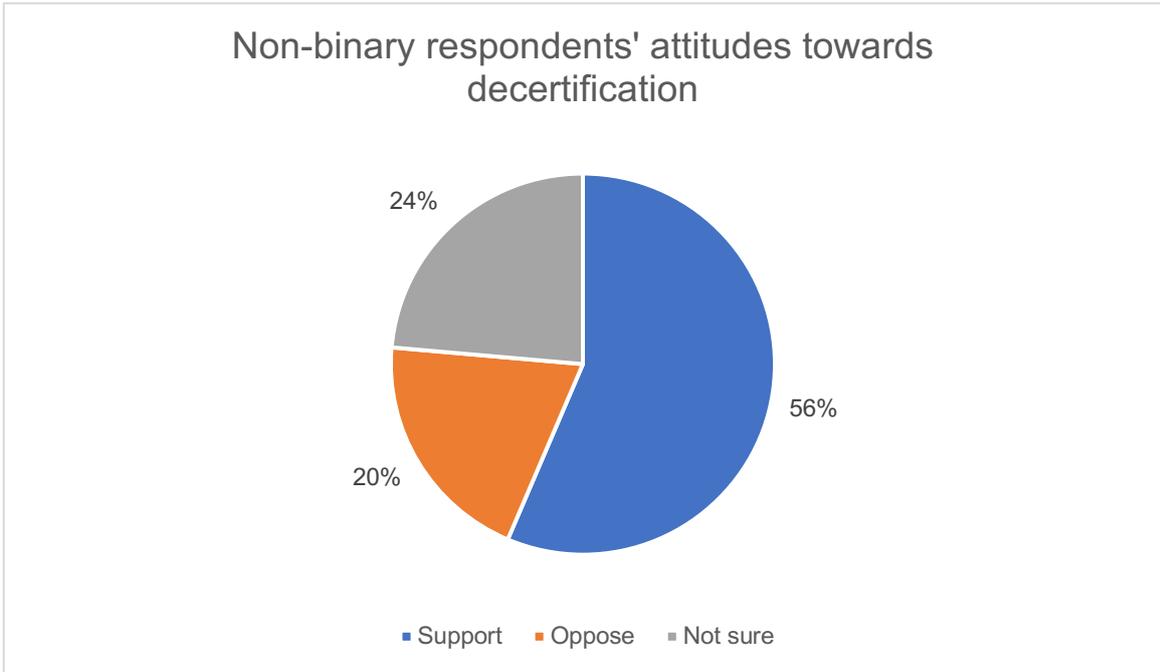


Figure 4–1. Non-binary participants' attitudes towards **decertification** (n = 140)

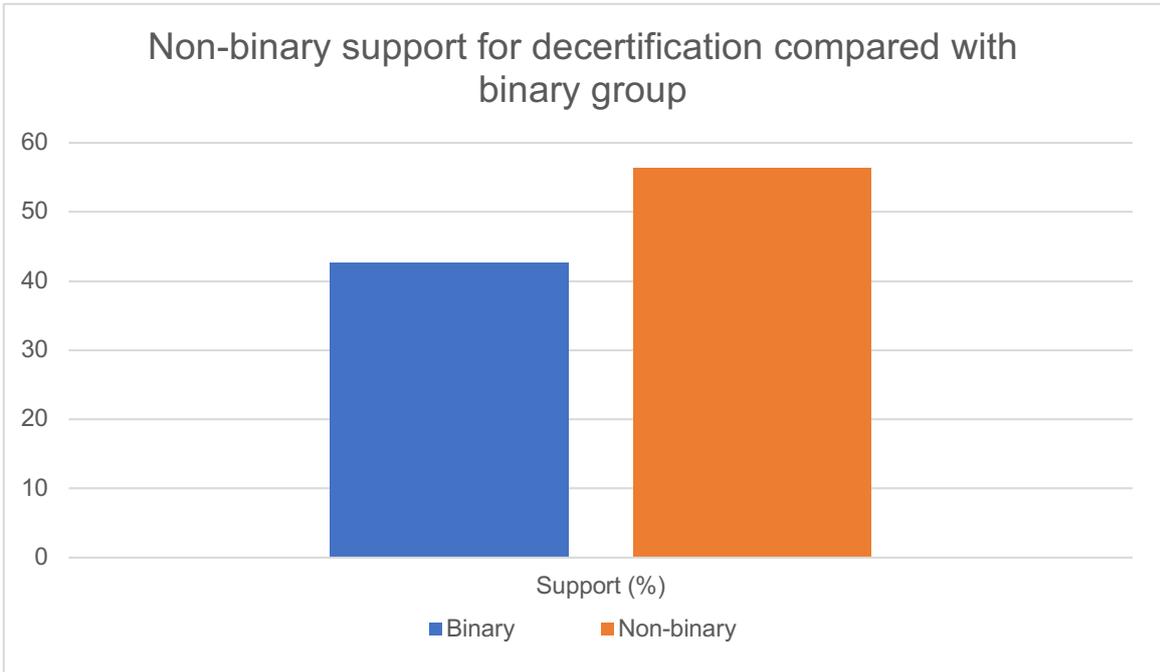


Figure 4–2. Comparison of non-binary and binary participants' support for **decertification** (n = 276)

The older age group were least supportive of decertification (43.8%), followed by the younger group (53.8), with the middle group the most supportive (65.2%). These differences were statistically non-significant ($P=.26$), meaning we cannot definitively conclude that the difference is real.

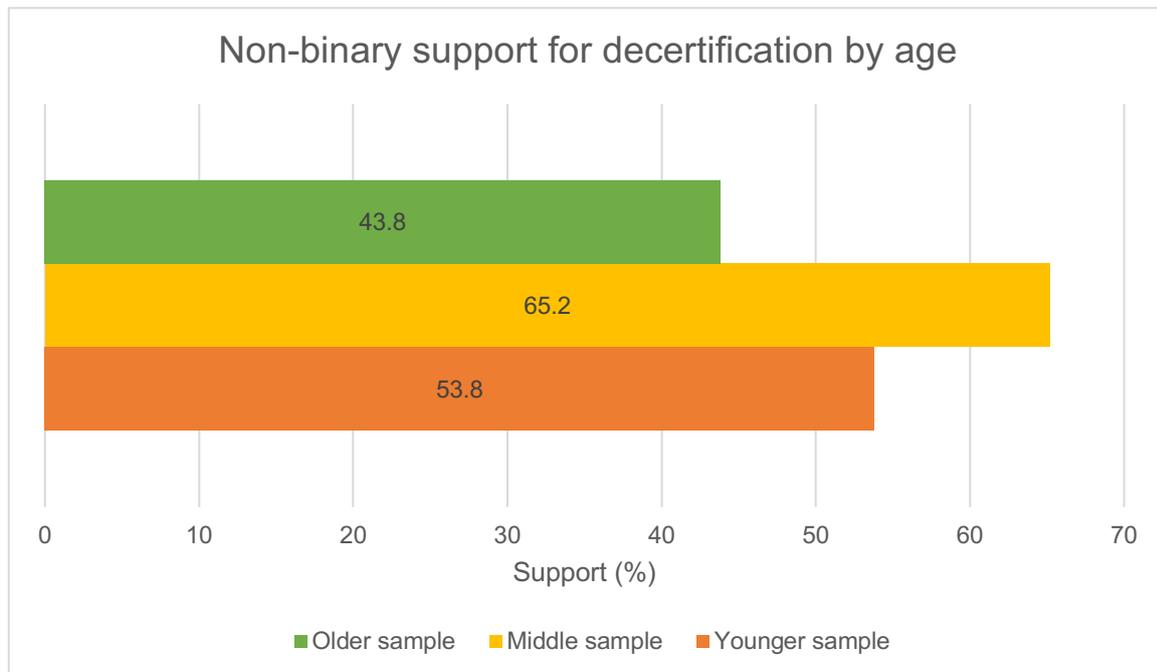


Figure 4–3. Non-binary participants' support for **decertification** by age ($n = 133$)

Compared to other reform options which presume a system of certification, support for decertification was comparatively low. Decertification attracted considerably less support (56.4%) than introducing a third sex option (95%) or multiple sex options (62.9%).

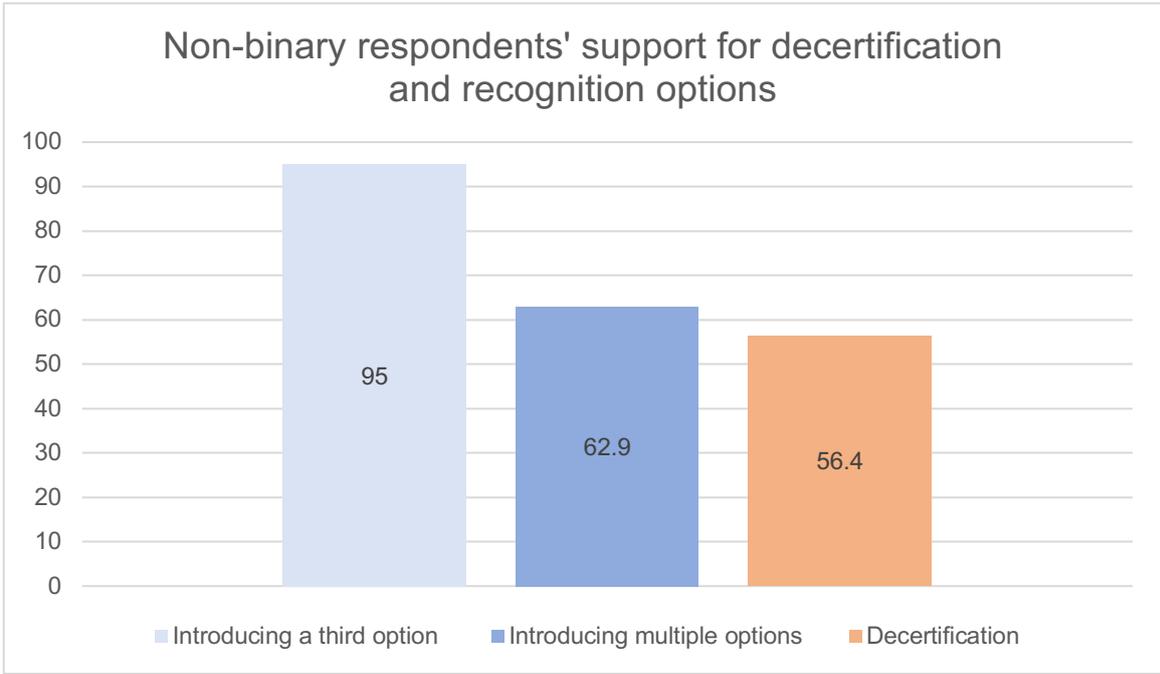


Figure 4–4. Non-binary participants' support for **decertification** and two recognition options (n = 140)

Participants were also asked to select the reform option they felt was ‘the *best* option’. Here, decertification was the most popular option selected by non-binary people (37.9%) compared with introducing an additional third (27.9%) or multiple sex options (30%). Non-binary preference for decertification was greater (though statistically non-significant ($P=.13$)) than the binary group who felt that decertification was the joint-worst macro-reform option. Therefore, despite decertification attracting less support than other requirements, it was ultimately considered the ‘best’ option overall for the non-binary group.

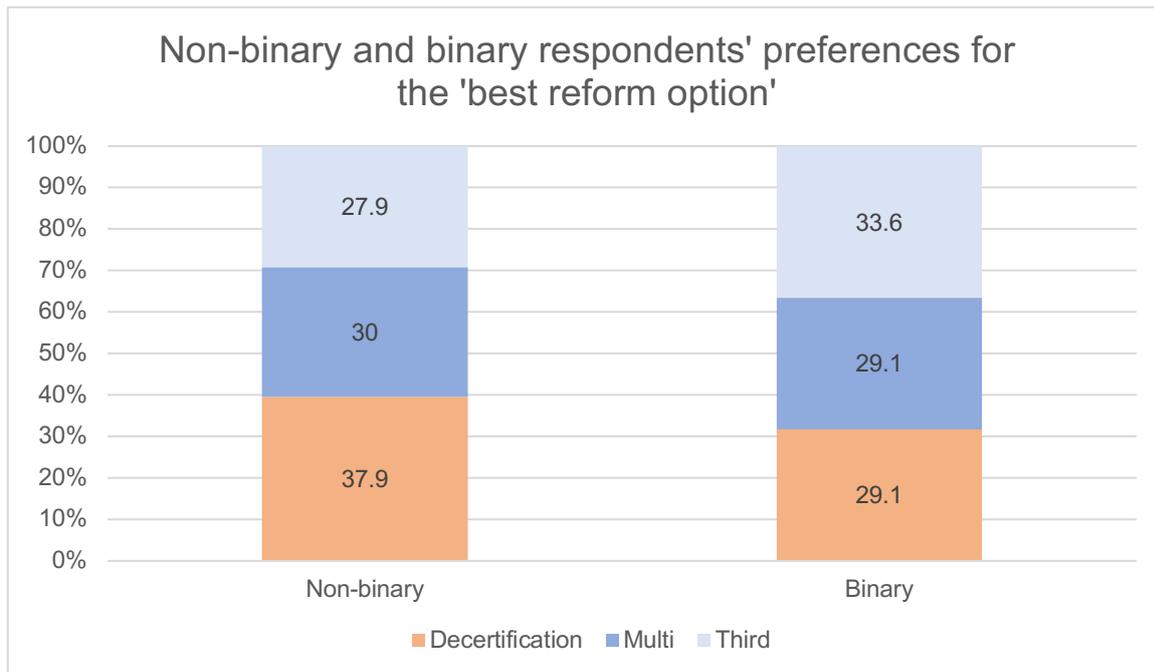


Figure 4–5. Non-binary and binary participants' preferences for the **best reform option** ($n = 276$)

4.2.2 Qualitative themes

Legal sex on the birth certificate serves no purpose

Several non-binary participants felt like there was no practical meaning or purpose in the certification of legal sex. One survey respondent felt that legal sex is merely 'a symbolic letter [on] legal documents'.⁶⁵¹ Similarly, another argued that 'having such importance placed on "sex" on birth certificates is very old fashioned and pointless'.⁶⁵² Criticism was mostly directed to the practice of recording sex *on the birth certificate*. Many participants felt there were instances where information about sex could be useful. For example, Participant 15 cited healthcare,⁶⁵³ and statistics used to help 'fight the oppression of women and gender minorities' as instances where information about

⁶⁵¹ SR 30, Non-binary, 26 – 35 years.

⁶⁵² SR 67, Non-binary, 19 – 25 years.

⁶⁵³ Participant 8, Non-binary, 26 – 35 years also noted healthcare as a context where information about sex could be useful.

sex could serve a useful purpose. However, the birth certificate was not considered to be a desirable, or even effective, way to achieve these aims.⁶⁵⁴ Participants therefore appeared to reflect Cannoot and Decoster's perception of sex on the birth certificate as an 'unconscious habit' rather than serving a useful purpose.⁶⁵⁵

Another participant argued in favour of decertification by reference to other similarly important characteristics which are not subject to mandatory certification. One respondent argued that 'gender is just like...religion and should not be mandatory as part of identification in the first place. There is no need for it on official documentation'.⁶⁵⁶ The comparison to religion is interesting because it recognises that, while these aspects of identity are important, this does not necessarily justify mandatory certification on the birth certificate.⁶⁵⁷ Furthermore, religion,⁶⁵⁸ like other characteristics such as race, sexual orientation and disability,⁶⁵⁹ is not certified but can still give rise to rights and responsibilities in law,⁶⁶⁰ such as protection from discrimination.⁶⁶¹ Decertification would therefore not necessarily mean that the State

⁶⁵⁴ Participant 15, Transfem/Non-binary, 26 – 35 years.

⁶⁵⁵ Pieter Cannoot and Mattias Decoster, 'The abolition of Sex/Gender Registration in the Age of Self-Determination: An Interdisciplinary, Queer, Feminist, and Human Rights Analysis' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 – 55, 41; Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press 2011).

⁶⁵⁶ SR 54, Transgenderless, 56 – 65 years.

⁶⁵⁷ Davina Cooper and Flora Renz, 'If the State Decertified Gender, What Might Happen to its Meaning and Value?' (2016) 43(4) *Journal of Law and Society* 483 – 505.

⁶⁵⁸ On law's conceptualisation of religion more generally, see: Suhraiya Jivraj, *The Religion of Law: Race, Citizenship and Children's Belonging* (Springer 2013).

⁶⁵⁹ Flora Renz and Davina Cooper, 'Reimagining Gender Through Equality Law: What Legal Thoughtways Do Religion and Disability Offer?' (2021) 30 *Feminist Legal Studies* 129 – 155

⁶⁶⁰ Anna-Katharina Höpflinger, Anne Lavanchy and Janine Dahinden, 'Introduction: Linking Gender and Religion' (2012) 41(6) *Women's Studies* 615-638.

⁶⁶¹ Equality Act 2010, s 10.

would have to withdraw from recognising someone's sex in all instances.⁶⁶² For example, Cooper and Renz suggest that in the event of decertification, sex could be included within a broad gender-based ground in equality legislation which could hypothetically continue to recognise and protect against sexed forms of discrimination.⁶⁶³ However, they do also note that the effectiveness of such a category in protecting against issues of sex (and gender) discrimination would depend on the legislative drafting.⁶⁶⁴

Gender norms

Another respondent argued that removing sex from the birth certificate might have a positive impact on problematising gender norms and roles within society more broadly. They argued that removing sex markers on birth certificates would be 'a statement about the importance of gender roles in society... The more gender is seen as fluid and conceptual rather than concrete, the easier trans people's lives will become'.⁶⁶⁵ This prediction reflects the arguments of several scholars who also argue that decertification could have a transformative effect on gender norms within society as it problematises the assumption that sex (and gender) is always significant enough to

⁶⁶² Davina Cooper and Flora Renz, 'If the State Decertified Gender, What Might Happen to its Meaning and Value?' (2016) 43(4) *Journal of Law and Society* 483 – 505.

⁶⁶³ Flora Renz and Davina Cooper, 'Reimagining Gender Through Equality Law: What Legal Thoughtways Do Religion and Disability Offer?' (2021) 30 *Feminist Legal Studies* 129 – 155.

⁶⁶⁴ For example, Renz and Cooper note the importance of equality legislative drafting encompassing both the understanding of gender as an element of diversity to be protected as well as something which may reproduce asymmetrical forms of disadvantage, see Flora Renz and Davina Cooper, 'Reimagining Gender Through Equality Law: What Legal Thoughtways Do Religion and Disability Offer?' (2021) 30 *Feminist Legal Studies* 129 – 155, 151 – 152.

⁶⁶⁵ SR 66, Non-binary transmasculine, 19 – 25 years.

warrant mandatory registration.⁶⁶⁶ If the State were to withdraw from legally certifying sex, this could impact social perceptions of the importance of gender in certain circumstances.⁶⁶⁷ However, whether law reform can have such a significant impact on social perceptions of gender is subject to debate. A British Social Attitudes report has suggested that ‘progressive policymaking’ could ‘influence the public to adopt more positive attitudes’ towards trans people, similar to the trajectory of attitudes towards same-sex relationships.⁶⁶⁸ However, while they make a comparison to same-sex marriage, the relevant policies which impacted views towards same-sex relations included *multiple* legislative reforms such as lowering of the age of consent to 18 (1994) and then to 16 (2001); the introduction of the Civil partnership Act in 2004; and the introduction of Marriage (Same Sex Couples) Act 2013.⁶⁶⁹ Arguably, this incremental approach to legislative reform, accompanied by generally improving social attitudes towards same-sex relations, is sufficiently distinguishable from the hypothetical situation where legal sex is decertified from the birth certificate after governance under the GRA since 2004. Therefore, while policymaking may indirectly affect social attitudes towards LGBTQ+ groups, its application in the context of decertification is uncertain. Furthermore, while decertification could impact

⁶⁶⁶ Lila Braunschweig, ‘Abolishing gender registration: a feminist defence’ (2020) 1(1) *International Journal of Gender, Sexuality and Law* 76 – 97; Pieter Cannoot and Mattias Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary Queer, Feminist, and Human Rights Analysis’ (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 – 55; Flora Renz, ‘Genders that don’t matter: Non-binary people and the Gender Recognition Act’ in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021).

⁶⁶⁷ Davina Cooper and Flora Renz, ‘If the State Decertified Gender, What Might Happen to its Meaning and Value?’ (2016) 43(4) *Journal of Law and Society* 483 – 505.

⁶⁶⁸ John Curtice and others, *British Social Attitudes, the 36th Report: Relationships and gender identity: public attitudes within the context of legal reform* (National Centre for Social Research 2019) 36.

⁶⁶⁹ *ibid* 18.

perceptions of the importance of sex, the effect it would have on non-binary identities specifically is less certain. The withdrawal of the State recording sex is arguably a statement on the general importance of legal sex to the State rather than on the legitimacy of non-binary identities specifically. It could be argued that the implicit legitimisation of non-binary identities enabled through certification-based reform (e.g. non-binary recognition) could have a more direct impact on perceptions towards non-binary identities than decertification.

The prediction of decertification having a positive impact on social attitudes also overlooks the potentially negative impact of decertification on non-binary populations. One non-binary respondent expressed concern that decertification could ‘give ammunition’⁶⁷⁰ to people who might seek to mock or undermine trans people’s experiences and rights. However, while one non-binary participant expressed concern at a backlash, this concern was mostly highlighted by binary respondents, who described being fearful of the potential for ‘resentment’⁶⁷¹ or ‘backlash’.⁶⁷² This might explain why non-binary people were more likely to support decertification than binary people, as some binary trans respondents were concerned that their existing rights of recognition could be impacted by a wider social backlash to decertification.⁶⁷³ This is

⁶⁷⁰ SR 217, Non-binary, 36 – 45 years.

⁶⁷¹ SR 58, Male, 26 - 35 years.

⁶⁷² SR 45, Transgender woman, 16-18 years.

⁶⁷³ This raises interesting issues related to intra-community politics between binary and non-binary people which is also noted in relation to gender dysphoria, see chapter 6.2.1. On the backlash to trans rights, particularly during the public consultation process, see Luke Armitage, ‘Explaining backlash to trans and non-binary genders in the context of UK Gender Recognition Act reform’ (2020) *Journal of the International Network for Sexual Ethics and Politics* 11 – 35; Ben Vincent, Sonja Erikainen and Ruth Pearce (eds), ‘TERF Wars: Feminism and the fight for transgender futures’ (2020) 68(4) *Sociological Review* 677 – 890.

representative of some (but not all) binary trans people currently being able to access legal recognition and affirmation of their gender identity.

This thesis is primarily concerned with non-binary populations, but the accounts of binary trans respondents were interesting here because they raised a broader point in relation to decertification. While decertification is relevant to non-binary populations, it also directly impacts the ability of binary trans (and cis) populations to have their legal sex recorded on the birth certificate.⁶⁷⁴ It is possible that, if we recognise that legal sex recognition may offer certain affirmative benefits, then other groups could question why they should have to forfeit their right to recognition.

Moreover, these participants arguably overestimate the role of law, and underestimate the role of other factors, in creating and sustaining a gendered society. The law is not the only factor which establishes and maintains gender roles and is arguably unable to solve or radically change social perceptions and stereotypes towards gender and gender diverse populations.⁶⁷⁵ Law reform can be practically useful in addressing inequalities, alleviating suffering and protecting against certain wrongs on the basis of gender and identity.⁶⁷⁶ However, overreliance on law to address social issues could be ineffective and arguably, in the instance of decertification, could risk rendering the

⁶⁷⁴ This is unless certification of legal sex remained optional for those who wanted it, though this would then raise questions as to the purpose or utility of sex on the birth certificate in the first place. This theme is discussed in more detail in relation to multiple sex options in chapter 5.

⁶⁷⁵ Sharon Cowan, 'Sex/Gender Equality: Taking a Break from the Legal to Transform the Social' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave Macmillan 2016) 116.

⁶⁷⁶ Sharon Cowan, 'The Best Place in the World to Be Trans? Transgender Equality and Legal Consciousness in Scotland' in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Springer 2021) 191.

law less powerful to respond to the negative implications of other gendered factors, depending on how the State regulated and recognised sex.⁶⁷⁷

Feasibility concerns

While non-binary participants were generally supportive of decertification, they highlighted concerns about how realistic it was as a reform option. One respondent described decertification as an ‘ideal’ solution, but that it was ultimately not realistic.⁶⁷⁸

Similarly, Participant 10 said:

I think it’s good to be idealistic [about reform to legal sex recognition] but you also have to be pragmatic and realise what the reality of the situation is and figure out a way that can minimise as much damage as possible. And then at some point in the future things can be more like an idealistic version of things.⁶⁷⁹

Participant 6 stated that ‘in an ideal world we would [remove sex from the birth certificate] however they’re not going to stop doing that...and getting our hopes up that they will is foolish...Nice idea but I just don’t think that will happen’.⁶⁸⁰ This opinion was commonly held among non-binary participants and has also been observed in other research projects too.⁶⁸¹ This perception of decertification as an ideal solution, but ultimately unrealistic in the short-medium term, is arguably the most likely explanation for why decertification was considered the ‘best’ reform option but

⁶⁷⁷ Davina Cooper and others, *Abolishing legal sex status: The challenge and consequences of gender-related law reform: Final Report* (King’s College London 2022) 18 – 25.

⁶⁷⁸ SR 275, Genderqueer, 19 – 25 years.

⁶⁷⁹ Participant 10, Non-binary, 19 – 25 years.

⁶⁸⁰ Participant 6, Transmasculine Non-binary, 19 – 25 years.

⁶⁸¹ Hannah J H Newman and Elizabeth Peel, “An Impossible dream”? Non-binary people’s perceptions of legal gender status and reform in the UK’ (2022) *Psychology and Sexuality* 1 – 15.

attracted less support than other reform options. Non-binary participants appear to support decertification in principle, but its attractiveness as a reform option in the short-medium term was undermined by its lack of feasibility.

While the removal of sex from the birth certificate is not new, decertification is relatively novel in practice as most jurisdictions across the world retain a system of sex certification.⁶⁸² Decertification was also not a reform proposal given substantive consideration by the UK Government or the Women and Equalities Committee in the public consultation for England and Wales, nor has the Scottish Government expressed an interest in removing sex from the birth certificate. The UK Government expressed an interest in removing ‘unnecessary requests for gender information’⁶⁸³ including in official documents but not necessarily the birth certificate.⁶⁸⁴ This is also reflected in other jurisdictions, such as Belgium and the Netherlands, where there have been proposals to remove sex markers from documents in relation to identity cards but not the civil registry.⁶⁸⁵ Nevertheless it is worth noting that Tasmania is a well-known exception to this, with the Justice and Related Legislation (Marriage and

⁶⁸² Cf Tasmania, see Alexandra Humphries and Ellen Coulter, ‘Tasmania makes gender optional on birth certificates after Liberal crosses floor’ (ABC News 2019) <<https://www.abc.net.au/news/2019-04-10/birth-certificate-gender-laws-pass-in-tasmania/10989170>>accessed 16 March 2022.

⁶⁸³ Government Equalities Office, *Government Response to the Women and Equalities Committee Report on Transgender Equality, Cm 9301* (Government Equalities Office 2016) 5.

⁶⁸⁴ See also Appendix 8 for the response to a FOI requesting an update on this review.

⁶⁸⁵ See general reporting on Belgium’s decision to remove sex from ID cards: The Brussels Times, ‘Indication of gender could disappear from Belgian ID card’ (The Brussels Times 2021) <<https://www.brusselstimes.com/195585/indication-of-gender-could-disappear-from-belgian-id-card>>accessed 20 August 2022. Similarly, see the Netherlands: Neela Ghoshal and Kyle Knight, ‘Netherlands sees no role for gender marker on ID documents’ (Human Rights Watch 2020) <<https://www.hrw.org/news/2020/07/08/netherlands-sees-no-role-gender-marker-id-documents>>accessed 20 August 2022.

Gender Amendments) Act 2019 providing for birth certificates to not specify sex unless requested by the parents or the child when they reach 16 years of age.⁶⁸⁶

On the contrary, while other reform options based on certification of sex – such as non-binary recognition and self-identification - are not necessarily common features of legal sex systems,⁶⁸⁷ the fact that they have been implemented in some jurisdictions makes them much more feasible options than decertification.⁶⁸⁸ These reform options have also received much greater policy interest from the UK Government where they did seek ‘initial views on non-binary recognition as it relates to the Gender Recognition Act’ during the public consultation.⁶⁸⁹ Similarly, while the Scottish Government declined to recognise non-binary identities in their most recent proposals, they did set up a Working Group for Non-binary People’s Equality which has recommended that the Scottish Government undertake further research with a view to introducing non-

⁶⁸⁶ Births, Deaths and Marriages Registration Act 1999, s 46 as amended by Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, s 22. For discussion see Louise Richardson-Self, “‘There are only two genders – male and female...’ An Analysis of Online Responses to Tasmania Removing “Gender” from Birth Certificates’ (2020) 1 *International Journal of Gender, Sexuality and Law* 295 - 322; CL Quinan and others, ‘Framing Gender Identity Registration Amidst National and International Developments: Introduction to “Bodies, Identities, and Gender Regimes: Human Rights and Legal Aspects of Gender Identity Registration’ (2020) 1 *International Journal of Gender, Sexuality and Law* 1, 19.

⁶⁸⁷ Directorate-General for Justice and Consumers, *Legal gender recognition in the EU: The journeys of trans people* (European Commission 2020); Zhan Chiam and others, *Trans Legal Mapping Report 2019: Recognition before the law* (ILGA World 2020).

⁶⁸⁸ It is also worth noting the exception of Tasmania which has made sex markers on the birth certificate optional: see Alexandra Humphries and Ellen Coulter, ‘Tasmania makes gender optional on birth certificates after Liberal crosses floor’ (ABC News 2019) <<https://www.abc.net.au/news/2019-04-10/birth-certificate-gender-laws-pass-in-tasmania/10989170>> accessed 16 March 2022.

⁶⁸⁹ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) 12, 51.

binary legal recognition.⁶⁹⁰ In other jurisdictions, Governments have also already undertaken reviews and scoping exercises on how to implement non-binary recognition.⁶⁹¹ Decertification therefore faces significant barriers, with the relative likelihood of adoption being much lower compared to other options.

4.3 Discussion: should decertification be recommended for reform?

The proposal of decertification raises interesting questions related to the State's presumed interest in sex. Moreover, there is a presumption against state interference to the individual, which is based on the principle of autonomy. Arguably as sex is such a personal and intimate aspect of private life, the presumption ought to lie with the State in justifying interference through mandatory certification. In chapter 2 it was argued that there are a range of potentially compelling reasons why the State might have an interest in sex. However, whether this must be achieved through registration on the birth certificate is at least questionable. Non-binary participants in this study appeared to reflect this suspicion that the certification on the birth certificate served a legitimate purpose which could not be achieved in other ways. This reflects Cannot

⁶⁹⁰ Working Group for Non-binary People's Equality, *Non-Binary Working Group Report and Recommendations March 2022* (Scottish Government July 2022) 36 – 40.

⁶⁹¹ E.g. see Belgium: Emmanuelle Bribosia, Isabelle Rorive and Hania Ouhnaoui, *Rapport au sujet de l'arrêt n° 099-2019 de la Cour constitutionnelle du 19 juin 2019 annulant partiellement la loi du 25 juin 2017 réformant des régimes relatifs aux personnes transgenres, et de ses conséquences en droit belge à la lumière du droit compare* (Institut pour l'Égalité entre les Femmes et les Hommes, 2019).

Furthermore, s 7 Gender Recognition Act 2015 in the Republic of Ireland specified the need for a review of the legislation after 2 years, with a subsequent review focusing on non-binary legal recognition. See Minister for Employment Affairs and Social Protection, *Gender Recognition Act 2015: Report to the Oireachtas under Section 7 of the Act* (Department of Employment Affairs and Social Protection 2019).

who has also argued that even if the State can be said to have a sufficient interest, the mandatory certification of sex is not proportionate to achieving those aims.⁶⁹²

However, there are also important counterarguments to proposing decertification for reform. The most common reason cited by non-binary participants was that decertification was comparatively much less realistic or feasible as an attractive reform option for policymakers. One of the most significant reasons for this may be that the consequences of it are less certain, including the social, legal and policy impacts. Scholars have started to address concerns surrounding the uncertainties of decertification for other areas of law and governance,⁶⁹³ which does suggest that there are innovative ways that the law could continue to govern areas of interest despite removing sex from the birth certificate. However such issues would require further consultation to determine how the law would operate in practice. While the uncertainties of other reform options can be mitigated by looking to other jurisdictions which already adopt similar frameworks, this is more complicated for decertification where there are fewer examples. Moreover, while certification of sex may have an impact on contributing to the social meaning of sex, it does not necessarily follow that decertification will be able to reduce or reverse that social meaning. Consequently,

⁶⁹² Pieter Cannoot and Mattias Decoster, 'The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary Queer, Feminist, and Human Rights Analysis' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 – 55, 47.

⁶⁹³ See (e.g.) Flora Renz, 'The challenge of same-sex provision: how many girls does a girls' school need?' (2020) 10(2) *feminists@law* 1 – 29; Flora Renz and Davina Cooper, 'Reimagining Gender Through Equality Law: What Legal Thoughtways Do Religion and Disability Offer?' (2021) 30 *Feminist Legal Studies* 129 – 155; Davina Cooper and others, *Abolishing legal sex status: The challenge and consequences of gender-related law reform: Final Report* (King's College London 2022).

while decertification is often forwarded on the basis of its transformative potential, this potential must be treated with caution.

Considering the uncertainties surrounding decertification as a reform proposal, there is the risk that the short-medium term benefits of other reform options could be overlooked and opportunities for reform may be missed. As reflected by participants' accounts, predicting and exploring longer-term ideas for the regulation of sex is valuable, but it is equally important to minimise as much damage as possible caused by the status quo. If there is a possibility that harm could be minimised by more realistic reform, the respective merits and challenges of these options should be afforded equal attention.

Decertification is also subject to compelling counter arguments from others, including binary cis and trans people, because of the impact that this reform option may have on them. It is a relevant consideration that most people do not object to the certification of sex on the birth certificate.⁶⁹⁴ This includes cis and trans (and non-binary) people⁶⁹⁵ for whom the certification of legal sex can provide an affirmative function.⁶⁹⁶ This affirmative function was recognised by the ECtHR in *Goodwin*, where the Court

⁶⁹⁴ Elizabeth Peel and Hannah Newman, 'Gender's Wider Stakes: Lay Attitudes to Legal Gender Reform' (2020) 10(2) *feminists@law* 1 – 65, 15.

⁶⁹⁵ Jessica A Clarke, 'They, Them and Theirs' (2019) 132 *Harvard Law Review* 894 – 991, 951; Davina Cooper and Flora Renz, 'If the State Decertified Gender, What Might Happen to its Meaning and Value?' (2016) 43(4) *Journal of Law and Society* 483 – 505, 495–496; See also Women and Equalities Committee, *Oral evidence to the Transgender Equality Inquiry, HC390, Q130 - 197* (House of Commons 13 October 2015) Q155.

⁶⁹⁶ Elizabeth Peel and Hannah Newman, 'Gender's Wider Stakes: Lay Attitudes to Legal Gender Reform' (2020) 10(2) *feminists@law* 1 – 65; J Michael Ryan, 'Born again?: (non-) motivations to alter sex/gender identity markers on birth certificates' (2020) 29(3) *Journal of Gender Studies* 269 – 281.

connected legal recognition for trans people with dignity and imposed an obligation on the UK Government to provide a means for post-operative transsexuals to receive legal sex recognition. Arguably this obligation on States to provide for means to receive recognition implicitly relies on there being a system of certification in the first place.⁶⁹⁷ It is also noteworthy that the Council of Europe's Parliamentary Assembly in Resolution 2191 called on States to 'consider making the registration of sex on birth certificates and other identity documents *optional* for everyone',⁶⁹⁸ rather than calling on States to remove it entirely. Therefore, decertification arguably raises moral, and possibly even legal, questions on the impact of decertification for binary trans people and others.

Decertification is an ambitious and potentially transformative option for a future legal sex system. However it is just one reform option which ought to be considered in alleviating the difficulties faced by non-binary people currently. From an idealised and utopian perspective, decertification is perhaps to be embraced. However, as a reform-focused, non-ideal law reform project in 2022, the issues associated with decertification outweigh the arguments in favour of this reform option currently. Therefore, decertification is not proposed as a reform recommendation.

⁶⁹⁷ *Christine Goodwin v United Kingdom* [2002] ECHR 588.

⁶⁹⁸ Council of Europe, *Resolution 2191* (Council of Europe 2017) (emphasis added).

5 Legal Recognition of Non-binary Identities

5.1 An introduction to non-binary legal recognition

The analysis from the previous chapter indicated that while decertification was an attractive option for non-binary participants, there is a need to explore reform which is more realistic and practicable in the short-medium term. This includes reform which relies on the certification of sex on the birth certificate, such as non-binary recognition, including via a third additional sex option or multiple additional sex options. In England and Wales, there are two options available for legal sex registration: male and female. The GRA provides a means to change this sex marker to match someone's (binary) gender identity but there is no provision for those who identify beyond the binary.⁶⁹⁹

The Government consulted on the idea of non-binary recognition in the 2018 public consultation for England and Wales, but made it clear that there was no intention to introduce this. In 2021, the Government have confirmed that they have no plans to expand the number of sex options available, citing the potentially 'complex practical consequences for other areas of the law, service provision and public life'.⁷⁰⁰ This was despite most respondents (58%) to the public consultation being in favour of making changes to the system of legal recognition to accommodate non-binary people.⁷⁰¹ However, work is increasing in Governments across Europe and further afield to

⁶⁹⁹ The Government recently confirmed that they will not be expanding the number of sex options, see government's response in UK Government and Parliament, 'Petitions: Make non-binary a legally recognised gender identity in the UK' (UK Government and Parliament 2021) <<https://petition.parliament.uk/petitions/580220>>accessed 14 March 2022.

⁷⁰⁰ See the Government's response in UK Government and Parliament, 'Petitions: Make non-binary a legally recognised gender identity in the UK' (UK Government and Parliament 2021) <<https://petition.parliament.uk/petitions/580220>>accessed 14 March 2022.

⁷⁰¹ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 130.

consider non-binary legal recognition.⁷⁰² While it is an uncommon feature of most jurisdictions, some states already provide for non-binary recognition in certain contexts. This includes (for example) Nepal (2007), Pakistan (2009), Bangladesh (2011), Australia (2013), India (2014), Malta (2018), Iceland (2019), Germany (2019), Canada (2020), and New Zealand (2021).⁷⁰³

The UK Government does not have plans to introduce non-binary legal recognition for England and Wales. However, the opinions of non-binary populations regarding legal recognition (including the form it should take) is important so that policymakers and researchers are sufficiently prepared for increasing calls to at least consider such reform.⁷⁰⁴ This is necessary in England and Wales as currently calls for legal recognition are rejected on the basis that there is not enough information available to policymakers.⁷⁰⁵ However, it may also be relevant as domestic and European case law is increasingly engaged with issues related to non-binary identities including legal

⁷⁰² E.g. Scotland and Belgium. See Working Group for Non-binary People's Equality, *Non-Binary Working Group Report and Recommendations March 2022* (Scottish Government July 2022) and Emmanuelle Bribosia, Isabelle Rorive and Hania Ouhnaoui, *Rapport au sujet de l'arrêt n° 099-2019 de la Cour constitutionnelle du 19 juin 2019 annulant partiellement la loi du 25 juin 2017 réformant des régimes relatifs aux personnes transgenres, et de ses conséquences en droit belge à la lumière du droit compare* (Institut pour l'Égalité entre les Femmes et les Hommes, 2019).

⁷⁰³ Though sometimes this ability to receive non-binary recognition is limited to intersex people who have to provide medical evidence. See, for example, in Germany where a ruling from the Constitutional Court led to the adoption of recognition for intersex people: Constitutional Court's ruling on: BVerfG, Order of the First Senate of 10 October 2017 - 1 BvR 2019/16 [1-57].

⁷⁰⁴ This was recommended by the NB working Group to the Scottish Government in their July 2022 report: Working Group for Non-binary People's Equality, *Non-Binary Working Group Report and Recommendations March 2022* (Scottish Government July 2022).

⁷⁰⁵ *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 [54] (Lord Reed P); UK Government and Parliament, 'Petitions: Make non-binary a legally recognised gender identity in the UK' (UK Government and Parliament 2021) <<https://petition.parliament.uk/petitions/580220>>accessed 14 March 2022.

recognition.⁷⁰⁶ As the right to legal recognition is regularly and increasingly framed as a human right,⁷⁰⁷ it is possible that such a claim may be successful and the Government may need to change national law to reflect that. Furthermore, as explored in chapter 2.5, there remains a gap in the empirical scholarship with regards to non-binary attitudes towards a third sex option *and* multiple sex options.

This chapter presents empirical findings related to non-binary participants' attitudes towards non-binary recognition, including an additional third sex option and multiple additional sex options. The third sex option attracted overwhelming support and, while it was noted as an imperfect solution, it was also considered to be an option which was sufficient and relatively realistic and feasible in the short-medium term. This chapter concludes with the proposal to introduce an additional third sex option.

5.2 Empirical findings

5.2.1 Quantitative data

Non-binary participants were supportive of expanding legal recognition beyond the binary. Just under three-quarters (72.9%) indicated that a non-binary option would make them more likely to apply for a GRC. This is compared to just 5% of the binary sample, representing a statistically significant difference ($P < .001$).

⁷⁰⁶ E.g. Elan-Cane who intends to appeal to the ECtHR following defeat in the Supreme Court: Elan-Cane, 'Tweet: X Passports in the UK. I very much regret to inform everyone that justice was not served today. The case will now go to the European Court of Human Rights in Strasbourg' (Twitter 2021) <<https://twitter.com/ChristieElanCan/status/1471059161672822787>> accessed 16 March 2022. See also *Y v France App no 76888/17* (ECtHR, pending) which will engage relevant issues.

⁷⁰⁷ Jens Theilen, 'Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition' (2018) 3 *European Human Rights Law Review* 249 – 257.

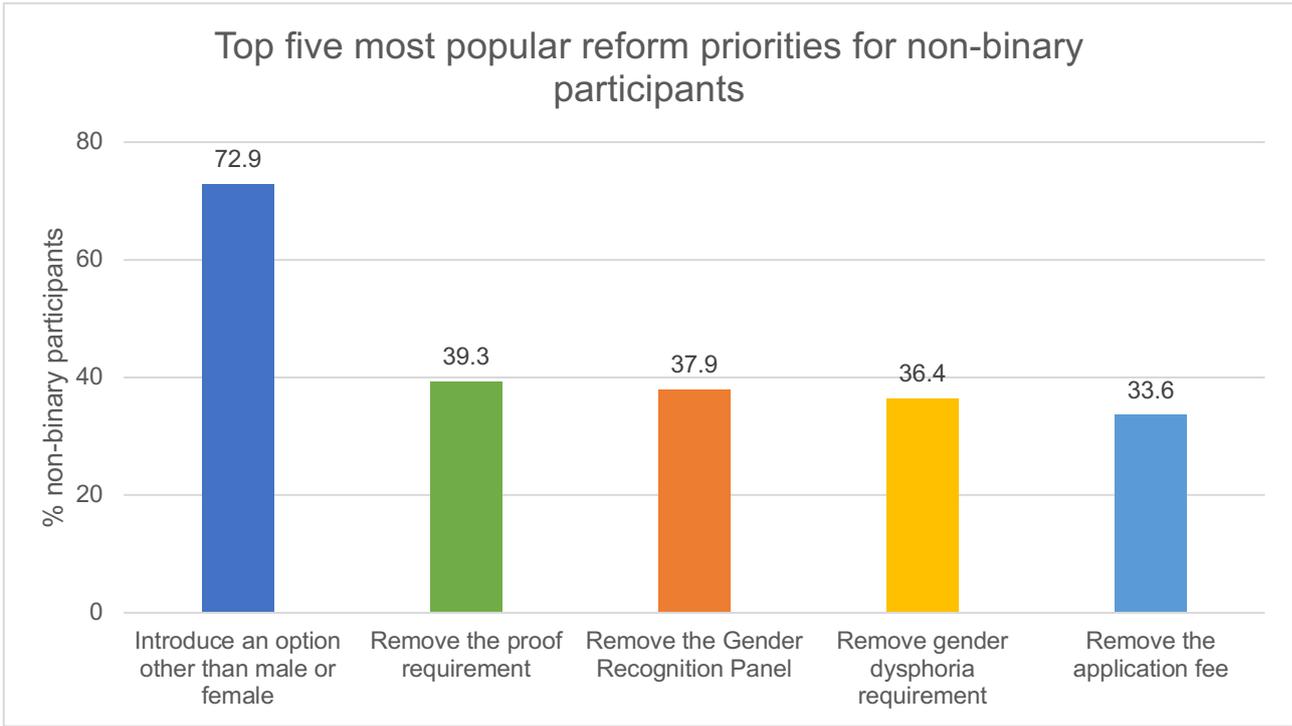


Figure 5–1. Top five most popular **reform priorities** for non-binary participants ($n = 140$)

The middle age group were most likely to say that introducing an option other than male or female would make them more likely to apply for a GRC (78.3%) followed by the younger (71.8%) and older groups (62.5%). These differences were statistically non-significant ($P=.45$).

Third sex option

The third sex option was popular among non-binary participants, with 95% in support. It is notable that zero non-binary participants were opposed. Non-binary participants were more likely to support the third sex option (95%) than binary trans participants (81.6%). This difference was statistically significant ($P=.001$), indicating a real difference.

Younger non-binary people were slightly less supportive of a third option (91%), compared with the middle (100%) and older age groups (100%). These differences were statistically non-significant ($P=.09$).

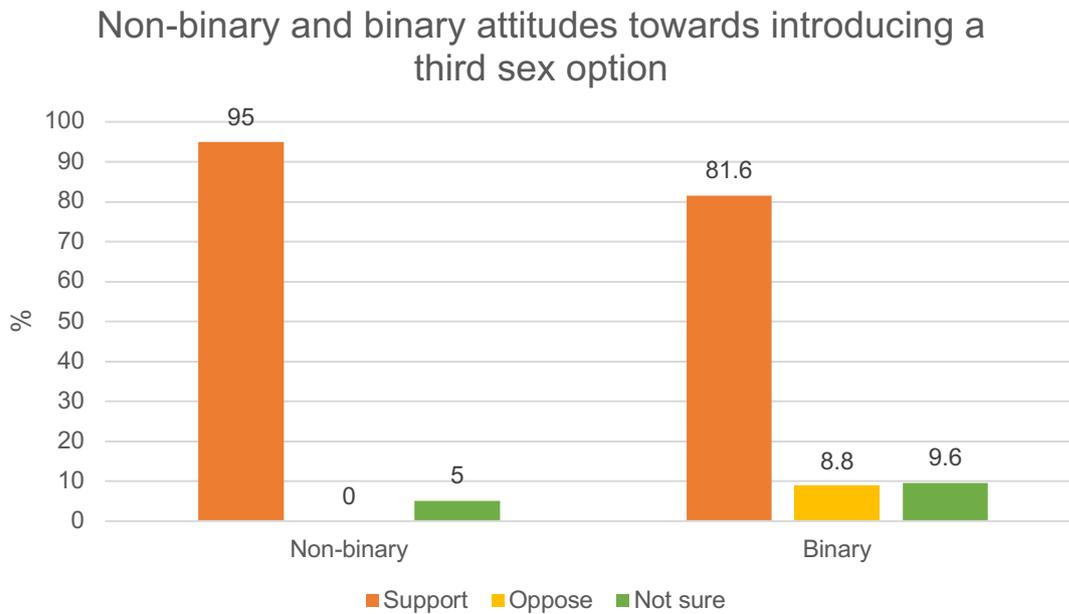


Figure 5–2. Non-binary and binary attitudes towards introducing an **additional third sex option** ($n = 276$)

Multiple additional sex options

Introducing multiple additional sex options was supported by 62.9% of non-binary survey respondents. Non-binary participants were more likely to support the introduction of multiple sex options (62.9%) compared with binary trans participants (55.9%), but this was not statistically significant ($P=.24$).

Age had a negligible impact on the degree of support for introducing multiple additional sex options. Younger non-binary respondents were most supportive (64.1%) followed

by older (62.5%), and middle aged respondents (60.9%). These findings were statistically non-significant ($P=.94$).

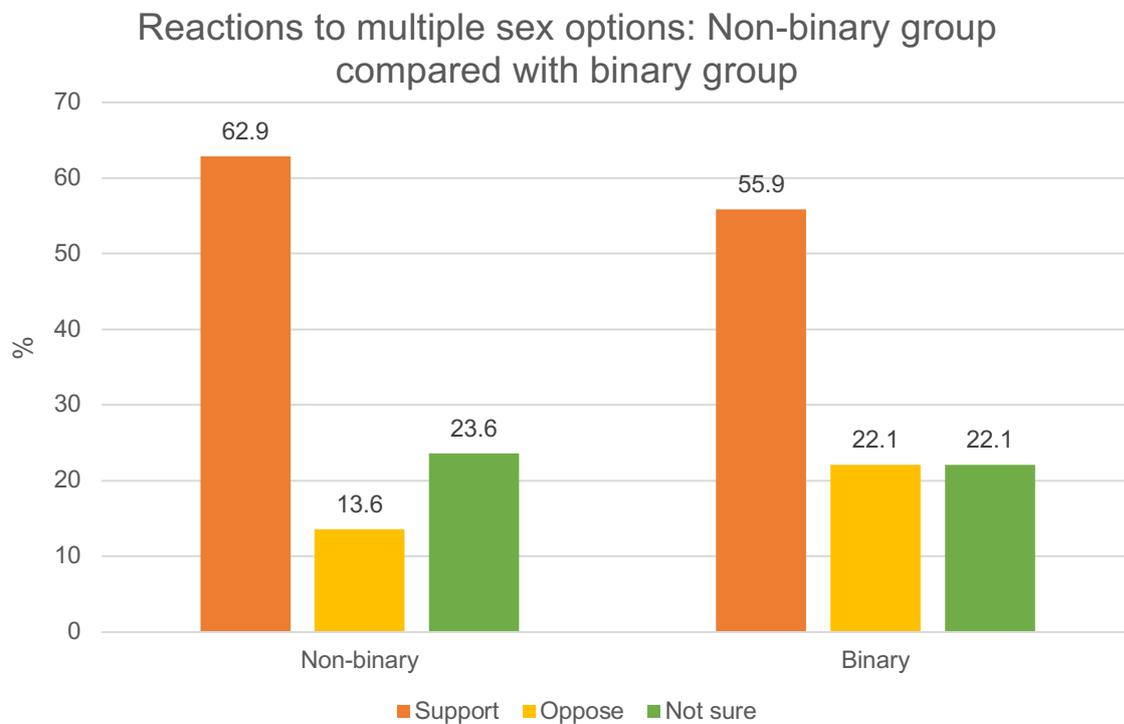


Figure 5–3. Non-binary and binary attitudes towards introducing **multiple additional sex options** ($n = 276$)

Comparison

The third sex option attracted much greater support (95%) than multiple additional sex options (62.9%). However, when participants were asked for their opinions on the best reform option, most preferred the introduction of multiple additional options.

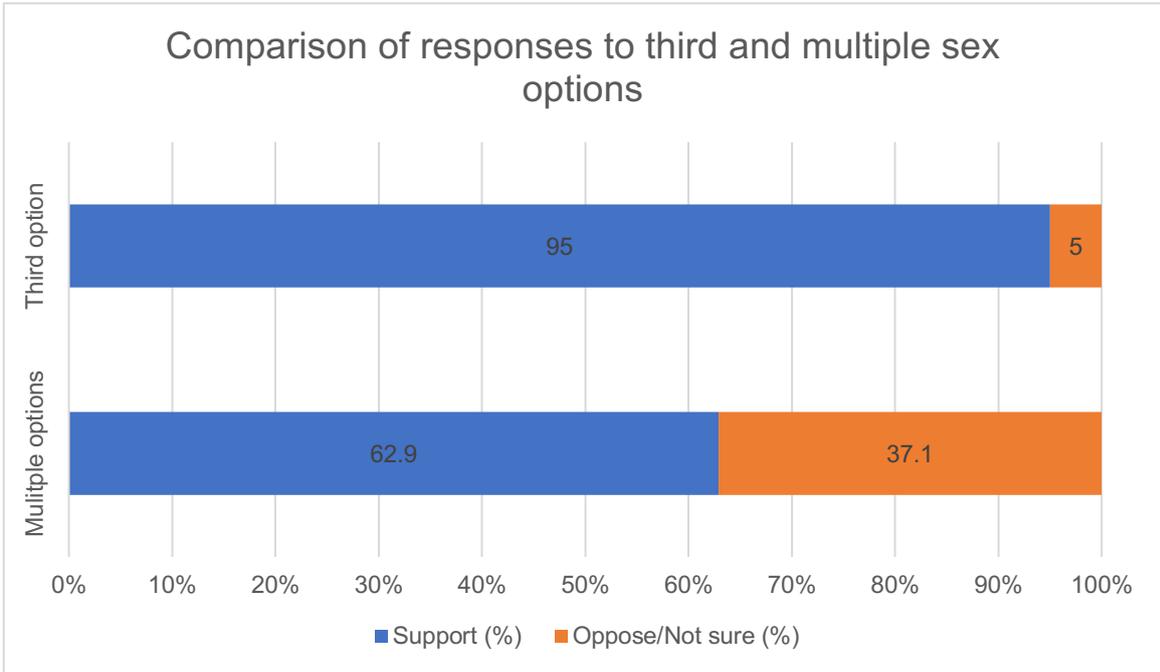


Figure 5–4. Comparison of non-binary support for introducing **third and multiple additional sex options** (n = 140)

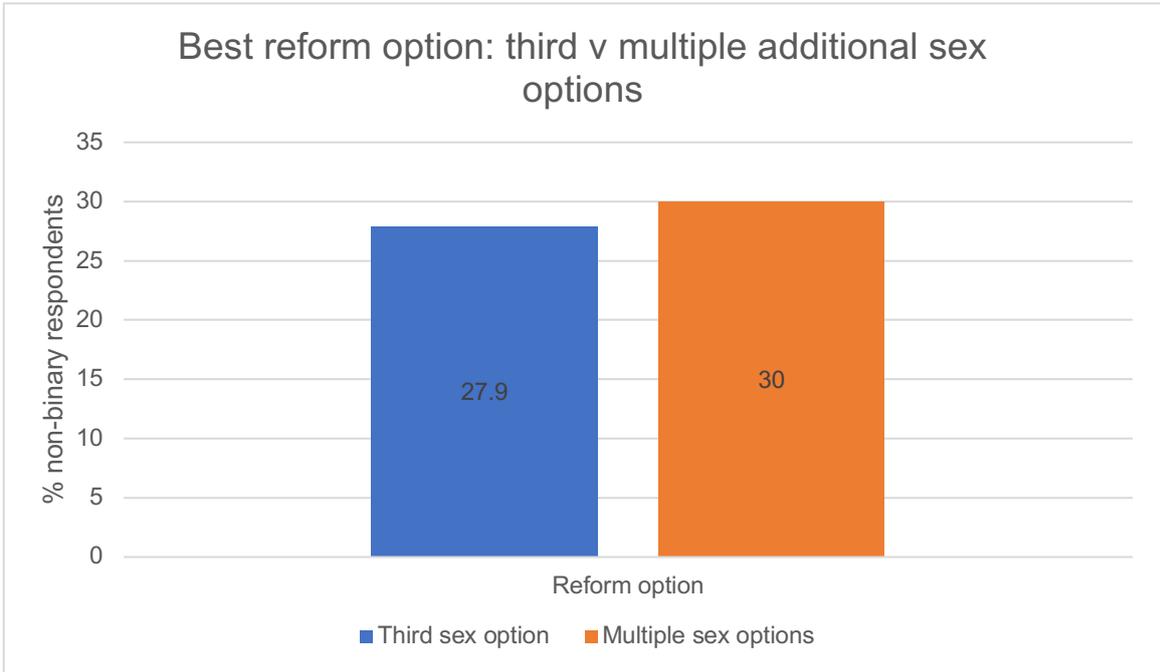


Figure 5–5. Comparison of non-binary preferences for the **best reform option** out of recognition options (n = 140)

5.2.2 Qualitative themes

Inclusion

Non-binary participants generally described non-binary recognition as positive because it was seen as an inclusive reform option. The current binary system was criticised by respondents who argued that it ‘excludes nonbinary and genderqueer people completely’⁷⁰⁸ and undermines their identity.⁷⁰⁹ Another described the current binary structure as representative of the State ‘trying to force folk into an extremely small, rigid box’.⁷¹⁰ They appeared to reflect a feeling that the binary structure undermines autonomy, which was shared by another who described non-binary people as currently ‘being forced’ to live according to a status which does not reflect their gender identity.⁷¹¹

The current exclusionary nature of non-recognition was in stark contrast to the system imagined by participants if non-binary recognition were introduced. Participants described a system which could recognise the ‘many different genders and possibilities’⁷¹² as being representative of the State affording greater ‘freedom’ to non-binary citizens.⁷¹³ This possibility was perceived as having a ‘big impact on people’s lives’⁷¹⁴ and ‘massively wide-reaching positive implications’.⁷¹⁵ The perceived impacts of non-binary recognition were varied, but could generally be grouped between practical reasons of navigating spaces and services safely, and symbolic reasons.

⁷⁰⁸ SR 167, Non-binary, 19 – 25 years.

⁷⁰⁹ Participant 14, Non-binary, 26 – 35 years.

⁷¹⁰ SR 93, Non-binary masc, 19 – 25 years.

⁷¹¹ SR 67, Non-binary, 19 – 25 years.

⁷¹² SR 93, Non-binary masc, 19 – 25 years.

⁷¹³ SR 18, 3/5000 Transgender, 19 – 25 years.

⁷¹⁴ SR 281, Non-binary, 16 – 18 years.

⁷¹⁵ SR 278, Non-binary, 19 – 25 years.

Navigating spaces and services safely

Many participants suggested that non-binary recognition could have practical benefits in navigating spaces and services where identity documentation may be required. Participant 14 reported that the current lack of non-binary recognition leaves many having to undertake significant admin to prove their identity and needing to have 'painful conversations' with service providers. They reported that, 'there's so much anxiety before getting a driving licence, passport and ID, every interaction you have is wrong... [non-binary recognition] would just get rid of that'.⁷¹⁶ They went on to argue that recognition could be important because (for example) their HMRC records, passport, driving licence, marriage certificate and other legal documents would be 'in the correct identity'.⁷¹⁷

Others also criticised non-recognition as negatively impacting their 'safety and well-being'.⁷¹⁸ Participant 12 noted the potential safety issues with the current system, stating that they felt 'always on edge'⁷¹⁹ when using identification documents in case 'someone questions' them about their gender identity.⁷²⁰ Participant 15 shared this concern, arguing that, 'if you walk through an airport and the security genders you one way and your passport genders you another, that's dangerous. That's physically dangerous'.⁷²¹ This point on the potential impact of recognition on safety is not non-binary specific and it is true of all trans people who have incongruent documentation.

⁷¹⁶ Participant 12, Trans/Non-binary, 26 – 35 years.

⁷¹⁷ Participant 14, Non-binary, 26 – 35 years.

⁷¹⁸ SR 23, Non-binary, 19 – 25 years.

⁷¹⁹ Participant 12, Trans/Non-binary, 26 – 35 years.

⁷²⁰ Participant 12, Trans/Non-binary, 26 – 35 years.

⁷²¹ Participant 15, Transfem/Non-binary, 26 – 35 years.

However there did appear to be a perception that this risk could be mitigated or minimised for non-binary people if they were able to access formal recognition. Human rights actors have long recognised a connection between legal recognition and discrimination against trans people. The UN Independent Expert on Sexual Orientation (SOGI) has argued that lack of legal recognition for non-binary persons ‘fuels discrimination, exclusion and bullying’⁷²² as the State’s marginalisation implicitly legitimises discriminatory attitudes among the general population.⁷²³ The UN 2015 Resolution also connects legal recognition to other rights in the context of employment, housing, state benefits and travelling.⁷²⁴ It recognises that non-recognition may contribute to discrimination and the ability for non-binary people to fully realise their rights in these areas.⁷²⁵ Resolution 2048 also connected the right to recognition of gender identity to discrimination and access to rights to work, housing and health services.⁷²⁶ While non-recognition arguably represents an implicit acceptance of non-binary marginalisation which indirectly reinforces discrimination, there is a problematic assumption that the law reversing this position will translate into markedly improved social acceptance of non-binary identities. Arguably, if social tension exists around gender diversity and expression, then there would remain the potential for social expectations of androgyny from those who have a third sex marker and therefore gender policing would still continue for non-binary populations. The assumption

⁷²² Victor Madrigal-Borloz (IE SOGI), *Report on Gender Identity* (United Nations 2018) 3.

⁷²³ Sandra Duffy, ‘Contested Subjects of Human Rights: Trans- and Gender-variant Subjects of International Human Rights Law’ (2021) 84(5) *Modern Law Review* 1041 – 1065, 1057.

⁷²⁴ Office of the United Nations High Commissioner for Human Rights, *Discrimination and violation against individuals based on their sexual orientation and gender identity*, A/HRC/29/23 (UNGA 4 May 2015) para 69.

⁷²⁵ *ibid.*

⁷²⁶ Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) para 1.

underlying these accounts is that the law can create and remove social norms and social tensions around gender diversity which is questionable.⁷²⁷

Contrarily, it could be argued that the introduction of non-binary recognition could create *additional* risk for non-binary individuals. One participant cautioned against expecting non-binary recognition to improve their safety, explaining that ‘as a non-binary person, having my gender legally recognised would automatically out me as trans, and I do not trust the Government to not abuse that information’.⁷²⁸ Participant 14 also appeared cautious of the assumed benefit of non-binary recognition to their safety. They said that their current preferred binary marker helped them to ‘pass’ in public spaces and since changing their ID marker to ‘male,’ they had been less likely to be refused entry to places and/or questioned. They expressed concern that if their documents displayed a non-binary marker, this would ‘immediately out [them] as trans or non-binary or different’.⁷²⁹ This is a compelling and realistic point which demonstrates how concerns around safety can be utilised by those in favour *or* against non-binary recognition. Non-binary markers to a certain extent raise, rather than reduce, the risk of outing (and the subsequent risk of discrimination or violence) because it is evidence of a non-cisgender gender identity. Whereas arguments in favour of binary legal recognition have often explicitly or implicitly been about reducing the risk of outing, this is substantively different for non-binary people and largely inapplicable.⁷³⁰

⁷²⁷ See similar discussions of social norms in chapter 4.2.2 above.

⁷²⁸ SR 183, Non-binary, 19 – 25 years.

⁷²⁹ Participant 14, Non-binary, 26 – 35 years.

⁷³⁰ Jens Theilen, ‘Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition’ (2018) 3 *European Human Rights Law Review* 249 – 257.

Symbolic reasons

Non-binary participants also offered apparent symbolic and/or internal reasons in favour of formal recognition. These were the most cited reasons in favour of recognition and also the most persuasive. One impact often cited was the sense that formal recognition would represent a sense of validity and legitimacy of their identity. Participants described formal recognition as making them feel like a 'valued member of society'⁷³¹ and helping them to not feel 'erased'.⁷³² These feelings were explained by Participant 14:

The impact [of non-binary recognition] would be that I'm not angry every time I have to tell someone who I am or prove my identity...this is who I am and you have to respect this and acknowledge me as this person... it's a very strong feeling [that I am] asserting my identity and my right to be treated with dignity, and given the legal acknowledgement that I exist.⁷³³

This participant reflects the importance of being recognised according to their non-binary identity and having that status affirmed on their documentation rather than being perceived according to a gender identity which does not reflect their lived reality. Legal recognition therefore potentially reduces feelings of erasure which is a form of othering that prevents someone from having their identity recognised and affirmed by others.⁷³⁴ This is important for non-binary populations because othering has negative implications for well-being and may contribute to discrimination against those

⁷³¹ SR 203, Non-binary, 19 – 25 years.

⁷³² Participant 14, Non-binary, 26 – 35 years.

⁷³³ Participant 14, Non-binary, 26 – 35 years.

⁷³⁴ Ben Colliver, Adrian Coyle and Marisa Silvestri, 'The "Online Othering" of Transgender People in Relation to "Gender Neutral Toilets"' in Karen Lumsden and Emily Harmer (eds), *Online Othering: Exploring Digital Violence and Discrimination on the Web* (Palgrave Macmillan 2019).

populations.⁷³⁵ This also links to Juang's argument that non-recognition is a problem because not only does this position non-binary people as a 'target or scapegoat' to others, but also internally to themselves as they begin to see themselves 'through the lens of such hatred'.⁷³⁶ This also arguably reflects Resolution 1728 where the Council of Europe described the 'cycle of discrimination and deprivation of their rights' that trans people experience due to 'discriminatory attitudes and to obstacles in obtaining [...] legal recognition of the new gender'.⁷³⁷ It described a consequence of this being the relatively high suicide rate among trans people.⁷³⁸ This argument in favour of reform therefore recognises the *internal* impact that legal recognition can have on non-binary people.

One participant had already obtained legal recognition of their preferred binary marker and was able to navigate services and spaces according to this marker. When asked if they would still want non-binary recognition specifically, they said that they would. They explained that their preferred binary marker (male) was 'slightly better than female but it's not correct, so that still doesn't sit comfortably'.⁷³⁹ They went on to say,

None of [the current markers] are true. They're just documents to allow me to move through society. If I get seen as male, if that's what I have to go by, then

⁷³⁵ See generally: Nick Antjoulle, *The Hate Crime Report 2016: homophobia, biphobia and transphobia in the UK* (Galop 2016); Neil Chakraborti and Stevie-Jade Hardy, *LGB&T hate crime reporting: Identifying barriers and solutions* (EHRC 2015); Joanna Jamal, *Transphobic Hate Crime* (Palgrave Macmillan 2018).

⁷³⁶ Richard M Juang, 'Transgendering the Politics of Recognition' in Paisley Currah, Shannon Price Minter and Richard M Juang (eds), *Transgender Rights* (University of Minnesota Press 2006) 242.

⁷³⁷ Parliamentary Assembly, *Resolution 1728: Discrimination on the basis of sexual orientation and gender identity* (Council of Europe 2010) para 4.

⁷³⁸ *ibid.*

⁷³⁹ Participant 14, Non-binary, 26 – 35 years.

fine. I'd rather that than having an 'F' on my documents. But all of them are wrong so none of them feel comfortable.⁷⁴⁰

There is therefore arguably a deeper desire or need for legal recognition among non-binary populations which is not easily quantifiable or linked to practical necessity or safety concerns. This is reflected in the account of this participant who had already obtained recognition of a preferred binary marker (which allowed them to navigate spaces safely), but still desired non-binary recognition. Their reasoning appeared to be underpinned by a desire to assert their autonomy in relation to legal recognition and not feel like that status was imposed on them.

The importance of autonomy is also relevant for the point made earlier about the risk of a non-binary sex marker for the safety of those using such a marker. While it could be argued that non-binary recognition may increase the risk to non-binary populations (and the State has an obligation to prevent its citizens from harm), preventing recognition on this basis could be argued to be a form of soft paternalism. Instead, the relative weight afforded to the acceptance of risk versus perceived benefit is arguably best placed with the non-binary individuals themselves.⁷⁴¹ This desire to be recognised as being capable of engaging in autonomous decision-making regarding sex status appeared to underpin several accounts from non-binary participants.

⁷⁴⁰ Participant 14, Non-binary, 26 – 35 years.

⁷⁴¹ On the distinction of hard/soft paternalism generally see Joel Feinberg, *Harm to Self* (Oxford University Press 1986) 12, 126.

Third sex or multiple sex options?

Non-binary participants expressed a range of opinions when comparing the third and multiple sex options. The overall sense was that a third sex option was not as inclusive as multiple sex options, but this latter option also carried its own significant drawbacks.

a. Multiple sex options as more inclusive

A common disadvantage noted by participants of the third sex option was that it was too restrictive. Participants referenced the ‘vast number of gender identities’ which exist, and their belief that each one should be ‘normalized and accepted’⁷⁴² and recognised as valid’.⁷⁴³ One participant said that while they would be satisfied with a third sex option, ‘many other gender identities would still not be represented’.⁷⁴⁴ Several participants therefore described multiple sex options as more ‘inclusive’ and ‘considerate’.⁷⁴⁵

One participant also preferred the multiple sex options because they felt that a third sex option would simply turn the ‘gender binary into a gender trinary’.⁷⁴⁶ Two other participants also felt that a singular additional option was ‘too restrictive’⁷⁴⁷ and would be ‘sticking a plaster over the situation, casting anyone who doesn’t fit the traditional binary as abnormal’.⁷⁴⁸ This reflects various arguments in the scholarship whereby an

⁷⁴² SR 22, Non-binary, trans man 19 – 25 years.

⁷⁴³ SR 81, Non-binary, 26 – 35 years.

⁷⁴⁴ SR 67, Non-binary, 19 – 25 years.

⁷⁴⁵ SR 7, Non-binary, 19- 25 years.

⁷⁴⁶ SR 160, Non-binary, 19 -25 years.

⁷⁴⁷ SR 286, Non-binary /queer, 19 – 25.

⁷⁴⁸ SR 122, Female/demi female, 16 – 18 years.

additional third option may recreate an equally problematic ternary system,⁷⁴⁹ where gender non-conformity is funnelled away into a separate category.⁷⁵⁰

Nevertheless, this argument was not universally held. Participant 15 felt that an additional third option could still be considered a ‘radical’ reform option,⁷⁵¹ which could undermine the ‘oppressive aspects of sex/gender normativity’ by showing that a ‘chunk of the population just can’t fit in with that system’.⁷⁵² Arguably, both the third and multiple sex options could be considered radical and potentially transformative compared to the status quo, as they represent a fundamental departure from binary sex which has formed the basis of civil registration since its inception. Although, given the relatively small population numbers of trans and non-binary citizens, both reform options could also serve to reinforce that binary.

However, as has already been noted in chapter 4 and above, there is an apparent need to caution against arguments in favour of reform based on how potentially radical or transformative they are. Changing social attitudes towards gender may help to raise

⁷⁴⁹ See generally Davina Cooper, ‘A very binary drama: The conceptual struggle for gender’s future’ (2019) 9(1) *feminists@law* 1-36; Anna James Wipfler, ‘Identity crisis: The limitations of expanding government recognition of gender identity and the possibility of genderless identity documents’ (2016) 39 *Harvard Journal of Law and Gender* 491-555; Peter Cannoot and Mattias Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary, Queer, Feminist and Human Rights Analysis’ (2020) 1 *International Journal of Gender, Sexuality and Law* 26 – 55, 26; Gwyn Easterbrook-Smith, ‘“Change can never be ‘complete”’: the legal right to self-identification and incongruous bodies’ (2020) 1 *International Journal of Gender, Sexuality and Law* 134 - 158; Lila Braunschweig, ‘Abolishing gender registration: A feminist defense’ (2020) 1 *International Journal of Gender, Sexuality and Law* 76.

⁷⁵⁰ Flora Renz, ‘Genders that don’t matter: Non-binary people and the Gender Recognition Act’ in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021) 160.

⁷⁵¹ Participant 15, Transfem / Non-binary, 26 – 35 years.

⁷⁵² Participant 15, Transfem / Non-binary, 26 – 35 years.

awareness of gender diversity, but that is unlikely to have a significant transformative effect. Moreover, even if we accept that transformative law reform has the potential to affect social attitudes in a positive way, then it is equally possible for it to impact social attitudes in a negative way (such as contributing to backlash, continued social marginalisation and exclusion, and reinforcing normative boundaries of gender identity). The case for reform must therefore take into account these broader issues of social attitudes towards gender diversity but not overstate this when weighing up respective reform proposals.

On inclusivity, it is worth noting that two participants indicated that non-binary recognition could better accommodate intersex people.⁷⁵³ One argued that multiple sex options would be preferable for this aim so that intersex people could have a separate option than non-binary people.⁷⁵⁴ Multiple sex options could therefore potentially mitigate issues identified in the literature where the conflation of non-binary and intersex experiences is problematic.⁷⁵⁵ However it would require further

⁷⁵³ SR 77, Male-Non-binary, 19 – 25 years and Participant 14, Non-binary, 26 – 35 years. It is worth repeating here the importance of not conflating non-binary and intersex people's concerns and needs. See Fae Garland and Mitchell Travis, 'Legislating intersex equality: building the resilience of intersex people through law' (2018) 38(4) *Legal Studies* 587 – 606; Fae Garland and Mitchell Travis, 'Queering the Queer/Non-Queer Binary: Problematizing the "I" in LGBTI+' in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021); Morgan Carpenter, 'The Normalization of Intersex Bodies and "Othering" of Intersex Identities in Australia' (2018) 15 *Journal of Bioethical Inquiry* 487 – 495; Suzanne Kessler, *Lessons from the Intersexed* (Rutgers 1998).

⁷⁵⁴ SR 232, Non-binary, 19 – 25 years.

⁷⁵⁵ See generally Fae Garland and Mitchell Travis, 'Legislating intersex equality: building the resilience of intersex people through law' (2018) 38(4) *Legal Studies* 587 – 606; Fae Garland and Mitchell Travis, 'Queering the Queer/Non-Queer Binary: Problematizing the "I" in LGBTI+' in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021); Morgan Carpenter, 'The Normalization of Intersex Bodies and "Othering" of Intersex Identities in Australia' (2018) 15 *Journal of Bioethical Inquiry* 487 – 495.

consultation with intersex people themselves, as it assumes that intersex people identify as non-binary when most do not.⁷⁵⁶

b. Uncertainty of what multiple sex options would look like

A notable theme from the empirical data on multiple sex options was the varying perceptions of what such a system would look like in practice, including how many options might be available and whether there would be an option to self-define. These factors have a significant impact on the evaluation of the proposed reform overall because they fundamentally change the nature of the proposed system. Further, depending on these factors, it could also limit the perceived benefits of multiple sex options mooted above. One respondent pointed out that it is not always guaranteed that multiple options would be more inclusive because they might rely on a finite list of sex statuses, which risks always excluding some groups. Consequently, they argued in favour of a third sex option on the basis that it would be 'more inclusive for everyone'.⁷⁵⁷

Another respondent who preferred multiple sex options said that this was because non-binary identities existed on 'a spectrum and [therefore] all genders should be recognised'.⁷⁵⁸ Similarly, another felt that introducing multiple options would be positive because 'it would mean that people could self-identify'.⁷⁵⁹ These participants appear to presume multiple sex options as representing a potentially open list of sex options rather than a closed list. Some participants suggested that a multiple sex

⁷⁵⁶ *ibid.*

⁷⁵⁷ SR 167, Non-binary, 19 – 25 years.

⁷⁵⁸ SR 175, Genderqueer, 19 – 25 years.

⁷⁵⁹ SR 42, Male outwardly, inward more female, 19-25 years.

system should operate on a similar basis to names, where people could write their own gender.⁷⁶⁰ This was similar to another respondent who said that ‘like titles, people should have a selection [of sex options] and then an option to self-define’.⁷⁶¹ Another respondent suggested having ‘an open field or multiple independent checkboxes that could be selected in combination’.⁷⁶² This would be similar to the system in Tasmania, where those aged 16 or over can select one of five options, including male, female, non-binary, indeterminate gender or ‘Other’ with the ability to specify another identity.⁷⁶³ However, this could still be subject to criticism, as the decision for certain identities to be classed as permanent specified identities could be argued to constitute the ‘othering’ of the identities not afforded this status.⁷⁶⁴

Meanwhile, others suggested more limited models of recognition. For example, one felt that a system of multiple sex options could involve the introduction of just a few additional sex options beyond male and female, for example ‘X’ and ‘N/A’.⁷⁶⁵ Another participant felt that a model with just two or three additional options would ‘at least give

⁷⁶⁰ SR 263, Genderflux, 19 – 25 years and Participant 4, Non-binary/Proxvir, 19 – 25 years.

⁷⁶¹ SR 114, Transmasculine, 26 – 35 years.

⁷⁶² SR 122, Female/demi female, 16 – 18 years.

⁷⁶³ The examples given in the form include: transgender, transsexual, bigender and agender. It is also interesting to note, though, that despite Tasmania’s system being perceived as progressive, the application form nevertheless requires applications to declare that they ‘live or seek to live as a person of that gender’ which could be subject to criticism similar to the wording of the statutory declaration under the GRA. See Registry of Births, Deaths & Marriages, ‘Application to register your gender 16 years and over’ (Tasmanian Government 2021) <https://www.justice.tas.gov.au/__data/assets/pdf_file/0010/539956/Application-to-Register-Gender-16-and-over.pdf>accessed 10 August 2022.

⁷⁶⁴ See generally: Ben Colliver, Adrian Coyle and Marisa Silvestri, ‘The “Online Othering” of Transgender People in Relation to “Gender Neutral Toilets”’ in Karen Lumsden and Emily Harmer (eds), *Online Othering: Exploring Digital Violence and Discrimination on the Web* (Palgrave Macmillan 2019).

⁷⁶⁵ SR 194, Trans man and Agender, 26 – 35 years.

people more options', even if it was not as inclusive as the more expansive multiple sex systems outlined above.⁷⁶⁶ Participants, therefore, demonstrated significant variation in what they thought a system which offered multiple sex options would look like.

These accounts raise an important point about inclusivity and the inherent limitations of a third sex option. Such an option can be criticised as being both under and over inclusive,⁷⁶⁷ in creating a single 'other' category for those who do not identify with the binary categories of male or female. This is underinclusive in failing to recognise the different identities and experiences among people within the non-binary community (including those who are agender), which arguably reinforces the normativity of the gender binary. However, a third sex option has also served in other jurisdictions to be over inclusive, as it is a category only open to those with variations in sex characteristics, problematically relying on the assumption that intersex people identify with a non-binary identity.⁷⁶⁸ Nevertheless, multiple sex options are also not without critique on this basis, as its inclusivity would depend on the type of system introduced. A system which allowed for the individual to write in their legal sex status appeared to be perceived as most inclusive, but this then raises broader questions of the practicality of such reform. If legal sex status could be written in on a completely unique and individual basis, this would arguably operate as de facto decertification. Such a system would also raise questions as to whether certain terms or phrases could be

⁷⁶⁶ SR 198, Transmasculine, 26 – 35 years.

⁷⁶⁷ Pieter Cannoot, 'The right to personal autonomy regarding sex (characteristics), gender (identity and/or expression) and sexual orientation: towards an inclusive legal system' (PhD thesis, University of Ghent 2019) 409.

⁷⁶⁸ Fae Garland and Mitchell Travis, 'Queering the Queer/Non-Queer Binary: Problematizing the "I" in LGBTI+' in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021).

rejected as not being appropriate as a legal sex status. In Tasmania, gender is defined under the Births, Deaths, and Marriages Registration Act 1999 as meaning:

- (a) Male, or
- (b) Female, or
- (c) Indeterminate gender, or
- (d) Non-binary; or
- (e) A word, or a phrase, that is used to indicate a person's perception of the person's self as being neither entirely male nor entirely female and that is prescribed; or
- (f) A word or phrase that is used to indicate a person's perception of the person's self as being neither entirely male nor entirely female.⁷⁶⁹

In the application form, applicants may select either male, female, non-binary, indeterminate gender, or other (with space to specify their gender identity).⁷⁷⁰ Where an applicant selects 'other' and specifies their gender identity, the Registrar must determine if the gender term provided fits with the definition of gender under the 1999 Act before it can be accepted as someone's legal sex status. This could be criticised on the basis that it affords the Registrar considerable discretion to determine the suitability (or not) of someone's gender identity as a legal sex status before registering it. Therefore, while on the face of it, multiple sex options may be perceived to be more inclusive, there would still remain questions as to the form of such a system, including

⁷⁶⁹ Births, Deaths, and Marriages Registration Act 1999, s 3A.

⁷⁷⁰ Registry of Births, Deaths & Marriages, 'Application to register your gender 16 years and over' (Tasmanian Government 2021) <https://www.justice.tas.gov.au/__data/assets/pdf_file/0010/539956/Application-to-Register-Gender-16-and-over.pdf>accessed 10 August 2022.

the number of agreed options, whether someone could write in their own identity, and the powers of the Registrar.

While some participants preferred a system of multiple sex options over a third sex option, it would be interesting to further explore alternative models mooted above with non-binary individuals to gain a greater insight into how they weigh up the respective perceived benefits and drawbacks. There is also an additional factor to note, in that most of the arguments in favour of multiple sex options were based on the idea that legal sex status is solely about self-identification and should not be impacted by the social goals which such regulation claims to serve.⁷⁷¹ While certain aims of legal sex might be achievable without certification on the birth certificate,⁷⁷² this was not a factor which many participants noted or reflected in their considerations. This arguably limits the attractiveness or feasibility of reform to policymakers, especially since concerns about implications has become the most prominent issue raised in legal sex reform discourse in England and Wales.⁷⁷³

c. Realistic and feasible

An apparently decisive point for many participants in weighing up the respective merits of third versus multiple sex options was which reform option was more realistic or feasible. One participant argued that ‘realistically, it appears more feasible to have a third gender option introduced’.⁷⁷⁴ A common reason for feeling that a third sex option

⁷⁷¹ See chapter 2.2. on the State’s potential interests in sex.

⁷⁷² Flora Renz, ‘The challenge of same-sex provision: how many girls does a girls’ school need?’ (2020) 10(2) *feminists@law* 1 – 29; Flora Renz and Davina Cooper, ‘Reimagining Gender Through Equality Law: What Legal Thoughtways Do Religion and Disability Offer?’ (2021) 30 *Feminist Legal Studies* 129 – 155.

⁷⁷³ Similar concerns have also been observed in Scotland.

⁷⁷⁴ SR 275, *Genderqueer*, 19 – 25 years.

was more realistic and feasible was because of social attitudes towards trans and non-binary populations, and the lack of policy support that multiple sex options would attract. Participants described a third sex option as the ‘most politically viable’,⁷⁷⁵ the ‘most plausible’,⁷⁷⁶ the ‘most likely’ option,⁷⁷⁷ and the ‘only thing standing a chance to get accepted’,⁷⁷⁸ given the ‘kind of opposition’ multiple options would face.⁷⁷⁹ Notwithstanding the merits of multiple sex options, a third sex option was still considered to potentially make a ‘big difference’ to their lives,⁷⁸⁰ while also being most realistic.

There were a range of reasons that they felt multiple sex options were less realistic, including the heated social and political discourse surrounding trans and non-binary populations⁷⁸¹ which ‘might be better with time, but not yet’.⁷⁸² One participant felt that a third sex option would cause the ‘least conflict’ between non-binary populations and the general population.⁷⁸³ There was therefore concern from participants who felt that multiple options could lead to a societal backlash against trans and non-binary people. One respondent expressed concern that ‘multiple options would cause more complication and potential mocking/outrage from transphobic groups/people’.⁷⁸⁴ Another respondent reflected this, saying that ‘an extensive list of every other

⁷⁷⁵ SR 256, Non-binary, 16 – 18 years.

⁷⁷⁶ SR 220, Non-binary, 36 – 45 years.

⁷⁷⁷ SR 119, Non-binary, 26 – 35 years.

⁷⁷⁸ SR 134, Non-binary, 19 – 25 years.

⁷⁷⁹ SR 220, Non-binary, 36 – 45 years.

⁷⁸⁰ SR 119, Non-binary, 26 – 35 years.

⁷⁸¹ Participant 10, Non-binary, 19 – 25 years; SR 86, Non-binary (Transmasculine), 19 – 25 years.

⁷⁸² SR 86, Non-binary (Transmasculine), 19 – 25 years.

⁷⁸³ SR 216, Non-binary, 19 – 25 years.

⁷⁸⁴ SR 78, Transmasculine Non-binary, 19 – 25 years.

gender...may cause confusion and backlash'.⁷⁸⁵ This concern was particular to attitudes on introducing multiple additional options, but the potential for a third sex option to have a similar effect was often overlooked. This may be because participants were discussing the *relative* merits of different reform options. Therefore, while multiple sex options may lead to backlash, this is also a risk with the third sex option, though such risk is potentially reduced in the context of a third sex option.

A third option was therefore perceived as being 'easier'⁷⁸⁶ and 'more straightforward',⁷⁸⁷ compared with introducing multiple additional sex options. Several participants reflected the points raised above, problematising the perceived inclusivity of multiple sex options. One participant felt that it would be 'simpler to just add a third [option] than create a potentially infinite (definitely vast) system'.⁷⁸⁸ Others argued that there were 'too many' non-binary identities to be able to represent all of them,⁷⁸⁹ and therefore multiple options would 'always exclude someone'.⁷⁹⁰ Therefore, the prospect of multiple sex options was described as 'adding significant complexity to the system',⁷⁹¹ being 'very complicated',⁷⁹² 'unmaintainable',⁷⁹³ and a move that would 'push us further into bureaucracy'.⁷⁹⁴ One participant felt that 'transness is too various and too unstable...to be contained within a list of options'.⁷⁹⁵ Another reflected this sentiment, arguing:

⁷⁸⁵ SR 242, Non-binary, 16 – 18 years.

⁷⁸⁶ SR 130, Non-binary gender fluid, 36 - 45 years.

⁷⁸⁷ SR 55, Non-binary, 46 – 55 years.

⁷⁸⁸ SR 86, Non-binary (transmasculine), 19 – 25 years.

⁷⁸⁹ SR 263, Genderflux, 19 – 25 years.

⁷⁹⁰ SR 217, Non-binary, 36 – 45 years.

⁷⁹¹ SR 53, Transmasculine, 26 – 35 years.

⁷⁹² SR 160, Non-binary, 19 – 25 years.

⁷⁹³ SR 71, Non-binary, 46 – 55 years.

⁷⁹⁴ SR163, Transmasculine non-binary, 19 – 25 years.

⁷⁹⁵ Participant 15, Transfem / Non-binary, 26 – 35 years.

While there's definitely a need to recognise non-binary identities, it'd be incredibly difficult to codify all the beautiful and diverse ways non-binary people identify (and the evolving terms we use to do so) in a way that wouldn't exclude and delegitimise identities which weren't included on the 'approved list'.⁷⁹⁶

The perceived complexity of multiple options contrasted with how one participant described a third option as preferable because it would accommodate non-binary people without 'disrupting the current system'.⁷⁹⁷ Arguably, this downplays the disruption which a third sex option would cause though, including potentially requiring reform to other laws to ensure consistency across government departments.⁷⁹⁸ However, when conducting a relative comparison between third and multiple sex options, it does appear reasonable to suggest that a third sex option would cause less disruption.

The perceived complexity of multiple sex options led one respondent to argue that there needed to be 'more research before instituting a system involving multiple genders'.⁷⁹⁹ For example, one participant questioned whether the State would have to be 'constantly updating a list of "valid" gender identities that will probably change in the future'.⁸⁰⁰ This again raises questions of the Registrar's hypothetical powers and/or the extent to which officials or politicians (influenced by party ideology) would be tasked with exercising discretion in accepting or rejecting certain descriptors. One

⁷⁹⁶ SR 217, Non-binary, 36 – 45 years.

⁷⁹⁷ SR 273, Non-binary, 26 – 35 years.

⁷⁹⁸ Disruption is discussed in more detail in chapters 5.3 and 9.3.1

⁷⁹⁹ SR 235, Non-binary, 19 – 25 years.

⁸⁰⁰ SR 30, Non-binary, 26 – 35 years.

participant had ‘concerns about how it would affect things such as passports’⁸⁰¹ and the ability of people to enter or leave countries that do not recognise certain identities. Birth certificates and passports are regulated by different processes though so a change to the rules on birth certificates would not necessarily mean a change to passports. However as incongruent documentation is undesirable, it is likely that introducing a non-binary legal sex status would require changes to the number of sex markers available on the passport.⁸⁰² With regards to passports specifically, multiple sex options could exacerbate inconsistencies as the International Civil Aviation Organization only allows for M (male), F (female) and X (unspecified) sex marker options for passports.⁸⁰³ Arguably, while a third sex option carries the possibility of the individual experiencing discrimination on account of their sex marker, this could be exacerbated for those under a multiple sex system who may be more likely to experience problems when travelling. They may also be more likely to hold a sex status which is socially unfamiliar or subject to marginalisation compared to the better-known concepts of a non-binary or third sex option.⁸⁰⁴

⁸⁰¹ SR 234, Non-binary, 19 – 25 years.

⁸⁰² However, is it worth noting that while inconsistency between passport and birth certificate markers would be undesirable, the State already does accept inconsistency between them as many trans and non-binary people have incongruent sex markers.

⁸⁰³ Human Rights Watch, ‘Transgender, Third Gender, No Gender: Part II’ (2020) <<https://www.hrw.org/node/376319/printable/print>>accessed 25 May 2021.

⁸⁰⁴ Women and Equalities Committee, *Oral evidence to the Transgender Equality Inquiry, HC390, Q130 - 197* (House of Commons 13 October 2015) Q155 <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/oral/23159.html>>accessed 2 February 2022.

Sufficient

While non-binary participants perceived multiple sex options to be more inclusive than a third sex option, a third option still generally received positive support and was considered sufficient for non-binary populations. Despite problems with creating a single category for all forms of non-binary experiences, several felt that this would be beneficial as it could operate as an ‘umbrella’⁸⁰⁵ category which was able to cater for many different minority gender identities. Another also argued that a third sex option would be ‘broadly encompassing of anyone who doesn’t identify as male or female and... in being not specific, it allows for that degree of variability’.⁸⁰⁶ Others said that while a third option would not satisfy everyone, it would be able to ‘cover’⁸⁰⁷ or ‘capture’⁸⁰⁸ any form of not identifying with the binary. Similarly, another respondent described the third option as the ‘best catch-all solution’ because non-binary is generally understood as a ‘catch all term for identities not on the man-woman binary’.⁸⁰⁹ There was, therefore, recognition of potential imperfections but nevertheless a perception that a third sex option was suitable as a reform option to the GRA.

One possible criticism of a third sex option is that it is not inclusive for agender people, because a third option implies that the individual identifies with a gender identity. However, one participant who identified as agender argued that a third option would be an ‘adequate’ option for them.⁸¹⁰ Another respondent also felt that ‘many non-binary

⁸⁰⁵ SR 278, non-binary 19 – 25 years; SR 244, non-binary, 19 – 25 years; SR 53, transmasculine, 26 – 35 years.

⁸⁰⁶ Participant 14, Non-binary, 26 – 35 years.

⁸⁰⁷ SR 244, Non-binary, 19 – 25 years.

⁸⁰⁸ SR 53, Transmasculine, 26 – 35 years.

⁸⁰⁹ SR 217, Non-binary, 36 – 45 years.

⁸¹⁰ SR 276, Agender, 19 – 25 years.

people and those of other genders would be happy to be registered as a third gender'.⁸¹¹ This indicates a degree of optimism among non-binary participants that a third sex option could still be desirable for many in the non-binary community, including those who are sometimes considered to be marginalised by a third sex option. However, further empirical research with minority gender groups specifically, such as agender groups, would be valuable to explore whether this was a commonly shared belief. Nevertheless, the non-binary group in this study did include people who identified with a range of minority gender identities, e.g. gender queer, gender flux, agender.⁸¹² Therefore, where the quantitative data indicated overwhelming support (and zero opposition) for a third sex option, this would have included those with minority gender identities.

5.3 Discussion: should a third sex option or multiple sex options be recommended for reform?

Introducing non-binary recognition was a reform priority for non-binary participants in this study. At the Scottish Parliament, it was suggested that the lack of non-binary recognition in the Gender Recognition Reform (Scotland) Bill 2022 was an issue which both binary and non-binary people were equally disappointed about.⁸¹³ However, in this research study, non-binary participants were considerably more supportive and enthusiastic towards non-binary recognition than binary trans participants.

⁸¹¹ SR 216, Non-binary, 19 – 25 years.

⁸¹² Appendix 3.

⁸¹³ Equalities, Human Rights and Civil Justice Committee, *14th Meeting 2022, Session 6* (Scottish Parliament 2022) 21.

Third and multiple sex options were both popular. Multiple sex options were perceived to be more inclusive initially, though the degree to which it would actually be inclusive would be subject to its form and other issues of practicality. Participants placed emphasis on how realistic and feasible reform proposals should be, and consequently, a third sex option appeared to be preferable in this regard. Some participants suggested that a third sex option could be important for their safety in accessing certain services, though others pointed out that there could also be increased risk with displaying a non-binary marker. A more compelling reason was the perceived symbolic or personal benefits to non-binary people, who connected legal recognition to feelings of inclusivity and autonomy. In this sense while non-binary recognition may not have a significant impact on social norms, the internal affirmation from legal recognition could be important in how non-binary people feel able to participate in public life.

A key counter argument to introducing a third sex option is the disruption it could cause. The ‘complex practical consequences’ of non-binary recognition to ‘other areas of law, service provision and public life’ were cited by the Government in their response to a petition which attracted 140,000 signatures in support of non-binary recognition.⁸¹⁴ The Court of Appeal in *Elan-Cane* held that the refusal of the HM Passport Office to recognise Mx Cane’s non-gendered identity on their passport engaged Article 8 ECHR, but was not a violation as it fell within the UK Government’s margin of appreciation.⁸¹⁵ The Supreme Court, in rejecting the appeal, concluded that non-

⁸¹⁴ UK Government and Parliament, ‘Petitions: Make non-binary a legally recognised gender identity in the UK’ (UK Government and Parliament 2021) <<https://petition.parliament.uk/petitions/580220>>accessed 14 March 2022.

⁸¹⁵ *R (Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363, [2020] QB 929.

binary recognition raises ‘complex issues with wide implications’.⁸¹⁶ The *Elan-Cane* case concerned passport identity markers, though it raises relevant and similar arguments related to non-binary legal sex recognition. Introducing a third sex option would arguably require many other areas of law and administration to also provide for a non-binary option, such as passports. This is because it would be administratively undesirable for the State to produce documents which may be unacceptable to, or inconsistent with, other laws or state departments.⁸¹⁷ The Supreme Court in *Elan-Cane* noted various areas of law which rely on the presumption of a binary sex status, including:

[S]ome rights of succession to hereditary titles; criminal offences (e.g. rape, female genital mutilation); various legislation which assumes that only a woman can give birth to, or be the mother of, a child (e.g. law on maternity rights and benefits, health provision and fertility treatment); nationality legislation; the Gender Recognition Act; equality and discrimination legislation; marriage and civil partnership; and the provision of public services e.g. prisons, hospital wards, refuges, and schools.⁸¹⁸

These areas are wide ranging and engage a variety of separate issues, meaning they cannot be fully addressed in this thesis. However, there are potential solutions to these issues, and points which they engage, which are worth noting here.

⁸¹⁶ *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 WLR 133 [54] (Lord Reed P).

⁸¹⁷ *ibid* [13] (Lord Reed P); HM Passport Office, *Gender Marking in Passports: Internal Review of Existing Arrangements and Possible Future Options* (HM Passport Office 2014) para 4.7.

⁸¹⁸ *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 WLR 133 [53] (Lord Reed P).

First, as explored in chapter 2.3, the status of sex in law has the potential to be interpreted according to the context. The hypothetical introduction of non-binary legal recognition is one area where this contextualised approach would be particularly useful, as it allows the law to interpret sex according to what might be relevant in different contexts. People could generally navigate public life (and law) on the basis of their non-binary identity, but this would not prevent the State from recognising other factors in determining sex in a given scenario where necessary.

Therefore, it may be possible that in exceptional circumstances, the law could provide for instances where a non-binary person with a GRC may nevertheless be treated according to their sex assigned at birth as it currently already makes provision for.⁸¹⁹ This is also a relevant point to those who may be concerned that non-binary recognition might impact certain rights under the EA, including the provision of single- and separate-sex services. The law already currently provides exceptions to those with the protected characteristic of gender reassignment to access certain services irrespective of their legal sex status,⁸²⁰ and it appears that non-binary populations may already be included under this protected characteristic.⁸²¹ Arguably, then, while explicit clarification on the legal status of non-binary populations regarding this would be useful, such exceptions could continue to operate to exclude anyone with the protected characteristic of gender reassignment where necessary.⁸²² An area of the EA which would arguably require greater attention or clarification following the

⁸¹⁹ Gender Recognition Act 2004, s 9(3).

⁸²⁰ *ibid.*

⁸²¹ *Taylor v Jaguar Land Rover Ltd* [2020] UKET 1304471/2018.

⁸²² This is not to implicitly endorse these exceptions or implicitly accept their legitimacy. However, in chapter 2 it was outlined that my thesis would presume the continued existence of such laws.

introduction of a third sex option would be the protected characteristic of sex. This may not require wholesale revision of the protected characteristic, but it would be desirable to explicitly clarify how an individual with a non-binary sex status would fit into this framework.⁸²³ Alternatively, it may be desirable to consider more substantive reform to the EA in this area, with some scholars arguing in favour of a general protected characteristic of gender identity which could merge the grounds of sex and gender reassignment.⁸²⁴ This kind of additional reform to the EA would likely increase the level of disruption rather than just providing for clarifications on how non-binary people are to be accommodated within the current structure of the EA. However it could be worthwhile as it would address existing problems that scholars have already identified in respect of the gender reassignment protected characteristic being too restrictive and adopting outdated language.⁸²⁵

Second, while a presumption of binary sex and gender underpins legislation in England and Wales, it is possible and arguably expected that presumptions can be

⁸²³ It would also be useful to clarify whether a non-binary individual would be expected to rely on sex or gender reassignment as grounds for discrimination or whether it would simply depend on the context.

⁸²⁴ Gender reassignment has already attracted criticism for being too restrictive and medicalised: Peter Dunne, 'The Civil Status of Trans people in England' in Isabel C Jaramillo and Laura Carlson (eds), *Trans Rights and Wrongs: A Comparative Study of Legal Reform Concerning Trans Persons* (Springer 2021) 263. The Women and Equalities Committee have previously recommended replacing gender reassignment with gender identity: Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) para 108. This was also recommended by the Council of Europe, see Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) para 6). Meanwhile other observers have suggested combining the grounds of sex and gender reassignment into one ground of 'gender,' see Flora Renz and Davina Cooper, 'Reimagining Gender Through Equality Law: What Legal Thoughtways Do Religion and Disability Offer?' (2021) 30 *Feminist Legal Studies* 129 – 155.

⁸²⁵ *ibid.*

rescinded, in light of new evidence or social change. If a previously held assumption made by policymakers and society at a certain time is later considered to be inaccurate, exclusionary and/or impracticable, the fact that that presumption exists in legislation is, on its own, arguably an insufficient reason to reject calls for law reform. This might involve reassessing where sex is relevant to law, whether it should continue to be, and how sex is specifically conceptualised in that instance, and if that conceptualisation of sex status is necessary to the aims of the legislation. This continued evaluation of how sex is relevant to law has already been happening in legislative drafting. One example of this can be seen in relation to the ‘universal he’, where masculine pronouns were commonly used in legislative drafting.⁸²⁶ Such drafting was exclusionary towards women and situated men as the objective neutral actor of law,⁸²⁷ so there has since been increasing trends towards gender neutrality in legislative drafting.⁸²⁸ In England and Wales, the British Office of Parliamentary Counsel states that primary legislation ‘should be drafted in a gender-neutral way, so far as it is practicable to do so’.⁸²⁹ Gender-neutral language should be adopted when drafting ‘free-standing text in a Bill’ and when ‘inserting text into older Acts which are not gender-neutral’.⁸³⁰ Given the volume of legislation which previously adopted masculine pronouns, this also risked disruption but was generally accepted as a necessary change.

⁸²⁶ Donald L Revell and Jessica Vapnek, ‘Gender-Silent Legislative Drafting in a Non-Binary World’ (2021) 48 *Capital Law Review* 103 - 147, 111.

⁸²⁷ Ngaire Naffine, ‘Who are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) 66(3) *Modern Law Review* 346 – 367.

⁸²⁸ Donald L Revell and Jessica Vapnek, ‘Gender-Silent Legislative Drafting in a Non-Binary World’ (2021) 48 *Capital Law Review* 103 – 147.

⁸²⁹ Office of the Parliamentary Counsel, ‘Drafting Guidance’ (Gov.UK 2020) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892409/OPC_drafting_guidance_June_2020-1.pdf> accessed 4 February 2022.

⁸³⁰ *ibid.*

Revising legislative drafting can be positive because the law does not just reflect reality but also constructs it,⁸³¹ and can be used to minimise or accentuate distinctions between groups of people in a way which has a discriminatory or exclusionary impact.⁸³² Similar to the exclusionary effect that historical legislative drafting had on women, the presumption of a gender binary in legislative drafting could be considered equally harmful for non-binary populations.⁸³³ Where the law adopts gender-neutral drafting by referring to men and women, or using ‘he or she’ pronouns, such drafting is still exclusionary for non-binary populations who do not fit into that binary framework.⁸³⁴ Many jurisdictions are therefore beginning to move from gender-neutral to gender-silent drafting, by adopting use of the singular ‘they’ pronoun and using alternative phrases such as ‘chairperson’ in place of chairman or chairwoman.⁸³⁵ Consequently, gender-silent drafting could be a solution to addressing the areas of law where there is a presumption of binary sex status.⁸³⁶

When assessing the degree of disruption, it is also worth recalling that non-binary people make up a small proportion of the population. In 2018, the Government estimated that there were around 200,000 – 500,000 trans people, but that only 4,910 people have been issued with a GRC since 2004.⁸³⁷ It would be expected that GRA

⁸³¹ Sally Hines, ‘Recognising Diversity? The Gender Recognition Act and Transgender Citizenship’ in Sally Hines and Tam Sangers (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 111.

⁸³² Donald L Revell and Jessica Vapnek, ‘Gender-Silent Legislative Drafting in a Non-Binary World’ (2021) 48 *Capital Law Review* 103 - 147, 127.

⁸³³ *ibid.*

⁸³⁴ *ibid* 107.

⁸³⁵ *ibid* 107.

⁸³⁶ *ibid* 103 – 147.

⁸³⁷ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018) para 5.

reform would result in an increase in the number of successful applications overall, but data from other jurisdictions would suggest that this would not be unmanageable.⁸³⁸ Even if we assume that the majority of the non-binary population were to apply for a GRC, this still does not necessarily pose a ‘threat of overturning the entire system’ such that reform should be rejected solely on this basis.⁸³⁹ Instead, a third sex status would likely be held by a minority of people, whom are already having to navigate a society which presumes a binary sex status. It is therefore also important to recognise the disruption caused by the current binary framework already. There has already been litigation related to gender-neutral parent markers,⁸⁴⁰ non-gendered passports,⁸⁴¹ non-binary discrimination⁸⁴² and asylum claims based on non-binary identity.⁸⁴³ There has also been considerable debate surrounding how to incorporate non-binary people into existing laws and public services.⁸⁴⁴ Many institutions and

⁸³⁸ Though it is worth noting that this is based on introducing self-determination rather than non-binary recognition. Moninne Griffith and others, *Review of the Gender Recognition Act 2015: Report to the Minister for Employment Affairs and Social Protection* (Gov.ie June 2018) 41 – 42. See also discussion of figures in Norway and Denmark, and estimations for Scotland: Scottish Government, *Gender Recognition Reform (Scotland) Bill: A consultation by the Scottish Government* (Scottish Government December 2019) 3.8.9 – 3.8.12.

⁸³⁹ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [87].

⁸⁴⁰ *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2021] Fam 77. See also Liam Davis, ‘Deconstructing tradition: Trans reproduction and the need to reform birth registration in England and Wales’ (2020) 22(1-2) *International Journal of Transgender Health* 179 – 190.

⁸⁴¹ *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 WLR 133.

⁸⁴² *Taylor v Jaguar Land Rover Ltd* [2020] UKET 1304471/2018.

⁸⁴³ *Mx M (gender identity – HJ (Iran) – terminology) El Salvador* [2020] UKUT 313 (IAC).

⁸⁴⁴ See (e.g.) Recommendations 22, 23 and 26 in Women and Equalities Committee, *Reform of the Gender Recognition Act: Government response to the Committee’s Third Report, Fifth Special Report of Session 2021 – 22, HC 129* (House of Commons 2022). See also Working Group for Non-binary People’s Equality, *Non-Binary Working Group Report and Recommendations March 2022* (Scottish Government July 2022).

businesses have made efforts to move towards gender-neutral facilities⁸⁴⁵ and the Courts are increasingly recognising that non-binary populations are in need of recognition and protection before the law in certain circumstances.⁸⁴⁶ Issues related to non-binary people in law and public life are therefore already generating considerable disruption and debate. Arguably a review of laws and policies which are already subject to criticism based on the need to recognise non-binary populations, and consideration of how to include this population, is already necessary. Rather than causing disruption, introducing legal recognition could prompt policymakers to address these issues and minimise disruption in the long term.

The extent to which reform causes disruption has been relevant for the ECtHR in assessing States' margin of appreciation in cases concerning legal sex recognition. In *Goodwin*, the court acknowledged that (binary) trans recognition would cause disruption to the field of birth registration and other areas such as 'access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance'.⁸⁴⁷ Nevertheless, these difficulties were 'manageable and acceptable' and society ought to be 'reasonably...expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost'.⁸⁴⁸ Therefore, administrative costs and

⁸⁴⁵ cf Department for Levelling Up, Housing and Communities, 'Toilet provision for men and women: call for evidence' (Gov.UK 2022) <<https://www.gov.uk/government/consultations/toilet-provision-for-men-and-women-call-for-evidence/toilet-provision-for-men-and-women-call-for-evidence>> accessed 16 March 2022.

⁸⁴⁶ E.g. to be protected against discrimination (*Taylor v Jaguar Land Rover Ltd* [2020] UKET 1304471/2018) or for asylum claims (*Mx M (gender identity – HJ (Iran) – terminology) El Salvador* [2020] UKUT 313 (IAC)).

⁸⁴⁷ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [91].

⁸⁴⁸ *ibid.*

difficulties alone cannot necessarily justify maintaining the current system. The potential disruption relies on a 'fair balance...between the general interest of the community and the interests of the individual'.⁸⁴⁹ In *Sheffield* – prior to *Goodwin* - Judge Van Dijk (dissenting) argued that:

Even if one accepts that full legal recognition of gender re-assignment poses certain problems for the English legal system and for society [and] for certain third parties, keeping the system as it is now, with its serious and continuous consequences for the private lives of post-operative transsexuals and the distress involved, in my opinion cannot be considered... proportionate... *[S]ociety and individual third parties may be required to accept a certain inconvenience to enable their fellow citizens to live in dignity and worth in the same society in accordance with the sexual identity chosen by them at great personal cost.*⁸⁵⁰

It could be argued that the balancing act involved in affording binary trans people recognition is substantively different from the current one involved in considering non-binary legal sex recognition. For the former, the UK Government had to accept the identity of people who came within the established binary legal structure of sex, whereas with a third sex option, society is asked to reshape that structure. Nevertheless, the change that the UK Government had to make in response to *Goodwin* was still significant in changing the nature of legal sex status as something which was previously understood as immutable and fixed at birth.⁸⁵¹ Therefore, while

⁸⁴⁹ *ibid* [72]: 'In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention'.

⁸⁵⁰ *Sheffield and Horsham v United Kingdom* [1998] ECHR 69 (Judge van Dijk) (emphasis added).

⁸⁵¹ *Corbett v Corbett* [1971] P 83, [1970] 2 All ER 33.

disruption from introducing non-binary recognition would not be insignificant, as seen from *Goodwin*, it is to be expected that where reform to legal sex could help an individual to live in dignity and worth, society may be expected to tolerate such disruption. The relevance of disruption for the margin of appreciation afforded to states, and issues of dignity, are given greater consideration in chapter 8.

Other jurisdictions have already started to look into non-binary recognition with Belgium commissioning an in-depth report into it and Scotland having set up a Non-binary Working Group which explores non-binary legal recognition.⁸⁵² However, there has been disappointment that in England and Wales, while non-binary recognition is rejected on the basis of disruption, there appears to be no attempt to further investigate this potential disruption or how it could be mitigated.⁸⁵³ This is not to minimise or negate the challenges associated with such reform, but there are steps which could be taken to address current roadblocks to reform. This might include, for example, conducting an in-depth review of areas of concern to those opposed to non-binary recognition such as the impact on (e.g.) the EA. There are also measures, such as a post-legislative review, which could allow the public and policymakers to reflect on the impact that a third sex option is having and highlight any areas in need of additional reform or clarification.

To conclude, it is accepted that disruption would be caused by the introduction of a third sex option. Other laws would also likely require reform to address apparent

⁸⁵² See n 701.

⁸⁵³ Similar frustration at the lack of meaningful development in this area was expressed in evidence to the Scottish Parliament, see Equalities, Human Rights and Civil Justice Committee, *14th Meeting 2022, Session 6* (Scottish Parliament 2022) 21 – 22.

inconsistencies and/or to clarify the legal position of those with a non-binary legal sex status. However, the extent to which this disruption would be unacceptable is questionable. The law has already demonstrated the capacity to evolve with social change and rather than *causing* disruption, a third sex option may prompt policymakers to clarify the position of non-binary people who are already navigating their precarious legal status. Consequently, a third sex option is proposed for reform. These findings and themes will be drawn out further using a dignity-lens in chapter 8, where there is also further consideration of the State's margin of appreciation in relation to legal sex recognition claims.

6 Gender Dysphoria

6.1 An introduction to the gender dysphoria requirement

Under section 2(1)(a) GRA, an application for a GRC under the Standard Track must evidence that they have received a diagnosis of gender dysphoria.⁸⁵⁴ Under section 25, gender dysphoria means the ‘disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism’.⁸⁵⁵ This is evidenced through ‘Report A’,⁸⁵⁶ which is a medical report detailing the applicant’s diagnosis of gender dysphoria.⁸⁵⁷ The report must be made by a ‘registered medical practitioner or registered psychologist practising in the field of gender dysphoria’.⁸⁵⁸

Gender dysphoria is defined in DSM-V as the ‘marked incongruence between one’s experienced/expressed gender and assigned gender’ with ‘clinically significant distress or impairment in social, occupational, or other important areas of

⁸⁵⁴ Gender Recognition Act 2004, s 2(1)(a).

⁸⁵⁵ *ibid* s 25.

⁸⁵⁶ See generally HM Courts and Tribunals Service, *Guidance on Completing the Standard Application Form for a Gender Recognition Certificate: T451* (HM Courts and Tribunals Service 2021) 14.

⁸⁵⁷ *ibid*. See also HHJ Michael Harris, ‘President’s Guidance No.1: Evidential requirements for applications under section 1(1)(a) of the Gender Recognition Act 2004’ (Gov. UK 2005)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961491/t492-presidents-guide.pdf>accessed 10 March 2022.

⁸⁵⁸ HM Courts and Tribunals Service, *Standard Application for a Gender Recognition Certificate: T450* (HM Courts and Tribunals Service 2021) s 6; HM Courts and Tribunals Service, *Guidance on Completing the Standard Application Form for a Gender Recognition Certificate: T451* (HM Courts and Tribunals Service 2021) 14. A list of doctors and psychologists specialising in gender dysphoria is provided for applicants on the Government’s website, though this list is non-exhaustive and applicants can obtain letters from other practitioners, see Government Equalities Office, ‘Doctors and psychologists specialising in gender dysphoria’ (Gov.UK June 2022) <<https://www.gov.uk/government/publications/gender-recognition-certificate-list-of-medical-practitioners-in-gender-dysphoria/doctors-and-psychologists-specialising-in-gender-dysphoria>>accessed 13 June 2022.

functioning’.⁸⁵⁹ Under the DSM-IV (1994), reference was previously made to ‘gender identity disorder’.⁸⁶⁰ The move to gender dysphoria under the DSM-V in 2013 was seen as an attempt to move away from associating gender diversity with disorder.⁸⁶¹ The introductory text to the relevant chapter in the DSM-V states that, in contrast to the previous term of gender identity disorder, gender dysphoria ‘focuses on dysphoria as the clinical problem, not identity per se’.⁸⁶² It recognises that not all individuals who experience an incongruence between their experienced or expressed gender identity and their assigned sex will experience distress.⁸⁶³ The DSM-5 specifies that the distress must have lasted at least six months and, for adults,⁸⁶⁴ must be manifested by at least six of the following (which must include the first criterion):

1. A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics [...].
2. A strong desire to be rid of one’s primary and/or secondary sex characteristics because of a marked incongruence with one’s experienced/expressed gender [...].

⁸⁵⁹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th ed, American Psychiatric Association 2013) 452, 453.

⁸⁶⁰ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-4* (4th ed, American Psychiatric Association 1994) 576 – 582.

⁸⁶¹ Arlene Istar Lev, ‘Disordering gender identity: Gender identity disorder in the DSM-IV-TR’ in Dan Karasic and Jack Drescher (eds), *Sexual and Gender Diagnoses of the Diagnostic and Statistical Manual (DSM)* (Routledge 2014) 35-69; Lin Fraser and others, ‘Recommendations for Revision of the DSM Diagnosis of Gender Identity Disorder in Adults’ (2010) 12(2) *International Journal of Transgenderism* 80-85.

⁸⁶² American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th ed, American Psychiatric Association 2013) 451.

⁸⁶³ *ibid.*

⁸⁶⁴ The description also includes further guidance on the possible manifestation of gender dysphoria in young adolescents, but this text has been omitted here as this chapter does not intend to address young adolescents. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th ed, American Psychiatric Association 2013) 452.

3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).⁸⁶⁵

Medical practitioners and clinicians may also refer to the diagnostic criteria for gender incongruence contained in the ICD-11 when assessing a person for the purposes of Report A.⁸⁶⁶ The ICD-11 describes gender incongruence as 'characterised by a marked and persistent incongruence between an individual's experienced gender and the assigned sex'.⁸⁶⁷ While the DSM-5 places emphasis on the distress which *may* accompany gender incongruence, the ICD-11's definition appears broader in placing less emphasis on clinical distress. However it does note that 'gender variant behaviour and preferences alone' are not sufficient to establish a diagnosis.⁸⁶⁸ The predecessor to ICD-11 – ICD-10 – referred to diagnostic categories such as 'transsexualism, 'gender identity disorder of children,' 'gender incongruence of adolescence and adulthood' and 'gender incongruence of childhood'.⁸⁶⁹ Gender incongruence was

⁸⁶⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th ed, American Psychiatric Association 2013) 452.

⁸⁶⁶ *Re An Application by JR111* [2021] NIQB 48 [48], [75], [144(c)], [114(d)] (Scofield J).

⁸⁶⁷ World Health Organisation, *ICD-11: International Classification of Diseases* (11th ed, World Health Organisation, adopted 2019) ch 7, HA60.

⁸⁶⁸ *ibid.*

⁸⁶⁹ World Health Organisation, *ICD-10: International Classification of Diseases* (10th ed, World Health Organisation, adopted 1990) ch 5

previously contained in the ‘Mental and behavioural disorders’ chapter, but for the ICD-11 it was moved into the chapter on ‘Conditions related to sexual health’. Similar to the DSM-V, the newest edition of the ICD attempts to move away from the stigma of associating gender diversity with disorder.⁸⁷⁰

A second medical report – Report B – is also required which must include details of any medical treatment that the applicant has had (or plans to have) to modify sexual characteristics.⁸⁷¹ It must also detail any other prescribed or planned medical treatment.⁸⁷² If the applicant has not undergone surgery the report must explain why.⁸⁷³ This report needs to be made by another medical professional, but they do not have to specialise in gender dysphoria.⁸⁷⁴

The public consultation findings showed that 64.1% respondents felt that there should not be a gender dysphoria requirement.⁸⁷⁵ The requirement is controversial because it medicalises the identity of trans people seeking recognition and many consider it to be stigmatising.⁸⁷⁶ In the Transgender Equality Inquiry, the requirement was criticised by several groups and individuals for pathologising trans people and implying that

⁸⁷⁰ Charles Moser, ‘ICD-11 and gender incongruence: language is important’ (2017) 46(8) *Archives of Sexual Behavior* 2515-2516.

⁸⁷¹ Gender Recognition Act 2004, s 3(3)(a).

⁸⁷² *ibid* s 3(3)(b).

⁸⁷³ HM Courts & Tribunal Service, *T451 Guidance on completing the Standard Application Form for a Gender Recognition Certificate* (Crown 2021) 14.

⁸⁷⁴ Gender Recognition Act 2004, s 3(1)(a) – (b).

⁸⁷⁵ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 52.

⁸⁷⁶ See generally Pieter Cannoot, ‘The pathologisation of trans* persons in the ECtHR’s case law on legal gender recognition’ (2019) 37(1) *Netherlands Quarterly of Human Rights* 14 – 35.

gender diversity is a mental illness⁸⁷⁷ and the Women and Equalities Committee recommended its removal.⁸⁷⁸ As outlined in chapter 2,⁸⁷⁹ medical models of legal sex recognition are often contrasted with systems based on self-identification which allow people to declare their legal sex without additional medical requirements.⁸⁸⁰ Self-identification is generally considered the model of ‘best practice’⁸⁸¹ and ‘optimal’⁸⁸² for the protection of trans rights because they afford gender diverse people great autonomy over their formal identity.⁸⁸³

In other jurisdictions, psychiatric evidence is a common requirement for legal sex recognition.⁸⁸⁴ However, the global depathologisation movement has contributed to a general move away from such requirements in other European and common law

⁸⁷⁷ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) paras 36 – 45.

⁸⁷⁸ *ibid* paras 44, 45.

⁸⁷⁹ See chapter 2.5.1.

⁸⁸⁰ This distinction can be seen in Isabel C Jaramillo and Laura Carlson (eds), *Trans Rights and Wrongs: A Comparative Study of Legal Reform Concerning Trans Persons* (Springer 2021) where hard and soft medicalisation models are contrasted with self-identification.

⁸⁸¹ Amnesty International, *The State Decides who I am: Lack of Recognition for Transgender People* (Amnesty International 2014) 90–91.

⁸⁸² Peter Dunne, ‘Ten years of gender recognition in the United Kingdom: still a “model for reform”?’ (2015) *Public Law* 530 – 539; Jessica Clarke, ‘Identity and Form’ (2015) 103(4) *California Law Review* 747 – 840, 837.

⁸⁸³ Valeria Venditti, ‘Gender kaleidoscope: Diffracting legal approaches to reform gender binary’ (2020) 1 *International Journal of Gender, Sexuality and Law* 56 – 75, 61.

⁸⁸⁴ TGEU, ‘Trans Rights Europe and Central Europe Index 2020’ (TGEU 2020) <<https://tgeu.org/trans-rights-europe-central-asia-index-maps-2020/>> accessed 20 August 2022; European Commission, *Trans and Intersex Equality Rights in Europe – A Comparative Analysis* (European Commission 2018).

jurisdictions,⁸⁸⁵ including in Great Britain.⁸⁸⁶ International human rights standards are based on six general principles, including that a system should be based on self-determination and should not involve medical or psychiatric reports which could be unreasonable or pathologising.⁸⁸⁷ The UN Independent Expert (SOGI) has called on states to ensure legal recognition is available on the basis of self-determination in line with the 2015 recommendations of the UN High Commissioner for Human rights.⁸⁸⁸ In the 2018 report from the UN Independent Expert (SOGI), medical health diagnoses were described as having been ‘misused to pathologize identities and other diversities’ and that the pathologisation of LGBTQ+ people ‘reduces their identities to diseases, which compounds stigma and discrimination’.⁸⁸⁹ In 2015, the Parliamentary Assembly of the Council of Europe called on member states to:

⁸⁸⁵ See generally: Zowie Davy, Anniken Sørli and Amets Suess Schwend, ‘Democratising diagnoses? The Role of the Depathologisation Perspective in Constructing Corporeal Trans Citizenship’ (2018) 38 *Critical Social Policy* 13 - 34; Jens T Theilen, ‘Depathologisation of Transgenderism and International Human Rights Law’ (2014) 14 *Human Rights Law Review* 327 – 342.

⁸⁸⁶ E.g. Republic of Ireland (2015) and Scotland (expected 2022). See Citizens Information, ‘Legal recognition of your preferred gender’ (Citizens Information Board 2021)

<https://www.citizensinformation.ie/en/birth_family_relationships/changing_to_your_preferred_gender.html>accessed 6 February 2022; Scottish Government, ‘Programme for Government’ (Scottish Government 2022)

<<https://www.gov.scot/programme-for-government/>>accessed 6 February 2022.

⁸⁸⁷ The other standards were that it should be a simple administrative process, confidential, based on free and informed consent without medical requirements; recognise non-binary identities and multiplicity of sex options; and should be accessible and cost free. See Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018) para 39.

⁸⁸⁸ Victor Madrigal-Borloz V (IE SOGI), *Report on Gender Identity* (United Nations 2018) 3; Office of the United Nations High Commissioner for Human Rights, *Discrimination and violation against individuals based on their sexual orientation and gender identity, A/HRC/29/23* (UNGA 4 May 2015) para 78.

⁸⁸⁹ Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health A/HRC/35/21* (UNGA 6 – 23 June 2017) para 48.

[A]mend classifications of diseases used at national level and advocate the modification of international classifications, making sure that trans people, including children, are not labelled as mentally ill, while ensuring stigma-free access to necessary medical treatment.⁸⁹⁰

Under the Gender Identity Law (2012), Argentina became one of the first jurisdictions to introduce self-declaration, allowing people to change their sex status in the National Registry without requiring medical evidence.⁸⁹¹ Several European jurisdictions have since introduced self-declaration, including Denmark, Ireland, Malta, Norway, Belgium, Portugal, Luxembourg and Iceland. Other common law jurisdictions - including states in the USA and Australia, and Canadian provinces - have also introduced self-identification.⁸⁹²

In 2018, Theresa May indicated her desire to move towards a system of self-identification when announcing the public consultation because 'being trans should never be treated as an illness'.⁸⁹³ However, the UK Government's position on the gender dysphoria requirement has changed considerably over the years and it is worth briefly providing some context to this. On the 24th May 2019, before the Government

⁸⁹⁰ Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) 6.3.3.

⁸⁹¹ Gender Identity Law 26.743 (Argentina) (2012).

⁸⁹² For Canada, see e.g. Québec (2015), Alberta (2018). For Australia, see e.g. Tasmania (2019), Victoria (2019). For USA, see e.g. California (2017), Arkansas (2010).

⁸⁹³ Gov.UK, 'Press release, government announced plans to reform process of changing legal gender' (Gov.UK 2018) <<https://www.gov.uk/government/news/government-announces-plans-to-reform-process-of-changing-legal-gender>>accessed 7 February 2022. See also Rowena Mason, 'Theresa May plans to let people change gender without medical checks' (The Guardian 2017) <<https://www.theguardian.com/society/2017/oct/18/theresa-may-plans-to-let-people-change-gender-without-medical-checks>>accessed 12 June 2022.

had provided a response to the public consultation, Theresa May announced her resignation.⁸⁹⁴ This prompted a Conservative Party leadership contest which was won by Boris Johnson in July 2019.⁸⁹⁵ Following several defeats in the House of Commons on matters related to the UK's withdrawal from the European Union (EU), Johnson called a snap general election for December 2019. This election saw the Conservative Party, headed by Boris Johnson, secure a majority in Parliament and form a new Government. This new government had responsibility for finalising their response to the findings of the public consultation and announcing plans for reform. Similarly, it is also worth noting since July 2016 when the Government announced a review of the GRA,⁸⁹⁶ the position of Secretary of State for Women and Equalities - which assumes responsibility for the Government Equalities Office – has been held by five different Members of Parliament over six separate terms of office.⁸⁹⁷ These changes are important in contextualising (at least partly) why the UK Government's position towards GRA reform in England and Wales has appeared to fluctuate over the years.

Contrasting with May's position in 2018, the new Johnson-led Government decided not to pursue removing the diagnosis requirement because it provides a 'safeguard'

⁸⁹⁴ BBC News, 'Theresa May quits: UK set for new PM by end of July' (BBC News 2019) <<https://www.bbc.co.uk/news/uk-politics-48395905>>accessed 20 August 2022.

⁸⁹⁵ BBC News, 'Boris Johnson wins race to be Tory leader and PM' (BBC News 2019) <<https://www.bbc.co.uk/news/uk-politics-49084605>>accessed 20 August 2022.

⁸⁹⁶ Government Equalities Office, 'Press release: Gender Recognition Act review announced in plan for transgender equality' (Gov.UK 2016) <<https://www.gov.uk/government/news/gender-recognition-act-review-announced-in-plan-for-transgender-equality>>accessed 18 August 2022.

⁸⁹⁷ Nicky Morgan MP (July 2014 – July 2016), Justine Greening (July 2016 – January 2018), Amber Rudd (January 2018 – April 2018), Penny Mordaunt (April 2018 – July 2019), Amber Rudd (July 2019 – September 2019), Liz Truss (September 2019 – present).

to ensure people do not ‘embark unadvisedly on the process of legally changing their gender identity’.⁸⁹⁸ The Government also justified retention of the requirement ‘in order to deter vexatious applications or abuse of the GRC process’.⁸⁹⁹ The safeguarding role of the diagnosis requirement is a common argument in favour of its retention in the GRA, as it implicates a third party into the GRC process which may reduce the likelihood of fraudulent applications.⁹⁰⁰ This is a particularly common argument opined by gender-critical feminists who feel that removing the diagnosis requirement could make the system open to abuse from predatory people, usually described as men.⁹⁰¹ These arguments, and the potentially safeguarding role of the diagnosis requirement, will be returned to in the final section of this chapter.

This chapter now turns to present empirical findings from non-binary participants towards the gender dysphoria requirement. These findings indicated strong opposition from non-binary participants towards the requirement. Non-binary participants criticised it for being unnecessary for legal sex recognition (as distinct from a medical transition), stigmatising, difficult to fulfil for non-binary people in particular, and that it involved accessing Gender Identity Clinics (GICs) which have long waiting times. This chapter concludes by proposing that the gender dysphoria requirement is removed.

⁸⁹⁸ *Re An Application by JR111* [2021] NIQB 48 [59] (Scofield J).

⁸⁹⁹ *ibid* [133] (Scofield J).

⁹⁰⁰ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 41 – 46; Lisa Mottet, ‘Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People’ (2013) 19 *Michigan Journal of Gender and Law* 373 - 470, 413 – 416.

⁹⁰¹ Fair Play for Women, ‘Written evidence submitted by Fair Play for Women [GRA0851]’ (UK Parliament 2020)

<<https://committees.parliament.uk/writtenevidence/16877/pdf/>> accessed 30 August 2022.

6.2 Empirical findings

6.2.1 Quantitative data

Most non-binary participants opposed the gender dysphoria requirement (80.7%). Non-binary participants were much more likely to oppose this requirement than binary trans participants (50.7%). This difference was statistically significant ($P < .001$).

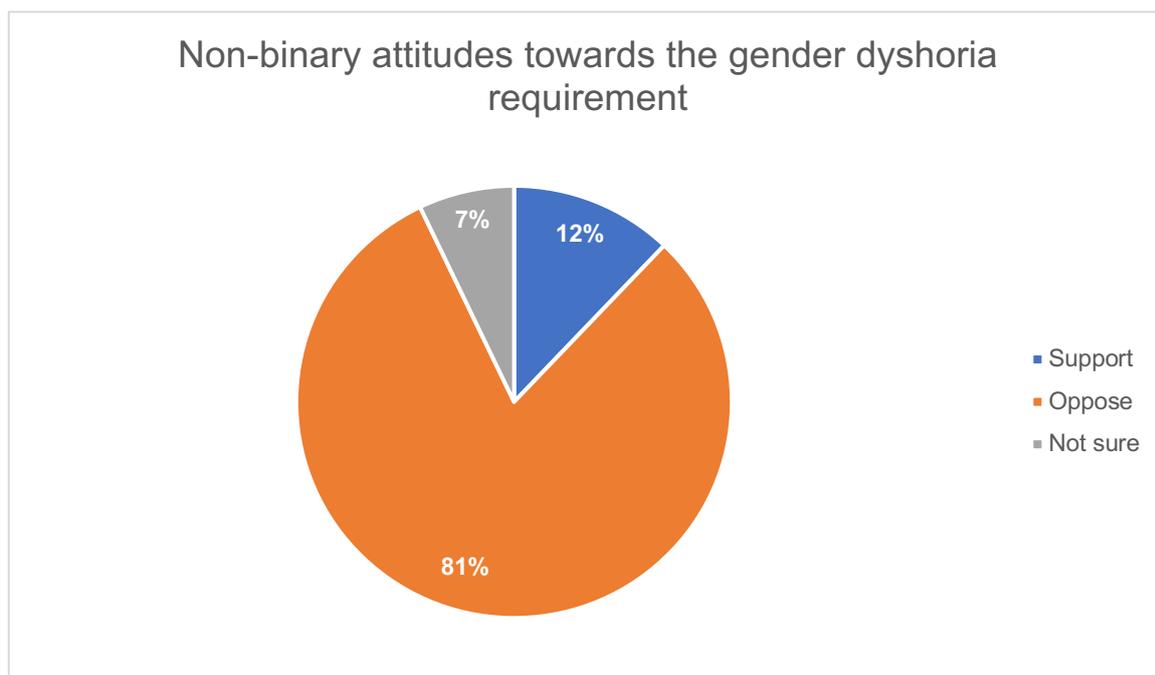


Figure 6–1. Non-binary attitudes towards the **gender dysphoria** requirement ($n = 140$)

The data collected in this study alone is insufficient to fully answer why this difference in attitudes exists.⁹⁰² However, in this study, there was evidence of two binary trans participants basing their preferences towards reform of this requirement on the perceived illegitimacy of non-binary identities. One binary participant argued that ‘trans is real...non-binary is woke bullshit’.⁹⁰³ Another stated that they ‘[only] believe in male, female and agender/neither... you cannot be genderfluid, you cannot be

⁹⁰² It is worth recalling that data from binary trans respondents is used as an anchor of comparison with non-binary responses, rather than these differences forming part of the substantive research questions, see chapter 3.2.1.

⁹⁰³ P200, M2F, 36 – 45 years.

stargender'.⁹⁰⁴ This reflects observations from other research where non-binary identities are sometimes perceived by binary trans people as 'impractically complicated'⁹⁰⁵ and 'strategically unhelpful'.⁹⁰⁶ Davidson's research suggests that this exclusion of non-binary identities could be due to the way that such identities 'challenge the commitments to binary sex and gender'⁹⁰⁷ and a politics of assimilation.⁹⁰⁸ This contestation of inclusion/exclusion among binary and non-binary trans people is not unusual as social movements often involve the creation and evolution of the definition of categories around which to collectively organise.⁹⁰⁹ Nevertheless it is regrettable to undermine the legitimacy of non-binary identities on the basis that they are strategically unhelpful. On the contrary, it could be argued that non-binary identities are strategically useful for trans activism as they challenge the boundaries of the 'social imaginary' of (binary) sex and gendered embodiment.⁹¹⁰ These intra community tensions may partly explain the stark difference between non-binary and binary opposition to this requirement, though further research into this would be useful to draw out these potential issues further.⁹¹¹

⁹⁰⁴ P82, Male, 16 – 18 years.

⁹⁰⁵ Megan Davidson, 'Seeking Refuge under the Umbrella: Inclusion, Exclusion, and Organising within the Category Transgender' (2007) 4(4) *Sexuality Research and Social Policy* 60 – 80, 66; Amy McCrea, 'Under the Transgender Umbrella: Improving ENDA's Protections' (2014) 15 *Georgetown Journal of Gender and Law* 543 – 562, 556; Peter Dunne and Jule Mulder, 'Beyond the Binary: Towards a Third Sex Category in Germany?' (2018) 19(3) *German Law Journal* 627 – 648, 636.

⁹⁰⁶ Patricia Gagne, Richard Tewksbury and Deanna McGaughey, 'Coming Out and Crossing Over: Identity Formation and Proclamation in a Transgender Community' (1997) 11 *Gender and Society* 478 – 508, 501. See Peter Dunne and Jule Mulder, 'Beyond the Binary: Towards a Third Sex Category in Germany?' (2018) 19(3) *German Law Journal* 627 – 648, 636.

⁹⁰⁷ Megan Davidson, 'Seeking Refuge under the Umbrella: Inclusion, Exclusion, and Organising within the Category Transgender' (2007) 4(4) *Sexuality Research and Social Policy* 60 – 80, 79.

⁹⁰⁸ *ibid* 60 – 80.

⁹⁰⁹ *ibid* 79.

⁹¹⁰ *ibid*.

⁹¹¹ *ibid* 66.

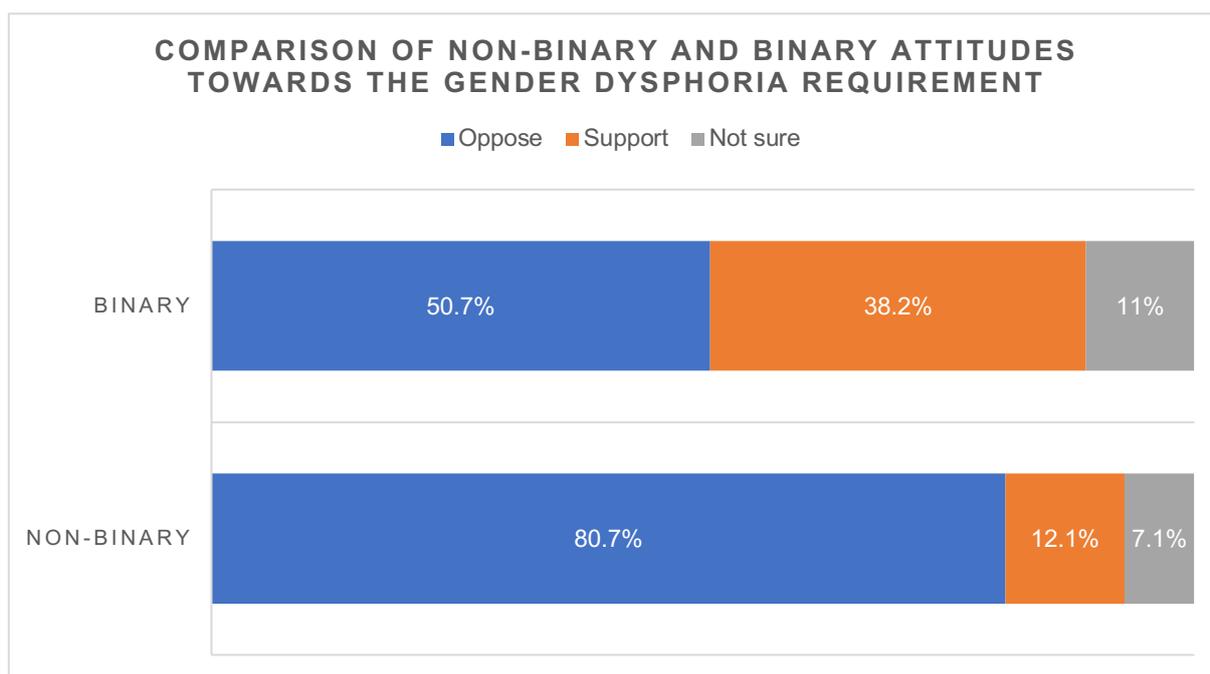


Figure 6–2. Comparison of non-binary and binary attitudes towards the **gender dysphoria** requirement ($n = 276$)

Compared to other current requirements, gender dysphoria was the joint-third most opposed, alongside the Gender Recognition Panel.⁹¹² Younger non-binary participants were most opposed to the requirement (82.1%), followed by the middle-aged group (80.4%) and the older group (75%). These differences were statistically non-significant ($P=.808$).

⁹¹² Empirical data on the Gender Recognition Panel is presented in chapter 7.4.

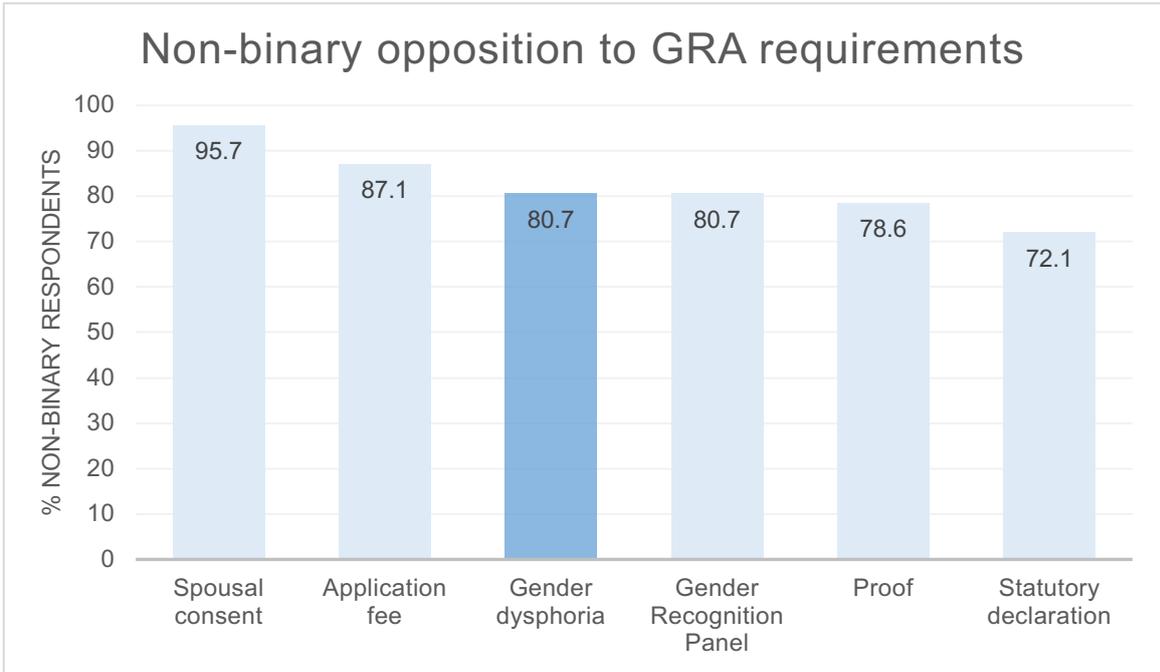


Figure 6–3. Non-binary opposition to the **gender dysphoria** requirement v other requirements (n = 140)

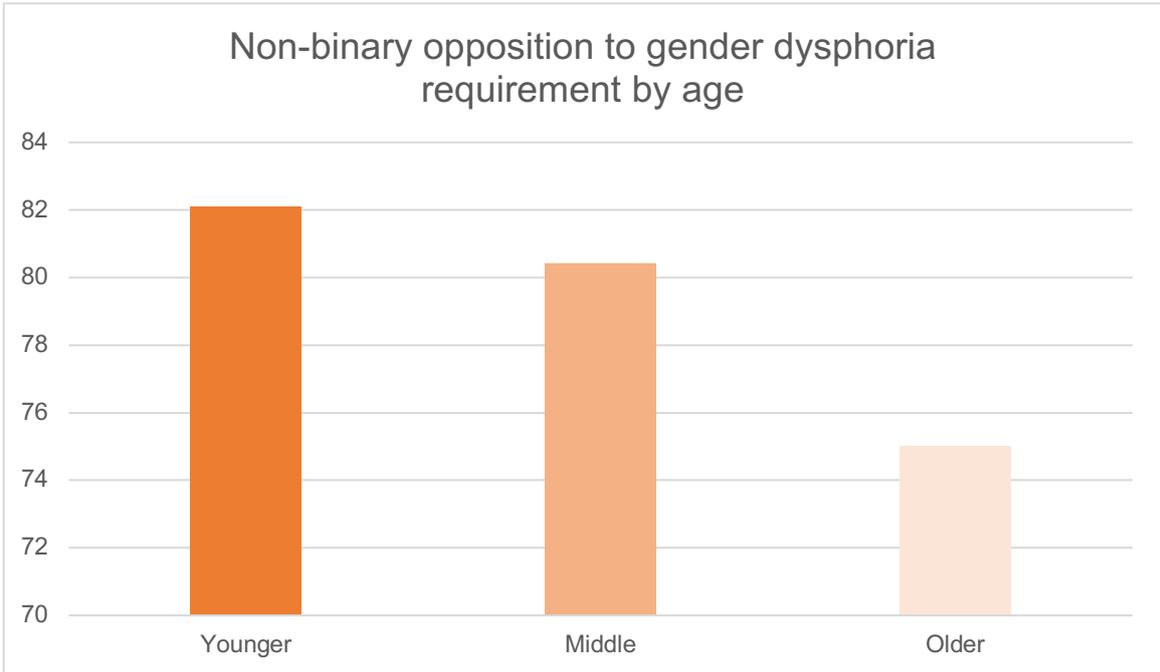


Figure 6–4. Non-binary opposition to **gender dysphoria** requirement by age (n = 113)

Participants were asked to select up to three reform options which would make them more likely to apply for a GRC. Of the current requirements, removing the gender dysphoria requirement was the third most selected option (36.4%). Non-binary participants were more likely to select this reform option compared with binary trans participants (13.2%). This difference was statistically significant ($P<.001$).

The middle age group were most likely to say that removing this requirement would make them more likely to apply for a GRC (47.8%). This was followed by the older (31.3) and younger groups (30.8%). These differences were statistically non-significant ($P=.15$).

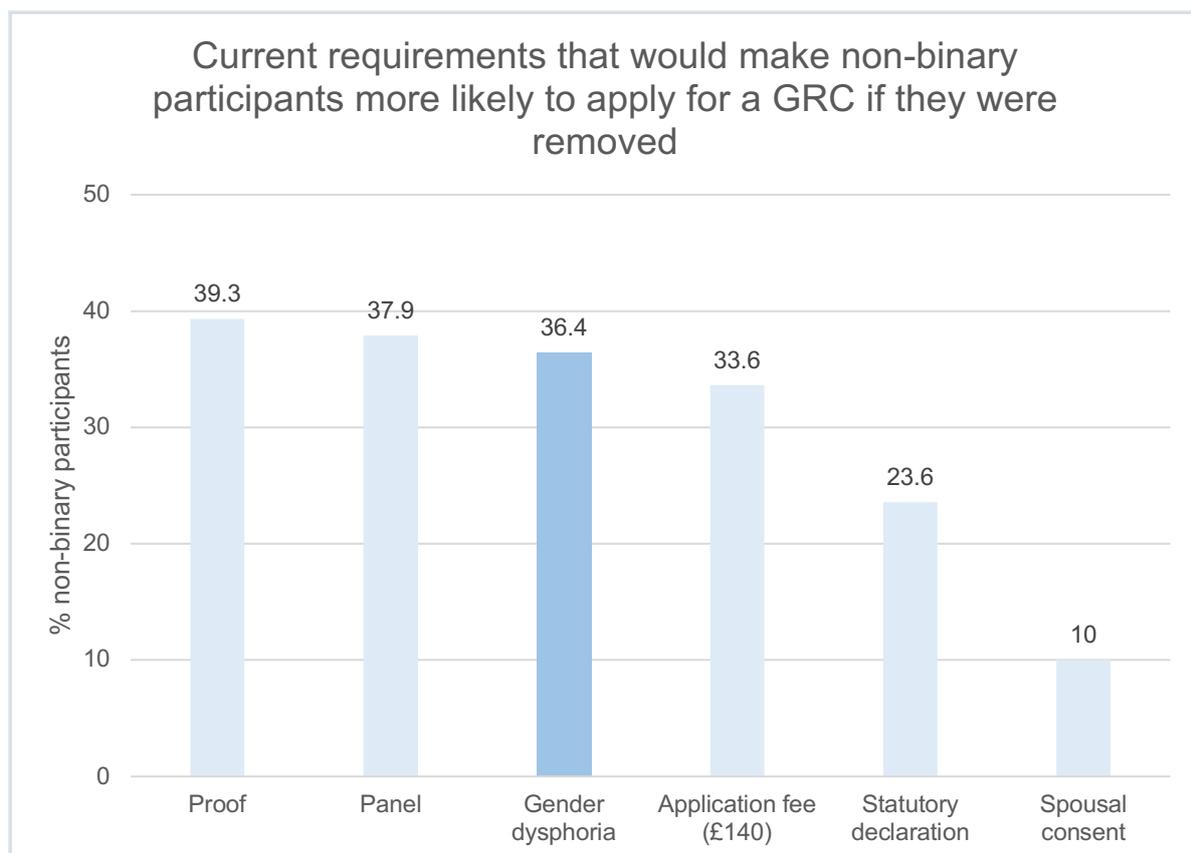


Figure 6–5. **Gender dysphoria** removal as a reform priority compared to other requirements ($n = 140$)

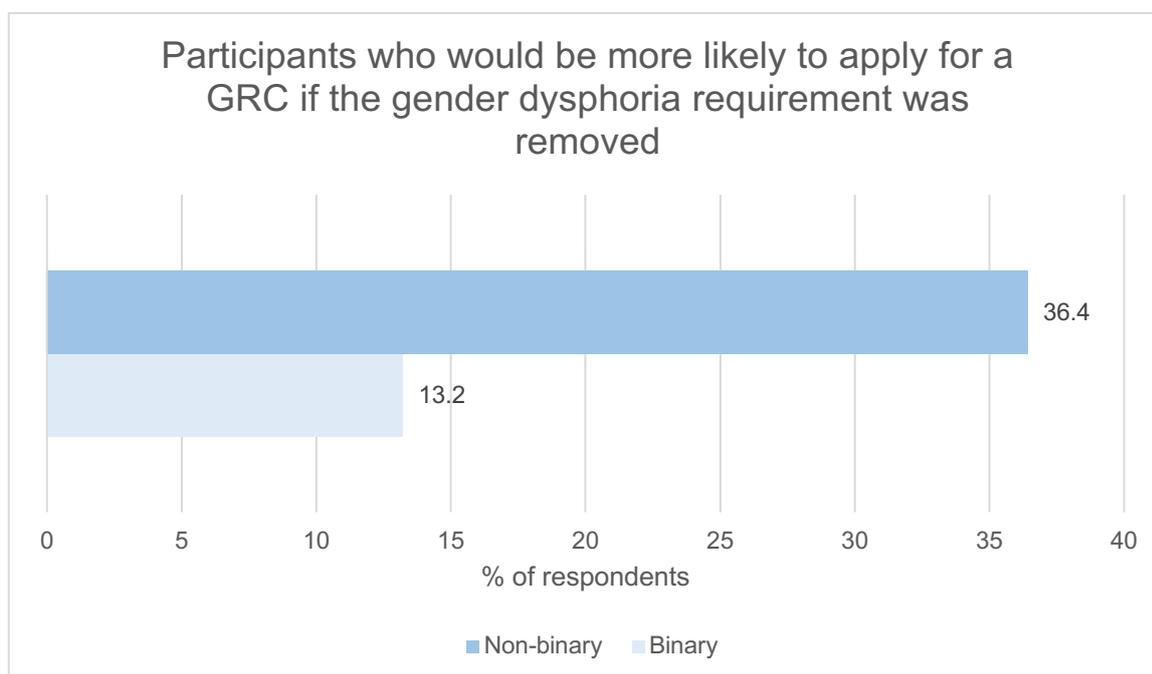


Figure 6–6. Comparison of non-binary and binary support for **gender dysphoria** as a reform priority (n = 276)

6.2.2 Qualitative themes

The diagnosis should not be necessary for legal recognition

The gender dysphoria diagnosis was generally seen as unnecessary for legal recognition, though some did consider the diagnosis useful for medical purposes. One participant argued that just because some people experience dysphoria ‘doesn’t mean that the way you describe trans-ness has to be through that... and so tying state recognition of gender to gender dysphoria is unnecessary’.⁹¹³ Another also said they ‘can understand it would be useful for [medical treatment] and things like that but I don’t see why they have to have it for legal documents and certificates, it doesn’t really

⁹¹³ Participant 15, Transfem / non-binary, 26 – 35 years.

matter, it just needs to be a certificate'.⁹¹⁴ Another said that they had a diagnosis because they wanted 'top surgery'⁹¹⁵ but that they weren't 'comfortable' with it as part of the GRA process.⁹¹⁶ Participant 12 also said that a gender dysphoria diagnosis may help with enabling their 'body to change...to match [their] gender', but that if they don't want this then 'society is not going to recognise [them]'.⁹¹⁷ This links to criticism of the Act on the basis that it firmly 'anchors' trans people to the medical sphere, with the medicalisation of trans people remaining 'unchallenged' and since 2004 being 'legislatively entrenched'.⁹¹⁸ This medicalisation has an impact on the perceived legal capacity of trans persons to autonomously and rationally determine their own identity and lives.⁹¹⁹ This medical/legal divide described by participants is interesting and links to the very common argument in favour of removing the requirement, in that there is no reason for the law to implicate the medical route to transition, when the two spheres have very different consequences. This reflects an awareness that safeguards are more likely to be expected for medical treatment because of the material consequences of being able to access potentially invasive medical interventions. The link that the law makes to the medical sphere has also created a concern that removing the gender dysphoria requirement for the purposes of legal transitioning would mean that it could no longer be used for medical purposes.⁹²⁰ This

⁹¹⁴ Participant 21, Female / demi-female, 16 – 18 years.

⁹¹⁵ Top surgery refers to surgery to remove or reduce breast or chest tissue.

⁹¹⁶ Participant 11, Non-binary, 26 – 35 years.

⁹¹⁷ Participant 12, Trans/non-binary, 26 – 35 years.

⁹¹⁸ Sharon Cowan, 'Looking Back (To)wards the Body: Medicalization and the GRA' (2009) 18(2) *Social & Legal Studies* 247 -252, 248.

⁹¹⁹ Pieter Cannoot, "'#WontBeErased": The effects of (de)pathologisation and (de)medicalisation on the legal capacity of trans* persons' (2019) 66 (101478) *International Journal of Law and Psychiatry* 1 – 11, 4.

⁹²⁰ Jens Scherpe and Peter Dunne, 'Comparative Analysis and Recommendations' in Jens Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2017) para 5.3.3.

has led to some trans people being fearful that if gender dysphoria were not recognisable as a medical condition, then the State may withdraw healthcare provision. This is particularly concerning for many trans people as gender-affirming healthcare can be important and beneficial to their lives.⁹²¹ Arguably, concerns about access to healthcare are heightened by the Act as it blurs the lines between medical and legal transition.⁹²² This perception has also been reinforced by the ECtHR implicitly legitimising the retention of medical requirements for legal recognition because of its function in the medical sphere.⁹²³ However, legal recognition does not impact the assessment for medical treatment⁹²⁴ and removing the diagnosis requirement for legal sex status would not prevent it being used in the medical sphere too. Nevertheless, even relying on a diagnostic model for healthcare has been criticised by several scholars who argue that the diagnosis is fundamentally pathologising and requires people to assimilate to a medicalized narrative of trans

⁹²¹ See (e.g.) Anne A Lawrence, 'Factors associated with satisfaction of regret following male-to-female sex reassignment surgery' (2003) 32(4) *Archives of Sexual Behaviour* 299 – 315; Tim van de Grift and others, 'Surgical Satisfaction, Quality of Life, and Their Association After Gender-Affirming Surgery: A Follow-up Study' (2018) 44(2) *Journal of Sex and Marital Therapy* 138 – 148; Valeria Bustos and others, 'Transgender and Gender-nonbinary Patient Satisfaction after Transmasculine Chest Surgery' (2021) 9(3) *Plastic and Reconstructive Surgery* 3479.

⁹²² Sharon Cowan, 'Looking Back (To)wards the Body: Medicalization and the GRA' (2009) 18(2) *Social & Legal Studies* 247 -252; Sally Hines, 'Recognising Diversity? The Gender Recognition Act and Transgender Citizenship' in Sally Hines and Tam Sangers (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010)

⁹²³ See (e.g.) *YY v Turkey* [2015] ECHR 257 [65] and *AP Garçon, Nicot v France* [2017] ECHR 338 [141]. For discussion of these issues in the former case, see Peter Dunne, 'YY v Turkey: Infertility as a pre-condition for gender confirmation surgery' (2015) 23(4) *Medical Law Review* 646 – 658.

⁹²⁴ Royal College of Psychiatrists, *Good practice guidelines for the assessment and treatment of adults with gender dysphoria* (RCP 2013).

identity.⁹²⁵ They argue that it should therefore be removed even for the purposes of assessing access to medical treatment.⁹²⁶

However, this distinction between medical and legal consequences is useful. It is possible to critically interrogate gatekeeping in trans healthcare while also recognising that legal and medical transitioning may require different safeguards. The ability to make this distinction is necessary because as Participant 11 argued, non-binary people might not want, or need, to engage with medical professionals. While this is also true of binary trans people, non-binary populations are less likely to access gender-related medical treatment and where they do, they often require fewer interventions.⁹²⁷ As Participant 11 noted, people ‘should be able to have their documentation be correct in the meantime even if they decide they don’t want to go down the medical route’.⁹²⁸ Similarly Participant 7 said that they ‘don’t need a diagnosis of gender dysphoria’ for medical reasons so having it as a requirement for legal recognition would mean that they would have to get it ‘for no reason’.⁹²⁹

⁹²⁵ Judith Butler, ‘Undiagnosing gender’ in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 288; Damien Riggs and others, ‘Transnormativity in the psy disciplines: Constructing pathology in the Diagnostic and Statistical Manual of Mental Disorders and Standards of Care’ (2019) 74(8) *American Psychologist* 912 – 924; Zowie Davy, Anniken Sørli and Amets Suess Schwend, ‘Democratising diagnoses? The role of the depathologisation perspective in constructing corporeal trans citizenship’ (2018) 38(1) *Critical Social Policy* 13 – 34.

⁹²⁶ Damien Riggs and others, ‘Transnormativity in the psy disciplines: Constructing pathology in the Diagnostic and Statistical Manual of Mental Disorders and Standards of Care’ (2019) 74(8) *American Psychologist* 912 – 924; Chris Dietz and Ruth Pearce, ‘Depathologising Gender: Vulnerability in Trans Health Law’ in Chris Dietz, Mitchell Travis and Michael Thomson (eds), *A Jurisprudence of the Body* (Palgrave Macmillan 2020).

⁹²⁷ Andreas Koehler, Jana Eyssel and Timo Nieder, ‘Genders and Individual Treatment Progress in (Non-)Binary Trans Individuals’ (2018) 15(1) *Journal of Sexual Medicine* 102 – 113.

⁹²⁸ Participant 11, Non-binary, 26 – 35 years.

⁹²⁹ Participant 7, Male outwardly, inward more female, 19 - 25 years.

Therefore the distinction is arguably particularly relevant for non-binary populations who may be more likely to otherwise not access medical care.

Nevertheless, the distinction between legal and medical transitioning must also be treated with caution. Drawing this distinction to advocate for legal sex reform must not come at the expense of policymakers affording attention to the accessibility of trans-related healthcare. Dietz observed that while policymakers in Denmark placed great emphasis on self-identification, the provision of medical care was left uninterrogated and has attracted insufficient policy attention. This has resulted in a situation where trans people may access legal recognition according to self-identification but for trans people wanting to begin their medical transition before receiving legal recognition, there are considerable financial and waiting list barriers. It could therefore be argued that there is a risk that policymakers consider medical and legal transition wholly distinct, such that while attention is paid to removing barriers to legal recognition, fewer resources are directed towards trans healthcare provision including public and private providers.⁹³⁰

However, across the UK, while some people do access private medical care, most healthcare is provided through the NHS and is state-funded. With regards to state-funded provision, NHS England has made provision for GICs since before the introduction of the GRA in 2004.⁹³¹ Further, while the Government recently rejected

⁹³⁰ Chris Dietz, 'Governing Legal Embodiment: On the Limits of Self-Declaration' (2018) 26(2) *Feminist Legal Studies* 185-204.

⁹³¹ NHS Wales makes similar decisions regarding gender related healthcare in Wales, where in recent years there has been a decentralisation of gender-related healthcare through Local Gender Teams, see generally: NHS Wales, 'Welsh Gender Service' (NHS Wales, 2022) <<https://cavuhb.nhs.wales/our-services/welsh-gender-service/>> accessed 23 August 2022.

GRA reform, there have been five new Gender Identity Clinic pilot schemes announced to address the waiting list times for trans healthcare.⁹³² These clinics are provided by NHS England rather than the GEO, indicating that the risks noted by Dietz in relation to Denmark may be less likely to materialise where the NHS has jurisdiction to make provision for trans healthcare.⁹³³ This is not to suggest that trans healthcare in England is not without criticism or that accessibility could not be improved. It also does not presuppose GRA reform could not be accompanied by trans-healthcare reform, as in Argentina, where the Gender Identity Law 2012 provided for self-identification and for state-funded healthcare to operate within an informed consent model. However, it does indicate that the risks identified by Dietz may be less likely to materialise where the NHS governs healthcare provision and accessibility rather than the Government directly. Consequently, the medical/legal divide adopted by non-binary participants is nevertheless a compelling way to problematise the law's adoption of medical safeguards for a purely legal process.

The requirement is stigmatising

There are increasing trends globally to depathologise trans and gender diverse experiences and identities.⁹³⁴ This trend is also reflected in England and Wales where,

⁹³² Women and Equalities Committee, *Reform of the Gender Recognition Act: Government response to the Committee's Third Report, Fifth Special Report of Session 2021 – 22, HC 129* (House of Commons 2022) paras 45 – 57. See also Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC129, Q258 – 287* (House of Commons 16 June 2021) Q265.

⁹³³ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC129, Q258 – 287* (House of Commons 16 June 2021) Q265; Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC129, Q186 – 217* (House of Commons 12 May 2021) Q190.

⁹³⁴ Zowie Davy, Anniken Sørli and Amets Suess Schwend, 'Democratising diagnoses? The Role of the Depathologisation Perspective in Constructing Corporeal Trans Citizenship' (2018) 38 *Critical Social Policy* 13 – 34.

in both healthcare and law, there are fewer references to gender diversity as a disorder.⁹³⁵ NHS England, in the practice guidelines for treating people with gender dysphoria, state that ‘gender variant people and gender non-conforming people do not necessarily have gender dysphoria and the population shows great diversity’.⁹³⁶ Similar language is reflected in a policy document commissioned by NHS Wales.⁹³⁷ The Government have also recently announced that they will remove references to ‘disorder’ in relation to gender dysphoria in the GRA in England and Wales.⁹³⁸

Despite this, several non-binary participants criticised the requirement on the basis that it was stigmatising because it perpetuates a medicalised understanding of gender diversity for trans and non-binary people.⁹³⁹ One participant explained that they felt the requirement ‘perpetuates part of the stigma that being trans is a mental illness and it’s something to be cured’.⁹⁴⁰ Participant 3 also felt that ‘making people qualify through dysphoria gives being trans quite a negative image because it makes it seem like it’s something you have to fix’.⁹⁴¹ Participant 2 also said that the requirement ‘sets you

⁹³⁵ I am often referring to NHS England resources as this is a distinct body from NHS Wales. However, the documentation and resources used by both are generally similar, see Welsh Health Specialised Services Committee (WHSSC), *Specialised Services, Service Specification: CP182b: Gender Identity Service for Adults (Non-surgical)* (3rd ed, WHSSC 2020) para 1.8.

⁹³⁶ NHS England, *Interim Gender Dysphoria Protocol and Service Guideline 2013/14* (NHS England 2013) 7.

⁹³⁷ Welsh Health Specialised Services Committee (WHSSC), *Specialised Services, Service Specification: CP182b: Gender Identity Service for Adults (Non-surgical)* (3rd ed, WHSSC 2020) para 1.

⁹³⁸ Mike Freer MP, *Letter to Elliot Colburn MP on Westminster Hall Debate: Petition 327108 Reform of the Gender Recognition Act* (Cabinet Office Equality Hub, 3 March 2022)

⁹³⁹ Alex Sharpe, ‘A Critique of the Gender Recognition Act’ (2007) 4 *Bioethical Inquiry* 33 – 42, 42.

⁹⁴⁰ Participant 4, Non-binary / proxvir, 19 – 25 years.

⁹⁴¹ Participant 3, Non-binary transmasculine, 19 – 25 years.

aside immediately...as somebody who is not right'.⁹⁴² They went on to argue that it should be removed because it 'denormalises [sic]' and 'medicalises' gender diversity.⁹⁴³ It could be argued that participants' fears that a medical diagnosis frames them as abnormal is based on an ableist view.⁹⁴⁴ However, this view is not intended to frame disabled people as abnormal or undesirable, but to point out that medicalisation in certain instances can be used to prevent people from 'participating equally [through imposing] artificial conditions that privilege one type of body or mind and exclude others'.⁹⁴⁵ Consequently, the problems with medicalisation are not necessarily just related to stigma, but to the invasive nature of such processes for trans people who are simply trying to access legal recognition. Participant 21 described feeling like the requirement was 'overly intrusive' and 'fundamentally starts from the point that you are lying unless proven otherwise'.⁹⁴⁶ They went on to express a desire to just 'get on' with their life without having 'to prove [themselves]'.⁹⁴⁷ This also connects to broader themes related to trans people feeling like their identities are treated with suspicion, which is particularly pronounced for non-binary communities.⁹⁴⁸ Participant 21 also said that:

It reduces us to nothing more than a condition and it almost makes you a second-class citizen because it's like you have to apply for the certificate and

⁹⁴² Participant 2, Gender-neutral, 56 - 65 years.

⁹⁴³ Participant 2, Gender-neutral, 56 - 65 years.

⁹⁴⁴ Dean Spade, 'Resisting Medicine, Re/modelling Gender' (2003) 18 Berkeley Women's Law Journal 15 - 37, 34.

⁹⁴⁵ *ibid.*

⁹⁴⁶ Participant 21, Female / demi-female, 16 - 18 years.

⁹⁴⁷ Participant 21, Female / demi-female, 16 - 18 years.

⁹⁴⁸ Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Policy Press 2020) 98.

get validated to make sure that you are one of the people who desperately needs intervention from the Government to grant you special status.⁹⁴⁹

These criticisms reflect findings from other studies which have also found that trans and non-binary people find the clinical setting to be intimidating and intrusive because of the questions asked.⁹⁵⁰ Moreover, the reports require highly sensitive and personal information. In particular, under Report B information about their body and possible medical interventions they might have had must be detailed. Sometimes a Panel may also request further information and/or clarification based on the way certain treatments or interventions were worded in the report before granting a GRC. This has been described as invasive and unusual, particularly as bodily changes are not strictly required under the Act.⁹⁵¹

There is a perception that such highly personal information (through both medical reports) could be necessary for the Gender Recognition Panel to be able to determine applications. Thirlwell J in *Carpenter* argued that a decision by the GRP must be made on the basis of 'full information' in respect of each applicant.⁹⁵² The President of the GRP has also said that the information provided as part of the diagnosis is useful in assessing other statutory criteria of the GRA.⁹⁵³ However, it is also important to

⁹⁴⁹ Participant 21, Female / demi-female, 16 – 18 years.

⁹⁵⁰ Sonja Ellis, Louis Bailey and Jay McNeil, 'Trans people's experiences of mental health and gender identity services: A UK study' (2015) 19(1) *Journal of Gay & Lesbian Mental Health* 1-17.

⁹⁵¹ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) para 37.

⁹⁵² *Carpenter v Secretary of State for Justice* [2015] EWHC 464 (Admin); [2015] 1 WLR 4111 [24] (Thirlwall J).

⁹⁵³ HHJ Michael Harris, 'President's Guidance No.1: Evidential requirements for applications under section 1(1)(a) of the Gender Recognition Act 2004' (Gov. UK 2005) para 3

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961491/t492-presidents-guide.pdf>accessed 10 March 2022.

consider the role of proportionality in balancing the desire to have information related to a person wanting to change their legal sex and the right of non-binary (and binary) trans people to privacy of intimate details of medical and gender history. This is more problematic in respect of Report B which details medical interventions not strictly required under the Act, but it is also an important consideration for Report A where the diagnosis is detailed. A psychiatric report is likely to detail very personal and sensitive aspects of a person's life and while this could (arguably) be more proportionate for those wishing to access invasive medical treatment, as noted by participants in the theme above, there remains doubt over whether this is justified for a legal change to documentation.

The diagnosis is difficult to fulfil (especially for non-binary people)

Participants generally felt that the diagnosis was narrow and difficult to fulfil. Some made general points about this which were not non-binary specific, while others argued that this requirement was particularly burdensome for non-binary people. When asked why they felt the requirement should be removed, Participant 6 was critical of the 'warped' definition of gender dysphoria which they considered to be summarised by 'do you hate your body? Tick, OK and therefore you're trans'.⁹⁵⁴ They argued that 'not everyone experiences body dysphoria...that doesn't mean that they're not trans'.⁹⁵⁵

⁹⁵⁴ Participant 6, Transmasculine non-binary, 19 – 25 years.

⁹⁵⁵ Participant 6, Transmasculine non-binary, 19 – 25 years.

As recognised by the DSM-5, ICD-11, NHS England, NHS Wales, and professional medical bodies (and the UK Government in 2018⁹⁵⁶), not all non-binary (and binary trans) people experience dysphoria.⁹⁵⁷ This means that this requirement acts as a roadblock for those who may desire legal recognition – and perhaps satisfy all the other requirements – but who may not experience clinical distress. This was reflected by Participant 8 who noted that while some trans people have ‘utterly crippling’ dysphoria which ‘makes life impossible’, others may not experience it to the extent of being able to obtain a diagnosis.⁹⁵⁸ They therefore argued that the gender dysphoria requirement was ‘exclusionary’⁹⁵⁹ because some trans people could access recognition while others could not. They went on to explain that whilst they do experience dysphoria, they know other people who only experience ‘partial dysphoria,’ which therefore ‘makes it difficult to jump through the hoops of getting the tick box from a psychologist’.⁹⁶⁰ Similarly, when asked if they felt that this requirement would be

⁹⁵⁶ Gov.UK, ‘Press release, government announced plans to reform process of changing legal gender’ (Gov.UK 2018) <<https://www.gov.uk/government/news/government-announces-plans-to-reform-process-of-changing-legal-gender>>accessed 7 February 2022. See also Rowena Mason, ‘Theresa May plans to let people change gender without medical checks’ (The Guardian 2017) <<https://www.theguardian.com/society/2017/oct/18/theresa-may-plans-to-let-people-change-gender-without-medical-checks>>accessed 12 June 2022.

⁹⁵⁷ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th ed, American Psychiatric Association 2013); World Health Organisation, *ICD-11: International Classification of Diseases* (11th ed, World Health Organisation, adopted 2019) ch7, HA60; NHS England, ‘Gender dysphoria’ (NHS England 2022) <<https://www.england.nhs.uk/commissioning/spec-services/npc-crg/gender-dysphoria-clinical-programme/gender-dysphoria/>>accessed 18 August 2022; British Medical Association, ‘Role of GPs in managing adult patients with gender incongruence’ (BMA 2022) <<https://www.bma.org.uk/media/5481/bma-role-of-gps-in-managing-adult-patients-with-gender-dysphoria-mar2022.pdf>>accessed 20 August 2022; Welsh Health Specialised Services Committee (WHSSC), *Specialised Services, Service Specification: CP182b: Gender Identity Service for Adults (Non-surgical)* (3rd ed, WHSSC 2020) para 1.8.

⁹⁵⁸ Participant 8, Non-binary, 26 – 35 years.

⁹⁵⁹ Participant 8, Non-binary, 26 – 35 years.

⁹⁶⁰ Participant 8, Non-binary, 26 – 35 years.

difficult for them to fulfil, Participant 3 felt that it would, explaining that while they do experience dysphoria, it was 'not nearly to the extent that some of [their] other trans friends have'.⁹⁶¹ Despite this, they said that they were not 'any less trans' than their friends and still felt that they should be able to obtain recognition. When asked how they might overcome this potential problem, they stated that they simply saw the requirement as a 'hoop to jump through' but not something that they feel should be necessary.⁹⁶²

These observations are not necessarily non-binary specific,⁹⁶³ though some participants argued that there were additional barriers to non-binary populations being able to obtain a diagnosis. This was for a range of reasons, including that they may be less likely to experience dysphoria to the degree required for a diagnosis, that the standards are binary-centric, and/or prejudicial attitudes from medical professionals towards non-binary identities. Participant 17 argued that there are a 'wider range of experiences' among non-binary people which make this diagnosis more difficult to obtain.⁹⁶⁴ Another argued that the requirement was 'gatekeeping,' because if a non-binary person 'doesn't present trans enough to a medical professional, then there's a roadblock'.⁹⁶⁵ Participant 19 also argued that some people 'identify as non-binary [but] do not experience what would be described in a medical context as gender dysphoria, but this doesn't make their identities any less sincere'.⁹⁶⁶ Another said that because

⁹⁶¹ Participant 3, Non-binary transmasculine, 19 – 25 years.

⁹⁶² Participant 3, Non-binary transmasculine, 19 – 25 years.

⁹⁶³ Spencer Garrison, 'On the limits of "trans enough": Authenticating Trans Identity Narratives' (2018) 32(5) *Gender & Society* 613–637.

⁹⁶⁴ Participant 17, Non-binary, 26 – 35 years.

⁹⁶⁵ Participant 4, Non-binary / proxvir, 19 – 25 years.

⁹⁶⁶ Participant 19, Non-binary, in the process of trying to establish a more specific identity, 26 – 35 years.

they are gender-neutral, ‘it is really hard [because] I say “I feel nothing” and [medical professionals] are like “how do you feel nothing?” It’s weird and trying to get a diagnosis of gender dysphoria on nothing is hard’.⁹⁶⁷

Similarly, there was a perception from one participant that gender dysphoria was a ‘narrow label,’ which they perceived to be ‘very binary and very strict’.⁹⁶⁸ Therefore, many participants reported relying on a binary narrative to access Gender Identity Clinics and receive a diagnosis of gender dysphoria because it is more ‘respected’ and ‘culturally relevant’.⁹⁶⁹ This arguably illustrates one of the greatest problems with the requirement, as the diagnosis is often associated with the ‘wrong body’ narrative which relies on a binary mind/body distinction, and in turn, does not easily accommodate those with non-binary identities.⁹⁷⁰ This links to other research which has found that many trans people rejected the ‘wrong body narrative’ which is often implicit in the medical conception of trans identity.⁹⁷¹ Such a construction of trans identity being based on an incongruence between the mind and body also fails to interrogate the binary categories of gender which these conceptualisations of trans identity rely on.⁹⁷² While non-binary participants felt that it was particularly difficult for them to satisfy, it is worth noting that other research has also shown that binary trans

⁹⁶⁷ Participant 16, Trans masculine, 26 – 35 years.

⁹⁶⁸ Participant 4, Non-binary / proxvir, 19 – 25 years.

⁹⁶⁹ Participant 4, Non-binary / proxvir, 19 – 25 years.

⁹⁷⁰ Sally Hines, ‘Recognising Diversity? The Gender Recognition Act and Transgender Citizenship’ in Sally Hines and Tam Sangers (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 92 – 93.

⁹⁷¹ Sharon Cowan, ‘Looking Back (To)wards the Body: Medicalization and the GRA’ (2009) 18(2) *Social & Legal Studies* 247 -252, 248.

⁹⁷² *ibid.*

people also generally find this diagnosis to be rigid and not reflective of their experiences of gender identity.⁹⁷³

Nevertheless, non-binary participants felt that the process to obtaining a diagnosis was ‘very binary transition geared’⁹⁷⁴ and this could have a direct impact on causing further delays to obtaining a diagnosis. Participant 17 felt that for non-binary people, it takes, ‘two times as long as binary trans people [to get diagnosed] because you have this whole extra level of having to prove [yourself]’.⁹⁷⁵ This was also shared by Participant 4 who said that ‘telling [staff at the GIC] that you are non-binary just means that you have extra time waiting and extra appointments and extra things that you have to prove’.⁹⁷⁶ Participant 10 felt that disclosing their non-binary identity may prevent them receiving a diagnosis entirely, arguing that some doctors are ‘less willing’ to diagnose non-binary people with gender dysphoria.⁹⁷⁷

In discussing how they navigate the perceived scepticism and stigma of non-binary identities in medical settings, participants describe feeling like they needed to construct a binary, medicalised narrative of gender identity to obtain a diagnosis. One participant described being very aware of their gender expression and presentation when going to medical appointments because Gender Identity Clinics ‘are notorious for pushing back non-binary people and criticising their presentation choices’.⁹⁷⁸ For

⁹⁷³ Sally Hines, ‘Recognising Diversity? The Gender Recognition Act and Transgender Citizenship’ in Sally Hines and Tam Sangers (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010).

⁹⁷⁴ SR 101, Non-binary, 19 – 25 years.

⁹⁷⁵ Participant 17, Non-binary, 26 – 35 years.

⁹⁷⁶ Participant 4, Non-binary / proxvir, 19 – 25 years.

⁹⁷⁷ Participant 10, Non-binary, 19 - 25 years.

⁹⁷⁸ SR 101, Non-binary, 19 – 25 years.

Participant 17, they said that they found it ‘easier just to pretend that [they were] a trans man or trans woman’ rather than explain that they were non-binary.⁹⁷⁹ For Participant 3, they described feeling ‘disingenuous’ when speaking with medical professionals to get a diagnosis because, while they described feeling symptoms of gender dysphoria from childhood, they ‘didn’t really experience gender dysphoria or even questioning [of their] gender until puberty’. They said that they were also asked ‘about clothes and how [they] present’ but that they felt this was wrong because clothes and presentation weren’t the ‘most important thing’ about their identity. They were also asked about physical transition plans by the doctor and had said that they discussed surgery and hormones which ‘seemed to satisfy him’.⁹⁸⁰

The awareness and self-policing of non-binary participants here reflects Butler’s assertion that to obtain a diagnosis of gender dysphoria, one must ‘submit to the language of the diagnosis’.⁹⁸¹ This can be seen in the way that non-binary participants felt that there would be a much greater prospect of obtaining a diagnosis if they described and expressed a binary narrative of gender, including a desire to access physical medical interventions.⁹⁸² Moreover, while participants are speaking in relation to Report A, which details the diagnosis of gender dysphoria, the perceived need to portray a binary and ‘wrong body’ narrative is propounded by Report B. Both reports together work to uphold an implicit but significant expectation running through the GRA

⁹⁷⁹ Participant 17, Non-binary, 26 – 35 years.

⁹⁸⁰ Participant 3, Non-binary transmasculine, 19 – 25 years.

⁹⁸¹ Judith Butler, ‘Undiagnosing gender’ in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 288.

⁹⁸² Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Policy Press 2020) 193 – 195.

that applicants will desire, and access, physical interventions.⁹⁸³ This implicit expectation is particularly powerful too, as Butler describes it as the ‘promise, if not the blackmail’⁹⁸⁴ that non-binary people ‘stand a chance’⁹⁸⁵ of getting the life, the body and the gender they want so long as they assimilate to the expected narrative.

Consequently, the diagnosis is arguably less about what someone’s gender identity actually is, and more a test on whether one can ‘conform to the language of the diagnosis’.⁹⁸⁶ The accounts from participants here are also largely consistent with other research which has found that non-binary people experience anxiety in medical contexts and a distrust of medical professionals as they fear that they will not be considered ‘trans enough’.⁹⁸⁷ There were several participants who had concerns that medical professionals may perceive non-binary identities with suspicion. One participant argued that medical professionals had ‘preconceived notions about how the world works’ and a fundamental misunderstanding of non-binary people.⁹⁸⁸ Participant 19 said that they were ‘afraid that [medical professionals] won’t take a non-binary identity as seriously as a binary transgender identity’.⁹⁸⁹ When asked why they felt they wouldn’t be taken as seriously, Participant 19 argued that medical

⁹⁸³ Alex Sharpe, ‘Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category’ (2007) 15 *Feminist Legal Studies* 57 – 84, 71.

⁹⁸⁴ Judith Butler, ‘Undiagnosing gender’ in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 288.

⁹⁸⁵ *ibid.*

⁹⁸⁶ *ibid.*

⁹⁸⁷ Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Policy Press 2020) 98.

⁹⁸⁸ Participant 4, Non-binary / proxvir, 19 – 25 years.

⁹⁸⁹ Participant 19, Non-binary, in the process of trying to establish a more specific identity, 26 – 35 years.

professionals 'see [non-binary people] as not being trans enough'.⁹⁹⁰ Participant 10 also felt that this could be explained by the stigma attached to such identities:

There's still a lot of stigma around being non-binary and there are doctors who think it's some kind of fad that young people are into, even though one of my closest friends is non-binary and 44 years old. It's not just a Gen-Z thing.⁹⁹¹

This links to research by Vincent who found that there was 'a sense that experiences were made considerably easier by performing or emphasising (more) binary identification and/or expression'⁹⁹² and that practitioners' understanding of gender remains 'heavily biased towards the gender binary'.⁹⁹³ Similarly, Scottish Trans found that 42.7% of non-binary respondents in the UK felt 'pressurised' by gender identity services to do things that they did not want to, including changing their name, wearing stereotypical clothes or undergoing a particular treatment.⁹⁹⁴ This is problematic as it could indicate that non-binary populations may be more likely to proceed on a path of medical transition which they do not actually want, in order to satisfy this precondition for legal recognition.

The adoption of a particular narrative of identity to satisfy the diagnosis is also interesting because these accounts undermine a supposed utility of the diagnosis requirement. If one of the reasons that we are maintaining the diagnosis is to provide a check, the accounts of non-binary participants in this study would indicate that this is being routinely circumvented because it does not represent the experiences of non-

⁹⁹⁰ Participant 17, Non-binary, 26 – 35 years.

⁹⁹¹ Participant 10, Non-binary, 19 – 25 years.

⁹⁹² Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Policy Press 2020) 194.

⁹⁹³ *ibid* 195 – 196.

⁹⁹⁴ Vic Valentine, *Non-binary people's experiences of using UK gender identity clinics* (Scottish Trans Equality Network 2016) 14.

binary (or binary⁹⁹⁵) trans people. This reflects evidence to the Women and Equalities Committee from Cat Burton who also questioned the utility of framing the diagnosis as something which can provide a reliable and valid means to ascertain someone's sincerity. Therefore, to retain it (despite its problems) on the basis that it could identify fraudulent applicants is unconvincing.⁹⁹⁶

This also links to, and undermines, another rationale that the diagnosis provides 'appropriate support, advice and safeguards for applicants'.⁹⁹⁷ This is a reason often cited in support for retaining a diagnosis requirement. The ECtHR in *AP* recognised that a diagnosis requirement could be of utility in assessing the appropriateness of a legal sex change to safeguard an applicant's own interests.⁹⁹⁸ Mr Justice Scoffield in *JR111* also placed emphasis on the diagnosis acting as a way for the applicant to understand the significance of a GRC. He argued that:

[T]here is something to be said for a process which allows the in-depth discussion and analysis of the context and reason for a GRC application to occur at a time and place of the applicant's choosing, with a medical professional or professionals (whom they perhaps know and trust)⁹⁹⁹

Mr Justice Scoffield added that the medical reports provide a 'measure of reassurance that [the change of legal sex] has been discussed with an independent expert and

⁹⁹⁵ Sally Hines, 'Recognising Diversity? The Gender Recognition Act and Transgender Citizenship' in Sally Hines and Tam Sangers (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010).

⁹⁹⁶ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC884*, Q96 – 123 (House of Commons 17 March 2021) Q97.

⁹⁹⁷ *Re An Application by JR111* [2021] NIQB 48 [133] (Scoffield J).

⁹⁹⁸ *AP Garçon, Nicot v France* [2017] ECHR 338 [141].

⁹⁹⁹ *Re An Application by JR111* [2021] NIQB 48 [133] (Scoffield J).

reflected upon carefully by the applicant'.¹⁰⁰⁰ Aside from providing an apparently optimistic account of the ability for trans and non-binary people to access timely and convenient healthcare,¹⁰⁰¹ it is also an apparently inaccurate understanding of the role of a medical professional in diagnosing gender dysphoria. An assessment for gender dysphoria is primarily concerned with ascertaining whether the individual meets the clinical criteria for that condition. Trans and non-binary people seeking a diagnosis are most often doing this for the purposes of accessing medical treatment,¹⁰⁰² rather than legal recognition. It is also unlikely that medical practitioners will be particularly concerned with providing advice or guidance on this legal process, when the consequences of medical treatment are more relevant to their expertise and the professional standards they are subject to.¹⁰⁰³ The healthcare professional is assessing the diagnosis for the purposes of that person being able to access (potentially very invasive) medical treatment.¹⁰⁰⁴ They are also subject to General Medical Council guidelines and if they deviate from 'good practice' they may face serious professional consequences.¹⁰⁰⁵ Having this requirement in the GRA therefore places the medical professional in a difficult position. An individual may express a non-binary identity for which they want to receive recognition (either of a binary or non-binary marker), but they might ultimately not satisfy the level required for a clinical

¹⁰⁰⁰ *ibid* [135] (Scofield J).

¹⁰⁰¹ This is discussed in greater detail in the next theme below.

¹⁰⁰² See (e.g.) Equalities, Human Rights and Civil Justice Committee, 'Meeting Tuesday 14th June 2022' (Scottish Parliament 2022) (David Parker) <<https://www.scottishparliament.tv/meeting/equalities-human-rights-and-civil-justice-committee-june-14-2022>>accessed 20 August 2022.

¹⁰⁰³ General Medical Council, 'Trans Healthcare' (GMC 2022) <<https://www.gmc-uk.org/ethical-guidance/ethical-hub/trans-healthcare>>accessed 22 February 2022.

¹⁰⁰⁴ NHS England, *Interim Gender Dysphoria Protocol and Service Guideline 2013/14* (NHS England 2014) appendix 1.

¹⁰⁰⁵ General Medical Council, 'Trans Healthcare' (GMC 2022) <<https://www.gmc-uk.org/ethical-guidance/ethical-hub/trans-healthcare>>accessed 22 February 2022.

diagnosis. It also overestimates the suitability for medical professionals who specialise in gender dysphoria as a clinical condition to offer independent and accurate advice on legal recognition.

Consequently the justification of the diagnosis requirement on the basis that it provides an accurate check on applicants, including the sincerity of their trans status and whether they fully understand the consequences of that process, is questionable.¹⁰⁰⁶ It also fails to recognise that for many non-binary people the diagnosis (and relevant assessment) does not represent a meaningful opportunity to discuss these issues. In these contexts non-binary populations appear particularly fearful of practitioners' attitudes towards their identity and the power they hold to prevent them accessing medical treatment and/or legal recognition.¹⁰⁰⁷ It could be argued that a solution to this could be to improve education and training of medical professionals so that non-binary people feel more comfortable in these settings. However, this still arguably relies on the presumption that there is a sufficiently serious need to protect the system from fraudulent applications, and that the diagnosis is the most proportionate or effective means to achieve this. Arguably, given the points raised earlier on the effects of the GRA's medicalised model, this balance is not currently achieved by the dysphoria diagnosis.

However, it is important to note that not all participants in this study had been through the process of obtaining a gender dysphoria diagnosis. Of those who had obtained a

¹⁰⁰⁶ This would still be to presume that a GRC offers the potential for harm though, see chapter 2.4.2 where this is disputed.

¹⁰⁰⁷ Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities, and Healthcare* (Policy Press 2020) 181.

diagnosis, they reported telling the medical professionals a binary narrative of gender identity. Therefore, much of the concern from non-binary people in this study was based on a *perception* of how they expected medical professionals might react if they had disclosed their non-binary identity. It is unsurprising that non-binary people are anxious about how their identity will be perceived by others, as they are often treated with suspicion, distrust, and paternalism.¹⁰⁰⁸ They are also sometimes perceived to be attention seeking, or that non-binary identities are a trend.¹⁰⁰⁹ However, the distrust of medical professionals by non-binary communities may also be exacerbated by online forums and support groups,¹⁰¹⁰ which provide non-binary people with the opportunity to share their positive and negative experiences. Due to ‘community solidarity’ within non-binary communities, often ‘scepticism of positive practice is more likely than scepticism of negative reports of doctors from others’.¹⁰¹¹ Therefore, where a non-binary person shares a negative experience with medical professionals in these spaces, it may contribute to more widespread anxiety among the whole group. As such, these empirical findings are evidence of a perception held by non-binary participants, rather than evidence of what is definitively happening ‘on the ground’ in Gender Identity Clinics. Other research is beginning to explore non-binary people’s experiences of such clinics, but it remains unknown whether expressing a non-binary identity does affect diagnosis rates in practice.¹⁰¹²

¹⁰⁰⁸ Jessica A Clarke, ‘They, Them and Theirs’ (2019) 132 Harvard Law Review 894 – 991, 910.

¹⁰⁰⁹ *ibid* 911.

¹⁰¹⁰ Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Policy Press 2020) 170 – 171.

¹⁰¹¹ *ibid*.

¹⁰¹² Jessica Taylor and others, ‘An exploration of the lived experiences of non-binary individuals who have presented at a gender identity clinic in the United Kingdom’ (2019) 20(2-3) International Journal of Transgenderism 195-204.

Accessing Gender Identity Clinics

Several interviewees described other barriers – not necessarily specific to non-binary people - that they experienced when trying to access Gender Identity Clinics. They felt that even if they could get a diagnosis of gender dysphoria with a non-binary identity, the actual process of getting a diagnosis was complicated by practical roadblocks. Just over half of the interviewees explicitly discussed how long the waiting list for the Gender Identity Clinic was, with some reporting their own waiting times ranging from several months to 3 years.¹⁰¹³ This meant that some had accessed private healthcare services instead. Participant 6 explained their experiences:

[The time spent waiting on the NHS] has been awful, that's why I've had to go private. Even though I can't afford going private, it was a choice between going private or potentially not being alive, so I know which one I'd rather pick... I know it sounds morbid but it's true.

Despite some increased funding for Gender Identity Clinics and the provision of new GIC pilot schemes,¹⁰¹⁴ healthcare for trans and non-binary people is largely inaccessible and underfunded. These issues have been exacerbated by the COVID-19 pandemic which has had a significant impact on NHS services in England and

¹⁰¹³ Participant 3, Non-binary transmasculine, 19 – 25 years; Participant 4, Non-binary / proxvir, 19 – 25 years; Participant 5, Non-binary, 26 – 35 years; Participant 6, Transmasculine non-binary, 19 – 25 years; Participant 10, Non-binary 19 – 25 years; Participant 11, Non-binary, 26 – 35 years; Participant 12, Trans/non-binary, 26 – 35 years; Participant 14, Non-binary, 26 – 35 years; Participant 16, Trans masculine, 26 – 35 years; Participant 17, Non-binary, 26 – 35 years; Participant 20, Trans, Genderqueer, Other, 46 – 55 years, Participant 21, Female / demi-female, 16 – 18 years.

¹⁰¹⁴ Gov.UK, 'Press Release: Government responds to Gender Recognition Act consultation' (Gov.UK 2020) <<https://www.gov.uk/government/news/government-responds-to-gender-recognition-act-consultation>>accessed 17 June 2021.

Wales.¹⁰¹⁵ As of June 2021, the Laurels Gender Identity Clinic in Exeter reported that they were operating on a five-year waiting list.¹⁰¹⁶ An individual hoping to receive a gender dysphoria diagnosis to fulfil the requirements for legal recognition from an NHS clinic would be required to wait several years or access private healthcare. This choice between cost and waiting time is likely to have a disproportionately negative effect on those from low socio-economic backgrounds who simply would not be able to afford to access private healthcare. Private healthcare also affords people greater control over medical treatment (including choosing the medical professional they see), so those with greater economic resources may be more likely to receive a diagnosis and access recognition in a timely manner.¹⁰¹⁷ This raises questions of the impact of socio-economic status and class on accessing legal recognition.¹⁰¹⁸ The Good Law Project has recently received permission for their judicial review to go ahead, challenging the lawfulness of waiting times for gender-related healthcare in England. It was discussed above that the risks identified by Dietz may be less likely to materialise in England and Wales. However, for non-binary (and binary) people hoping to medically transition before legally transitioning, the removal of the diagnosis requirement alone would be

¹⁰¹⁵ For example, see British Medical Association, 'The hidden impact of COVID-19 on patient care in the NHS in England' (July 2020) <https://www.bma.org.uk/media/2840/the-hidden-impact-of-covid_web-pdf.pdf>accessed 17 June 2021; The Guardian, 'Number of people on England's NHS waiting list tops 5m for first time' <<https://www.theguardian.com/society/2021/jun/10/number-of-people-on-englands-nhs-waiting-list-tops-5m-for-first-time>>accessed 17 June 2021; NHS Wales, 'Updates from the Welsh Gender Services' (NHS Wales 2022) <<https://cavuhb.nhs.wales/our-services/welsh-gender-service/updates-from-the-welsh-gender-service/>>accessed 23 August 2022.

¹⁰¹⁶ Devon Partnership Trust, 'Gender Identity: Waiting Times' (NHS 2021) <<https://www.dpt.nhs.uk/our-services/gender-identity/waiting-times>>accessed 17 June 2021.

¹⁰¹⁷ Surya Monro, 'Transgender politics in the UK' (2003) 23(4) *Critical Social Policy* 433 – 452, 438.

¹⁰¹⁸ *ibid.* See also Surya Monro, 'Theorizing transgender diversity: Towards a social model of health' (2000) 15(1) *Sexual and Relationship Therapy* 33 – 45.

futile in helping them to receive timely legal recognition. Based on the (in)accessibility of gender related healthcare (particularly in England), such people would still have to wait several years to access healthcare before then going through a legal sex change.

6.3 Discussion: should the diagnosis requirement be reformed?

The gender dysphoria diagnosis was one of the most controversial aspects of the GRA for non-binary participants in this study. The requirement attracted very strong opposition and many interviewees were keen to discuss this requirement. Criticism from non-binary participants mirrored criticisms of the requirement from other trans people, scholars and human rights bodies. This included that there appears to be no clear justification for retaining this requirement as part of a legal system of recognition, that it is stigmatising, that it is difficult to fulfil, and that clinics were inaccessible. However, there was also a sense that non-binary populations were particularly burdened by this diagnosis requirement for reasons of accessibility and/or personal choice. The requirement therefore arguably limits the number of non-binary people able to obtain legal recognition, without demonstrating a clear justification as to why only certain trans people - who experience distress - should be able to access recognition.

The requirement also appears to be ineffective and disproportionate to its purported safeguarding role. It was noted in the introduction to this chapter that some, including the UK Government, argue that the dysphoria diagnosis may offer an important safeguarding role, particularly to protect others against fraudulent applicants. Aside from the risk of framing trans people, usually trans women, as potentially predatory

and dangerous,¹⁰¹⁹ there are additional points to note in relation to this argument. Firstly, I addressed these arguments in chapter 2 to contend that as a matter of law, reform to the current requirements including the diagnosis, would not necessarily affect the operation of other perceived legal safeguards, including (e.g.) single- and separate-sex services.¹⁰²⁰ Secondly, there is no empirical evidence of people taking advantage of sex recognition laws to commit fraud or crimes against women in other jurisdictions.¹⁰²¹ It is also arguably unfair to deny reform which could alleviate the suffering of trans and non-binary people on the basis that another group may engage with that law in an unintended way. Thirdly, in practice, legal sex on the birth certificate is rarely used in public spaces, including in sex-segregated spaces. While the birth certificate can act as proof for obtaining other IDs, other IDs have separate processes for changing the sex marker displayed on them e.g. driving licences and passports. Blincoe also argues that more onerous sex recognition laws may even contribute to difficulties in governing sex-segregated spaces as people come to expect incongruence between identity documents.¹⁰²² Therefore, the extent to which legal sex could have a material impact on safeguarding in such spaces in practice is doubtful.

¹⁰¹⁹ Fair Play for Women, 'Written evidence submitted by Fair Play for Women [GRA0851]' (UK Parliament 2020) <<https://committees.parliament.uk/writtenevidence/16877/pdf/>> accessed 30 August 2022.

¹⁰²⁰ See chapter 2.4.2.

¹⁰²¹ See (e.g.) Sonia Katyal, 'The numerous clauses of sex' (2017) 84 *University of Chicago Law Review* 389 – 494, 467 – 471; Tobias Wolf, 'Civil Rights Reform and the Body' (2012) 6(1) *Harvard Law and Policy Review* 201 – 231, 207-208; Melissa Sterling, 'To Pee or Not to Pee - Where Is the Question: Transgender Students and the Right to Use Public School Restrooms' (2015) 3(1) *Cardozo Journal of Law and Gender* 757 - 784, 771.

¹⁰²² Emily Blincoe, 'Sex Markers on Birth Certificates: Replacing the Medical Model with Self-Identification' (2015) 46(1) *Victoria University of Wellington Law Review* 57–84.

However, while the impact of a simplified legal recognition system on the legal rights of others may be minimal, there may be a legitimate interest in having safeguards in the system so that prospective applicants are given the opportunity to reflect and consider the implications of changing their legal sex. It could also be argued that, while people abusing this system may be unlikely, it is reasonable for policymakers to protect against such an occurrence in a proportionate way. Perceived and actual rights clashes are relatively common and rights are often accompanied by the potential for exploitation. Nevertheless, rights-inspired reform should not be withdrawn on a perceived risk or clash of rights without first assessing the likelihood of harm and then considering safeguards which are proportionate to mitigate those risks. A gender dysphoria requirement could be one way to alleviate these concerns. However, one could also argue that there are other non-pathologising requirements which could provide that function too. For example many self-identification systems still retain a degree of formality by making use of statutory declarations.¹⁰²³ These can provide an applicant with the opportunity to comprehend the legal consequences of a sex status change, and also due to cost, practicality, and legal sanctions for false declarations, serve as a deterrent to people who may wish to fraudulently change their legal sex.¹⁰²⁴ While it is doubtful that a GRC could be used to cause harm to others, concerns around false applications are commonplace in GRA reform discourse on the medical requirement in particular. It may therefore be strategically useful for policymakers to consider the role of other requirements to alleviate these concerns in place of the diagnosis requirement.

¹⁰²³ See DG Justice and Consumers, *Legal gender recognition in the EU: the journeys of trans people towards full equality* (European Commission 2020).

¹⁰²⁴ This would still be to presume that a GRC offers the potential for harm though, see chapter 2.4.2 where this is disputed.

A key problem with the requirement is that it medicalises trans people's experiences and non-binary participants felt that it was particularly stigmatising. They appeared to associate this diagnosis with a sense of inequality and unfairness, such that they felt like a second-class citizen. However, the diagnosis requirement also requires non-binary populations to engage with medical professionals within the clinical setting, which appears to be particularly anxiety-inducing for non-binary populations who may fear a degree of suspicion towards their identity. Despite the Johnson Government stating that the Act struck the correct balance when rejecting substantive reform, records indicate that they did actually consider reform of the diagnosis requirement for several months following the public consultation. They were recorded as recognising that '[gender dysphoria] is seen as a mental illness so can be quite stigmatising'.¹⁰²⁵ Around March 2020, the Secretary of State (Elizabeth Truss MP) was recorded as providing a 'steer that she wanted to explore options to amend the existing legislation to remove reference to the diagnosis of gender dysphoria'.¹⁰²⁶ In June 2020, the GEO appeared to be working on the proposal of removing the reference to gender dysphoria and replacing it with 'gender incongruence' as contained in the ICD-11.¹⁰²⁷ Some concerns had been raised by the National Adviser on LGBT Health (Dr Michael Brady) and the Department for Health and Social Care (DHSC) that this move could be impractical and potentially confusing for practitioners.¹⁰²⁸ Nevertheless, the GEO continued with the policy, hopeful of the DHSC providing support to the final policy, on the basis that gender incongruence was a commonly understood term among clinical

¹⁰²⁵ *Re An Application by JR111* [2021] NIQB 48 [63] (Scofield J).

¹⁰²⁶ *ibid* [65] (Scofield J).

¹⁰²⁷ *ibid* [68] (Scofield J).

¹⁰²⁸ *ibid* [66] (Scofield J).

practitioners, meaning the proposal would be ‘largely symbolic’ and not interfere with existing clinical processes’.¹⁰²⁹

As of 22 June 2020, the GEO and the Secretary of State still supported a move to gender incongruence, though by the 2 July 2020 the Government’s position had changed and the diagnosis requirement was retained with no changes.¹⁰³⁰ The precise reasons for this remain unclear¹⁰³¹ though the key decision ‘to not move forward with any legislative reform on the GRA’¹⁰³² was said to be made following discussions between the Secretary of State and the Prime Minister’s Office.¹⁰³³ It is possible that concerns raised by Dr Michael Brady and the DHSC were influential, though there was no evidence of any attempt to ascertain directly from clinicians whether they felt the new wording would present problems in practice.¹⁰³⁴ In September 2020, the Government announced that there would be no reform to the gender dysphoria requirement, stating that in their view the current balance struck in the legislation between ‘fundamental safeguards’ and ‘supporting people who want to change their legal sex’ was correct.¹⁰³⁵ In response to a 2021 recommendation from the Women and Equalities Committee to remove the requirement, the Government restated its position that while ‘being transgender is not a mental illness’, the requirement ensures

¹⁰²⁹ *ibid* [69] (Scofield J).

¹⁰³⁰ *ibid* [80] (Scofield J).

¹⁰³¹ The judge described the Government’s evidence submissions as opaque, see *Re An Application by JR111* [2021] NIQB 48 [80] (Scofield J).

¹⁰³² *Re An Application by JR111* [2021] NIQB 48 [78] (Scofield J).

¹⁰³³ *ibid* [76] (Scofield J).

¹⁰³⁴ *ibid* [83] (Scofield J).

¹⁰³⁵ Kemi Badenoch MP, *Letter from the Minister of Equalities to the Chair of the Women and Equalities Committees* (Women and Equalities Committee 14 July 2021).

that the legal recognition process is ‘rigorous’ and ‘robust’.¹⁰³⁶ This is intriguing because while the Government have rejected reform on the basis that the legislation strikes a fair balance, it does indicate that for a fair period of time they did recognise (and validate) that there were problems with the gender dysphoria diagnosis requirement in particular.

Nevertheless, the Government have since announced that they will be amending the specific reference to gender dysphoria as a ‘disorder’ in the GRA via a remedial order.¹⁰³⁷ This follows from a judgment of the High Court of Northern Ireland in May 2021 in relation to the Convention-compatibility of the gender dysphoria requirement, specifically with regards to Articles 8 and 14 ECHR. The applicant challenged the combined effects of sections 1, 3 and 25 of the GRA, that an applicant for a GRC must provide medical evidence that they have, or have had, a ‘disorder’.¹⁰³⁸ The applicant challenged this on practical and symbolic grounds, including that it was difficult to find experts who can provide a diagnosis and the costs they had to incur for the reports.¹⁰³⁹ Mr Justice Scofield ultimately held that the requirement itself was lawful and within the State’s margin of appreciation. However, interestingly, he did find that the express reference to gender dysphoria as a ‘disorder’ under section 25 was unlawful. At paragraph 146 he explained:

[T]he Government’s decision to continue to require supporting medical evidence and a specific diagnosis before a Gender Recognition Panel is

¹⁰³⁶ Women and Equalities Committee, *Reform of the Gender Recognition Act: Government response to the Committee’s Third Report, Fifth Special Report of Session 2021 – 22, HC 129* (House of Commons 2022) paras 19 – 20.

¹⁰³⁷ *ibid* para 20.

¹⁰³⁸ *Re An Application by JR111* [2021] NIQB 48 [28] (Scofield J).

¹⁰³⁹ *ibid* [10] (Scofield J).

obliged to grant a GRC may be viewed as part of the ‘proper checks and balances’ which the State, in its judgment, is entitled to adopt and passes Convention muster; but the requirement that that diagnosis be one which is specifically and expressly defined as a ‘disorder’ is not.

Consequently, the Court made a declaration of incompatibility pursuant to section 4 HRA and in response, the Minister for Equalities has announced that the Government will remove reference to ‘disorder,’ describing it as ‘wholly outdated and inappropriate’ and ‘stigmatising’.¹⁰⁴⁰ This raises the question of whether this reform will alleviate the problems highlighted by non-binary participants throughout this chapter.

The language used by legislative drafters is not neutral and can be understood as ‘productive and political’.¹⁰⁴¹ Nevertheless, revising the language used in section 25 appears insufficient on its own to tackle the problems of medicalisation caused by the diagnosis requirement. The diagnosis requirement, whether labelled as disorder or not, frames trans identity for the purposes of legal recognition as something to be ‘diagnosed, treated and potentially cured’.¹⁰⁴² It could be argued that medicalisation is useful because it has the potential to ‘lend credibility’ to those in need of medical treatment, particularly for those with ‘less social acceptability’ such as non-binary populations.¹⁰⁴³ However, this appears irrelevant where medical discourses are adopted as authority in determining the ability of non-binary populations to access

¹⁰⁴⁰ Mike Freer MP, *Letter to Elliot Colburn MP on Westminster Hall Debate: Petition 327108 Reform of the Gender Recognition Act* (Cabinet Office Equality Hub, 3 March 2022).

¹⁰⁴¹ Emily Grabham, ‘Exploring the Textual Alchemy of Legal Gender: Experimental Statutes and the Message in the Medium’ (2020) 10(2) *feminists@law* 1 – 47, 43.

¹⁰⁴² Austin H Johnson, ‘Rejecting, reframing, and reintroducing: Trans people’s strategic engagement with the medicalisation of gender dysphoria’ (2019) 41(3) *Sociology of Health & Illness* 517-532, 518.

¹⁰⁴³ *ibid.*

non-medical rights like legal recognition. Medicalisation may indeed lend credibility to those who experience gender-related distress requiring medical treatment,¹⁰⁴⁴ but this has no clear applicability to rights of legal recognition which in turn affects other rights like access to education and work. This subsumption of gender diversity into a medicalised framework, perpetuated through the GRA, is particularly problematic as some scholars have argued that it could represent a form of social control over groups of people who are perceived to demonstrate non-normative behaviour.¹⁰⁴⁵ This also relates to broader criticism of the overreliance on medical discourse where human behaviours are increasingly included within psychiatry,¹⁰⁴⁶ with diagnostic materials criticised for ‘diagnostic bracket creep’¹⁰⁴⁷ and ‘diagnostic imperialism’.¹⁰⁴⁸ This is not to suggest that gender dysphoria is not a legitimate medical condition. Instead, it is to criticise the law’s reliance on a narrow and clinical definition of gender-related distress to frame transgender diversity for all those seeking legal recognition. The problem with medicalising trans and non-binary identities under the GRA also runs much deeper than the description of ‘disorder’. Irrespective of this term, the principle under the GRA remains the same, that through the diagnosis requirement, jurisdiction is afforded to medical authorities to determine access to legal rights of recognition. This requires non-binary (and binary) individuals to enter into the clinical setting for assessment and to report very personal and sensitive information which has no clear relevance to legal

¹⁰⁴⁴ *ibid.*

¹⁰⁴⁵ *ibid.*

¹⁰⁴⁶ Chris Dietz and Ruth Pearce, ‘Depathologising Gender: Vulnerability in Trans Health Law’ in Chris Dietz, Mitchell Travis and Michael Thomson (eds), *A Jurisprudence of the Body* (Palgrave Macmillan 2020).

¹⁰⁴⁷ Christopher Lane, ‘The Strangely Passive-Aggressive History of Passive-Aggressive Personality Disorder’ in Jonathan M Metzl and Anna Kirland (eds), *Against Health: How Health Became the New Morality* (New York University Press 2010) 105, citing Peter Kramer, *Listening to Prozac: The Landmark Book about Antidepressants and the Remaking of the Self* (Penguin 1997) 15.

¹⁰⁴⁸ Nikolas Rose, *Our Psychiatric Future* (Polity Press 2019) 7.

recognition. It is arguably these factors which are most problematic about the current diagnosis requirement. Consequently, it is unlikely that removing reference to disorder will alleviate the problems that non-binary participants associated with this requirement.

To summarise, the gender dysphoria requirement problematically fuses medical and legal transition pathways and operates as a particularly problematic barrier for non-binary populations seeking recognition. While there may be an interest in retaining a degree of formality in the GRA process, the problems associated with the gender dysphoria requirement appear disproportionate to these interests.¹⁰⁴⁹ Consequently, removal of the gender dysphoria diagnosis is proposed as part of my reform recommendations. These issues will be returned to in chapter 8 before finalising my reform recommendations in chapter 9.

¹⁰⁴⁹ It is worth noting that at a matter of law, no court in England and Wales, nor has the ECtHR considered this to be disproportionate: see *AP Garçon, Nicot v France* [2017] ECHR 338. However, the reasoning of the court in relation to this requirement is problematised in chapter 8.6.

7 Additional requirements

7.1 Introduction to the additional requirements

This chapter turns to consider other additional requirements in the GRA. This includes the statutory declaration, proof requirement, Gender Recognition Panel, spousal consent provision and application fee. Each section introduces the requirement in question, presents empirical findings of non-binary attitudes towards the requirement, and then concludes with whether the requirement should be reformed.

The chapter concludes with the recommendations to retain (but reform) the statutory declaration; remove the proof requirement; remove the Gender Recognition Panel and delegate application processing powers to the Registrar General; replace the spousal consent provision with a spousal notification; and remove the application fee.

7.2 Statutory declaration

7.2.1 An introduction to the statutory declaration requirement

A statutory declaration is a written statement of facts which is witnessed by a person who is authorised to administer oaths, e.g. a solicitor.¹⁰⁵⁰ They are generally used as statements of fact where other forms of evidence may be limited or unascertainable. They are required by statute in other contexts such as company and commercial law,¹⁰⁵¹ and property law.¹⁰⁵² They may also be accepted in other areas even where there is no statutory requirement, e.g. a name change.¹⁰⁵³ Under section 2(1)(c) GRA

¹⁰⁵⁰ HM Courts and Tribunal Service, *Statutory declaration for single applicants: T467* (Crown Copyright 2020).

¹⁰⁵¹ E.g. insolvency and commercial property, see: Insolvency Act 1986, s89 and Landlord and Tenant Act 1954, Practice Note.

¹⁰⁵² E.g. adverse possession of land, see: Land Registration Act 2002, Sch 6.

¹⁰⁵³ An example of a statutory declaration of name change is listed on the UK Government website, see Gov.UK, 'Statutory Declaration of Change of Name'

an applicant for a GRC under the Standard Track must ‘intend to continue to live in their acquired gender until death’.¹⁰⁵⁴ In accordance with section 3(4), this must be evidenced by providing a statutory declaration.¹⁰⁵⁵ It is a criminal offence for an individual to knowingly and wilfully make a declaration which is false, and carries a potential sentence of two years imprisonment and/or a fine.¹⁰⁵⁶ The relevant section of the statutory declaration form reads as follows:

1. I transitioned in __ / ____

I have lived as a _____ (insert ‘male’ or ‘female’ as appropriate)

throughout the period of ____ years before the date of this statutory declaration and I intend to live in that gender until death.¹⁰⁵⁷

Several European jurisdictions which allow someone to change their legal sex have some form of statutory declaration requirement, including those which operate on the basis of self-identification.¹⁰⁵⁸ The statutory declaration is less controversial than many other requirements (e.g. gender dysphoria and proof)¹⁰⁵⁹ and in the public consultation, most respondents indicated that they were in favour of retaining the

(Gov.UK 2022)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/118854/19049-statutory-declaration.pdf>accessed 7 February 2022.

¹⁰⁵⁴ Gender Recognition Act 2004, s2(1)(c).

¹⁰⁵⁵ *ibid* s3(4). See also HM Courts and Tribunal Service, *Statutory declaration for single applicants: T467* (Crown Copyright 2020).

¹⁰⁵⁶ Perjury Act 1911, s 5.

¹⁰⁵⁷ HM Courts and Tribunal Service, *Statutory declaration for single applicants: T467* (Crown Copyright 2020).

¹⁰⁵⁸ E.g. Belgium, Denmark, Republic of Ireland, Luxembourg, Malta and Portugal. See: DG Justice and Consumers, *Legal gender recognition in the EU: the journeys of trans people towards full equality* (European Commission 2020) 110- 111.

¹⁰⁵⁹ See e.g. Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) 11 – 19 where little to no attention was paid to the statutory declaration.

statutory declaration (83.5%).¹⁰⁶⁰ Just over half (52.8%) of those in favour of the requirement were also supportive of the current wording.¹⁰⁶¹ In 2021, the Women and Equalities Committee described the requirement as an ‘essential safeguard’ to ensure that applications are made with ‘genuine intent’.¹⁰⁶² They recommended that the Government should retain the statutory declaration and increase policing of potential fraudulent declarations.¹⁰⁶³ However, the Committee did recommend that the wording be amended to remove the reference to ‘until death’ so that people could reverse their decision to change legal sex if they wished to do so.¹⁰⁶⁴ Some of these issues were also reflected in the accounts of non-binary participants towards this requirement, which I will now turn to present.

7.2.2 Empirical findings

Quantitative data

Most non-binary respondents were opposed to the statutory declaration requirement (72.1% opposed, 15% supported). The attitudes of non-binary participants were notably different from binary respondents, who were relatively evenly split on this requirement with 43.4% in support and 48.5% opposed. This was a statistically significant difference ($P < .001$), indicating a real difference existed between the groups.

¹⁰⁶⁰ 16.5% were opposed, see Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 59.

¹⁰⁶¹ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 5.

¹⁰⁶² Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) para 110.

¹⁰⁶³ *ibid* para 96.

¹⁰⁶⁴ *ibid* para 110.

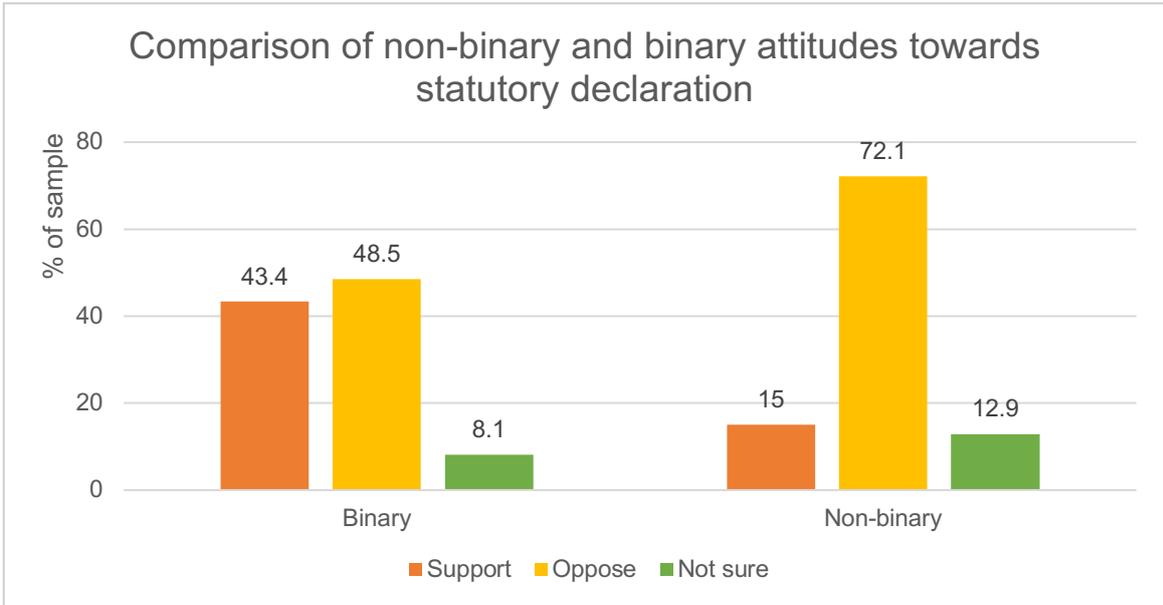


Figure 7–1. Comparison of non-binary and binary attitudes towards **statutory declaration** (n = 276)

The statutory declaration was the least opposed requirement compared to other current requirements (72.1%). Younger and older non-binary groups were similarly opposed (65.4% younger, 68.8% older) but the middle group was considerably more opposed (84.8%).

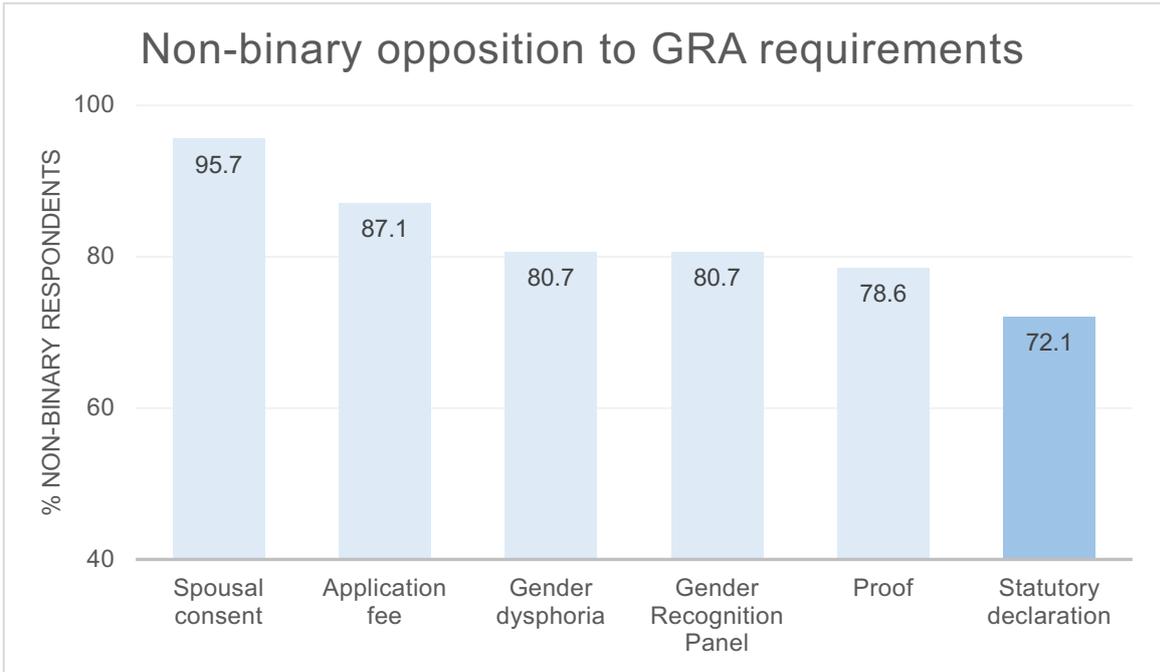


Figure 7–2. Non-binary opposition to **statutory declaration** v other current requirements (n = 140)

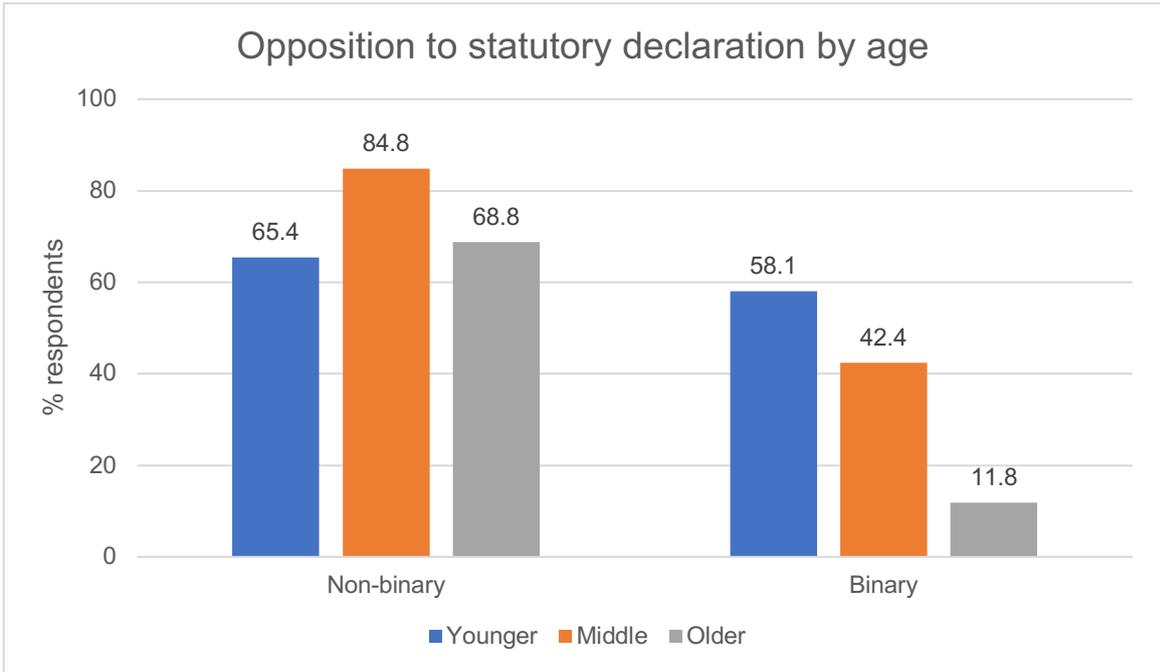


Figure 7–3. Comparison of non-binary and binary opposition to **statutory declaration** by age (n = 276)

The younger non-binary group were least opposed to the statutory declaration, which contrasted with the binary trans group, where the younger group were most opposed. These differences were (just) statistically non-significant ($P=.063$).

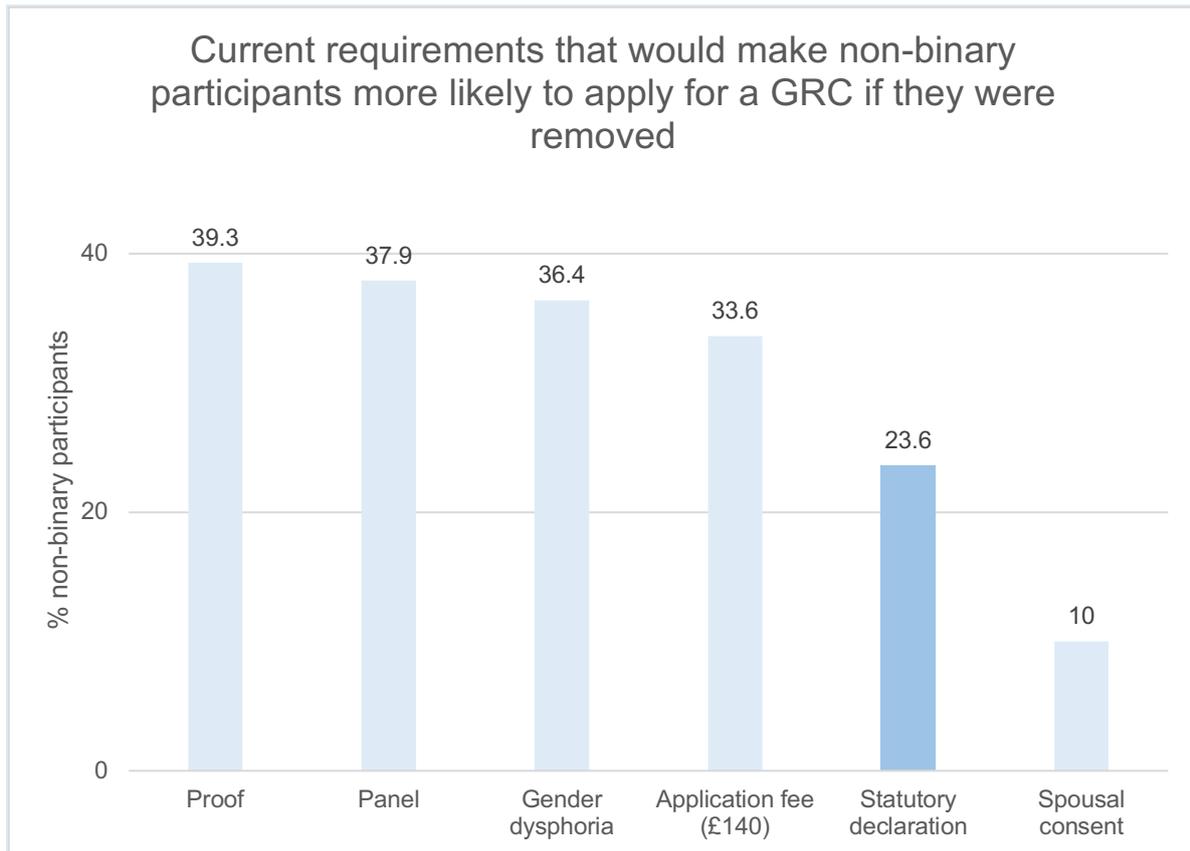


Figure 7–4. Non-binary **Statutory declaration** as a reform priority v others (n = 140)

Just under one-quarter (23.6%) said that removing the requirement would make them more likely to apply for a GRC. Compared with other current requirements, the statutory declaration was ranked the second lowest. When comparing binary and non-binary responses, non-binary respondents were more likely to select the removal of the statutory declaration as a reform priority. This difference was statistically non-significant by a small margin ($P=.062$).

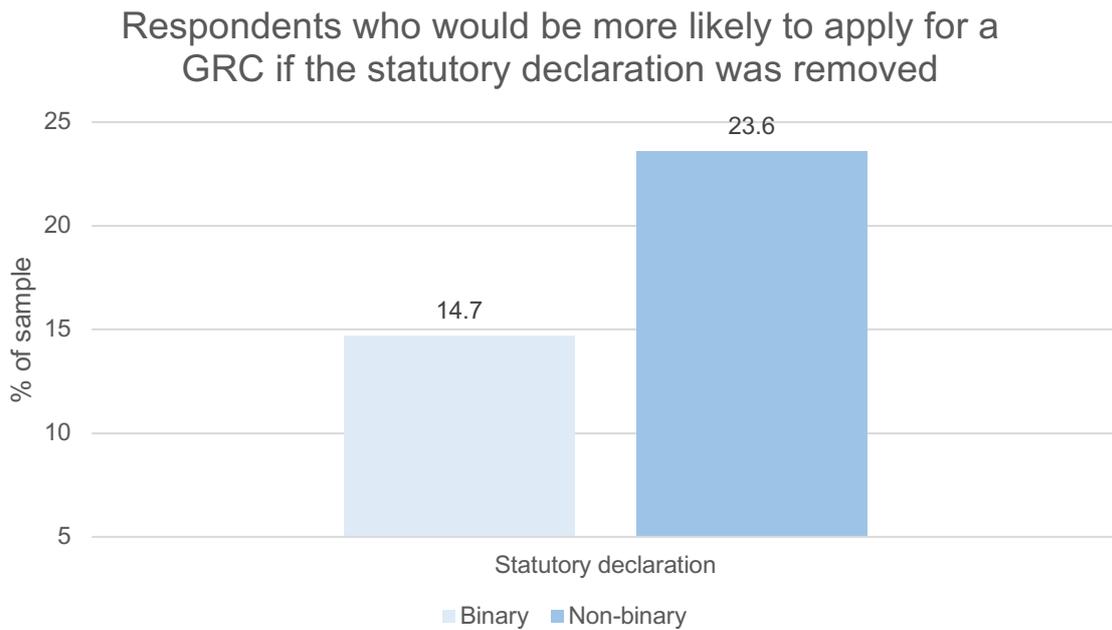


Figure 7–5. Comparison of non-binary and binary attitudes towards **statutory declaration** as a reform priority (n = 276)

Among non-binary respondents, the older group (31.3%) were most likely to select the removal of the statutory declaration as a reform priority, followed by the younger group (23.1%) and middle group (21.7%). These differences were statistically non-significant ($P=.73$).

Qualitative themes

Wording

The main criticism of this requirement related to the wording of the declaration. The most controversial phrases were (a) ‘living in’ their acquired gender, (b) ‘until death’ and (c) ‘acquired gender’.

i. 'Living in' the acquired gender

Some of the criticism referred to having to intend to 'live in' their gender. Participant 18 stated that they 'would definitely take issue with the phrase "living in my gender" ...what does that even mean?'.¹⁰⁶⁵ Participant 11 also rhetorically asked 'how can you define living as a woman without reinforcing stereotypes? Or living as a man?'.¹⁰⁶⁶ The comments from participants above related to the current binary system as it stands, but there were also comments on this requirement in relation to a future system which recognised a non-binary option.

Participants indicated that it would be difficult for them to sincerely declare that they intend to 'live in' their acquired gender if a non-binary option were introduced. Participant 18 argued that there was no 'framework' for what it means to be 'living as non-binary'. They argued that non-binary people 'illuminate how messed up the system is' because there is no 'clear line' to determine what it means to live as non-binary. As such, 'when other people have to think about [what it means to live as non-binary], it kind of breaks the system down'. Participant 12 also described the wording of 'living in' gender as particularly 'problematic for gender queer or non-binary people'. They argued that irrespective of 'how someone lives in their gender... they are 'still non-binary'.¹⁰⁶⁷ A similar point was made by Participant 13 who questioned 'how would you enforce something like that and how would that ever work with non-binary genders? How would you know [whether they live in their gender]? ...it's like these people have never met a trans person before in their life'.¹⁰⁶⁸ There is a lack of

¹⁰⁶⁵ Participant 18, Non-binary, 19 – 25 years.

¹⁰⁶⁶ Participant 11, Non-binary, 26 – 35 years.

¹⁰⁶⁷ Participant 12, Trans/nonbinary, 26 – 25 years.

¹⁰⁶⁸ Participant 13, Agender, 19 – 25 years.

guidance and case law on what it means to ‘live in’ a particular gender in law with regards to a GRC and/or how it could be shown that an individual did not intend to live in their gender. In practice, it seems unlikely that gender expression could lead to criminal liability regarding a perceived false declaration, because it would be difficult to prove that *at the time of making the declaration*, the person did not solemnly believe the declaration to be true.¹⁰⁶⁹ Nevertheless, non-binary participants perceived this uncertainty as a risk.¹⁰⁷⁰

The main criticism related to this phrasing was therefore the ambiguity of what it means to ‘live in’ a particular gender. Participant 18 questioned whether they would be perceived as ‘lying’ if they were to sign a statutory declaration of their intention to live as non-binary, but then express their gender in ‘binary ways’. They questioned, ‘are people going to see me out and about wearing make-up and say “haha you’re lying” because I signed a declaration?’.¹⁰⁷¹ They (Participant 18) also felt that this provision had implicit assumptions surrounding gender expression which might be interpreted differently depending on someone’s assigned sex at birth:

I have a non-binary friend who was assigned male at birth and we both have short hair [and] we both wear makeup. [These are] two presentation things that we both share [and] we always talk about how, for me, when I cut my hair short that was seen as me being a ‘good non-binary person’.

This particular account reflects the distrust and anxiety of non-binary people towards regulatory frameworks, which was also apparent in the findings on gender

¹⁰⁶⁹ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC884, Q46 - 94* (House of Commons 10 February 2021) Q56 - 57.

¹⁰⁷⁰ Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities, and Healthcare* (Policy Press 2020) 181.

¹⁰⁷¹ Participant 18, Non-binary, 19 – 25 years.

dysphoria.¹⁰⁷² This wording does not appear to serve a clear role in identifying and prosecuting fraudulent applicants, as it would be practically difficult to prove. Instead, it could arguably be considered another example of the Act's attempt to instil gender normativity as an expected, and essential, element to obtain citizenship.¹⁰⁷³

ii. 'Until death'

Another area of criticism was the phrasing that the applicant must intend to live in their acquired gender 'until death',¹⁰⁷⁴ which is also known as the 'sign in blood' clause.¹⁰⁷⁵ Most participants who commented on this requirement expressed concern on the impact of this on someone who may have a non-linear experience of their gender identity and/or those who detransition. Participant 14 described it as a 'high imposition' because it 'allows for no flexibility in how you might feel, or recognition that your sense of identity might change... it's essentially a form of gatekeeping to stop people self-identifying'.¹⁰⁷⁶ Participant 18 also rhetorically asked, 'is [living in my gender] something I can really promise to do in a few years?'.¹⁰⁷⁷ Another said that they would not feel confident to promise to live in their acquired gender until death, saying 'you don't know what's going to happen'.¹⁰⁷⁸ Asked whether they thought non-binary people were particularly burdened by this phrasing, Participant 14 suggested 'maybe there's more certainty [towards your gender identity] if you see yourself in a binary way'.

¹⁰⁷² Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities, and Healthcare* (Policy Press 2020) 181. See chapter 6.2 on gender dysphoria.

¹⁰⁷³ Emily Grabham, 'Governing Permanence: Trans Subjects, Time and the Gender Recognition Act' (2010) 19(1) *Social and Legal Studies* 107 – 126.

¹⁰⁷⁴ Gender Recognition Act 2004, s 2(1)(c).

¹⁰⁷⁵ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) para 107.

¹⁰⁷⁶ Participant 14, Non-binary, 26 – 35 years.

¹⁰⁷⁷ Participant 18, Non-binary, 19 – 25 years.

¹⁰⁷⁸ Participant 10, Non-binary, 19 - 25 years.

However, they did note that for *all* trans people, transitioning is a ‘process of disentangling who you think you are from who you thought you were, and that’s a long-term process’.¹⁰⁷⁹ This reflects some of the sentiment seen at the Women and Equalities Committee, where observers argued this aspect of the declaration could ‘trap’ people into a legal decision which may not apply to them later on.¹⁰⁸⁰ There is no provision made in the GRA for people wishing to detransition, so someone wishing to change their legal sex a second time would likely have to go through another full change under the GRA to do this.¹⁰⁸¹

Similar to the wording of ‘living in’ one’s gender (above), participants appeared to question the enforceability of the ‘until death’ wording. Participant 10 asked ‘what are you going to do if people don’t stick to that?’¹⁰⁸² and ‘how would you enforce something like that?’¹⁰⁸³ Similarly, Participant 15 asked ‘how can you do that? How can you police it?’¹⁰⁸⁴ The ambiguity at least raises the possibility that a person could be criminally liable for a prior declaration, which is particularly problematic for non-binary people who are more likely to express a fluid gender identity. This ambiguity is undesirable for non-binary people who may be faced with the choice between obtaining recognition of a preferred binary (or non-binary) marker and risking criminal liability, or retaining their birth assigned legal sex status which raises various practical and personal issues. Reflecting the perceived unenforceability of the provision,

¹⁰⁷⁹ Participant 14, Non-binary, 26 – 35 years.

¹⁰⁸⁰ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) para 107.

¹⁰⁸¹ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC884, Q46 - 94* (House of Commons 10 February 2021) Q57.

¹⁰⁸² Participant 10, Non-binary, 19 – 25 years.

¹⁰⁸³ Participant 13, Agender, 19 – 25 years.

¹⁰⁸⁴ Participant 15, Transfem / non-binary, 26 – 35 years.

Participant 15 therefore felt that it was ‘pointless,’ ‘meaningless,’ and ‘just a way to please bureaucrats’.¹⁰⁸⁵ Arguably, the wording of the statutory declaration is attempting to define and prescribe a particular narrative of gender identity which simply does not reflect non-binary (or binary) experiences of gender identity. Such a requirement arguably represents the State’s endorsement of a degree of suspicion towards gender diverse people,¹⁰⁸⁶ which perpetuates an understanding of trans identities as less stable.¹⁰⁸⁷ As Cannoot argues, arguably such wording attempts to ‘achieve the same goals’ as pathologising requirements, by only granting recognition to the ‘true’ trans person who is willing, or able, to commit to a lifelong, binary gender identity.¹⁰⁸⁸

Nevertheless, it could be argued that a requirement for permanence is a safeguard in the interests of legal certainty which could deter fraudulent applicants and/or reduce the likelihood of people regularly applying to change their legal sex.¹⁰⁸⁹ However, the likelihood of fraudulent applications being submitted as a result of a liberalised legal sex recognition system appears to be without empirical basis. In addition, even if someone were to fraudulently obtain a GRC, it is unclear how this could be used to

¹⁰⁸⁵ Participant 15, Transfem / non-binary, 26 – 35 years.

¹⁰⁸⁶ Equalities, Human Rights and Civil Justice Committee, ‘Meeting Tuesday 21st June 2022’ (Scottish Parliament 2022) (Chris Dietz) <<https://www.scottishparliament.tv/meeting/equalities-human-rights-and-civil-justice-committee-june-21-2022>>accessed 20 August 2022.

¹⁰⁸⁷ Sharon Cowan, ‘Looking Back (To)wards the Body: Medicalization and the GRA’ (2009) 18(2) *Social & Legal Studies* 247 -252, 250.

¹⁰⁸⁸ Pieter Cannoot, ‘The “Third Option”: Not Man, Not Woman, Not Nothing’ (IACL-IADC 2018) <<https://blog-iacl-aidc.org/the-third-gender/2018/6/3/new-belgian-gender-recognition-act-shouldnt-self-determination-also-include-non-binary-people-gwh56>>accessed 20 August 2022.

¹⁰⁸⁹ Equalities, Human Rights and Civil Justice Committee, *18th Meeting 2022 Session 6* (Scottish Parliament 2022) (Naomi Cunningham, Outer Temple Chambers and Sex Matters; Karon Monaghan QC, Matrix Chambers).

harm another person in practice.¹⁰⁹⁰ Nevertheless, if we did accept that deterring fraudulent applications may be desirable, it is still unclear whether this wording specifically is needed. As this empirical data suggests, the wording of the statutory declaration is currently perceived as unenforceable in any case, so the extent to which it might actually deter a bad actor from applying is unconvincing. Arguably, the statutory declaration itself (irrespective of wording) is likely to provide the greatest deterrent to non-trans people applying by virtue of the time and financial costs involved. Furthermore, while multiple, frequent applications would be administratively undesirable, it is worth noting that detransition rates are relatively low,¹⁰⁹¹ making it highly unlikely that many people would submit multiple applications. Even if we accept that this may be a risk though, other measures could be used as mitigation without making people commit to a lifelong legal sex until death. For example, in Belgium a person can change their legal sex back to their birth assigned sex through the family court, with each subsequent request subject to strict judicial procedure.¹⁰⁹² The judicial procedure in Belgium has been criticised as paternalistic and lacking evidence that multiple applications would occur regularly and/or pose a risk to wider society.¹⁰⁹³

¹⁰⁹⁰ This is partly because birth certificates are rarely used as identification in practice anyway, see discussion near the end of chapter 2.4.2 in particular.

¹⁰⁹¹ Valeria Bustos and others, 'Regret after Gender-affirmation Surgery: A Systematic Review and Meta-analysis of Prevalence' (2021) 9(3) *Plastic and reconstructive surgery* 3477; Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) para 107. The reasons for this are not necessarily to do with gender identity, but because they find transitioning hard, see AJ Kuiper and Peggy T Cohen-Kettenis, 'Gender Role Reversal among Postoperative Transsexuals' (1998) 2(3) *International Journal of Transsexualism*.

¹⁰⁹² Pieter Cannoot, 'The "Third Option": Not Man, Not Woman, Not Nothing' (IACL-IADC 2018) <<https://blog-iacl-aidc.org/the-third-gender/2018/6/3/new-belgian-gender-recognition-act-shouldnt-self-determination-also-include-non-binary-people-gwh56>> accessed 20 August 2022.

¹⁰⁹³ *Ibid.*

However, it is at least a preferable solution to the current one in England and Wales where there is no clear route back for people.

iii. Acquired gender

One participant also criticised the wording of 'acquired gender'. This wording is used in section 2(1)(c) and more broadly in the Act but not the statutory declaration form itself.¹⁰⁹⁴ Participant 11 described this phrase as 'weird,' before rhetorically asking 'why have I acquired my gender and my sister hasn't?'.¹⁰⁹⁵ They argued that,

Everyone I know – not just trans people - has gone through a process of understanding their gender and seeing what it means for them and finding a comfortable presentation that might change over the years.¹⁰⁹⁶

These findings mirror criticism that other scholars have levelled at this wording in the Act.¹⁰⁹⁷ It arguably implies a distinction between trans identities as artificial, while non-trans identities are considered natural or inherent.¹⁰⁹⁸ The problem with this is that it implies a degree of frivolity in trans identities, rather than reflecting that those seeking a GRC are seeking recognition of a deeply held internal sense of self.¹⁰⁹⁹

¹⁰⁹⁴ HM Courts and Tribunals Service, *Statutory declaration for single applicants: T467* (Gov.UK 2020).

¹⁰⁹⁵ Participant 11, Non-binary, 26 – 35 years.

¹⁰⁹⁶ Participant 11, Non-binary, 26 – 35 years.

¹⁰⁹⁷ Sharon Cowan, 'Looking Back (To)wards the Body: Medicalization and the GRA' (2009) 18(2) *Social & Legal Studies* 247 -252, 250; Flora Renz, 'Genders that don't matter: Non-binary people and the Gender Recognition Act' in Senthurun Raj and Peter Dunne (eds), *The Queer Outside in Law* (Palgrave Macmillan 2021) n 9; Sally Hines, 'Recognising Diversity? The gender recognition act and transgender citizenship' in Sally Hines and Tam Sangers (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 93.

¹⁰⁹⁸ Emily Grabham, 'Governing Permanence: Trans Subjects, Time and the Gender Recognition Act' (2010) 19(1) *Social and Legal Studies* 107 – 126, 117.

¹⁰⁹⁹ Sharon Cowan, 'Looking Back (To)wards the Body: Medicalization and the GRA' (2009) 18(2) *Social & Legal Studies* 247 -252, 250.

On the other hand, it could be argued that for the sake of legal clarity it is desirable to be able to differentiate between a previously held legal sex status, and a newly 'acquired' status, so that the attribution of the rights and obligations associated with this change are clear. Arguably then, as a product of legal drafting, the use of acquired gender serves a particular function in distinguishing two legal statuses. However, where the phrase is used more broadly to relate to trans and non-binary people's social transition, it may be more conducive to perpetuating stigma. While legal language does impact how meaning is ascribed on account of being a powerful discourse,¹¹⁰⁰ how to re-draft this phrase to satisfy those criticisms remains unclear. To the extent that the law prescribes a legal sex status from birth, which may then be subject to change to create new rights and responsibilities, there must be a way to recognise this.¹¹⁰¹ Arguably then, the use of this language within the Act itself is potentially not as problematic as other wording because it does serve a clear practical purpose.

Not decisive in whether they make an application or not

Despite considerable criticism towards the wording of the declaration, the declaration was not detrimental to non-binary participants decision making in deciding whether to apply for a GRC. Participant 10 explained that they 'would [sign the declaration] and be able to be like "sure that's fine" but in my head I would definitely be like "I don't

¹¹⁰⁰ Carol Smart, 'Law's Power, the Sexed Body, and Feminist Discourse' (1990) 17(2) *Journal of Law and Society* 194 – 210, 198 – 200.

¹¹⁰¹ Some might argue that this shows why decertification is necessary. However, as explored in chapter 4.3 there remain problems and uncertainties with this option for now. It is also arguably questionable whether policymakers and lawmakers would consider removing sex status at birth to be proportionate to the problem with the language of 'acquired gender'.

know”¹¹⁰² Participant 18 argued that while there are ‘definitely a lot of faults’ with the declaration, they were ‘obviously no stranger to navigating the bureaucratic processes that [they] don’t agree with’. Therefore, they said that they ‘would have no problem with ticking that box’.¹¹⁰³ This view was shared by Participant 15 who explained that non-binary people are ‘used to lying about our gender and our levels of certainty because, in order to get medical care, we have to’. They explained that ‘we’re used to making shit up to get what we need’.¹¹⁰⁴ This further reflects the themes raised in chapter 6, where non-binary people demonstrate that they are accustomed to, and understand the need to, submit to the language of certain institutions or risk being denied access to certain medical or legal rights.¹¹⁰⁵ Nevertheless, from a policy perspective, it is noteworthy that non-binary participants did not consider this to be a significant burden which would, in itself, stop them from applying. It therefore potentially demonstrates that it could be an area where there is room for compromise on retaining a degree of formality within the system.

7.2.3 Discussion: should the statutory declaration be reformed?

In its current form, the statutory declaration presumes and requires a binary, permanent narrative of gender identity which is not reflective of the lived experiences of non-binary trans populations. This places non-binary people in a particularly uncertain and uncomfortable legal position, where there appears to be no clear way to change their legal sex status without committing to such a narrative, and in turn

¹¹⁰² Participant 10, Non-binary, 19 – 25 years.

¹¹⁰³ Participant 18, Non-binary, 19 – 25 years.

¹¹⁰⁴ Participant 15, Transfem/non-binary, 26 – 35 years.

¹¹⁰⁵ Judith Butler, ‘Undiagnosing gender’ in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006).

sacrificing the ability to change this status more than once. This potentially reflects why, in the quantitative data, non-binary people were much more likely to oppose the statutory declaration compared with binary trans participants.

However, the statutory declaration could serve a practical function in representing a degree of formality within a reformed system. As non-binary participants did not appear to find the declaration requirement decisive in applying for a GRC (and it was the lowest ranked reform priority), there is potential for this requirement to act as proportionate tool in alleviate concerns of fraudulent or frivolous applications. Arguably, the time and financial costs associated with a statutory declaration offer a sufficient and proportionate deterrent against the small risk of people making applications insincerely. The current wording, however, does not appear to serve a practical purpose beyond attempting to encourage trans applicants to express a wholly unreasonable and unnecessary commitment to gender normativity and permanence. It is also potentially stigmatising in perpetuating an inequality between the legitimacy of trans identities versus the gender identities of cisgender people. As a result, while the statutory declaration in principle could be used as an opportunity to sincerely reflect on the change of legal sex status, it currently does not appear to serve this purpose for non-binary populations in any meaningful sense because of the phrasing.

It could be argued that rather than changing the wording of the statutory declaration, one could simply introduce a separate statutory declaration or exceptional process for those wanting to change legal sex more than once, akin to the Belgian system. This would be preferable to the current law as there would at least be some way to change legal sex more than once. However, it would ultimately fail to address the problems

associated with the current wording. It would also expose the contradictory nature of the wording by requiring permanence of gender identity, while simultaneously providing for a means to change this status more than once. Therefore, the most effective solution would be to detach the statutory declaration from the narrative of gender permanence. Alternative phrasing for the declaration which may achieve these aims could be:

I do solemnly and sincerely declare that I:

- (i) Do not identify with the legal sex status I was assigned at birth
- (ii) Understand the consequences of the application
- (iii) Make this application of my own free will.

This wording is suggested on the basis that it still requires an applicant to declare that they are transgender but without specifying a permanent narrative of gender identity. This would also avoid problems identified with the Republic of Ireland's system which, while being based on self-identification, requires that applicants demonstrate a lifelong commitment to their preferred (binary) gender identity.¹¹⁰⁶

This proposed wording also provides the applicant with the opportunity to reflect on the consequences of the application and to declare that it is made of their free will. Overall, this could strike a reasonable balance between the interests of non-binary people and that of maintaining a manageable system which also provides for criminal

¹¹⁰⁶ Citizens Information, 'Legal recognition of your preferred gender' (Citizens Information Board 2021)
<https://www.citizensinformation.ie/en/birth_family_relationships/changing_to_your_preferred_gender.html>accessed 6 February 2022.

liability for a false declaration. This wording would also be suitable for a system which provided for a third sex option, by not specifying commitment to a binary sex status.

I do not intend to suggest that this wording is without criticism, and it would require additional consultation, including explicit guidance on how someone could go about changing their legal sex status more than once. It may also require specific guidelines to be drafted for prosecutors which explain how they could evidence criminal liability vis-à-vis proving that someone did not identify with the legal sex status they were assigned at birth under (i).¹¹⁰⁷

Policymakers may also consider creating an additional new offence for fraudulent GRC applications. The Scottish Government have proposed introducing such an offence as part of their reform to the GRA.¹¹⁰⁸ It is not uncommon for specific criminal offences to be included in founding legislation.¹¹⁰⁹ Other jurisdictions, such as Denmark, also have a separate criminal sanction for a false application. The benefit of an additional offence is that it may provide for more specific sentencing guidelines, but in the context of England and Wales, it is doubtful that such an offence is necessary given the existing penalties under the Perjury Act. The Perjury Act provides for a maximum penalty of two years imprisonment (or a fine or both) for providing a false declaration, which appears sufficient.¹¹¹⁰ An additional criminal offence may also place those with non-linear experiences of gender identity in an increasingly vulnerable

¹¹⁰⁷ Though it is worth noting that these ambiguities on enforceability already exist with the current wording.

¹¹⁰⁸ Gender Recognition Reform (Scotland) Bill 2022, s 14.

¹¹⁰⁹ Equalities, Human Rights and Civil Justice Committee, *17th Meeting 2022, Session 6* (Scottish Parliament 2022) 5 (Paul Lowe, National Records of Scotland).

¹¹¹⁰ Perjury Act 1911, s 5.

position, and arguably further perpetuates the idea of trans identities being unstable and presenting a risk to wider society.¹¹¹¹ Therefore, an additional criminal offence appears unnecessary in England and Wales, though it could be another mechanism included within a reform package to alleviate concerns surrounding insincere applications.

To conclude, it is proposed in this thesis that the statutory declaration requirement is retained, but with new wording which detaches the change of legal sex status from a permanent and binary narrative of gender identity.

¹¹¹¹ See comments from Catherine Murphy (Engender) at Equalities, Human Rights and Civil Justice Committee, 'Meeting Tuesday 31st May' (Scottish Parliament 2022) <<https://www.scottishparliament.tv/meeting/equalities-human-rights-and-civil-justice-committee-may-31-2022>>accessed 20 August 2022.

7.3 Proof requirement

7.3.1 An introduction to the proof requirement

Under section 2(1)(b) GRA, an applicant for a GRC under the Standard Track must prove that they have lived full time in their acquired gender for at least two years before the date of the application.¹¹¹² Evidencing section 2(1)(b) GRA is fulfilled in Part 5 of the application form. This part requires applicants to specify the date from which they can provide evidence that they have lived full time in their acquired gender.¹¹¹³ Part 5 also outlines the obligation to provide evidence and gives examples of relevant evidence, such as official documents like passports, driving licences, utility bill letters or other letters from official, professional, or business organisations.¹¹¹⁴ The official guidance for the Standard Track states that ‘typically five or six different documents should be included with an application’ but that applicants should not ‘send large quantities of documents unless absolutely necessary’.¹¹¹⁵

Most respondents to the public consultation were opposed to the proof requirement (78.6%).¹¹¹⁶ Some criticised the requirement for being difficult to fulfil, too long, humiliating and dehumanising.¹¹¹⁷ The proof requirement has also attracted

¹¹¹² Gender Recognition Act 2004, s 2(1)(b).

¹¹¹³ HM Courts and Tribunals Service, *Standard Application for a Gender Recognition Certificate: T450* (HM Courts and Tribunals Service 2021) s 5.

¹¹¹⁴ *ibid.*

¹¹¹⁵ HM Courts and Tribunals Service, *Guidance on Completing the Standard Application Form for a Gender Recognition Certificate: T451* (HM Courts and Tribunals Service 2021) 13.

¹¹¹⁶ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) para 55.

¹¹¹⁷ *ibid* paras 55 – 56.

considerable criticism from the Women and Equalities Committee who have, in two separate inquiries, called on the Government to remove the requirement.¹¹¹⁸

ILGA Europe and TGEU do not track the presence of proof requirements in other European jurisdictions,¹¹¹⁹ though a 2017 report for the European Commission did note that enforced waiting periods (which may or may not require proof) are adopted in various jurisdictions.¹¹²⁰ The proof requirement as it operates in England and Wales is not commonly explicitly mentioned by human rights bodies or actors in articulating human rights standards on legal sex recognition. However it is relevant insofar as these standards require systems to be quick, transparent, accessible, and based on self-determination.¹¹²¹ In Resolution 2048, the Council of Europe Parliamentary Assembly described enforced waiting periods during which to gain ‘life experience’ in the ‘gender of choice’ contribute to making recognition procedures ‘generally cumbersome’.¹¹²² The proof requirement is therefore applicable to these international human rights standards, though it is worth noting that they are not unlawful under the ECHR.

¹¹¹⁸ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) 35. Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) paras 44 – 45.

¹¹¹⁹ ILGA Europe, ‘Rainbow Europe Map and Index 2022’ (ILGA 2022) <<https://www.ilga-europe.org/report/rainbow-europe-2022/>> accessed 13 August 2022; TGEU, ‘Trans Rights Map Europe and Central Asia 2022’ (TGEU 2022) <<https://tgeu.org/trans-rights-map-2022/>> accessed 10 August 2022.

¹¹²⁰ DG Justice and Consumers, *Legal gender recognition in the EU: the journeys of trans people towards full equality* (European Commission 2020) 8.3.3.

¹¹²¹ Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) para 6.2.1. See also Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018) para 39.

¹¹²² Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) para 3.

7.3.2 Empirical findings

Quantitative data

The proof requirement was opposed by most non-binary participants (78.6%). The difference between non-binary (78.6%) and binary opposition (58.1%) to this requirement was statistically significant ($P < .001$), indicating a real difference existed between the groups.

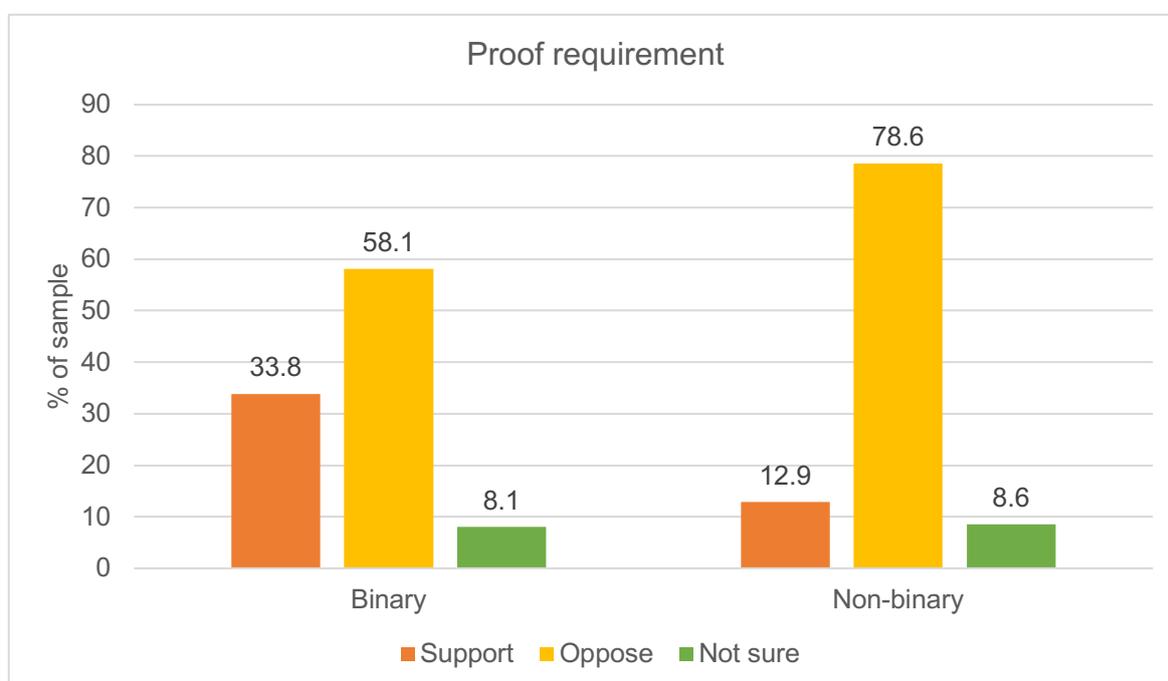


Figure 7–6. Non-binary and binary attitudes towards the **proof** requirement ($n = 276$)

Compared to other current requirements, the proof requirement was the fifth most opposed out of a possible six.

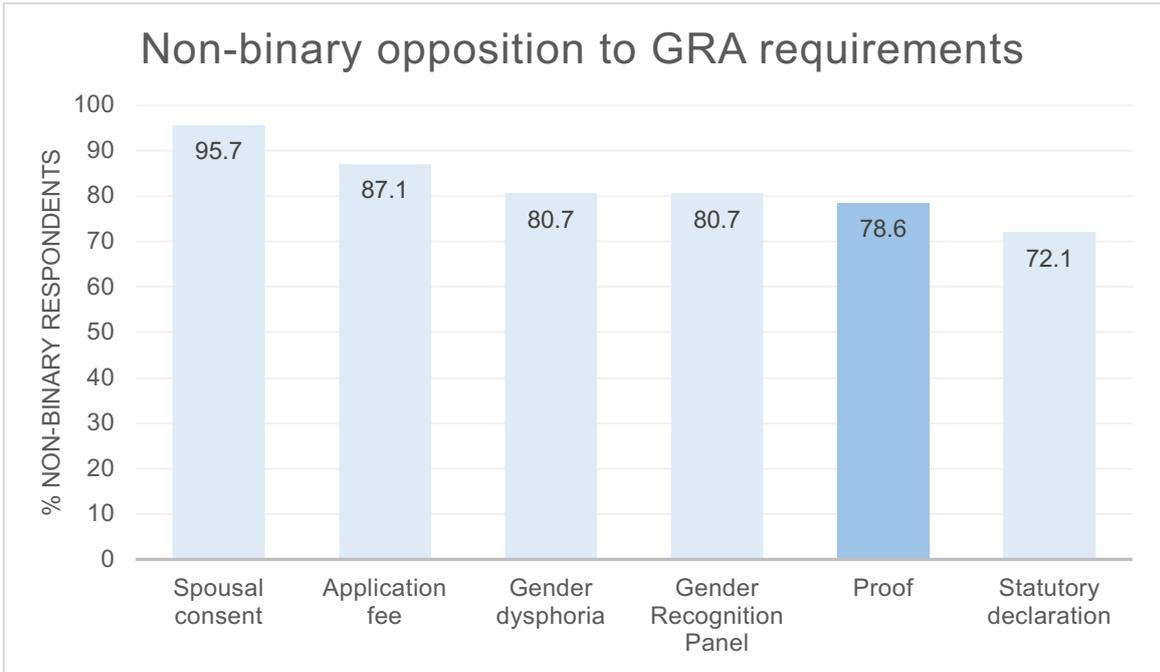


Figure 7–7. Non-binary opposition to the **proof** requirement v other requirements (n = 140)

There were notable differences in the levels of opposition to this requirement depending on age, and this was to a statistically significant extent ($P < .001$). Opposition to this requirement was greatest in the middle age group (91.3%), followed by the younger group (75.6%), with the older group the least opposed (56.3%).

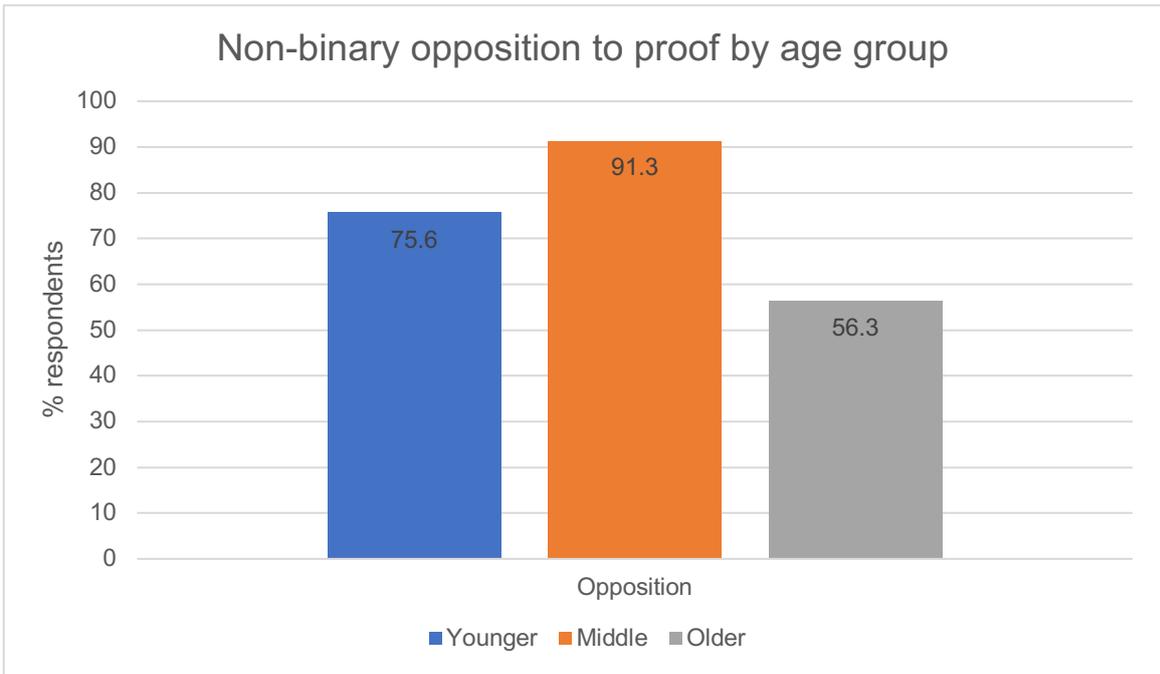


Figure 7–8. Non-binary opposition to **proof** requirement by age (n = 110)

Of those who supported retaining some form of proof requirement, the majority favoured reducing the current two-year time period.

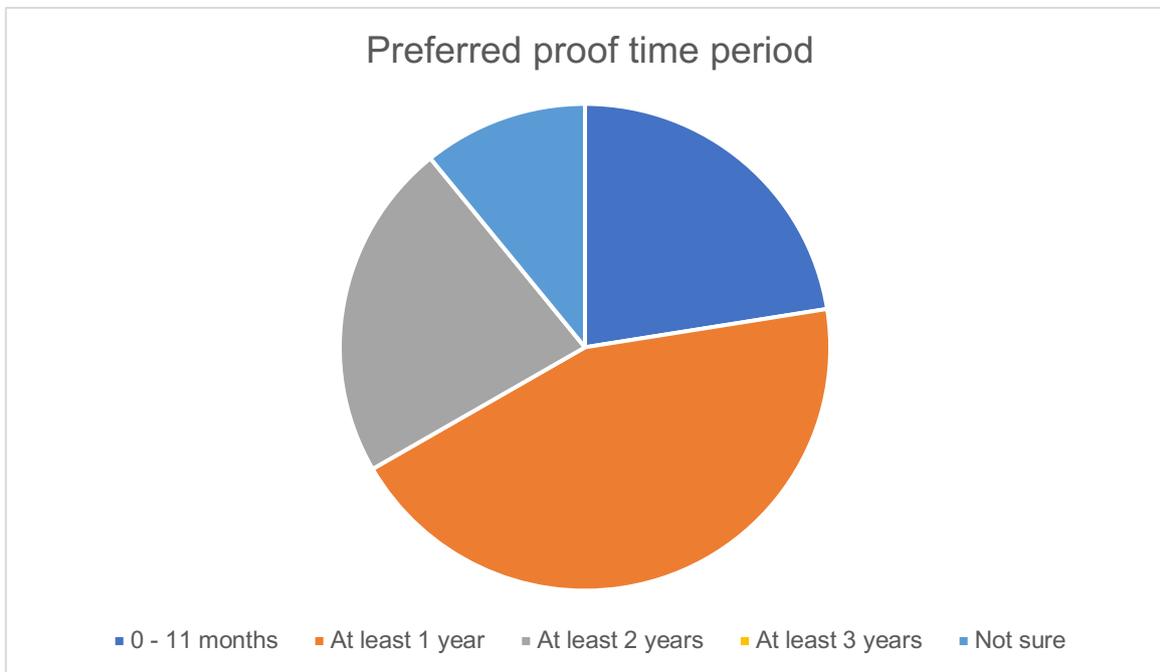


Figure 7–9. Non-binary preferences for a reformed **proof** time period (n = 18)

When asked which requirements would make them more likely to apply for a GRC if they were removed, 39.3% of non-binary respondents selected the proof requirement. Compared with others, removing the proof requirement was the most popular reform option that would make more non-binary people apply for a GRC.

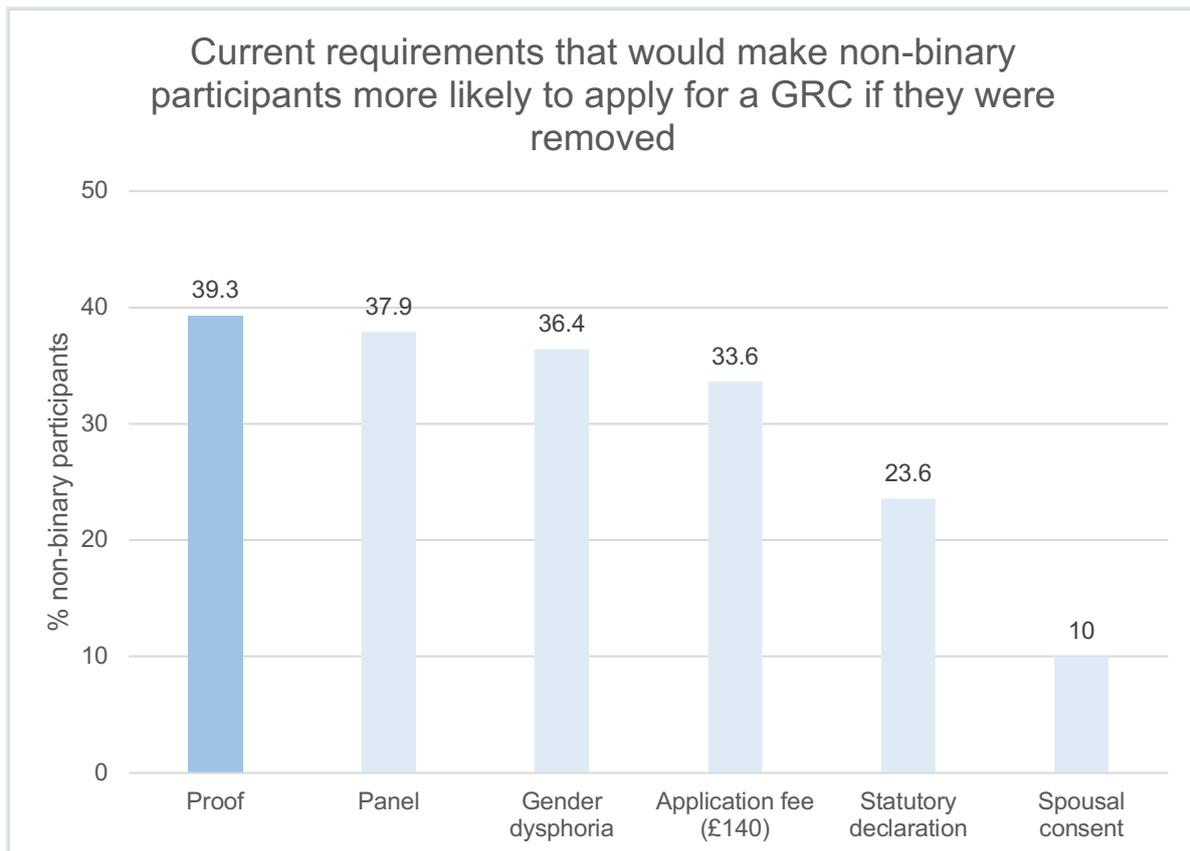


Figure 7–10. Removing **proof** requirement as a reform priority v other requirements (n = 140)

Removing the proof requirement was selected by almost the same proportion of binary trans people, with 39.7% saying that this would make them more likely to apply for a GRC. This difference was therefore statistically non-significant ($P=.94$).

There were notable differences between age groups. While a significant proportion of the younger (41%) and middle age (45.7%) groups selected this reform option, just 12.5% of the older respondents did the same. These differences were statistically non-significant, by a small margin ($P=.06$).

Qualitative themes

Difficult to fulfil, especially for non-binary people

Participants felt this requirement was particularly difficult for non-binary people to fulfil. Much of the criticism assumed that a non-binary marker would also be available. One participant said that they were 'not sure how this [requirement] would work as a non-binary person'.¹¹²³ They highlighted that official documentation rarely allowed for non-binary markers, observing that there are 'no options to choose a non-binary gender on forms, passports etc'. Therefore, it would be difficult to gather enough paperwork displaying a non-binary marker to satisfy this requirement.¹¹²⁴ Participant 2 also rhetorically questioned:

How do you prove what you are? What if your gender is you feel male one moment, feel female the next, feel neither? Sometimes both at the same time?
How do you do that for two years? Three years?¹¹²⁵

Consequently, if a third sex option were introduced, it would arguably be impractical to retain the proof requirement, unless non-binary markers were already available on

¹¹²³ SR 276, Agender, 19 – 25 years.

¹¹²⁴ Arguably if a third sex option were introduced though, it would be reasonable to assume that non-binary markers would become more widely available. However, even if non-binary recognition were introduced and non-binary markers became commonly available, applicants would still have to gather at least two years' worth of proof before satisfying the requirement. Therefore, a two-year buffer period would likely exist between the introduction of non-binary recognition in law and the ability of non-binary people to satisfy the requirements in practice.

¹¹²⁵ Participant 2, Gender-neutral, 56 - 65 years.

a widespread basis. To introduce a third sex option before this point would add an additional wait time on non-binary applicants who would have to wait for more services and organisations to offer such options before being able to amass enough evidence. This is similar to the additional barrier already placed on young trans people by virtue of the proof requirement, who may not have been able to collect all the relevant evidence before turning 18 years old. This means that they may have to wait even longer to receive recognition before doing things in their preferred legal sex status, e.g. applying for university and/or getting married.

Some of the criticism also applied to binary markers. Participant 18 drew on the Scottish Draft Bill (2019) which proposed that applicants should provide three months' worth of proof,¹¹²⁶ with the sentiment equally relevant¹¹²⁷ for the current two year wait in England and Wales:

How can you police whether someone has lived in their gender for three months? Do you want me to submit three months of documentation? How can you deal with the fact that some documents are going to be in one gender and some in the other? We have been thinking about our gender for years... how are we supposed to wait another three months?¹¹²⁷

The final point noted by Participant 18 above is a common criticism of the two-year proof requirement, in that trans and non-binary people have likely had several years or decades, contemplating and reflecting on their gender identity before seeking to obtain legal recognition. Similarly, Participant 3 said that they 'can see why' the current proof requirement involves 'an extended period of time' so that it is 'not a decision that

¹¹²⁶ Scottish Government, *Gender Recognition Reform (Scotland) Bill: Analysis of responses to the public consultation exercise* (Scottish Government 2021) 15 – 20.

¹¹²⁷ Participant 18, Non-binary, 19 - 25 years.

people take lightly'. However, they felt that people applying for a GRC would not 'do it lightly anyway'. They argued that they 'think there's so many hoops to jump through and waiting lists to be on [...] Having that qualifier is just putting another obstacle in the way of trans people being able to claim their own identity'.¹¹²⁸ The barrier that this puts on prospective applicants is heightened in the current system where other requirements also contribute to an overall significant waiting time. Those attempting to access NHS gender identity clinics for a diagnosis of gender dysphoria would have likely already had to wait for several years.¹¹²⁹ Moreover, those wanting to medically transition before seeking legal recognition will be waiting several more years still, as gender-affirming surgeries are also subject to various additional waiting lists.¹¹³⁰

Other participants described this requirement as difficult to fulfil, but in ways which were not necessarily specific to non-binary people. For example, Participant 16 felt that the proof requirement was particularly inaccessible because they have ADHD so the amount of paperwork required could be difficult to manage.¹¹³¹ This could potentially be addressed by the move to digitise the system announced by the Government in 2021,¹¹³² though at the time of writing, applicants still have to send their application and supporting evidence to a physical address.¹¹³³ Nevertheless, the Government have reported that the new digital system has so far received positive

¹¹²⁸ Participant 3, Non-binary transmasculine, 19 – 25 years.

¹¹²⁹ See discussion on waiting lists in 6.2.2.

¹¹³⁰ *ibid.*

¹¹³¹ Participant 16, Trans masculine, 26 - 35 years.

¹¹³² Gov.UK, 'Press release: Government responds to Gender Recognition Act consultation' (Gov.UK 2021) <<https://www.gov.uk/government/news/government-responds-to-gender-recognition-act-consultation>>accessed 8 September 2021.

¹¹³³ Gov.UK, 'Apply for a gender recognition certificate' (Gov.UK 2021) <<https://www.gov.uk/apply-gender-recognition-certificate/how-to-apply>>accessed 8 September 2021.

feedback in testing¹¹³⁴ and there will remain an option to apply offline for a GRC.¹¹³⁵ However, as Whittle argues, it is unlikely that digitising the system alone – without reducing or removing the amount of evidence required - will significantly address these issues which are particularly hard for neurodiverse or disabled applicants. In evidence to the Women and Equalities Committee, Burton described how difficult this requirement was to fulfil. She described having amassed two years worth of proof, but because she had prepared the documentation one month before the application date, the application was rejected for not including sufficient proof for that final one month period.¹¹³⁶ She therefore described this requirement as ‘one of the most onerous parts of the entire application’.¹¹³⁷ It is therefore doubtful that digitisation of this process alone will substantively reduce this burden. Similarly, the digital system requires access to a computer or smartphone which may be inaccessible for those on low income.¹¹³⁸

Pressure to prematurely ‘come out’

The proof requirement also potentially places pressure on non-binary (and binary) people to come out prematurely in certain situations (e.g. at work, education settings, when using identification documents) in order to access legal recognition. This was a point reflected by Participant 3 who felt that this requirement is more difficult for people who have not come out yet, because they would not have as much paperwork

¹¹³⁴ Mike Freer MP, *Letter to Elliot Colburn MP on Westminster Hall Debate: Petition 327108 Reform of the Gender Recognition Act* (Cabinet Office Equality Hub, 3 March 2022).

¹¹³⁵ *ibid.*

¹¹³⁶ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC884, Q96 – 123* (House of Commons 17 March 2021) Q99.

¹¹³⁷ *ibid.*

¹¹³⁸ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC884, Q1 - 19* (House of Commons 9 December 2020) Q10.

evidencing their gender.¹¹³⁹ They referred to the example of people who ‘aren’t in circumstances where they are able to come out’ but argued that this ‘doesn’t make them any less trans’. They added that ‘it doesn’t mean that they are living any less in their gender to themselves’. Applicants obtain legal recognition for a range of reasons, and while non-binary people may seek affirmation of their identity on their birth certificate, they also may wish to retain certain markers in different contexts for privacy and/or safety reasons.¹¹⁴⁰ Consequently, the proof requirement may pressurise those seeking recognition to use a particular sex marker in contexts where they do not feel comfortable or safe.

Gender is personal

Another theme related to this requirement was that gender is personal to individuals, and so cannot - and/or should not - be objectively adjudged by another person. Participant 3 explained that they ‘don’t see how someone else could qualify whether I had been living in my gender or not,’ because ‘gender...is a very personal thing’.¹¹⁴¹ This was shared by another who also argued that ‘proof of living as a gender is extremely subjective, particularly for gender non-conforming people’.¹¹⁴² These accounts linked to themes of autonomy, in that having this very personal aspect of identity being subject to an evidentiary standard undermines the ability of non-binary people to autonomously determine their legal sex status according to self-

¹¹³⁹ Participant 3, Non-binary transmasculine, 19 - 25 years.

¹¹⁴⁰ J Michael Ryan, ‘Born again?: (non-) motivations to alter sex/gender identity markers on birth certificates’ (2020) 29(3) *Journal of Gender Studies* 269 – 281, 269 – 272.

¹¹⁴¹ Participant 3, Non-binary Transmasculine, 19 – 25 years.

¹¹⁴² SR 103, Non-binary, 19 – 25 years.

determination.¹¹⁴³ It is also important to note the impact that this time limit may have on the lives of trans populations who may need a GRC more urgently. For some people, they may need a GRC because they are approaching pensionable age, or their partner is having a child and they want to formalise their relationship in the correct legal sex status.¹¹⁴⁴ The time limit, and general length of the process, could also be significant in how people are remembered after their life in their death certificate if they pass away before being able to receive formal recognition.

Similarly, as there is very little (if any) clinical basis for 'real-life experience' tests,¹¹⁴⁵ this raises questions as to why the law is attempting to apply this standard for legal recognition. Participant 6 argued that rather than objectively measuring gender identity, they felt this requirement was an expression of the State, 'trying to dictate what you do with your life, and that doesn't sit right with me at all'.¹¹⁴⁶ This reflects a perception that the proof requirement requires trans populations to express and present their gender identity in a particular way in exchange for legal recognition. Participant 6 described the requirement as 'uncomfortable' because they 'shouldn't have to prove my gender to anyone, I should just have my word taken for it because it's what I have had to go through'.¹¹⁴⁷ Another explained that they 'don't see why it's

¹¹⁴³ Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) para 6.2.1. See also Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018) para 39.

¹¹⁴⁴ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC884, Q1 - 19* (House of Commons 9 December 2020) Q6.

¹¹⁴⁵ See, in particular, evidence from Dr John Dean (Chair, Clinical Reference Group for Specialised Gender Identity Services, NHS England) in Women and Equalities Committee, *Oral evidence: Transgender Equality, HC390, Q1 - 47* (House of Commons 8 September 2015) Q17.

¹¹⁴⁶ Participant 6, Transmasculine Non-binary, 19 - 25 years.

¹¹⁴⁷ Participant 6, Transmasculine Non-binary, 19 - 25 years.

anyone's business. I don't know why gender non-conforming and trans folk need to jump through hoops to prove themselves'.¹¹⁴⁸ As well as autonomy, this theme also links to issues of (in)equality, in that trans and non-binary people feel subjected to an unfair standard or proof in respect of their gender identity which is perceived as less legitimate than cisgender identities.¹¹⁴⁹

Confusion related to relevance of gender expression

There was also apparent confusion regarding the proof requirement. This was mainly centred around the perception that applicants were required to prove their gender identity by physically expressing their gender in feminine or masculine ways. For example, Participant 17 thought that this requirement involved trans women being expected to be 'really feminine' and trans men to be 'really masculine'. Therefore, they argued that the proof requirement was a particularly 'tough one for non-binary people' because they don't have a 'traditional stereotype to fall into'.¹¹⁵⁰

Similarly, Participant 1 described the requirement as 'rubbish,' but that it was 'straightforward' for binary trans people to prove because (for example) 'if you're a trans woman you should dress as a woman and live as a woman'.¹¹⁵¹ However, they felt that for non-binary people, they 'don't really know what or how they would expect me to prove that'. They said that ultimately 'if that was the hoop that I had to jump

¹¹⁴⁸ Survey Respondent 93, Non-binary Masc, 19 – 25 years.

¹¹⁴⁹ Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Policy Press 2020) 103, 118 – 119.

¹¹⁵⁰ Participant 17, Non-binary, 26 – 35 years.

¹¹⁵¹ This is also interesting in further highlighting potential intra-community policing of gender norms, as this participant appears to expect gender normativity from binary trans people, see generally Lauren Jensen, *Experiences of gender policing within the lesbian, gay, bisexual, transgender and queer (lgbtq) community* (DPhil Thesis, Southern Illinois University at Carbondale 2013).

through then I would,' but that they were 'not sure what it would look like'.¹¹⁵² This requirement could be more difficult for non-binary people to prove (if there were a non-binary option) because non-binary markers are less commonly available in official documentation. However, the way that a person physically presents or expresses their gender identity is not something that can be directly assessed by the panel. This is because the Panel must usually make its determination on the papers as to whether the legal requirements are satisfied, without face-to-face engagement with applicants.¹¹⁵³ Gender expression could have a subconscious impact on the Panel members if documentation submitted as part of an application included photographic elements,¹¹⁵⁴ such as a driving licence, though such consideration of physical appearance would be *ultra vires*.

This misunderstanding by some interviewees as to how the proof requirement was assessed contrasts with research which, in the context of equality discrimination, indicates that trans and non-binary people understood the law very well.¹¹⁵⁵ However, it is worth noting that this was a sub-theme, and was not explored with all participants, meaning that this does not necessarily represent widespread misunderstanding among the non-binary population. At the very least it does arguably reflect how wording used throughout the GRA creates the perception of an expected gender narrative and expression which contributes to confusion and anxiety among non-binary populations.

¹¹⁵² Participant 1, Non-binary, 46 - 55 years.

¹¹⁵³ Gender Recognition Act 2004, Sch 1, para 6(4).

¹¹⁵⁴ This point is picked up on in more detail in chapter 7.4 below on the Gender Recognition Panel.

¹¹⁵⁵ Sharon Cowan, 'The Best Place in the World to Be Trans? Transgender Equality and Legal Consciousness in Scotland' in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Springer 2021) 201- 202.

7.3.3 Discussion: should the proof requirement be reformed?

The proof requirement was overwhelmingly unpopular with non-binary participants in particular. The majority were opposed to the requirement and it is worth emphasising that its removal was identified as the reform option which would most likely make non-binary participants apply for a GRC. The requirement is problematic for non-binary people wanting to access binary recognition as they may be more likely to hold incongruent documentation. However it would also be incredibly problematic to retain such a requirement if a third sex option were introduced. Participants expressed apparent frustration at how the requirement appears to treat trans identities with suspicion and creates a sense of inequality between trans and cis populations. On a practical level, the proof requirement is also burdensome and undermines the ability of trans populations to access recognition in a timely and accessible manner.¹¹⁵⁶

In addressing these issues, it could be argued that the time period associated with the proof requirement should be reduced. However, the same questions would remain over the rationale behind a new (albeit reduced) time period. Arguably, any time period selected could be argued to be arbitrary, as any form of proof required would not have a clinical or empirical basis for being able to reliably validate gender identity. It would also remain highly problematic for non-binary populations, for whom a proof requirement creates an almost insurmountable barrier.

¹¹⁵⁶ Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) 6.2.1.

Other jurisdictions have mooted introducing a reflection period in place of a time-specific proof requirement, such as the three-month reflection period proposed in Scotland.¹¹⁵⁷ A reflection period could be seen as less problematic than a proof requirement as it does not require people to submit evidence. However it raises questions as to the justification for a reflection period. It overlooks that many applicants would have already spent considerable time reflecting on their gender identity and therefore risks continuing to frame gender diverse identities as less sincere. This reflection period could be useful in that it provides for a degree of formality in the system for applicants to contemplate their change of legal sex, though arguably this aim is already served by the retention of the statutory declaration requirement.¹¹⁵⁸ Consequently, it is proposed that the proof requirement ought to be removed in its entirety, without merely reducing the time period imposed or replacing it with a reflection period.

¹¹⁵⁷ Gender Recognition Reform Bill (Scotland) 2018.

¹¹⁵⁸ See chapter 7.2.

7.4 Gender Recognition Panel

7.4.1 An introduction to the Gender Recognition Panel

Under schedule 1 GRA, provision is made for the Gender Recognition Panel,¹¹⁵⁹ which is a tribunal to determine GRC applications.¹¹⁶⁰ The Lord Chancellor can only appoint a person to sit as a member of the Gender Recognition Panel if they hold a ‘relevant legal qualification,’¹¹⁶¹ or are a ‘registered medical practitioner’.¹¹⁶² The Panel members are appointed by the Lord Chancellor with the agreement of the Presidents of the Courts for England and Wales, Scotland, and Northern Ireland.¹¹⁶³ Only judges, medical practitioners or psychologists may be appointed to the Panel.¹¹⁶⁴ The GRP has limited contact with applicants, except to acknowledge their application and inform them of a decision, and/or to ask for more information if required.¹¹⁶⁵ The Panel generally considers applications on the papers without face-to-face engagement with an applicant.¹¹⁶⁶

¹¹⁵⁹ Gender Recognition Act 2004, s 1(4) gives effect to sch 1 which makes provisions for Gender Recognition Panels.

¹¹⁶⁰ Gender Recognition Act 2004, s 1(3) outlines that applications are determined by a Gender Recognition Panel.

¹¹⁶¹ Gender Recognition Act 2004, sch 1(2)(a). See Courts and Legal Services Act 1990, s 71 for information on the relevant legal qualifications.

¹¹⁶² Gender Recognition Act 2004, sch 1(2)(b).

¹¹⁶³ Judge Paula Gray, *Evidence to the House of Commons Women and Equalities Committee on their investigating the Government’s response to the Consultation concerning the Gender Recognition Act 2004 [GRA 2023]* (Women and Equalities Committee 2021) para 4.

¹¹⁶⁴ Kemi Badenoch MP, *Letter from the Minister of Equalities to the Chair of the Women and Equalities Committees* (Women and Equalities Committee 14 July 2021).

¹¹⁶⁵ HM Courts and Tribunals Service, *Guidance on Completing the Standard Application Form for a Gender Recognition Certificate: T451* (HM Courts and Tribunals Service 2021) 2.

¹¹⁶⁶ Gender Recognition Act 2004, sch 1, para 6(4).

The public consultation did not gather data on the Gender Recognition Panel,¹¹⁶⁷ however the Women and Equalities Committee did explore issues related to the Panel.¹¹⁶⁸ They noted concerns related to the transparency of the Panel and how it is an off-putting requirement.¹¹⁶⁹ They recommended that the Government ‘conduct a review on whether the Gender Recognition Panel could be removed, with their powers delegated to the Registrar General for England and Wales’.¹¹⁷⁰

International human rights standards generally reflect the need for recognition procedures to be quick and accessible.¹¹⁷¹ The UN High Commissioner for Human Rights stipulates that processes for legal recognition ought to be based on self-determination and be a simple, administrative process.¹¹⁷² The High Commissioner described judicial procedures as creating ‘significant additional barriers’ by:

[U]nnecessarily [prolonging] the process and [creating] additional financial burdens, noting that they may constitute disproportionate and unnecessary intrusion into the exercise of individual rights, particularly where a judge is asked to determine the validity of a person’s gender identity, which is a deeply personal and intimate matter.¹¹⁷³

¹¹⁶⁷ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020).

¹¹⁶⁸ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) 42 – 43.

¹¹⁶⁹ *ibid.*

¹¹⁷⁰ *ibid* para 135.

¹¹⁷¹ Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015); *SV v Italy App no 55216/08* (ECtHR 11 October 2018) [72].

¹¹⁷² Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018) para 39.

¹¹⁷³ *ibid* para 40.

Some jurisdictions across Europe operate a full judicial process for legal recognition, though in most states there is evidence of administrative processes to changing legal sex.¹¹⁷⁴ Applicants under the GRA do not necessarily need to present for a judicial hearing, though the GRP is a branch of the HM Courts and Tribunal Service and may (though has rarely ever done so¹¹⁷⁵) request an in-person hearing. It has therefore been described by the Women and Equalities Committee as representing a ‘quasi-judicial’ recognition process.¹¹⁷⁶ As noted in a publication for the European Commission, both administrative and judicial procedures may contravene human rights standards by ‘being unreasonably lengthy, costly and opaque in their decision-making’.¹¹⁷⁷ I will now turn to present empirical findings from non-binary participants on their attitudes towards the GRP.

7.4.2 Empirical findings

Quantitative data

Most non-binary respondents were opposed to the Gender Recognition Panel (80.7%). This compared with less than three-quarters (72.1%) of binary trans respondents. The difference between the groups was statistically non-significant ($P=.09$).

¹¹⁷⁴ ILGA Europe, ‘Rainbow Europe Map and Index 2022’ (ILGA 2022) <<https://www.ilga-europe.org/report/rainbow-europe-2022/>> accessed 13 August 2022.

¹¹⁷⁵ Judge Paula Gray, *Evidence to the House of Commons Women and Equalities Committee on their investigating the Government’s response to the Consultation concerning the Gender Recognition Act 2004 [GRA 2023]* (Women and Equalities Committee 2021) para 23.

¹¹⁷⁶ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) paras 44 and 45.

¹¹⁷⁷ Directorate-General for Justice and Consumers, *Legal gender recognition in the EU: The journeys of trans people* (European Commission 2020) 6.2.2.

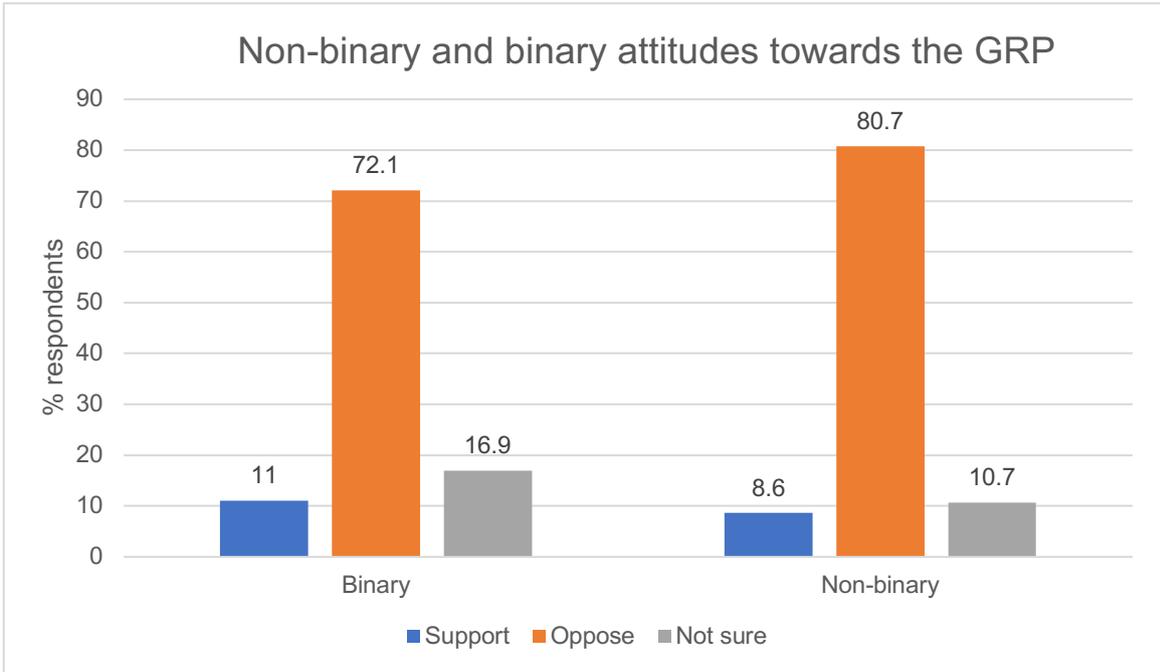


Figure 7–11. Non-binary and binary attitudes towards the **Gender Recognition Panel** (n = 276)

The differences across age groups were limited, with the middle and older groups equally opposed at 87% and 87.5% respectively. The younger age group was slightly less opposed, though these differences were statistically non-significant ($P=.233$).

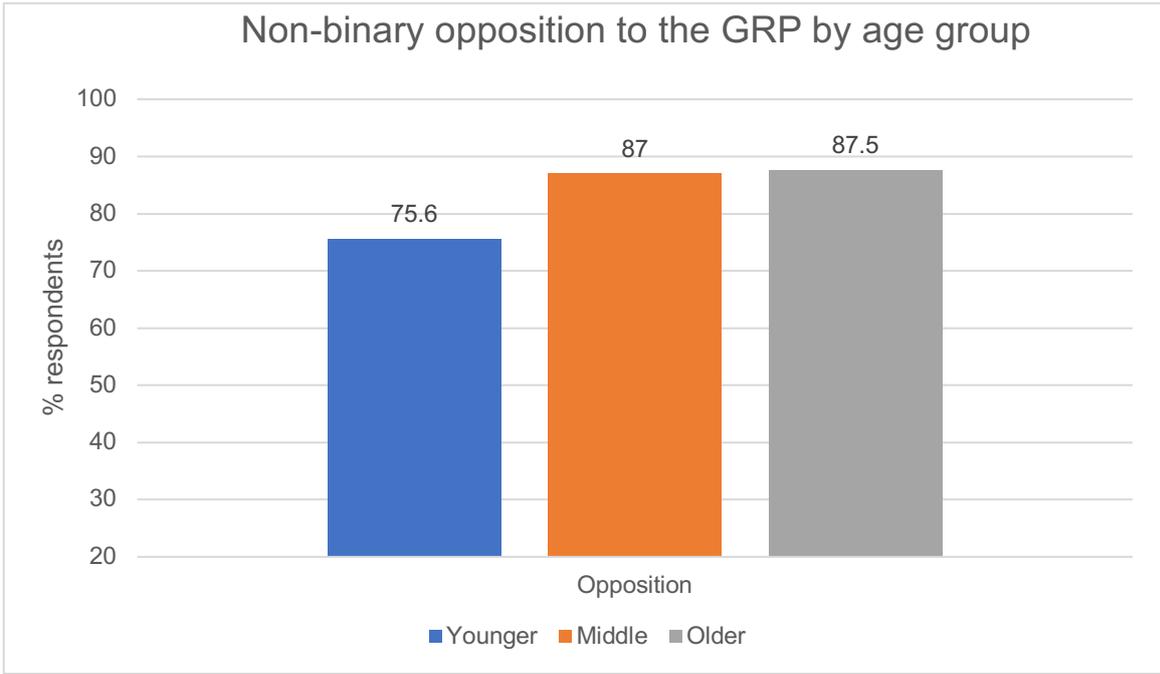


Figure 7–12. Non-binary opposition to the **Gender Recognition Panel** by age (n = 113)

Compared to other requirements, the GRP was the joint-third most opposed, alongside the gender dysphoria requirement.

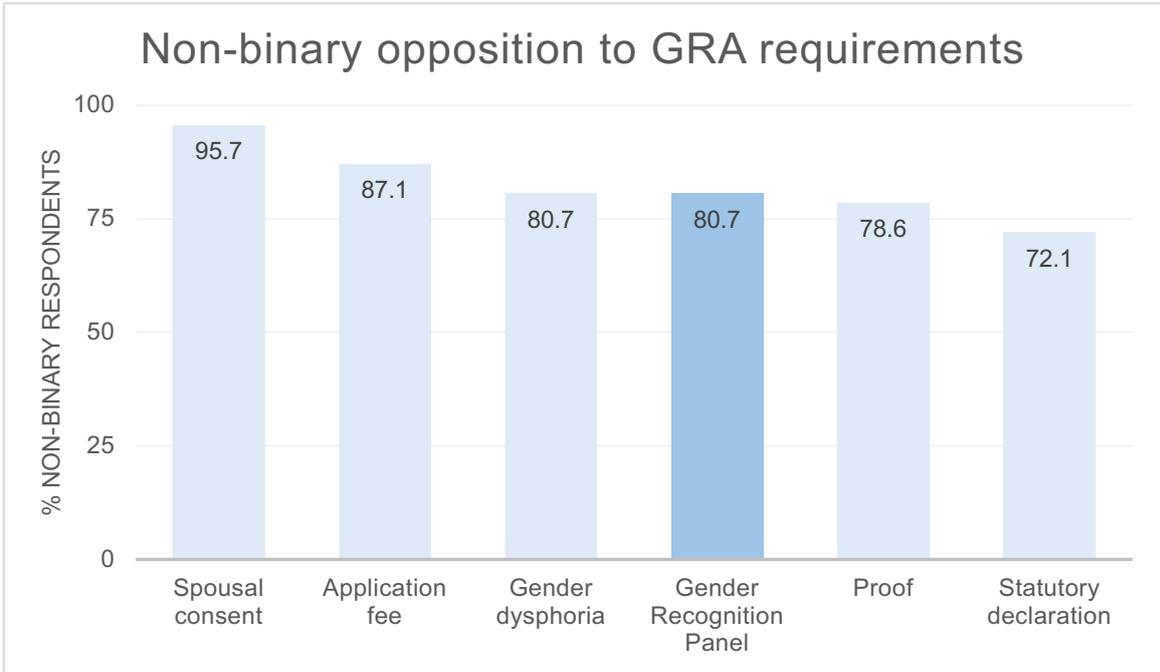


Figure 7–13. Non-binary opposition to the **Gender Recognition Panel** v other requirements (n = 140)

Removing the GRP was the second most selected reform option which would make non-binary participants more likely to apply for a GRC (37.9%).

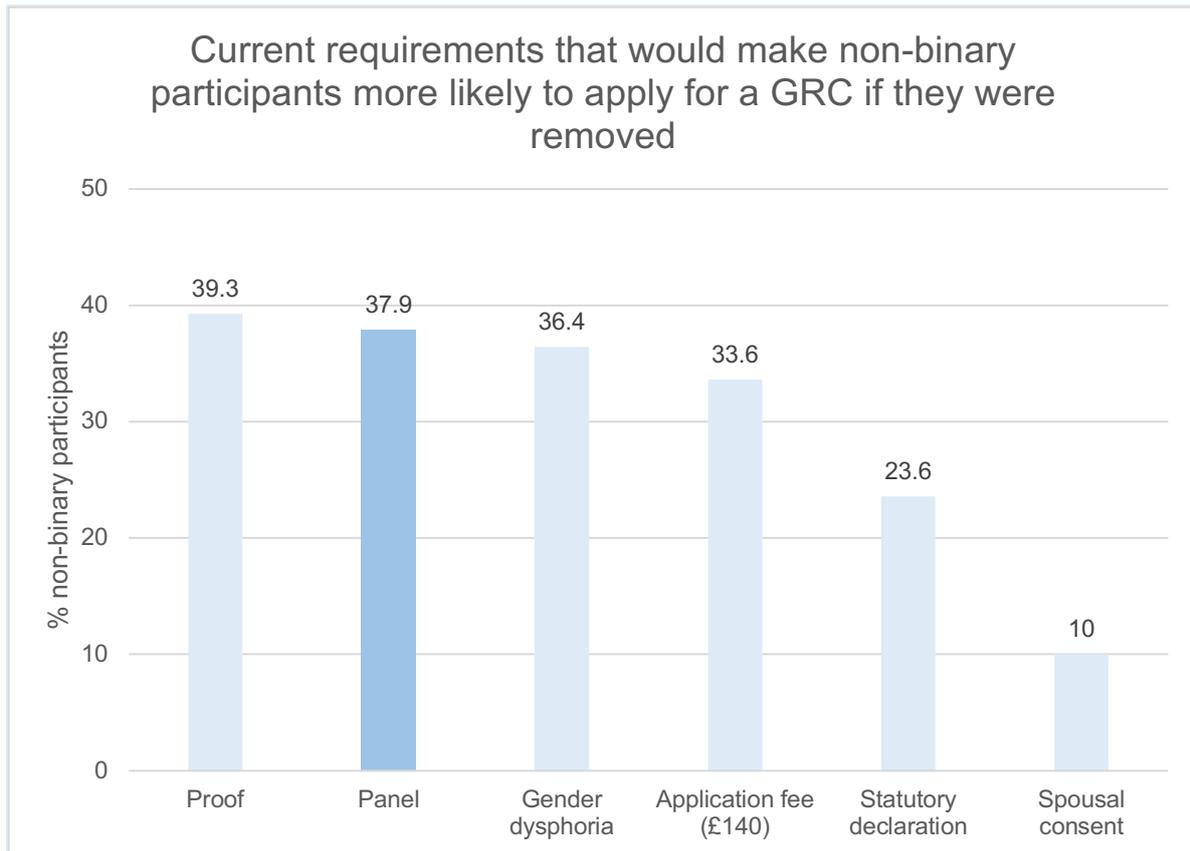


Figure 7–14. Removing **Gender Recognition Panel** as reform priority v other reform options for non-binary participants (n = 140)

The non-binary group were less likely to select this reform option (37.9%) compared with the binary group (56.6%). This difference was statistically significant ($P=.002$). Therefore while non-binary participants were more likely to oppose this requirement, they were less likely to select it as a reform priority. Older non-binary respondents were most likely to select this reform option (43.8%), followed by the younger group (38.5%) and middle age group (34.8%). These differences were statistically non-significant ($P=.81$).

Qualitative themes

Perceived interrogation of identity

Participants were generally uncomfortable with the Panel as it made them feel 'judged',¹¹⁷⁸ 'interrogated',¹¹⁷⁹ and as if the Panel were determining 'whether or not an individual's sense of self is valid'.¹¹⁸⁰ One explained that this felt 'so hurtful and discriminatory' because cisgender identities are 'taken at face value whereas we are interrogated and treated as if society needs to be protected from us'.¹¹⁸¹ This relates to the themes engaged throughout this chapter on the other requirements, in that there is a sense of inequality between the scrutiny of trans identities compared with cisgender identities, such that trans identities are treated with greater suspicion.¹¹⁸² The particular anxiety that non-binary people experience as a result of their identities being perceived as unstable¹¹⁸³ is potentially why the quantitative data indicated that non-binary people were particularly opposed to the requirement and considered it to be the second most-selected reform priority.

This perception of the Panel as 'gatekeeping' and 'discriminatory'¹¹⁸⁴ reflects other research indicating that trans populations are sceptical that regulations and law will be applied and enforced fairly.¹¹⁸⁵ This perception is arguably worsened by the confidentiality surrounding the Panel, in relation to its members and the decision

¹¹⁷⁸ Participant 3, Non-binary transmasculine, 19 – 25 years.

¹¹⁷⁹ SR 122, Female/demi-female, 16 - 18 years.

¹¹⁸⁰ SR 122, Female/demi-female, 16 - 18 years.

¹¹⁸¹ SR 122, Female/demi-female, 16 - 18 years.

¹¹⁸² Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Policy Press 2020) 103, 118 – 119.

¹¹⁸³ *ibid.*

¹¹⁸⁴ SR 137, Non-binary, 26 – 35 years.

¹¹⁸⁵ Sharon Cowan, 'The Best Place in the World to Be Trans? Transgender Equality and Legal Consciousness in Scotland' in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Springer 2021) 210.

making process. This makes some fear that the Panel may hierarchise certain cases for reasons which are not strictly required under the Act.¹¹⁸⁶ This has been described as risking ‘scope creep’ which refers to additional information sometimes requested by the GRP such as (e.g.) further information on surgical interventions.¹¹⁸⁷

The impersonal nature of the GRP was noted as a criticism from another participant who expressed unease at the anonymity or ‘facelessness’ of the panel.¹¹⁸⁸ The transparency of the GRP is a common criticism, as panel members are anonymised.¹¹⁸⁹ Two respondents criticised the perceived lack of relevant expertise of those sitting on the panel. One respondent argued that applications should not be determined by ‘a panel of cisgendered “experts”’.¹¹⁹⁰ Meanwhile, another asked, ‘how many cis people are asked to have a bunch of "experts" validate their gender?’.¹¹⁹¹ Similarly, Participant 16 also felt that the medical and legal professionals on the panel do not ‘know enough about trans people’.¹¹⁹² Judge Paula Gray provided further information on the Panel in her evidence to the WEC, outlining that the current membership of the Panel comprises six judges and four doctors. While the Panel has a user group where the President and other senior Panel members can discuss the

¹¹⁸⁶ Sharon Cowan, ‘Looking Back (To)wards the Body: Medicalization and the GRA’ (2009) 18(2) *Social & Legal Studies* 247 -252, 250.

¹¹⁸⁷ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC884, Q96 – 123* (House of Commons 17 March 2021) Q102.

¹¹⁸⁸ SR 122, Female/demi-female, 16 - 18 years.

¹¹⁸⁹ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) 41.

¹¹⁹⁰ SR 137, Non-binary, 26 – 35 years.

¹¹⁹¹ SR 48, Trans/nonbinary, 26 - 35 years.

¹¹⁹² Participant 16, Trans masculine, 26 - 35 years.

process with trans people, this group only meets annually, and it is unclear whether non-binary people are represented in that user group.¹¹⁹³

Despite concerns surrounding the transparency of the Panel members and their work, this is defended on the basis that it protects members and applicants as the nature of their work is dealing with highly sensitive issues.¹¹⁹⁴ The Panel is subject to statutory duties, including under s 22 GRA,¹¹⁹⁵ meaning that it must sit in private and keep information which they consider private.¹¹⁹⁶ As per s 22, if they revealed details which could lead to someone being identified, they could be subject to criminal sanction.¹¹⁹⁷ Nevertheless, it could also be argued that the nature of the work justifies *greater* transparency for applicants, who are often submitting their own personal information such as medical history and records detailing surgical interventions and psychiatric assessments. By having to submit such personal information, it is unsurprising that many non-binary trans people find the current operation of the Panel to be ‘offensive’ and ‘distressing’.¹¹⁹⁸ It appears to be the combined effect of the Panel’s power to

¹¹⁹³ Judge Paula Gray, *Evidence to the House of Commons Women and Equalities Committee on their investigating the Government’s response to the Consultation concerning the Gender Recognition Act 2004 [GRA 2023]* (Women and Equalities Committee 2021) para 13.

¹¹⁹⁴ Judge Paula Gray, *Second Response to the Women and Equalities Committee regarding the inquiry into the Reform of the Gender Recognition Act [GRA 2026]* (Women and Equalities Committee 2021) 7.

¹¹⁹⁵ Gender Recognition Act 2004, s 22 provides that it is a criminal offence for those who have acquired ‘protected information’ (i.e. someone’s GRC application and/or transgender status) to disclose that information unless any of the exceptions under s 22(4) apply.

¹¹⁹⁶ Judge Paula Gray, *Second Response to the Women and Equalities Committee regarding the inquiry into the Reform of the Gender Recognition Act [GRA 2026]* (Women and Equalities Committee 2021) 7.

¹¹⁹⁷ *ibid.*

¹¹⁹⁸ Equalities, Human Rights and Civil Justice Committee, *14th Meeting 2022, Session 6* (Scottish Parliament 2022) 18.

grant/deny recognition, the perceived lack of transparency, and the highly personal information required of the applicant, which is particularly problematic.¹¹⁹⁹

Interestingly, some participants appeared to support greater dialogue with the Panel. One participant explained:

I don't want them to judge my life on paperwork. I would rather have [a doctor at the GIC] judge my life because...he knows me in person, and I have told him about my life... I have shown him my driving licence and bank card so it's more personal, whereas paperwork is just paperwork, you can have no personality there. I want to show the real me, not just paperwork-me.¹²⁰⁰

However, along with concerns related to s 22, a closer dialogue between applicants and the Panel would arguably raise questions as to the potential for bias and discrimination. Arguably, there is a greater potential for subjective or arbitrary decision-making if individual doctors were tasked with granting GRC applications. It could also draw the medical profession further into the GRA process, which as seen in chapter 6, already presents challenges and risks for non-binary people.

While some criticised the impersonal nature of the Panel, some assumed that they would have to attend in person for the application process. Participant 1 (who had not yet been through the process) described their perception as:

¹¹⁹⁹ E.g. Vic Valentine makes reference to the 'power' which the GRP holds over applicants in describing how this requirement is perceived by trans and non-binary people, see Equalities, Human Rights and Civil Justice Committee, *14th Meeting 2022, Session 6* (Scottish Parliament 2022) 18.

¹²⁰⁰ Participant 16, Trans masculine, 26 - 35 years.

[Y]ou turn up for the interview, you meet three people (or however many it is), they see you for like half an hour/an hour and that's all they see of you. It just seems like a ridiculously short time to make such a big decision on.¹²⁰¹

This account from Participant 1 is more accurately understood as empirical information on the perception of the GRP, rather than an actual experience of this process. However, it is interesting that, for this participant, even an in-person hearing would be insufficient as a means to determining a GRC application. While this participant appeared to presume that they would have an in-person Panel, GRC applications are 'almost always considered on the papers'.¹²⁰² Under schedule 1, para 6(4), a Panel must determine applications without a hearing unless the Panel considers that a hearing is necessary.¹²⁰³ Evidence from Judge Paula Gray indicates that so far only two oral hearings have been held.¹²⁰⁴ However, it remains a matter of judicial discretion as to when an oral hearing may be deemed 'necessary'.¹²⁰⁵ This is potentially problematic as an oral hearing carries greater risk of bias and discrimination, particularly in relation to gender stereotyping. Other participants felt an in-person Panel hearing could also be problematic, as it would risk Panel members 'judging the validity of gender identity based on outdated, binary stereotypes' and would therefore be 'disgusting'.¹²⁰⁶ Therefore, while in-person hearings are incredibly

¹²⁰¹ Participant 1, Non-binary, 46 - 55 years.

¹²⁰² HM Courts and Tribunals Service, *The General Guide for all Users: T455* (HM Courts and Tribunals Service 2021) 18.

¹²⁰³ Gender Recognition Act 2004, sch 1, para 6(4).

¹²⁰⁴ Judge Paula Gray, *Evidence to the House of Commons Women and Equalities Committee on their investigating the Government's response to the Consultation concerning the Gender Recognition Act 2004 [GRA 2023]* (Women and Equalities Committee 2021) para 23.

¹²⁰⁵ *ibid.*

¹²⁰⁶ SR 137, Non-binary, 26 – 35 years.

rare, this remains an additional area of uncertainty with regards to the operation of the GRP.

However, even the current operation of the Panel may involve an implicit or subconscious 'commitment to gender normativity'.¹²⁰⁷ For example, as mentioned in chapter 7.3 above, some of the evidence submitted as part of the proof requirement (e.g. identification cards and documentations) may include photographs of the applicant which could indirectly be a factor in the decision making of the panel. There are no studies on the decision making of the GRP to suggest that this happens, though wider research suggests unconscious bias could be a factor in judicial decision making more generally.¹²⁰⁸ This could be an interesting area for further research into the GRA process, though considering the current statutory provisions regarding confidentiality and privacy, it is unlikely that direct research with the Panel could be conducted.¹²⁰⁹ Nevertheless, another participant argued that, even on the papers, the Panel has pre-determined idea of 'all the different aspects of what they think makes you express your gender and live in your gender' such as using various pronouns, markers or titles. They argued that the current system fails to recognise that 'everybody experiences gender differently throughout their lives,' meaning that the individual is best placed to make that determination rather than 'somebody who has probably never met you'.¹²¹⁰

¹²⁰⁷ Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016) 141.

¹²⁰⁸ See (e.g.) John F Irwin and Daniel L Real, 'Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity' (2010) 42 *McGeorge Law Review* 1 – 18 and Janet Bond Arterton, 'Unconscious Bias and the Impartial Jury' (2008) 40 *Connecticut Law Review* 1023 - 1033.

¹²⁰⁹ Though a study could potentially be conducted using former judges and medical professionals to mimic the operation of the Panel.

¹²¹⁰ Participant 3, Non-binary transmasculine, 19 – 25 years.

Consequently, whether assessed on the paperwork or in-person, the GRP was still perceived to be an offensive and unnecessary aspect of the GRA.

Generally a GRC application will be looked at by the Gender Recognition Panel Administrative Team to 'ensure that the documentation that is put before the Panel is as complete as it can be'.¹²¹¹ The application is then passed on to the GRP who may grant or refuse an application, or (if necessary) issue Directions requesting further information or documents.¹²¹² An application that has been rejected must be accompanied by the reasons for rejection and the opportunity for the unsuccessful applicant to appeal a point of law.¹²¹³ However, considerable disagreement exists, even among experts in the field, as to whether sufficient feedback is provided. In evidence to the WEC, there was disagreement on whether the GRP gave reasons for rejecting applications with some experts arguing that - despite evidence provided by Judge Paula Gray¹²¹⁴ and the obligations under schedule 1 of the Act to provide reasons for rejection¹²¹⁵ - sometimes reasons were not provided to unsuccessful applicants.¹²¹⁶ This is concerning because if it is true that applications may not be accompanied by the reasons for rejection, this would mean that an unsuccessful applicant could not appeal.¹²¹⁷ These issues raised indicate that there is at least a

¹²¹¹ HM Courts and Tribunals Service, *The General Guide for all Users: T455* (HM Courts and Tribunals Service 2021) 17.

¹²¹² *ibid* 18.

¹²¹³ Gender Recognition Act 2004, s 8(1).

¹²¹⁴ Judge Paula Gray, *Evidence to the House of Commons Women and Equalities Committee on their investigating the Government's response to the Consultation concerning the Gender Recognition Act 2004 [GRA 2023]* (Women and Equalities Committee 2021).

¹²¹⁵ Gender Recognition Act 2004, sch 1, paras 6(6) - 6(7).

¹²¹⁶ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) 41 – 43.

¹²¹⁷ Gender Recognition Act 2004, s 8(1).

degree of opacity surrounding the Panel which results in a worrying level of confusion as to its powers and discretion. This appears to contribute to the sense of vulnerability non-binary participants expressed in relation to submitting their highly sensitive information at considerable personal and financial cost to an unidentifiable panel of professionals.

The panel as a practical necessity

Despite the criticism, one participant did argue that the panel could serve a necessary practical purpose. Participant 2 explained that they felt it would be

Very difficult to work out a way [to determine GRC applications] that would work for everyone, for everyone's protection and everybody's recognition that wouldn't include a panel of some sort because that's how we work...We have to have a system

This recognises that while the current Panel may be undesirable, it would be necessary for some kind of body to exist which can receive and process applications in practice.¹²¹⁸

7.4.3 Discussion: should the Gender Recognition Panel be reformed?

The GRP serves a useful function in that it provides a means for applications to be processed. Applicants are also not necessarily subject to a full judicial hearing in England and Wales, nor do they have to directly incur legal costs associated with the tribunal.¹²¹⁹ However, the current GRP generates considerable concern and confusion

¹²¹⁸ Participant 2, Gender-neutral, 56 - 65 years.

¹²¹⁹ It could have been argued when the application fee was £140 that this might have been associated with tribunal costs, though as this is now £5 it is unlikely that this covers those expenses. The wider costs of the process may nevertheless be excessive, as will be explored in chapter 7.6 on the application fee.

as to its purpose and decision making. The main issues appeared to be the lack of transparency of the Panel and the sense of being subjected to judgement. Arguably, these aspects of the GRP could be seen to undermine international human rights standards by contributing to a sense of opacity to the process of legal sex recognition.¹²²⁰

There is also doubt over whether the legal and medical professionals on the Panel are even necessary to determine applications. Evidence from Judge Paula Gray asserts that the panel strictly assesses the prescriptive requirements of the GRA so there is no room for discretion in decision making.¹²²¹ Arguably, then, the processing of applications according to the GRA criteria could be undertaken by an administrative body.¹²²² The relevance of the medical professionals would be further undermined if the gender dysphoria requirement were removed as proposed in chapter 6. However, arguably so long as the applicant has met the prescribed medical requirements outlined in the Act, there still appears to be no clear reason why additional medical professionals must sit on the GRP. Therefore, and especially if other requirements were also removed, there should arguably be no need for application processing to be carried out by the GRP as a tribunal, rather than (e.g.) an administrative body.

An alternative body to delegate such processing powers could be the General Register Office which currently holds records of births, deaths, marriages, civil partnerships,

¹²²⁰ Directorate-General for Justice and Consumers, *Legal gender recognition in the EU: The journeys of trans people* (European Commission 2020) 6.2.2.

¹²²¹ Judge Paula Gray, *Second Response to the Women and Equalities Committee regarding the inquiry into the Reform of the Gender Recognition Act [GRA 2026]* (Women and Equalities Committee 2021) 7.

¹²²² Though considering the current amount of processing required, this would likely require considerable expense.

stillbirths and adoptions in England and Wales.¹²²³ This could be a suitable alternative body to process GRC applications and would avoid additional costs by setting up application processing within existing administrative infrastructure.¹²²⁴ If application processing powers were delegated to the Registrar General for England and Wales,¹²²⁵ this would also be similar to (e.g.) Scotland who have proposed delegating application processing powers to the Registrar General for Scotland.¹²²⁶

The role of the Registrar may also be utilised by policymakers as it could also serve an additional safeguarding function, by signposting applicants to support services or additional resources to better understand the consequences of legal sex change. Furthermore, it is also possible that delegating this responsibility (along with reducing the evidence required of applicants) could save the Government money in the long term. This is because the current costs of running the medico-legal panel (which have to process a considerable body of evidence) is likely to be much higher than an administrative body with prior experience of processing similar applications. Consequently, it is proposed that the Gender Recognition Panel should be removed, with responsibility for processing GRC applications delegated to the Registrar General for England and Wales.

¹²²³ Gov.UK, 'General Register Office' (Gov.UK 2022) <<https://www.gov.uk/general-register-office>>accessed 10 March 2022.

¹²²⁴ See Department of Social Protection, 'Apply for a Gender Recognition Certificate / Revised Birth Certificate' (Gov.ie 2022) <<https://www.gov.ie/en/service/b55abf-gender-recognition-certificate/>>accessed 10 March 2022.

¹²²⁵ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) para 135.

¹²²⁶ Gender Recognition Reform (Scotland) Bill 2022, s 2.

7.5 Spousal consent

7.5.1 An introduction to the spousal consent requirement

Applicants for a GRC must provide a statutory declaration of their marriage or civil partnership status, because this status may impose additional requirements on an applicant. Prior to 2013, a married person needed to divorce or annul their marriage before they could receive a GRC.¹²²⁷ A change of legal sex status of one party would have changed the nature of the marriage from opposite sex to same sex, which was not permissible at that time. Once the marriage was divorced or annulled, and the individual had received a full GRC, the couple could then enter into a civil partnership if they wished, as such partnerships were open to same-sex couples.¹²²⁸ Since the introduction of the Marriage (Same Sex Couples) Act 2013 (MSSCA), it has been possible for same-sex partners to marry. Consequently, it has also been possible for marriages to continue beyond one partner obtaining a full GRC, so long as the applicant's spouse makes a statutory declaration of consent for their marriage to continue.¹²²⁹ If the spouse does not consent, an interim GRC is granted which can then be used by either party as grounds to annul their marriage.¹²³⁰ Following annulment, a full GRC can then be issued to the applicant.

Civil partnerships were previously only available to same-sex couples.¹²³¹ Where one partner in a civil partnership sought to obtain a GRC, they could only apply for an

¹²²⁷ A divorce would have been on the existing grounds. An annulment would be provided through an interim GRC.

¹²²⁸ Civil Partnership Act 2004, s 1(1) (as originally enacted).

¹²²⁹ Gender Recognition Act 2004, ss 4A as amended by the Marriage (Same Sex Couples) Act 2013 and the Civil Partnership (Opposite-sex Couples) Regulations 2019.

¹²³⁰ *ibid.* Cf Scotland where an interim GRC has only been grounds for divorce of marriage or dissolution of civil partnership, rather than annulment.

¹²³¹ Civil Partnership Act 2004, s 1(1).

interim GRC which would provide grounds for annulment of the partnership. Following annulment (or dissolution), the pair could then enter into a marriage after the issuance of a full GRC. They could remain in that partnership if both parties were granted a full GRC on the same day. Following the introduction of the MSSCA, it became possible for a GRC applicant and their partner to convert the civil partnership into a marriage as opposed to ending their civil partnership, on the condition that the partner provides consent. Following the Civil Partnership (Opposite-Sex Couples) Regulations 2019, opposite-sex couples have been able to enter into civil partnerships in England and Wales.¹²³² These regulations amended the GRA to allow applicants to obtain a full GRC without annulling or dissolving their civil partnership or converting it to a marriage, so long as their partner consents.¹²³³

To summarise the current position, the spouse or civil partner of an applicant must issue a statutory declaration of consent in order for their marriage or civil partnership to continue before the issuance of a full GRC.¹²³⁴ If no consent is given, an interim GRC is issued to provide grounds for annulment.¹²³⁵ These rules are generally known as 'spousal consent' or 'spousal veto',¹²³⁶ which have been described as imposing a

¹²³² Government Equalities Office, *Implementing Opposite-Sex Civil Partnerships: Next Steps* (GEO July 2019) 13.

¹²³³ Explanatory Memorandum to the Civil Partnership (Opposite-Sex Couples) Regulations 2019 No. 1458, 5.

¹²³⁴ Gender Recognition Act 2004, s 4A as amended by the Marriage (Same Sex Couples) Act 2013 and the Civil Partnership (Opposite-sex Couples) Regulations 2019.

¹²³⁵ Gender Recognition Act 2004, s 4A as amended by the Marriage (Same Sex Couples) Act 2013; Civil Partnership (Opposite-sex Couples) Regulations 2019; HM Courts & Tribunals Service, *The General Guide for all Users T455: Gender Recognition Act 2004* (2019) 9.

¹²³⁶ Gender Recognition Act 2004, s4A as amended by the Marriage (Same Sex Couples) Act 2013. See generally Catherine Fairbairn and others, *Briefing Paper 08969 Gender recognition and the rights of transgender people* (House of Commons Library 2020) 35.

‘veto on gender recognition’.¹²³⁷ However, such descriptions are misleading since the requirement concerns a declaration of a spouse or partner’s intention to remain in the relevant legal partnership, rather than declaring their consent or veto to a change in legal sex status and a GRC application per se.¹²³⁸

The significance of the spousal consent is that while a divorce or civil partnership can be ended through divorce or dissolution, the interim GRC provides for annulment. A divorce or dissolution means the marriage or partnership is ended but its previous existence is still recognised in law. However, under annulment, the marriage or partnership is rendered null and void, and is treated in law as if it had never happened. The spousal consent therefore provides for an exceptional ground to annul the marriage or partnership beyond the grounds provided for in relation to divorce or dissolution.

Divorce requirements have been condemned as incompatible with international human rights standards,¹²³⁹ though it is important to note that the ECtHR has held that it is not a violation of the ECHR.¹²⁴⁰ *Compulsory* divorce requirements attract the most

¹²³⁷ Caterina Nirta, ‘A Critique of the Model of Gender Recognition and the Limits of Self-Declaration for Non-Binary Trans Individuals’ (2021) *Law and Critique*.

¹²³⁸ Stephen Whittle, ‘Written evidence to the Women and Equalities Committee [GRA2010]’ (UK Parliament 2020) <<https://committees.parliament.uk/writtenevidence/18336/pdf/>> accessed 20 August 2022.

¹²³⁹ See (e.g.) where such requirements were considered incompatible with the ICCPR: Human Rights Committee, *G v Australia: Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No.2172/2012* (2017) CCPR/C/119/D/2172/201. See also Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018).

¹²⁴⁰ *Hämäläinen v Finland* [2014] ECHR 787.

attention from human rights bodies and organisations,¹²⁴¹ though the spousal consent as in England and Wales is not often directly condemned on human rights grounds. Requirements related to ‘third-party consent for adults’¹²⁴² seeking legal recognition have been criticised on human rights grounds. The spousal consent requirement could be relevant to this standard insofar as it involves a third-party providing consent. However, as the spouse/partner is technically not consenting to the GRC application itself, it is arguably not relevant to this criticism. Nevertheless, the more general stipulations for recognition systems to be based on the principle of self-determination are much more relevant to the spousal consent requirement under the GRA.¹²⁴³

In September 2020, the Government confirmed that it would not be reforming this requirement, despite 84.9% of respondents to the public consultation expressing disagreement with the provision.¹²⁴⁴ The Government have defended the spousal consent as a ‘safeguard for the non-transitioning spouse’ to decide whether they want their marriage or civil partnership to continue before issuance of a GRC.¹²⁴⁵ They

¹²⁴¹ See e.g. ILGA Europe, ‘Rainbow Europe Map and Index 2022’ (ILGA 2022) <<https://www.ilga-europe.org/report/rainbow-europe-2022/>> accessed 13 August 2022; TGEU, ‘Trans Rights Map Europe and Central Asia 2022’ (TGEU 2022) <<https://tgeu.org/trans-rights-map-2022/>> accessed 10 August 2022; Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) para 3; Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018) para 39.

¹²⁴² Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018) para 28.

¹²⁴³ *ibid*; Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) para 6.2.1.

¹²⁴⁴ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 65.

¹²⁴⁵ Mike Freer MP, *Letter to Elliot Colburn MP on Westminster Hall Debate: Petition 327108 Reform of the Gender Recognition Act* (Cabinet Office Equality Hub, 3 March 2022).

argue that parties to a marriage (or civil partnership) should have an ‘equal say in the future’ of that partnership, given that transitioning can ‘fundamentally change its nature’.¹²⁴⁶

However, this position has also been criticised on the basis that a change of legal sex does not, as a matter of law, change that the marriage or civil partnership was valid at the point of entry.¹²⁴⁷ In *Napier v Napier*,¹²⁴⁸ Pickford J held that ‘where a decree of nullity or divorce a vinculo was granted it was in consequence of an impediment existing at the time of the marriage which made it no marriage’.¹²⁴⁹ In other words, in determining the validity of a marriage, one must look to the conditions of the point of entry into the union. It could be argued that while the circumstances within the union might change, at the point of entry the union was legal and should not be treated as if it never happened as per annulment. The current position appears even more peculiar in light of the introduction of same-sex marriage, where the State has already accepted that the sex of the parties to a marriage does not determine entry to the institution. Arguably, by suggesting that a change in legal sex status equates to a change in the terms of the contract, this incorrectly implies that there are ‘two kinds of marriage’ within law which denote a radically different legal status or position, and which

¹²⁴⁶ Women and Equalities Committee, *Reform of the Gender Recognition Act: Government response to the Committee’s Third Report, Fifth Special Report of Session 2021 – 22, HC 129* (House of Commons 2022) para 31.

¹²⁴⁷ Peter Dunne, ‘(Trans) Marriage Equality? Challenging Europe’s marital “Dissolution Requirements”’ (2016) 28(4) *Child and Family Law Quarterly* 325 – 348; Peter Dunne, ‘Marriage Dissolution as a pre-requisite for legal gender recognition’ (2014) 73(3) *Cambridge Law Journal* 506 – 510.

¹²⁴⁸ *Napier v Napier* [1915] P 184, 189 (Pickford LJ).

¹²⁴⁹ *ibid.*

therefore justifies a process for annulment.¹²⁵⁰ The significance of this distinction in law between divorce/dissolution and annulment was important to introduce early on in the chapter as these issues are picked up on throughout the empirical findings. I will therefore now present these findings on non-binary participants' attitudes towards this requirement.

7.5.2 Empirical findings

Quantitative data

Most non-binary respondents in this study opposed the spousal consent requirement (95.7%). Non-binary participants were more likely to oppose this requirement than binary trans participants. This difference was statistically non-significant by a small margin ($P=.054$).

¹²⁵⁰ Jens Scherpe and Peter Dunne, 'Comparative Analysis and Recommendations' in Jens Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2017) 635.

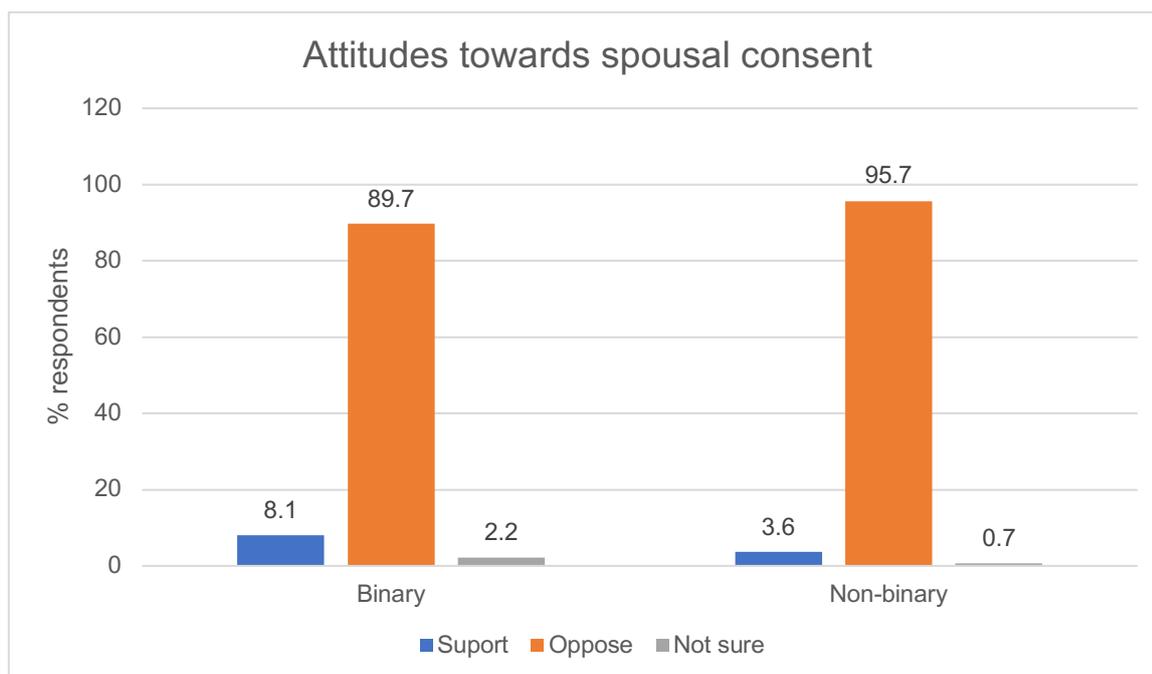


Figure 7–15. Non-binary and binary attitudes towards the **spousal consent** requirement (n = 276)

The middle age non-binary group were most likely to oppose this requirement (100%), closely followed by the younger group (96.2%). There was a notable gap between these two groups and the older group (81.3%), and these differences were statistically significant ($P=.012$). Older non-binary people were therefore much less likely to oppose this requirement, perhaps reflecting generational differences in attitudes towards the nature of marriage and civil partnerships.¹²⁵¹

¹²⁵¹ The potential reasons for this could be that older groups are more likely to hold traditional views related to gender roles in marriage and/or, perhaps that young people are more likely to criticise marriage as an outdated and patriarchal institution (see qualitative themes below). On attitudes towards gender roles more generally, see Alison Park and others, *British Social Attitudes, the 30th report, Gender roles: an incomplete revolution?* (NatCen Social Research 2013) 115 – 138.

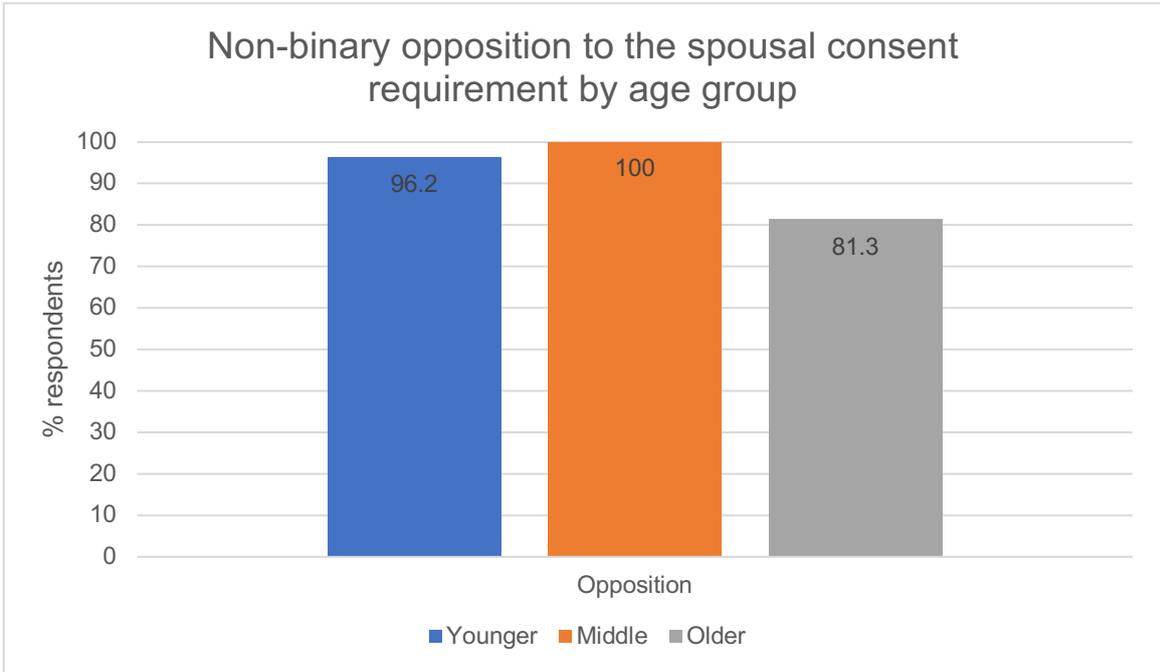


Figure 7–16. Non-binary opposition to the **spousal consent** requirement by age (n = 72)

The spousal consent requirement was the most opposed current requirement by a considerable margin, and it was the only current requirement to attract opposition from more than 90% of non-binary respondents.

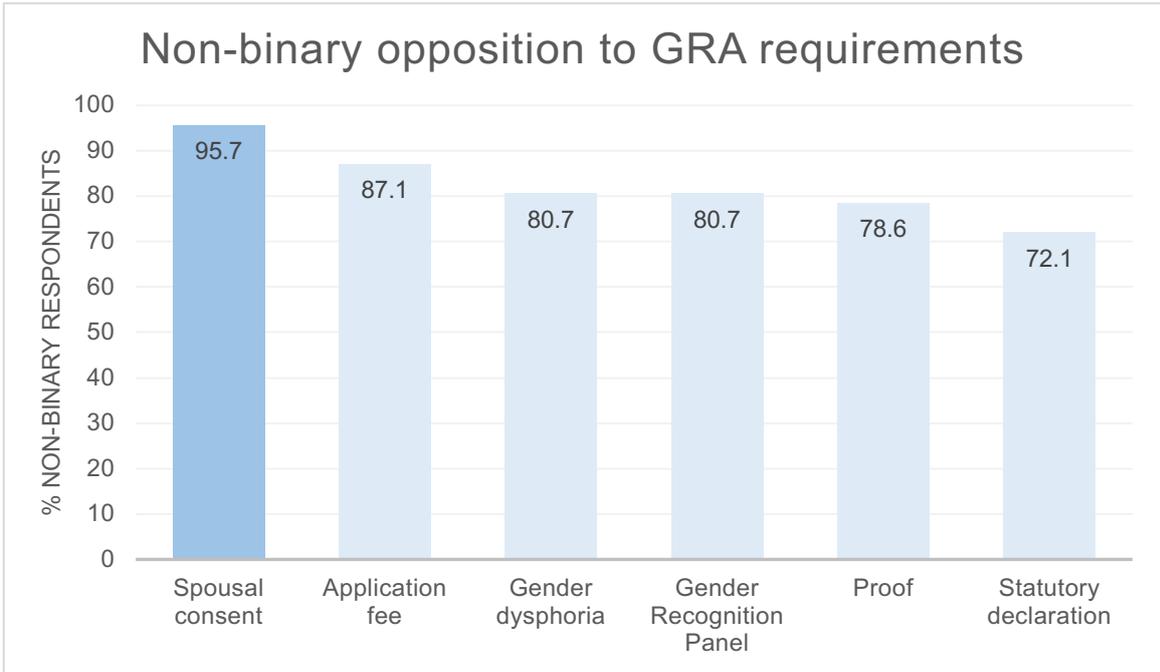


Figure 7–17. Non-binary opposition to the **spousal consent** requirement v others ($n = 140$)

Despite the considerable opposition, removing this requirement was the least selected reform option which would make non-binary participants more likely to apply for a GRC. Non-binary people were much less likely to say that removing this requirement would make them more likely to apply for a GRC (10%) compared to binary trans respondents (25%). This difference was statistically significant ($P < .001$).

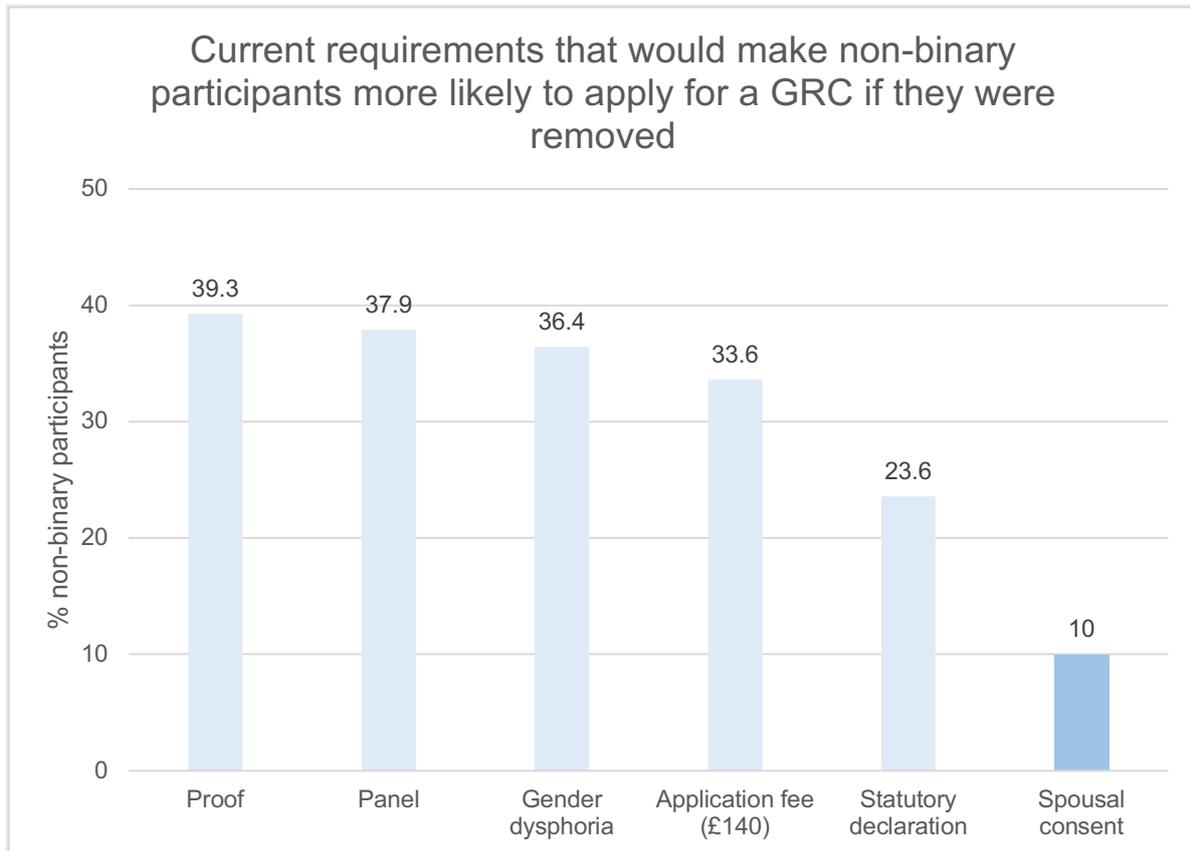


Figure 7–18. Removing **spousal consent** as a reform priority v other current requirements for non-binary participants (n = 140)

The middle age group was most likely to select this reform option (17.4%) followed by the younger (6.4%) and then older groups (6.3%). These differences were statistically non-significant ($P=.13$).

Qualitative themes

The spousal consent requirement did not attract as many additional comments as other requirements. However, some comments were made regarding autonomy and power imbalances between spouses/partners.

Autonomy

Two participants criticised the spousal consent requirement on the basis that it undermines autonomy, reflecting comments made by respondents in the public consultation.¹²⁵² One argued that gender is, ‘not something any other individual should have a say over and we should all have the ability to reach our own conclusions’.¹²⁵³ Similarly, another described the spousal consent requirement as ‘ridiculous’ and argued that, ‘gender is a completely personal thing and its great if your spouse supports you, but it shouldn’t be a requirement at all’.¹²⁵⁴

Many participants appeared to reflect a common misperception of the requirement as representing consent to the transition of the trans spouse, though it is better understood as consent to the continuation of the marriage or partnership.¹²⁵⁵ Nevertheless, it can have an indirect impact on the application in delaying the GRC application, particularly if the divorce, dissolution or annulment is a difficult and lengthy process.¹²⁵⁶ The connections between autonomy and gender identity reflects criticism from GIRES that this provision places trans people as the ‘only group that can have their civil rights delayed by another’.¹²⁵⁷ GIRES said, that irrespective of it being a delay (rather than veto), the effect of it is to imply that the “feelings” of the non-trans

¹²⁵² Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 65.

¹²⁵³ SR169, Fluctuates between male and nothing, 19 – 25 years.

¹²⁵⁴ Participant 3, Non-binary transmasculine, 19 -25 years.

¹²⁵⁵ Stephen Whittle and Fiona Simkiss, ‘A perfect storm: the UK Government’s failed consultation on the Gender Recognition Act 2004’ in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender Sexuality and the Law* (Edward Elgar Publishing 2020) n 107.

¹²⁵⁶ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) para 51.

¹²⁵⁷ *ibid* para 49.

spouse are more important' and it represents a 'clear indication' that the Government considers trans people as 'less than equal'.¹²⁵⁸

When asked why they thought the requirement should be removed, Participant 18 said that they 'just don't think its relevant what the spouse thinks'.¹²⁵⁹ This links to an apparent inconsistency pointed out by Dr Karl Rutledge in that the GRA gives the non-trans spouse/partner a role within the legal transition process which they do not have at any other stage of transitioning, including medical decisions such as being prescribed hormone therapy or undergoing surgery.¹²⁶⁰ Participant 18 also explained that if an applicant's spouse, 'is against it and they don't consent, then that probably says more about the relationship than it does anything else'.¹²⁶¹ They explained that for them, if their spouse did not consent then they 'would probably need to reconsider that relationship'.¹²⁶² These are legitimate reasons why someone might want to end a marriage or civil partnership (i.e. a spouse transitioning, or a spouse not being supportive of transition), but arguably it does not justify the law providing for annulment for an issue related to gender transition (as opposed to using existing grounds for divorce or dissolution).

Furthermore, while Participant 18 said that they might need to reconsider the relationship if their spouse was not supportive, research suggests that many

¹²⁵⁸ *ibid.*

¹²⁵⁹ Participant 18 Non-binary, 19 – 25 years.

¹²⁶⁰ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) para 50.

¹²⁶¹ Participant 18, Non-binary, 19 – 25 years.

¹²⁶² Participant 18, Non-binary, 19 – 25 years.

relationships continue where one partner transitions.¹²⁶³ Participant 1 and Participant 4 criticised the provision – with Participant 4 describing it as an ‘archaic concept’¹²⁶⁴ – but said that their partners were already, and would continue to be, supportive of them. By the time of applying for a GRC, most trans people are likely to have already told their partners¹²⁶⁵ and only a very small minority of applications are interim GRCs (around 3.5%).¹²⁶⁶ Arguably this requirement wrongly perpetuates the ‘unrealistic assumption that spouses are often not aware of their partner transitioning’.¹²⁶⁷ Renz argues that this provision is therefore based on ‘imaginary or hypothetical’ situations and ‘moral panics’ that a trans person will deceive their partner and/or leave them ‘trapped’ in the relationship.¹²⁶⁸ On the contrary, even where the non-trans spouse is not fully aware of their partners identity, this may not be malicious deception, but could be explained as them being fearful of their partner’s reaction. One participant in this study did say that they had not disclosed their gender identity to their partner because of concern about their partner’s reaction.¹²⁶⁹ This links to issues of the vulnerability of

¹²⁶³ Jennifer L Levi, ‘Divorce and Relationship Dissolution’, in Jennifer L Levi and Elizabeth E Monnin-Browder (eds), *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012) 87.

¹²⁶⁴ Participant 4, Non-binary / proxvir, 19 – 25 years.

¹²⁶⁵ Flora Renz, ‘Consenting to gender? Trans spouses after same-sex marriage’ in Daniel Monk and Nicola Barker (eds), *From Civil Partnership to Same Sex Marriage 2004 - 2014: Interdisciplinary Reflections* (Routledge 2015) 12.

¹²⁶⁶ This is based on comparing the data on total interim GRCs from GRP_5 tab with total full GRCs granted data in GRP_4 in Gov. UK, ‘Tribunal Statistics Quarterly: July to September 2021: Main Tables’ (July to September 2021) (Gov.UK) <<https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021>>accessed 10 March 2022.

¹²⁶⁷ Flora Renz, ‘Consenting to gender? Trans spouses after same-sex marriage’ in Daniel Monk and Nicola Barker (eds), *From Civil Partnership to Same Sex Marriage 2004 - 2014: Interdisciplinary Reflections* (Routledge 2015) 12.

¹²⁶⁸ Trans Widows Voices, ‘Written evidence submitted by Trans Widows Voices [GRA2029]’ (UK Parliament 2021) <<https://committees.parliament.uk/writtenevidence/36734/pdf/>>accessed 8 March 2022.

¹²⁶⁹ Participant 17, Non-binary, 26 – 35 years.

non-binary (and binary) trans people in such situations where they may be at risk of domestic violence and coercive control. This was a prominent issue in itself and is therefore presented in further detail in the theme below.

Power imbalances

There were comments which expressed concern that the requirement could put the applicant in a vulnerable position. One participant asked, 'what if [the applicant is] in an abusive relationship?'.¹²⁷⁰ They argued that it is 'unacceptable that a partner gets a say on the person's gender'.¹²⁷¹ Another pointed out that it may not just be difficult for applicants with current partners, but also for 'those who have separated but not yet divorced'.¹²⁷² This links to concerns heard in the WEC Transgender Equality Inquiry, from groups specialising in domestic violence and abuse. While the requirement does not allow a person to ultimately veto an application, the potential impact of this provision on the trans applicant should be seen within the context of domestic abuse and the tactics that perpetrators often adopt in such situations. This is particularly important as trans people are disproportionately at risk of experiencing domestic violence.¹²⁷³ Research shows that domestic abuse perpetrated against trans people often involves the perpetrator using tactics like withholding medication or preventing treatment which helps the victim express their gender identity.¹²⁷⁴ Galop therefore describe the spousal consent requirement as a 'further potential tool for abuse and

¹²⁷⁰ SR 231, Non-binary, 19 - 25 years.

¹²⁷¹ SR 231, Non-binary, 19 - 25 years.

¹²⁷² SR 114, Trans masculine, 26 – 35 years.

¹²⁷³ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC 884, Q1 - 19* (House of Commons 9 December 2020) Q14.

¹²⁷⁴ Jasna Magić and Peter Kelley, 'LGBT+ people's experiences of domestic abuse: a report on Galop's domestic abuse advocacy service' (London Galop 2018) <http://www.galop.org.uk/wp-content/uploads/Galop_domestic-abuse-03a-low-res-1.pdf>accessed 20 August 2022.

coercive control' as it gives the spouse/partner the ability to prevent the victim from obtaining a GRC while in a marriage or partnership.¹²⁷⁵ They warn that it gives an abusive partner the tools to further 'ridicule, deny, and disempower' their partner,¹²⁷⁶ which can be particularly burdensome for people who are married or in a civil partnership but have separated.¹²⁷⁷ Similarly, RISE have described the requirement as 'extremely concerning and potentially dangerous for trans people who are experiencing domestic abuse'.¹²⁷⁸ They argued that abusers will often employ tactics to prevent their partner from transitioning, adopting a 'highly controlling' approach with a 'sense of entitlement' over their partner.¹²⁷⁹ This reflects other research indicating that cisgenderism and microaggressions are often 'operationalised' in the context of intimate partner violence against trans and non-binary people.¹²⁸⁰ The requirement, in RISE's view, therefore 'gives abusive partners a tool to foster the sense that they have ownership and authority over their partner's body and identity'.¹²⁸¹ This is also

¹²⁷⁵ Galop, *Written evidence submitted to the Women and Equalities Committee [GRA1614]* (UK Parliament 2020) para 6.2.

¹²⁷⁶ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) para 53.

¹²⁷⁷ Galop, *Written evidence submitted to the Women and Equalities Committee [GRA1614]* (UK Parliament 2020) para 6.4.

¹²⁷⁸ Rise, 'Written evidence submitted to the Transgender Equality Inquiry' (UK Parliament, August 2015)
<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19548.pdf>>accessed 10 August 2022.

¹²⁷⁹ *ibid.*

¹²⁸⁰ Michaela M Rogers, 'Exploring the Domestic Abuse Narratives of Trans and Nonbinary People and the Role of Cisgenderism in Identity Abuse, Misgendering, and Pathologizing' (2021) 27(12-13) *Violence Against Women* 2187 – 2207.

¹²⁸¹ Rise, 'Written evidence submitted to the Transgender Equality Inquiry' (UK Parliament, August 2015)
<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19548.pdf>>accessed 10 August 2022.

particularly concerning for non-binary people who report similar degrees of domestic abuse as other trans people,¹²⁸² and particularly high levels of sexual violence.¹²⁸³

The vulnerability of trans and non-binary people in relation to abusive relationships is arguably overlooked in arguments in favour of the requirement, where the non-trans spouse is often framed as the one needing protection from the potentially abusive spouse.¹²⁸⁴ This has been criticised by Renz as relying on highly troublesome assumptions about trans people, their gender identity, their motivations and their relationships.¹²⁸⁵ It usually presumes that the partners of the trans applicants are always cisgender women,¹²⁸⁶ who are subsequently portrayed as ‘potentially vulnerable victims of deception who the law needs to protect’.¹²⁸⁷ This arguably rests on an implicit distrust of trans peoples’ identity and the image of the ‘predatory’ trans woman.¹²⁸⁸

¹²⁸² Sarah Peitzmeier and others, ‘Intimate Partner Violence in Transgender Populations: Systematic Review and Met-Analysis of Prevalence and Correlates’ (2020) *American Journal of Public Health* 110.

¹²⁸³ Galop, *LGBT+ People and Sexual Violence* (Galop 2022) 11.

¹²⁸⁴ Trans Widows Voices, ‘Written evidence submitted by Trans Widows Voices [GRA2029]’ (UK parliament 2021) <<https://committees.parliament.uk/writtenevidence/36734/pdf/>> accessed 8 March 2022. See generally Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021).

¹²⁸⁵ Flora Renz, ‘Consenting to gender? Trans spouses after same-sex marriage’ in Daniel Monk and Nicola Barker (eds), *From Civil Partnership to Same Sex Marriage 2004 - 2014: Interdisciplinary Reflections* (Routledge 2015) 14.

¹²⁸⁶ *ibid* 14. See also Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC129, Q124 - 165* (House of Commons 16 June 2021) Q143.

¹²⁸⁷ Flora Renz, ‘Consenting to gender? Trans spouses after same-sex marriage’ in Daniel Monk and Nicola Barker (eds), *From Civil Partnership to Same Sex Marriage 2004 - 2014: Interdisciplinary Reflections* (Routledge 2015) 8.

¹²⁸⁸ Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (Seal Press 2016) 36; Flora Renz, ‘Consenting to gender? Trans spouses after same-sex marriage’ in Daniel Monk and Nicola Barker

Two participants also linked this requirement to broader criticisms of marriage as a patriarchal institution.¹²⁸⁹ Participant 18 said that they found the spousal consent requirement ‘uncomfortable’ before arguing that ‘it’s like going back 100 years to the time where one partner has possession of the other partner, which seems a bit strange to me’.¹²⁹⁰ Participant 4 also connected the requirement to perceived patriarchal underpinnings of marriage, saying that while marriage ‘can be a beautiful thing’, it was ultimately about ‘a father giving away a bride to a man as property...and has its roots in misogyny’. Therefore, the requirement ‘participates in that [misogyny]’ because a partner would be able to say “you’re not going to do this” [and] that makes no sense to me whatsoever...in what other circumstance would that be appropriate?’.¹²⁹¹ Arguably these criticisms appear more directly related to marriage as an institution, rather than the spousal consent provision specifically. However, similar arguments have been made by scholars who argue that the provision is intimately related to heteropatriarchy and represents a ‘thinly veiled excuse for homophobia’.¹²⁹² Evidence presented to the Women and Equalities Committee has described it as a ‘relic of homophobia’ which is based on a fear of finding yourself married to someone of the same-sex.¹²⁹³ This criticism is more compelling since the law retains the spousal

(eds), *From Civil Partnership to Same Sex Marriage 2004 - 2014: Interdisciplinary Reflections* (Routledge 2015) 8.

¹²⁸⁹ Nicola Barker, *Not the marrying kind: A feminist critique of same-sex marriage* (Palgrave Macmillan 2012).

¹²⁹⁰ Participant 18, Non-binary, 19 – 25 years.

¹²⁹¹ Participant 4, Non-binary / proxvir, 19 – 25 years.

¹²⁹² Flora Renz, ‘Consenting to gender? Trans spouses after same-sex marriage’ in Daniel Monk and Nicola Barker (eds), *From Civil Partnership to Same Sex Marriage 2004 - 2014: Interdisciplinary Reflections* (Routledge 2015) 7. See also Alex Sharpe, ‘Transgender Marriage and the Legal Obligation to Disclose Gender History’ (2012) 75(1) *Modern Law Review* 33–53.

¹²⁹³ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act, HC 884, Q96 – 123* (House of Commons 17 March 2021) Q101.

consent provision (and ability to annul the marriage/partnership) since the introduction of same-sex marriage. As argued in the introduction, if the law governing the institution of marriages make no distinction between sexes, it is unclear why, under this provision, a change in legal sex status does represent a fundamental change in the marriage contract. Arguably, by providing for an additional legal remedy, beyond that which is already available for relationship breakdown, the State could be seen to be legitimising moral panics surrounding a marriage being perceived as same-sex.¹²⁹⁴

Sharpe argues that this provision represents a broader homophobia within law, most evident through law on legal sex status because of the expectation that trans people will identify as heterosexual.¹²⁹⁵ In *Corbett*, marriage was described as an institution in which the ‘capacity for natural heterosexual intercourse is an essential element’.¹²⁹⁶ Throughout the judgment, April Ashley’s identity as a woman was assessed with reference to her sexuality and heterosexual normativity, in an attempt to ‘establish homosexuality over transsexuality’.¹²⁹⁷ The effect of the inscription of ‘homosexuality onto the body’ of Ashley by Ormrod J was to conclude that she was in fact an ‘accomplished female impersonator’.¹²⁹⁸ It could be argued that law reform since *Corbett*, including the MSCCA, GRA and EA, may indicate that this homophobic anxiety no longer persists in law. However, it is common for those in favour of the spousal consent requirement to justify its existence on the basis that one partner’s

¹²⁹⁴ Peter Dunne, ‘Ten years of gender recognition in the United Kingdom: still a “model for reform”?’ (2015) Public Law 530 – 539, 533 – 534.

¹²⁹⁵ Alex Sharpe, ‘Transgender Jurisprudence and the Spectre of Homosexuality’ (2000) 14(1) Australian Feminist Law Journal 23 – 37.

¹²⁹⁶ *Corbett v Corbett* [1971] P 83, [1970] 2 All ER 33, 105 (Ormrod J).

¹²⁹⁷ Alex Sharpe, ‘Transgender Jurisprudence and the Spectre of Homosexuality’ (2000) 14(1) Australian Feminist Law Journal 23 – 37, 28.

¹²⁹⁸ *Corbett v Corbett* [1971] P 83, [1970] 2 All ER 33, 104 (Ormrod J).

transition could ‘change the identity of one of the partners’ and they should therefore have a ‘right to say in their own identity’.¹²⁹⁹ While it is true that a partner may wish to leave a relationship based on their partner’s transition, it still does not appear to justify the State providing for an exceptional provision for partners of GRC applicants to leave their partnership through annulment. Annulment may be preferred by some who, for cultural or social reasons, find divorce and/or a perceived same-sex union to be offensive.¹³⁰⁰ However, this preference alone does not appear to justify that provision, particularly when balancing this preference against the impact that it has on trans applicants. Arguably the spousal consent requirement, alongside other provisions of the Act,¹³⁰¹ reflects the State’s endorsement of a continued anxiety surrounding normative gender and sexual identity.¹³⁰²

7.5.3 Discussion: should the spousal consent requirement be reformed?

The spousal consent provision in England and Wales is preferable to requirements in other jurisdictions which require divorce or conversion to a civil union. Such requirements are subject to criticism as to their legitimacy and proportionality,¹³⁰³ and while not requiring divorce/dissolution, the spousal consent provision arguably mimics such requirements by '[sending] out a clear signal that these relationships are valued

¹²⁹⁹ Women and Equalities Committee *Oral evidence: Reform of the Gender Recognition Act*, HC 884, Q124 - 165 (House of Commons 21 April 2021) Q143; Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 65.

¹³⁰⁰ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22*, HC997 (House of Commons 2021) para 116.

¹³⁰¹ See relevant discussions particularly in 6.3 (gender dysphoria), 7.2.2 (statutory declaration wording) and 7.3.2 (proof requirement).

¹³⁰² Flora Renz, ‘Consenting to gender? Trans spouses after same-sex marriage’ in Daniel Monk and Nicola Barker (eds), *From Civil Partnership to Same Sex Marriage 2004 - 2014: Interdisciplinary Reflections* (Routledge 2015) 2 - 3.

¹³⁰³ Peter Dunne, ‘(Trans) Marriage Equality? Challenging Europe’s marital “Dissolution Requirements”’ (2016) 28(4) *Child and Family Law Quarterly* 325 – 348.

less highly'.¹³⁰⁴ However it is worth repeating that such requirements (including the provision in England and Wales) are not unlawful under the ECHR.¹³⁰⁵

While it has been recognised that many relationships can survive post-transition,¹³⁰⁶ there may be circumstances in which a person wants to leave a marriage or civil partnership in light of their partner's transition. However, since the introduction of no-fault divorce in April 2022,¹³⁰⁷ this right of the partner is sufficiently provided for in law. Before then, divorce was provided for under certain limited circumstances, as well as often inflicting distressing processes on the parties involved and their children.¹³⁰⁸ However, since fault does not have to be proven as a legal fact to divorce, this suggests that existing legal grounds would be sufficient. On 21 February in a Westminster Hall debate, Mike Freer MP stated that the Divorce, Dissolution and Separation Act 2020 coming into effect imminently will 'remove what is known as spousal veto'.¹³⁰⁹ While he was incorrect in that it will not remove the requirement, he envisaged that it will have a 'positive impact' in cases where someone does not want to stay in their marriage or civil partnership given their partner's transition.¹³¹⁰

¹³⁰⁴ Lucy Crompton, 'Civil Partnerships Bill 2004: The Illusion of Equality' [2004] 34(12) Family Law 888 – 891, 891.

¹³⁰⁵ *Hämäläinen v Finland* [2014] ECHR 787.

¹³⁰⁶ Jennifer L Levi, 'Divorce and Relationship Dissolution', in Jennifer L Levi and Elizabeth E Monnin-Browder (eds), *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012) 87.

¹³⁰⁷ Divorce Online, 'No Fault Divorce' (Divorce Online 2022) <<https://www.divorce-online.co.uk/divorce/no-fault-divorce/what-is-a-no-fault-divorce/>> accessed 10 March 2022.

¹³⁰⁸ *ibid.*

¹³⁰⁹ Mike Freer MP, *Letter to Elliot Colburn MP on Westminster Hall Debate: Petition 327108 Reform of the Gender Recognition Act* (Cabinet Office Equality Hub, 3 March 2022).

¹³¹⁰ *ibid.*

Consequently, the law arguably provides for a suitable route out of a marriage or civil partnership without providing for the spousal consent requirement.

Nevertheless, while transition has been argued to not justify grounds for annulment, it could be argued that it is desirable to safeguard against the (unlikely) situation that a partner or spouse is not aware of their partner's transition. This has also appeared to be an issue which policymakers may want to safeguard against. It may increase the likelihood of reform successfully passing too, since it may represent a compromise for those concerned at the very small risk of someone not being aware of their partner's transition. One solution to this is for the Registrar to provide a notice to the partner of an applicant where a full GRC is to be granted.¹³¹¹ This could present the partner with the relevant information to then decide whether to continue in the partnership or seek divorce or dissolution on the existing grounds.

The provision could also potentially be accompanied by the ability for the spouse or partner to lodge a request for delay, to allow time for the divorce or dissolution to be finalised. However, any such period should be time limited so that an application could not be delayed beyond what is necessary. This could perhaps be a period between 6 – 12 months, though such a time limit would require more detailed consultation with experts working in this field.

A spousal notification is also not without risk, as an automatic notification to an abusive spouse or partner (or a partner from whom the applicant is separated) could place the

¹³¹¹ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) paras 46, 63.

applicant in a vulnerable position.¹³¹² A notice provision should therefore be accompanied by the ability for an applicant to object to this notice in exceptional circumstances, such as where notification could pose a serious risk to their safety or the safety of others (such as children).¹³¹³

This solution could represent a reasonable compromise which recognises that the spousal consent provision is particularly stigmatising and harmful. However, it also recognises that reform is much more likely to proceed where there is at least some mechanism to safeguard against the very unlikely situation of one partner not being aware of another's transition. Consequently, it is proposed that the spousal consent provision is replaced with a spousal notification period.

¹³¹² See generally: Amy Roch, Graham Ritchie and James Morton, *Transgender People's Experiences of Domestic Abuse* (Scottish Transgender Alliance 2013).

¹³¹³ Jens Scherpe and Peter Dunne, 'Comparative Analysis and Recommendations' in Jens Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2017) 633.

7.6 Application fee

7.6.1 An introduction to the application fee

Under section 7(2), the GRA makes provision for a non-refundable application fee.¹³¹⁴

At the time of data collection in March 2020, the application fee for a GRC was £140.

This fee was an excessive financial burden on applicants and the majority of respondents to the public consultation were in favour of removing the fee (58.5%), though a sizeable number were in favour of retaining the fee (41.5%).¹³¹⁵ Of those who thought the fee should be retained, the majority felt the fee should not be reduced from £140.¹³¹⁶

Interestingly, despite the application fee not attracting as much opposition as other requirements, the Government announced that their limited reform to the GRA would include reducing the fee to a ‘nominal amount’.¹³¹⁷ In May 2021, the Minister for Women and Equalities announced that the fee would be reduced to £5 to make the process ‘more affordable’ and to remedy concerns as to the cost of the process.¹³¹⁸ The previous fee could be waived under some circumstances and the possibility of receiving financial help remains.¹³¹⁹ The current £5 is a notable improvement on the

¹³¹⁴ Gender Recognition Act 2004, s 7(2).

¹³¹⁵ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 69.

¹³¹⁶ *ibid* 70.

¹³¹⁷ Government Equalities Office and the Rt Hon Liz Truss, ‘Written Ministerial Statement: Response to Gender Recognition Act (2004) consultation’ (Gov.UK, 22 September 2020).

¹³¹⁸ Government Equalities Office, ‘Press release: Gender Recognition Certificate fee reduced’ (Gov.UK May 2021) <<https://www.gov.uk/government/news/gender-recognition-certificate-fee-reduced>>accessed 3 October 2021.

¹³¹⁹ HM Courts & Tribunals Service and Ministry of Justice, ‘How to apply for help with fees (EX160A)’ (Gov.UK 23 May 2022) <<https://www.gov.uk/government/publications/apply-for-help-with-court-and-tribunal-fees/how-to-apply-for-help-with-fees-ex160a>>accessed 20 August 2022.

overall financial burden and is similar to other administrative document requests, such as requesting a birth, death, marriage or civil partnership certificate which currently costs £11.¹³²⁰ In this context, the £5 is unexceptional. However, there are additional costs associated with the legal sex process which was noted by respondents to the Government's public consultation.¹³²¹ This issue of additional costs, and other concerns as to the justification of the application fee, were noted by non-binary participants in this study and will be presented below.

The Council of Europe's Resolution 2048 calls on member states to make legal recognition procedures 'accessible' for all people irrespective of their 'financial situation'.¹³²² The High Commissioner for Human Rights also calls on legal recognition systems to be 'accessible and, to the extent possible, cost-free'.¹³²³ There is no maximum cost limit as per the ECHR, though it does need to be 'accessible'.¹³²⁴ These standards are framed broadly, so they do not only refer to the impact of any application fee, but more generally refer to the whole process as needing to be financially accessible for applicants.

¹³²⁰ E.g. requesting a birth, death, marriage or civil partnership certificate costs £11. See Gov.UK, 'Order a birth, death, marriage or civil partnership certificate' (Gov. UK 2022) <<https://www.gov.uk/order-copy-birth-death-marriage-certificate>>accessed 8 March 2022.

¹³²¹ Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020) 71-72.

¹³²² Parliamentary Assembly, *Resolution 2048: Discrimination against transgender people in Europe* (Council of Europe 2015) para 6.2.1.

¹³²³ Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018) para 39.

¹³²⁴ *X v The Former Yugoslav Republic of Macedonia* [2019] ECHR 55 [70]

The empirical findings presented below account for the new reduced application fee. The survey was designed to account for possible reforms to the GRA following the public consultation so the question on the application fee did not specify an amount. Participants were asked whether they felt there should be an application fee, and if so, what the fee should be.¹³²⁵ The interview data also did not presume a specific fee amount. Therefore, despite reform, the empirical findings are still applicable to the new fee.

7.6.2 Empirical findings

Quantitative data

Most non-binary participants opposed the application fee (87.1%). The application fee was equally unpopular with binary trans respondents (89.7%). This difference was statistically non-significant ($P=.506$).

¹³²⁵ Appendix 2.

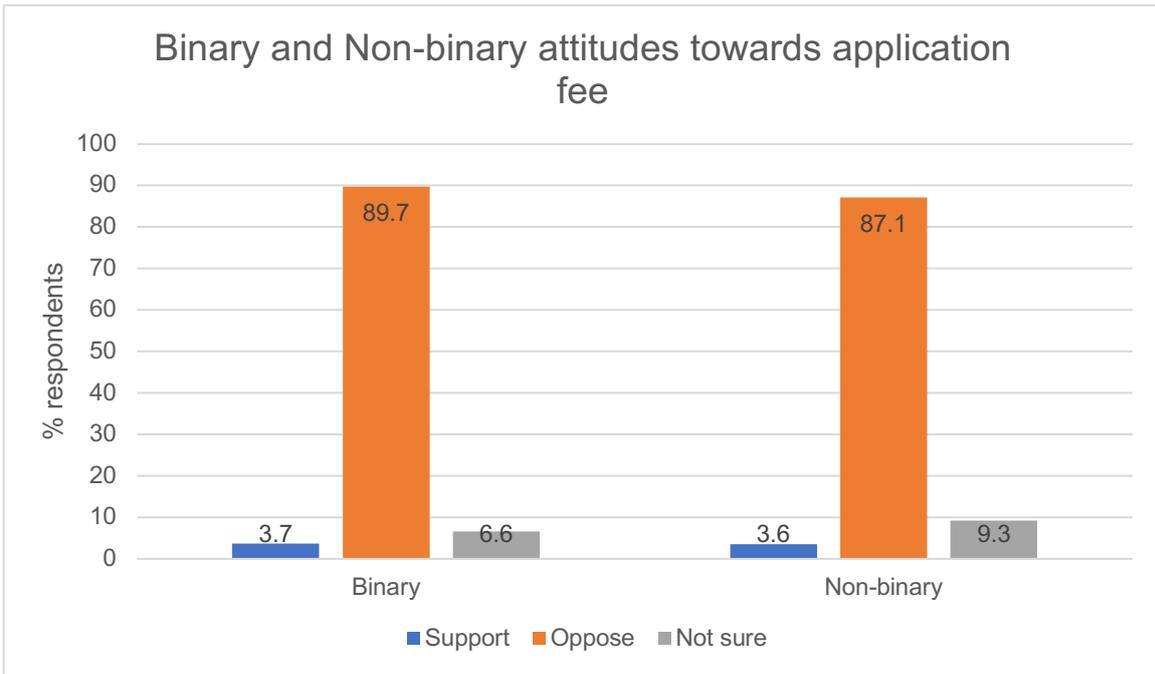


Figure 7–19. Non-binary and binary attitudes towards **application fee** (n = 276)

Opposition to the application fee decreased as age increased, with 94.7% of the younger non-binary respondents opposed, compared with 78.6% of the older group. This may represent generational differences in wealth, with those in the older group having access to greater disposable income than the younger group. The differences between the groups were statistically non-significant ($P=.100$).

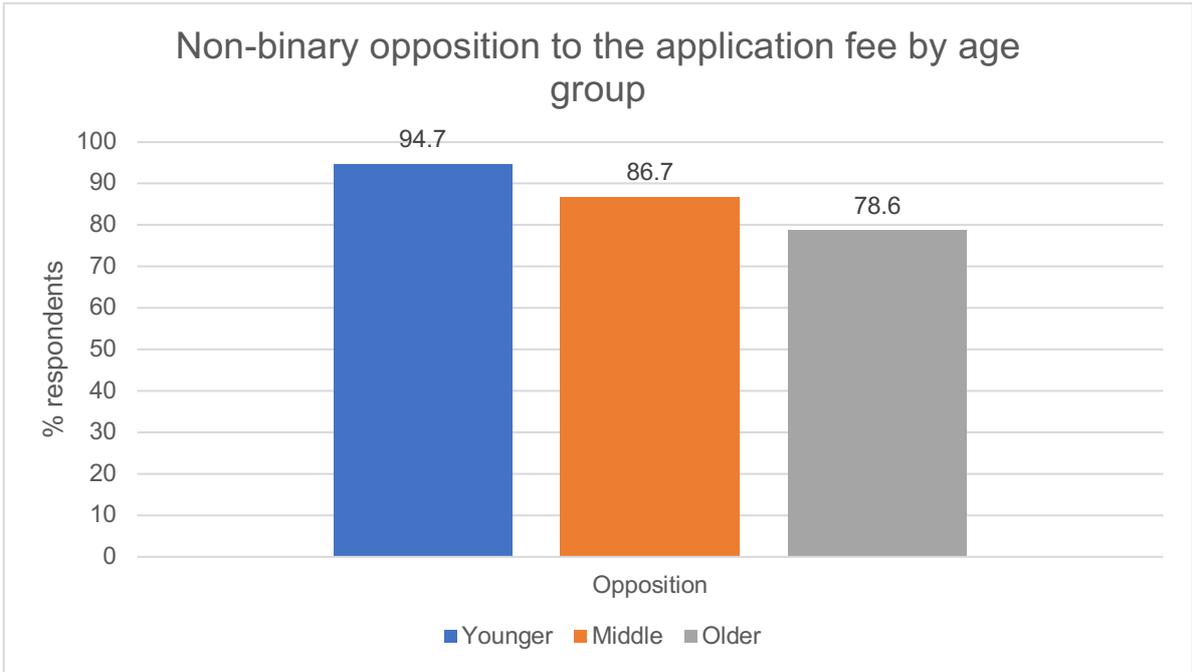


Figure 7–20. Non-binary opposition to the **application fee** by age (n = 122)

When compared with the other current requirements of a GRC, the application fee was the second most opposed current requirement of the GRA.

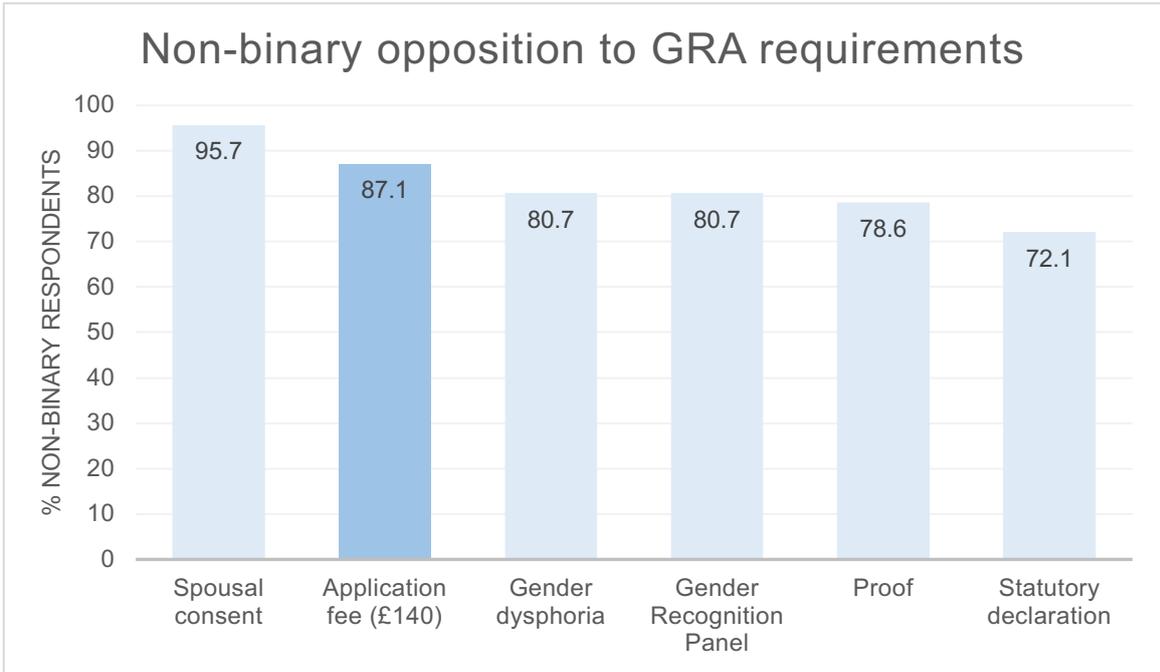


Figure 7–21. Non-binary opposition to the **application fee** v other requirements (n = 140)

Non-binary participants who said that there *should* be an application fee (5 respondents, 3.6%) were then offered a range of fee options to select from. Most of these responses supported a fee of £100 or less.¹³²⁶ Meanwhile, one survey respondent felt that there should be an increase in the application fee to between £141 – 200.¹³²⁷

¹³²⁶ SR 36, Non-binary, 56 – 65 years; SR 38 Trans, Genderqueer, Other, 46 – 55 years; SR239 Non-binary 19 – 25 years; SR246 Non-binary, Gender fluid 26 – 35 years.

¹³²⁷ SR17, Transgender, 19 – 25 years.

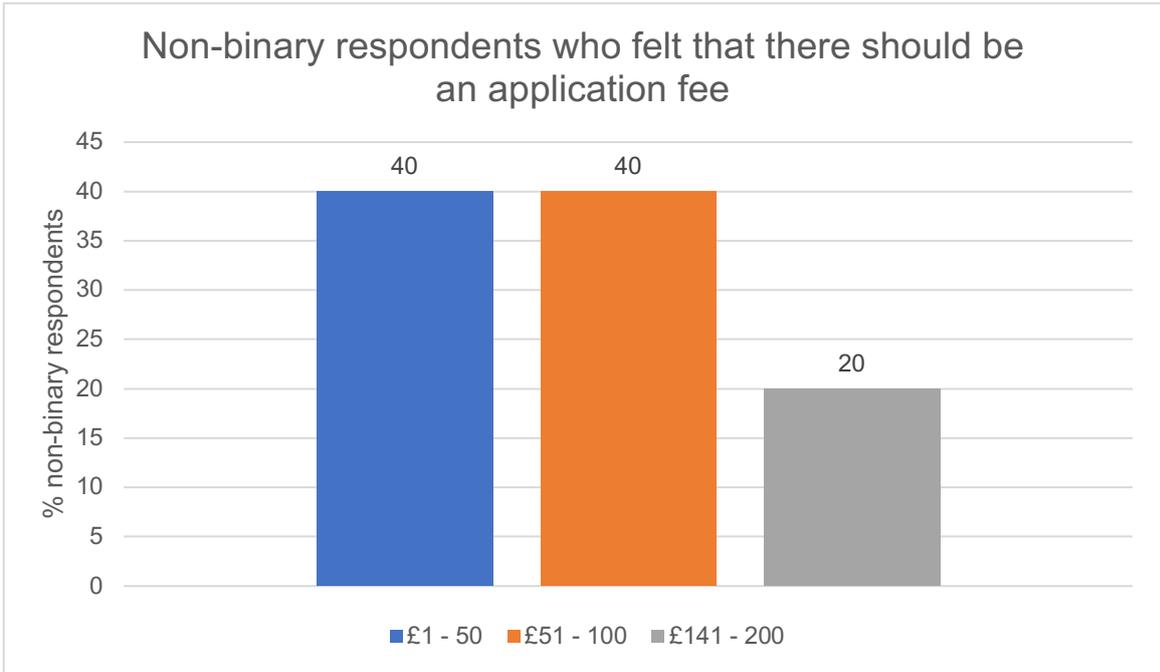


Figure 7–22. Non-binary attitudes towards reformed **application fee** options (n = 5)

Just over one-third of non-binary respondents (33.6%) said that removing the application fee would make them more likely to apply for a GRC. Binary trans respondents were much more likely to say that removing the application fee would make them more likely to apply for a GRC (68.4%) compared with non-binary respondents (33.6%). This difference was statistically significant at $P < .001$.

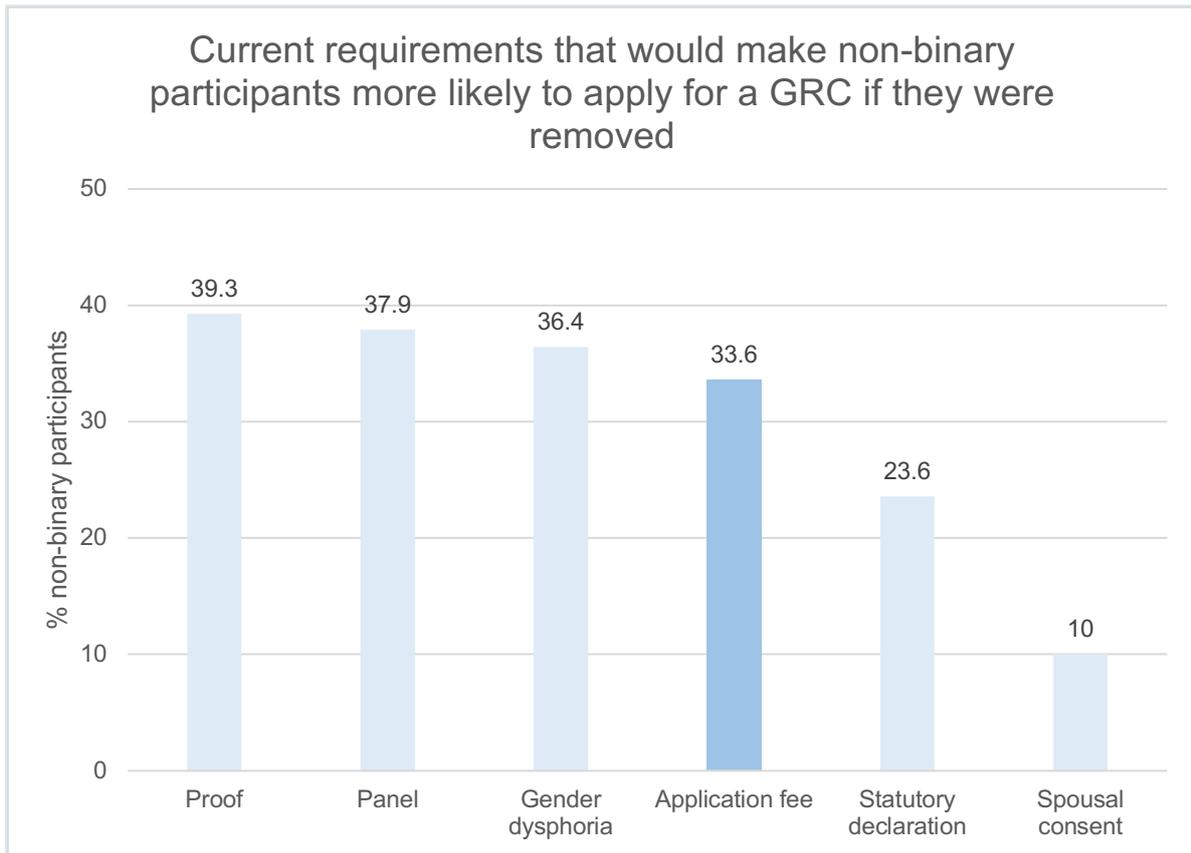


Figure 7–23. Removing **application fee** as a reform priority for non-binary participants v other reform options (n = 140)

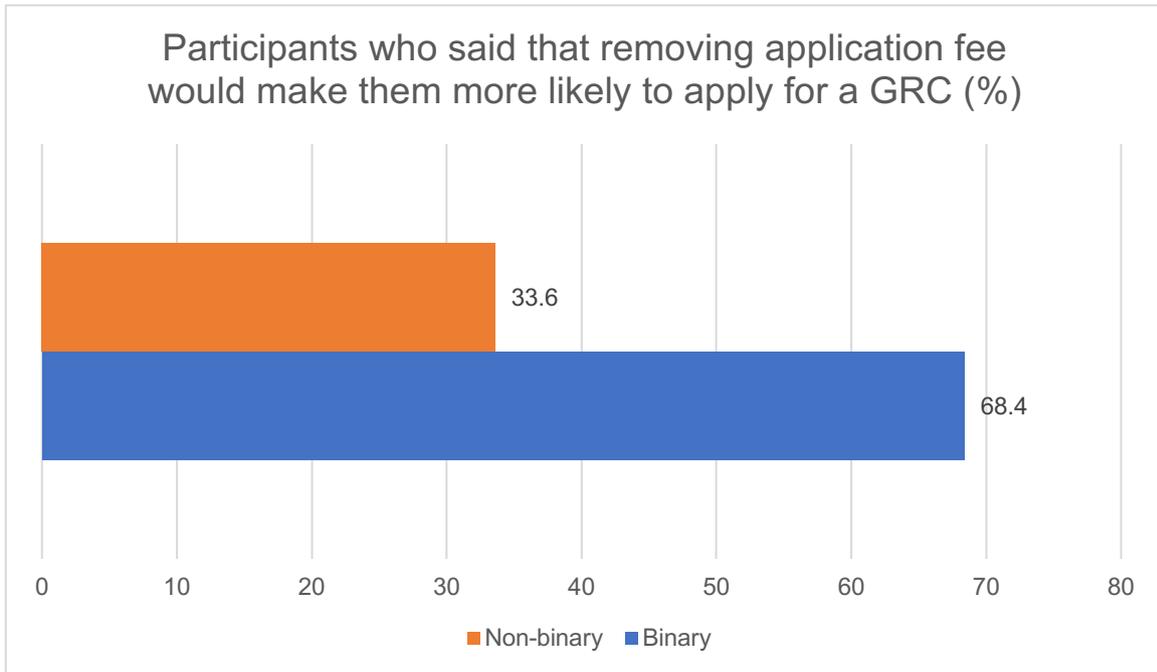


Figure 7–24. Non-binary and binary support for removing **application fee** as a reform priority (n = 276)

Older non-binary respondents were most likely to select this as a reform priority (43.8%), followed by younger respondents (38.5%) and middle-aged respondents (34.8%). These differences were statistically non-significant ($P=.81$).

Qualitative themes

General and hidden costs

There were very few non-binary respondents who discussed the application fee in the free text option of the survey. However, many binary trans respondents highlighted that there were additional costs in the GRC application process.¹³²⁸ With this

¹³²⁸ For the (binary) survey respondents, one respondent highlighted that obtaining a GRC is ‘expensive’ and cited ‘the application itself, solicitors’ fees, and doctors fees’ as examples of additional hidden costs: SR127, Male, 26 - 35 years. This was also reflected by another who pointed out that ‘the costs are often a lot more than [the application fee] though. When I got my GRC I had to spend a lot of money in order to get one of the preferred professionals to do me a referral’: SR 162, Male, 19 – 25 years. Another respondent similarly highlighted that ‘the evidence cost money

information from the binary trans respondents, the additional costs were then discussed with the non-binary interviewees.

Some participants criticised the supporting evidence as adding significant cost to the system. Participant 3 explained that the expense involved in 'building up enough evidence for [the panel]' was a barrier to them applying for a GRC. When asked what kind of additional costs concerned them, they said 'the cost of travelling to [Gender Identity Clinics] for appointments' to obtain a diagnosis of gender dysphoria, as well as changing other documents to evidence the proof requirement, like a driving licence and passport.¹³²⁹

Similarly, Participant 11 explained how the 'expense' was a problem in the GRC process. They also noted the supporting evidence as the biggest concern and that they had spent £150 on changing other documents to satisfy the proof requirement. Therefore, they argued that even if the fee were reduced or waived, the process is still 'not free' because of the cost to obtain supporting evidence.¹³³⁰ Two others criticised the costs too. When asked which element of the GRA put them off the most, Participant 17 simply replied 'the cost'.¹³³¹ Participant 16 responded to this question in the same way, saying the reason they had not applied was because 'it is expensive' and their status as a student made the system even more inaccessible financially.¹³³² The overall cost of an application can be significant with fees potentially incurred in

too...why should I pay £140 plus monies for reports?': SR 170, Trans man, 46 -55 years.

¹³²⁹ Participant 3, Non-binary transmasculine, 19 -25 years.

¹³³⁰ Participant 11, Non-binary, 26 – 35 years.

¹³³¹ Participant 17, Non-binary, 26 – 35 years.

¹³³² Participant 16, Trans masculine, 26 – 35 years.

obtaining the two medical reports;¹³³³ solicitors fees involved in the statutory declaration of the applicant and spouse/partner;¹³³⁴ changing markers on other documentation like passports and driving licences; providing copies of the original birth and marriage/civil partnership certificates; sending the application and paper work via special delivery (if not opting for the digital route); and if evidence is not provided in English an applicant will need to pay for official translation by a recognised organisation and have that translation certified.¹³³⁵ Consequently, in practice, the ability for someone to access recognition, even without considering application fees, is largely dependent on their socio-economic status.¹³³⁶ This is highly problematic as, if legal recognition is understood as a fundamental right,¹³³⁷ this would suggest that socio-economic status is a significant factor in someone being able to realise such rights. With costs of up to £1000 for those wishing to accumulate the necessary evidence in a timely manner, this would arguably contradict evidence from some groups who supported retention of the previous £140 application as the cost of the process was currently 'not that burdensome'.¹³³⁸

¹³³³ The costs of these reports are not covered by the NHS so doctors can charge. Some doctors at the GIC do it for free, while others charge.

¹³³⁴ This is usually £5 but a solicitor may also charge for preparing the statutory declaration paperwork.

¹³³⁵ GIRES, 'Obtaining Your Gender Recognition Certificate' (GIRES 2014) <<https://www.gires.org.uk/obtaining-your-gender-recognition-certificate/>> accessed 13 August 2022.

¹³³⁶ Surya Monro, 'Transgender politics in the UK' (2003) 23(4) *Critical Social Policy* 433 - 452, 438.

¹³³⁷ Holning Lau, 'Gender Recognition as a Human Right' in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020).

¹³³⁸ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22, HC997* (House of Commons 2021) para 27.

Other participants expressed hesitation about applying and incurring costs in light of the possibility that the application was rejected. One respondent explained that one reason they would ‘hesitate’ to apply for a GRC was ‘the chance of getting rejected and how high this seems to be...given how much money it costs, this puts me off as it is costly enough without the high chance of rejection’.¹³³⁹ This was also reflected by Participants 3 and 6 who were concerned that they would pay the fees, get rejected and then not be able to retrieve those costs.¹³⁴⁰ It is interesting that participants appeared to perceive a high chance of rejection, as the statistics reflect that the vast majority of applications are successful. For the period of 2005/06 – 2020/21,¹³⁴¹ out of 6771 total GRC applications, 524 were unsuccessful.¹³⁴² These concerns of rejection are particularly interesting as it mirrors the anxiety participants expressed in the empirical data on other requirements regarding perceptions on the legitimacy of their non-binary identity. Non-binary participants expressed similar distrust and anxiety related to how their identities would be perceived by others in relation to the gender dysphoria, proof and statutory declaration requirements. In each instance, as with the application fee, non-binary participants appear particularly sceptical of their gender identity being perceived as sufficiently ‘trans enough’ to satisfy the requirements.¹³⁴³

¹³³⁹ SR 78, Transmasculine non-binary, 19 – 25 years.

¹³⁴⁰ Participant 3, Non-binary transmasculine, 19 – 25 years; Participant 6, Transmasculine non-binary, 19 – 25 years.

¹³⁴¹ No data is available on applications made in the first year. See the ‘GRP_1 tab’ in Gov. UK, ‘Tribunal Statistics Quarterly: July to September 2021: Main Tables’ (July to September 2021) (Gov.UK)

<<https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021>>accessed 10 March 2022.

¹³⁴² The rest were unsuccessful for a range of reasons, including refusal (294), withdrawn (142), no fee paid (45) or made in error (43). See Gov. UK, ‘Tribunal Statistics Quarterly: July to September 2021: Main Tables’ (July to September 2021) (Gov.UK) <<https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021>>accessed 10 March 2022.

¹³⁴³ Ben Vincent, *Non-Binary Genders: Navigating Communities, Identities and Healthcare* (Policy Press 2020) 98.

Binary trans people also experience similar concerns related to being trans enough, but this concern is arguably pronounced for non-binary populations who are specifically excluded from the regime. Therefore, non-binary people seeking legal recognition will likely experience a heightened level of anxiety in assimilating to a narrative which is even further removed from their experiences as it is for binary trans applicants. Therefore, while the chances of rejection are statistically low, non-binary people are arguably much more likely to see themselves as being at risk of rejection.

One participant criticised the fee, but also connected this to other aspects of the process. They argued that the process should be ‘way easier and take a lot less time, effort, money and navigating of bureaucracy’ because ‘currently it's too exhausting for any of us to want to bother [to apply]’.¹³⁴⁴ This is an important point, in that the impact of the application fee is best understood when it is contextualised within the broader framework of the Act, which gives an overall perception of inaccessibility for non-binary people. This appears to be particularly relevant in the context of the new reduced £5 application fee. Arguably when the fee was £140, it could possibly be seen as supporting the costs of the Panel, however, since the fee reduction it is arguably more difficult to understand the reason for the fee as it will have little impact on running costs of the GRP. This is particularly confusing since successful applicants who receive a GRC will only receive a short birth certificate which is limited in its use. Therefore, for those requiring a copy of the full birth certificate, they will need to incur additional expense which is £11 in England and Wales.¹³⁴⁵ Consequently, the new fee does not

¹³⁴⁴ SR259, Non-binary trans masculine, 19 – 25 years.

¹³⁴⁵ General Register Office, ‘Order a birth, death, marriage or civil partnership certificate’ (Gov.UK 2022) <<https://www.gov.uk/order-copy-birth-death-marriage-certificate>>accessed 18 August 2022.

even cover the administrative cost involved in providing a new full birth certificate, adding another expense to applicants.

Furthermore, while the application fee is an additional cost for the applicant, it is also arguably not so much that it could be considered to operate a safeguarding role, either to prevent fraudulent or frivolous applications. It therefore appears to serve a limited practical purpose. This was reflected by evidence given by Dr Jane Hamlin, President of the Beaumont Society to the WEC, who said that ‘we are not clear what the purpose of the fee is. If it were absolutely clear, perhaps we would be happier about it’.¹³⁴⁶ The opacity of the justification for the fee has led to the Women and Equalities Committee describing the reduction in application fee as contributing ‘virtually nothing to the running of the [GRC] system’ and therefore ‘tokenistic’.¹³⁴⁷

7.6.3 Discussion: should the application fee be reformed?

The reduced fee is a significant improvement on the previous application fee, but the additional costs involved in the application still place an unreasonable burden on prospective applicants. This is what Stephen Whittle has described as the ‘gradual accumulation of cost’ involved in the GRA process.¹³⁴⁸ This means that, in practice, the system of legal recognition is not accessible and exacerbates a socio-economic divide in those able to realise their right to receive recognition.

¹³⁴⁶ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act*, HC 884, Q96 – 123 (House of Commons 17 March 2021) Q112.

¹³⁴⁷ Women and Equalities Committee, *Reform of the Gender Recognition Act: Third Report of Session 2021 – 22*, HC997 (House of Commons 2021) para 30.

¹³⁴⁸ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act*, HC 884, Q1 - 19 (House of Commons 9 December 2020) Q2.

The current fee also raises questions as to its justification and whether it does serve a practical purpose, or whether it just serves to make the process of legal recognition more cumbersome. In response to the WEC, the Government admitted that the sole reason for reducing the fee rather than removing it entirely was because the latter would have required primary legislation.¹³⁴⁹ It was therefore quicker to reduce the fee through secondary legislation 'less than a year after [the Government's] response was published'.¹³⁵⁰ It is arguably unsatisfactory to justify the fee on this basis, as decisions affecting legal recognition are so important as to justify the additional time and disruption incurred by passing primary legislation. As trans and non-binary people had already been made to wait for several years before an official government response on plans for GRA reform,¹³⁵¹ arguably they would have accepted an additional wait in exchange for more substantive reform.

The Government have also implied that the reduced fee has contributed to an increase in GRC applications, including a 49% increase between July – September 2020, and 72% increase between January - March 2021 and April to June 2021. However, it is worth recalling that the reduced £5 fee was not announced until May 2021, suggesting that the increase in applications before that time may not be related to more people finding the process financially accessible. Moreover, the empirical data from this study would indicate that even if more people were to apply for a GRC following a fee reduction, this is much more likely to be binary trans people than non-binary people.

¹³⁴⁹ Women and Equalities Committee, *Reform of the Gender Recognition Act: Government response to the Committee's Third Report, Fifth Special Report of Session 2021 – 22, HC 129* (House of Commons 2022) para 7.

¹³⁵⁰ *ibid.*

¹³⁵¹ For example, while the Government announced their plan to review the GRA in 2016, it was not until 2020 (two years after the public consultation) that they announced their final decision.

It is worth recalling that nearly twice as many binary participants said that removing the application fee would make them more likely to apply than non-binary participants. This difference was statistically significant, suggesting a real difference in the impact that removing (and arguably reducing) this fee would have on non-binary versus binary groups.

Therefore it is important that the application fee should be removed, but not without accompanying consideration of how to remove or reduce the wider costs involved in the GRA process. The most effective way to achieve a reduction in overall cost would be to remove particularly burdensome requirements (e.g. the gender dysphoria diagnosis and proof requirement) and move towards an administrative process. Failing that, if the State imposes legal and medical conditions on the right to recognition - which require the expertise of judicial and medical professionals - then that should arguably be a cost which is incurred by the State. Consequently, it is proposed that the application fee should be removed.

7.7 Summary

Chapters 5 and 6 proposed two reform recommendations, namely to introduce a third sex option and to remove the gender dysphoria requirement. This chapter - chapter 7 - has presented and analysed empirical findings related to five additional requirements of the GRA, including the statutory declaration, proof, Gender Recognition Panel, spousal consent, and application fee. In doing so, the chapter has recommended five additional proposals for reform. The recommendations were to retain (but reform) the statutory declaration; to remove the proof requirement in its entirety; to remove the GRP and delegate application processing powers to the

Registrar General for England and Wales; to replace the spousal consent with a spousal notification; and to remove the application fee. The thesis now turns to consider these proposals for reform, and the relevant empirical findings, using a dignity-based analysis. Further details on the aims and rationale of this analysis is outlined in the introduction to chapter 8.

8 Dignity analysis

8.1 Introduction

In this chapter, I turn to consider my proposals for reform in light of a dignity-based conception of rights. This chapter uses dignity as a lens to explore issues related to legal recognition of non-binary identities and requirements for achieving legal recognition.

The aim is to explore the deeper significance of my findings in terms of the concept of human dignity, which combines theoretical, relational, individual and social factors into a broader legal understanding of personhood and rights. It is also to show how dignity can be used as a framework for advancing non-binary rights claims to legal sex recognition and reform. This chapter therefore provides an opportunity for a deeper reflection on the empirical findings which helps to advance my overall investigation into issues of legal sex recognition and the significance of this to non-binary populations. In this chapter, I focus on non-binary communities as they are the population on which this thesis focuses, but this framework may also have applications for binary trans populations.

This chapter proposes a theoretical and normative argument on how dignity can be used to advance emerging rights to legal sex recognition. This is not strictly a doctrinal analysis of the law as it is. Instead I draw on my empirical findings, preceding analysis, and various sources of law to put forward my view on how emerging rights should be conceptualised.¹³⁵² My primary focus is on the law of England and Wales. I draw on a

¹³⁵² On such analyses see (e.g.) Holning Lau, 'Gender Recognition as a Human Right' in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric*

range of domestic primary and secondary legislative sources, as well as international hard and soft law instruments. I mostly refer to sources from the Council of Europe, including the ECHR, as it is legally applicable in England and Wales due to the Human Rights Act 1998.¹³⁵³

8.2 The roots of dignity in law

The roots of the modern constitutional principle of (human¹³⁵⁴) dignity can be traced to the French Revolution which was underpinned by the ‘spirit of dignity’.¹³⁵⁵ The 1789 Declaration of the Rights of the Man and of the Citizen was significant in placing ‘Man’ at the centre of the ‘institutional and human rights’ framework.¹³⁵⁶ Article 6 provided that ‘[...] since all citizens are equal in its¹³⁵⁷ eyes, they are likewise eligible for all

(Cambridge University Press 2020) 195; Jens Theilen, ‘Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition’ (2018) 3 *European Human Rights Law Review* 249 - 257; Damian A Gonzalez Salzberg, *Sexuality and Transsexuality Under the European Convention on Human Rights* (Hart Publishing 2019); Pieter Cannoot and Mattias Decoster, ‘The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary Queer, Feminist, and Human Rights Analysis’ (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 – 55; Peter Dunne, *Rethinking Legal Gender Recognition* (forthcoming, Bloomsbury 2023).

¹³⁵³ There has been a consultation by the UK Government on reform to the HRA though the UK will remain a signatory to the ECHR: see Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill of Rights – consultation’ (Gov.UK July 2022) <<https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>> accessed 10 August 2022.

¹³⁵⁴ I will use dignity and human dignity interchangeably in this thesis. On the applications of dignity to other beings and entities, see (e.g.) Joseph Vining, ‘Dignity as perception: recognition of the human individual and the individual animal in legal thought’ in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013).

¹³⁵⁵ Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 39 – 42.

¹³⁵⁶ *ibid* 43.

¹³⁵⁷ For clarity, this is a reference to the eyes of the law.

dignities, positions and posts [...]'.¹³⁵⁸ While 'dignities' was a specific reference to professional and social positions at the time,¹³⁵⁹ the statement of equality within the Declaration, underpinned by the conceptualisation of dignity-as-equality marked a deliberate departure from previous understandings of dignity as rank.¹³⁶⁰ The Declaration represented a transitional constitutional document whereby Man was increasingly understood as pre-existing society, distinguishable from animals, self-referential as opposed to *imago dei*,¹³⁶¹ and as equal with other men.¹³⁶² As Dupré argues, to be a "man" and worthy of constitutional protection, it was enough to be born out of a woman'.¹³⁶³ This 'ontological freedom' allowed men to break away from expectations to conform to *imago dei*, while also conditioning the legitimacy of society's existence on its ability to protect the rights of man.¹³⁶⁴ Scholars at the time, reflecting on the 1789 Declaration, echoed this ontological basis of rights, referring to rights as deriving from 'the natural dignity of man'¹³⁶⁵ and the 'native' dignity inherent in human beings.¹³⁶⁶ The gendered language of the 1789 Declaration is striking and reflects how women (and other gender minorities) were largely absent from early discussions of rights and dignity.¹³⁶⁷ While Man was supposedly used to describe a

¹³⁵⁸ Declaration of the Rights of the Man and of the Citizen 1789, art 6 (original wording).

¹³⁵⁹ Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 39 – 40.

¹³⁶⁰ *ibid* 40.

¹³⁶¹ *ibid* 39 – 46.

¹³⁶² *ibid* 40 – 41.

¹³⁶³ *ibid* 39 – 43.

¹³⁶⁴ *ibid* 43.

¹³⁶⁵ Thomas Paine, *The Rights of Man* (Anchor 1973) 320, as quoted in Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 40.

¹³⁶⁶ Mary Wollstonecraft, *A vindication of the rights of woman* (originally published 1759 – 1797, Hackett Pub Co 2013).

¹³⁶⁷ See also on race and the 1789 Declaration: Kamban Naidoo, 'Race, ethnicity, discrimination and violence in "colour-blind" France' (2019) 25(2) *Fundamina* 68-93.

universal rights-holder, the explicit use of gendered language nevertheless placed a significant limitation on the promise of dignity under the Declaration. However, the key point on the 1789 Declaration for this discussion is to note that it was significant in providing the 'constitutional cradle out of which dignity could emerge as the foundation of human rights' nearly two centuries later.¹³⁶⁸

The modern concept of dignity is underpinned by the philosophy of Immanuel Kant who is well-known for articulating the maxim (known as the object-formula) that a person must 'act in such a way as to treat humanity, whether in your own person or in that of anyone else, always as an end and never merely as a means.'¹³⁶⁹ Kant understood the capacity to reason as forming the basis of one's intrinsic value (dignity) and right to be treated as an ends.¹³⁷⁰ Human beings (intrinsic value/ends) are to be distinguished from other entities like animals and things which are understood as having mere relative value (or price).¹³⁷¹

Kant understood *humanity* as conferring equal and intrinsic worth on every human being, such that to undermine someone else's dignity would be to undermine humanity itself.¹³⁷² Consequently, while Kant's philosophy framed autonomy as an inherent right for human beings/ends, this was not in a strictly individualistic sense, rather it was

¹³⁶⁸ Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 41.

¹³⁶⁹ Immanuel Kant, *Groundwork for the Metaphysics of Morals* (originally published 1785, Jonathan Bennett trs, 2017) 29.

¹³⁷⁰ *ibid* 33.

¹³⁷¹ *ibid*.

¹³⁷² In particular, see references to humanity in the categorical imperative: Immanuel Kant, *Groundwork for the Metaphysics of Morals* (originally published 1785, Jonathan Bennett trs, 2017) 29.

based on recognising the reciprocity and relationality of human beings.¹³⁷³ Kant's philosophy is also noteworthy in no longer necessarily grounding intrinsic value in biology,¹³⁷⁴ but rather it was recognised in entities which had the capacity to reason. This basis of dignity was much broader than previous philosophical conceptions. This basis was expanded on by Wollstonecraft to critique the 1789 Declaration, arguing that women were equally rational as men, and were consequently endowed with equal rights to dignity.¹³⁷⁵ This shows how Kant's conception of dignity was particularly useful in expanding who can be understood as having intrinsic value, such that gendered distinctions do not necessarily preclude this right. The universal promise of Kant's conception of dignity was central to framing and substantiating the modern constitutional concept of dignity, though this was not until nearly two centuries later after the Second World War.

The aftermath of the Second World War, inspired by past atrocities and a rejection of fascism and Nazism,¹³⁷⁶ represented a new direction for dignity based on the promise for a universal right to dignity.¹³⁷⁷ The Universal Declaration of Human Rights was significant in this respect in that it represented, for the first time, the promise that every

¹³⁷³ Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 35.

¹³⁷⁴ *ibid* 34.

¹³⁷⁵ Mary Wollstonecraft, *A vindication of the rights of woman* (originally published 1759 – 1797, Hackett Pub Co 2013). See also Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 40.

¹³⁷⁶ Charter of the United Nations (adopted 24 October 1945 1 UNTS XVI), preamble; Constitution of the United Nations Educational, Scientific, and Cultural Organisation (adopted 16 November 1945), preamble.

¹³⁷⁷ Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 68.

being, for ever, had equal worth.¹³⁷⁸ The preamble to the Declaration describes the recognition of the ‘inherent dignity [and the] equal and inalienable rights of all members of the human family as being the ‘foundation of freedom, justice and peace in the world’.¹³⁷⁹ Under Article 1, the Declaration states that ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’.¹³⁸⁰ This echoes several aspects of Kantian thought, in particular that human beings do not have mere relative value (price),¹³⁸¹ but rather have intrinsic value (dignity) by virtue of their capacity to reason.¹³⁸² The reference to acting in a ‘spirit of brotherhood’ towards one another also closely echoes Kant’s categorical imperative which obliges individuals to act as though the ‘maxim of your action were to become, through your will, a universal law of nature’.¹³⁸³ The categorical imperative places an obligation on individuals to treat one another as they would want to be treated.

The connections between Kant and dignity under the UDHR, and in other European constitutions at the time,¹³⁸⁴ has led to Kant being described as the ‘father of the modern concept of human dignity’.¹³⁸⁵ This modern concept distinguishes humans

¹³⁷⁸ Erin Daly, ‘Judicial activity, democratic activity: the democratising effects of dignity’ in Daniel Bedford and others (eds), *Human dignity and democracy in Europe: Synergies, Tensions and Crises* (Edward Elgar 2022) 19.

¹³⁷⁹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), preamble.

¹³⁸⁰ *ibid* art 1.

¹³⁸¹ Immanuel Kant, *Groundwork for the Metaphysics of Morals* (originally published 1785, Jonathan Bennett trs, 2017) 33.

¹³⁸² *ibid*.

¹³⁸³ *ibid* 24.

¹³⁸⁴ See (e.g.) Basic Law for the Federal Republic of Germany (Grundgesetz) 1949, art 1(1) and Christoph Enders, ‘Human dignity in Germany’ in Paolo Becchi & Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer Verlag 2019).

¹³⁸⁵ Giovanni Bognetti, ‘The Concept of human dignity in European and US Constitutionalism’ in Georg Nolte, *European and US Constitutionalism* (23 – 24 May

(rational/ends) from non-human entities (means/things),¹³⁸⁶ and while the equality-as-dignity legacy from the 1789 lives on, the UDHR marked the beginning of the *universal* modern constitutional concept of dignity. The relevance of gender implicitly persists in the UDHR, through the language of ‘brotherhood’, ‘mankind’, and the two references to ‘men and women’ as a binary understanding of gender.¹³⁸⁷ Nevertheless, the rights holder is most often referred to as the human person, the human being, and/or any member of the human family.¹³⁸⁸ The abstraction of this rights holder not only offered the promise of dignity to women, but potentially other gender minorities.¹³⁸⁹

8.3 Connecting dignity to human rights

The UDHR was not only significant in the way that it framed dignity as universal, but also in the way that it framed dignity as central to all rights. The preamble describes the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’ as the ‘foundation of freedom, justice and peace in the world’.¹³⁹⁰ The UDHR therefore not only provides for a substantive *right* to dignity under Article 1, but by describing it as the foundation for freedom, justice and peace, dignity is also a *foundational value* for rights. Dignity is conceptualised in similar fashion under the International Covenant on Civil and Political Rights (ICCPR), where human rights

2003) 66. For critique, see Samuel J Kerstein, ‘Kantian dignity: a critique’ in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014).

¹³⁸⁶ Catherine Dupré, *The Age of Dignity* (Hart 2015) 33 – 34.

¹³⁸⁷ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), preamble, art 16.

¹³⁸⁸ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), preamble.

¹³⁸⁹ Johannes Morsink, ‘Women’s Rights in the Universal Declaration’ (1991) 13(2) *Human Rights Quarterly* 229 – 256.

¹³⁹⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), preamble.

are described as deriving from the ‘inherent dignity of the human person’.¹³⁹¹ Dignity is therefore foundational as the authority to seek and claim rights.¹³⁹²

The understanding of dignity as the basis of rights, or as a ‘mother right’¹³⁹³ was mirrored across post-war European constitutionalism.¹³⁹⁴ This includes in European states’ constitutions,¹³⁹⁵ and in the treaties and case law of European bodies such as the European Union (EU) and the Council of Europe. Its protection is particularly strong and explicit within the EU, where under Article 2 Treaty on European Union (TEU) it is enshrined as the first foundational value of the EU.¹³⁹⁶ It has also been held to be a general principle of law, with the CJEU (then ECJ) in *Omega* stating that the EU ‘undeniably strives to ensure respect for human dignity as a general principle of law’.¹³⁹⁷ Under the Charter of Fundamental Rights, it constitutes the ‘real basis’ of fundamental rights,¹³⁹⁸ and also enjoys protection under Article 1 where it is described

¹³⁹¹ International Covenant on Civil and Political Rights, UNGA 2200A (XXI) (16 December 1966).

¹³⁹² Erin Daly, ‘Judicial activity, democratic activity: the democratising effects of dignity’ in Daniel Bedford and others (eds), *Human dignity and democracy in Europe: Synergies, Tensions and Crises* (Edward Elgar 2022) 33.

¹³⁹³ Aharon Barak, ‘Human dignity; the constitutional value and the constitutional right’ in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013).

¹³⁹⁴ Though prior to World War 2, some states did recognise dignity in their constitutions see e.g. Germany (Weimar Constitution 1919, art 151) and Ireland (Constitution of 1937, preamble).

¹³⁹⁵ See (e.g.) West Germany (1949), Spain (1978), Portugal (1976), Hungary (1989).

¹³⁹⁶ Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 2.

¹³⁹⁷ *Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (2004) C-36/02 [34].

¹³⁹⁸ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

as 'inviolable',¹³⁹⁹ that is, an absolute right from which there can be no derogation.¹⁴⁰⁰

The versatility of dignity in European constitutionalism is arguably one of its greatest strengths, in that it can be used to ground and legitimise rights as well as potentially providing an actionable ground upon which someone can assert their right to dignity.

In the Council of Europe, dignity is notably absent from the text of the Convention and there is not an explicit right to dignity,¹⁴⁰¹ though it has been developed in the Strasbourg court's case law since the 1970s.¹⁴⁰² It has been used to develop a range of rights¹⁴⁰³ and its protection has since been described as the 'very essence' of the Convention.¹⁴⁰⁴ Despite the lack of 'textual anchor',¹⁴⁰⁵ judges in England and Wales have increasingly engaged with dignity in matters related to Convention rights and the HRA. While the courts are not strictly bound by ECtHR judgments, judges have '[followed] the lead of Strasbourg' by recognising dignity as a foundational value of rights and using it as an 'interpretive tool to shape [the] contours' of rights.¹⁴⁰⁶ Dignity

¹³⁹⁹ On article 1 see Catherine Dupré, 'Article 1: Human dignity' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 3 – 24.

¹⁴⁰⁰ It enjoys similarly strong protection in Germany under Article 1(1) Basic Law of 1949. See generally: Christoph Enders, 'Human dignity in Germany' in Paolo Becchi & Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer Verlag 2019).

¹⁴⁰¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

¹⁴⁰² *Tyrer v United Kingdom* [1978] ECHR 2.

¹⁴⁰³ Jean-Paul Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013).

¹⁴⁰⁴ *S W v United Kingdom* [1995] ECHR 52 [44].

¹⁴⁰⁵ Daniel Bedford, 'Human dignity in Great Britain and Northern Ireland' in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019) 322.

¹⁴⁰⁶ *ibid.* See (e.g.) *Airedale NHS Trust v Bland* [1993] UKHL 17, [1993] AC 789 and *Law Hospital NHS Trust v Lord Advocate* (1996) Scot CS CSIH 2) where dignity was used to recognise the existing rights and interests of a person in a permanent vegetative state (including interests in their life and death) and justify an award of damages.

has consequently been described as a ‘core value of the common law’¹⁴⁰⁷ in England and Wales, and has been influential in a range of legal cases including (e.g.) medical treatment,¹⁴⁰⁸ procedural fairness,¹⁴⁰⁹ asylum and immigration,¹⁴¹⁰ and discrimination and harassment.¹⁴¹¹

The judicial use of dignity in England and Wales has reflected the theoretical connections to Kant, similar to the connections made in the UDHR. In *Airedale*, Hoffman LJ noted that the ‘dignity of an individual is an intrinsic value’,¹⁴¹² similar to Kantian notions of intrinsic worth. Similar sentiments reflecting the intrinsic value of human life were seen in *Rees* and *Macfarlane*.¹⁴¹³ In *Rees*, Lord Scott distinguished humans from non-human entities:

The difficulty produced by cases like *McFarlane* and the present case is because the originally unwanted progeny is *a human being, not an animal*, and because, for very deeply ingrained cultural and, for some, religious reasons, human life, whether that of babies, children, adults in the prime of life or the aged and whether normal or associated with disability, is regarded by society

¹⁴⁰⁷ *R (A, B, X and Y) v East Sussex County Council (No 2)* [2005] EWHC 585 (Admin) [93] (Munby J). Munby J stated that respect for human dignity was a value in English law ‘long pre-dating the [ECHR]’.

¹⁴⁰⁸ *Airedale NHS Trust v Bland* [1993] UKHL 17, [1993] AC 789.

¹⁴⁰⁹ *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [68] (Lord Reed).

¹⁴¹⁰ *R v Secretary of State for the Home Department Ex p Limbuela* [2005] UKHL 66, [2006] 1 AC 396; *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152.

¹⁴¹¹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557; *Hall v Bull* [2013] UKSC 73, [2013] 1 WLR 3741.

¹⁴¹² *Airedale NHS Trust v Bland* [1993] UKHL 17 [1993] AC 789 (Hoffmann LJ).

¹⁴¹³ *Macfarlane and Another v Tayside Health Board (Scotland)* [1999] UKHL 50, [2000] 2 AC 59 (Lord Millett).

generally and by the law as *uniquely precious* and as *incapable of valuation in monetary terms*.¹⁴¹⁴

Lord Scott's dictum engages several aspects of Kantian philosophy with regards to dignity. This includes making a distinction on the value of human beings (ends) versus that of non-human entities such as animals (means). The universality of dignity is also emphasised through recognition that, irrespective of age or ability, there are no distinctions between human beings in terms of the degree to which they are considered to have intrinsic worth. Lord Scott's final comments also directly echo Kant's distinction, between things which have a price and a relative value,¹⁴¹⁵ versus the intrinsic value of human beings which are 'incapable of valuation in monetary terms'.¹⁴¹⁶ Similar sentiment is seen in *Osborn*, with Lord Reed (citing Waldron with approval):

Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.¹⁴¹⁷

¹⁴¹⁴ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] AC 309 (Lord Scott) (emphasis added).

¹⁴¹⁵ Kant distinguishes further between market price and luxury price, that is, things involving general human desires and needs (market) or that which is not a need but accords with a certain taste (luxury): Immanuel Kant, *Groundwork for the Metaphysics of Morals* (originally published 1785, Jonathan Bennett trs, 2017) 33.

¹⁴¹⁶ Immanuel Kant, *Groundwork for the Metaphysics of Morals* (originally published 1785, Jonathan Bennett trs, 2017) 33.

¹⁴¹⁷ *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [68] (Lord Reed) (emphasis added); Waldron quote from Jeremy Waldron, 'How Law Protects Dignity' [2012] Cambridge Law Journal 200, 210.

As in *Rees*, this passage reflects a distinction between humans (ends) and non-human entities (means), but also recognises the Kantian basis of intrinsic worth as being connected to the rational agency of human beings and their ability to reason.¹⁴¹⁸

8.4 The application of dignity for legal recognition of ‘post-operative transsexuals’ under *Goodwin*

The theoretical roots of dignity, and its relationship with Kantian thought, are important in articulating the essence of dignity in law. However, these roots do not tell us much about how dignity may impose substantive legal obligations and rights on others around legal sex recognition. To explore this further, I will now turn to consider *Goodwin*, where I argue a dignity framework was a key tool for the ECtHR in finding an obligation on the State to formally recognise the gender identity of Ms Goodwin via legal sex status.¹⁴¹⁹

Prior to *Goodwin*, judges in the ECtHR and England and Wales had already referenced dignity in arguing for expanded transgender rights, though this was often in dissenting judgements.¹⁴²⁰ Dignity had also been used elsewhere to develop and expand rights for transgender people. In 1996, the ECJ relied on dignity to find that discrimination on the basis of gender reassignment against trans people could be

¹⁴¹⁸ Waldron articulates a slightly different understanding of dignity to Kant so his work cannot always be considered applicable to the Kantian conception, though this basic point of distinguishing humans (ends) from animals and property (means) does reflect the categorical imperative of Kant.

¹⁴¹⁹ Daniel Bedford, ‘Human dignity in Great Britain and Northern Ireland’ in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019) 333.

¹⁴²⁰ *Bellinger v Bellinger* [2001] EWCA Civ 1140, [2002] Fam 150 (Justice Thorpe); *Cossey v United Kingdom* [1990] ECHR 21 (Judge Martens); *Sheffield and Horsham v United Kingdom* [1998] ECHR 69 (Judge Bernhardt and others) (Judge Van Dijk).

considered sex discrimination. The ECJ stated that toleration of such discrimination would be a 'failure to respect the dignity and freedom' of a trans person.¹⁴²¹ Dignity was therefore not necessarily new in articulating rights for trans people, though *Goodwin* was arguably one of the earliest examples within the Council of Europe.

In *Goodwin*, the court recalled that 'the very essence of the Convention is respect for human dignity and human freedom,'¹⁴²² before adopting an expansive understanding of the harm of non-recognition to Ms Goodwin, such that her right to dignity required a means to change her legal sex status. As in cases preceding *Goodwin*, the Court recognised gender identity as an aspect of social identity¹⁴²³ and an individual's private life which engages Article 8 of the Convention.¹⁴²⁴ The importance placed on gender identity since *Goodwin* has been followed, with the ECtHR in *AP* describing gender identity as 'an essential aspect of individuals' intimate identity, not to say their existence'.¹⁴²⁵ This understanding was mirrored in the English Court of Appeal in the case of *Elan-Cane*, where it was observed that 'there can be little more central to a citizen's private life than gender, whatever that gender may or may not be'.¹⁴²⁶ However, it was not just the centrality of gender identity to an individual's private life which was notable in *Goodwin*, but the way in which the Court understood the State's recognition (or non-recognition) of this intimate aspect of identity as affecting the

¹⁴²¹ *P & S v Cornwall County Council C-13/94* [1996] IRLR 347 [22].

¹⁴²² *Christine Goodwin v United Kingdom* [2002] ECHR 588 [90].

¹⁴²³ *Mikulić v Croatia* [2002] ECHR 27.

¹⁴²⁴ *Pretty v United Kingdom* [2002] ECHR 2346/02 [61]; *B v France App no 13343/87* (ECtHR, 25 March 1992) [63] (Judge Pettiti).

¹⁴²⁵ *AP Garçon, Nicot v France* [2017] ECHR 338.

¹⁴²⁶ *R (Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363, [2020] QB 929 [46] (King LJ).

whole, integrated person, and their ability to live in conditions of dignity and equal worth.

The ECtHR in *Goodwin* framed gender identity as having a wider impact on the ‘personal development’ of the individual, including their ‘physical and moral security’.¹⁴²⁷ The Court recalled the importance of personal autonomy to the interpretation of Article 8,¹⁴²⁸ which is in turn a central underlying principle of dignity.¹⁴²⁹ Underpinned by the Kantian idea that rational beings capable of explaining themselves should be free to exercise autonomy,¹⁴³⁰ the Court underlined the importance of allowing such beings to ‘establish details of their identity as *individual* human beings’.¹⁴³¹ As autonomy is the ‘basis for the dignity of human nature,’¹⁴³² it is the key foundation upon which individuals are free to determine their own ends, including how they develop, identify and express their personality and gender identity. Consequently, Ms Goodwin’s ability to exercise autonomy over her personality and identity was hindered by the State’s failure to provide for a means to change her legal sex in accordance with her gender identity.¹⁴³³ While personal autonomy is not an absolute right, in *Goodwin*, the reasons offered by the State were no longer proportionate to the harm suffered by post-operative transsexuals in not being able to receive recognition.

¹⁴²⁷ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [90].

¹⁴²⁸ *ibid.*

¹⁴²⁹ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] AC 309 [123] (Lord Millett).

¹⁴³⁰ *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [68] (Lord Reed).

¹⁴³¹ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [90] (emphasis added).

¹⁴³² Immanuel Kant, *Groundwork for the Metaphysics of Morals* (originally published 1785, Jonathan Bennett trs, 2017) 34.

¹⁴³³ Isaiah Berlin, *Two Concepts of Liberty: Four Essays On Liberty* (Oxford University Press 1969) 118-172.

The Court in *Goodwin* went further than connecting issues of legal sex recognition to autonomy and also articulated a relationship between gender identity and emotional integrity. Emotional integrity is an ‘indispensable precondition’¹⁴³⁴ for the enjoyment of private life, which includes personal development and the ability to develop relationships with others.¹⁴³⁵ If a trans person cannot enjoy the moral security of having their gender identity formally recognised, this can contribute to negative self-worth and self-esteem,¹⁴³⁶ feelings which are described by Lady Hale as the internal aspects of dignity.¹⁴³⁷ This internal sense of dignity can be undermined by treatment or conditions which provoke feelings of shame and humiliation;¹⁴³⁸ inferiority;¹⁴³⁹ inadequacy and worthlessness;¹⁴⁴⁰ and desperation and hopelessness.¹⁴⁴¹ These feelings can in turn have a deeper negative impact by undermining autonomy,¹⁴⁴² as they thwart the individual’s ability to fully and freely develop their identity¹⁴⁴³ and/or enjoy affiliation or relationships with other people.¹⁴⁴⁴ This relates to Nussbaum’s understanding of dignity as:

¹⁴³⁴ *Bensaid v United Kingdom* [2001] ECHR 82 [47].

¹⁴³⁵ *Pretty v United Kingdom* [2002] ECHR 2346/02 [61].

¹⁴³⁶ Baroness Brenda Hale, ‘Dignity’ (Ethel Benjamin Commemorative Address 2010).

¹⁴³⁷ *ibid.*

¹⁴³⁸ *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20 [214 – 216].

¹⁴³⁹ *Napier v Scottish Ministers* [2005] 1 ScotSC 229 [78] (Lord Bonomy). See also *Pretty v United Kingdom* [2002] ECHR 2346/02 [52].

¹⁴⁴⁰ *Napier v Scottish Ministers* [2005] 1 ScotSC 229 [38] (Lord Bonomy).

¹⁴⁴¹ *R v Secretary of State for the Home Department Ex p Limbuela* [2005] UKHL 66 [2006] 1 AC 396 [59] (Lord Bingham) [71] (Lord Scott); Daniel Bedford, ‘Human dignity in Great Britain and Northern Ireland’ in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019) 334.

¹⁴⁴² Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2013) 32.

¹⁴⁴³ *ibid* 29.

¹⁴⁴⁴ *ibid* 34.

[T]hat of the human being as a dignified *free being who shapes his or her own life in cooperation and reciprocity* with others, rather than being passively shaped or pushed around by the world in the manner of a 'flock' or 'herd' animal. A life that is really human is one that is shaped throughout by these human powers of practical reason and sociability.¹⁴⁴⁵

This reflected what the Court in *Goodwin* recognised, which is that where an individual cannot enjoy the physical and moral security of being recognised in their gender identity, they are less likely to feel able to enjoy relationships and affiliations with others based on self-respect and non-humiliation. The potential harm of non-recognition or misrecognition was understood by the Court as placing the trans person in an 'anomalous position'¹⁴⁴⁶ or an 'intermediate zone',¹⁴⁴⁷ between 'social reality and law' provoking feelings of stress, alienation, vulnerability, humiliation, and anxiety.¹⁴⁴⁸

In addition to a broad understanding of the potential harm of non-recognition, the Court also recognised the importance of allowing Ms Goodwin to enjoy personal development and physical and moral security in the 'full sense *[as] enjoyed by others in society*'.¹⁴⁴⁹ The court therefore recognised the current law as creating or reproducing an inequality between cisgender and transgender people to fully realise and enjoy their right to private life. Equality has been representative of the 'spirit of dignity' since the 1789 Declaration and is significant not only for the impact that

¹⁴⁴⁵ Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000) 72 (emphasis added).

¹⁴⁴⁶ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [77].

¹⁴⁴⁷ *ibid* [90].

¹⁴⁴⁸ *ibid* [77].

¹⁴⁴⁹ *ibid* [90] (emphasis added).

inequality has on the individual,¹⁴⁵⁰ but because of the wider impact it has on society. Baroness Hale argues that unequal treatment ‘damages social cohesion, creating not only an underclass, but an underclass with a grievance’.¹⁴⁵¹ Consequently, non-recognition has the potential to cause harm beyond the individual to wider society which reinforces a sense of strict individualism and is in contrast to the spirit of solidaristic empowerment.¹⁴⁵²

The Court in *Goodwin* therefore adopted an expansive understanding of the impact of the law on legal sex recognition to Ms Goodwin. This was achieved through a dignity-based framework because of the way in which dignity captures the harm that is done to the whole, integrated person.¹⁴⁵³ The dignitarian recognition of the ‘rich blend of human dimensions and properties’¹⁴⁵⁴ is reminiscent of Kantian thought in understanding each individual as an end in themselves, such that the proportionality of a particular law may be impacted by the unique positionality and experiences of a particular group with that law. This incorporates a substantive conception of equality, where the State may need to go beyond formal equality to support an individual to achieve conditions of dignity.¹⁴⁵⁵ In *A, B, X & Y*, Munby J stated that ‘to avoid discriminating against the disabled...one may...need to treat the disabled differently

¹⁴⁵⁰ Baroness Brenda Hale, ‘Dignity’ (Ethel Benjamin Commemorative Address 2010) 9.

¹⁴⁵¹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [132] (Baroness Hale). See also *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 [270] (Mummery LJ); *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2009] 1 AC 287 [44] (Baroness Hale).

¹⁴⁵² Pablo Gilabert, *Human dignity and human rights* (Oxford Scholarship 2018) ch 7.

¹⁴⁵³ Daniel Bedford, ‘Human dignity in Great Britain and Northern Ireland’ in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019) 338 – 339.

¹⁴⁵⁴ *ibid* 338.

¹⁴⁵⁵ Sandra Fredman ‘Substantive equality revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712-738.

precisely because their situation is significantly different from that of the able-bodied'.¹⁴⁵⁶ Therefore, an 'enhanced degree of protection...may be called for when...human dignity is at stake'.¹⁴⁵⁷ In the context of *Goodwin*, a substantive conception of equality, where the State provides for a means to change legal sex, was necessary for Ms Goodwin to live in conditions of equal worth and dignity.¹⁴⁵⁸

Nevertheless, the ECtHR's analysis in *Goodwin* was also limited, such that the right to legal recognition under Article 8 was reserved for 'post-operative transsexuals' and States have since been afforded a wide margin to determine legal recognition criteria. The only limitations the ECtHR has placed on States in determining requirements for legal sex recognition has been to require that such systems are 'accessible and clear'¹⁴⁵⁹ and that they do not include sterilisation requirements.¹⁴⁶⁰ The Court has so far not required States to provide for legal recognition for non-binary people, nor have requirements, like medical examination and diagnosis requirements, been held to be unlawful.¹⁴⁶¹ In such instances, the Court has often referred to the wide margin of appreciation that States enjoy in this area, despite generally recognising that the margin is limited where it concerns an issue of such importance as gender identity.¹⁴⁶²

¹⁴⁵⁶ *R (A, B, X and Y) v East Sussex County Council (No 2)* [2005] EWHC 585 (Admin) [93] (Munby J). This case was arguably the first explicit construction of human dignity in a UK ruling: Catherine Dupré, *The Age of Dignity* (Hart Publishing 2015) 89.

¹⁴⁵⁷ *R (A, B, X and Y) v East Sussex County Council (No 2)* [2005] EWHC 585 (Admin) [93] (Munby J).

¹⁴⁵⁸ On the commonality between disability and trans activism see Ashley Mog and Amanda Lock Swarr, 'Threads of Commonality in Transgender and Disability Studies' (2008) 28(4) *Disability Studies Quarterly*. See also Dean Spade, 'Resisting Medicine, Re/modelling Gender' (2003) 18 *Berkeley Women's Law Journal* 15 – 37.

¹⁴⁵⁹ *X v The Former Yugoslav Republic of Macedonia* [2019] ECHR 55 [70].

¹⁴⁶⁰ *AP Garçon, Nicot v France* [2017] ECHR 338.

¹⁴⁶¹ *ibid.*

¹⁴⁶² *Christine Goodwin v United Kingdom* [2002] ECHR 588 [90]; *Hämäläinen v Finland* [2014] ECHR 787 [67]; *Pretty v United Kingdom* [2002] ECHR 2346/02 [71].

It is argued that certain presumptions of the court towards gender diversity have resulted in an unduly wide margin of appreciation for States.

I will now turn to explore the potential applications of dignity to non-binary recognition. In doing so, I explore how my empirical findings apply to the issues of dignity recognised in *Goodwin*. However, I argue that, to better account for non-binary populations, the understanding of the harm of non-recognition adopted by the ECtHR requires reconceptualising. I argue that by reframing the harm of non-recognition from being 'outed' as transgender to being misgendered, non-binary people may be better accounted for under a dignity-based claim for legal recognition.

8.5 The potential applications of dignity to non-binary recognition

The empirical findings in chapter 5 indicated that non-binary participants were supportive of recognition for both practical and symbolic reasons. The symbolic value of recognition is most relevant to the dignity discussion here. While it is unlikely to have a significant and direct effect on social attitudes towards non-binary populations, the symbolic value of recognition arguably does engage issues related to autonomy and emotional integrity. Participants placed value on recognition in allowing them to live according to an identification which better reflected their lived reality of gender identity. This contrasted with the current position where participants felt erased and undermined by having to live according to one of the binary options available. In particular, it is worth recalling Participant 14's words here, where they described:

The impact [of non-binary recognition] would be that I'm not angry every time I have to tell someone who I am or prove my identity...this is who I am and you have to respect this and acknowledge me as this person... it's a very strong

feeling [that I am] asserting my identity and my right to be treated with dignity, and given the legal acknowledgement that I exist.¹⁴⁶³

Participant 14 connects legal recognition to those feelings of internal dignity, such as the emotional integrity and moral security also recognised in *Goodwin*. While the analysis in *Goodwin* was limited to a specific group of trans persons, the relationship between legal recognition and the free development of personality, is arguably equally applicable to non-binary populations.

Further, while law reform alone cannot prevent hostility or prejudice towards non-binary populations, the sense of empowerment associated with legal recognition may impact the extent to which non-binary people feel able to freely engage with others in society. As in *Goodwin*, where trans people cannot obtain legal recognition, it has a much broader impact on the whole, integrated person. By having to choose between total non-recognition or submitting to the narrative expected under the GRA, non-binary people are placed in a double bind where in either instance they must ‘forfeit any right to recognition and respect as a “normal” human being’.¹⁴⁶⁴ The Court of Appeal in *Elan-Cane* argued that ‘[n]o-one has suggested (nor could they) that the Appellant [Elan-Cane] has no right to live as a non-binary, or more particularly as a non-gendered, person’.¹⁴⁶⁵ However, if we understand legal recognition as being intimately connected to our dignity and the extent to which we freely develop ourselves

¹⁴⁶³ Participant 14, Non-binary, 26 – 35 years.

¹⁴⁶⁴ Kendall Thomas, ‘Are Transgender Rights (In)human Rights?’ in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 317.

¹⁴⁶⁵ *R (Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363, [2020] QB 929 [46] (King LJ).

and engage with others, the result of withholding formal legal recognition *is* arguably to the effect that Elan-Cane (and others) cannot live as non-binary in a meaningful sense according to conditions of equal worth.

Moreover, it has been recognised that the visibility of a non-binary marker may in some instances provoke prejudice or discrimination by outing them as trans. However, affording individuals the freedom to choose whether (and when/where) they are visible as non-binary aligns with the fundamental value of autonomous decision making. Furthermore, given that protection against discrimination potentially extends to non-binary people,¹⁴⁶⁶ it may also be the case that on many occasions, their non-binary identity would be affirmed by being recognised without discrimination. This recognition, in itself, is important for issues of gender identification because gender affirmation cannot be understood in terms of merely respecting individual choices.¹⁴⁶⁷ It requires us to hold a particular attitude towards each other on account of our difference.¹⁴⁶⁸ It recognises that gender identity, as an integral aspect of an individual's private life, personality, and therefore their dignity, is 'constituted and confirmed by society'.¹⁴⁶⁹ Under a dignity framework, we are required to treat each other according to solidaristic empowerment, including our gender identity, with regard for our shared

¹⁴⁶⁶ *Taylor v Jaguar Land Rover Ltd* [2020] UKET 1304471/2018.

¹⁴⁶⁷ Robert E Goodin, 'The Political Theories of Choice and Dignity' (1981) 18 *American Philosophical Quarterly* 91 – 100, 100: 'Respecting people's dignity does seem to be a more fundamental premise of our individualistic ethic than that of respecting choices.... And respecting people's dignity has strikingly different practical implications than respecting their choices simpliciter'.

¹⁴⁶⁸ This is also referred to as attitudinal respect by Dworkin: '[t]he fundamental human right, we should say, is the right to be treated with a certain attitude, an attitude that expresses the understanding that each person is a human being whose dignity matters. See' Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2008) 35.

¹⁴⁶⁹ Neomi Rao, 'Three concepts of dignity in constitutional law' (2011) 86(1) *Notre Dame Law Review* 183 – 271, 248.

humanity.¹⁴⁷⁰ This was a key theme underlying the UDHR which recognises individuals as members of the human family, rather than as individuals separated from one another. As our intrinsic and equal worth is constitutive of, and constituted by, our humanity, when this intrinsic worth is not recognised, it fails to recognise that shared humanity.¹⁴⁷¹ This issue of recognising someone's humanity is particularly important for gender diverse people who are vulnerable to de-humanising processes and treatment.¹⁴⁷² Thomas argues that normative gendered embodiment is human embodiment and normative human being is gendered being.¹⁴⁷³ Therefore, where non-binary people cross over, cut across, move between or otherwise queer sex/gendered boundaries, they are testing and contesting those boundaries of human ontology.¹⁴⁷⁴ This is where there is a potential site for contention in using dignity to frame non-binary rights, because of the ontological definition of the human being adopted by dignity.¹⁴⁷⁵ However, as noted above, the conceptual strength of the abstracted human being who is endowed with dignity by virtue of their capacity to reason is a strength, in that it can incorporate people irrespective of gender identity.

The empirical findings aligned with other research which has also previously identified a strong sense of suspicion and pessimism from non-binary populations towards

¹⁴⁷⁰ Pablo Gilabert, *The dignitarian approach as a program in Human dignity and human rights* (Oxford University Press 2018) 13; Neomi Rao, 'Three concepts of dignity in constitutional law' (2011) 86(1) *Notre Dame Law Review* 183 – 271, 245.

¹⁴⁷¹ Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 38.

¹⁴⁷² Kendall Thomas, 'Are Transgender Rights (In)human Rights?' in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006).

¹⁴⁷³ *ibid* 316.

¹⁴⁷⁴ *ibid*.

¹⁴⁷⁵ See chapter 8.2 above.

medical and legal institutions. There were indications that, for non-binary populations, accessing medical and legal services was potentially more burdensome because of their identity which manifested in a more general anticipation of injustice. This arguably reflects Baroness Hale's understanding of dignity whereby unequal treatment contributes not only to an underclass, but an underclass with a grievance.¹⁴⁷⁶ The GRA is particularly problematic in this respect as non-binary populations are not only marginalised from cisgender people, but also from other trans populations who are willing and/or able to achieve recognition according to the expected narrative underpinning many of the current requirements. This potentially damages social cohesion and further marginalises non-binary communities who disengage from institutions which may provide important services for their health and wellbeing, as well as further isolating non-binary populations from others within the trans community.

The understanding of equality according to dignity instead emphasises the importance of recognising the equal and intrinsic worth of the other, including their distinctive needs, desires and vulnerabilities.¹⁴⁷⁷ People are mutually dependent, and by virtue of their community status, have both 'rights *and duties* with respect to other persons, as they have to them'.¹⁴⁷⁸ Dignity offers us protection but also liability to be 'called to account as a morally responsible actor'.¹⁴⁷⁹ Recognising the other's equal and intrinsic dignity is not just a matter for the State, but is required of each individual citizen too. This does not mean agreeing or accepting the demands of others under all

¹⁴⁷⁶ Baroness Brenda Hale, 'Dignity' (Ethel Benjamin Commemorative Address 2010).

¹⁴⁷⁷ Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 38.

¹⁴⁷⁸ Rom Harre, *The Singular Self*.(SAGE publications 1998) 72.

¹⁴⁷⁹ *ibid* 71.

circumstances. However, we are under an obligation to have regard for our shared humanity, which offers us a corrective and critical distance to understanding the other, as well as establishing reciprocity and equality between each other.¹⁴⁸⁰ This builds on the relational aspect of dignity, however, it also illustrates the theoretical depth of dignity, and how this should be used to inform policymaking and governance in practice. In terms of non-binary legal recognition, it requires us to recognise the equal and intrinsic dignity of non-binary people, including the ways which legal recognition can affirm gender identity and in turn can facilitate enjoyment of private and public life.

While it is argued that non-binary populations are similarly harmed by non-recognition as the ECtHR in *Goodwin* understood binary populations to be, the Court has so far not considered the harm of non-recognition for non-binary populations as sufficiently similar, or serious enough, to restrict the state's margin of appreciation. It is argued that one reason for this is because the Court has so far framed the harm of non-recognition as being 'outed' as trans. I now turn to explore this in more detail, including outlining how a reconceptualization of this could be adopted under a dignity framework.

¹⁴⁸⁰ This is inspired by Levinas' claim of alterity and the category of the Third in addition to the subject and Other in Emmanuel Levinas, *Totality and Infinity* (Duchesne University Press 1969) 213; Emmanuel Levinas, *Otherwise than Being, or Beyond Essence* (Kluwer 1991). 159. See Costas Douzinas and Ronnie Warrington, 'The Face of Justice: A Jurisprudence of Alterity' (1994) 3 *Social and Legal Studies* 405 – 425, 71.

8.5.1 (Re)conceptualising the harm of non-recognition from outing to misgendering

In *Goodwin*, the Court ringfenced the applicability of their analysis to ‘post-operative transsexuals’ whose ‘stress and alienation arising from a discordance’ in society and legal status justified legal recognition.¹⁴⁸¹ Gonzalez-Salzburg argued that this was based on the Court’s distinction between the ‘true’ and ‘false’ transsexual.¹⁴⁸² The Court’s ‘true’ transsexual is firmly grounded in medical science with trans identity understood as a ‘medical condition’¹⁴⁸³ for which medical treatment (most notably surgery¹⁴⁸⁴) is necessary for ‘alleviating the condition’.¹⁴⁸⁵ Sharpe and Gonzalez-Salzburg argue that this represents genitocentrism and homophobia within the Court’s jurisprudence¹⁴⁸⁶ which was subsequently overcome following *AP*.¹⁴⁸⁷ Nevertheless, while moving away from the genitocentrism of law, medicine was retained as the primary regulator in the determination of legal sex recognition. This is reproduced under the GRA through the gender dysphoria diagnosis, where legal recognition is framed in terms of pathology, mental distress, and the wrong body narrative.¹⁴⁸⁸ By

¹⁴⁸¹ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [77].

¹⁴⁸² *B v France App no 13343/87* (ECtHR, 25 March 1992) (Judge Pettiti).

¹⁴⁸³ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [52] [81].

¹⁴⁸⁴ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [81]; *L v Lithuania App no 27527/03* (ECtHR, 11 September 2007) [57] where the Court appears to consider the lack of legal recognition for pre-operative transsexual unproblematic. See also *Nunez v France App No 18367/06* (ECtHR 27 May 2008) as translated by Damian A Gonzalez Salzberg, *Sexuality and Transsexuality Under the European Convention on Human Rights* (Hart Publishing 2019) 48.

¹⁴⁸⁵ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [78].

¹⁴⁸⁶ Damian A Gonzalez-Salzburg, *Sexuality and Transsexuality Under the European Convention on Human Rights* (Hart Publishing 2019) 49 – 51; Alex Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Routledge 2002) 56.

¹⁴⁸⁷ Damian A Gonzalez-Salzburg, *Sexuality and Transsexuality Under the European Convention on Human Rights* (Hart Publishing 2019) 53 – 55.

¹⁴⁸⁸ Sally Hines, ‘(Trans)Forming Gender: Social Change and Transgender Citizenship’ (2007) 12(1) *Sociological Research Online* 5.3 – 5.12; Sharon Cowan, ‘Looking Back (To)wards the Body: Medicalization and the GRA’ (2009) 18(2) *Social & Legal Studies* 247 -252, 248.

associating gender diversity with dysphoria and pathology, the ECtHR recognises an overriding desire to avoid being ‘outed’ as transgender.¹⁴⁸⁹ The ‘anomalous position’ caused by the ‘conflict between social reality and law’¹⁴⁹⁰ risks causing feelings of vulnerability, humiliation and anxiety.¹⁴⁹¹ A similar understanding of the harm of non-recognition was reproduced in the dissenting judgment in *Hämäläinen*, where Judge Sajo, Judge Keller and Judge Lemmens argued:

The applicant has an interest in being granted a female identification number because *otherwise she will be required to identify herself as transgender* – and thus reveal an aspect of her personality belonging to her most intimate sphere – every time the discrepancy between her gender presentation and her identity card has to be explained.¹⁴⁹²

This reflects the ECtHR’s understanding of the ‘successful’ trans person as dependent on the ‘intelligibility of [their] new gender in the eyes of non-trans people’.¹⁴⁹³ This framing is particularly harmful for non-binary populations because, so long as the ‘ability to be perceived by non-trans people as a non-trans person is valorized, normative expressions of gender within a singular category are mandated’.¹⁴⁹⁴ This implicit desire for someone’s trans identity to be invisible also arguably understands gender diversity through a trans-negative lens.¹⁴⁹⁵ This lens perpetuates an

¹⁴⁸⁹ See dissenting opinions of Judge Sajo, Judge Keller and Judge Lemmens) in *Hämäläinen v Finland* [2014] ECHR 787.

¹⁴⁹⁰ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [77].

¹⁴⁹¹ *ibid.*

¹⁴⁹² *Hämäläinen v Finland* [2014] ECHR 787 [8] (Judge Sajo, Judge Keller and Judge Lemmens) (emphasis added).

¹⁴⁹³ Dean Spade, ‘Resisting Medicine, Re/modelling Gender’ (2003) 18 Berkeley Women’s Law Journal 15 – 37, 26.

¹⁴⁹⁴ *ibid.*

¹⁴⁹⁵ I am using trans negative in contrast to Raj’s use of ‘trans-positive’ in Rupert Raj, ‘Transforming Couples and Families: A TransFormative Therapeutic Model for

understanding of trans identity and experience as being characterised by distress and sacrifice. Demonstrable sacrifice- such as surgeries or experiencing discrimination or hardship - is described by Gonzalez-Salzburg as one of the key tools used by the ECtHR in determining the 'true' transsexual for the purposes of legal rights.¹⁴⁹⁶ This was also reflected in *Elan-Cane*, where the Court of Appeal understood the importance of Elan-Cane's non-gendered identity with reference to surgical interventions and prejudice. The Court said:

[A] gender identity chosen as it has been here, achieved or realised through successive episodes of major surgery and lived through decades of *scepticism, indifference and sometimes hostility* must be taken to be absolutely central to the person's private life.¹⁴⁹⁷

While the gender dysphoria model is commonly understood, it also contrasts with other community-based understandings of trans experience such as those based on gender euphoria, which was highlighted by three participants in this study as guiding and defining their medical, legal and/or social transitioning process. Gender euphoria can be understood as the 'distinct enjoyment or satisfaction caused by the correspondence between the person's gender identity and gendered features associated with a gender other than the one assigned at birth'.¹⁴⁹⁸ It is separable from dysphoria, such that an

Working with the Loved-Ones of Gender-Divergent Youth and Trans-Identified Adults' (2008) 4(2) Journal of GLBT Family Studies 133-163.

¹⁴⁹⁶ Damian A Gonzalez Salzberg, *Sexuality and Transsexuality Under the European Convention on Human Rights* (Hart Publishing 2019) 46 – 47.

¹⁴⁹⁷ *R (Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363, [2020] QB 929 [46] (King LJ) (emphasis added).

¹⁴⁹⁸ Florence Ashley and Carolyn Ells, 'In favor of covering ethically important cosmetic surgeries: Facial feminization surgery for transgender people' (2018) 18(12) The American Journal of Bioethics 23–25.

individual may experience euphoria without having experienced dysphoria.¹⁴⁹⁹ It is therefore a definition which can detach trans status from dysphoria. Participant 4 noted that gender euphoria can be highly personal, such that while some people experience it in relation to medical transitioning, others find it in legal and/or social transitioning.¹⁵⁰⁰ Participant 14 described gender euphoria as referring to the ‘innate’ sense of ‘looking right and feeling right’ which may or may not involve medical transitioning.¹⁵⁰¹ Another (Participant 3) expressed frustration at gender dysphoria as the dominant narrative of trans identity, arguing that many non-binary people experience gender euphoria, but that ‘doesn’t get spoken about nearly as much’.¹⁵⁰²

Drawing on gender euphoria as an alternative way of understanding the experiences of non-binary people, it is possible to see legal recognition as serving an affirmative function which may, or may not, be tied to the desire to avoid being outed. Instead of non-recognition being harmful for outing someone as trans, for non-binary people it is a form of misgendering which undermines gender euphoria. As Kavanagh argued, the importance placed on passing by the ECtHR presumes the desire for non-binary (and binary) trans populations to have ‘the freedom, like everyone else, to slip quietly into the crowd’.¹⁵⁰³ For non-binary populations, while recognition may ‘out’ them as trans, it is nevertheless important because it serves as affirmative function.¹⁵⁰⁴ It is not

¹⁴⁹⁹ Florence Ashley, ‘Thinking an ethics of gender exploration: against delaying transition for transgender and gender creative youth’ (2019) 24(2) *Clinical Child Psychology and Psychiatry* 223 – 236.

¹⁵⁰⁰ Participant 4, Non-binary / proxvir, 19 – 25 years.

¹⁵⁰¹ Participant 14, Non-binary, 26 – 35 years.

¹⁵⁰² Participant 3, Non-binary transmasculine, 19 – 25 years.

¹⁵⁰³ Paul Kavanagh, ‘Slipping Quietly into the Crowd—UK Transsexuals Finally out of Exile’ (2005) 9 *Mountbatten Journal of Legal Studies* 21 – 42, 42.

¹⁵⁰⁴ Jens Theilen, ‘Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition’ (2018) 3 *European Human Rights Law Review* 249 - 257, 252 – 253.

disputed that passing is important to many people's experiences, and I do not intend to suggest that this is not a legitimate reason to seek legal recognition, as being outed can place trans people at risk of violence and discrimination. Such narratives have also often been successful for non-binary (and binary) trans populations attempting to access and navigate medical and legal institutions.¹⁵⁰⁵ However, grounding the legal understanding of trans experience in this narrative arguably contributes to a restrictive understanding of the deserving rights holder. This framework is also potentially limited for many binary trans people too. It overlooks the potential for reconceptualising legal recognition as an affirmative designation which can incorporate a broader cohort of trans identities.

8.6 Requirements for recognition

Each requirement surveyed in this study attracted criticism and opposition from non-binary participants, namely the gender dysphoria requirement, the statutory declaration, the proof requirement, the Gender Recognition Panel, spousal consent, and application fee.

Autonomy is arguably most obviously engaged by the gender dysphoria requirement, spousal consent and GRP, as they bring third parties (medical and legal professionals, spouses/partners) into the GRC process, and in the context of spousal consent, may make them vulnerable to having their autonomy infringed by other citizens (i.e. the partner/spouse).¹⁵⁰⁶ However, the gender dysphoria requirement was particularly

¹⁵⁰⁵ It was persuasive and strategically useful in *Christine Goodwin v United Kingdom* [2002] ECHR 588 [106] but has had a limited impact on legal sex rights since then particularly for non-binary people, but also binary people: *Hämäläinen v Finland* [2014] ECHR 787.

¹⁵⁰⁶ See chapter 7.5 on spousal consent.

contentious, attracting the most additional comments in the survey and interviews. Participants were particularly opposed to the practical and symbolic barriers it placed on them, as well as the pivotal role it played in perpetuating a medicalised, binary narrative of gender identity under the Act. The choice between non-recognition and facing the issues described above, or submitting to this narrative, engages autonomy. Butler describes how trans people have to adapt their language in order to access the diagnosis:

The only way to secure the means by which to start this transformation is by learning how to present yourself in a discourse that is not yours, a discourse that effaces you in the act of representing you, a discourse that denies the language you might want to use to describe who you are, how you get here, and what you want from this life.¹⁵⁰⁷

This arguably reflects how non-binary participants described feeling like they must submit to the language they felt was expected of them by medical professionals such as that based on pathology and disorder.¹⁵⁰⁸ This expected narrative of gender, reinforced through the powerful discourses of law and medicine,¹⁵⁰⁹ arguably deters the individual from expressing their gender diversity in a way which is more fluid and

¹⁵⁰⁷ Butler here was talking in general about the diagnosis of gender dysphoria, including for medical purposes. Judith Butler, 'Undiagnosing gender' in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 288.

¹⁵⁰⁸ Pieter Cannoot, 'The pathologisation of trans* persons in the ECtHR's case law on legal gender recognition' (2019) 37(1) *Netherlands Quarterly of Human Rights* 14 – 35.

¹⁵⁰⁹ Carol Smart, 'Law's Power, the Sexed Body, and Feminist Discourse' (1990) 17(2) *Journal of Law and Society* 194 – 210, 198 – 200.

variable.¹⁵¹⁰ It also positions gender diversity as irrational, which undermines their status as rational beings with intrinsic worth.¹⁵¹¹

Nevertheless, other requirements reinforce this narrative too, through expectations of gender permanence and rigidity (e.g. statutory declaration, proof) and arguably perpetuates a legal charade that gender identity can be reliably ascertained through legal, administrative and clinical, proof (e.g. statutory declaration, proof, Gender Recognition Panel). This narrative is relevant to a dignity analysis insofar as it undermines the autonomy of applicants who are unable to articulate their gender identity in ways which may more accurately reflect their lived experience. It is also perpetuated in more subtle ways too, such as through Report B,¹⁵¹² where medical treatment is an implicit expectation. In *Carpenter*, the requirement to provide details of gender reassignment surgery was held not to be a breach of Articles 8 or 14 ECHR, despite the fact that someone who had not undergone surgery could still obtain a GRC and would not have to provide such details.¹⁵¹³ Therefore, even where there is not a specific requirement related to medical intervention, the Act nevertheless requires applicants to submit highly personal and intimate medical information to the Panel.

¹⁵¹⁰ Dieter Grimm, Alexandra Kemmerer and Christoph Mollers, *Human Dignity in context: explorations of a contested concept* (Nomos 2017) 377.

¹⁵¹¹ Zowie Davy, Anniken Sørli and Amets Suess Schwend, 'Democratising diagnoses? The Role of the Depathologisation Perspective in Constructing Corporeal Trans Citizenship' (2018) 38 *Critical Social Policy* 13 - 34.

¹⁵¹² As a reminder, Report B must include details of any medical treatment that the applicant has had (or plans to have) to modify sexual characteristics, see chapters 1.3, 6.1 and 6.2 for more on Report B in particular.

¹⁵¹³ *Carpenter v Secretary of State for Justice* [2015] EWHC 464 (Admin); [2015] 1 WLR 4111. For case commentary see Robin White, 'Recognition by the Northern Ireland High Court of a Shift in Gender Recognition' (Old Square 2021) <<https://oldsquare.co.uk/recognition-by-the-northern-ireland-high-court-of-a-shift-in-gender-recognition-robin-moira-white/>> accessed 25 August 2022.

Through the discourse of law,¹⁵¹⁴ this has a potentially significant impact on the extent to which non-binary (and binary) people feel able to embark on the process of changing their legal sex and develop their identity and express their personality with others fully and freely. Consequently, this would be contrary to the understanding of dignity in which one of the most important principles is the autonomy to determine one's own ends as rational beings.

8.6.1 Problems with the ECtHR's prioritisation of physical integrity over emotional integrity

An expansive understanding of how the requirements may impact on autonomy (and therefore personal development) has so far not been adopted by the courts in England and Wales, nor in the ECtHR. The ECtHR has taken a relatively steady approach to questions of legal sex requirements, only requiring that systems are 'clear, accessible and transparent'¹⁵¹⁵ and that there is no requirement on applicants to 'demonstrate an irreversible change in appearance'.¹⁵¹⁶ This latter finding was made in the case of *AP* concerning three separate claims of illegality vis-à-vis requirements for legal sex change in France. The first referred to the requirement to provide proof of the 'irreversible nature of the change in their appearance,' namely to demonstrate that they 'had undergone sterilisation surgery or medical treatment entailing a very high probability of sterility'.¹⁵¹⁷ The second and third referred to the requirements for individuals to prove the existence of a gender identity disorder, and to undergo a medical examination, respectively. While the first claim about sterility requirements

¹⁵¹⁴ Carol Smart, 'Law's Power, the Sexed Body, and Feminist Discourse' (1990) 17(2) *Journal of Law and Society* 194 – 210, 198 – 200.

¹⁵¹⁵ *AP Garçon, Nicot v France* [2017] ECHR 338 [4].

¹⁵¹⁶ *ibid.*

¹⁵¹⁷ *ibid* [135].

was successful, the second and third claims were rejected. The court distinguished between the first (sterility requirements), and second requirement (gender identity disorder), stating that ‘unlike the sterility condition, the requirement to obtain a prior psychiatric diagnosis does not directly affect individuals’ physical integrity’.¹⁵¹⁸ Physical integrity is a core element of dignity insofar as it protects the individual from outside interference.¹⁵¹⁹ However, emotional integrity is equally important to the ability of an individual to live in conditions of equal worth and dignity, with this distinction by the Court in *AP* contrasting with the recognition of the importance of both moral and physical security in *Goodwin*.¹⁵²⁰

Similarly, in this study the GRA was perceived by non-binary participants as stigmatising, through the association of trans identity with medicine and pathology, and the perceived interrogation and suspicion of trans identity. It is also important to recognise how other requirements contribute to the overall perception of the Act for trans populations, in placing an onerous burden on applicants which can be demeaning to their internal sense of worth. For example, while the current application fee is low, when viewed in the wider context of the Act, which already imposes significant costs on the applicant, it arguably contributes to the wider sense of injustice and inequality perpetuated by the Act. This sense of unfairness was apparently exacerbated through a lack of transparency and clarity in relation to certain

¹⁵¹⁸ *ibid* [139].

¹⁵¹⁹ *ibid* [128]; *S W v United Kingdom* [1995] ECHR 52 [44]. See also Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 100 and Daniel Bedford, ‘Human dignity in Great Britain and Northern Ireland’ in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019) 344.

¹⁵²⁰ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [90].

requirements (e.g. GRP),¹⁵²¹ which in turn engages issues of the rule of law and the obligation for such laws to be accessible and clear under the ECHR.¹⁵²²

The potential harm to emotional integrity that the requirements of various legal systems could pose to non-binary (and binary) trans populations has arguably been overlooked and undermined in the ECtHR which has instead prioritised issues of physical integrity. The finding of the ECtHR is extraordinary insofar as it represents a departure from the genitocentrism of prior case law which framed the ‘true’ transsexual in terms of surgical procedures.¹⁵²³ Nevertheless, the implicit hierarchy between physical and emotional integrity is a very limited understanding of dignity, where harm has been ranked according to its physical or emotional nature, rather than a holistic assessment which recognises the harm to the whole, integrated person.¹⁵²⁴

8.6.2 Problems with the ECtHR’s use of the margin of appreciation

One of the most significant bases for the ECtHR’s rejection of claims related to legal recognition has been the Court’s deference to states’ margin of appreciation.¹⁵²⁵ The Court generally considers the State’s margin of appreciation to be limited in relation to issues of fundamental importance to private life like gender identity.¹⁵²⁶ However, other cases evidence the Court adopting a wide margin in relation to issues engaging

¹⁵²¹ See chapter 7.4 for the Gender Recognition Panel.

¹⁵²² *X v The Former Yugoslav Republic of Macedonia* [2019] ECHR 55 [70].

¹⁵²³ Damian A Gonzalez Salzberg, *Sexuality and Transsexuality Under the European Convention on Human Rights* (Hart Publishing 2019) 38 – 42, 53 – 55.

¹⁵²⁴ Daniel Bedford, ‘Human dignity in Great Britain and Northern Ireland’ in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019).

¹⁵²⁵ *AP Garçon, Nicot v France* [2017] ECHR 338.

¹⁵²⁶ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [90]; *Hämäläinen v Finland* [2014] ECHR 787 [67]; *Pretty v United Kingdom* [2002] ECHR 2346/02 [71].

controversial moral issues, such as sexual education,¹⁵²⁷ reproductive rights,¹⁵²⁸ homosexual sex,¹⁵²⁹ homosexual adoption,¹⁵³⁰ and various cases related to trans people, including parenting,¹⁵³¹ legal recognition and marriage.¹⁵³² There is no single analytical path that the Court follows in relation to the margin of appreciation, though the ‘European consensus’ has been relevant to such analyses in cases concerning legal sex recognition.¹⁵³³ Theilen has grouped the ECtHR’s understanding of European consensus into three broad groups, namely legal consensus (including European domestic statutes, international treaties, regional laws, and expert and European public consensus); expert consensus (medical and scientific); and public opinion (though there is rarely reference to empirical evidence).¹⁵³⁴ Given the varying range of sources used to determine European consensus, the Court’s approach on occasions has unsurprisingly been subject to criticism for inconsistency. For example, in *AP* the Court accepted that there was no European consensus on sterilisation but nevertheless found the sterilisation requirements to be unlawful. At the time, 22 out of 40 States which provided for legal recognition retained such a requirement, representing the majority position.¹⁵³⁵ Instead, the Court placed emphasis on the

¹⁵²⁷ *Handyside v United Kingdom* [1976] ECHR 5.

¹⁵²⁸ *Paton v United Kingdom* (1980) 19 DR 244, 3 EHRR 408; *Boso v Italy* [2002] ECHR 846; *Open Door and Dublin Well Woman v Ireland* [1992] ECHR 68; *Tysi c v Poland* [2007] ECHR 219; *D v Ireland* [2006] ECHR 1210.

¹⁵²⁹ *Laskey and others v United Kingdom* [1997] ECHR 4.

¹⁵³⁰ *Frett  v France* [2002] ECHR 156.

¹⁵³¹ *X, Y and Z v United Kingdom* [1997] ECHR 20.

¹⁵³² *Rees v United Kingdom* [1986] ECHR 11 [47]; *Cossey v United Kingdom* [1990] ECHR 21 [42]; *Sheffield and Horsham v the United Kingdom* [1990] ECHR 21.

¹⁵³³ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [85]; *AP Gar on, Nicot v France* [2017] ECHR 338 [121]; *H m l inen v Finland* [2014] ECHR 787 [67].

¹⁵³⁴ Jens Theilen, *European Consensus between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication* (Nomos 2021) 64.

¹⁵³⁵ *AP Gar on, Nicot v France* [2017] ECHR 338 [124].

number of States who had *recently* decided to abandon the requirement.¹⁵³⁶ They noted that 11 states had removed it between 2009 – 2016.¹⁵³⁷ This indicates a flexibility in the Court’s assessment of European consensus, where a lack of consensus on a particular requirement does not necessarily preclude the Court from finding it to be unlawful. The Court demonstrated similar flexibility in *Goodwin*, pointing to the importance of the ‘continuing international trend’ in explaining why it ‘attaches less importance to the lack of evidence of a common European approach’.¹⁵³⁸ Consequently, the Court’s reliance on the lack of European consensus in relation to other requirements, particularly psychiatric diagnosis requirements, is increasingly unconvincing. It could be argued that, at least for psychiatric diagnosis requirements, there is a sufficient consensus for the purposes of the Court’s margin of appreciation analysis. This could include the growing international recognition that being trans is not a mental illness,¹⁵³⁹ the ‘rapid evolution of social attitudes’¹⁵⁴⁰ towards trans people across Europe,¹⁵⁴¹ and/or the number of States removing psychiatric requirements in a relatively small period of time. In 2017, the Court in *AP* noted that only 4 states which provided for recognition did not have a diagnosis requirement, whereas just five years later in 2022, this figure is now 11 according to ILGA Europe.¹⁵⁴² Arguably this could be considered to reflect a growing European consensus as it was understood in *AP* with regards to sterilisation requirements.

¹⁵³⁶ *ibid.*

¹⁵³⁷ *ibid.*

¹⁵³⁸ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [85].

¹⁵³⁹ See relevant discussions in chapter 6.2.

¹⁵⁴⁰ *Schalk and Kopf v Austria* [2010] ECHR 1996 [92-95].

¹⁵⁴¹ In *Marckx*, the ECtHR held that the ECHR must be ‘interpreted in light of present-day conditions’: *Marckx v Belgium* [1979] ECHR 2 [41].

¹⁵⁴² ILGA Europe, ‘Rainbow Europe Map and Index 2022’ (ILGA 2022) <<https://www.ilga-europe.org/report/rainbow-europe-2022/>> accessed 13 August 2022.

The European consensus approach can also be criticised as ‘tyranny of the majority’,¹⁵⁴³ with Benvenisti arguing that it is inappropriate for cases concerning minorities because reference to State practice is ‘unlikely to reflect’ minority interests.¹⁵⁴⁴ Instead, the ‘inherent deficiencies’¹⁵⁴⁵ of the majoritarian decision making within states should be mitigated against by the Court, rather than reinforced.¹⁵⁴⁶ It could also be questioned whether a lack of consensus should justify the infringement of human rights. While the ECtHR have noted a consensus issue on occasions, this has not been determinative of other actors’ conclusions on the compatibility of the diagnosis requirement with rights. In the IACtHR’s 2017 *Advisory Opinion for Costa Rica*, the Court endorsed a self-identification model of legal sex recognition without pathologising requirements such as medical or psychological certifications.¹⁵⁴⁷ Similarly, in 2018 the UN Expert also called for the adoption of self-identification, describing medical diagnoses as ‘abusive’ and reducing gender diversity

¹⁵⁴³ Yutaka Arai-Takahashi, ‘The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry’ in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 96; Panos Kapotas and Vassilis P Tzevelekos, ‘How (Difficult Is It) to Build Consensus on (European) Consensus?’ in Panos Kapotas and Vassilis P Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press) 13.

¹⁵⁴⁴ Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 *New York University Journal of International Law and Politics* 843 - 854, 851.

¹⁵⁴⁵ *ibid* 847.

¹⁵⁴⁶ Jens Theilen, *European Consensus between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication* (Nomos 2021) 64.

¹⁵⁴⁷ *Inter-American Court of Human Rights, Advisory Opinion OC-24/17* (IACtHR 24 November 2017).

down to a disease, in turn creating stigma and discrimination.¹⁵⁴⁸ The IACtHR specifically addressed the issue of consensus, arguing that controversy or a lack of consensus surrounding LGBTQ+ issues could not necessarily be justifications for the infringement of human rights.¹⁵⁴⁹ Arguably, rather than granting greater leniency towards states, where there is an apparent conflict between majority and minority preferences, the review of the Court should be stricter.¹⁵⁵⁰

This does not mean that the margin of appreciation (including European consensus) should not be utilised at all by the Court in its assessment. However it should not act to shield the State from accountability by conditioning the rights of marginalised groups on the practice of the majority.¹⁵⁵¹ The ECtHR should therefore adopt a much stricter understanding of the margin of appreciation for the purposes of legal sex recognition requirements (and also for non-binary recognition). So far, the Court has offered States a broad margin of appreciation with regards to legal sex recognition, however, there has been a failure to conduct its assessments which consider the particular needs and experiences of the non-binary community. This chapter has sought to illustrate the applicability of dignity issues to legal sex recognition by drawing on the experiences of non-binary populations. Under a dignity framework, the potential harm

¹⁵⁴⁸ Victor Madrigal-Borloz (IE SOGI), *Report on protection against violence and discrimination based on sexual orientation and gender identity A/73/152* (UNGA 12 July 2018) para 28.

¹⁵⁴⁹ *Inter-American Court of Human Rights, Advisory Opinion OC-24/17* (IACtHR 24 November 2017).

¹⁵⁵⁰ Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843 - 854; Ivana Radačić, 'The Margin of Appreciation, Consensus, Morality and the Rights of the Vulnerable Groups' (2010) 31(1) *Zb Prav fak Rij / University of Rijeka Law Journal* 599 – 616, 612.

¹⁵⁵¹ Ivana Radačić, 'The Margin of Appreciation, Consensus, Morality and the Rights of the Vulnerable Groups' (2010) 31(1) *Zb Prav fak Rij / University of Rijeka Law Journal* 599 – 616, 612.

to the whole, integrated person caused by current laws is unacceptable as a failure to recognise the equal and intrinsic value of non-binary people.

8.7 Conclusion: the opportunities of a dignity framework

Dignity has the potential to offer non-binary rights claims a conceptual and normative framework through which to further rights claims related to legal recognition. In particular, the understanding of harm to the whole, integrated person draws out the significance of legal recognition claims, particularly for non-binary populations for whom the long-standing narrative of trans identity in case law has been inadequate and has not gone far enough in addressing their particular needs and concerns.

Dignity can bring a degree of dynamism to the law on legal recognition such that it can draw on a range of conceptual tools (including autonomy, equality, integrity) to understand the harm of a violation of dignity in a given scenario. In the context of non-binary legal recognition, dignity can draw out the symbolic value of reform, which is particularly important for vulnerable populations¹⁵⁵² as well as offering a framework through which to reconceptualise the harms of non-recognition.

The rich history of dignity also provides a pertinent tool for guiding future articulations of rights, by being firmly grounded in the rejection of the past atrocities of the Second World War, while simultaneously offering the conceptual flexibility to recognise ever-expanding rights claims. As Theilen notes, the new right to legal recognition was framed in *Goodwin* as being discovered following from the 'clearer light' and 'sense of

¹⁵⁵² See generally: Michael Freeman, *Family Values and Family Justice* (Routledge 2010) ch 14.

new-found enlightenment' provided by the passing of time.¹⁵⁵³ The dignity framework proposed in this thesis therefore rejects the temporal rhetoric of *Goodwin* where at paragraph 90, the Court said:

*In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved.*¹⁵⁵⁴

This idea of the *Goodwin* judgment representing a 'coming to truth'¹⁵⁵⁵ was explicitly reflected in the extra judicial comments of Sir Nicolas Bratza (former president of the ECtHR) who said that with *Goodwin*, '[t]he long road to establishing the Convention rights of transsexuals ... was at last *at an end*'.¹⁵⁵⁶ However, such rhetoric sits uncomfortably with the Court's own obligation to have regard to changing social conditions and the need to keep legal measures under review in light of the 'serious problems' facing trans people.¹⁵⁵⁷ This temporal dimension to *Goodwin* fails to

¹⁵⁵³ Jens Theilen, 'Pre-existing rights and future articulations: Temporal Rhetoric in the Struggle for Trans Rights' in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020) 209.

¹⁵⁵⁴ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [90] (emphasis added).

¹⁵⁵⁵ David Valentine, *Imagining Transgender: An Ethnography of a Category* (Duke University Press 2007) 245; Jens Theilen, 'Pre-existing rights and future articulations: Temporal Rhetoric in the Struggle for Trans Rights' in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020).

¹⁵⁵⁶ Nicolas Bratza, 'The Christine Goodwin Case. The Long Road to Transsexual Rights in the United Kingdom' (2014) 34 *Human Rights Law Journal* 245 -250, 251 (emphasis added); Jens Theilen, 'Pre-existing rights and future articulations: Temporal Rhetoric in the Struggle for Trans Rights' in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020).

¹⁵⁵⁷ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [74]. See also *Rees v United Kingdom* [1986] ECHR 11 [47]; *Cossey v United Kingdom* [1990] ECHR 21 [42]; *Sheffield and Horsham v the United Kingdom* [1990] ECHR 21 [60].

recognise the spirit of dignity in that while it is based on a never-again promise,¹⁵⁵⁸ it is invariably forward-looking too. It is based on recognising an increasing number of situations and entities being brought into its remit for protection with the ‘belief that life can be better and that human beings can make a better life’.¹⁵⁵⁹ By framing *Goodwin* as the final hurdle for trans rights, the Court’s desire for rights to be ‘practical and effective, not theoretical and illusory’¹⁵⁶⁰ was undermined for non-binary people, for whom *Goodwin* did not provide any form of right to legal recognition.¹⁵⁶¹

Notwithstanding the conceptual and theoretical depth of dignity, it is also normatively grounded with the capacity to be considered alongside policy and proportionality assessments. The relative feasibility and realism of various reform options was important for participants throughout this study, making this aspect of dignity (being able to balance various interests) particularly beneficial. This is also important because, while this chapter has forwarded a dignity-based framework which I have argued should be adopted by the ECtHR in the future, it must also be recognised that dignity cannot be the only consideration in assessing issues of legal sex recognition. Specific policy considerations would also feed into a broader proportionality assessment by the ECtHR. While such issues have not been explored in detail in this chapter, some relevant policy considerations have been noted elsewhere throughout the thesis (i.e. feasibility, practicality, state interests). I would argue, though, that these

¹⁵⁵⁸ Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 58 – 62.

¹⁵⁵⁹ *ibid* 69.

¹⁵⁶⁰ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [74].

¹⁵⁶¹ Jens Theilen, ‘Pre-existing rights and future articulations: Temporal Rhetoric in the Struggle for Trans Rights’ in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020).

interests must be balanced against a dignity-based and non-binary focused account of the issues at stake.

This is also where, arguably, dignity provides benefits above other analyses of legal recognition based on post-structuralism. Such analyses successfully deconstruct the GRA as treating ‘transsexuals as subjects to be identified according to a supposedly objective biopolitical criteria,¹⁵⁶² regulated and treated as mentally disordered and then reassigned into a binary order’.¹⁵⁶³ However, they also fail to provide a guiding light for minimising or overcoming these issues through reform. On the contrary, this chapter has sought to illustrate how the rich roots of dignity and the contours of a dignity framework can be used to guide reform efforts.

Turning to the bigger picture, scholars in recent years have started to investigate the connections between dignity and democracy.¹⁵⁶⁴ Whereas the relationship between the rule of law and democracy has long been explored, the academic exploration of dignity in this context is relatively novel.¹⁵⁶⁵ Some other scholars have been critical of values like dignity, arguing that it is a limited (neo)liberal value.¹⁵⁶⁶ Not only would I

¹⁵⁶² Original wording of the author, ‘criteria’ should read ‘criterion’.

¹⁵⁶³ Alex Harris, ‘Non-binary Gender Concepts and the Evolving Legal Treatment of UK Transsexed Individuals: A Practical Consideration of the Possibilities of Butler’ (2012) 13(6) *Journal of International Women's Studies* 57-71, 68.

¹⁵⁶⁴ Daniel Bedford and others (eds), *Human dignity and democracy in Europe: Synergies, Tensions and Crises* (Edward Elgar 2022).

¹⁵⁶⁵ *ibid.*

¹⁵⁶⁶ Jens Theilen, ‘Depathologisation of Transgenderism and International Human Rights Law (2014) 14 *Human Rights Law Review* 327, 332. See also an interesting outline on the perceived tensions between post-structuralist queer theory and (neo)liberal rights strategies in Damian A Gonzalez Salzberg, *Sexuality and Transsexuality Under the European Convention on Human Rights* (Hart Publishing 2019) 21.

contest this as dignity actually offers a relatively dynamic way to understand rights,¹⁵⁶⁷ but I would also argue that the relationship that dignity has with liberal democracy is valuable. This is particularly true in light of the threat which populism has posed to liberal constitutionalism across Europe in recent years.¹⁵⁶⁸ Democratic backsliding has been observed in several European states,¹⁵⁶⁹ in favour of so-called illiberal democracy.¹⁵⁷⁰ This has been characterised by efforts to undermine the ‘post-war dignity promise’¹⁵⁷¹ which understood every human being as having intrinsic and equal worth within society.¹⁵⁷² Instead, already-vulnerable groups have suffered further marginalisation and discrimination, including trans and non-binary populations.¹⁵⁷³ These crises in Europe have led some to criticise the utility of values like democracy and dignity.¹⁵⁷⁴ However, dignity provides a key conceptual, political and legal tool through which to advance a particular kind of democracy, or as Daly argues, to improve the *quality* of democracy.¹⁵⁷⁵ Dignity therefore stretches beyond

¹⁵⁶⁷ Daniel Bedford and others (eds), *Human dignity and democracy in Europe: Synergies, Tensions and Crises* (Edward Elgar 2022).

¹⁵⁶⁸ *ibid.*

¹⁵⁶⁹ See (e.g.) Licia Cianetti, James Dawson and Sean Hanley (eds), *Rethinking ‘democratic backsliding’ in Central and Eastern Europe* (Routledge 2019).

¹⁵⁷⁰ ‘Illiberal democracy’ was used by Viktor Orbán (Prime Minister of Hungary) in a speech in 2014 to describe his plans for the future of Hungary. While not a ‘new phrase’, it has been used since to refer to the phenomena of some European states moving away from liberal democracy. For the English translation of Orbán’s full speech, see Csaba Tóth, ‘Full text of Viktor Orbán’s speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014’ (The Budapest Beacon 2014) <<https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>>accessed 20 August 2022.

¹⁵⁷¹ Daniel Bedford and Catherine Dupré, ‘Introduction to Human Dignity and Democracy in Europe’ in Daniel Bedford and others (eds), *Human dignity and democracy in Europe: Synergies, Tensions and Crises* (Edward Elgar 2022) 3.

¹⁵⁷² *ibid.*

¹⁵⁷³ *ibid* 1 – 17.

¹⁵⁷⁴ *ibid.* It is worth noting that these scholars do not criticise dignity, but they provide a useful overview of how others have.

¹⁵⁷⁵ Erin Daly, ‘Judicial activity, democratic activity: the democratising effects of dignity’ in Daniel Bedford and others (eds), *Human dignity and democracy in Europe: Synergies, Tensions and Crises* (Edward Elgar 2022) 29, 34.

individual instances of law reform to the macro level of political and legal governance, offering a conceptual framework through which to make sense of, and potentially counter, the threat that the rejection of liberal democratic values poses to marginalised groups.

This chapter has sought to draw out the deeper significance of the themes from my empirical findings. It has identified the relevance of these to themes of dignity, predominantly as conceptualised in *Goodwin*. However, it has also highlighted where reconceptualisation is needed regarding non-binary people's rights and interests so that they are taken into account more fully and accurately. This chapter has indicated that issues of legal sex recognition connect to much deeper issues of dignity which must be approached with regard for the equal and intrinsic worth of non-binary individuals. Dignity also requires that reform is approached in the spirit of solidaristic empowerment and reciprocity, recognising that it is in everyone's interests as human beings to protect and facilitate the dignified existence of others.¹⁵⁷⁶ It may therefore require the State to make particular provision, perhaps including measures beyond formal equality and/or those which may cause a level of disruption, to enable non-binary populations to live according to conditions of equal worth. With this in mind, I now turn to my recommendations chapter which sets out my final recommendations for reform.

¹⁵⁷⁶ See chapter 8.2 on the connections between dignity and humanity.

9 Recommendations

9.1 Introduction

This chapter presents my final recommendations for reform. I also explore the issues of the level of disruption caused by my recommendations and the relevance of checks and balances remaining in the system. I then turn to consider any additional areas for reform which have not been considered already in the thesis.

The dignity analysis in chapter 8 provided a framework through which to analyse the significance of the problems with the current law and forwarded a general case for reform. This was based on the argument that reform should be approached in the spirit of recognising the equal and intrinsic worth of non-binary people. In particular, reform claims should be approached in the spirit of dignity, with due regard for the principles of autonomy, equality and personal integrity. However this does not necessarily tell us what that reform should be in policy terms.

It could be argued that many trans and non-binary people misunderstand the GRA process, and these misunderstandings are the reason why they are put-off from applying. Instead of reform, some have argued that greater dissemination of information to trans groups about the GRA process is needed.¹⁵⁷⁷ It is true that in this study some non-binary participants expressed misunderstanding or confusion in relation to certain aspects of the law. However, throughout the thesis, the vast majority of the criticism has demonstrated that many requirements, and processes related to those requirements, are a significant barrier to non-binary populations which cannot

¹⁵⁷⁷ Women and Equalities Committee, *Oral evidence: Reform of the Gender Recognition Act*, HC 129, Q218 - 257 (House of Commons 16 June 2021) Q232.

be obviously resolved through reform based on education. Drawing together the preceding analysis throughout the thesis, I forward two key reform recommendations.

Firstly, and perhaps most crucial of all, non-binary legal recognition should be introduced. The total lack of non-binary legal recognition is arguably the most immediate and significant problem with the current law which undermines the autonomy of non-binary populations and perpetuates an inequality between them and others. A third sex option is recommended on the basis that it would address the current legal invisibility of non-binary people, and while it is not without critique, it is more feasible and pragmatic compared to multiple sex options.

Secondly, the current law should be reformed to introduce a model of legal recognition which is based on the principle of self-identification. Based on my findings and subsequent analysis, I would argue that removing the gender dysphoria requirement ought to be prioritised for reform. Nevertheless, other requirements also require removal, namely the proof and application fee requirements. Some degree of formality would be retained through (e.g.) the statutory declaration and the role of the administrative body tasked with processing applications. The spousal notification would also provide an added degree of formality for those with spouses or partners.

As noted throughout the thesis, even if non-binary legal recognition were not introduced, reform to these current requirements could still be valuable to non-binary populations who may seek recognition of a preferred binary marker. Furthermore, if non-binary recognition were rejected, measures should be adopted to work towards introducing non-binary recognition. This should include a review (or post-legislative

review if other reform is adopted) to consider the ongoing impact of non-recognition on non-binary populations. This might include (e.g.) a review every 2 and a half years for evidence gathering sessions with relevant stakeholders, as well as an ongoing commitment to reviewing (and reporting on) areas of particular concern identified by the Government or EHRC. I will now turn to list my reform proposals and discuss the issues of disruption and potential ‘checks and balances’ within the system.

9.2 Reform recommendations and rationale

Throughout this thesis, seven recommendations for reform have been proposed. These recommendations would de facto introduce a system of self-identification and would provide for non-binary legal recognition. These reforms would assist in removing the need for non-binary populations to navigate an ‘impossible dilemma’¹⁵⁷⁸ between submitting to a pathologising and dehumanising process or rejecting that narrative but living without recognition. It is argued that this is an unacceptable infringement on the dignity of non-binary populations for which society cannot accept as a mere inconvenience arising from a formality.¹⁵⁷⁹ The recommendations are as follows:

1. *Recommendation 1: A third sex option should be introduced.*
2. *Recommendation 2: The gender dysphoria requirement should be removed.*
3. *Recommendation 3: The statutory declaration should be retained but with new wording.*
4. *Recommendation 4: The proof requirement should be removed.*

¹⁵⁷⁸ *AP Garçon, Nicot v France* [2017] ECHR 338 [132].

¹⁵⁷⁹ *Christine Goodwin v United Kingdom* [2002] ECHR 588 [77].

5. *Recommendation 5: The Gender Recognition Panel should be removed, with responsibility for processing GRC applications delegated to the Registrar General for England and Wales.*
6. *Recommendation 6: The spousal consent requirement should be replaced with a spousal notification provision.*
7. *Recommendation 7: The application fee should be removed.*

The current system is not incompatible with international human rights, however, these reform options would align with international best practice on legal sex recognition. Nevertheless, these reforms are not the final hurdle for non-binary (and binary trans) rights. One theme persisting through my empirical findings was the value that non-binary populations placed on reforms being practical and feasible, though these options were not always the most ideal solutions. Non-binary participants considered certain reform options to be comparatively better than others (e.g. decertification as better than non-binary recognition), but this relative valuation did not necessarily correspond to a higher level of support for those options individually. In fact, there was a negative correlation in that the better the reform option was compared to others, the less support it attracted on its own. This was mostly because of feasibility concerns and the sense that these more idealistic reforms would not receive sufficient support from policymakers and the general public. As a project which has adopted critical realism and non-ideal theorising within its normative framework, the concerns related to feasibility and practicality have been valued highly in formulating my recommendations. However, as standards surrounding legal sex recognition evolve, including in the domestic and international sphere, it is highly likely that relative assessments of feasibility and practicality will also change. It is not certain that rights

standards for non-binary people will necessarily improve, especially in England and Wales where there has been a concerning shift in rhetoric towards trans people,¹⁵⁸⁰ but they will likely evolve to encompass different concerns and policy considerations. These reforms are therefore not the end of the story,¹⁵⁸¹ but they are a valuable and necessary improvement for non-binary populations in the short-medium term at least.

9.3 Addressing high-profile concerns with reform

Various counter arguments have been engaged with throughout the thesis. However, my recommendations engage two key counter arguments in particular, namely the disruption caused by introducing these reforms and whether there would be sufficient safeguards built into this reformed system.

9.3.1 Disruption

The introduction of a self-identification model would likely generate much less disruption compared to the introduction of a third sex option. This is because self-identification changes how people come within the current binary system, whereas non-binary recognition requires us to change the shape of that binary system. Nevertheless, the disruption caused by introducing a third sex option is not sufficient to justify maintaining the status quo with regards to non-binary populations. As argued in chapter 5.3, the law has already demonstrated the capacity to adapt in light of changing social attitudes and standards. Following *Goodwin*, the UK Government also

¹⁵⁸⁰ Stephen Whittle and Fiona Simkiss, 'A perfect storm: the UK Government's failed consultation on the Gender Recognition Act 2004' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender Sexuality and the Law* (Edward Elgar Publishing 2020); ILGA Europe, 'Rainbow Europe Map and Index 2022' (ILGA 2022) <<https://www.ilga-europe.org/report/rainbow-europe-2022/>> accessed 13 August 2022.

¹⁵⁸¹ See discussion on the rejection of temporal rhetoric in chapter 8.7.

made a significant change in providing for legal sex status to be determined by gender identity as opposed to it being immutable and fixed at birth.¹⁵⁸² There is therefore precedent for accepting disruption in providing for reform which allows a group to live in accordance with their right to dignity.

The introduction of a third sex option would require policy consideration to clarify certain areas of law where there are contestations around the interpretation of sex. It may also lead to instances where judicial interpretation is needed to clarify the law in a particular area. It is outside the scope of this thesis to consider each of these areas in detail, though it may require revisiting legislative drafting norms and/or providing for explicit exceptions or clarifications on the legal position of those with a non-binary sex status.¹⁵⁸³ However, such considerations are not particularly novel as they fit into existing debates and contestations surrounding sex in law and society already.¹⁵⁸⁴

This relates to another very important point, which is that while some have argued that non-binary legal recognition would cause disruption, it is worth re-emphasising that reform could also address existing disruption. The legal position of non-binary people has already attracted litigation, for which the Government has had to defend its position, and this is likely to continue. Arguably, a detailed consideration of the position of non-binary people in law, prompted by reflecting on non-binary legal recognition reform, could be incredibly beneficial to the Government to reduce the cost and disruption associated with legal challenges. Similarly, by bringing England and Wales

¹⁵⁸² *Corbett v Corbett* [1971] P 83, [1970] 2 All ER 33.

¹⁵⁸³ Though it is worth repeating that these current laws are not without criticism, see chapter 2.4.2.

¹⁵⁸⁴ See (e.g.) n 823 on existing scholarly debates surrounding protected characteristics under the EA.

in line with international best practice, it reduces the likelihood that the law will be subject to an unfavourable domestic or international judgment on the human rights compatibility of the law. Rather than waiting until aspects of the law are found to be incompatible with human rights, as was the case in *Goodwin* and *JR111*,¹⁵⁸⁵ it would be much more cost- and time-effective to address the problems with the law now while there is greater time to assess the intended and unintended consequences of reform.

With regards to the removal or reform to existing current requirements, this would also generate a degree of disruption in implementing a new system based on self-identification. However, as with the introduction of a third sex option, there is potential for such reform to mitigate disruption caused by the current law. For example, moving application processing powers from the GRP to an existing administrative body would potentially save the Government significant costs involved in maintaining the GRP currently. The time spent processing applications would also likely be reduced where particularly burdensome requirements were removed or reformed. Consequently, while it is accepted that the reforms proposed would generate disruption, this would not be unacceptable especially as they may even address and alleviate existing problems.

9.3.2 Checks and balances

The idea of having ‘checks and balances’ built into the system of legal sex recognition has been a notable concern of the Government¹⁵⁸⁶ and as such, the idea of retaining

¹⁵⁸⁵ *Christine Goodwin v United Kingdom* [2002] ECHR 588; *Re An Application by JR111* [2021] NIQB 48.

¹⁵⁸⁶ Gov.UK, ‘Press release: government responds to Gender Recognition Act consultation’ (Gov.UK 22 September 2020)

a degree of formality in the system has been addressed at various points in the thesis. The notion of ‘checks and balances’ has often been invoked in relation to the impact of reform on cis women, however, there is no evidence that self-identification has been used in other jurisdictions to harm women, nor would self-identification affect the operation of single- and separate-sex exceptions under the EA. Chapter 2 sought to explore some of these key areas of contestation to demonstrate that the law can, and already does, adopt a context-specific approach to sex in law where necessary. Reforming the means to receiving recognition would not remove the exceptions already adopted in respect of those who have received recognition. There is also no reason why such exceptions or provisions could not continue to operate under a system which provides for a third sex option.

There is certainly merit in exploring unintended consequences of law reform, particularly of a third sex option for which potential unintended consequences has attracted less scholarly attention than self-identification.¹⁵⁸⁷ This not only includes the impact of reform on cis women, but also other groups such as those of faith. However, it is also important to note that such issues are not novel,¹⁵⁸⁸ nor do they appear to present an insurmountable barrier so as to prevent rights-based reform progressing. Rather, any potential risks ought to be assessed according to empirical evidence on the likelihood of that risk materialising, and even if such risks are possible, measures

<<https://www.gov.uk/government/news/government-responds-to-gender-recognition-act-consultation>>accessed 10 March 2022.

¹⁵⁸⁷ See chapters 2.4 and 2.5 in particular.

¹⁵⁸⁸ See generally William N Eskridge and Robin Fretwell Wilson (eds), *Religious freedom, LGBT rights, and the prospects for common ground* (Cambridge University Press 2019).

can be taken to mitigate those potential harms based on guidance already in existence with regards to non-binary and trans inclusion within society.

While there is generally a lack of empirical evidence suggesting that GRA reform could lead to serious harm of others, there is arguably much more value in the system retaining a degree of formality, or ‘checks and balances’, for the purposes of the applicant understanding the consequences of changing legal sex status. It is envisaged that the statutory declaration would operate as the main form of safeguard within the system, to provide applicants with the opportunity to understand the consequences of legal sex change. It would also reduce the unlikely but administratively undesirable possibility of someone submitting frequent, multiple applications to change legal sex status. The declaration would also require an applicant to incur a time and financial cost which would be proportionate to these aims, particularly as the penalty for false declarations would remain.¹⁵⁸⁹

Moreover, as argued in chapter 7.4, the role of the Registrar could be utilised to signpost relevant resources and support for applicants. Additionally, as explored in chapter 5.3, policymakers may also wish to consider adopting a post-legislative review of reform, which could include an assessment of such concerns. Consequently, the recommendations proposed in this thesis provide a proportionate means to achieve the aims associated with maintaining checks and balances within the system.

¹⁵⁸⁹ Perjury Act 1911, s 5.

9.4 Other issues requiring consideration

This thesis has sought to forward reform recommendations which are practicable, though it could not account for every practical issue associated with reform. Other issues likely requiring consideration from policymakers in England and Wales may include the powers of the Registrar in processing and approving applications. For example, it may be desirable for the Registrar to request additional evidence or information as part of an application.¹⁵⁹⁰ On the other hand, it could be argued that such additional powers would not be necessary as the requirements are supposed to be prescriptive with little room for the Registrar to exercise discretion. Additional powers granted may also raise questions as to how this power was limited, and whether there remained a risk that applicants would have to provide evidence beyond that which is strictly required under the Act. Consequently, if policymakers were to consider the conferment of additional powers necessary, this power would require robust parliamentary scrutiny to ensure the powers of the Registrar were not arbitrary or without limit.

Another issue not considered in this thesis, but which has been proposed in Scotland, includes the possibility to provide for grounds for an ‘interested party’ to apply for revocation of someone else’s GRC.¹⁵⁹¹ This proposal has been positioned as a further safeguard against fraudulent applications, though the discussion above arguably demonstrates that there are already proportionate mechanisms to mitigate this (very unlikely) risk within the reform recommendations. Nevertheless, if such reform were considered in England and Wales, it would be important to reflect carefully on who

¹⁵⁹⁰ This is a measure which has been proposed by the Scottish Government in introducing their plans for reform.

¹⁵⁹¹ Gender Recognition Reform (Scotland) Bill 2022, s 9.

may be defined as a sufficiently 'interested party', and the potential impact of this with regards to abusive and coercive behaviour from partners/spouses¹⁵⁹² and other groups who may be prejudice towards trans people. It would therefore require careful consideration as to the requirements needed to lodge a claim, and whether those submitting fraudulent motions against GRC-holders should also be subject to criminal sanction. Moreover, if an application were successfully lodged which resulted in a hearing between the GRC-holder and the Registrar, the powers of the Registrar in those circumstances to request additional evidence beyond which was required by the Act would need to be subject to scrutiny.

Another area which may need further consideration in England and Wales is the eligibility of those applying for a GRC. In Scotland, those able to apply for a GRC are proposed to be those 'ordinarily resident in Scotland'.¹⁵⁹³ This potentially raises questions as to how long someone may have to reside for, as well as raising concerns as to the status of refugees or asylum seekers. Therefore, in England and Wales, the eligibility of the applicant may need to be considered in light of these issues.

9.5 Summary

This thesis has forwarded seven individual reform recommendations which together would introduce a system of legal sex recognition based on self-identification as well as providing for non-binary recognition through an additional third sex option. While reform is likely to generate disruption, it is also argued that such disruption is tolerable

¹⁵⁹² See relevant discussion in chapter 7.5.

¹⁵⁹³ Gender Recognition Reform (Scotland) Bill 2022, s 2.

and acceptable. I will now turn to conclude the thesis by revisiting the aims of the project, methods used, limitations, and final concluding remarks.

10 Conclusion

10.1 Aims and rationales

In 2016, the Women and Equalities Committee described the GRA as outdated and '[running] contrary to the dignity and personal autonomy of applicants'.¹⁵⁹⁴ When this project was being developed, the Government at the time had expressed an interest in reforming the GRA which had long attracted criticism on various bases, including its binary and medicalised underpinnings. The primary aim of this thesis was to investigate how this system impacts upon non-binary populations in particular. In doing so, this thesis recognised that the experiences of non-binary populations would not only be relevant for considerations of macro-reform (i.e. introducing a non-binary marker), but of micro-reform to individual requirements too. This specific focus on non-binary populations and GRA reform was therefore envisaged to contribute a distinctly non-binary focus to the existing literature on legal sex recognition.

The policy-interest in GRA reform at the time from the Government and the public was a key motivator in this project's sensitivity to wider policy considerations related to legal sex recognition, particularly as issues of non-binary recognition had been dismissed early on. Therefore, this project aimed to contribute research to an issue which appeared to need much greater scholarly attention in a way which was also sensitive to the interests and concerns of policymakers. The project therefore sought to balance a critical and scholarly investigation of the law with an appreciation for wider policy considerations.

¹⁵⁹⁴ Women and Equalities Committee, *Transgender Equality, First Report of Session 2015 – 16, HC 390* (House of Commons 2015) 3.

10.2 Methods, process, and approach

The research questions were devised with the intention of producing research which would propose reform recommendations. As a reminder, the research questions outlined in chapter 1.5, were as follows:

1. To what extent do non-binary people support reform to the GRA?
 - a. To what extent do binary and non-binary people differ in their support for reform?
2. What are the reasons non-binary people give for support (or lack thereof)?
3. Should the GRA be reformed in light of the attitudes of non-binary people?
4. How should the GRA be reformed in light of the attitudes of non-binary people?

To gather the attitudes of non-binary populations, an empirical, mixed-methods research design was adopted using an online survey and semi-structured interviews. The online survey sought attitudes towards key current requirements of the GRA and macro-reform options (third sex option, multiple sex options and decertification). The online survey attracted 276 responses, with 140 non-binary respondents. The data from binary trans people was used as an anchor of comparison for non-binary responses. Interviews were conducted with 21 non-binary people. The interviews allowed for a more detailed exploration of the GRA and reform with non-binary people.

The normative framework adopted reflected the balance needed in this study between realism and idealism. The framework assisted in proposing recommendations which were relatively realistic, pragmatic and accounted for policy considerations (critical

realism, non-ideal theorising).¹⁵⁹⁵ Having said that, law reform is also inherently about considering how a law or policy could be improved which involves a certain degree of idealistic thinking. For this, a dignity-based conception of rights was adopted to draw out the deeper significance of the findings, to avoid an uncritical acceptance of the status quo, and to guide the reform recommendations. Dignity also has a legal basis in England and Wales, which appeared a suitable fit for the project which was concerned with law reform.

10.3 Main implications

The main implication of this research is to provide a non-binary account of legal sex recognition and reform as it operates in England and Wales. The findings showed an overwhelming dissatisfaction with this law among non-binary populations, particularly in relation to the lack of formal recognition available for non-binary people. However, there was also significant discontent with current requirements of the GRA too, with the gender dysphoria diagnosis requirement in particular operating as a problematic and potentially harmful barrier for non-binary populations.

This thesis is envisaged to have the most direct contribution to three main areas of literature, including criticism of the GRA, non-binary recognition and decertification, and scholarship on legal sex recognition which engages with European human rights law.¹⁵⁹⁶ It also advances the field in identifying novel and insightful ways to empirically study the trans community (by statistically testing between binary and non-binary

¹⁵⁹⁵ This was a relative, not absolute, judgment on which options were more realistic than others.

¹⁵⁹⁶ Chapter 2.5.

groups to uncover real differences), and by offering a direct connection between scholarship related to non-binary legal recognition and human dignity.

The project also has potential implications outside of scholarship, in that it identifies and engages with a range of considerations related to legal sex recognition and reform. As the visibility of non-binary populations grows and claims related to their rights and status in society are increasingly made,¹⁵⁹⁷ courts and legislatures will be required to balance various interests involved in such claims. This research provides a useful reference for the identification of relevant issues and a framework through which to balance and contextualise them. It may also be useful for strategic efforts to improve the rights of non-binary populations, as participants were consulted not just on the number of sex options available, but also the requirements for legal recognition. This may help scholars, policymakers and activists to ascertain reform priorities for non-binary populations, and in instances where certain reform options may be less likely (e.g. macro-reforms), other options for reform will be available which could still be beneficial to this population in the short-medium term.

10.4 Scope and Limitations

The various methodological and normative decisions made throughout this project are inevitably accompanied by a range of benefits and drawbacks. I will now briefly outline

¹⁵⁹⁷ E.g. Elan-Cane who intends to appeal to the ECtHR following defeat in the Supreme Court: Elan-Cane, 'Tweet: X Passports in the UK. I very much regret to inform everyone that justice was not served today. The case will now go to the European Court of Human Rights in Strasbourg' (Twitter 2021) <<https://twitter.com/ChristieElanCan/status/1471059161672822787>>accessed 16 March 2022. See also *Y v France App no 76888/17* (ECtHR, pending) which will engage relevant issues.

some potential limitations of my study and, if applicable, how I sought to mitigate against these.

Firstly, this study adopted an empirical research design which helped to elevate non-binary people's experiences; however, this inevitably relies on the subjective perceptions of such populations towards the law. This means that my reform recommendations are based on the centring of the interests of this community. While consideration has been given to the position of binary trans people and issues related to cisgender women, empirical engagement with these communities was not possible as part of this study. Nevertheless, as I have attempted to highlight throughout this thesis, there is merit in focusing on non-binary populations who have comparatively less research conducted on their experiences in relation to GRA reform.¹⁵⁹⁸

An empirical study which relies on the subjective accounts of people also risks the possibility that their accounts may be mistaken. While recognising the importance of the subjective perspective, I also adopted a critical realist lens to mitigate against such issues. I have therefore offered commentary where my participants may be mistaken or where a wider contextual point may have been relevant to their perceptions. Empirical research inevitably encapsulates this tension between the benefits of ascertaining subjective perceptions and the consequent downsides of this.¹⁵⁹⁹ However in this project I have sought to achieve a balance between elevating the voices of non-binary people while also recognising that this is a project which must

¹⁵⁹⁸ Chapter 2.5.

¹⁵⁹⁹ See chapter 3.2.1.

also be sensitive to certain considerations beyond the subjective opinions of one group.

Second, my recommendations are concerned with law reform of the GRA and cannot address wider injustices. I do not predict that they will be radically transformative in addressing gender inequalities, transphobia, and/or issues of economic and redistributive justice.¹⁶⁰⁰ As noted at various points in this thesis, it is doubtful that any isolated law reform could achieve these aims. Similarly, my research is focused on legal sex recognition and does not address wider, pressing issues affecting trans and non-binary communities, such as access to affordable and timely healthcare. Legal sex reform cannot, on its own, be considered sufficient in addressing all concerns for non-binary populations, and as such, any law reform package should also consider these wider issues too.¹⁶⁰¹

Thirdly, as a PhD project, I have been limited by my time and financial resources.¹⁶⁰² The conceptual and legal issues engaged by legal sex recognition and non-binary people are far reaching. I was unable to consult and consider every contextual debate and issue which is engaged with this topic. However, I have sought to signpost these where necessary. For example, while there is scope for more work to be done on the relationship between gender-critical feminism and GRA reform, for the purposes of

¹⁶⁰⁰ Kendall Thomas, 'Are Transgender Rights (In)human Rights?' in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 252.

¹⁶⁰¹ See discussion of (e.g.) healthcare in chapters 2.5.1 and 6.2.2.

¹⁶⁰² The project was also somewhat limited by the COVID-19 pandemic, where I was unable to advertise the project at in-person events and had to rely entirely on online engagement.

this thesis, such discussions had to be limited to what was most relevant.¹⁶⁰³ Similarly, while I have proposed reform recommendations, and considered the potential impact of these for non-binary populations (and others),¹⁶⁰⁴ I am unable to foresee and anticipate every possible implication or consequence of reform. Law reform in an area such as this, particularly to introduce a third sex option, would require greater attention from policymakers and stakeholders than has been afforded to it so far in England and Wales.

Fourthly, the sample size of this project is not comparable to empirical research conducted by the Government or other large organisations related to non-binary and trans populations.¹⁶⁰⁵ However it is similar to other academic contributions¹⁶⁰⁶ and was large enough to be able to conduct the statistical tests to ascertain real differences between groups.

10.5 Subsequent related research: areas and opportunities

Following this research project, I have identified four areas of opportunity for future research and/or where the field would benefit from further research on a particular

¹⁶⁰³ See chapter 2.4.2.

¹⁶⁰⁴ See chapters 9.3 and 2.4.

¹⁶⁰⁵ E.g. the National LGBT survey was able to reach 7403 non-binary people, Scottish Trans were able to reach 895 non-binary people and the public consultation received 102,818 responses (though it is unclear how many non-binary people were included). See Government Equalities Office, 'National LGBT Survey: Research Report (2018) Annex 3: Characteristics' (Gov.UK 2018) <<https://www.gov.uk/government/publications/national-lgbt-survey-summary-report>>accessed 16 March 2022; Vic Valentine, *Non-binary people's experiences in the UK* (Scottish Trans Equality Network 2016); Professor Daniel King and others, *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office 2020).

¹⁶⁰⁶ Hannah J H Newman and Elizabeth Peel, "An Impossible dream"? Non-binary people's perceptions of legal gender status and reform in the UK' (2022) *Psychology and Sexuality* 1 – 15.

topic. First, distinguishing between binary and non-binary groups was useful in this research to provide a point of comparison for non-binary responses. This project demonstrated that when you ask non-binary people specifically and compare this with binary trans people, there may be significant differences in how they value different reform options. Consequently, distinguishing between these groups may be useful in future research to mitigate against the effects of subsuming sub-groups within a larger sample where significant differences may exist. This is arguably particularly important for research related to law reform where accounting for reform priorities and areas where people may be un/willing to compromise, is strategically useful. Moreover, the binary responses were primarily used as a point of comparison for the non-binary responses, but it could be valuable for future research to build on areas in this project where a significant difference exists between binary and non-binary populations. This might include, e.g. attitudes towards the gender dysphoria requirement, where future research could focus on exploring in much greater detail why the binary trans population may be more sympathetic to this requirement.

Secondly, further research into the non-binary community and legal sex recognition would benefit from gathering additional demographic information from those within the non-binary community such as race, religion, socio-economic status, education, and regional location. This is important in recognising that the law may impact differently on non-binary people depending on their intersecting identities,¹⁶⁰⁷ and so their attitudes and experiences towards the law could also uncover greater diversity.

¹⁶⁰⁷ Sharon Cowan, 'The Best Place in the World to Be Trans? Transgender Equality and Legal Consciousness in Scotland' in Senthoran Raj and Peter Dunne (eds), *The Queer Outside in Law* (Springer 2021) 203 – 204.

Thirdly, as already noted in chapter 3.2.5.3, issues related to children and young people with diverse genders engage a range of complicated considerations. Further research with these groups, particularly those with non-binary identities, is imperative for understanding the full impact of the GRA (particularly the minimum age limit) on such groups.

Fourthly, it is argued that dignity offers exciting opportunities to future articulations and conceptualisations on non-binary trans rights. It has already seen success in the courts in the context of binary trans rights, and this thesis has also highlighted its applications in the non-binary context. Future research may benefit from building on this framework, to fully understand the impact of various laws on non-binary populations, as well as using it to put forward persuasive, legally-ground suggestions for reform.

10.6 Final concluding remarks

This project has taken place during a difficult period for those seeking the advancement of non-binary rights. The recent public consultation processes in England and Wales, and in Scotland, have demonstrated that issues related to legal sex recognition provoke fierce and polarised debate.¹⁶⁰⁸ Similarly, while non-binary people are increasingly visible in mainstream media, there exists perceptions that non-binary identities are a fad, attention seeking, or representative of a wider ‘woke’

¹⁶⁰⁸ Stephen Whittle and Fiona Simkiss, ‘A perfect storm: the UK Government’s failed consultation on the Gender Recognition Act 2004’ in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender Sexuality and the Law* (Edward Elgar Publishing 2020); Luke Armitage, ‘Explaining backlash to trans and non-binary genders in the context of UK Gender Recognition Act reform’ (2020) *Journal of the International Network for Sexual Ethics and Politics* 11 – 35.

politics.¹⁶⁰⁹ Nevertheless, laws and systems which exclude non-binary people are increasingly being challenged in courts to varying degrees of success and these challenges are likely to continue.¹⁶¹⁰ Moreover, while the Government rejected substantively considering non-binary recognition, the fact that a question was included indicates that it is at least in the peripheral vision of policymakers.¹⁶¹¹

The next decade will be key as non-binary issues could begin to move from the peripheral to the centre of discussions on legal sex reform. When these discussions present themselves, it is crucial that there is already a body of scholarship which addresses the case for reform, the areas which need reform, and a prior consideration of reform priorities. This research seeks to encourage other researchers to continue work which combines aspiration for an always-improving standard of dignified existence for every individual, alongside an appreciation for the social and political context which may place restraints on realising certain aspirations. This combination could be crucial for when (not if) the question of legal sex recognition reform next returns to the mainstream policy agenda.

¹⁶⁰⁹ See (e.g.) Verity Sulway, 'Purple-haired gender-fluid vegan numpty!' Piers Morgan hits out at "woke war" in schools' (Express 2022) <<https://www.express.co.uk/celebrity-news/1567199/Piers-Morgan-twitter-hits-out-woke-war-gender-fluid-school-vegan-numpty-news-latest-update>>accessed 16 March 2022; Isabella Nikolic, 'Caitlyn Jenner slams 'WOKE world' of gender identity' (Daily Mail 2022) <<https://www.dailymail.co.uk/news/article-10542107/Caitlyn-Jenner-slams-WOKE-world-gender-identity-saying-figure-out.html>>accessed 16 March 2022.

¹⁶¹⁰ *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 WLR 133.

¹⁶¹¹ Government Equalities Office, *Reform of the Gender Recognition Act - Government consultation* (Crown 2018).

Appendices

- Appendix 1 Ethics certificate
- Appendix 2 Survey materials
- Appendix 3 Interview materials
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- Appendix 6 Survey data – Non-binary responses
- Appendix 7 Freedom of Information request

Appendix 1 Ethics Certificate



**COLLEGE OF SOCIAL SCIENCES
AND INTERNATIONAL STUDIES**

Ethics Committee
ssis-ethics@exeter.ac.uk

CERTIFICATE OF ETHICAL APPROVAL

Title of Project:
The Gender Recognition and Reform Project

Academic Unit: School of Law
Research Team Member(s): Mollie Gascoigne,
Project Contact Point: m.gascoigne@exeter.ac.uk
Supervisor(s): Stephen Skinner Charlotte Bishop

This project has been approved for the period

From: 27/01/2020
To: 01/07/2020

Ethics Committee reference: 201920-035

A handwritten signature in black ink, appearing to read "Susan Kelly".

Susan Kelly Date: 31/01/2020
Co-Chair, SSIS College Ethics Committee

Appendix 2 Survey Materials

Survey Information Sheet

The following is a brief summary about the SURVEY component of the GRR Project. Please consider the information about this project set out below and discuss with family, friends, others or ask the researcher any questions.

Why have I been approached?

You are invited to take part because you identify as trans and/or non-binary, you are over the age of 16 and it is important that your voice is heard in the debate on the legal recognition of gender. We are looking for people who are from, or reside in, the UK.

What is this research about?

There is a lot of debate about how the law could be changed to meet the needs of trans people. The Gender Recognition & Reform (GRR) project at Exeter University wants to hear your responses and thoughts about possible ways to improve this system. You do not have to have been through the process of applying for legal gender recognition to respond to this survey - we are looking for responses from all those identifying as trans and/or non-binary who are over the age of 16.

What is the Gender Recognition Act (GRA)?

The GRA is the law that allows trans people to have their gender legally recognised, giving them access to legal rights and responsibilities of the gender they identify with and a new birth certificate. The Government undertook a public consultation on the GRA to gather opinions on the system and the consultation closed in October 2018; this project is undertaken in light of the consultation. The questions in this survey relate specifically to the 'Standard Track' for obtaining a Gender Recognition Certificate, which is the most popular, with over 95% of applicants using this route.

What would taking part involve?

Taking part involves a short survey which should take about 12 minutes. Please do not leave any identifying information in your responses*. However, if you do, this will be removed by the researcher as soon as reasonably possible. At the end of this survey, there is an opportunity for those identifying as non-binary to leave contact details to be contacted for an additional Skype or telephone interview. If you decide to leave your contact details, you will be contacted to see if you still wish to take part and if so, to arrange an interview. You will be given an Information Sheet and Consent Form before the interview to check that you are still happy to take part. You can change your mind about participating

before, during and even after the interview (subject to the conditions outlined in the Information Sheet).

Will I receive payment for taking part?

As a token of appreciation for your participation, ten £10 vouchers or equivalent charitable donations to a registered UK charity are available to be won as part of a randomised draw if you leave your contact details when prompted. This is entirely optional, and you do not have to enter the draw.

What are the risks?

Most of the questions in this survey do not ask for details of personal experiences, but it is possible that answering the questions may cause you upset or distress. You are reminded that you are able to withdraw before or during the survey. Should you experience any upset or distress, please refer to the UK helplines at the end of this Information Sheet.

What if I change my mind?

Taking part in the survey is entirely up to you and you can choose not to take part or stop halfway through. You can withdraw from the study at any time by not submitting your responses and closing the survey. Once you have submitted however, your data cannot be withdrawn. Your consent to the information contained in this Information Sheet is inferred on the basis that you have read this before the survey, selected "I agree, proceed to survey" and proceeded to the survey. By clicking this, you are agreeing to participate in research being undertaken by the University of Exeter. If you leave your contact details for an interview, the default position is that these will only be used for the purposes of organising an interview and they will be stored securely and deleted up to 21 days following the interview. However, you can request to withdraw them before this date by emailing recogandreform@exeter.ac.uk.

If you leave contact details to be entered in the draw for a £10 voucher or equivalent charitable donation, the default position is that these will only be stored securely and used for the purposes of organising receipt of the voucher/donation. They will be immediately deleted following this by default

What will happen to the data?

Results from the interview will be used in fulfilment of a PhD qualification. Information that you provide may be used for publication in academic journals, presented at conferences, seminars or other forms of publication but these will all be anonymised. The University of Exeter processes personal data for the purposes of carrying out research in the public interest. The University shall endeavour to be transparent about its processing of your personal data and this Information Sheet should provide a clear explanation of this. If you do have any queries about the University's processing of your personal data that cannot be resolved by the researcher, further information may be obtained from the University's Data Protection Officer by emailing dataprotection@exeter.ac.uk or at www.exeter.ac.uk/dataprotection

Will I be identified?

Responses to this survey are anonymous, including to the researcher. Your survey responses will be kept separate from any contact details you may leave. If you do leave any identifiable information in the survey, this will be removed prior to any form of publication or sharing of the results. Every effort will be taken to obscure and remove identifiable information prior to publication or sharing of the results. However, there is always a risk that you may be identifiable from the information provided

For any questions, queries or feedback, please contact Mollie Gascoigne at recogandreform@exeter.ac.uk or directly at M.Gascoigne@exeter.ac.uk. Mollie is a PhD Candidate at Exeter University and is the creator of the Gender Recognition & Reform project. Mollie is funded by the Economic and Social Research Council for this PhD research. The Intercom Trust, Mermaids UK and other organisations/groups have very kindly and generously supported the research by enabling the researcher to make contact with the community, but the researcher is responsible for the conduct of the research. If you are unhappy with any aspect of this research and wish to raise an issue with someone other than the named researcher, please contact either the SSIS College Research Ethics Committee at ssis-ethics@exeter.ac.uk or Dr Stephen Skinner (supervisor) at S.J.Skinner@exeter.ac.uk

This project has been approved by the SSIS Ethics Committee at the University of Exeter (ref No. 201920-035)

Need support? The Intercom Trust Confidential Helpline: 0800 612 3010; The Intercom Trust Confidential email: helpline@intercomtrust.org.uk; Mermaids UK: 0808 801 0400

- I **agree** to the terms above, start survey >
- I **disagree** to the terms above, end survey

Survey questions

What is your gender identity? [.....]

Would you say that your gender identity **matches completely** with the sex you were assigned at birth?

- Yes, my gender identity **DOES** match completely the sex I was assigned at birth.
- No, my gender identity **DOES NOT** match completely the sex I was assigned at birth.

Which category below includes your age?

- 15 years or younger
- 16 - 18 years
- 19 - 25 years
- 26 - 35 years
- 36 - 45 years
- 46 - 55 years
- 56 - 65 years
- 66 years old +

1. Currently the law requires applicants for a Gender Recognition Certificate to provide a medical report proving that the applicant has a diagnosis of gender dysphoria. Gender Dysphoria is a medical diagnosis based on an individual experiencing "discomfort or distress" because there is a "mismatch between their sex and gender identity."

Do you think that a **diagnosis of gender dysphoria** should be required for a Gender Recognition Certificate?

- Yes, there **SHOULD** be this requirement.
- No, there **SHOULD NOT** be this requirement.
- Not sure.

2. Currently the law requires a statutory declaration to be made of the applicant's intention to live permanently in their "acquired gender" until death. A statutory declaration is a written statement of facts which the person who signs it solemnly declares to be true. It must be witnessed by a person who is authorised to administer oaths (e.g. a practising solicitor).

Do you think that there should be a requirement for the applicant to make a

statutory declaration of intention to live permanently in their "acquired gender" until death?

- Yes, there **SHOULD** be this requirement.
- No, there **SHOULD NOT** be this requirement.
- Not sure.

3. The law currently requires applicants have to prove that they have lived full time in their "acquired gender" for a certain time period.

Do you think that applicants should have to **prove that they have lived** in their "acquired gender" for a certain time period?

- Yes, they **SHOULD** have to prove this.
- No, they **SHOULD NOT** have to prove this.
- Not sure.

IF ANSWER TO PREVIOUS QUESTION WAS YES

- 3.1. Under the current law, applicants have to prove that they have lived full time in their "acquired gender" for at least two years.

What do you think this **time period** should be?

- 0 - 11 months
- At least 1 year
- At least 2 years
- At least 3 years
- At least 4 years
- At least 5 years
- Not sure.

4. Currently, an application fee is required when applying for a Gender Recognition Certificate.

Do you think that there should be an **application fee** for a Gender Recognition Certificate?

- Yes, there **SHOULD** be an application fee. (1)
- No, there **SHOULD NOT** be an application fee. (2)
- Not sure. (3)

IF ANSWER TO PREVIOUS QUESTION WAS YES

- 4.1. The application fee can cost up to £140.

How much do you think this **application fee** should cost?

- £1 - 50
- £51 - 100
- £101 - 140
- £141 - 200
- £201 - 240
- £241 +
- Not sure.

5. Under the current law there is a minimum age limit for applying for a Gender Recognition Certificate.

Do you think that there should be a **minimum age limit** for applying for a Gender Recognition Certificate?

- Yes, there **SHOULD** be a minimum age limit.
- No, there **SHOULD NOT** be a minimum age limit.
- Not sure.

IF ANSWER TO PREVIOUS QUESTION WAS YES

- 5.1. Under the current law the minimum age for applying for a Gender Recognition Certificate is 18 years old.

What do you think the **minimum age limit** should be?

- 10 years
- 16 years
- 18 years
- 21 years
- Not sure.
- Other (please specify)

6. Currently, the law requires that if an applicant is married (or in a civil partnership), their spouse or partner must issue a statutory declaration of consent. A statutory declaration is a written statement of facts which the person who signs it solemnly declares to be true. It must be witnessed by a person who is authorised to administer oaths (e.g. a practising solicitor).

Do you think that there should be a requirement that **applicants have to obtain consent** from their spouse/partner if they are married or in a civil partnership?

- Yes, there **SHOULD** be this requirement.
- No, there **SHOULD NOT** be this requirement.
- Not sure.

7. Currently, the law requires that applications must be submitted to the Gender Recognition Panel. The panel is made up of legal and medical members and decides on the outcome of the application.

Do you think that there should be a requirement that the application has to be submitted to the **Gender Recognition Panel**?

- Yes, there **SHOULD** be this requirement.
- No, there **SHOULD NOT** be this requirement.
- Not sure.

8. This section will now look at three possible reform options and then ask you which one you think is best.

- 8.1. Some countries allow for legal recognition of a third or 'other' gender. For example, someone might be able to have 'X' recorded on their birth certificate instead of 'male' or 'female'. England and Wales do not recognise this at present.

Do you think that there should be a **third legally recognised gender** introduced to England and Wales?

- Yes, there **SHOULD** be a third option.
- No, there **SHOULD NOT** be a third option.
- Not sure.

- 8.2. Some people might find that introducing a third option is insufficient because it still cannot recognise the diversity of gender identities. One possible option for overcoming this is to introduce multiple gender categories alongside the third option e.g. 'agender' might be introduced as well. However, some people still consider this option to be too complicated.

Do you think that there should be a **multi-gender system** introduced to England and Wales?

- Yes, there **SHOULD** be a multi-gender system.
- No, there **SHOULD NOT** be a multi-gender system.
- Not sure.

- 8.3. Currently the law provides that we all have a legal gender which begins with the sex we are registered with at birth on our birth certificates. One suggestion for law reform that has been put forward is to remove this system of gender recognition, meaning that the state would stop recording sex on birth certificates.

Do you think that the **system of gender recognition** should be removed in England and Wales?

- Yes, the system of gender recognition **SHOULD** be removed.
- No, the system of gender recognition **SHOULD NOT** be removed.
- Not sure.

8.4. Having had a chance to think about the previous options, which reform option do you think is the **best** option?

- Introducing a **third** gender option.
- Introducing **multiple** gender options.
- Removing the **system** of gender recognition.
- Not sure.

8.5. In one or two sentences, please briefly explain your answer.

9. Although the law allows people to change their legal gender, most people choose not to. Various things put people off and we want to know more about this to help reform the law. Please select **up to three** of the most important reform options which would make **you** more likely to apply for a Gender Recognition Certificate.

Finish the sentence: "I would be more likely to apply for a Gender Recognition Certificate if..."

[Select up to three options]

- ...there was an option other than 'male' or 'female'."
- ...I didn't have to get a diagnosis of gender dysphoria."
- ...I didn't have to make a statutory declaration of intention to live in my 'acquired gender' until death."
- ...I didn't have to give proof of living in my 'acquired gender' for two years."
- ...I didn't have to apply to the Gender Recognition Panel."
- ...I didn't have to pay an application fee."
- ...I didn't have to wait until I was 18."
- ...I didn't have to get spousal consent (if married or in a civil partnership)."
- Not sure.
- Not applicable.
- Other (please specify)

10. Are there any other issues or comments you wish to make about legal gender recognition?

In exchange for taking part in this survey, there are **ten £10 vouchers** or equivalent charitable donations of your choice available to win. If you do NOT want to enter the draw, please click 'Submit' without entering your details here and your answers to the survey will be submitted.

Do you want to be entered into a draw for the chance to win a £10 voucher?

- Yes**, I would like to be entered. (1)
- No**, thank you. (2)

This is entirely voluntary and you can decide to NOT enter the draw by clicking 'Submit' without entering your details here and your answers to the survey will be submitted. If you have changed your mind and do not want to leave your contact details, please leave these boxes blank and continue.

Please leave your contact details below to be entered into the prize draw. Please note that there are no compulsory requirements to fill out: if you do not want to leave your name, you can leave your preferred name instead.

- Name
- Preferred name
- Email
- Contact telephone number (UK)

If you are non-binary, over the age of 16 and are from - or reside in - the UK, there is also the opportunity to take part in an interview as part of this study. If you are interested in hearing more about these face-to-face, Skype or telephone interviews, you can leave your details below. This is entirely voluntary and you can decide to NOT leave your details by clicking 'Submit'. Please note that there are no compulsory requirements to fill out: if you do not want to leave your name, you can leave your preferred name instead.

- Name
- Preferred name
- Email
- Contact telephone number (UK)

Appendix 3 Interview materials

Interview information sheet

Welcome to the Gender Recognition & Reform Project

The following is a brief summary about the INTERVIEW component of the GRR Project. Please consider the information carefully and discuss with family, friends, others or ask the researcher any questions.

What is this research about?

There is a lot of debate about how the law on legal gender recognition could be changed to meet the needs of trans people, but there is still very little known about the experiences of non-binary people and their thoughts on legal gender recognition. The Gender Recognition & Reform (GRR) project at Exeter University aims to give you the chance to *explain in your own terms* what being non-binary means to you and your views about the regulations associated with legal recognition. You do not have to have been through the process of applying for legal gender recognition to take part in an interview - we are looking to hear about the experiences of all those identifying as non-binary who are over the age of 16.

Why have I been approached?

You are invited to take part in a face-to-face, Skype or telephone interview because you identify as non-binary, you are over the age of 16 and it is crucial that your voice is heard in the debate on the legal recognition of gender. You must also be from, or reside in, the UK.

What is the Gender Recognition Act 2004 (GRA)?

The GRA is the law that allows people to have their gender legally recognised, giving them access to legal rights of the gender they identify with and a new birth certificate issued. The Government undertook a public consultation on the GRA to gather opinions on the system and the consultation closed in October 2018; this project is undertaken in light of the consultation. This project is mostly interested in the 'Standard Track' for obtaining a Gender Recognition Certificate which is the most popular, with over 95% of applicants using this route.

What would taking part involve?

Taking part involves an informal face-to-face, Skype or telephone interview which should last around 60 minutes. The interview will involve me asking you open-ended questions about your experiences as non-binary in general terms and the medical and/or legal experiences you may have had. The aim is to allow you to *explain in your own terms* what being non-binary means to you and your views about the regulations associated with legal recognition. Taking part in the interview is entirely up to you and you can choose to withdraw at any stage, including during and after the interview (up to the 21-day cooling off limit).

You will be contacted 7 days following your interview with an informal debrief of the interview and an opportunity to give feedback on the overall GRR project. This feedback survey will take around 5 minutes and all respondents for the feedback survey will be given a £5 voucher or equivalent charitable donation to a registered UK charity of your choice. More information on this survey will be given to you in that email along with a separate Information Sheet or you can contact recogandreform@exeter.ac.uk if you have any queries before then. There are limited spaces available to take part in this project and ending the recruitment process will be at the researcher's discretion.

What are the risks?

It is possible that discussing some topics might cause you upset or distress. You can request a break or complete withdrawal from the interview at any point before or during (see below on "What if I change my mind?"). If you feel uncomfortable discussing these issues in a public space, a telephone and Skype interview might be a suitable alternative. You may also request that the interview takes place at Exeter University in a private room.

Will I receive payment for taking part?

As a token of appreciation for your participation, you will be offered a £20 voucher for either Amazon, One4All multi-store gift card, UK supermarket or an equivalent donation to a UK registered charity of your choice. If you opt for a face-to-face interview, your travel expenses will be reimbursed, and refreshments will be provided.

If you withdraw before the interview, you won't receive the £20 voucher or donation, but financial losses incurred as a direct result of organising the interview may be reimbursed, subject to the researcher's discretion. If you withdraw at any stage during or after the interview (up to the 21-day cooling off limit), you will still be offered the voucher/donation.

What will happen to the data?

Results from the interview will be used in fulfilment of a PhD qualification. Information that you provide may be used for publication in academic journals, presented at conferences, seminars or other forms of publication but these will all be anonymised. The interview will be recorded using a Dictaphone (audio recording). The University of Exeter processes personal data for the purposes of carrying out research in the public interest. The University shall endeavour to be transparent about its processing of your personal data and this Information Sheet should provide a clear explanation of this. If you do have any queries about the University's processing of your personal data that cannot be resolved by the research team, further information may be obtained from the University's Data Protection Officer by emailing dataprotection@exeter.ac.uk or go to www.exeter.ac.uk/dataprotection.

You can request a copy of your interview transcript from the researcher, by emailing recogandreform@exeter.ac.uk up to 21 days following your interview.

Will I be identified?

Interview data will be held confidentially and securely, using pseudonyms' as default. Your contact details will be destroyed 21 days following the date of your interview. Your pseudonym and interview transcript will be held indefinitely. Every effort will be taken to obscure and remove identifiable information at the point of transcription and prior to publication or sharing of the results. However, there is always a risk that you may be identifiable from the information provided.

What if I change my mind?

Withdrawing before the interview: You can withdraw from the interview at any time before the interview. Your contact details will also be destroyed at this stage by default. Withdrawing during the interview: You can withdraw at any stage during the interview. You will be asked at this point whether you want the data collected up until the point of withdrawal, including contact details, to be withdrawn or not. Your decision on this will not affect your right to withdraw.

Withdrawing after the interview: There is a 21 day 'cooling off' period so that after the interview you can decide to withdraw your data from the research. To do this, contact the researcher within 21 days after the date of your interview by emailing recogandreform@exeter.ac.uk, giving your name and the date of interview, and request that all of your data, including contact details, are deleted.

After the 21-day cooling off period, it will not be possible to withdraw your data from the project.

Any questions?

For any questions, queries or feedback, please contact Mollie Gascoigne at recogandreform@exeter.ac.uk or directly at M.Gascoigne@exeter.ac.uk. Mollie is a PhD Candidate at Exeter University and is the creator of the Gender Recognition & Reform project. Mollie is funded by the Economic and Social Research Council for this PhD research. The Intercom Trust, Mermaids UK and other organisations/groups have very kindly and generously supported the research by enabling the researcher to make contact with the community, but the researcher is responsible for the conduct of the research. If you are unhappy with any aspect of this research and wish to raise an issue with someone other than the named researcher, please contact either the SSIS College Research Ethics Committee at ssis-ethics@exeter.ac.uk or Dr Stephen Skinner (supervisor) at S.J.Skinner@exeter.ac.uk.

This project has been approved by the SSIS Ethics Committee at the University of Exeter (ref No. 201920-035)

Need support?

The Intercom Trust Confidential Helpline: 0800 612 3010

The Intercom Trust Confidential email: helpline@intercomtrust.org.uk

Mermaids UK: 0808 801 0400

Interview consent form

Researcher

Mollie Gascoigne

Please tick the boxes of the statements which you consent to and fill in your name, the date and signature on the next page. Statements and fields marked with * are mandatory fields prior to participation in the project.

Information

- * I confirm that I have read the information sheet for the above project. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.
- * I understand that my participation is voluntary and that I am free to withdraw before, during or after the interview without giving any reason [subject to the conditions regarding the voucher/donation and data information outlined in the Information Sheet].
- * I am over the age of 16.

Contact details

- * I understand that my contact details will be securely stored for the time period necessary for conducting the interview.
- * I understand that my contact details will be deleted by default 21 days after my interview.
- I am happy for the researcher to contact me shortly after my interview to invite me to a final survey opportunity worth £5.

Interview data

- * I understand that taking part involves the collection of interview responses using a Dictaphone (audio recording).
- * I understand that the data from the interview will be used for the purposes of academic research in fulfilment of a PhD qualification.
- * I understand that there is a 21-day cooling off period following the interview where I can withdraw my data from the research [see Information Sheet for more info]. Following 21 days, I am unable to withdraw because my data will be unidentifiable.
- * I understand that pseudonymised data from interview transcripts may be stored for an indefinite period.
- * I understand that every effort will be taken to obscure or remove identifiable information, using pseudonyms and removing name/locations

by default. However, I understand that there is always a risk that I might be identifiable from the information that I provide.

* I understand that my interview findings may be included in reports published in an academic publication, seminar or presentation.

* I agree to take part in the above project.

Please name, date and sign here (in BLOCK CAPITALS)

*Full name	
Preferred name	
*Age	
Pronouns	
*Date	
*Signature	
Is there anything I can do to accommodate you before, during or after the interview? Or, if there is anything else you want me to be aware of, please write it here (or email recogandreform@exeter.ac.uk as soon as possible).	

FOR THE RESEARCHER TO COMPLETE

Name	
Date	
Signature	

Interview guide

Preliminary questions

1. Check identity and that participants is in a safe place to speak about their gender identity for 45 – 60 mins.
2. Check consent to record the interview
3. Any questions before starting the interview?

Being non-binary

1. How did you come to identify as non-binary and what does being non-binary mean to you?

GRA and reform

1. Do you have documents in different names etc or is everything the same?
2. Have you ever applied for a GRC before? Are you interested in applying?
3. Which GRA requirement is the biggest problem or most off-putting for you?
4. What is your opinion on the gender dysphoria requirement?
5. What would make you more likely to apply for a GRC? Explore nuance.
6. If there was a non-binary option (either as a third or multi gender systems), would you apply for it?
 - a. How would this impact your life?
7. Opinions on third gender option, multi-gender system, and/or removing system?
8. Any other comments or points on legal recognition?

Medical/healthcare

1. Experiences of speaking to a GP about gender identity
2. Experiences of speaking to a doctor at GIC about gender identity (and referral process)

Post interview

1. Thank you
2. Any questions?
3. Reminder of data policy and right to withdrawal

Appendix 4 Participant data

Survey participants								
Age (years)	16-18	19-25	26-35	36-45	46-55	56-65	66+	Total (%)
Gender								
Binary	17	69	23	10	7	9	1	136 (49.3%)
								<i>Women</i> 87 <i>Men</i> 47
Non-binary	8	70	35	11	12	3	1	140 (50.7%)
Total	25	139	58	21	19	12	2	276 (100%)

Survey participants	
Gender identity	Frequency
Man	87
Non-binary	68
Woman	49
Non-binary transmasculine	15
Agender	11
Transmasculine	8
Trans/transgender	6
Non-binary man	5
Genderqueer	5
Non-binary genderfluid	3
Non-binary transfeminine	3

Demi girl/female	2
Non-binary genderqueer	2
Non-binary trans/transgender	2
Gender-neutral	1
Genderfluid	1
Genderflux	1
Non-binary woman	1
Intersex	1
Non-binary proxvir	1
Trans andro	1
Trans Man Agender	1
Questioning	1
Trans, genderqueer, other	1
Total	276

Survey participants		
Gender identity	Frequency	Valid percent
Man	87	31.5
Woman	49	17.8
Non-binary	140	50.7
Total	276	100

Survey participants	
Age (years)	Number of responses
16 - 18	25

19 - 25	139
26 - 35	58
36 - 45	21
46 - 55	19
56 - 65	12
66+	2
Total	276

Survey participants		
Age group	Frequency	Percent
Young (16 – 25)	164	59.4
Middle (26 – 45)	79	28.6
Older (46 +)	33	12
Total	276	100

Interview participants				
Participant no.	Gender identity	Age group	Interview time	Interview type
P1	Non-binary	46 - 55 years	58:36	Skype
P2	Genderqueer	56 - 65 years	50:43	Skype
P3	Non-binary transmasculine	19 - 25 years	41:28	Telephone
P4	Non-binary / Proxvir	19 - 25 years	50:59	Skype
P5	Non-binary	26 – 35 years	43:09	Skype
P6	Transmasculine non-binary	19 - 25 years	56:41	Telephone
P7	Male outwardly, inward more female	19 - 25 years	33:48	Telephone
P8	Non-binary	26 - 35 years	59:24	Telephone
P9	Non-binary	19 - 25 years	36:29	Skype
P10	Non-binary	19 - 25 years	54:59	Skype

P11	Non-binary	26 - 35 years	56:49	Skype
P12	Trans/nonbinary	26 - 35 years	56:36	Telephone
P13	Agender	19 - 25 years	47:13	Telephone
P14	Non-binary	26 - 35 years	50:53	Skype
P15	Transfem / non-binary	26 - 35 years	41:41	Skype
P16	Trans masculine	26 - 35 years	41:08	Skype
P17	Non-binary	26 - 35 years	43:31	Telephone
P18	Non-binary	19 - 25 years	51:48	Skype
P19	Non-binary, in the process of trying to establish a more specific identity.	26 – 35 years	N/A	Written
P20	Trans, Genderqueer, Other	46 - 55 years	49:54	Telephone
P21	Female / demi-female	16 - 18 years	40:15	Telephone

Appendix 5 Survey data - All responses

Question 1	Gender dysphoria	Response	Frequency	%
		Support	69	25
		Oppose	182	65.9
		Not sure	25	9.1
		Total	276	100

Question 2	Statutory declaration	Response	Frequency	%
		Support	80	29
		Oppose	167	60.5
		Not sure	29	10.5
		Total	276	100

Question 3	Proof	Response	Frequency	%
		Support	64	23.2
		Oppose	189	68.5
		Not sure	23	8.3
		Total	276	100

Question 3.1	Proof time limit	Response	Frequency	%
		n/a	212	-
		0 – 11 months	12	18.8
		At least 1 year	27	42.2
		At least 2 years	21	32.8

		At least 3 years	2	3.1
		Not sure	2	3.1
		total	64	100

Question 4	Application fee	Response	Frequency	%
		Support	10	3.6
		Oppose	244	88.4
		Not sure	22	8
		total	276	100

Question 4.1	Application fee amount	Response	Frequency	%
		n/a	266	-
		£1 – 50	4	40
		£51 – 100	4	40
		£101 – 140	1	10
		£141 - £200	1	10
		£201 - 240	0	0
		£241 +	0	0
		Total	10	100

Question 5	Minimum age	Response	Frequency	%
		Support	109	39.5
		oppose	128	46.4
		Not sure	39	14.1
		total	276	100

Question 5.1	Minimum age limit	Response	Frequency	%
		n/a	167	-
		10 years	6	5.5
		16 years	53	48.6
		18 years	37	33.9
		21 years	2	1.8
		Other	10	9.2
		Not sure	1	0.9
		Total	276	99.9

Question 5.1	Responses to "Other" from Question 5.1	Response	Frequency	%
		14 or 15	2	20
		14 years old	1	10
		Between 16 and 18	1	10
		18 or younger with parental consent and GP dependent on circumstances	1	10
		I think it should be 16, but with some flexibility if the young person can be proven to meet Gillick competency	1	10
		I think there should be a requirement to be a legal adult before they can apply however I think we need to consider other health/learning disabilities that may effect someone's decision at such a young age etc	1	10
		If lived-in role is increased, minimum age should be 16. if reduced or stayed as it is, 18	1	10
		Under 16 with parental consent, 16 and over to self-consent	1	10
		10 years old with parental consent, otherwise 16 years old no parental consent required	1	10
		Total	10	100

Question 6	Spousal consent	Response	Frequency	%
		Support	16	5.8
		oppose	256	92.8
		Not sure	4	1.4
		total	276	100

Question 7	Panel	Response	Frequency	%
		Support	27	9.8
		oppose	211	76.4
		Not sure	38	13.8
		Total	276	100

Question 8.1	Third	Response	Frequency	%
		Support	244	88.4
		Oppose	12	4.3
		Not sure	20	7.2
		total	276	100

Question 8.2		Response	Frequency	%
		Support	164	59.4

	Multi	Oppose	49	17.8
		Not sure	63	22.8
		Total	276	100

Question 8.3	Remove	Response	Frequency	%
		Support	137	49.6
		Oppose	72	26.1
		Not sure	67	24.3
		Total	276	100

Question 8.4	Best reform option	Response	Frequency	%
		Third	84	30.4
		Multi	81	29.3
		Remove	92	33.3
		Not sure	17	6.2
		Blanks	2	0.7
		Total	276	99.9

Question 9	“I would be more likely to apply for a GRC if...”	Selected <i>Frequency (%)</i>	Did not select <i>Frequency (%)</i>
	There was an option other than M/F	109 (39.5)	167 (60.5)
	Gender dysphoria was removed	69 (25)	207 (75)
	Statutory declaration was removed	53 (19.2)	223 (80.8)

	Proof was removed	109 (39.5)	167 (60.5)
	Panel was removed	130 (52.9)	146 (47.1)
	Application fee was removed	140 (50.7)	136 (49.3)
	Minimum age limit was removed	18 (6.5)	258 (93.5)
	Spousal consent removed	48 (17.4)	228 (82.6)
	Not sure	3 (1.1)	273 (98.9)
	N/A	8 (2.9)	268 (97.1)
	Other	24 (8.7)	252 (91.3)

Question 9	Responses to “Other” from Question 9
	“Family members were given more resources and help in supporting transgender individuals below 21 years of age”
	“Given the existence of a GRC I'd apply for one if it actually acknowledged agender people - but I think we shouldn't have GRCs, we should have a system like they do in Argentina (but less binary) where you can simply self-declare your gender(s) (or absence of gender) and that's literally all it takes”
	“I may be incorrect but I believe that full GRS is a requirement of getting a GRC so this would make me less likely to apply”
	“I divorced. And prior to that, argued strongly that my body was my own to determine, and should in no way require the permission of my spouse before treatment began. Once I had surgery, I felt that I had an automatic right to being recognised and shouldn't need to apply as it should be a given.”
	“I have a GRC, so these are the ones that I consider barriers”
	“if i could be without trauma from some people sneaky / dominant / authoritarian / bossy / sad / assuming moral authority over people”
	“not being believed by the panel”
	“I didn't have to prove it with anything. A simple online gov.uk form/tick box”
	“Proof of living as a gender is extremely subjective, particularly for gender non conforming people, so current legislation excludes them from successfully making legal changes at current”

"I already have a gender recognition certificate"	
"The permission from spouse is especially difficult for those who have separated but not yet divorced"	
"Already gone through the system to acquire a GRC but the combination of a high fee and having to give proof of living in my acquired gender would have been the main drivers not to do it"	
"If I thought it wouldn't then increase transphobia & harm my safety. I.e. how police, nhs, future employers would react to seeing my ID"	
"If it was socially acceptable for me to exist in the first place and I felt I could do so safely at all"	
"I would like to say that despite me choosing these options, i myself have applied for a GRC within the last month - so have tackled the process. I found it a lot easier and more simple then it is often made out to be. But i am not yet married etc."	
"All of the above, really + I don't feel safe to be out to everyone, and worry about the state knowing I am trans given the current government and transphobia in the UK"	
"If I didn't have to ask permission to have something so intimate and fundamental to me recognised"	
"I am dyslexic the form is long and you have to contact various different bodies to gather the evidence. The evidence cost money too. I would not get a discount because I earn £34000. However why should I pay £140 plus monies for reports after tax income. "	
"As an anarchist I don't recognise the Government or consent to be governed by them, therefore their opinion on what gender I am carries no weight. I would apply for a GRC if it were free but it doesn't matter enough to me to spend the money"	
"I felt comfortable to be open about being non-binary presenting as male."	
"I didn't have to provide very intimate medical details"	
"If I didn't have to provide medical information"	
"The system in England and Wales was more like the Scottish whereby Birth Certificates can be reclaimed. "	
"I would really like to select more than three options here!"	
Total	<i>24 responses (representing 4.2% each)</i>

Appendix 6 Survey data - Non-binary responses

Question	Response	Frequency	%
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	Gender Dysphoria	Support	17	12.1
		Oppose	113	80.7
		Not sure	10	7.1
		Total	140	100

Question 2	Statutory declaration	Response	Frequency	%
		Support	21	15
		Oppose	101	72.1
		Not sure	18	12.9
		Total	140	100

Question 3	Proof	Response	Frequency	%
		Support	18	12.9
		Oppose	110	78.6
		Not sure	12	8.6
		Total	140	100

Question 3.1	Proof time	Response	Frequency	%
		N/A	(122)	-
		0 – 11 months	4	22.2
		At least 1 year	8	44.4
		At least 2 years	4	22.2
		At least 3 years	0	0
		Not sure	2	11.1
		Total	18	100

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Question 4	Application fee	Response	Frequency	%
		Support	5	3.6
		Oppose	122	87.1
		Not sure	13	9.3
		total	140	100

Question 4.1	Application fee amount	Response	Frequency	%
		N/A	135	-
		£1 – 50	2	1.4
		£51 – 100	2	1.4
		£101 – 140	0	0
		£141 – 200	1	0.7
		£200 – 240	0	0
		£241 +	0	0
		Total	140	100

Question 5	Minimum age	Response	Frequency	%
		Support	46	32.9
		Oppose	72	51.4
		Not sure	22	15.7
		total	140	100

Question 5.1	Minimum age limit	Response	Frequency	%
		N/A	(94)	-
		10 years	2	4.3
		16 years	28	60.9

	18 years	10	21.7
	21 years	1	2.2
	Other	4	8.7
	Not sure	1	2.2
	Total	46	100

Question 5.1	Of those who answered "other" to Question 5.1	Response	Frequency	%
		14	1	25
		Between 16 and 18	1	25
		I think it should be 16, but with some flexibility if the young person can be proven to meet Gillick competency	1	25
		Under 16 with parental consent, 16 and over to self-consent	1	25
		Total	4	100

Question 6	Spousal consent	Response	Frequency	%
		Support	5	3.6
		Oppose	134	95.7
		Not sure	1	0.7
		Total	140	100

Question 7	Response	Frequency	%
	Support	12	8.6

	Panel	Oppose	113	80.7
		Not sure	15	10.7
		Total	140	100

Question 8.1	Third	Response	Frequency	%
		Support	133	95
		Oppose	7	5
		Not sure	0	0
		Total	140	100

Question 8.2	Multi	Response	Frequency	%
		Support	88	62.9
		Oppose	19	13.6
		Not sure	33	23.6
		Total	140	100

Question 8.3	Remove	Response	Frequency	%
		Support	79	56.4
		Oppose	28	20
		Not sure	33	23.6
		Total	140	100

Question 8.4	Best reform option	Response	Frequency	%
		Third	39	27.9

	Multi	42	30
	Remove	53	37.9
	Not sure	6	4.3
	Blanks	0	0
	Total	140	100

	"I would be more likely to apply for a GRC if..."	Selected	Did not select
		<i>Frequency (%)</i>	<i>Frequency (%)</i>
Question 9	There was an option other than M/F	102 (72.9)	38 (27.1)
	Gender dysphoria was removed	51 (36.4)	89 (63.6)
	Statutory declaration was removed	33 (23.6)	107 (76.4)
	Proof was removed	55 (39.3)	85 (60.7)
	Panel was removed	53 (37.9)	87 (62.1)
	Application fee was removed	47 (33.6)	93 (66.4)
	Minimum age limit was removed	5 (3.6)	135 (96.4)
	Spousal consent removed	14 (10)	126 (90)
	Not sure	0 (0)	140 (100)
	N/A	6 (4)	134 (96)
	Other	15 (11)	125 (89)

Question 9	Responses to "other" from Question 9
<p>Given the existence of a GRC I'd apply for one if it actually acknowledged agender people - but I think we shouldn't have GRCs, we should have a system like they do in Argentina (but less binary) where you can simply self-declare your gender(s) (or absence of gender) and that's literally all it takes</p>	
<p>if i could be without trauma from some people sneaky / dominant / authoritarian / bossy / sad / assuming moral authority over people</p>	

Proof of living as a gender is extremely subjective, particularly for gender non conforming people, so current legislation excludes them from successfully making legal changes at current.	
The permission from spouse is especially difficult for those who have separated but not yet divorced	
If I thought it wouldn't then increase transphobia & harm my safety. I.e. how police, nhs, future employers would react to seeing my ID	
If it was socially acceptable for me to exist in the first place and I felt I could do so safely at all.	
All of the above, really + I don't feel safe to be out to everyone, and worry about the state knowing I am trans given the current government and transphobia in the UK	
If I didn't have to ask permission to have something so intimate and fundamental to me recognised	
As an anarchist I don't recognise the Government or consent to be governed by them, therefore their opinion on what gender I am carries no weight. I would apply for a GRC if it were free but it doesn't matter enough to me to spend the money	
I felt comfortable to be open about being non-binary presenting as male	
I would really like to select more than three options here!	
Total	11 responses representing 0.7% each

Appendix 7 Survey data - Statistical test data

Gender						
Qu. No.	Opposition to current requirements	Opposition (frequency)	% of sample	% of binary sample n=136	% of non-binary sample n=140	Stat sig.
1	Gender dysphoria	182	65.9	50.7	80.7	.000*
2	Statutory declaration	167	60.5	48.5	72.1	.000*
3	Proof	189	68.5	58.1	78.6	.000*
4	Application fee	244	88.4	89.7	87.1	.506
5	Minimum age	128	46.4	41.2	51.4	.088
6	Spousal consent	256	92.8	89.7	95.7	.054

7	Panel	211	76.4	72.1	80.7	.090
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* some values will not add up equally because some people did not respond to every question

Age							
Qu. No	Requirement	Opposition (frequency)	% of sample	% of young sample n=78	% of middle n=46	% of older sample n=16	Stat sig.
1	Gender dysphoria	113	80.7	82.1	80.4	75	.808
2	Statutory declaration	101	72.1	65.4	84.8	68.8	.063
3	Proof	110	78.6	75.6	91.3	56.3	.008*
4	Application fee	122	90.4	94.7	86.7	78.6	.100
5	Minimum age	72	51.4	55.1	58.7	12.5	.004*
6	Spousal consent	134	95.7	96.2	100	81.3	.012* [f]
7	Panel	113	80.7	75.6	87	87.5	.233

Gender						
Qu No.	Reform option	Support (frequency)	% of sample	% of binary sample n=136	% of non-binary sample n=140	Stat sig.
8.1	Third	244	88.4	81.6	95	.001*
8.2	Multi	164	59.4	55.9	62.9	.238
8.3	Remove	137	49.6	42.6	56.4	.022*
8.4	Third	84	30.7	33.6	27.9	.304
	Multi	81	29.6	29.1	30	.871
	Remove	92	33.6	29.1	37.9	.125

Age							
Qu. No	Reform	Frequency	% of (NB) Sample	% Young sample n=78	% Middle sample n=46	% Older sample n=16	Stat sig.
8.1	Third	133	95	91	100	100	.086 [f]
8.2	Multi	88	62.9	64.1	60.9	62.5	.937

8.3	Remove	79	56.4	53.8	65.2	43.8	.259
8.4	Third	39	27.9	29.5	23.9	31.3	.759
	Multi	42	30	30.8	26.1	37.5	.675
	Remove	53	37.9	37.2	45.7	18.8	.158

Gender						
Qu. No.	I would be more likely to apply for a GRC if...	Frequency (selected)	% of sample	% of binary sample n=136	% of non-binary sample n=140	Stat sig.
9	There was an option other than male or female	109	39.5	5.1	72.9	.000*
	Gender dysphoria requirement was removed	69	25	13.2	36.4	.000*
	Statutory declaration requirement was removed	53	19.2	14.7	23.6	.062
	Proof requirement was removed	109	39.5	39.7	39.3	.943
	Panel was removed	130	47.1	56.6	37.9	.002*
	Application fee was removed	140	50.7	68.4	33.6	.000*
	Minimum age requirement was removed	18	6.5	9.6	3.6	.044*
	Spousal consent requirement was removed	48	17.4	25	10	.001*
	Not sure	3	1.1	2.2	0	.118 [f]
	N/A	8	2.9	2.9	2.9	.967
	Other	24	8.7	9.6	7.9	.616

Age							
Qu. No.	"I would be more likely	Frequency (selected)	% of sample	% of young	% of middle n=46	% of older	Stat sig.

	to apply for a GRC if...”			sample n=78		sample n=16	
9	There was an option other than male or female	102	72.9	71.8	78.3	62.5	.451
	Gender dysphoria requirement was removed	51	36.4	30.8	47.8	31.3	.146
	Statutory declaration requirement was removed	33	23.6	23.1	21.7	31.3	.733
	Proof requirement was removed	55	39.3	41	45.7	12.5	.058
	Panel was removed	53	37.9	38.5	34.8	43.8	.805
	Application fee was removed	47	33.6	43.6	23.9	12.5	.013*
	Minimum age requirement was removed	5	3.6	6.4	0	0	.236 [f]
	Spousal consent requirement was removed	14	10	6.4	17.4	6.3	.134 [f]

Appendix 8 FOI request



Cabinet Office

Room 405
70 Whitehall
London, SW1A 2AS

foi-team@cabinetoffice.gov.uk
www.cabinetoffice.gov.uk

Mollie Gascoigne

By email: M.Gascoigne@exeter.ac.uk

FOI Reference: FOI2021/01585
11/08/2021

Dear Mollie Gascoigne

I refer to your request where you asked:

"In accordance with the Freedom of Information Act, I would like to request the following information please:

The status, progress, or outcome of the 'cross government review on removing unnecessary requests for gender information, including in official documents' referenced on page 5 here in the Government's Response to the Women and Equalities Committee Report on Transgender Equality in 2016."

With apologies for the delay, I am writing to advise you that following a search of our paper and electronic records, I have established that the information you requested is held by the Cabinet Office.

The information you have requested is, however, exempt under section 35(1)(a) of the Freedom of Information Act, which protects the formulation of policy. Disclosure would weaken Ministers' ability to discuss controversial and sensitive topics free from premature public scrutiny.

Section 35 is a qualified exemption and I have considered whether the balance of the public interest favours our release of this material. There is a general public interest in disclosure of information and I recognise that openness in government may increase public trust in and engagement with the government. I recognise that the decisions

Ministers make may have a significant impact on the lives of citizens and there is a public interest in their deliberations being transparent. These public interests have to be weighed against a strong public interest that policy-making and its implementation are of the highest quality and informed by a full consideration of all the options. Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications. The candour of all involved would be affected by their assessment of whether the content of the discussions will be disclosed prematurely. If discussions were routinely made public there is a risk that Ministers may feel inhibited from being frank and candid with one another. As a result the quality of debate underlying collective decision making would decline, leading to worse informed and poorer decision making. Taking into account all the circumstances of this case, I have concluded that the balance of the public interest favours withholding this information.

If you are unhappy with the service we have provided and wish to make a complaint or request a review of our decision, you should write to the Information Rights Team at the address shown in the footnote below or email foi-team@cabinetoffice.gov.uk within two months of the date of this letter.

If you have any queries about this letter, please contact the FOI Team quoting the reference number above.

If you are unhappy with the service you have received in relation to your request or wish to request an internal review, you should write to:

Rachel Anderson
Head of Freedom of Information
Cabinet Office
70 Whitehall
London
SW1A 2AS

email: foi-team@cabinetoffice.gov.uk

You should note that the Cabinet Office will not normally accept an application for internal review if it is received more than two months after the date that the reply was issued. If you are not content with the outcome of your internal review, you may apply directly to the Information Commissioner for a decision. Generally, the Commissioner cannot make a decision unless you have exhausted the complaints procedure provided by Cabinet Office. The Information Commissioner can be contacted at:

Wycliffe House

Water Lane
Wilmslow
Cheshire
SK9 5AF

Yours sincerely

A handwritten signature in black ink, appearing to be 'A. Khan', written in a cursive style.

FOI Team
Cabinet Office

References and lists

List of statutes

Basic Law for the Federal Republic of Germany (Grundgesetz) 1949

Births and Deaths Registration Act 1953

Births, Deaths and Marriages Registration Act 1999 (Tasmania)

Census (England and Wales) Order 2020

Census Act 1920

Charter of Fundamental Rights [2007] OJ C303/17

Charter of the United Nations (adopted 24 October 1945 1 UNTS XVI)

Civil Partnership (Opposite-sex Couples) Regulations 2019

Civil Partnership Act 2004

Consolidated Version of the Treaty on European Union [2008] OJ C115/13

Constitution of the United Nations Educational, Scientific, and Cultural Organisation

(adopted 16 November 1945)

Convention for the Protection of Human Rights and Fundamental Freedoms

(European Convention on Human Rights, as amended) (ECHR)

Convention on the Rights of the Child, UNGA Res 44/25 (20 November 1989)

Council of Europe, *Resolution 2048* (Council of Europe 2015)

Council of Europe, *Resolution 2191* (Council of Europe 2017)

Courts and Legal Services Act 1990

Equality Act 2010

Female Genital Mutilation Act 2003

Gender Identity Law 26.743 2012 (Argentina)

Gender Recognition Act 2015 (Republic of Ireland)

Gender Recognition Reform (Scotland) Bill 2022

Gender Representation Public Boards (Scotland) Act 2018

Human Fertilisation and Embryology Act 2008

Insolvency Act 1986

International Covenant on Civil and Political Rights, UNGA 2200A (XXI) (16
December 1966)

Justice and Related Legislation (Marriage and Gender Amendments) Act 2019
(Tasmania)

Land Registration Act 2002

Landlord and Tenant Act 1954

Marriage (Same Sex Couples) Act 2013

Marriage Act 1949

Maternity and Parental Leave etc. Regulations 1999

Matrimonial Causes Act 1973

Ministerial and other Maternity Allowances Act 2021

Perjury Act 1911

Same Sex Marriage Act 2013

Sentencing Act 2020

Sexual Offences Act 2003

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217

A(III))

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