Feminist Legal Studies (2023) 31:67–93
https://doi.org/10.1007/s10691-022-09516-3

Decertifying Gender: The Challenge of Equal Pay

Emily Grabham[1]

Accepted: 29 November 2022 / Published online: 23 March 2023

Abstract
'The Future of Legal Gender' project has assessed the potential implications for feminist legal scholarship and activism of decertifying sex/gender. Decertification refers to the state moving away from officially determining or registering sex/gender. This article explores the potential impact of such moves on equal pay law and gender pay gap reporting. Equal pay and gender pay gap reporting laws provide an important focus for the project because they aim to address structural dynamics associated with persistent pay inequality that women experience across occupations in the United Kingdom. These legal measures illuminate *gendering* as a large-scale social problem widely understood to operate structurally and systemically. What effect, then, could decertifying sex/gender have on the law and conceptual power of equal pay? Might decertification undermine the structure of equal pay law, with all hard-won gains it has brought for women? Or is it possible to imagine that decertification could accompany a more inclusive and effective legal architecture for equal pay?

Keywords Decertification · Equal pay · Gender pay gap · Gender pluralism · Materialist feminism · Self-identification

A radical restructuring of society is necessary for women to get enough money, and, conversely, if women get enough money, society will necessarily be restructured. (Lewis 1988, 4)
Sex as we know it—gender identity, sexual desire and fantasy, concepts of childhood—is itself a social product. (Rubin 2011, 39)

Introduction

'The Future of Legal Gender' (FLaG) project has critically explored different ways of reforming legal gender status. As a core part of this work, we have considered the potential effects on law, activism and campaigning of moves to decertify sex/gender. Decertification can take many forms but is broadly understood as the state

✉ Emily Grabham
e.grabham@kent.ac.uk

[1] University of Kent, Canterbury, England, UK

moving away from officially determining or registering sex/gender (Cooper and Renz 2016; Cooper 2020; Cooper and Emerton 2020), including potentially abolishing legal registration of sex and gender (Cooper et al. 2022). Other articles in this special issue address different aspects of our work on decertification. The reasons for considering decertification as a legal reform have been considered at length elsewhere but include eradicating complex and humiliating legal gender reclassification processes for transgender people, unpicking the effects of binary legal categories of male/female in excluding non-binary people from key rights, recognising plural constructions and experiences of gender, and addressing law's role in substantiating conservative conceptions of sex and gender (Cruz 2004; Katyal 2017; Clarke 2018; Cannoot and Decoster 2020; Holzer 2020; Venditti 2020; Peel and Newman 2023). Concerns that have been expressed about such a reform include that it could mask inequalities instead of addressing them; it could undermine or make it harder to regulate single-sex spaces (Renz 2023); it might disproportionately impact people already disadvantaged on other grounds; and it could undermine accuracy and consistency in data collection (Cooper et al. 2022).

In this article, I explore the potential impact of decertification on equal pay law and gender pay gap reporting. Equal pay provides an important focus for the project because it highlights structural dynamics associated with persistent pay inequality that women experience across occupations in the United Kingdom. These legal measures illuminate *gendering*—including of workplace and unpaid social reproduction—as a large-scale social problem widely understood to operate beyond the level of individuals. As such, the technical characteristics and imaginary of equal pay law invite us to reflect on whether a registered sex/gender is necessary for laws to target inequalities arising from how people and roles are gendered. Might decertification undermine the structure of equal pay law with all the hard-won gains it has brought for women? Or is it possible to imagine that decertification could accompany a more inclusive and effective legal architecture for equal pay?

This article considers what would happen to equal pay law if legislative principles set out in our final project report—*Abolishing Legal Sex Status: The challenge and consequences of gender-related law reform*—were to come into force (Cooper et al. 2022). These principles were developed through our research and iterative prototyping process (Cooper 2023). They envision the aims of decertification as: abolishing a legal system of certification that treats sex and gender as legally assigned or registered qualities of individuals; contributing to the dismantling of hierarchical structures based on gender and sex, that also encode and institutionalise difference; supporting the lives of people whose gender leads them to experience exclusion or other forms of disadvantage; and contributing to the undoing of social injustices and inequalities more broadly. Nine legislative principles then (1) provide for the abolition of legal registration of sex and gender; (2) introduce a new ground of gender in equality law; (3) strengthen gender-neutral legal drafting; (4) provide a legal right to organise gender-specific provision for specific purposes; (5) provide for self-identification of gender; (6) provide for the continued use of gender-based categories in data collection where appropriate; (7) require the harmonisation of existing law to align with decertification and (8) levelling-up in welfare-related laws; and (9) provide recognition of a plurality of gender statuses (Cooper et al. 2022, 37–39).

I have focused on the potential consequences on equal pay law and gender pay gap reporting of principles 2 (new ground of gender in equality law), 5 (self-identification of gender), and 9 (recognition of gender plurality) in particular, although other principles would apply. In exploring these consequences, I have undertaken doctrinal research on equal pay law and regulations on gender pay gap reporting; performed cross disciplinary literature reviews of academic and policy publications engaging with feminism, gender, pay, equal pay and pay gap reporting law; and conducted a roundtable in October 2019 with leading feminist labour law scholars. I conducted eleven semi-structured interviews of experienced equal pay lawyers, academics, and non-governmental organisation (NGO) and policy specialists in fields relating to equal pay. I also corresponded with the Office for National Statistics (ONS), and analysed four interviews undertaken by FLaG project partners. Semi-structured interviews allowed participants' own accounts of issues key to the assessment of equal pay law to emerge in distinct ways: for example, what participants perceived was the social harm that equal pay was supposed to address, their accounts of the technical challenges and limitations of UK equal pay law, and how they imagined decertification might affect current law, as well as their thoughts about what the paradigm of equal pay missed in relation to unfair pay. The roundtable lasted two hours and the depth interviews lasted around an hour each. The interviews and roundtable were recorded, and along with scholarly/policy literatures and doctrinal law were coded and analysed in multiple phases, allowing the iterative development and cross-checking of key themes. Doctrinal research and literature reviews contributed to interview questions and were later sharpened in the light of interview and roundtable analysis. I re-assessed findings as the legislative principles were finalised.[1]

I have assumed that unequal pay based on the gendering of job roles and occupations would remain a large-scale social and economic problem after decertification and that it would still need to be addressed through legislation and a range of policy and activist measures. One interviewee put it this way: "If you take away the label of gender, you don't take away the centuries of oppression against women as women." Decertification would neither be expected to 'resolve' unequal pay, nor should it be permitted to invisibilise ongoing material inequalities.

The first section of this article discusses equal pay law in the context of changing feminist debates about gender and gendering at work. Following sections then discuss self-identification at work before assessing the potential effects of decertification on specific stages of making an equal pay claim. Gender pay gap reporting is a distinct legal obligation from equal pay law but I consider it within this article as debates about pay reporting tend to capture policy and public attention. The final substantive section considers the effects of decertification on 'the alternatives': a range of measures proposed by feminists and equal pay specialists that would move equal pay law in different directions beyond the adversarial, complaint led model currently used in the UK.

[1] For a discussion of the FLaG project's methods overall, please see Cooper and Renz 2023.

Feminism, Gendering, and Equal Pay

2020 marked the 50th anniversary of equal pay law in the UK. One of the first examples of equalities legislation in the United Kingdom, the Equal Pay Act 1970 eventually gave women a route to bringing a claim for 'equal pay for work of equal value'. Equal pay provisions are now contained in the Equality Act 2010. Feminist criticisms of the legislation include its individualistic basis, the adversarial and risky Employment Tribunal route, the need for a male comparator, the complexity of the law, and its inability to respond to either gender segregation in the labour market or the gendered distribution of unpaid care and other social reproduction work (Fredman 2004; 2008; McColgan 1993). Despite some notable victories, equal pay claims remain difficult to litigate and win, and the gender pay gap is currently 15.4 per cent for all employees (ONS 2021).[2] Furthermore, the lack of dedicated remedies for pay inequalities on grounds of race and disability has occluded the material disadvantage experienced by Black and minority ethnic women and women with disabilities and prevented an intersectional approach to pay inequalities more broadly (Fawcett Society and Young Women's Trust 2018). The effect of this has been that in terms of legal remedies for sex discrimination and unequal pay, the distinctive experiences of Black women are to this day still rendered invisible by law's inability to 'see' or address intersectionality (Ashiagbor 2013).

Understanding how decertification might affect equal pay law is shaped by a range of factors, including one's view of what are the social harms that equal pay law should target, whether these harms are based on sex or gender (or both), and whether a registered sex/gender is needed for the state or employer to take steps to address the gendering of roles and pay at work.[3] At the very least, as Judy Fudge and Patricia McDermott have put it, equal pay law "puts the intellectual project of feminism to work in developing an understanding of how gender is expressed in economic relations" (Fudge and McDermott 1991, 5). Many of the most powerful accounts of why we need equal pay measures emphasise the undervaluing of care work and the systematic nature of gendered job segregation and wage discrimination as economic problems.

Within voluminous scholarship across a range of disciplines (O'Reilly et al. 2015; Rubery and Grimshaw 2015), feminist and social science research has done much to help us to understand the dynamics creating and sustaining equal pay. Materialist feminist scholars from the second wave onward have surfaced and analysed a range of dynamics relevant to the gendering of pay, such as for example the relationship between capitalism and patriarchy (Hartmann 1976), the effects of neo-colonial labour policies (Lewis 2000) and racialising ideologies of the family (Carby 1997) and the re-creation of class through organisational systems (Acker 1991). As a result we can see unpaid work, job segregation, wage discrimination, and structural racism underpinning the continued production of gender norms and ideologies—and

[2] Office for National Statistics. 2021. Gender Pay Gap in the UK: 2021. https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2021#the-gender-pay-gap. Accessed on 18 October 2022.

[3] Many thanks to Diamond Ashiagbor for helping clarify my thinking on this.

producing gendered subjects—instead of merely evidencing pre-existing essentialised sex/gender identities. Reflecting on wage discrimination, for example, Joan Acker observed that "the practice of setting women's wages lower than those of men is part of the process of creating gender inequality" (Acker 1991, 5). Through profound theoretical innovations developed in many cases from empirical observation, materialist feminists have conceptualised gender, race and class as produced and sustained in complex ways through workplace, sectoral and macroeconomic infrastructures, ideologies and social relations. Indeed, the theoretical insights of materialist feminism were only possible because sex was not theorised as a pre-existing feature of individual and social life but instead as linked in complex ways with gendering and racialising dynamics (Carby 1997; Lewis 2000).

What consequences should material and social inequalities experienced by transgender, gender-fluid and non-binary people have for the way that we understand unequal pay and occupational segregation as social dynamics of gendering? Would removing legal certification of sex and allowing self-identification of gender undermine equal pay law? As we have seen, the problems that equal pay laws have been envisioned to address rely much less on how one identifies in terms of sex or gender and more on one's location within an already gendered—and gendering—labour market.[4] In theory this should allow for an approach to equal pay law that responds to new forms of social gendering and evolving gender identifications because the conceptual focus would target social dynamics and not individual identifications. Yet current law contains binary terms relating to sex. My aim has been to explore how a legal architecture addressing gendering structures, processes and cultural norms that are seen to distribute pay unevenly between men and women could be affected by a legal initiative aimed at unpicking harms caused by binary sex/gender models in law.

Self-identification of Sex/Gender at Work

In assessing the potential effect of decertification, a preliminary question is how self-identification could affect workplace practices concerned with documenting workers' sex/gender identity. The current position is that employees specify their sex/gender to their employer on job application forms and contractual and other employer documentation such as new starter forms. This sex/gender is interpreted through state tax and 'right to work' requirements.[5] To give a flavour of current rules, His Majesty's Revenue & Customs (HMRC) online guidance covers the checks that employers have to make to ensure that an employee has the right to work in the UK. This involves checking the applicant's original documents (e.g. passport) or looking

[4] Many thanks to a reviewer for *Feminist Legal Studies* for inviting me to state this more clearly.

[5] It should be noted that self-identification would pose distinct issues for tax and national insurance law, both of which drive the identification of binary sex/gender to employers at present. These areas are necessarily outside the scope of the present research but would have distinct effects on employers' conduct and possibly, by extension, on equal pay claims.

at the applicant's right to work details online.[6] To work out an employee's tax code, employers need to notify HMRC of the employee's information including date of birth, 'gender', full address and start date.[7] Employers can usually get this information from a P45, but if this is not available then the employer fills in a 'starter checklist'. The starter checklist asks personal details including whether the worker is "male or female" and their national insurance number.[8] It appears here that 'gender' is used interchangeably with, or to represent, sex. Once again, it depends on each employer's own processes how they gather this information.[9] Notably, HMRC lists 'sex' as part of the information about employees that employers can keep without their permission, whereas employees' permission is needed to keep certain types of 'sensitive' data" including race and ethnicity, religion, biometrics, health and medical conditions and sexual history or orientation.[10]

Even prior to the research for this article, developments in the area of gender pay gap reporting began testing the potential effects of self-identification on gathering pay data and in turn on how organisations, individuals, and wider policy actors understand the social problem of unequal pay. Advice on gender pay gap reporting produced by the Advisory, Conciliation and Arbitration Service/Government Equalities Office (ACAS/GEO) in 2019 and last updated in March 2021 suggested that employees should be permitted to update their gender for the purposes of pay reporting by large employers.[11] This has already introduced into UK law and policy on pay the idea of periodic or regular self-identification of gender. The principle of self-identification is further supported by ongoing law reform discussions about how to facilitate reporting of ethnicity to employers for a new ethnicity pay gap reporting obligation (Adams et al. 2018; Department for Business, Energy and Industrial Strategy 2018). Whilst gender and ethnicity pay gap reporting are very different legal obligations to equal pay claims, what is shared by each is the need for employers to know or register an employee's sex/gender (or other protected characteristic) in order to be able to fulfil their legal obligations.

Self-identification in the area of employment could take a range of forms. Employers might operate the hybrid system suggested by ACAS/GEO through which they would rely firstly on sex/gender identifications recorded in their payroll systems followed by periodic updates by individuals. Identification of sex/gender would at least partially depend on how HMRC would respond to decertification of sex/gender, because payroll practices, and indeed many payroll systems, are oriented to the categories of identification that HMRC mandates. Or, if tax and national insurance reforms were to permit it, employers could move to a model of total self-identification, whereby an employee would specify a sex/gender when beginning

[6] https://www.gov.uk/check-job-applicant-right-to-work?step-by-step-nav=47bcdf4c-9df9-48ff-b1ad-2381ca819464.

[7] See: https://www.gov.uk/new-employee/employee-information.

[8] See: https://public-online.hmrc.gov.uk/lc/content/xfaforms/profiles/forms.html?contentRoot=repository:///Applications/PersonalTax_A/1.0/SC2&template=SC2.xdp.

[9] A large role is also likely played by payroll software.

[10] See: https://www.gov.uk/personal-data-my-employer-can-keep-about-me.

[11] See: https://www.gov.uk/guidance/who-needs-to-report-their-gender-pay-gap#gender-identity.

employment and employers would allow this to be updated whenever employees needed or in response to a periodic request for identification. Whilst both of these approaches appear fairly radical, employers already vary in their practice of ascertaining and recording sex/gender.

Equal Pay Law

Lydia Hayes has described UK equal pay law as "politically ground-breaking but legally modest" (Hayes 2014, 38). Whilst other areas of employment discrimination law use statutory torts, equal pay law uses an equality clause inserted into all contracts of employment—a contractual mechanism. The right to equal pay for work of equal value is contained in part three of the Equality Act 2010. Equal pay law allows people to claim that their pay is not equal to a named comparator of the opposite sex. More specifically, it permits a person of "either" sex to make a claim that, in comparison with a named comparator of the "opposite sex" doing "equal work", their contractual terms are "less favourable".[12] A "sex equality clause" is implied into the employee's contract of employment, with the idea that the clause evens out any discrimination (or "less favourable treatment") between the person making the claim and their comparator of the opposite sex.[13] In this way, equal pay law intervenes into the contractual relationship between employer and employee, modifying any terms that are "less favourable" on grounds of sex.

A claim for equal pay asserts that the claimant's contract already contains this equality clause. Claims can be on the basis of a comparison between two individuals, for example, between news presenters (e.g. Samira Ahmed and Jeremy Vine) (direct discrimination), or between two groups doing roles that have been gendered in distant ways—e.g. checkout operators in a supermarket as concerned with warehouse workers (indirect discrimination).[14] A claimant needs to establish (1) a difference in pay and (2) "equal work" between herself and her comparator.[15] The definition of 'equal work' itself in s65 Equality Act 2010 points to some of the ways that equal pay law has tried to break open intensely complex and opaque employer pay practices. According to s65:

[12] s66 Equality Act 2010 ('EA').

[13] s66 EA: (1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
(2) A sex equality clause is a provision that has the following effect—
(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;
(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

[14] *Samira Ahmed v BBC,* Employment Tribunal Case No: 22068589/2018. See also the claims against major supermarkets and retailers coordinated by Leigh Day & Co: https://www.equalpaynow.co.uk/. See (McColgan 1997) for an in-depth historical account of the struggle to have indirect discrimination claims permitted in equal pay law.

[15] Hypothetical comparators are permitted in cases of direct pay discrimination—see s71 EA 2010. Essentially this covers a situation where a person, for example, tells a woman "I would pay you more if you were a man" (Explanatory notes, s71 EA).

"A's work is equal to that of B if it is -

(a) *like B's work;*
(b) *rated as equivalent to B's work, or*
(c) *of equal value to B's work*."

An employer might argue that a female complainant and her comparator are not doing equal work or that the comparator is not valid. But once the complainant has established difference in pay and equal work, the burden shifts to the employer, if they are able, to make out the "material factor" defence. The "material factor" defence is set out in s69 and allows an employer to argue that the difference in pay is due to a material factor which is not on the ground of sex. Essentially employers can argue that an apparently unequal pay practice does not trigger a sex equality clause if a) it does not treat people differently just because of their sex or b) if it does put women (or men) at a particular disadvantage compared with the other sex, then it is a proportionate means of achieving a legitimate aim. In England and Wales, equal pay claims are made in employment tribunals and in the High Court and can result in compensation going back six years.

Establishing a Protected Characteristic

This section assesses the effects of decertification on the first stage of any claim—establishing the protected characteristic. Currently, equal pay provisions in the Equality Act use the wording of 'sex'. Sex is defined as a "protected characteristic" in the Equality Act through s11, which states that:

> (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.

In turn, s212(1) of the Act defines a man as a "male of any age" and a woman as a "female of any age". As such, the Act does not provide a definition of sex or gender (Malleson 2018). It is assumed that everyone has a sex, and because all sex-related provisions in the Act are symmetrical (open to claims from 'both' sexes) it has been assumed that everyone belongs to one sex or 'the other'. One effect of decertification would be that a new protected characteristic of gender would apply to equal pay claims. This would mean that a claim could be made by someone of any gender, which would shift the implicit symmetry in equal pay law. The protected characteristic would apply to transgender people, no matter their legal status pre-decertification (i.e. whether or not they had a gender recognition certificate (GRC) prior to decertification), and to people defining as agendered or non-binary and other genders, expanding protection to these groups. The Equality Act only currently allows transgender people to make equal pay claims on the basis of their acquired gender under part three of the Act, and not claims relating to gender reassignment-related

pay discrimination.[16] With the introduction of the new protected characteristic, this would need to be amended, bringing trans, non-binary and agender-related pay discrimination within the scope of part three. Whilst European Union law has for many years recognised discrimination (including unequal pay) on the basis of gender reassignment as a form of sex discrimination, the new expanded protected characteristic would necessarily include a wider range of genders than currently protected in EU law.[17]

A key concern is that self-identification could lead to messy and enduring definitional questions about the identity of claimants that equal pay law has not yet had to face (Emerton 2023). As a policy expert put it: "If you have no legal way of defining sex or gender, then you have nothing to fall back on." If it is not possible to discern someone's gender by virtue of a legally certified sex or gender, would this not undermine efforts to litigate unequal pay? This is a difficult area to assess because the fact of sex as a protected characteristic has not been contested in equal pay proceedings (although it has been tested in relation to comparators—see below). It is not possible to determine whether this matter-of-factness about sex is down to an implicit assumption that it could be ascertained from official documents if needed.

Some interview participants raised the possibility that decertification could prompt employers to contest a claimant's self-identified gender in order to contest their membership of the protected characteristic. In discrimination law claims, employers sometimes have an opportunity to contest a person's membership of a protected characteristic through costly preliminary proceedings. For example, medical reports from clinicians as well as lengthy submissions and even dedicated hearings are still sometimes required to establish a claimant's disability in disability discrimination claims (Lawson 2011). Discrimination claims can fail at the first hurdle before a tribunal or court has had the opportunity to consider the substance.

Such a concern evidences unease about decertification shifting the architecture of equal pay law and undermining hard-won rights in a context in which the adversarial complexity and slowness of equal pay proceedings is well recognised. Yet for good or ill, equality legislation has approached the protected category of sex as something which is assumed and not evidenced in equal pay law. Depending on how the new protected characteristic of gender were drafted, this could also be the case post-decertification.

Furthermore, as participants of the 2019 roundtable pointed out, the general direction of equality law has been to focus on the extent to which the protected characteristic that has been believed or advanced caused the discriminatory situation, rather than insisting that the protected characteristic fits the claimant. Tribunals and

[16] See s70 EA 2010 and (White and Newbegin 2021).

[17] EU law would remain of relevance, as the Withdrawal Agreement retains case-law of the Court of Justice of the European Union. On gender reassignment, see further *P v S and Cornwall County Council* Case C-13/94 (1996) 2 CMLR 247, art157 of the Treaty on the Functioning of the European Union, and art14 of the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). On the question of the scope of EU-related sex discrimination rights see: (van den Brink and Dunne 2018). Many thanks to an anonymous reviewer for FLS for highlighting questions relating to EU law.

courts at UK and EU level have rejected an approach to the development of equality law that would disallow a claim purely on the basis that a claimant did not themselves occupy the protected characteristic.[18] Case law on associative and perceived discrimination under the Equality Act covers a range of situations in which a person has been able to successfully advance a claim for direct discrimination relating to a protected characteristic that they do not in fact hold. These claims are possible because the relevant definition of direct discrimination refers to discrimination 'because of' and previous legislation referred to discrimination 'on grounds of', without specifying that the discrimination had to be associated with a characteristic held by the claimant themself.[19] In the recent decision of the European Court of Justice in the *CHEZ* case (concerning associative discrimination against a non-Roma woman living in a Roma area that was targeted by a racist approach to the provision of electricity meters), the Court suggested that it was possible to make a claim of associative indirect discrimination.[20]

This case law indicates that as long as there is a causal relationship between the protected characteristic and the detriment that a claimant experiences, the claim can proceed. The development of this approach in the area of equal pay law is uncertain, as the vast majority of equal pay cases are decided under part 3 of the Equality Act (which specifically concerns pay) rather than s13 (which concerns direct discrimination).[21] Nevertheless, it indicates an approach to protected characteristics that would support a focus on how gendered wage setting practices and occupational segregation affect a claimant rather than requiring a strict enquiry into a person's gender. More specifically, it could allow men within female-gendered occupations being able to advance an equal pay claim without reference to a successful female claimant, as is presently required for 'piggyback claims' (see further below).[22]

A further reason why decertification might present less of a challenge than expected to the initial stages of making an equal pay claim is that the concepts used in the legislation and associated guidance are just as oriented to social dynamics of gendering as they are to ideas of binary sex. Sex and gender-related terms and

[18] Although note that claims in relation to marriage/civil partnership and in relation to pregnancy and maternity are not covered by this.

[19] See further *Chief Constable of Norfolk v Coffey* (2019) EWCA Civ 1061; *Coleman v Attridge Law* (2008) C-303/06; (2008) IRLR 722; (2008) ICR 1128; *Weathersfield Ltd v Sergeant* (1999) IRLR 94; *English v Thomas Sanderson Blinds Ltd* (2009) IRLR 206.

[20] *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* C-83/14 (2015) IRLR 746. However, the wording of the relevant provision relating to indirect discrimination in the EA 2010 – s19 – seems to make such a reading more difficult at UK level because it appears to require the claimant to have the protected characteristic which is affected by the respondent's actions. s19 (1) EA: "A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's."

[21] s70 of the EA states that the sex discrimination provisions of the Act do not apply where an equality clause (part 3 EA) is in existence.

[22] Many thanks to an anonymous reviewer for pointing this out. 'Piggyback' claims allow a man in a role gendered female and paid less than equivalent male-gendered roles to make an equal pay claim. These claims are based on a male claimant making a comparison with a woman in a role that has already been subject to a successful equal pay claim. If indirect associative discrimination claims were permitted, there would be no need for a successful female claimant.

concepts are used alongside each other, and sometimes interchangeably, in statutory provisions, guidance and policy documents relating to equal pay in the Equality Act. A similar array of examples can be found in the Equality and Human Rights Commission Statutory Code of Practice (Equality and Human Rights Commission 2016). Within this element of the legal architecture, a shift to a protected characteristic of 'gender' and to self-identification need not pose foundational problems in capturing the social harm of unequal pay (occupational segregation, gendering of roles, and wage discrimination).

Making a Comparison

Equal pay law currently requires a claimant to make a comparison with someone of the "opposite sex" in order to establish that she or he is not being paid equally for work of equal value.[23] This is also the case with respect to 'piggy-back' claims, in which men in female-gendered roles make equal pay claims consequential upon successful equal pay claims brought by women in those roles. Piggy-back claims identify successful female claimants as comparators, and as such extend protection to men in female-gendered roles and occupations through and not outside the comparison framework.[24] Notably, hypothetical comparators are not permitted in equal pay claims, which means that a claimant in either the 'regular' or the piggy-back claim must identify a specific individual as their comparator.[25]

The use of the words 'the opposite' sex in equal pay provisions indicates that a binary sex system was uppermost in the minds of the drafters and legislators at the time the Equal Pay Act 1970 went through Parliament. The idea of 'the opposite' presents a real challenge to those living outside the gender binary who might otherwise consider an equal pay claim, but who would only be able to point to 'another' sex/gender, not 'the opposite', as this academic equal pay specialist put it:

> [For] people who would not want to classify themselves … there would be no opposite, there is just other …. I think [this] raises quite interesting questions around, who do you then choose as a comparator if there is a third category?

As we have seen, legislative principle 9 envisions amending references to 'the opposite sex' to recognise gender plurality. This, combined with the protected characteristic of gender, would have the effect of structuring the comparison as between a person of one gender and a person of another gender, thereby eliminating problems that non-binary individuals and people of other genders might face. This could also apply to piggyback claims.

A further potential issue here relates to the identification of a comparator. Decertification would affect how employers identify the gender of their employees and how the gender of the comparator is reported at work and then identified for the purpose of an equal pay claim. Following such a change, HMRC could well review its

[23] S64 EA 2010.

[24] *North & Others v Dumfries & Galloway Council* (2013) IRLR 737. See further (Allen 2020).

[25] See further *Bury Metropolitan Borough Council v Hamilton & Others* (2011) IRLR, para 15.

own administrative and identification procedures, and it might decide not to require employers to report gender as part of their usual returns or to expand the categories for gender reporting. Employers would still need to identify and recognise a person's gender for reasons outside of HMRC reporting (e.g. with respect to gender pay gap reporting—see further below), and they would draw on a range of practices to do so, as they do at present. For example, they might ask workers to self-identify their gender, similar to recommendations by ACAS/GEO guidance on gender pay gap reporting.[26]

Some interview participants voiced a concern that decertification could undermine the identification of a comparator in equal pay proceedings. As one interviewee put it: "If there is no legal sex at all then your comparators can disappear in a puff of smoke, can't they?" (job evaluation specialist). Indeed, the need for a comparator of 'the opposite sex' did undermine an equal pay claim in the early 1990s when a claimant unwittingly chose as her comparator a transgender man. In the 1994 Employment Tribunal decision in *Collins v Wilkin Chapman*, the tribunal found that because the male comparator was transgender, the comparator was biologically a woman and therefore not of the opposite sex.[27] The comparator was living as a man when he began employment in the respondent's firm of solicitors. The female claimant in the case observed that the comparator was paid more than she was and that he was given a lower volume of work despite being on the same grade. When the claimant brought an equal pay claim, the respondent found out that the comparator's lived gender did not match his birth sex.[28] The comparator gave an affidavit to the tribunal that he was female and that he had been registered at birth "in the female gender" but that he had "gender dysphoria syndrome".[29] His birth certificate was produced in evidence to the tribunal. The tribunal found that the comparator was of the same sex as the claimant and as he was the only available comparator, the claim failed.

Robin White and Nicola Newbiggin argue that this decision is no longer good law following the Gender Recognition Act (White and Newbegin 2021) and decertification would provide further support for such a position. Reforms allowing hypothetical comparators would also eliminate such a problem (see final section). In any case, because comparators will have already self-identified their gender at work and because equal pay law allows the claimant to choose her comparator, the spectre of employers in equal pay claims contesting the gender identification of comparators many times over is highly unlikely.[30]

[26] Albeit that such reporting is on a binary basis.

[27] EAT 945/93 full citation pls. The EAT then reiterated the problem with the comparator when it decided that a sex discrimination claim arising from the failure of the equal pay claim would fail for the same reason. Many thanks to Robin White for providing me with the transcript.

[28] It is not clear from the only transcript of this claim—that from the EAT proceedings—how this information came to light and what effect the nature of the 'outing' that this comparator went through during the proceedings had on him.

[29] *Collins v Wilkin Chapman* (Employment Appeal Tribunal 14 March 1994) para 2.

[30] Many thanks to Nicole Busby for helping me with this point.

Measuring and Evidencing Unequal Pay

Participants expressed concern in interviews that decertification could undermine data that is used to track pay inequalities and that this would affect equal pay law. As one interviewee put it:

> I think the difficulty for equal pay laws is that how would you collect data, how will you decide if you no longer have classes of men and women, how will you recognise that there is a gender pay gap at all?

Pay data by sex/gender is gathered and used in very different ways for distinct purposes relating to equal pay policy and research more broadly. As such, the effects of decertification on wider pay data are difficult to predict and would depend on how the ONS and HMRC decided to respond to the changes. For example, the gender pay gap statistics that ONS produces are drawn from the Annual Survey of Hourly Earnings (ASHE), which is in turn drawn from HMRC data.[31] As we have seen, HMRC online guidance states that employers should provide the employee's "gender" when registering them for tax purposes, yet ASHE states that it "provides information about the levels, distribution and make-up of earnings and hours paid for employees by sex, and full-time and part-time working".[32]

Gender pay gap statistics tend to be used for policy reports by NGOs working in the area of equalities, broadcast and print media, as well as government or third sector organisations attempting to contextualise their own pay inequalities. By contrast, the Labour Force Survey (LFS) provides the official measures of employment and unemployment, as well as information about the "employment circumstances of the UK population".[33] The LFS is used for a range of public policy and research purposes including, for example, the Bank of England's recent working paper *Understanding Pay Gaps* (Amadxarif et al. 2020).[34] The data in the LFS comes from a household survey and as such, is reported by individuals themselves or a member of their household. As part of the survey, respondents are asked whether their sex is male or female.[35] Whilst there are many differences between ASHE and LFS data and its uses, the significant difference for our purposes is that sex/gender is reported

[31] More specifically, ASHE is taken from a 1 per cent sample of employee jobs from HMRC PAYE records. See further: https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/annualsurveyofhoursandearningsashegenderpaygaptables.

[32] See further https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/methodologies/annualsurveyofhoursandearningslowpayandannualsurveyofhoursandearningspensionresultsqmi#methodology-background. Respondents are asked to 'enter the sex of the employee' and are then given the categories of M for male and F for female.

[33] See: https://www.ons.gov.uk/surveys/informationforhouseholdsandindividuals/householdandindividualsurveys/labourforcesurvey.

[34] For other examples of how LFS data is used, see: https://www.ons.gov.uk/employmentandlabourmarket.

[35] See further https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/methodologies/labourforcesurveyuserguidance.

by the business for ASHE (and therefore calculation of the gender pay gap and other uses) and by the individual survey respondent (or their proxy) for LFS.[36]

Self-identification on its own would have very little effect on data about pay and occupations drawn from the LFS. However, depending on the response of ONS and HMRC to decertification, this could affect the gender pay gap statistics derived from ASHE. It is not clear what respondents who expressed concern about decertification affecting the quality of sex/gender pay data thought about the self-reported nature of LFS data. Another point, however, is that both ASHE and LFS currently gather data through a binary choice of sex/gender and decertification would support the recognition of plural genders through legislative principle 9. This could have its own effects on the type of data gathered, and the statistics produced, by the ONS.

Whilst issues relating to the gathering of data and production of sex/gender related statistics are important to our understanding of (un)equal pay more generally, they are not the central legal question in equal pay claims. A claimant is required to identify a comparator of 'the opposite sex' as we have seen and then establish that he or she is employed on like work, work rated as equivalent under a job evaluation scheme, or work of equal value to the comparator.[37] This is a question of fact for the tribunal and once the claimant has successfully established this, as well as her lower pay or unequal conditions, then the burden of proof then shifts to the employer to make out a defence, if they can, via the "material factor" defence, as we have already seen.[38]

Essentially, the core issue that a claimant must address under any of the routes in s65 Equality Act is the nature of their work, which includes the "precise and concrete" conditions of the work the claimant and her comparator are actually doing, not merely their job descriptions or their stated job roles.[39] At this point, the enquiry engages with the extent of gendering of job roles, functions and everyday working practices, as well as the nature of gendered occupational segregation that might be at play. For example, in the Carlisle hospitals claim, differences in pay were found between domestics washing floors, earning £7,505 for working a 39 hour week and "wall-washers" (all of whom were men) earning £9,995 for a 37 hour week (Allen 2020, 195). Litigation against Birmingham City Council led to a settlement of over £700 million in 2012 for cooks, care workers and cleaners (mainly women) who had been denied bonuses paid to workers in roles such as refuse collectors and street cleaners (mainly men).[40] Current litigation run by Leigh Day & Co on behalf of over 45,000 supermarket and high street shop workers against Asda, Coop, Morrisons,

[36] See further https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/methodologies/annualsurveyofhoursandearningslowpayandannualsurveyofhoursandearningspensionresultsqmi.

[37] s65 EA 2010. Such questions have led to voluminous litigation due to the complexity of employer pay structures, and also because changes in the way that employers structure their businesses (e.g. through contracting out) have created new dilemmas for equal pay claimants (Fredman 2008; Allen 2020).

[38] s69 EA 2010.

[39] C 381/99 *Susanna Brunnhofer and Bank der österreichischen Postsparkasse AG* [2001] IRLR 271; *Electrolux v Hutchinson* (1976) IRLR 410.

[40] See further *Birmingham City Council v Abdulla & Others* (2012) UKSC 47. For the settlement figure, see https://www.bbc.co.uk/news/uk-england-birmingham-20294633.

Tesco, Sainsburys and Next targets pay structures that differentiate between shop and store workers (who are predominantly female) and warehouse and distribution workers (who are predominantly male).[41]

The decision to be made under s65 addresses the question of the gendering of job roles and not the precise identified sex/gender characteristics of the claimants. If a job evaluation shows that women's roles are undervalued in relation to men's roles, this is usually sufficient to establish a claim.[42] If a job evaluation does not exist, then the tribunal will appoint an independent expert to prepare a report. In the latter case, parties will put considerable effort into engaging with the independent expert. As this interviewee put it:

> We all spend years, literally years arguing about the value of someone's job … It's not a situation where you are, as a woman going to bring an equal pay claim. You are saying, I am a woman and I am comparing against that man and then you find some evidential document where the employer says, we are not paying her this now, a woman. It is always going to be based on [the] historic undervaluing of women's jobs or if we are talking about that it's usually when you are talking about occupational segregation because that's entire classes of jobs … (Equal pay solicitor)

Especially in cases where an independent expert is appointed, the largest portion of the evidentiary burden for the claimant is to show unequal pay for women and men based on the assessments of their roles. In other words, the legal focus shifts to the way that complex dynamics causing unequal pay have influenced (or not) the pay and career structures of women in the employing organisation. With gender as the protected characteristic, the more usual binary inquiries could continue in much the same way as now (e.g. between roles gendered male and those gendered female) or with some adjustments (e.g. an employer might underpay non-binary people in much the same way as it underpays women).

Indirect discrimination claims advance an argument that women in a particular occupation are underpaid by an employer compared to men doing work of equal value. In this situation, the burden of proof remains on the claimant to establish her case and for this reason, the availability of accurate statistics can be important. Statistics are not generally required for these claims, with some exceptions. The relevant case-law suggests that the main focus of such statistics is likely to be the employing organisation itself.[43] The picture is complicated however by an observation from a barrister specialising in equal pay cases, who noted that LFS statistics are useful in these sorts of equal pay cases for their granularity and the ability to show and compare pay trends in occupations on a longitudinal basis. Finally, an

[41] See further Equal Pay Now: https://www.equalpaynow.co.uk/.

[42] The EHRC has published detailed guidance on job evaluation for employers. See: https://www.equalityhumanrights.com/en/advice-and-guidance/job-evaluation-schemes.

[43] See for example *Gibson v Sheffield City Council* (2010) IRLR 311 which suggested that claimants can make statistical arguments from information disclosed by employers.

equal pay solicitor noted that they may then go on to use statistical data to rebut a material factor defence put forward by the employer.

The effects of self-identification on establishing an indirect discrimination claim or contesting a material factor defence would depend on the level of data (whether employer level or national—LFS) and the employer's practice in recording and using data relating to sex/gender; whether, for example, they were using current HMRC practice or self-identification.

Pay Gap Reporting

A further consideration is how self-identification would affect reporting on gender pay gaps. Currently, UK public sector employers and private and voluntary sector employers with over 250 employees have an obligation to analyse their gender pay gap each April and report on it within 12 months.[44] Public and private sector employers are under an obligation to calculate and publish annually: mean gender pay gap in hourly pay; median gender pay gap in hourly pay; mean bonus gender pay gap; median bonus gender pay gap; proportion of males and females receiving a bonus payment; proportion of males and females in each pay quartile.[45] Welsh authorities are required to undertake specific actions on gender (and other) pay gaps included within their wider obligation to reduce socio-economic inequalities.[46] Employers can optionally include a narrative explaining any gender pay disparities and what action they will take to address them.[47]

As a device for supporting equal pay demands, pay gap reporting has limitations. One interviewee spoke in particular about the way that the epistemology of the employer-level pay gap limits understanding of wider labour market and sectoral dynamics contributing to gendered unequal pay. Nevertheless, pay gap reporting has much support amongst policy experts and NGOs, perhaps because it takes a step towards imposing an obligation on employers to self-monitor. For our purposes, it is notable that the secondary legislation setting out the reporting obligations does not define the terms 'male' and 'female'. Guidance on gender pay reporting published by ACAS and the Government Equalities Office highlights this and advises employers

[44] See the EA 2010 (Gender Pay Gap Information) Regulations 2017 ('the GPG Regulations'); the EA 2010 (Specific Duties and Public Authorities) Regulations 2017 ('the SDPA Regulations'); the EA 2010 (Specific Duties) (Scotland) Regulations 2012 (amended 2015, 2016 and 2018) ('the Scotland Regulations'); the EA 2010 (Statutory Duties) (Wales) Regulations 2011 (as amended 2019) ('the Wales Regulations').

[45] See for example, regulations 2, 8–13 GPG Regulations.

[46] These include: collating and publishing data on pay and pay differences between male and female employees; publishing equality objectives addressing any identified gender pay differences along with statements about the steps the authority has taken or will take to meet such objectives; publishing an action plan on the causes of any gender pay differences; preparing an annual report on the progress it has made to fulfil its equality objectives (including those relating to gender pay gaps) and a statement on how effective its steps have been. See the Wales Regulations.

[47] This is recommended by the ACAS/Government Equalities Office Guide to Managing Gender Pay Reporting (ACAS/GEO 2019). See: https://archive.acas.org.uk/media/4764/Managing-gender-pay-reporting/pdf/Managing_gender_pay_reporting_07.02.19.pdf.

to exercise sensitivity in terms of how employees self-identify their gender. The guidance states that reporting should not lead to employees being "singled out and questioned about their gender".[48] It suggests that employers gather and update information about employees' gender identity for the purposes of gender pay gap reporting based on how the employee has identified with respect to HR and/or payroll, if these records are updated regularly. If the information is not available or might be unreliable then "employers should establish a method which enables all employees to confirm or update their gender". As the guidance puts it: "This can done by inviting employees to check their recorded gender, and update it if required."[49]

The previous (2019) version of the guidance then referred to a free template made available through ACAS for this purpose. The template included the following wording, intended for employers to adapt:

> Gender Pay Reporting requires our organisation to make calculations based on employee gender. We will establish this by **using our existing HR and payroll records**. All employees can confirm and update their records if they choose to by contacting **[INSERT A CONTACT HERE]**. (emphasis in the original)[50]

Employers were informed that it was essential to know whether an individual employee is male or female rather than the overall numbers of male or female employees due to the way in which the pay gaps are calculated. The guidance stated that in situations where an employee "does not self-identify as either gender" then the employer could omit the individual from gender pay calculations.

In this way, ACAS/GEO guidance has recommended a blended approach which moves towards a self-identification norm. Existing human resources records of employees' sex/gender identifications are still gathered and maintained through employers' usual practice and in line with HMRC reporting requirements, but they are not the only envisioned source of data about employee's sex/gender identifications. Regular gender self-identification update processes are recommended for the specific purpose of gender pay gap reporting. Following, HMRC would in any case need to assess their overall need for male/female identifications and how to gather this data, and they would do so with a view to the interrelationship between tax data and certain statistical data (specifically for our purposes, ASHE) outlined above, amongst other factors. If most employers followed the ACAS/GEO guidance on pay gap reporting for identifying employees' gender, then the effect of such a change on gender pay gap reporting could be negligible, as the recommended process for gathering data about would rely on regular opportunities for self-identification.

Within interviews for this project, the response to the pay gap reporting measures, and to the various versions of the ACAS/GEO guidance, has coalesced around two key themes. The first theme concerns the effect on current pay datasets (e.g.

[48] See: https://www.gov.uk/guidance/who-needs-to-report-their-gender-pay-gap#gender-identity.

[49] *Supra* n 47.

[50] February 2019 version of the guidance, on file with the author.

ASHE) of individuals changing their gender identity in a system with an element of self-identification. One participant, a human resources specialist, emphasised the value of ASHE data in tracking pay over time, which allows users to understand pay gaps by age. She linked this to the recording of sex/gender as 'male or female' through payroll, thereby referencing the dynamic interrelationship of tax law, payroll systems, the production of some national statistics, and employers' insights into their own pay gaps:

> …the Office of National Statistics, which is the UK wide standard for data, they have got 20, 30 year time series data on gender pay gap reporting. Incredibly useful. You can see trends by age. Over a huge length of time. **And the only reason that is available is because employers have male or female on their payroll system.** That data flows from payroll to HMRC to ONS and so they can track the entire country's gender pay gap. (emphasis added)

The real value of the HMRC binary identification, she said, was that it created a "set of male and female data because of payroll" which is a "full data set that we can rely on". Similar concerns about the coherence of datasets were shared by the executive director of a prominent equalities NGO, who observed that self-identification inevitably allows individuals to change their gender identification over time, and that it "would be very difficult to do things like gender pay gap reporting" within the purview of such systems. Whilst this might only affect small numbers now, she thought that it could be more common in ten or twenty years for people to wish to change their gender identification.

The second theme concerns the effects on trans and non-binary individuals in relation of the reporting obligation. Currently, transgender individuals who have already identified in a lived gender on a binary basis at work through acquiring a GRC and/or changing their details on passports or birth certificates are incorporated into the reporting on the basis of their 'acquired' gender. Adam Penman has observed that trans women's time spent earlier in their careers identified (by others, if not themselves) as men could effectively undermine the longitudinal accuracy of the reporting and "artificially narrow the gap" (Penman 2020, np). However, as an NGO policy expert put it, the numbers of such individuals in relation to the dataset for large employers are likely to be relatively small. A further concern is that gender pay gap reporting has significant potential at present to obscure and distort the experiences of trans employees (Penman 2020). Penman argues that failing to require reporting on cis–trans pay data potentially occludes a significant pay gap between cisgender and transgender employees. As he puts it, inconsistencies in reporting approaches between employers and the lack of a nuanced approach to gathering data on trans employees (e.g. on employees who are transitioning) heighten the risk of inaccuracies in gender pay gap data.[51]

[51] In a 2019 report by the Chartered Institute of Personnel and Development, a survey of employers found that in most cases employers did not feel they had the correct technology in place to gather and analyse the data, and that they had only moderate confidence in the quality of their data. See: https://www.cipd.co.uk/Images/gender-pay-gap-reporting-lessons-1_tcm18-55693.pdf.

As we have seen, ACAS/GEO guidance has recommended excluding from pay reporting any employees who identify as non-binary. For the director of a prominent equalities NGO, this is the result of a legal system that "doesn't allow you to have a different identity outside trans and cis man or woman". For Penman, it creates a tension between promoting equality, on the one hand, and excluding people "who have fought for greater visibility" from the conversation around equal pay, on the other (Penman 2020, np). In other words, excluding non-binary people (who do not comprise a unified category) from reporting raises the question of whether such initiatives are aimed at full inclusion and visualising pay inequalities across a plurality of genders, or whether they are aimed at identifying pay inequalities between men and women. As another interviewee argued, however, binary gender reveals the social construction of pay systems precisely because women make up a large proportion of the labour market:

"Gender is the best way to reveal the unfairness and the arbitrariness and social construction of pay systems. Gender [is a] really important part because of the large share of women in the labour market" (Labour market specialist).

Another concern relating to the issue of pay gap reporting is what happens when individuals are given the choice of not identifying, in other words opting out of providing the requested information entirely (instead of positively identifying as non-binary, as such). As one participant put it: "… give white men an opportunity to disengage from equal pay and trust me, they will take it." The fear was of under-reporting by cisgender men and the potential skewing of pay data as a result. Such a situation would be mitigated under current law by the suggestion in the ACAS/GEO guidance for employers to rely on their existing payroll records in the first instance to identify employees. A similar approach could be used to address such concerns post-decertification.

In any case, self-reporting (and non-reporting) of protected characteristics is in wide discussion at present, due to the policy focus on addressing pay gaps on the basis of ethnicity and disability. Research reports by the EHRC, the Fawcett Society and the Resolution Foundation, for example, have focused on the extent and causes of these pay gaps and how they intersect with the gender pay gap (Adams et al. 2018; Breach and Li 2017; Fawcett Society and Young Women's Trust 2018; Henehan and Rose 2018; Longhi and Brynin 2017). At present, there is no UK-wide obligation for private employers and most public employers to report pay gaps relating to ethnicity and disability, although listed public authorities in Wales are required to draw up equality objectives covering all protected characteristics and Scotland requires listed bodies to publish an equal pay statement with information on occupational segregation information for race, gender and disability.[52] Where employers do gather data on these protected characteristics, they do so through self-identification on new starter forms and after that, the information is updated through staff surveys (Adams et al. 2018). Employers who have managed to increase participation in disclosure of ethnicity and disability have done so using careful communication strategies and by linking disclosure to an inclusive work culture (Adams et al. 2018, 45),

[52] *Supra* n 43, 45.

as well as including a 'prefer not to say' option. When these same employers use the data to report on pay gaps, they tend to use binary classifications (e.g. white/BAME, disabled/non-disabled) (Adams et al. 2018). The Department for Business, Energy & Industrial Strategy (BEIS) consulted on ethnicity pay gaps in 2019. The consultation included questions on how to classify ethnicity, for example, whether to use the ONS 2011 Census approach of grouping individuals into one of 18 categories (BEIS 2019, 22). In February 2022, the Women and Equalities Committee of the House of Commons recommended that legislation mandating reporting on ethnicity pay gaps be introduced by April 2023 for all organisations that currently report on gender.[53] In March 2022, the government announced that it would not to make such reporting mandatory.[54] Meanwhile, the ONS reports on the "ethnic pay gap" using 17 categories and reports by sex, age, and region, using the Annual Population Survey 2012–2019 (instead of ASHE, as is used for the gender pay gap statistics).[55]

What this indicates is that the question of self-identifying gender for the purposes of gender pay gap reporting would need to be resolved in line with wider reforms anticipated by the BEIS consultation and Women and Equalities Committee, as well as policy initiatives by the EHRC and others, in relation to disability and other protected characteristics. The privileging of equality legislation on gender pay gaps over legislation targeting other pay gaps appears much less defensible as time goes on, especially when viewed within the context of intersectional inequalities (Fawcett Society and Young Women's Trust 2018, 9). And if it is possible to self-identify a protected characteristic as important as ethnicity using one of multiple categories, then a similar approach could be used in relation to plural genders.

Decertifying the Alternatives

> I keep on thinking about what the legal framework could be doing if it were recognising what the real determinants of the pay gap are… the focus would be on those who are segregated into parts of the labour force to which low status and low pay are attributed. So it's not primarily emerging from the gender which has been certified. (Roundtable participant, October 2019)

The remaining question is how decertification might affect potential reforms to equal pay law or proposed alternative structures. The way we understand the factors leading to unequal pay—for example job segregation and wage discrimination—has helped us visualise complex dynamics of gendering at institutional and sectoral

[53] House of Commons Women and Equalities Committee *Ethnicity Pay Gpa Reporting* Fourth Report of Session 2021–22, HC 998.

[54] See Ethnicity Pay Reporting, October 2018: https://www.gov.uk/government/consultations/ethnicity-pay-reporting. See further: Inclusive Britain: government response to the Commission on Race and Ethnic Disparities, 17 March 2022, Department of Levelling Up, Housing and Communities and Race Disparity Unit.

[55] See https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/ethnicitypaygapsingreatbritain/2019#ethnicity-breakdowns.

level. Many politicians and campaigners over the past century intended equal pay law to address these dynamics, which were accepted to be problems of pay-setting by employers rather than caused by individual instances of pay discrimination (Allen 2020). Yet feminists have identified many problems with the current legal structure. Equal pay law sits within the disciplinary home of labour law, a discipline which has until only very recently almost totally evacuated women's unpaid work to other legal spheres, such as family law and welfare law (Conaghan 2005; Fudge 2014) and which invisibilises race whilst being constituted, formally and conceptually, by histories of racist thinking (Ashiagbor 2021). Equal pay aims at addressing pay discrimination between men and women instead of securing pay equality more broadly. Despite an urgent need for low pay to be addressed as a harm in itself, equal pay law only works if discrimination can be shown, and even then, it can help preserve pay systems that feature significant vertical pay problems between, for example, managers and frontline staff.

Further issues relate to the technical characteristics and scope of equal pay law. For example, the individual nature of the remedy puts considerable pressure on workers and makes bringing larger claims on behalf of classes of employees practically and legally onerous and off-putting (Atkins 1986; Fredman 2008).[56] Many commentators have also raised significant concerns about the limitations of the requirement for an actual comparator (Fredman 2008; Rubery and Koukiadaki 2016). Due to the slowness of equal pay litigation, often created by the tendency of the legal mechanisms to attract attention to procedure and reliance on appeals, one interviewee described it as "a radical concept in the hands of a very conservative machinery".

Solutions to the immediate technical and procedural problems of equal pay law, as well as more utopian models, fall into three categories: (1) adjustments to the current equal pay system; (2) the imposition of positive duties on employees through for example mandatory equal pay audits through 'third generation equality laws' (Fredman 2008); and (3) measures that intervene at the level of the state, for example through socially responsible procurement and 'fourth generation' rights (O'Cinneide 2005; Rubery and Koukiadaki 2016). In this final section, I assess the potential effects of decertification on these more far-reaching visions of equal pay law.

Potential adjustments to the current system include tackling the many problems concerning the comparator system, reducing the scope for employer justification of unequal pay, stronger laws requiring pay transparency, facilitating intersectional equal pay claims, more inclusive coverage of equal pay law (to include atypical workers, for example), and more inclusive coverage of employers (Fredman 2008; Downie 2019). The effects of decertification in relation to these would most likely fall broadly along the lines of its effects on the current system because these reforms envision that the current model would continue with adjustments. The exception here would be measures to facilitate intersectional equal pay claims and pay gap

[56] Although individual rights to bring legal action can help in situations where, for example, trade unions have failed to take action (Hoskyns 1985). In any case, a common question within the current literature on equal pay law is the extent to which equal pay litigation benefits from, or can exist outside, a supportive structure of collective bargaining (Hayes 2014; Deakin et al. 2015; Guillaume 2015).

reporting, which could provide further support for models that do not prioritise gender and which could accommodate intersectional pay inequalities or pay inequalities based on other protected characteristics on the same standing as gender.

The second group of alternatives—third generation equal pay rights—involves moving to a hybrid model comprising individual rights where necessary but within the overall framework of positive duties. A significant component of this approach is the mandatory equal pay audit, one aspect of a range of measures that move into the direction of placing the onus for monitoring and improving equality of pay on private as well as public sector employers (McColgan 1993; Fredman 2008; Rubery and Koukiadaki 2016). Mandatory equal pay audits target qualitative and structural factors underpinning wage discrimination. Employers are positioned as best placed to track the problem and take action, and ensuring forward looking action rather than claims based on historical problems (Fredman 2012). Significantly, because these measures still operate at the level of the employer, they may be less well suited on their own to tackling sectoral or wider labour market issues that underpin gendered unequal pay, for example occupational segregation, contracting out, austerity policies, and any other large-scale shifts that degrade women's pay.

These models might respond to decertification in two ways. In the first, employers could promote a practice of monitoring and taking action (through audits) based on attention to how they, as employers (through job roles and pay grades), treat people within the workforce. Workers would self-identify their gender how they wish. There is a risk that in increasing the spectrum of monitoring, employers might be tempted to spend more effort on data collection and interpretation than substantive measures to equalise pay (O'Cinneide 2005, 273). In any case, the effect of decertification would depend on employer practices gathering such data, and/or the interrelationship of mandatory pay audits with payroll practices, software, and tax law and practice. A system combining self-identification, on the one hand, with attention to the types of gendering of job roles and pay grades within the employing practice, on the other, could challenge the current reification of a sex/gender binary within equal pay initiatives. On the other hand, whilst providing recognition for a plurality of genders, it might continue to show unequal pay generally operating in binary ways.

Another route would involve using a system of self-identification recognising a plurality of genders for most purposes at work whilst retaining an element of binary assessment in order to continue to trace particular types of gendered pay differentials that are recognised as affecting mainly women as measured against men. This could be done to effectuate legislative principle 4—the legal right to organise gender-specific provision for specific purposes. As we outline in relation to that principle, this would be legally valid when done to address social subordination. It could be possible, for example, for an individual to self-identify as non-binary at work generally but to have a dual identity with a category of female or male (e.g. non-binary/female) for equal pay and gender pay gap monitoring purposes. If it could be evidenced (e.g., through LFS reporting on plural genders) that pay differentials affecting genders apart from female and male were a significant issue, then monitoring could shift to a model more in line with the first route above, gradually phasing out the binary model. Under both of these routes, self-identification and gender plurality might not pose much of a problem for third generation equal pay measures,

which appear in many ways more suited to addressing changing experiences of gender and pay inequalities because they focus on processes that lead to undervaluation of women's work rather than individualised definitions of gender.

The third group of alternatives to the current model comprises state-led measures. These would ideally involve intervening to provide support for social reproduction and those performing social reproduction as core aspect of re-valuing women's work (Rubery and Koukiadaki 2016, 107). In focusing on gender roles rather than gender identities, these measures could well be little affected by decertification. These alternatives envision that the state would be active in inspection and enforcement, creating incentives for others to work towards equal pay, and helping to shape social norms about equal pay and overall wage inequality (Rubery and Koukiadaki 2016, 93). In the UK, debates around the state's role in ensuring equal pay have coalesced around using universal rights to improve equal pay outcomes and building so-called fourth generation rights (Hepple, et al. 2000). Participants in the 2019 roundtable for this project highlighted the role of minimum wage legislation as an example of a universal floor of rights approach that already applies to workers of all genders and could continue to apply in conditions of decertification. If drafted to avoid sectoral inequalities and other restrictions and set a high enough level of pay, minimum wage legislation would be indifferent to self-identification and plural genders but it could still particularly ameliorate low pay affecting women and also improve low pay associated with other genders.

'Fourth generation' equality rights go beyond the anti-discrimination model whilst also constructing mandatory positive requirements with effective enforcement (Rubery and Koukiadaki 2016, 30). The content and expression of such rights is important, however. The narrow and overly deferent focus of the public sector equality duty (PSED) to have 'due regard' to advancing equality of opportunity, for example, has limited the promotion of equal pay and other equality goals in the public sector (Fredman 2013). If the framework requires a public body to publish and adhere to a plan of action, it is much stronger than the current PSED which does not (Fredman 2012). Currently, many public sector bodies publish pay information as a result of the PSED and pay reporting regulations, but the extent of positive action is patchy. Self-identification could provide data relating to new and perhaps unexpected gender pay inequalities, pushing at the definitional limits of the current PSED.

Another example is a set of measures proposed by the Equal Opportunities Commission to government in 2004 (but not taken up) through which the government would set its own national sex/gender equality targets, including eliminating the gender pay gap in public service occupations (O'Cinneide 2005). Using its own power, including financial controls, the government would then coordinate action through other public bodies to reach these goals. If it adopted such measures relatively soon, government might rely on LFS or HMRC data to understand the extent of pay differentials in relevant sectors. At present, such sources do not provide statistics relating to genders other than female and male, so the data would be under-inclusive in conditions of recognised gender plurality. Such reforms would therefore lead to more debate about how gender statistics are gathered. And as suggested above, government would need to decide whether to take action across a gender spectrum or

whether to focus for specific purposes on binary sex/gender pay differentials. However, as we have seen, effective measures providing a floor of rights, such as minimum wage legislation, need not be targeted at specific genders. As the interviewee quoted at the beginning of this section put it, if the model focused on how people are pushed into low-paid work, then would not be from the outset a question of which gender they have identified.

Conclusion

Against the backdrop of powerful feminist accounts of the reasons for unequal pay, UK legal remedies have been considerably lacking. Equal pay law has had a complex relationship with feminist demands, is imperfect, and has only been able to provide a remedy for one axis of inequality—sex/gender—in the context of complex intersectional dynamics that have long been identified by materialist feminist scholars and activists as underpinning unequal pay more broadly. It is possible that this partial epistemology and partial remedy is connected with an understanding of sex/gender as something that law can and should properly set apart from race and disability. Legal structures such as equal pay remedies may contribute to the ex post facto justification of the apparently 'foundational' legal status of sex/gender.

This article has assessed the potential effects on equal pay law and gender pay gap reporting of decertifying gender, understood for our purposes as bringing with it (1) a protected characteristic of gender, (2) self-identification, and (3) the recognition of gender plurality. I have focused on the process of advancing an equal pay claim under part 3 of the Equality Act and assessed how decertification could affect each stage of the current law: the assertion of a protected characteristic, the identification of a comparator, and the evidencing of unequal pay. Asserting a protected characteristic would be more straightforward for people of a wider array of gender identities. Making a comparison would happen as between the claimant and someone of another gender. On the question of whether and how job roles and structures have led to unequal pay, the focus would remain on the employer's gendering practices, not on the identities of individuals. As for gender pay gap reporting, the shift towards hybrid self-identification means that decertification would have much less of an effect in this area than on equal pay law. However, legislators would need to decide how to conceptualise and address pay discrimination in conditions of recognised gender plurality.

Finally, I assessed the potential effects of decertification on alternatives to the current model of equal pay law advanced by prominent equality law specialists and policy experts. Imposing positive obligations on employers and state bodies would be oriented more towards tracing dominant gender pay differentials and effectively addressing them rather than relying on individual remedies. For this reason, decertification may affect such models less extensively than equal pay reforms that retain the current legal architecture. As time progresses, the possibility of new forms of pay inequalities across the gender spectrum may lead to innovations in what employers (and possibly the state) are required to do to achieve equal pay. In the meantime,

pressing debates about the lack of effective legal remedies for intersectional and race/disability pay differentials, as well as the status of multiple gender categories, are already raising dilemmas for equal pay law. On its own, decertification would not resolve these issues. Yet combined with the alternative approaches already under discussion, decertification could allow new perspectives and practical solutions to emerge that could lead the way to more inclusive and effective equal pay laws.

Acknowledgements Many thanks to the speakers at the 2019 roundtable at the University of Kent on 'Decertifying Equal Pay'—Diamond Ashiagbor, Lizzie Barmes, Lydia Hayes and Claire Mummé—and the FLaG interview participants for their insightful discussion of the issues. Thank you also to the FLaG project team, the anonymous reviewers for *Feminist Legal Studies,* and Diamond Ashiagbor, Lizzie Barmes, Nicole Busby, Ruth Dukes, Emily Rose, and Robin Moira White for immensely helpful feedback. The obvious omission in this article is pensions. This area of law is too large and complex to include within the current analysis but would raise distinct and pressing issues for decertification. Many thanks to Diamond Ashiagbor for prompting me on this. The research for this article was funded by the Economic and Social Research Council ES/P008968/1.

References

Acker, Joan. 1991. *Doing Comparable Worth: Gender, Class, and Pay Equity*. Philadelphia: Temple University Press.

Adams, Lorna, Aoife Ni Luanaigh, Dominic Thomson, and Helen Rossiter. 2018. Measuring and Reporting on Disability and Ethnicity Pay Gaps. *Equality and Human Rights Commission*, 30 August. https://www.equalityhumanrights.com/en/publication-download/measuring-and-reporting-disability-and-ethnicity-pay-gaps. Accessed 18 October 2022.

Allen, Robin. 2020. *Making Comparisons in Equality Law: Within Gender, Age and Conflicts.* Cambridge: Cambridge University Press.

Amadxarif, Zahid, Marilena Angeli, Andrew Haldane, and Gabija Zemaityte. 2020. Staff Working Paper No.977: Understanding Pay Gaps. July, *Bank of England.* http://www.bankofengland.co.uk/working-paper/2020/understanding-pay-gaps. Accessed 18 October 2022.

Ashiagbor, Diamond. 2013. The Intersection Between Gender and "Race" in the Labour Market: Lessons for Anti-Discrimination Law. In *Feminist Perspectives on Employment Law*, 139–160. New York: Routledge-Cavendish.

Ashiagbor, Diamond. 2021. Race and Colonialism in the Construction of Labour Markets and Precarity. *Industrial Law Journal* 50(4): 506–531.

Atkins, Susan. 1986. The Sex Discrimination Act 1975: The End of a Decade. *Feminist Review* 24(1): 57–70.

Breach, Anthony, and Yaojun Li. 2017. Gender Pay Gap by Ethnicity in Britain - Briefing. 6 March, *Fawcett Society*. https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=f31d6adc-9e0e-4bfe-a3df-3e85605ee4a9. Accessed 18 October 2022.

Brink, Marjolein van den, and Peter Dunne. 2018. Trans and intersex equality rights in Europe: a comparative analysis. 15 November, *European Commission.* https://op.europa.eu/en/publication-detail/-/publication/f63460ca-ebac-11e8-b690-01aa75ed71a1/language-en. Accessed 18 October 2022.

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

Carby, Hazel. 1997. White Women Listen! Black Feminism and the Boundaries of Sisterhood. In *Materialist Feminism: A Reader in Class, Difference, and Women's Lives*, ed. Rosemary Hennessey and Chrys Ingraham, 110–128. New York: Routledge.

Clarke, Jessica A. 2018. They, Them, and Theirs. *Harvard Law Review* 132: 894–991.

Conaghan, Joanne. 2005. Work, Family, and the Discipline of Labour Law. In *Labour Law*, *Work and Family,* ed. Joanne Conaghan and Kerry Rittich, 19–42. Oxford: Oxford University Press.

Cooper, Davina. 2020. Taking Public Responsibility for Gender: When Personal Identity and Institutional Feminist Politics Meet. *Feminists@ Law*. https://doi.org/10.22024/UniKent/03/fal.968

Cooper and Renz 2023. Crafting Prefigurative Law in Turbulent Times: Decertification, DIY Law Reform, and the Dilemmas of Feminist Prototyping. *Feminist Legal Studies*. https://doi.org/10.1007/s10691-022-09515-4

Cooper, Davina, and Robyn Emerton. 2020. Pulling the Thread of Decertification: What Challenges Are Raised by the Proposal to Reform Legal Gender Status? *Feminists@ Law*. https://doi.org/10.22024/UniKent/03/fal.938

Cooper, Davina, Robyn Emerton, Hannah Newman, Elizabeth Peel, Flora Renz, and Jessica Smith. 2022. Abolishing Legal Sex Status: The Challenges and Consequences of Gender-related Law Reform. https://futureoflegalgender.kcl.ac.uk/final-report/. Accessed 18 October 2022.

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

Cruz, David B. 2004. Disestablishing Sex and Gender. *California Law Review* 90(4): 997–1086.

Deakin, Simon, Sarah Fraser Butlin, Colm McLaughlin, and Aleksandra Polanska. 2015. Are Litigation and Collective Bargaining Complements or Substitutes for Achieving Gender Equality? A Study of the British Equal Pay Act. *Cambridge Journal of Economics* 39 (2): 381–403.

Department for Business, Energy and Industrial Strategy. 2018. Ethnicity Pay Reporting: Government Consultation. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/747546/ethnicity-pay-reporting-consultation.pdf. Accessed 18 October 2022.

Downie, Margaret. 2019. Preferential Pay Protection: Does UK Law Provide Poorer Protection to Those Discriminated against on Grounds of Protected Characteristics Other than Gender? *International Journal of Discrimination and the Law* 19(1): 4–25.

Emerton, Robyn. 2023. "We're not there yet" but "it's not-pie-in-the-sky": Legal consciousness around decertification in the equality governance sector. *Feminist Legal Studies*. https://doi.org/10.1007/s10691-022-09509-2

Equality and Human Rights Commission. 2016. Equal Pay: Statutory Code of Practice. https://www.equalityhumanrights.com/en/publication-download/equal-pay-statutory-code-practice. Accessed 18 October 2022.

Fawcett Society and Young Women's Trust. 2018. Invisible Women: APPG on Sex Equality June 2018. https://www.fawcettsociety.org.uk/invisible-women. Accessed 18 October 2022.

Fredman, Sandra. 2004. Marginalising Equal Pay Laws. *Industrial Law Journal* 33(3): 281–285.

Fredman, Sandra. 2008. Reforming Equal Pay Laws. *Industrial Law Journal* 37(3): 193–218.

Fredman, Sandra. 2012. Breaking the Mold: Equality as a Proactive Duty. *American Journal of Comparative Law* 60(1): 265–288.

Fredman, Sandra. 2013. *The Right to Equal Pay for Work of Equal Value. Background Paper for the Working Group on Discrimination against Women in Law and Practice (The Working Group)*. New York: The United Nations.

Fudge, Judy. 2014. Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction. *Feminist Legal Studies* 22(1): 1–23.

Fudge, Judy, and Patricia McDermott. 1991. *Just Wages: A Feminist Assessment of Pay Equity*. Toronto: University of Toronto Press.

Guillaume, Cécile. 2015. Understanding the Variations of Unions' Litigation Strategies to Promote Equal Pay: Reflection on the British Case. *Cambridge Journal of Economics* 39(2): 363–379.

Hartmann, Heidi. 1976. Capitalism, Patriarchy, and Job Segregation by Sex. *Signs Journal of Women in Culture and Society* 1(3): 137–169.

Hayes, Lydia. 2014. "Women's Voice" and Equal Pay: Judicial Regard for the Gendering of Collective Bargaining. In *Voices at Work: Continuity and Change in the Common Law World*, ed. Alan Bogg and Tonia Novitz, 35–54. Oxford University Press.

Henehan, Kathleen, and Helena Rose. 2018. Opportunities Knocked? Exploring Pay Penalties among the UK's Ethnic Minorities. July, *Resolution Foundation*. https://www.resolutionfoundation.org/app/uploads/2018/07/Opportunities-Knocked.pdf Accessed 18 October 2022.
Hepple, Bob, Mary Coussey, and Tufyal Choudhury. 2000. *Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Law*. Oxford: Hart Publishing.
Holzer, Lena. 2020. Smashing the Binary? A New Era of Legal Gender Registration in the Yogyakarta Principles Plus 10. *International Journal of Gender, Sexuality and Law* 1(1): 98–133.
Hoskyns, Catherine. 1985. Women's Equality and the European Community. *Feminist Review* 20(1): 71–88.
Katyal, Sonia K. 2017. The Numerus Clausus of Sex. *University of Chicago Law Review* 84: 389–494.
Lawson, Anna. 2011. Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated. *Industrial Law Journal* 40(4): 359–383.
Lewis, Debra. 1988. *Just Give Us the Money: A Discussion of Wage Discrimination and Pay Equity*. Vancouver: Women's Research Centre.
Lewis, Gail. 2000. Black Women's Employment and the British Economy. In *Feminism and Race*, ed. Kum-Kum Bhavnani, 297–318. Oxford: Oxford University Press.
Longhi, Simonetta, and Malcolm Brynin. 2017. The Ethnicity Pay Gap. August, *Equality and Human Rights Commission.* https://www.equalityhumanrights.com/sites/default/files/research-report-108-the-ethnicity-pay-gap.pdf. Accessed 18 October 2022.
Malleson, Kate. 2018. Equality Law and the Protected Characteristics. *The Modern Law Review* 81(4): 598–621.
McColgan, Aileen. 1993. Legislating Equal Pay? Lessons From Canada. *Industrial Law Journal* 22(4): 269–286.
McColgan, Aileen. 1997. *Just Wages for Women*. *Just Wages for Women*. Oxford: Oxford University Press.
O'Cinneide, Colm. 2005. Positive Duties and Gender Equality. *International Journal of Discrimination and the Law* 8(1–2): 91–120.
O'Reilly, J., M. Smith, S. Deakin, and B. Burchell. 2015. Equal Pay as a Moving Target: International Perspectives on Forty-Years of Addressing the Gender Pay Gap. *Cambridge Journal of Economics* 39(2): 299–317.
Peel, Elizabeth, and Hannah J.H. Newman. 2023. "I Don't Think That's Something I've Ever Thought About Really Before": A Thematic Discursive Analysis of Lay People's Talk About Gender. *Feminist Legal Studies*. https://doi.org/10.1007/s10691-022-09508-3
Penman, Adam. 2020. Gender Pay Gap Reporting and Trans People. 27 July, *HR Magazine*. https://www.hrmagazine.co.uk/articles/gender-pay-gap-reporting-and-trans-people/. Accessed 18 October 2022.
Renz, Flora. 2023. Gender-Based Violence Without a Legal Gender: Imagining Single-Sex Services in Conditions of Decertification. *Feminist Legal Studies*. https://doi.org/10.1007/s10691-022-09511-8
Rubery, Jill, and Damian Grimshaw. 2015. The 40-Year Pursuit of Equal Pay: A Case of Constantly Moving Goalposts. *Cambridge Journal of Economics* 39(2): 319–343.
Rubery, Jill, and Aristea Koukiadaki. 2016. Closing the Gender Pay Gap: A Review of the Issues, Policy Mechanisms and International Evidence. 1 December, *International Labour Organisation.* http://www.ilo.org/gender/Informationresources/Publications/WCMS_540889/lang--en/index.htm. Accessed 18 October 2022.
Rubin, Gayle. 2011. *Deviations - A Gayle Rubin Reader*. Durham, North Carolina: Duke University Press.
Venditti, Valeria. 2020. Gender Kaleidoscope: Diffracting Legal Approaches to Reform Gender Binary. *International Journal of Gender, Sexuality and Law* 1(1): 56–75.
White, Robin, and Nicola Newbegin. 2021. *A Practical Guide to Transgender Law*. Somerset: Law Brief Publishing.