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## Transgender Jurisprudence

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### <a> Introduction

In this chapter, you will be introduced to how the law in England and Wales has engaged with transgender people and how other countries have tried to be more inclusive of non-binary people. We will explore how law has tried to define sex and gender and has often done so in a way that excludes some people from important legal protections. As you may be aware, transgender<sup>1</sup> and non-binary<sup>2</sup> people are increasingly becoming the focus of much current research in, amongst other areas, sociology, medicine and law.<sup>3</sup> There is also a growing social and cultural awareness of diverse gender identities. In fact the US *Time* magazine argued in 2014 that society has reached the “Transgender Tipping Point” with trans rights becoming the new civil rights frontier.<sup>4</sup> However, in most of these contexts trans and non-binary people, and the social/legal issues affecting this group disproportionately, such as the legal regulation of sex/gender, are still being treated as marginal or outliers in terms of their specific concerns regarding legal recognition and protection. At the same time, while there is increasing public awareness of people who do not identify with a binary understanding of gender, this is only slowly being translated into legal and policy debates. Nevertheless, you may already know that several jurisdictions have recently begun to offer legal recognition beyond the traditional female and male categories

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<sup>1</sup> The term ‘transgender’, or ‘trans’ for short, is generally used to refer to people who do not identify with the sex they were assigned at birth. It replaces older terms taken from medical terminology such as ‘transsexual’. In contrast ‘cis’, short for ‘cisgender’, describes a person whose gender aligns with the one they were assigned at birth.

<sup>2</sup> ‘Non-binary’ refers to people who do not identify as female or male. They may describe themselves as a mixture of the two or as having an identity beyond current conceptions of gender.

<sup>3</sup> Zowie Davy, *Recognizing transsexuals: Personal, political and medicolegal embodiment* (Ashgate 2012); Sally Hines, *Transforming Gender: Transgender Practices of Identity, Intimacy and Care* (Policy Press 2007); Sally Hines, "A pathway to diversity?: human rights, citizenship and the politics of transgender" (2009) 15 *Contemporary Politics* 1, 87-102; Alex Sharpe "Transgender Marriage and the Legal Obligation to Disclose Gender History" (2012) 75 *The Modern Law Review* 1, 33-53.

<sup>4</sup> Katy Steinmetz, "The Transgender Tipping Point," *Time Magazine* (29<sup>th</sup> May 2014), available at: <https://time.com/135480/transgender-tipping-point/> (accessed 15<sup>th</sup> May 2022).

including Australia, India, Malta and Germany.<sup>5</sup>

This chapter will provide an overview of how the legal system in England and Wales has engaged with the rights of transgender and non-binary people over the last 50 years. In doing so we will first outline key legal cases that have gradually changed how trans people are treated in and by law, next we will consider in what ways the Gender Recognition Act 2004 supports the recognition of trans people, before turning to the more recent issue of how non-binary people should be recognised in law. Finally, we will consider arguments for whether assigning people a legal gender status can still be considered an important function of the legal system. By the end of this chapter, you will be able to understand the core themes that have emerged across case law and legislation when dealing with trans issues. You will have an understanding of the core texts and authors in this field, alongside being able to recognise the importance of different judgments in this specific legal area. Throughout this area you will find reflection questions and activities to help you guide your understanding of the legal issues discussed in the chapter.

#### **Box 9.1**

**By the end of this chapter, you should be able to:**

1. Know the key legal cases that have shaped this area of law.
2. Understand the importance of different judgments in this area.
3. Evaluate the different reforms that have been proposed in this context.
4. Be able to think critically about the legal regulation of gender.

#### **<a>Pre-Gender Recognition Act Case Law**

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<sup>5</sup> Peter Dunne and Jule Mulder, "Beyond the Binary: Towards a Third Sex Category in Germany?" (2018) 19 *German Law Journal* 3, 627-648; Lena Holzer, "Non-binary Gender Registration Models in Europe: Report on third gender marker or no gender marker options" (*ILGA Europe*, September 2018) < <https://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/non-binary-gender-registration-models-europe> > accessed 19 September 2021; Flora Renz, "Genders that don't matter: Non-binary people and the Gender Recognition Act 2004" in Senthorun Raj and Peter Dunne (eds), *The Queer Outside in UK Law* (Palgrave Macmillan 2021), 143-164.

The law in England and Wales has long tried to grapple with how to treat people who do not identify with the legal gender status they were assigned at birth and that has been recorded on their birth certificate. However, until recently, this was mostly done through case law. *Corbett v. Corbett*<sup>6</sup> is perhaps the most well-known case focusing on transgender identity claims. It deals with the case of April Ashley, OBE and the status of her marriage to her then husband Arthur Corbett. Ashley is a trans woman who had been married to Mr Corbett for several years, during which he was aware that she had been assigned male at birth.<sup>7</sup> Corbett later demanded that the marriage be declared void on the basis that Ashley was “really” male and therefore the marriage was legally impossible as same-sex marriage did not exist at the time or, alternatively, on the ground that the marriage had not been consummated. Ormrod J, the presiding judge, agreed and declared that the marriage was void as “the biological sexual constitution of an individual is fixed at birth (at the latest)”.<sup>8</sup> Hence the court declared that Ashley had always been male. Based on the test in *Corbett*, sex was considered in law a permanently fixed category, which is determined at birth (“at the latest”) through biological factors, such as what a person’s genitals look like. Consequently, gender as a social category is not considered to carry sufficient weight to justify legal recognition for trans people.

One issue that emerges from this case and tends to shape all subsequent cases, seems to be judicial concerns about “fraud” or the “inauthenticity” of trans people [and their gender identity], which some commentators have suggested is in fact a thinly veiled excuse for homophobia.<sup>9</sup> This is evidenced by the fact that, as Sharpe argues, trans people are often expected to explicitly define themselves as heterosexual. Homosexual desire is a factor that could indicate that a trans person is “inauthentic”, i.e. not really trans. As such April Ashley, was described by the judge as a “female

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<sup>6</sup> [1971] P 83.

<sup>7</sup> Ashley died in December 2021 with her death and pioneering life noted in global media. See for example: Clay Risen, 'April Ashley, London Socialite and Transgender Pioneer, Dies at 86' *New York Times* (New York, 3 January 2022) <https://www.nytimes.com/2022/01/03/world/europe/april-ashley-dead.html> accessed 7 June 2022.

<sup>8</sup> *Corbett v. Corbett* [1971] P 83, p.104

<sup>9</sup> Alex Sharpe, "Gender Recognition in the UK: A Great Leap Forward" (2009) 18 *Social & Legal Studies* 2, 241-245; Avi Boukli and Lynne Copson, “Cultural Harm: ‘trans fraud’, ‘gender deception’ and zero-sum games” (2019) 3 *Justice, Power and Resistance* 2, 26-48.

impersonator” rather than as a woman. He refused to accept her identity despite the fact that she had actually undergone gender reassignment surgery, changed her name by deed poll, obtained a passport in that name, obtained a new national insurance card through the Ministry of National Insurance, worked successfully as a female model, and attempted to persuade the superintendent registrar, albeit unsuccessfully, to change her birth certificate. All of which were significant achievements at a time when there was little cultural or legal awareness that trans people even existed. The judge concluded that for legal purposes sex was defined as fixed, binary and based on chromosomes, gonadal tissue, and genitals at birth and therefore could never be changed.

A similar concern about a trans person pretending to be “cisgender” or heterosexual can be found in *J v. ST (formerly J)(transsexual ancillary relief)*.<sup>10</sup> This case concerned a trans man who had undergone a double mastectomy, but not a phalloplasty and had been married to a cis woman for several years. A decree of nullity was granted and Ward LJ specifically discusses in his decision that ST had no sexual experience, which allowed J to “pretend” to be male.<sup>11</sup> He also draws attention to the heterosexual character of marriage and as such considers J’s deception to be undermining marriage itself.<sup>12</sup> Overall, Ward LJ, just like Ormrod J in *Corbett*, conflates homosexuality with being trans, resulting in repeatedly expressed concerns over damage to the heterosexual institution of marriage if trans people were to be recognised in their changed gender, even though J might have well considered himself to be heterosexual.

A later and closely related case, concerning trans identities specifically in the context of marriage is *Bellinger v. Bellinger*<sup>13</sup>. In this case a trans woman sought a judicial declaration that her marriage to a cis man was indeed valid. In his judgement and in line with the preceding cases, Lord Hope expressly mentioned his intention to

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<sup>10</sup> [1998] Fam 103.

<sup>11</sup> *J v. ST (formerly J)(transsexual ancillary relief)* [1998] Fam 103, p.109

<sup>12</sup> *Ibid*, p.141

<sup>13</sup> [2003] 2 AC 467.

maintain the existing categories of sex/gender as he believed that recognising sex reassignment would blur the lines between male and female.<sup>14</sup> He also made repeated mentions of the biological distinction between the sexes, which according to him, permeates nature and society. Sharpe terms this the “(bio)logical approach” and argues that this allows for the view that sex is immutable and therefore the basis for any gender identity.<sup>15</sup> This idea that both sex and gender should be treated as purely binary, with gender being perhaps the more flexible of the two categories is the underpinning norm for all cases and legislation dealing with trans people up to this point. In the intervening years after *Corbett* and *J v ST* a number of cases came before UK courts that all came to the same conclusion; namely that it was not possible for trans people in the UK to legally change their gender. The reasoning for this gradually shifted, with several judgements pointing out that while sex is a fixed biological entity, gender could be changed, but a legal process for this needed to be created by government rather than through the courts.

This culminated in the case of *Goodwin v United Kingdom*<sup>16</sup> before the European Court of Human Rights. The applicant, Christine Goodwin, a United Kingdom national, born in 1937, was a trans woman. She claimed that she had problems and faced sexual harassment at work during and following her gender reassignment. She also alleged that the fact that she had to keep the same National Insurance number had meant that her new employer would be able to obtain information from her previous employers under another name and gender, with resulting embarrassment and humiliation for her. She therefore argued that the UK’s failure to provide a legal option for changing one’s gender directly excluded her from the ability to marry and had led to systemic discrimination, therefore violating her rights under the ECHR.<sup>17</sup> The court agreed with her and found that her rights under Articles 8 and 12 had been violated and that therefore the UK needed to introduce a mechanism that would allow people

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<sup>14</sup> *Bellinger v. Bellinger* ([2003] 2 AC 467) p.477

<sup>15</sup> Alex Sharpe, "English transgender law reform and the spectre of Corbett" (2002) 10 *Feminist Legal Studies* 1, 65-89.

<sup>16</sup> [2002] 35 E.H.R.R. 18.

<sup>17</sup> Claire Bessant, "Transsexuals and Marriage after Goodwin v United Kingdom" (2003) 33 *Family Law-Bristol* 111-116.

to amend their legal gender status. This was largely based on the fact that almost all other states who had signed up to the European Convention of Human Rights already had measures that allowed individuals to legally change their gender identity.

### **Box 9.2**

#### **Perspective:**

“An analysis of *Bellinger* in the House of Lords demonstrates judicial reiteration of the idea that sexual identity is about sex (that is, biological and natural) rather than gender. U.K. case law leaves intact not only the sex/gender distinction per se, but also reifies the notion that marriage is based on sex (the natural fixed biological body), as opposed to gender (socially constructed masculinity/femininity).”

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* 1, 67-96, 75.

### **<a>The Gender Recognition Act 2004**

The Gender Recognition Act 2004 (GRA) was introduced as a direct response to the decision in *Goodwin*. The GRA now allows a person to legally change their gender as recorded on their birth certificate as long as they meet specific conditions. Notably, and similar to earlier cases involving trans people, such as *Corbett v Corbett* and *Bellinger v Bellinger*, the GRA focuses on gender, rather than sex, as the category that can be changed by law. This means that, as Sharon Cowan argues, there is still an underlying assumption that sex is fixed at birth and trans people are limited to a social or legal change of their gender – this is even regardless of whether any medical interventions have been used.<sup>18</sup>

Anybody who now wants to obtain a Gender Recognition Certificate or GRC has to meet four specific conditions. They have to be 18 or over; they have to be diagnosed with gender dysphoria, which is the medical diagnosis associated with being trans;

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<sup>18</sup> 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* 1, 67-96, 75.

they need to prove that they have lived in the “new” gender for 2 years prior to the application and lastly need to swear that they will remain in that gender for the rest of their lives.<sup>19</sup> Once an applicant thinks they can meet these conditions they have to fill out a form, which includes a statutory declaration and submit 2 medical reports that state they have been diagnosed with gender dysphoria, as well as documents that show that they have lived in their gender for the last two years.<sup>20</sup> This should be items like a UK passport, driving license, bank statements etc. Their application is then assessed by a panel of medical and legal experts who focus primarily on the medical evidence and on whether it shows a sufficient degree of commitment to permanently live in a gender that is different from the one assigned at birth.<sup>21</sup> In most cases a Gender Recognition Certificate is granted, although between 10-20% of applications are rejected each year, usually because they failed to prove that they had lived in their gender for 2 years and that they wanted to remain in that gender permanently.<sup>22</sup> This process and attached conditions may deter individuals from engaging with the application process altogether and therefore the GRA has been criticised on the basis of posing an undue burden on trans people, given the overall low application numbers across the last 15 years.

As you can see the law has moved on from the outright denial of trans people’s existence, which can be found in previous case law, to allowing at least some people to be legally recognised. At the time of its introduction, the GRA was in fact considered one of the most progressive legal frameworks globally allowing for trans people’s legal recognition.<sup>23</sup> This is primarily because procedures referred to in legal instruments as

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<sup>19</sup> s.2 Gender Recognition Act 2004

<sup>20</sup> s.3 Gender Recognition Act 2004

<sup>21</sup> HM Courts & Tribunal Service, "T452 Guidelines for registered medical practitioners and registered psychologists: To facilitate completion of the Medical Report Proforma for Gender Recognition" (June 2004)  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786903/t452-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786903/t452-eng.pdf)> accessed 25 June 2021.

<sup>22</sup> Ministry of Justice, "Tribunals and Gender Recognition Certificate Statistics Quarterly - April to June 2015" (*Ministry of Justice Statistics bulletin*, 10 September 2015)  
<<https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2015>> accessed 19 August 2020.

<sup>23</sup> Alex Sharpe, "Gender recognition in the UK: a great leap forward" (2009) 18 *Social & Legal Studies* 2, 241-245.



“Gender Reassignment Surgery”, which are now more commonly described as “Gender Affirming Surgery”, and hormone treatment to modify one’s appearance are not officially required for an application. Despite the fact that law does not require surgical interventions, many applicants assume that some medical treatment is vital to a successful application.<sup>24</sup> Often support groups specifically advise people that their medical reports need to say that they are planning to have gender affirmation surgery even if that is not mandated by law.<sup>25</sup> Lord Filkin, in the parliamentary debate around the GRA specifically mentioned that panels should scrutinise those applications, where surgery had not taken place, more closely as this may be evidence that “at heart there was doubt in the person's mind about whether he or she was going to make a committed and permanent change”.<sup>26</sup> Based on the literature available from Press for Change and comments made by members of the Tribunal that assess applications under the GRA, this does indeed seem to be the case in practice.<sup>27</sup>

Until the recent introduction of same sex marriage in the UK in 2013, a GRC was only available to unmarried trans people or those who were willing to convert their relationship from a marriage into a civil partnership, and vice versa. Effectively trans people had to get divorced, if they wanted legal recognition of their gender. As can be seen from the parliamentary debates prior to the GRA, this requirement was introduced mainly to alleviate concerns by religious groups about the introduction of “inadvertent” same-sex marriages when one spouse changed their gender.<sup>28</sup>

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<sup>24</sup> House of Commons - Women and Equalities Committee, “Transgender Equality”, (*House of Commons*, 8 December 2015), <<https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> > accessed 20 July 2020.

<sup>25</sup> Press for Change, “The Standard Track Gender Recognition Application Process” (2014) <<http://www.pfc.org.uk/StandardTrackGRCS.html> > accessed 7 July 2020.

<sup>26</sup> HL Deb 29 January 2004, Gender Recognition Bill, vol 656 (31), col 375.

<sup>27</sup> UK Trans Info, “Gender Recognition Panel User Group Meeting - minutes for the 13th March 2013 in London and 30th April 2013 in Newcastle” (2013) <<http://uktrans.info/attachments/article/217/document%207.pdf>> accessed 4 September 2016. UK Trans Info, “Gender Recognition Panel User Group meeting minutes for 10th November in London and 25th November in Manchester” (2015) <<https://uktrans.info/attachments/article/217/> > accessed 4 September 2016.

<sup>28</sup> HC Deb 23 February 2004, Gender Recognition Bill, vol 418 (541).

The Marriage (Same Sex Couples) Act 2013 includes an amendment to the GRA which allows trans people who are married or in a civil partnership to legally remain in their relationship even after they transition.<sup>29</sup> The amendment is obviously a positive development in so far as trans people will no longer be forced to choose between the legal recognition of their relationship or their gender identity. However, the amendment introduces a new requirement that the cisgender spouse will have to give written consent before their partner can obtain a full GRC – the so-called “spousal veto”.<sup>30</sup> The government argued that this amendment was necessary due to two reasons: a) cis gender spouses were often unaware of their partner’s transition, and b) they had no legal remedy if their partner wanted to transition and they were unhappy about this fact.<sup>31</sup> Both claims are factually dubious. For instance, the requirements for obtaining a GRC, as discussed above, set out that an applicant needs to live in their new gender for two years, which makes it difficult to imagine that a spouse would remain unaware of this happening. Secondly cisgender spouses, like anybody else who is unhappy with their marriage, are able to divorce their spouse if they want to end the relationship.

However, with the new amendment even if a relationship has broken down, without their spouse’s consent trans people will only be able to apply for an interim GRC which expires after 6 months, at which point they have to restart the entire recognition process. Apart from the emotional cost of this process, the financial cost of re-starting the legal process is around £700. Trans people have expressed significant concerns about this new requirement and highlighted that trans spouses could effectively be blackmailed about issues such as custody of children and greater maintenance payments after divorce as a result.<sup>32</sup> In fact, Scotland in 2014 decided not to introduce

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<sup>29</sup> Marriage (Same Sex Couples) Act 2013, Schedule 5.

<sup>30</sup> Marriage (Same Sex Couples) Act 2013, Schedule 5 Part 1 Paragraph 2.

<sup>31</sup> HC Deb Marriage (Same Sex Couples) Bill, 21 May 2013, 563 (9).

<sup>32</sup> Helen Belcher, "We won't have truly equal marriage until we get rid of the spousal veto" (*NewStatesman*, 4 April 2014) < <http://www.newstatesman.com/politics/2014/04/we-wont-have-truly-equal-marriage-until-we-get-rid-spousal-veto> > accessed 15 March 2015. Flora Renz, "Consenting to gender? Trans spouses after same-sex marriage" in Nicola Barker and Daniel Monk (eds) *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections*, (Routledge 2015), 79-94.

this particular requirement in their version of the GRA due to concerns about the power imbalance it creates.<sup>33</sup>

### **Box 9.3**

#### **Debate:**

Do you think it is important that cisgender spouses have veto power over their partner's ability to change their legal gender status? Can you consider any implications that the veto power could have?

Existing research about people's experience of using the GRA to change their legal status, generally demonstrates that trans people hold a negative view of this law.<sup>34</sup> Trans people feel that the law treats their gender as inherently suspect.<sup>35</sup> The prevalence of the wrong body narrative, i.e. the idea that all trans people experience themselves as being born or trapped in the wrong body has been frequently criticised in a medical context.<sup>36</sup> It effectively designates trans people who do not conform to this narrative, i.e. those who do not describe themselves as having been born in the wrong body, as inauthentic. The GRA does not just take up the medical narrative of being born in the "wrong body" but actually ensures that this is perceived as the most viable narrative for those desiring legal recognition of their gender, primarily through the evidential requirements outlined earlier, which rely heavily on medical reports.<sup>37</sup> Indeed, trans people have noted that throughout the process they felt pressured to provide a certain image of themselves as they were at the mercy of official decision making. People felt that they were inherently under suspicion and that the panel

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<sup>33</sup> Equal Opportunities Committee, 16 January 2014, Session 4, column 1756.

<sup>34</sup> House of Commons - Women and Equalities Committee, "Transgender Equality", (*House of Commons*, 8 December 2015), <<https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> > accessed 20 July 2020.

<sup>35</sup> Flora Renz, "(De)regulating trans identities" in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and the Law*, edited by Chris Ashford and Alexander Maine, (Edward Elgar 2020), 244-255.

<sup>36</sup> Zowie Davy, *Recognizing transsexuals: Personal, political and medicolegal embodiment* (Ashgate 2012).

<sup>37</sup> Sharon Cowan, "Looking Back To(wards) the Body: Medicalization and the GRA" (2009) 18 *Social & Legal Studies* 2, 247-252.

would be biased against them, regardless of the validity of their claims.<sup>38</sup> For trans people law often becomes an extension of wider social biases against their identity claims and they see law not as a neutral arbiter of disputes but rather as a hostile and biased entity, which intentionally makes it difficult to access legal rights. To deal with this hostility applicants feel that rather than providing a true account of their identity, they have to match their application as closely as possible to the image of the “true transsexual” to successfully apply.

Beyond concerns about the GRA itself, there is also a wider concern regarding whether providing for a way to legally change one’s gender is sufficient to address discrimination and hostility against trans and non-binary people. In the case of *J v B and The Children (Ultra-Orthodox Judaism: Transgender)*<sup>39</sup> the court dealt with two parents who had separated when one of them transitioned from male to female. Both parents and the children were part of the Orthodox Jewish community. In the ruling for this case the Judge decided against allowing a trans woman (J) access to her children. Mr Justice Peter Jackson argued that to allow J contact with her children would lead to the children and their mother to be ostracised by their community based on their religious beliefs. The decision did not hinge on J’s *legal* gender status, but rather on this specific community’s understanding of gender, which did not recognise the possibility of a person changing their gender.

Previous case law like *Corbett* was plainly discriminatory against trans people seen retrospectively, and arguably, both the case of *J v B* and aspects of the GRA embody similarly transphobic sentiments. This is mostly because they largely operate under the assumption that being cisgender is a legal and social norm, and any accommodation for trans people is exceptional and potentially dangerous (e.g., in the case of the spousal veto as it seeks to protect the cisgender partner). Further, while the obligation to have gender affirmation surgery is no longer a requirement in order

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<sup>38</sup> House of Commons - Women and Equalities Committee, “Transgender Equality”, (*House of Commons*, 8 December 2015), <<https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> > accessed 20 July 2020, 12-13.

<sup>39</sup> [2017] EWFC 4.

to obtain a GRC, in medical and social contexts intense debates do take place about the physiological and morphological characteristics of trans people. On a practical level transgender rights may be advanced by overturning discriminatory laws, allowing trans people to legally change their ID documents, and passing anti-discrimination laws that protect trans people. However, this may not be enough to challenge the prejudicial assumptions underpinning law, which presume that sex and gender are purely binary, unchangeable and largely fixed from birth as can be clearly seen in *J v B*.

#### **Box 9.4**

##### **Presentation Task:**

The Gender Recognition Act 2004 currently requires applicants who want to change their gender to provide evidence of their “acquired” gender by submitting medical reports and official documents such as a driving license, bills or passports. Try to think of other ways in which someone could evidence their gender and explain why you think these would work better or worse than the currently required evidence.

#### **<a>The Equality Act 2010**

You may already be familiar with the Equality Act 2010 from your study of other legal areas as it is the main anti-discrimination legislation in the UK. The Equality Act 2010 combined the various existing pieces of anti-discrimination law such as the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995 into one single statutory framework to ensure consistency between the different protected characteristics, such as age, disability, sex, race and religion and philosophical belief. As we discussed above, a formal change of legal gender status is solely governed by the Gender Recognition Act 2004. However, the Equality Act 2010 also simultaneously provides specific anti-discrimination protections for trans people. As such, s.7 of the Equality Act protects people from discrimination in the context of employment and service provision, if they have the protected characteristic of “gender reassignment”. Notably, section 7 is framed significantly wider than the GRA in terms of who is

covered by anti-discrimination provisions. A person is defined as having the protected characteristic of “gender reassignment” if they are proposing to, are undertaking, or have undertaken any steps to change “physiological or other attributes of sex”. Therefore s.7 covers all trans people regardless of their legal status, particularly when read in combination with the official explanatory notes to the Equality Act, which note that a person does not need to undertake any medical procedures to be covered by this provision, whereas the GRA at present requires a medical diagnosis.

More recently in the case of *Taylor v Jaguar Land Rover Ltd*<sup>40</sup> an employment tribunal found that non-binary and gender-fluid people are also covered by the protected characteristic of gender reassignment in the Equality Act.<sup>41</sup> Although this is not a binding decision, as it came from a first instance tribunal, it does provide some indication of judicial reasoning in this area, which seems to extend anti-discrimination law beyond the remits of legal gender recognition as this remains limited only to people who identify as female or male. In practice this means that employers and service providers should generally treat trans and non-binary people in line with their declared gender, regardless of their legal gender status.<sup>42</sup> Beyond “merely” not discriminating, public bodies (local councils, state schools, etc.) must also take account of individuals with the characteristic of “gender reassignment” when considering their responsibilities under the Public Sector Equality Duty contained in s.149 of the Equality Act. This duty asks such institutions to “have due regard to” equality by thinking about their existing practices and possibly changing these in relation to the characteristics protected by the Equality Act, thereby encouraging a more pro-active approach to equality and inclusion.<sup>43</sup>

However, the anti-discrimination provisions contained in s.7 Equality Act are not absolute. In certain circumstances the law allows employers and service providers to

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<sup>40</sup> [2020] ET 1304471/2018.

<sup>41</sup> Owen Bowcott, “Gender-fluid engineer wins landmark UK discrimination case” (*The Guardian*, 17 September 2020) < <https://www.theguardian.com/world/2020/sep/17/gender-fluid-engineer-wins-landmark-uk-discrimination-case> > accessed 10 April 2022.

<sup>42</sup> *Taylor v Jaguar Land Rover Ltd* [2020] ET 1304471/2018

<sup>43</sup> Sandra Fredman, “The public sector equality duty” (2011) 40 *Industrial Law Journal* 4, 405-427.

exclude trans people. Specifically, schedule 3 para. 28 Equality Act 2010 expressly allows for the exclusion of people who have the protected characteristic of gender reassignment from single-sex services and accommodation. Any single-sex provider seeking to rely on this provision would need to demonstrate that the exclusion of trans people is a proportionate means of achieving a legitimate aim. The circumstances under which this provision can be utilised are currently somewhat contested but are likely to be limited to instances where there is no other option for providing the specific service, for example in the context of some domestic violence service provision.<sup>44</sup> As such legally the default assumption remains that trans people should generally be treated in line with their gender, regardless of whether or not they have obtained a GRC.

**Box 9.5**

**Problem Question:**

Fin is a student in a state school that currently has different dress codes for male and female pupils. Fin identifies as non-binary and argues that they should be able to wear elements from both the boys' and girls' uniforms. The headteacher refuses this request and says that Fin has to wear either the boys' or the girls' uniform and that Fin will be excluded if they do not comply with this. Fin and their parents argue that this is unlawful discrimination under the Equality Act 2010. Advise Fin and the school about their respective legal positions.

**<a>Reforms and the Legal Recognition of Non-binary People**

In England and Wales until the GRA came into force, trans people were unable to legally change their birth certificates and other documents to accurately reflect their gender identity. As we have seen, previous case law defined sex and gender in primarily biological and absolutely binary terms and made several highly problematic assumptions about trans people. The GRA has supposedly revolutionised gender

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<sup>44</sup> Alex Sharpe, "Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?" (2020) 83 *Modern Law Review* 3, 539-557.

rights in the UK by moving away from a biological understanding of sex/gender and by making it possible for trans people to change their birth certificates, gain access to legal rights, and be protected against discrimination. However, this legal framework is now more than 15 years old and has changed very little in this time. For instance, the GRA makes no accommodations for people who do not identify with a binary understanding of gender and want their legal status amended accordingly.

Some potential reforms for the existing legal framework were set out by the Transgender Equality report published in January 2016 by the House of Commons Select Committee on Women and Equalities. Crucially, the report notes the complete lack of legal provision for non-binary people. At the same time it is strongly critical of the medicalised approach of the GRA, particularly in regard to the evidentiary requirements contained therein, which are inherently exclusionary to those not willing or able to undergo specific types of gender confirmation surgery and at the same time serve to pathologise non-cisgender identities. Implicitly the medical aspect of the GRA also further serves to exclude people who do not identify with a binary understanding of gender, as they are less likely to undergo the full range of procedures commonly referred to as “gender confirmation surgery” and are also likely to have more difficulty accessing appropriate medical care in the first place. In its recommendations, the report suggests that the GRA should urgently be updated to reflect both of these concerns. In many ways the report is ground-breaking, in the sense that it officially acknowledges the existence and concerns of non-binary identified people; a category that did not even rate a mention in previous official debates about the GRA in 2003 and 2013.

The key recommendation of the report regarding provisions for non-binary people is that the government should “look into the need to create a legal category for those people with a gender identity outside that which is binary and the full implications of this”.<sup>45</sup> However, there is no mention of the wider legal impact such a change could potentially have or of specific processes that would assess the social and legal

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<sup>45</sup> House of Commons Women and Equalities Committee, “Transgender Equality” (House of Commons, 2015), 11.



implications stemming from this. For instance, if gender identity in a legal context were to include three categories, would this also impact other gender based legislation, such as for example the Equality Act 2010 in regard to sex-based discrimination?<sup>46</sup> Although law in England and Wales is now largely gender neutral, there are nevertheless some remaining areas where a person's legal gender can affect their treatment in law and those areas would undoubtedly be affected by any move toward a third gender category.

In general, the introduction of an additional category for non-binary people, while perhaps beneficial to some people, is likely to raise similar concerns to those related to the existing binary gender categories. Even if this category was purely based on a "self-declaration" approach, in line with the wider proposal of the report, it would be likely to still remain exclusionary towards some people – for instance, those who do not identify with any gender at all, those who do not wish to go through an official process to "confirm" their gender or those who are unable to access the application process due to economic and other reasons. Although this report is not legally binding, the government, in its response to the report, has committed to reviewing the GRA with the intent to "streamline and de-medicalise the gender recognition process", a process that seems to have stalled as of 2022.<sup>47</sup>

While the exact scope of parliamentary attempts at including non-binary people is currently unclear, the High Court has simultaneously been considering a case for judicial review of the current gender marker system for UK passports.<sup>48</sup> In *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department*<sup>49</sup> the High Court was asked to determine whether it is lawful not to have an alternative gender option, specifically an "X" designation, for those who do not identify as either

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<sup>46</sup> See s. 11 Equality Act 2010, which states that sex refers to "a man or to a woman".

<sup>47</sup> Government Equalities Office, "Government Response to the Women and Equalities Committee Report on Transgender Equality" ( July 2016) , 1-32, 11 < [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/535764/Government\\_Response\\_to\\_the\\_Women\\_and\\_Equalities\\_Committee\\_Report\\_on\\_Transgender\\_Equality.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/535764/Government_Response_to_the_Women_and_Equalities_Committee_Report_on_Transgender_Equality.pdf) > accessed 19 November 2021.

<sup>48</sup> It should be noted that while existing reform proposals are primarily aimed at reforming the Gender Recognition Act 2004, this does not inherently affect gender markers on passports, which can be changed regardless of one's legal gender on one's birth certificate.

<sup>49</sup> [2018] EWHC 1530 (Admin).

male or female. The claimant in this case identified as “non-gendered” and was therefore trying to obtain a passport that reflected this by using an “X” gender marker, which is a pre-existing option that the International Civil Aviation Organisation uses as a shorthand to indicate that gender is “unspecified”. The judgement acknowledges that “the claimant has a justifiably strong personal interest in gaining full legal recognition as being a non-gendered individual”, but suggests that this is a separate issue from the challenge to the current passport policy. Part of the basis for the rejection of the claimant’s arguments seems to be the fact that this case focuses on passports rather than birth certificates, the latter of which are argued to be “of fundamental importance in recording and establishing the applicant’s gender identity”.<sup>50</sup> As a result of this and the fact that the government’s review of potential reforms had not been concluded, the court ultimately ruled that Article 8 of the European Convention of Human Rights did not impose a positive obligation on the government to accommodate people who do not identify as either male or female. However, the judgement strongly suggests that this could be reconsidered, if the government fails to consider accommodations for non-binary people in their upcoming consultation. Elan Cane appealed this decision first to the Court of Appeal and then the Supreme Court. Again, the courts rejected this claim and argued that compelling the home office to introduce additional gender markers on passports would be unduly burdensome while potentially only benefitting a small group of people.

Although X is perhaps the most common gender alternative to the traditional M/F binary the German Constitutional Court (BVerfG) recently ruled in favour of a different option in its decision on German birth registers.<sup>51</sup> The BVerfG, like most other jurisdictions in Europe, had already acknowledged in previous decisions the right to determine one’s own gender identity within the context of existing (binary) gender options. In fact, the BVerfG set out the right to determine one’s own gender identity

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<sup>50</sup> *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin), para. 113-116*

<sup>51</sup> 1 BvR 2019/16. See, further, also 1 BvL 3/03 (2005) (par 47), 1 BvL 1, 12/04 (2006) (par 67), 1 BvR 3295/07 (2011) (par 51).

in its 1978 “first transsexuals decision”, which established that a transsexual person had the right to have their gender changed in the birth registry to correspond to the gender to which they belonged in their “psychic and physical constitution”.<sup>52</sup> More recently, the Court has made this right explicit. In a 2008 decision, the Court recognised the existence of a constitutional “right to recognition of one’s self-determined gender identity” (*Recht auf Anerkennung der selbstbestimmten geschlechtlichen Identität*) and invalidated the legal provision requiring the dissolution of a pre-existing marriage as a precondition for legal recognition of a new gender identity, similarly to the spousal veto that still exists in England and Wales.<sup>53</sup>

The most recent decision on gender recognition was made by the BVerfG in response to a complaint brought by an intersex person against the existing law requiring gender registration on the basis of a binary female/male system. Germany’s personal status law had already been amended in 2013 in order to allow parents of intersex children to avoid or delay registering a gender marker on the child’s birth certificate that may be or become inaccurate.<sup>54</sup> The complainant, represented by the campaign group Die dritte Option (“the third option”), argued that this constituted a “negative” recognition of non-binary individuals and was therefore a form of gender-based discrimination.<sup>55</sup>

In its 2017 decision the BVerfG agreed with the complainant and argued that the current birth/gender registration system violated the right to the free development of a person’s identity as encompassed in Article 2 of Germany’s Basic Law.<sup>56</sup> Having one’s

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<sup>52</sup> 1 BvR 16/72, para 50

<sup>53</sup> 1 BvL 10/05, para 40

<sup>54</sup> Die dritte Option, “Verfassungsbeschwerde” (02 September 2016) < [http://dritte-option.de/wp-content/uploads/2013/06/Dritte-Option\\_Anonymisierte-Verfassungsbeschwerde-2016.pdf](http://dritte-option.de/wp-content/uploads/2013/06/Dritte-Option_Anonymisierte-Verfassungsbeschwerde-2016.pdf). > accessed 7 June 2022.

<sup>55</sup> The group, it should be noted, reasoned that it was necessary to seek a positive, third, non-binary registration option (and not the abolition of gender registration) in order to obtain a ruling that would take the place of the existing option to not register a new-born child, with its accompanying administrative protocols that were viewed as creating a pressure for medical/surgical intervention in order to secure a registration rather than a non-registration and avoid the stigma still frequently associated with being intersex.

<sup>56</sup> Peter Dunne and Jule Mulder, “Beyond the Binary: Towards a Third Sex Category in Germany?” (2018) 19 *German Law Journal* 3, 627-648. Lena Holzer, “Non-binary Gender Registration Models in Europe: Report on third gender marker or no gender marker options” (*ILGA Europe*, September 2018)

gender identity accurately recognised in law is therefore a fundamental right that the government needs to accommodate. Specifically, the BVerfG ruled that the government needs to provide a “positive” third gender option, likely either “inter” (short for “intersex”) or “divers” (roughly translated as “other”), that acknowledges non-binary identities in a positive way rather than erasing them from documents entirely. Although the case itself was brought by an intersex person, the text of the judgment itself suggested that this new gender option could be open to trans, non-binary and intersex people. However, the actual implementation of this by the government has meant that this judgement was interpreted to only apply to intersex people requiring official medical statements, with “divers” becoming the new third gender marker.

Another obvious comparator for considering legal inclusion of non-binary people, which was also raised in *R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department*<sup>57</sup> is Australia. Australia is in many ways representative of a number of jurisdictions including parts of Canada<sup>58</sup>, the US<sup>59</sup>, and New Zealand,<sup>60</sup> that permit the use of an “X” gender marker on various ID documents. Australia was one of the earliest adopters of the “X” gender marker and since 2013 has permitted any adult who wishes to do so, to use “X” as a gender marker for all federal documents including passports.<sup>61</sup> The government guidance specifies that “X” refers to any person “who does not exclusively identify as either male or female” and therefore opens this category up to encompass a variety of different gender identities. This

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< <https://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/non-binary-gender-registration-models-europe> > accessed 19 September 2021.

<sup>57</sup> [2018] EWHC 1530 (Admin).

<sup>58</sup> Walter Strong, "Transgender N.W.T., residents can now change birth certificates to reflect gender" *CBC News* (15 July 2017) < <http://www.cbc.ca/news/canada/north/nwt-transgender-legislation-changes-1.4206782> > accessed 15 May 2022.

<sup>59</sup> Sam Levin, "'Huge validation': Oregon becomes first state to allow official third gender option" (*The Guardian*, 15 June 2017) < <https://www.theguardian.com/us-news/2017/jun/15/oregon-third-gender-option-identity-law> > accessed 5 May 2022.

<sup>60</sup> Te Tari Taiwhenua/Internal Affairs, "Information about Changing Sex / Gender Identity" (New Zealand Government, 15 February 2018) < <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>. > accessed 15 May 2022.

<sup>61</sup> Australian Government "Australian Government Guidelines on the Recognition of Sex and Gender" (Commonwealth of Australia, 1 July 2013) < <https://www.ag.gov.au/rights-and-protections/publications/australian-government-guidelines-recognition-sex-and-gender> > accessed 25 May 2022.

model is in line with the one proposed by Christie Elan-Cane in the recent judicial review case. Arguably an X marker could potentially accommodate a variety of different identities and effectively serve as a catch-all for everyone not identifying as solely male or female. However, the Australian government reserves the right to demand various types of evidence to “confirm” a person’s gender identity. Additionally, the X marker is at least on an official level intended to only be available for trans and intersex people, or “sex and gender diverse” as per the government materials, and does not seem to be intended, for instance, for someone simply not wishing to disclose their gender identity.

Although it is currently unclear to what extent the UK government will recognise non-binary identities, it seems likely that an equivalent to Australia’s X marker will be introduced in the long run. This would be in line with the arguments advanced in Elan-Cane’s judicial review case and would likely be the easiest administrative option as X is already a recognised passport marker unlike any potential alternative option. Interestingly this option would likely be subject to the same critique advanced by the BVerfG in its most recent case. Although the BVerfG specifically criticised the option of simply leaving the gender marker blank, using an “X” for unspecified gender arguably follows the same spirit by classing those who use it as inherently other. In rejecting such a negative designation the BVerfG relied on its interpretation of gender as an inherent if not constitutive part of one’s personality, one that has “outstanding significance” both to the individual and the wider society.<sup>62</sup> Since the right to a free development of one’s personality is at stake, the government therefore has a positive obligation to ensure that people can fully express their gender identity and are protected by doing so. A negative gender marker that only applies to a specific group of people is an inherent violation of this principle.

**Box 9.6**

**Essay Question:**

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<sup>62</sup> BVerfG para. 38-39.

Critically discuss what the potential effects would be if the UK government were to allow people to legally change their gender to “non-binary”.

### **<a>Should States Continue to Assign a Legal Gender?**

Beyond the specific criticism advanced by the German constitutional court against negative gender markers there is a further theoretical criticism of extending the existing legal gender recognition framework to include a third option. Having access to legal recognition and legal protection of one’s identity status is undoubtedly beneficial, even if only in symbolic terms. While the introduction of a third gender category or gender marker would rectify the explicit exclusion of non-binary people from the existing legal recognition process, using what you have learned about queer theory in Chapter 2, the introduction of such a third category can also be read as the introduction of a new normative category for the purpose of assimilation of currently non-normative genders.<sup>63</sup> Hence, the current legal trend toward adding categories to accommodate non-binary identities may suggest that, following Judith Butler, new genders are becoming or are made intelligible by the state.<sup>64</sup> As this is a developing area, at the moment it is difficult to assess whether the introduction of a third gender category can challenge a binary understanding of gender or whether it instead simply reifies a tripartite system of gender categories to replace the existing binary system. Introducing a third gender marker for official legal documents also does little to challenge the pervasive gendering of both public and private spaces, which routinely serves to impose gendered norms on those entering these spaces.

The introduction of these new categories also raises the question as to who will choose these new gender markers. Official discussions in various jurisdictions such as the UK and Germany suggest that the need for a third gender marker is limited to a

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<sup>63</sup> Surya Monro, "Transmuting Gender Binaries: the Theoretical Challenge" (2007) 17(1) *Sociological Research Online* < <https://www.socresonline.org.uk/12/1/monro.html> > accessed 25 January 2022.

<sup>64</sup> Judith Butler, *Gender Trouble: feminism and the subversion of identity* (Routledge 1999) 122.

very narrow group of trans and intersex people.<sup>65</sup> For instance in *R (on the application of Christie Elan-Cane)*<sup>66</sup> the evidence cited in the judgement suggests that only about 7,000 people in the UK identify as non-binary, with an even smaller subset wishing to use a third gender marker. Similarly, the German BVerfG assumed the new gender marker was primarily desired by intersex people who do not identify with the gender-binary, a likely even smaller group. As such the official understanding of a third or non-binary gender option is still that this is an exception granted to a minority group, with the default, or “normal”, gender options remaining as male and female. However, in principle these new options could be taken up by a much wider range of people.

Considering that the number of people identifying as non-binary seems to be increasing, is it possible to imagine a future legal landscape in which a third gender option becomes the default or “normal” option? And if so, is this then merely a step toward removing legal gender entirely? An increasing number of jurisdictions, such as some Australian and US states and Canadian provinces, are moving towards the “decertification” of legal gender status, by removing it from official documentation entirely rather than only offering ways of amending it.<sup>67</sup> This could potentially have several advantages: it would be in line with broader moves to make law gender-neutral and reduces the need to gender people; it could reduce the difficulties faced by trans and non-binary people in amending documentation; it could allow more people to live without a formal legal gender label; and it could reduce the relevance of gender in daily life overall.<sup>68</sup> Such moves to reduce the recording of gender are however unlikely to entirely eradicate persistent gender-inequality. Instead in such a scenario gender might become more similar to sexual orientation, as a characteristic that is legally recognised for the purposes of anti-discrimination law, but does not carry a formal legal status.

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<sup>65</sup> Davina Cooper and Flora Renz "If the State Decertified Gender, What Might Happen to its Meaning and Value?" (2016) 43 *Journal of Law & Society* 4, 483-505.

<sup>66</sup> [2018] EWHC 1530 (Admin).

<sup>67</sup> Christine Quinan, Verena Molitor, Marjolein van den Brink, and Tatjana Zimenkova, “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, 1-25.

<sup>68</sup> Davina Cooper and Flora Renz, "If the State Decertified Gender, What Might Happen to its Meaning and Value?" (2016) 43 *Journal of Law & Society* 4, 483-505.

## <a>Queer Feminist Statute: A Bill to Amend Ss. 11 and 7 of the Equality Act 2010

### <b>Background

In this part of the chapter, we will attempt to rewrite the relevant sections of the Equality Act 2010 from a queer feminist legal theory perspective. As we have seen above, currently s.7 of the Equality Act 2010 protects individuals from discrimination on the basis of the protected characteristic of “gender reassignment”. Recent case law has also extended these protections to non-binary and gender fluid people. At the same time s.11 Equality Act 2010 protects from discrimination on the basis of the protected characteristic of “sex”. This has generally been interpreted to prohibit discrimination on the grounds of a person’s biological sex, and it also prohibits discrimination on the basis of structural gender norms, e.g. men are more likely to be able to work night shifts and weekends due to the uneven distribution of care work and therefore using this as a requirement for promotion can be discriminatory,<sup>69</sup> and on the grounds of gender stereotyping, e.g. workplace dress codes that are more burdensome for female employees are also likely to be discriminatory.<sup>70</sup>

The rewriting of the Equality Act, which you can see below, merges s.7 and s.11 of the Equality Act 2010 by creating a new protected characteristic of “gender”. Given how pervasive gender-based discrimination continues to be, it is important to address this in the context of anti-discrimination law. This would also forbid service providers, public sector bodies and employers from requiring people to behave or dress differently based on their actual or perceived gender. This new protected characteristic clearly sets out that legal gender status is irrelevant to anti-discrimination law, thereby ensuring that everyone is equally protected from discrimination on this basis.

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<sup>69</sup> *Burden v Chief Constable of Hampshire Constabulary* (ET 3100659/2014)

<sup>70</sup> Government Equalities Office, “Dress codes and sex discrimination – what you need to know” (2018)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/709535/dress-code-guidance-may2018-2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709535/dress-code-guidance-may2018-2.pdf)> accessed 20 May 2022.



## **Gender Equality Act 2022**

### *Part 1*

#### *Introduction*

1. The Equality Act 2010 is amended in accordance with this Part of the Act.

#### *Gender Reassignment*

2. Remove Section 7 Gender reassignment:

“(1)A person has the protected characteristic of gender reassignment if the person 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.

(2)A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

(3)In relation to the protected characteristic of gender reassignment—

(a)a reference to a person who has a particular protected characteristic is a reference to a transsexual person;

(b)a reference to persons who share a protected characteristic is a reference to transsexual persons.”

#### *Sex*

3. Remove Section 11 Sex:

“In relation to the protected characteristic of sex—

(a)a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;

(b)a reference to persons who share a protected characteristic is a reference to persons of the same sex.”

#### *Gender*

4. After Section 6 (Disability): insert –

“Section 7 Gender:

- 1) Gender includes, but is not limited to –

- a. gender expression;

- b. social processes that create distinctions between differently gendered groups;

- c. embodied characteristics;

- d. gender identities, including the disavowal of gender.
- 2) A reference to a person's gender is a reference to a person who has the protected characteristic of gender in the various forms that it may take
- 3) There is no requirement for individuals to be legally assigned to specific gender categories in order to have the protected characteristic of gender."

### <a>Conclusion

This chapter has outlined the key legal cases that have shaped transgender jurisprudence in the UK, in particular *Corbett v Corbett* and *Goodwin v UK*, as well as the relevant legal frameworks, namely the *Gender Recognition Act 2004* and the *Equality Act 2010*. It has also explored how other jurisdictions have dealt with the more recent issue of non-binary recognition, by considering the examples of Germany and Australia. As the Bill at the end of this chapter shows, law could go even further to fully protect all people against gender-based discrimination.

### <b>Summary

- Pre-Gender Recognition Act case law rejected claims for legal recognition from transgender people in the absence of a statutory framework covering this area.
- The Gender Recognition Act 2004 has introduced a new legal mechanism that allows people to change their sex marker as it is noted on their birth certificate, as long as they can meet the different legal requirements set out in the Act.
- The Equality Act 2010 offers protection from discrimination for people with the protected characteristic of gender reassignment, which in recent case law has been interpreted to include non-binary people.

- Although some jurisdictions also offer legal recognition for non-binary people, for instance by allowing someone to change the sex/gender marker in their passport to an “X”, this is not currently an option in the UK.

#### <a>Further Reading

- 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.
- Petra L. Doan, "The tyranny of gendered spaces – reflections from beyond the gender dichotomy" (2010) 17 *Gender, Place & Culture*, 5, 635-654.
- Emily Grabham, "Governing permanence: Trans subjects, time, and the Gender Recognition Act" (2010) 19 *Social & Legal Studies* 1, 107-126.
- Flora Renz and Davina Cooper, "Reimagining gender through equality law: What legal thoughtways do religion and disability offer?" (2022) *Feminist Legal Studies*, 1-27.
- Alex Sharpe, "Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?" (2020) 83 *Modern Law Review* 3, 539-557.
- Valeria Venditti, “Gender kaleidoscope: Diffracting legal approaches to reform gender binary” (2020) 1(1) *International Journal of Gender, Sexuality and Law*, 56-75.