



Abolishing legal sex status: The challenge and consequences of gender-related law reform

Future of Legal Gender Project
Final Report

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2.



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2. Emily Grabham is a Professor of Law at the University of Kent, specialising in feminist legal studies. She is the author of *Brewing Legal Times: Things, Form, and the Enactment of Law* (2016).

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3. Elizabeth Peel is a Professor of Communication and Social Interaction in the School of Social Sciences and Humanities at Loughborough University, and a Fellow of the British Psychological Society. They have published widely in critical health and social psychology and her latest book – with Gemma Witcomb – is *Gender Diversity and Sport: Interdisciplinary Perspectives on Increasing Inclusivity* (2022).

4.



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5



6.



7.



Research Associates

5. Robyn Emerton was a Research Associate on the Future of Legal Gender project, based at King's College London. Her research focuses on women's and transgender people's equality and human rights. Her PhD (2018) examined the legal situation of transgender prisoners and the emerging tension between rights and risk in their governance. Robyn has published in various human rights law journals and, more recently, in *feminists@law* and *The Conversation*.

6. Han Newman was a Research Associate on the Future of Legal Gender project, based at Loughborough University. Now a researcher at the University of Hertfordshire, their research centres around the psychology and sociology of gender, particularly in relation to sport and exercise. Han's PhD (2020) explored the negotiation of gender aesthetics in the UK strongwoman community.

7. Jessica Smith was a Research Associate at King's College London. Her work explores law in everyday life with a focus on law and bureaucracy, law and space, and law as process. Jess has a forthcoming book *Entangled Lines: Law, Civil Registration, and the Everyday of Civic Space* (Routledge), and has published in the *Journal of Law and Society*, *The Sociological Review*, and *The Conversation*.

1. Overview

1. The Future of Legal Gender was a collaborative research project, funded by the Economic and Social Research Council, UK, that ran from May 2018 until April 2022. It explored, from a social justice perspective, the legal, social, and policy implications of reforming the current system in England & Wales which requires everyone to have a legal sex.

2. Having a legal sex begins with birth registration as female or male and continues over a lifetime unless a person formally transitions. Obtaining a Gender Recognition Certificate under the Gender Recognition Act 2004 changes a person's gender and their legal sex. Otherwise, the presumption, in law, is that a person's gender is the sex they are registered with at birth.

3. Legal sex and gender contribute to who we are as legal subjects. They affect how we are treated, and the opportunities that we have, as this report explores. More generally, legal sex status contributes to the social development of women and men as two separate groups of people. It suggests that both sex and gender matter – not simply for remedying inequality but as core settled aspects of who we are.

4. To explore whether the current system of assigning people a legal sex and gender status should be dismantled, and the challenges and potential difficulties this proposal raises, we undertook extensive research, involving several different methods (described in more detail in the [appendix](#)). This included a survey eliciting over 3,000 responses; 200 interviews with government officials, trade unions, regulatory bodies, community organisations, service providers, academics, lawyers, and general publics; and iterative focus group discussions and workshops with lawyers, academics, legal drafting experts, NGOs, and public officials to explore the principles of decertification emerging from our research.

5. Our research identified benefits to decertification. These included: dismantling a legal system which formally places people, from birth, in unequal social categories of female and male; supporting greater self-expression – free from gender constraints; and removing the legal burdens currently placed on people who want state recognition of a change in their sex and gender status.


6. Concerns about decertification also emerged from our research. These concerns mainly related to gender and sex-specific services, data collection, violence, and positive action. Some research participants worried that measures to abolish sex as a legal status would make it harder to retain provision and spaces based on distinctions between women and men (or females and males) and that this would disadvantage women.

7. Our research identified some ways of tackling these concerns. These strategies build on current practices of ‘soft decertification’ as public bodies and other organisations and agencies respond to users, staff, and clients who self-identify outside of a binary framework of gender anchored in the sex registered at birth. However, the hollowing out of legal sex has also faced opposition from groups who assert the importance of attending to women as a class defined by their sex. During this research, public bodies described how they navigated tensions between these competing demands, amid divergent interpretations of the relevant law.

8. Advancing gender equality as a broad, intersectional agenda does not just depend on state action. It also does not depend on equality law alone; other laws also shape gender relations and whether people can live in gender nonconforming ways. However, equality law has become a site of intense debate. Our research explored how different categories in equality law operate and questioned whether people need to be legally assigned to a category, such as gender or sex, to access legal remedies. Other equality grounds, such as race and sexual orientation, operate without requiring these ‘protected characteristics’ to be part of a person’s legal identity.

9. Several interviewees suggested that the present political climate was not a suitable or safe one in which to question the architecture of equality law or to radically alter gender and sex categories. Decertification may therefore be better approached through the prism of ‘slow law’. This involves transitional legal reforms (e.g. making gender transitioning easier, and legally recognising other gender identities) while also attending to far-reaching structural concerns of poverty, violence, exclusion, and exploitation. Decertification does not rely on these concerns being resolved. However, what decertification means and how it will work will be shaped by the social policy landscape within which its implementation is situated.

10. In [section 9](#), we set out some possible principles for a law decertifying sex and gender.



Imagine a society where sex is not recorded on birth certificates, children are not socialised into gender, and people can live and express themselves without gender-based expectations and constraints.

2. Introduction

The Future of Legal Gender was a four-year project funded by the Economic and Social Research Council to explore the current British system which registers and assigns sex at birth and then *treats that sex and corresponding gender as a legal status*.¹ We don't often think of sex and gender in this way. To put it in context, nationality and marriage are legal statuses that state law registers and regulates, ethnicity and sexuality are not. Being defined as a legal status does not mean that the law always treats people differently as a result. However, specific legal statuses, such as sex, nationality, or marital status, become relevant in different contexts, giving rise to forms of treatment that are often politically contested.

What would be the implications, in England & Wales,² if the current 'certification' system which accords people a legal sex and gender was dismantled so that sex and gender were no longer legally controlled statuses? Would changing how the law assigns and regulates membership in sex and gender categories help or hinder policies to undo gender-based and other forms of inequality?

It is important to stress that decertification, as addressed here, does not mean unravelling the legal protections currently in place to advance equality. However, decertification would bring the legal structure for addressing gender and sex-based discrimination and inequality closer to that in operation for other grounds of inequality which do not rely on legally assigned or registered statuses. For instance, discrimination on grounds of race and sexual orientation are unlawful, but people are not legally registered or assigned a sexual orientation or race.

¹ Whether people are assigned a legal gender (as well as a legal sex) is disputed. However, many laws, policies, and registration forms refer to gender rather than sex. In such cases, it is typically assumed that a person's gender will match their legal sex. For judicial discussion of the interchangeability of sex and gender, see *Fair Play for Women Ltd v. The Registrar General for Scotland and The Scottish Ministers* [2022] CSIH 7, paras 20-22. Obtaining a Gender Recognition Certificate under the provisions of the Gender Recognition Act 2004 provides legal recognition of an 'acquired gender', which also entitles the successful applicant to obtain a new birth certificate identifying their new legal sex.

² To provide focus for the legal discussion, the project took England & Wales as its jurisdictional focus. However, survey and interview respondents also came from Scotland and other jurisdictions.

Our decision to research decertification was a response to several developments that were moving law away from its prior reliance on a fixed, binary model of women and men as two distinct groups. These developments included:

- Laws becoming increasingly gender neutral in content and form.
- The introduction of a formal procedure to legally transition under the Gender Recognition Act 2004.
- Recognition of more than two genders by many service providers, employers, unions, and community organisations in Britain (see [section 7](#)). In some countries, 'nonbinary' (or similar) is also recognised in law as a gender status.³

Decertification can seem the logical conclusion to these developments as the rationale for people to have a legal sex and gender gets thrown in doubt. Yet, most legal initiatives, globally, have taken a different approach, incorporating transgender, nonbinary, and other people into the existing legal structure of classification. But are there good reasons for retaining the existing classification structure? What would be the implications of dismantling it? These questions sat at the heart of our research.

Between 2018 and 2021, we conducted research, in conditions of considerable conflict over how sex and gender should be understood and treated. In Britain, disagreement revolved around two perspectives.⁴ One foregrounded women's sex-based rights, the need to dismantle male domination, and the importance of abolishing gender-based roles and stereotypes.⁵ The other focused on equality and cultural recognition for diverse sex and gender-based identities and expressions, with gender understood as something that was flexible, plural, and not defined by a person's body.⁶ Divisions between these two positions have been emphasised in the media and in public debate. However, many people continue to combine versions of both sets of arguments, including in ways that vary depending on the context.

3 See, for instance, Clarke, J.A. (2018) 'They, them, and theirs', *Harvard Law Review*, 132: 894–991; Holzer, L. (2018) 'Non-binary gender registration models in Europe: Report on third gender marker or no gender marker options', ILGA-Europe; <https://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/non-binary-gender-registration-models-europe>; Holzer, L. (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) <https://www.northumbriajournals.co.uk/index.php/IJGL/article/view/1001>.

4 Cooper, D. (2019) 'A very binary drama: The conceptual struggle for gender's future', *feminists@law*, 9(1): 1–36.

5 For two feminist accounts oriented to women as a sex-based class, see Stock, K. (2021) *Material Girls: Why Reality Matters for Feminism* (Little, Brown); and Jeffreys, S. (2014) *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (Routledge).

6 See for instance, Hines, S. (2020) 'Sex wars and (trans) gender panics: Identity and body politics in contemporary UK feminism', *Sociological Review*, 68(4): 699–717; see also the Yogyakarta Principles, a set of recommended international human rights principles relating to gender identity and sexual orientation; <https://yogyakartaprinciples.org/introduction/>.

Gender

We approach gender as a complex social phenomenon that produces structural advantage and disadvantage in relation to power, resources, visibility, inclusion, and authority along a range of registers (including women/ men, trans/cis, gender/ agender). While gender is often used today to refer to ‘identities’, we approach gender as something that is ‘institutionalised’, including in rules, values, patterns of wealth and power, and in interpersonal interactions.⁷ The institutional character of gender can be seen in gender’s impact on care responsibilities and work; expectations about life choices; in the association of authority with masculinity and empathy with femininity; in the norms structuring relations between women and men; in the gendering of clothes, toys, novels, and dance; and in ideologies that depict gender differences as natural or as chosen.

Sex

Today, in Britain, there is no simple way of understanding sex. Courts, policymakers, activists, and wider publics use the term in different ways, and it is the source of considerable disagreement.⁸ Sex is used to refer to bodily processes and parts, to a formal legal status, to living as a woman or as a man, among other definitions.⁹ During the period of our research, the concept of sex was used either *to think away from or towards* the notion of stable dimorphic bodily forms (female and male) where chromosomes, hormones, reproductive organs, genitalia and outward appearance are assumed to align – at least in most cases. We approach understandings of sex, what counts as relating to sex, and the implications of sex as shaped, and given meaning, by the gendered environment in which they arise. For further discussion, see [section 6](#).

⁷ For further discussion, see Martin, P. Y. (2004) ‘Gender as social institution’, *Social Forces*, 82(4): 1249–1273; see also Cooper, D. (2020) ‘Taking public responsibility for gender: When personal identity and institutional feminist politics meet’, *feminists@law*, 10(2): 1–32.

⁸ On different approaches to defining sex in a legal context, see for instance Schiappa, E. (2022) ‘Defining sex’, *Law and Contemporary Problems*, 85(1): 9–24; Stock, K. (2022) ‘The importance of referring to human sex in language’, *Law and Contemporary Problems*, 85(1): 25–45.

⁹ See, for instance, the court’s consideration of the meaning of ‘sex’ in *Fair Play for Women Ltd v. The Registrar General for Scotland and The Scottish Ministers* [2022] CSIH 7, especially para 20 (a Scottish case on official guidance for respondents in answering the ‘sex’ question in the 2022 Scottish census).

Despite differing views on decertification, research participants generally agreed that our lives should not be defined by the bodies we are born with.

3. Reforming gender

Discussion of policy and legal reform typically focuses on currently viable practical adjustments. Our research sought to explore a longer-term, more fundamental change: the abolition of legal sex and gender status or ‘decertification’. We explored the implications of its introduction in the present time, but our research was also deliberately speculative.

Decertification may be the direction of travel for sex and gender as legal categories, but it is a legal proposal that is unlikely to come to fruition in Britain in the next few years. The context in which any such reform happens is therefore likely to be different to today in ways that are largely unknowable. This makes a close technical discussion less valuable than a broader discussion of law reform principles. Our aim in developing a legislative proposal (see [section 9](#)) is to prompt discussion: would decertification be desirable and in what form would it be desirable? What are its challenges? What would need to be in place prior to its introduction?

Despite differing views on decertification, research participants generally agreed that our lives should not be defined by the bodies we are born with.¹⁰

The modern birth registration system in Britain emerged in the 19th century. Registering sex, by observing a baby’s genitals at birth, helped to uphold a system of inequality between women and men, including in relation to property, inheritance, illegitimacy, employment, and the franchise.¹¹ Over time, however, laws in Britain have become increasingly gender-neutral in the sense of moving away from a system that gives women and men different legal rights and obligations. As a result, while people continue to have a legal sex and gender, the *consequences* of being legally a woman or man have lessened significantly. This seems a progressive development at first glance.¹² Removing legally imposed prohibitions and disadvantages faced by women advances equality.

¹⁰ For examples from our research, see Peel, E. and Newman, H.J.H. (2020) ‘Gender’s wider stakes: Lay attitudes to legal gender reform’, *feminists@law*, 10(2): 1–65; Newman, H.J.H. and Peel, E. (2022) ‘An impossible dream? Non-binary people’s perceptions of legal gender status and reform in the UK’, *Psychology & Sexuality*, DOI: [10.1080/19419899.2022.2039753](#); Peel, E. & Newman, H.J.H. ‘I don’t think that’s something I’ve ever thought about really before’: Lay participants’ ‘before’, ‘with’, and ‘against’ legal gender discourse’, under review.

¹¹ For more general discussion on the history of civil registration, see Durbach, N. (2014) ‘Private lives, public records: Illegitimacy and the birth certificate in twentieth-century Britain’, *Twentieth Century British History*, 25(2): 305–326; Szreter, S. and Breckenridge, K. (eds) (2012) *Registration and Recognition: Documenting the Person in World History* (British Academy/Oxford University Press).

¹² A related issue is the use of third person gender-neutral language in legislative drafting, see Grabham, E. (2020). ‘Exploring the textual alchemy of legal gender: Experimental statutes and the message in the medium’, *feminists@law*, 10(2): 1–47.

However, the risk of gender-neutral law is that it can mask and fail to address the social inequalities and other harms that continue – including in relation to poverty, work, violence, exclusion, and social stereotyping.

Some laws today still rely on sex and gender differences – for instance, in the different provisions governing same-sex and different-sex marriage.¹³ More commonly, law's support for sex and gender-based differences is indirect and permissive. For instance, employers can ask women and men to dress differently at work.¹⁴ The legally permitted length of the school day assumes that someone, usually a woman, is available to collect young children and look after them.¹⁵ In limited contexts, the law also explicitly legalises positive measures to redress inequality. Political parties, for instance, can decide to create all-women shortlists when selecting a parliamentary candidate (under the Equality Act 2010, s. 104). The Equality Act 2010, s. 149 also places a legal duty on public bodies to advance equality of opportunity, good relations, and eliminate discrimination on grounds that currently include 'sex' and 'gender reassignment'.

How effective is the assignment and use of sex and gender as legal markers for advancing equality and justice, and should they be reformed?

Much of the current focus, internationally, is on the use of sex and gender categories on registration forms and identity documents. Our project wanted to look beyond gender registration to the potential impact of decertification on the wider legal landscape as well as on social life and policymaking.

We discuss our methodology in more detail in the [appendix](#). The aim of our project was to prompt discussion about changes beyond what seems doable in the short-term, to explore reforms to the law not currently on the table. This is a way of 'rehearsing' future law and its risks and rewards, as well as offering insight into the problems, challenges, and attachments that people have to the current system. To concretise some of the issues and choices, we developed a set of legislative principles that could underpin a decertification law ([section 9](#)). These principles present one version of decertification and are intended for wider discussion.

¹³ See Marriage (Same Sex Couples) Act 2013.

¹⁴ According to government guidance, the relevant legal test is whether there is an 'equivalent standard' between men and women. See [Government Equalities Office](#), (2018) 'Dress codes and sex discrimination – what you need to know'.

¹⁵ See for broader discussion on gender, childcare, and the labour market, [Office for National Statistics \(2019\)](#), 'Families and the labour market, UK: 2019' which reported 'over half of mothers (56.2%) said they had made a change to their employment for childcare reasons, compared with 22.4% of fathers' with 'reduced working hours' being a key change. For wider data on differences between women and men, see [World Economic Forum \(2021\)](#) 'Global Gender Gap Report 2021'.

How effective is the assignment and use of sex and gender as legal markers for advancing equality and justice, and should they be reformed?

4. The benefits of decertification

Decertification of gender and sex offers benefits to people who do not fit the current binary framework of women and men, and who are placed, or feel obliged, to squeeze into one category or another.¹⁶

It reduces the penalties and costs of living outside these categories, for example, as nonbinary, genderqueer or agender. It frees public bodies and other organisations from having to navigate the policy complexity, legal challenges, and administrative demands of fitting people into existing categories – for instance, determining whether someone is a woman or a man when the label, or how someone is allocated (e.g. for search purposes), is disputed by the person concerned. And it removes the need for formal gender transitioning procedures, which many people experience as intrusive, pathologising, and controlling.¹⁷

One nonbinary person we interviewed, said,
'If you ask me what we should do, it's do without any legal concept of gender. I don't see the point. Why should we have one? Why does the state need to know whether you are a masculine presenting or feminine presenting person?'

Gender, however, as our research explored, does not just involve already established identities or how a person expresses themselves or self-identifies. Our research approached gender as a complex social phenomenon that produces and organises the categories of women and men, and feminine and masculine, to shape the lives of people, laws, rules, systems of exchange, interactions, and other processes in ways that create difference and inequality. Understanding gender in this way explains other benefits to decertification.

Decertification abolishes a formal legal structure that places people from birth in unequal categories. Registering people with a legal sex, and the expectation that people will have a corresponding legal and social gender, does not just *communicate* what someone is – that they are this gender or sex. It also helps *form* their sex and gender status and how they may identify.¹⁸

¹⁶ In 2017, the UK government conducted the '[National LGBT Survey](#)'; over 108,000 people who identified as LGBT responded. 6.9% identified as nonbinary. The proportion of trans people identifying as nonbinary was considerably higher in those under 35 (57% compared to 36% for those over 35). The numbers of people identifying as nonbinary, genderqueer or agender are likely to have risen since this survey. See also Newman, H.J.H. and Peel, E. (2022). 'An impossible dream? Non-binary people's perceptions of legal gender status and reform in the UK', *Psychology & Sexuality*, DOI: [10.1080/19419899.2022.2039753](#).

¹⁷ See for example, evidence published in [Women and Equalities Committee \(2021\)](#), *Reform of the Gender Recognition Act* (HC 977, 2021–22).

¹⁸ The work that certification does beyond communicating information has been researched more extensively in quite different, other contexts, including in relation to produce and trade. See for example, Munasinghe, A., Cuckston, T. and Rowbottom, N. (2021) 'Sustainability certification as marketisation: Rainforest Alliance in the Sri Lankan tea production industry', *Accounting Forum*, 45(3): 247–272; see also Evans, A., & Miele, M. (2017). 'Food labelling as a response to political consumption: Effects and contradictions', in Keller, M., Halkier, B., Wilska, T.-A., & Truninger, M. (eds) *Routledge Handbook on Consumption* (Routledge).

More generally, certification as female or male contributes to wider social norms about what sex and gender mean and how they should be expressed. Treating women and men as legally distinct groups bolsters heteronormative laws, policies, and cultural assumptions (witnessed in the different treatment of non-genetic parents on birth certificates).¹⁹

Decertification alone won't eradicate gender and sex-based inequalities, but it can contribute to:

- reducing the costs and penalties faced by those whose gender or sex does not conform to current legal expectations;²⁰
- enabling organisations to respond more effectively to the complex and different ways that gender is lived and experienced;
- dismantling a legal structure that institutionalises gender-based categories.

Decertification undermines the assumption that gender divisions in roles, dress, behaviour, and treatment are natural, lawful, or desirable. It supports diverse forms of self-expression and interaction by loosening the hold of gendered norms and expectations.

It may also, potentially, help to counter the early gender socialisation of children by resisting the use of sex or gender categories to differentiate between them.²¹ Moving away from a system which treats sex as binary and fixed, and which treats gender as a necessary dimension of being human, can help shift public understanding of how gender operates. Importantly, it can help to reframe gender as a set of social and institutional processes (rather than personal qualities) that shape people's lives, and the world they live in, even as people also take up gender's meanings – in conforming and non-conforming ways – to make their own lives meaningful and liveable.

¹⁹ See Jackson, E. (2022) 'When is a mother not a mother?' in Gilmore, S. and Scherpe, J. (eds) *Family Matters: Essays in Honour of John Eekelaar* (Intersentia); also Cannoot, P. and Decoster, M. (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.

²⁰ See also Spade, D. (2015) *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (2nd edn, Duke University Press).

²¹ For research exploring related measures in the Swedish context, see Odrowąż-Coates, A. (2015) 'Is gender neutrality a post-human phenomenon? The concept of 'gender neutral' in Swedish education', *Journal of Gender & Power*, 3(1): 113-133.

5. Addressing concerns about decertification

Our research identified different concerns about decertification that are important to take seriously for decertification to work as a progressive programme for change. Many of the concerns expressed relate to women – their vulnerability to violence, precarious access to targeted benefits and activities, and the harms caused to equality remedies and data collection if divisions based on sex are no longer legally enforced.

As part of the process of evaluating decertification's benefits and risks, we sought to work through the concerns posed to see if decertification could be developed in a way that reduces inequalities rather than intensifying them.²² In adopting this approach, we integrated concerns about women's structural disadvantage into a framework that recognises the multiple and interlocking character of inequality, with gender-based inequalities also shaped by socio-economic class, racism, age, nationality, disability, and sexuality, among other factors. This also means addressing inequality's different dimensions, which include exclusion, exploitation, violence, subordination, and stereotyping,²³ rather than focusing on one 'face' of inequality to the exclusion of others.²⁴

In [section 6](#), we address in more detail some issues that decertification raises, where resolution depends on the version of decertification introduced. Here, we identify and respond to more general concerns about decertification's effects.

1. It would only mask inequalities, not reduce them.

Some participants suggested that decertification would send the misguided message that inequality can be eradicated by removing gender and sex-based labels from people.

One interviewee said: *'It's like taking the number plate off a car and saying you have changed the car. You haven't changed the car and the car is still a car. That's not going to deal with pollution, is it?'*

²² See also Cooper, D. and Emerton, R. (2020) 'Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?', *feminists@law*, 10(2): 1-36.

²³ See Young, I.M. (1990) *Justice and the Politics of Difference* (Princeton University Press).

²⁴ This is a source of tension between some feminist and trans activists, where one set of activists focus on the problems of subordination and exploitation faced by women because of their recognised and institutionalised class position, while other activists focus on the exclusion and stigmatisation transgender people face because their gender identity is not recognised; see also Cooper, D. (2019) 'A very binary drama: The conceptual struggle for gender's future', *feminists@law*, 9(1): 1-36.

Decertifying sex and gender is not expected, by itself, to dismantle sex and gender-based inequalities. The version of decertification that we explore recognises that gender and sex-based inequality and violence are likely to endure and need to remain matters that government and other bodies attend to.²⁵ However, a person's sex and gender is not fixed. We can understand this in two ways. First, at a personal and social level, what sex and gender mean, and the categories that people are placed in, can change.²⁶ Second, decertification does not just affect the process of communicating what someone's sex is. The uncoupling of sex and gender from legal status also contributes to the dismantling of a normative structure that shapes people's lives and identity. The ambition for decertification is that it may contribute to reducing gender-based socialisation and encourage greater variation in how people live, appear, and express themselves, in ways that are less conditioned by gender norms (as well as being less conditioned by the state).

2. Decertification would make it harder to regulate and organise single-sex spaces and activities, putting women at risk of violence and discomfort, and undermining the sense of community that women-only spaces can offer.²⁷

Some interviewees expressed the concern that decertification would undermine clear sex-based divisions between males and females. This would make it harder to separate women and girls from people identified as male²⁸ in contexts of undress and vulnerability, including in domestic violence shelters and services, changing rooms, hospital wards, and public toilets. Some also suggested that making a case for public funding for women-only provision would become harder if the category of women was based on self-identification.²⁹

Women-only spaces have long provided important sites of community, identity, and pleasure. Decertification doesn't stop such gender-specific provision and activities from taking place (see [section 9](#)). What it does is remove legal status as a basis for determining access.³⁰

²⁵ See also Grabham, E. 'Decertifying gender: The challenge of equal pay', *under review*.

²⁶ The idea that sex can change is subject to dispute. However, whether sex is fixed or not depends on how sex is defined. Biological sex often refers to hormones, reproductive capacity, and genitals. These can all change (and be changed). For further discussion, see also Fausto-Sterling, A. (2020) *Sexing the Body: Gender Politics and the Construction of Sexuality* (Revised edn, Basic Books).

²⁷ For further discussion, see Renz, F. 'How do feminist single-sex spaces function in conditions of decertification?' *under review*.

²⁸ Our research identified sharp differences of opinion about whether people were men as a matter of lived fact, because they had a particular sexed body, or whether the issue of concern was one of perception, where some people were perceived by others to be men based on how they looked, regardless of their body, legal status, or identity. Appearing to be a man in a changing room context might also be based on different factors (the undressed body, for instance) than appearing to be a man in a sports context or intake interview for a domestic violence shelter.

²⁹ Self-identification can be viewed as a pragmatic policy choice that offers the least problematic basis for determining gender in many circumstances. Its adoption should not be read as confirmation of the claim that gender is formed through self-identification.

³⁰ The gendered character of inequality, violence and other harms needs to be regularly reassessed, recognising this will change over time. Many arguments for women-only provision are anchored in the social harms that women experience. But being a woman, depending on how it is defined, does not always correspond with having a legal status as female. Our gendered society also harms people with gender identities that are not legally protected. This suggests that the current system of formal status is not an effective way of protecting people from gender-related harms.

The extent to which legal status has been used to manage access to women-only provision, in recent years, is unclear. Many women's organisations told us that they relied on self-identification.³¹ They did not expect legal documents to be presented and did not want to presume that a person's sex or gender could be known from their appearance.

One women's service told us, *'We should be able to offer our services to anyone that considers themselves to be a woman.'*

Another said, *'Everyone who accesses our service [or] who volunteers ... are women, but that definition of women includes trans women... and people who identify as needing women's services can also access our service. So, somebody who is nonbinary could access our services.'*

While some women-only services take a different approach, many providers described their use of risk assessments to identify and manage potential problems rather than expecting biological or legal status as female to do the safeguarding work. In other contexts, research participants described the move to individualised cubicle spaces and the emphasis on privacy (not always seen as a positive move) to manage the proximity of bodies with different genitalia,³² such as in leisure centre changing rooms.

We discuss the use of governance techniques of risk assessment and privacy in more detail elsewhere.³³

Here, we just make two further points. First, an intersectional understanding of safety, and a multifaceted account of inequality, means being alert to the different harms that can arise – including racism, misogyny, and harassment towards people with nonconforming gender presentations. Single-axis approaches to harm or risk can miss the interconnections and ways in which some apparent remedies can enact other kinds of harm. Second, the concerns expressed about changing how single-sex (or gender) spaces operate, such as changing rooms, public toilets, and hospital wards, can imply that it is strangers who pose the main risk to women. Yet, as feminists have long argued, male violence towards women often comes from people who know each other – such as partners or other family members.³⁴ Decertification's relationship to lessening the gender-based socialisation that seems to feed male violence is important here to consider.

³¹ Some women's domestic violence services differentiated between adopting a self-identification approach for one-on-one work and a case-by-case approach when it came to who counted as a woman for group work. For further discussion on the approaches taken by 'single-sex' services see [Women and Equalities Committee \(2019\)](#), *Enforcing the Equality Act: The Law and the Role of the Equality and Human Rights Commission* (HC 1470, 2017–19).

³² See also Dunne, P. (2018) '(Trans)forming single-gender services and communal accommodations', *Social & Legal Studies*, 26(5): 537–561.

³³ Cooper, D. and Emerton, R. (2020) 'Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?' *feminists@law*, 10(2): 1–36.

³⁴ The Office for National Statistics notes that 'In the year ending March 2020, female victims were more commonly killed by a partner or ex-partner or a family member, while for males the suspected killer was more commonly a friend or acquaintance, stranger or other known person'. See [Office for National Statistics \(2021\)](#), 'Homicide in England and Wales: year ending March 2020'.

3. Decertification would have a disproportionately negative impact on people already disadvantaged on other inequality grounds.

Our research identified three concerns here. First, frontline workers, users of public provision, and women in custody would be at the sharp end of reform and would experience the tensions and ensuing harms if divisions in provision based on (or backed up by) legal sex status were dismantled. Second, given the government's prolonged programme of cuts to public services, funding, and welfare, including more people in the category of women would put greater pressure on an already limited resource. Third, decertification would impact, with particular severity, on the use of public facilities, such as changing rooms and toilets, by orthodox women from minority religious communities.

It is important that decertification is not introduced in a way that exacerbates existing inequalities. While further research is needed, our study underscored the need for decertification's introduction to be tied to better funded public provision and facilities, rather than conditions of welfare austerity. Enabling people to have options when it comes to changing rooms, toilets, hostel accommodation, and hospital provision is likely to make the introduction of decertification easier. Making options available also recognises that some people may prefer to have allocation decisions, such as for accommodation, based on other criteria – religion, ethnicity, or sexuality, for instance, rather than gender (or sex).

At the same time, it is important that decertification does not become a justification for withdrawing resources from gender-specific provision, for instance if public bodies treat it as a reason to only fund shelters that also cater to men.

Equality law has become a key terrain in considering the effects of reforming legal sex and gender status. Decertification would place gender (or sex) as an equality ground on a par with others, such as race and sexual orientation, which do not rely on state-assigned status. Among research participants, views differed on whether equality grounds which have legally assigned membership proved more effective as a result. However, since the introduction of legally assigned and defined status is not being advocated for other equality categories, such as sexual orientation and race, it is important that equality grounds can work effectively without it.

Several research participants suggested that orthodox religious women might feel unable to use public facilities, such as leisure centre changing rooms, if people with differently sexed bodies shared the space. Others emphasised that religious people, including orthodox women, vary in their approach to public spaces not segmented by sex. Giving people options (e.g. toilets and changing rooms which use gender-specific and inclusive signage) along with greater use of fully private cubicles were preferred strategies among some interviewees. It is also important to tease out which access concerns relate to the process of legal change, and which might endure.

The dilemma of how generally applicable laws interface communities with different social norms is one which liberal democracies repeatedly confront.³⁵ The discretion that religious and other communities should have to define and determine gender and sex in ways that diverge from formal state norms is something we return to in [section 6](#).

4. Women and men need to be separated so women are not disadvantaged by having to compete with men in competitive sports and so positive action for women is possible. Decertification will make both of these much harder.

The impact of sex-related differences on sporting achievement is a contested and difficult topic.³⁶ Some argue strict policies are needed to protect women's sports; others argue that rules which target transgender and intersex women institute exclusionary, unfair, sometimes racist practices.³⁷ The current focus on testosterone levels to regulate participation in elite women's sports, and the anxiety that some trans women will have an in-built advantage, shows the limited and uneven reliance on *legal* sex that already exists.³⁸

In many sports, meaningful achievement is relative to age, height, weight, and musculature.³⁹ For elite competition, advantage is also enhanced by access to better equipment, trainers, time, and facilities. Decertification does not stop sex and gender-specific sports from continuing. However, its proposition encourages some more fundamental rethinking about what fairer, inclusive competition might entail. Current public discussion focuses on the challenge of incorporating people into an existing binary sex-based structure. But there is value in also considering other models, for instance a paralympic-type approach which assesses functional capacity, so people are placed in fairly matched classes or the development of new sports that entail a gender-mix of skills.⁴⁰

Concerns over opportunistic membership claims and ambiguity of definition and category boundaries is an issue that positive action also, in many contexts, has had to address.⁴¹ Self-identification, however, does not have to mean that people can claim the benefits arising from membership in a disadvantaged class simply by saying they are a member, for instance, in the case of admission onto an all-women shortlist for selecting parliamentary candidates.

³⁵ See for instance Cooper, D. (2019) *Feeling like a State: Desire, Denial, and the Recasting of Authority* (Duke University Press).

³⁶ For a discussion of its history, see Erikainen, S. (2019) *Gender Verification and the Making of the Female Body in Sport: A History of the Present* (Routledge).

³⁷ See discussion in Karkazis, K. and Jordan-Young, R.M. (2018) 'The powers of testosterone: Obscuring race and regional bias in the regulation of women athletes', *Feminist Formations*, 30(2): 1-39.

³⁸ See for instance, Jordan-Young, R. M., & Karkazis, K. (2019) *Testosterone* (Harvard University Press).

³⁹ Sports, such as boxing, wrestling, and Paralympic sports, use sex/ gender as a sorting device; but they also use other criteria to determine 'fair' or 'meaningful' competition. See Kerr, R. and Obel, C. (2018) 'Reassembling sex: Reconsidering sex segregation policies in sport', *International Journal of Sport Policy and Politics*, 10(2): 305-320. For a more general discussion of the difficulties in using categories in sports, alongside reasons for them, see Parry, J. & Martínková, I. (2021) 'The logic of categorisation in sport', *European Journal of Sport Science*, 21(11): 1485-1491.

⁴⁰ Martínková suggests one alternative option is for unisex sports to be designed around a wider range of skills so that male-identified bodies do not have an overall competitive advantage. Martínková, I. (2020) 'Unisex sports: Challenging the binary', *Journal of the Philosophy of Sport*, 47(2): 248-265.

⁴¹ For a useful discussion of the use of race-based affirmative action policies in Brazil, see Schwartzman, L. F. (2009) 'Seeing like citizens: Unofficial understandings of official racial categories in a Brazilian university', *Journal of Latin American Studies*, 41(2): 221-250; see also Bailey, S. R. (2008) 'Unmixing for race making in Brazil', *American Journal of Sociology*, 114(3): 577-614.

Questioning people's membership in a class can be experienced as intrusive or degrading, but supplementary criteria can be used to augment self-identification. This may be necessary in cases where demand for an opportunity exceeds its supply, or where there are concerns about opportunistic or mischievous claims. For example, in the case of a job, training opportunity, or representative role, all applicants could be asked to explain why they should receive the opportunity or why they are qualified to represent a particular group or set of concerns. Simply saying you are a woman or agender may not be enough to obtain targeted scarce opportunities as we illustrate in the hypothetical case of *AHome* below ([section 6](#)).

5. It would produce distortions, inaccuracies, and lack of continuity in data collection.

Some participants expressed concern that data, such as that collected for the census, would become 'meaningless' or unhelpful if questions about sex were subject to changing or subjective definitions of who counted as a woman or a man. For instance, if the category of 'sex' was expanded to include self-identified 'sex'.⁴²

It is important to have statistical data that shows the inequalities, harms, and needs of different groups of people, and it is especially important to have data that shows how experiences are shaped by a combination of social relations, including gender, race, and socio-economic class. As society changes, which categories to use and how to define them becomes a complex issue, particularly when there is a lack of consensus on what the categories mean. All data categories (including race, religion, disability, and socio-economic class) evolve over time, and this affects how respondents answer questions.

Some academics have suggested that surveys do not simply collect data about social categories, such as sex or gender. They also help to shape, reinforce, and give authority to ways of understanding the categories being used.⁴³ This makes the choice of categories by those designing a survey especially important.

For those completing a survey, categories such as 'sex' or 'gender' will be understood in diverse ways. For instance, some will answer a question about sex based on the social category they live in. Others will assume the question is about their genitals, about their legal status, or about the sex they were registered as having at birth.

⁴² Disagreement and litigation have arisen over how the category of 'sex' should be understood by respondents to the census and related data collection activities. Institutional moves in England & Wales towards a more flexible approach, affirming that people might categorise their sex according to their understanding of it as a lived (and potentially changing) category, have been pulled back to a narrower definition of sex based on legal status. See *R (Fair Play for Women) v. UK Statistics Authority* [2021] EWHC 940 (Admin). For a discussion of some of the issues relating to the capturing and definition of sex in data collection, see the debate section on 'Sex, gender and the census' in (2020) *International Journal of Social Research Methodology* 23(5): 517-540.

⁴³ For recent discussion, see Collier, B. and Cowan, S. (2021) 'Queer conflicts, concept capture and category co-option: The importance of context in the state collection and recording of sex/ gender data', *Social & Legal Studies*, <https://doi.org/10.1177/2F09646639211061409>. See also Browne, K. (2016) 'Queer quantification or queer(y)ing quantification: Creating lesbian, gay, bisexual or heterosexual citizens through governmental social research'. In Nash C.J. and Browne, K. (eds) *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science* (Routledge); Guyan, K. (2021) 'Constructing a queer population? Asking about sexual orientation in Scotland's 2022 census', *Journal of Gender Studies*, DOI: [10.1080/09589236.2020.1866513](https://doi.org/10.1080/09589236.2020.1866513).

Seeking to enforce a single definition, for instance about sex, is practically difficult and can lead to a loss of buy-in from respondents. Communicating statistical data also benefits from commentary that discusses the choices people make in how they answer questions, rather than assuming people understand and use data categories in a uniform way.⁴⁴

In some contexts, more precise questions may help to avoid distortions or inaccuracies, for example, 'do you menstruate?' or 'are you perceived or treated as a man at work?' rather than, or in addition to, 'are you male or female?'⁴⁵ Acts of sexism may also be far more dependent on how someone is perceived by others than how they self-identify. How to collect this data, and what to do with it (when it diverges from self-understandings) raises challenging questions.

6. Decertification would remove an important tool for those whose gender is challenged.

Having a legal sex and gender status can be symbolically meaningful and can provide a shield for people whose sex or gender is challenged. Some organisations said that obtaining a Gender Recognition Certificate gave people a sense of protection and confidence if their sex or gender was questioned in a public place.

Certification can prove an important shield.⁴⁶ However, in many cases where people's gender or sex is challenged, legal confirmation is not to hand (people do not usually carry birth certificates with them in public places and, in Britain, people do not have ID cards). Some people also felt it was wrong to normalise an expectation that such evidence should be provided. Legal certification is also only helpful for people who have legal recognition of the sex or gender in which they live. People who transition socially without obtaining a Gender Recognition Certificate (as many people do) or who identify as genderqueer, agender or nonbinary, for example, do not have a legal status they can use for protective purposes.

7. What about countries that have different systems?

One practical issue that decertification raises concerns the difficulty people may experience when they migrate or travel to countries with different sex and gender-recognition systems.

For people who move abroad, how a person's sex or gender is understood in another country depends on that country's rules. This includes their rules on how and whether they recognise the gender and sex system in the country of departure.⁴⁷

⁴⁴ See for discussion, Collier, B. and Cowan, S. (2021) 'Queer conflicts, concept capture and category co-option: The importance of context in the state collection and recording of sex/ gender data,' *Social & Legal Studies*, <https://doi.org/10.1177%2F09646639211061409>.

⁴⁵ A useful parallel concerns a change by the Department of Health and Social Care on donating blood, which moved from an approach focused on sexual orientation, to focusing on 'highest risk behaviours' which applies to all donors, regardless of sexuality... 14 December 2020, <https://www.nursingtimes.net/news/policies-and-guidance/rule-changes-means-more-gay-and-bisexual-men-can-give-blood-15-12-2020/>

⁴⁶ See King, D et al., (2020) *Gender Recognition Act: Analysis of consultation responses* (Government Equalities Office), p. 39, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919890/Analysis_of_responses_Gender_Recognition_Act.pdf

⁴⁷ See also Goessel, S.L. (2016) 'From question of fact to question of law to question of private international law: the question whether a person is male, female, or...' *Journal of Private International Law*, 12(2): 261-280; Van den Brink, M. Reufs, P. and Tigchelaar, J. (2015) 'Out of the box-domestic and private international law aspects of gender registration', *European Journal of Law Reform*, 17(2): 282-293.

There are broad parallels here with how marriage in one country is recognised and treated by another.⁴⁸ Gender transition is already creating complexity for people who transition according to their home country's laws and then later migrate.

International treaties on the recognition of sex and gender statuses might help to create consistency of practice in this rapidly evolving field. In terms of international travel, states can and do recognise the category 'X' – meaning neither female nor male – on passports from other jurisdictions.⁴⁹ However, many countries, including the UK, do not permit X markers on their own passports.⁵⁰

⁴⁸ See for instance, Cossman, B. (2008) 'Betwixt and between recognition: Migrating same-sex marriages and the turn toward the private', *Law and Contemporary Problems*, 71: 153–168; Luibhéid, E. (2008) 'Sexuality, migration, and the shifting line between legal and illegal status' *GLQ*, 14(2-3): 289–315; Hamilton, F., and Noto La Diega, G. (eds) (2021) *Same-Sex Relationships, Law and Social Change* (Routledge).

⁴⁹ International Civil Aviation Organization, (2015), *Machine Readable Travel Documents. Part 4 — Specifications for Machine Readable Passports (MRPs) and Other TD3 Size MRTDs*, Doc 9303, p.14; https://www.icao.int/publications/Documents/9303_p4_cons_en.pdf.

⁵⁰ This was challenged in *R (on the application of Elan-Cane) v. Secretary of State for the Home Department* [2021] UKSC 56. The Supreme Court held that there was no legal obligation, under the European Convention on Human Rights or the Human Rights Act 1998, for the British government to make a non-gendered marker (such as 'X') available for UK passports.

6. Legal policy choices

Decertification is not a fixed, one-size-fits-all measure. There are many policy choices and details that need to be worked out to address the concerns our research identified (discussed in [section 5](#)).

Our legislative principles below, in [section 9](#), indicate one form decertification could take. Here, we address two issues in more detail: how gender and sex should operate as legal terms, and the extent to which sectors and organisations should be able, in law, to develop their own approach to gender and sex categories. Later, we discuss how decertification could develop as part of a long-term agenda, including through ‘soft decertification’ policies and practices by public bodies, employers, and other service providers. Gender inequality is neither a product of law alone nor something law alone can and should fix.

Using gender and sex in law

One area where legal choices arise is in how to use the terms ‘sex’ and ‘gender’ in law.⁵¹ British law now uses both terms. Sometimes sex and gender are used interchangeably, sometimes to mean different things.⁵²

Equality law is one important area where both terms are used, for instance both ‘sex’ and ‘gender reassignment’ are ‘protected characteristics’ – that is grounds for bringing a claim of discrimination. The Equality Act 2010, s. 78, on ‘Gender Pay Gap Information’ also refers to ‘male and female employees’. For the purposes of discrimination grounds, one option would be to use gender rather than sex as an umbrella term, which could then encompass a set of more specific bases for identifying unlawful unequal treatment, such as bodily sex, gender non-conformity, norms, and expectations relating to women and men, and transitioning (see [section 9](#)).⁵³ This broader approach is in line with some international developments.⁵⁴ It is also in line with how equality law currently works. For instance, discrimination on grounds of ‘sex’ includes *perceived* sex.⁵⁵ In other words, a person who is discriminated against because they are *assumed* to be a woman can bring a case regardless of whether they are *legally* a woman.

⁵¹ See for broader discussion, Cowan, S. et al (2021) ‘Sex and gender equality law and policy: A Response to Murray, Hunter, Blackburn, and Mackenzie,’ *Scottish Affairs*, 30(1): 74–95; Sharpe, A. (2020) ‘Will gender self declaration undermine women’s rights and lead to an increase in harms?’ *The Modern Law Review*, 83(3): 539–557.

⁵² See for instance, the Human Fertilisation and Embryology Act 2008, which restricts embryology testing and states that the ‘sex’ of the embryo can be established if there is a risk that any resulting child will have or develop a serious physical or mental disability, serious illness, or serious medical condition which is ‘gender-related’ (schedule 2, para 3).

⁵³ This parallels the approach adopted by the Equality Act 2010, s. 9 to the ‘protected characteristic’ of ‘race’, which includes ‘colour’; ‘nationality’; and ‘ethnic or national origins’.

⁵⁴ See for instance Iceland’s Act on Equal Status and Equal Rights Irrespective of Gender, [No.150/2020](#).

⁵⁵ For explanation on this point, see Equality Act, [Explanatory Notes](#), para 63.

The social assumptions that get made about people's bodies, capabilities, and life choices, and their treatment as a result, make it unhelpful to separate sex from gender in equality law and to treat them as two separate grounds.

An employer's concern that any woman (of a given age) might get pregnant, for instance, regardless of whether they wish to, or are physically able to, is a form of discrimination that can also affect trans women. In a contemporary British context, addressing inequalities related to 'gender' (and other gender-related harms) should also include the experiences of people who live as genderqueer, agender and nonbinary.

Regulated freedom for organisations

A second area of policy choice in how decertification operates concerns the degree of autonomy granted to non-governmental bodies.⁵⁶ Should they be able to establish their own criteria and approach for determining sex and gender – whether this is based on self-identification, observing genitals at birth, or something else? Allowing organisations definition-setting autonomy could lead someone to be recognised as having one sex or gender for one purpose and a different one in another context. This could result, for instance, in someone being viewed as agender in their liberal religious community, a man by their sporting body, and a woman from the perspective of their employer.

This may seem confusing or counter-intuitive but a context-specific approach can arise for other equality grounds, such as disability and religion.⁵⁷ It also operates for gender and sex when people change the sex category listed on their passport but do not have the Gender Recognition Certificate required to change their birth certificate. In elite sports, testosterone levels are often used to determine whether someone can compete as a woman,⁵⁸ rather than birth certificates or a Gender Recognition Certificate alone.

If abolishing legal sex and gender further de-standardises who counts as a woman and a man, this may increase the likelihood of people having their sex and gender recognised in divergent ways.

One legal option would be to permit organisations to set their own criteria for how they understand the terms of 'sex' or 'gender' but make certain criteria or approaches unlawful⁵⁹ on the grounds they are degrading or intrusive, such as requiring people to reveal their genitals to 'prove' their sex. In general, however, our research indicated a lack of desire on the part of many interviewees for a scenario where different sectors and organisations apply their own criteria for determining sex and gender.

⁵⁶ This is explored further in Cooper, D. and Renz, F. (2016) 'If the state decertified gender, what might happen to its meaning and value?' *Journal of Law and Society*, 43(4): 483–505 and Cooper, D. and Emerton, R. (2020) 'Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?' *feminists@law*, 10(2): 1–36.

⁵⁷ For further discussion on religion and disability as equality grounds that offer thoughtways for developing gender as an equality category, see Renz, F. and Cooper, D. (2022) 'Reimagining gender through equality law: What legal thoughtways do religion and disability offer?' *Feminist Legal Studies*, <https://doi.org/10.1007/s10691-021-09481-3>.

⁵⁸ See for instance, 'IAAF introduces new eligibility regulations for female classification' (26 April 2018). Available at: <https://www.worldathletics.org/news/press-release/eligibility-regulations-for-female-classifica>; for reservations regarding the capacity to create fair competition between women and men through setting testosterone levels, see UK Sports' Bodies, *Guidance for Transgender Inclusion in Domestic Sport* (September 2021): <https://equalityinsport.org/docs/300921/Guidance%20for%20Transgender%20Inclusion%20in%20Domestic%20Sport%202021.pdf>. See also Witcomb, G. and Peel, E. (2022) *Gender Diversity and Sport: Interdisciplinary Perspectives* (Routledge).

⁵⁹ This approach has been adopted for other grounds of inequality. For instance, in *R (E) v. Governing Body of JFS* [2009] UKSC 15, the Supreme Court held that the school's admissions policy, which used matrilineal descent (or a recognised conversion) to determine whether someone was halakhically Jewish, was in breach of the Race Relations Act 1976.

An alternative is for state law to establish what ‘gender’ means post-decertification (as the key *legal* term in this area). This could introduce self-identification as the legal norm. In the [legislative principles](#), we suggest some limits to self-identification where other or supplementary ways of knowing someone’s gender seem helpful.

Self-identification is compatible with gender-specific provision as the following hypothetical example illustrates. While gender is determined, in this example, by the service users themselves, other supplementary criteria are also used to determine how temporary accommodation should be allocated.

A hypothetical case – a city support service for agender people

A housing group, *AHome*, wants to set up a support service for agender people who are homeless, which would include the provision of temporary housing for those who need it. There currently is no other service aimed specifically at agender people in the area, but there are similar services provided on a mixed-gender basis. *AHome* has carried out survey and interview style research with people who are homeless in the area. This research has identified that there is a significant number of agender people who do not feel comfortable using the existing services as they say they experience bias and discrimination from staff and other service users in mixed-gender settings.

AHome plans to ask potential beneficiaries whether they identify as agender before they can access their drop-in services, financial advice, and other services. As they have limited capacity to provide temporary housing, they plan to only make this available to people who say they have experienced discrimination and harassment due to being perceived as agender or gender non-conforming, rather than rely on self-identification as agender alone.

Other examples of how decertification might work in practice can be found in the resources section of our website: futureoflegalgender.kcl.ac.uk/resources/.

7. Do we need a change in law?

So far, we have explored the benefits and risks raised by decertification as a legislative reform that would dismantle the current system of binary sex status. However, despite the law not having changed to date, many public bodies, unions, NGOs, and other employers and service providers have policies and practices that recognise informal transitioning, self-identification, and gender identities other than as women and men. This may suggest legal reform is unnecessary, that 'soft decertification' can provide a route for reforming how gender is approached.

Here are some examples.

A leisure centre manager, who we interviewed, talked about the importance of not making assumptions about someone's sex or gender based on their appearance. Staff had been advised not to direct people to specific changing rooms based on what they assumed their sex or gender was. *'If someone comes in and says: where are the changing rooms? We say we have got a male changing room there, a female changing room there, and an accessible changing room there, and allow them to make that choice.'*

An interviewee from an umbrella NGO told us, *'When we talk to our organisations and they are collecting data on their workforces, we say ... you can't just assume something of someone. Please don't look at someone and assume that that's a male. Please don't do that.'*

Some local councils we spoke to said they were keen to include nonbinary people in their policies and practices. One officer said: *'Pregnant women, pregnant trans men, and pregnant nonbinary people have different experiences and different needs.'*⁶⁰

⁶⁰ See also Clarke, J.A. (2019) 'Pregnant people?' *Columbia Law Review*, 119: 173-199.

Several research participants cited new language-policy initiatives in which body parts were referred to without assuming a correspondence with a specific gender or sex, such as ‘people with uteruses’ or ‘pregnant people’, recognising that people who are legally men, for instance, can have uteruses, become pregnant, and give birth.⁶¹ This was a controversial subject for some interviewees, not least because the tendency to treat body parts as gender-neutral seemed mainly to apply to women’s bodies.

Understanding the gendered histories and legacies of inequality in relation to pregnancy, breastfeeding, menstruation, and menopause can seem weakened if the link with women’s bodies gets lost. At the same time, many people do not have the normative bodies associated with being a woman or a man, and this lack of correspondence grows more complex when other gender identities are also considered.

Rather than settle on a single set of terminology to use in all cases, language choices can be guided by the context and purpose. Technically precise language seems appropriate for legislative provisions where gendered assumptions about body parts can create difficulties, for instance laws that assume only men produce sperm or only women have ovaries.⁶² As one interviewee from an NGO remarked, *‘I think that having legal terminology which is ... comprehensive and coherent is important; otherwise you end up with laws which do not do any good. ...Saying ‘pregnant people’ in the law, I don’t see that as a huge problem.’*

Policy communications, however, by public bodies such as local councils may have other priorities, including to describe provision in ways that are generally understood as well as being inclusive. ‘Breast and chest feeding’, for instance, may be better than choosing one term over the other. There is no gender-neutral norm here.

Tensions between different political approaches, in relation to sex and gender, affected many of the organisations we spoke with. Some of these tensions surfaced as a conflict between different interests. One union interviewee described a ‘zipping’ procedure adopted at their annual conference to alternate women and men as speakers to ensure women were not crowded out. Someone then raised the dilemma of nonbinary people and whether they should go in the men’s or women’s pile. Our interviewee described how the decision was first to put them in with the women, *‘Then someone said: ‘hang on a minute, the whole point of this rule is to increase the representation of women.’ ...If you said I am nonbinary, you are saying I am not female, and so then you are in the other [pile].’*

Focusing on sex and gender-based groups as having their own interests and needs was something we encountered often, but it isn’t unproblematic. It can assume groups have distinct interests which place them in conflict with other groups, where more for one group means less for another, and it can side-line questions about how groups and interests themselves form.

⁶¹ See *R (McConnell and YY) v. Registrar General* [2020] EWCA Civ 559; see also Karaian, L. (2013) ‘Pregnant men: Repronormativity, critical trans theory and the re(conceive)ing of sex and pregnancy in law’, *Social & Legal Studies*, 22(2); 211–230.

⁶² See for instance, the Human Fertilisation and Embryology Act 2008 which sets out conditions for determining legal parenthood rules under the headings ‘Use of sperm, or transfer of embryo, after death of man providing sperm’ (s.39) or ‘Woman not to be other parent merely because of egg donation (s.47)’. This raises legal difficulties if a trans man freezes eggs, or a trans woman does the same with sperm.

Inequality is not just about how resources are allocated between already established groups but about how social locations in terms of socio-economic class, race, nationality, and gender (among others) are created and recreated, and how people inhabit them.

The status of law

When interviewees discussed how their organisations approached gender and sex, law came repeatedly to the fore.⁶³ Some interviewees described their take-up of a more inclusive language of gender in their policies, and how they had then faced pressure from social movement campaigners to use a narrower legal language of sex. Interviewees described how they managed the tensions. One council official told us, *'We do use – would prefer to use gender because it's a broader term. You've also got to consider the issues of nonbinary and things like this. But, under pressure, and in recognition that the legal term is, actually, sex... our response is, we will use 'sex' when it is specifically about the protected characteristics [in the Equality Act]. But at all other times, we would prefer to use 'gender' when we are talking more generally.'*

Interviewees talked about the importance of correctly applying the law, including in contexts of disagreement about what 'correct application' entailed. The attention given to the law by policymakers, and the legal challenges proposed or brought to counter policy initiatives that adopted a more expansive language of gender, suggests that legislative reform may be needed to support changes in how policymakers, service providers, and employers treat gender and sex.⁶⁴ However, this does not mean that the political climate in Britain is ready for a law to bring in decertification just yet.

⁶³ For further discussion, see Emerton, R. "We're not there yet' but 'it's not pie in the sky': Legal consciousness, decertification, and the equality sector', *under review*.

⁶⁴ See for example, *R (Fair Play for Women) v. UK Statistics Authority* [2021] EWHC 940 (Admin). See also '[Challenge to Guidance on Transgender Issues in Cornish Schools](#)', *Religion, Law and the Constitution: Balancing Beliefs in Britain* on judicial review action intended against the Department of Education for not intervening to challenge Cornwall's guidelines on transgender issues in schools.

Slow law does not mean moving at a slow pace or avoiding contentious law reform. Rather, it recognises that legal reform can be part of a wider programme of change.

8. Slow law: A way forward

Soft decertification is happening already in many spheres. However, the use of litigation to hold back or resist this general direction of travel suggests legal reform may be needed for decertification to succeed as a comprehensive change.

Legal reform doesn't have to mean a single piece of legislation. Decertification could be introduced over time through a series of separate laws that gradually, together, make the compulsory registration of sex, and the assumption that people have a legal sex and gender, redundant. This could include measures to reform equality law by introducing a new, more expansive category of gender, by addressing how gendered terms are used in reproductive or parenting contexts, and by simplifying the procedure for legal recognition of gender transitioning. Several interviewees, who were broadly supportive of decertification, argued that recognising multiple gender identity categories in law could also be an important interim step. Tackling some of the most contentious issues in advance would allow decertification to function as a streamlining law rather than a major new legislative framework.

Slow law identifies reforms that may be desirable in the long-term but are controversial or appear premature because other actions need to take place in advance of them.

One NGO senior policy worker said: *'I think if things were to change so much that... women and men as terms became redundant... then you might want to look at getting rid of legal status. I guess I think it is sort of utopian, but it doesn't really fit the here and now.'*

Others took a different approach, identifying decertification, positively, with a less regimented approach to gender that would enable people to live outside of existing gender boxes (and ideally outside of gender boxes altogether). They enjoyed the opportunity to imagine a different legal landscape, and to explore the challenge of reaching it.

A senior policy figure interviewed, from an NGO, compared decertification with putting someone on the moon: *'In order to put a person on the moon, you have got to think up the idea of putting a person on the moon. You need to be creative and think big. I think it [decertification] is thinking big.'*

A genderfluid member of the public, reflecting on decertification, remarked, *'I would love that. I would absolutely love that.'*

In our research, views clearly diverged about the right time for decertification and how, practically, to accomplish it – so people’s lives would be less shaped and defined by gender and its categories. Our research also revealed some of the issues that need to be addressed prior to or alongside decertification for it to operate as a progressive reform. Gender-based violence and inequality, welfare austerity, migration controls, legacy legal issues, the marginalisation of new gender identities, anxiety over naked bodies in changing rooms, hospital wards and other shared spaces, and the need for international recognition of new approaches to gender and sex (to minimise conflicts between different regimes) were just some of the issues raised. Decertification is not dependent on these being solved. However, the context of its introduction matters. Decertification can take shape as a neoliberal measure within a programme of governmental withdrawal from taking responsibility for countering social inequality. Alternatively, it can be part of a broader social justice programme to support diverse ways of flourishing, where bodies are not legally allocated at birth to the unequal social categories of female and male.

Slow law does not mean moving at a slow pace or avoiding contentious law reform. Rather, it recognises that legal reform can be part of a wider programme of change.

‘Slow law’ pays attention to process – to the participatory, creative, ambitious aspects of developing a proposal for legal change. This means facing, simultaneously, in two directions: forward from the conditions in which we find ourselves to build something better; and backwards from hoped-for future changes to identify what may be needed to prepare the way. Decertification may seem a very modest reform or it may seem a significant reorganisation of gender in society. But what decertification does, as a slow law proposal, is to invite us to think about wider change.

Developing a law reform proposal, like decertification, does not only aim to resolve a problem. It also aims to prompt reflections on those aspects of our society, such as gender, and how they have been organised, which have long been taken for granted.



9. Legislative principles for the decertification of sex and gender

The principles that follow provide an example of what decertification could entail if it was introduced as a legal reform. The questions listed identify areas for further discussion and consideration.

Aims of decertification:

1. To abolish a legal system of certification that treats sex and gender as legally assigned or registered qualities of individuals;
2. To contribute to the dismantling of hierarchical structures based on gender and sex, that also encode and institutionalise difference;
3. To support the lives of people whose gender leads them to experience exclusion or other forms of disadvantage;
4. To contribute to the undoing of social injustices and inequalities more broadly.

Principles of decertification law:

1. Legal registration of sex and gender is abolished.

Sex and gender status would no longer be *legally established or assigned* (for instance by registering sex on birth certificates). Laws such as the Gender Recognition Act 2004, that provide a mechanism for changing legal sex and gender status, would become redundant. Sex observed at birth could continue to be recorded, in aggregate, for planning and statistical purposes, but would no longer form part of an individual's legal status.

Existing legal registration of sex and gender (through birth certification or Gender Recognition Certificate) would no longer carry legal effect.

2. Introduction of a new ground of gender

in equality law. Gender remains a legally important term for tackling social subordination, discrimination, violence, and other injustices, including through equality law. Legal use of the concept of gender can also encompass inequalities that relate to forms of embodiment associated with sex. The current grounds of 'sex' and 'gender reassignment' in the Equality Act 2010 would be merged to form the ground of 'gender' as a 'protected characteristic' for discrimination, harassment etc. and the public sector equality duty. Recognising gender as a 'ground' of inequality and discrimination, i.e. the basis on which inequality and discrimination take place, does not require individuals to be legally assigned to specific gender categories. Employers, service providers, and others also cannot require people to dress or behave differently on grounds of gender.

Question

Should gender itself be legally defined? The Equality Act 2010 currently adopts different approaches to different grounds of inequality. In some cases, it works by identifying member classes that together comprise the overall category (e.g. for sex and sexual orientation); in some it describes component elements of the category (e.g. race). As gender's meaning is in flux, one option is to leave its definition to evolving case-law (as with the 'protected characteristic' of religion and philosophical belief). However, since the scope of gender as a legal ground is currently in dispute, an alternative option is to provide a non-exhaustive legislative list of component elements. This could include bodily sex, gender non-conformity, norms and expectations relating to women and men, and social transitioning.

3. Gender-neutral legal drafting. Current 'gender specific' terminology includes mother, female, father, male, woman, man, opposite sex, same sex. Building on existing practice, where it is necessary to use pronouns in legislation, gender-neutral pronouns (e.g. they, them, their) should be used *except* where this leads, or contributes, to structural inequality, other injustices, or to lack of legislative clarity. In contexts where it is legally important to name physical processes with gendered meanings, this can be done without using an explicitly gendered language (e.g. gestational or birth parent rather than mother or woman. This recognises that people other than women also become pregnant).

4. Legal right to organise gender-specific provision for specific purposes. Gender-specific⁶⁵ provision, activities, and membership criteria would remain legally valid where this is done to address social subordination,⁶⁶ unfairness, violence, or harassment (for instance, women's domestic violence shelters, women's sports, community provision for nonbinary and agender young people etc).

Question

Should gender-specific provision also be permissible in other circumstances, for instance:

- To establish or maintain personal dignity in conditions where mixed gender provision is perceived (by the individual concerned or according to prevailing social norms) as demeaning, embarrassing or uncomfortable (e.g. in certain hospital wards)?
- By small, informal organisations or those not in receipt of public or commercial funds, even where these are not intended to address social subordination, unfairness, violence, or harassment (e.g. a men's tennis club)?

5. Self-identification. Decertification introduces a presumption of self-identification in determining 'gender' category membership in line with certain other legal categories, such as sexual orientation and race.

⁶⁵ The term 'gender-specific' refers to the use of single or multi-gender categories for provision, activities, and data collection by organisations and individuals, which do not extend to include all gender-based categories.

⁶⁶ 'Subordination' refers to rules, decisions, policies, and practices that sustain, contribute, or lead to socially patterned asymmetries of power in relation to resources, treatment, and regard. The term subordination is closely linked to inequality. What it emphasises is the processual character of inequality.

However, it recognises that: a) unlawful discrimination may relate to physical embodiment and/ or others' perceptions in ways that diverge from self-identification; b) taking up gender-specific opportunities or benefits through affirmative action may also require demonstrated evidence of disadvantage based on gender or a capacity and readiness to represent subordinate and marginalised gender experiences; c) gender-specific provision may draw on alternative or supplementary criteria to self-identification in relation to selecting staff, users, and volunteers (e.g. relevant work experience, suitability). However, evidentiary requirements that undermine a person's wellbeing and dignity are not acceptable.

Question

If alternative or supplementary criteria to self-identification, by an organisation or individual service provider, are legally permitted, should they be subject to regulatory oversight (e.g. by an equality commissioner, specialist tribunal, or court)?

6. Data collection can continue to use gender-based categories where appropriate, for instance a government survey on homelessness or pay. Questions about gender will normally rely on self-identification. On occasion, other kinds of data may be more useful, e.g. based on service provider or employer perceptions of the gender composition of their users and workplace. Data-gathering in relation to embodied sex should take account of variations in sex development (also referred to as intersex) and the diversity of human bodies.

For medical purposes, good practice means asking questions at a higher level of specificity. 'Are you menstruating?' rather than: 'what is your sex?' since the sex category elicited by this question may not provide useful information on the body that someone has.

- 7. Harmonisation.** Existing laws should be revised to align with the principles for the decertification of sex and gender. Marriage, for instance, should take a single unified form, merging the currently separate legal provisions for 'same-sex' and 'opposite-sex' marriage.
- 8. Levelling up.** Welfare-related laws that require revision because of decertification should be revised in ways that enhance rather than reduce public provision (e.g. the definition of overcrowding should be extended to two persons of 'any gender' who are over ten and share a room, see Housing Act 1985, s. 325).
- 9. Recognising plurality.** Where law uses the terminology of 'same sex' and 'opposite sex' (e.g. definition of 'sexual orientation', Equality Act 2010, s. 12), or assumes that there are two gender statuses, this should be amended to recognise plurality.

10. Project publications

(up to April 2022)

Final report

Cooper, D., Emerton, R., Grabham, E., Newman, H.J.H. Peel, E., Renz, F., & Smith, J. (2022). *Abolishing legal sex status: The challenge and consequences of gender related law reform*. Future of Legal Gender Project. Final Report. King's College London.

Articles

Cooper, D. (2019a) 'Beyond the current gender wars', *IPPR Progressive Review*, 25(4): 393-403 <https://doi.org/10.1111/newe.12127>

Cooper, D. (2019b) 'A very binary drama: The conceptual struggle for gender's future', *feminists@law*, 9(1) <https://doi.org/10.22024/UniKent/03/fal.655>

Cooper, D. (2020a) 'Towards an adventurous institutional politics: The prefigurative 'as if' and the reposing of what's real', *Sociological Review*, 68(5): 893-916 <https://journals.sagepub.com/doi/full/10.1177/0038026120915148>

Cooper, D. (2020b) 'Taking public responsibility for gender: When personal identity and institutional feminist politics meet', *feminists@law*, 10(2) <https://doi.org/10.22024/UniKent/03/fal.968>

Cooper, D. (under review) 'Do-It-Yourself law-making in turbulent times: Decertification as a feminist law reform project'

Cooper, D. & Emerton, R. (2020) 'Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?' *feminists@law*, 10(2) <https://doi.org/10.22024/UniKent/03/fal.938>

Cooper, D., Grabham, E. & Renz, F. (2020) 'Introduction to the Special Issue: Exploring the feminist politics of decertification', *feminists@law*, 10(2) <https://doi.org/10.22024/UniKent/03/fal.937>

Emerton, R. (under review) 'We're not there yet' but 'it's not pie in the sky': Legal consciousness, decertification, and the equality sector'

Grabham, E. (2020) 'Exploring the textual alchemy of legal gender: Experimental statutes and the message in the medium', *feminists@law*, 10(2) <https://doi.org/10.22024/UniKent/03/fal.950>

Grabham, E. (under review) 'Decertifying gender: The challenge of equal pay'

Newman, H.J.H. & Peel, E. (2022) 'An impossible dream?': Non-binary people's perceptions of legal gender status and reform', *Psychology & Sexuality* <https://doi.org/10.1080/19419899.2022.2039753>

Peel, E. (2021) 'Talk about legal gender: Thoughts on what legal consciousness studies and discursive psychology together can reveal', *Psychology of Women and Equalities Section Review*, 4(2): 2-5.

Peel, E. & Newman, H.J.H. (2020) 'Gender's wider stakes: Lay attitudes to legal gender reform', *feminists@law*, 10(2) <https://doi.org/10.22024/UniKent/03/fal.953>

Peel, E. & Newman, H.J.H. (under review) "I don't think that's something I've ever thought about really before': Lay participants' 'before', 'with', and 'against' legal gender discourse.'

Renz, F. (2020) 'The challenge of same sex provision: How many girls does a girls' school need?' *feminists@law*, 10(2) <https://doi.org/10.22024/UniKent/03/fal.941>

Renz, F. (under review) 'How do feminist single-sex spaces function in conditions of decertification?'

Renz, F. & Cooper, D. (2022) 'Reimagining gender through equality law: What legal thoughtways do religion and disability offer?' *Feminist Legal Studies* <https://doi.org/10.1007/s10691-021-09481-3>

Smith, J., Cannoot, P., Cloutier de Repentigny, P., Holzer L., Leung, S., Ni Mhuirthile, T., Vipond, E., & Varman, N. (forthcoming) 'Roundtable on deregistration and gender law reform internationally'.

Blog posts

Cooper, D. (2020a). Responding to gender critical feminism: On gender, sex and a generous feminist politics in anxious times. *Critical Legal Thinking* <https://criticallegalthinking.com/2020/04/16/responding-to-gender-critical-feminism-on-gender-sex-and-a-generous-feminist-politics-in-anxious-times/>

Cooper, D. (2020b). Debating gender and sex: Meaning, reality and the creation of other futures. *SLSA Blog* <http://sfsablog.co.uk/blog/blog-posts/debating-gender-and-sex-meaning-reality-and-the-creation-of-other-futures/>

Peel, E. (2021). 'Before', 'with' and 'against' gender socio-legal discourse. *SLSA Blog* <http://sfsablog.co.uk/blog/blog-posts/before-with-and-against-gender-socio-legal-discourse/>

Renz, F. (2019). Fluctuating intensities: Thinking about gender through other socio-legal categories. *SLSA Blog* <http://sfsablog.co.uk/blog/blog-posts/fluctuating-intensities-thinking-about-gender-through-other-socio-legal-categories/>

Appendix: Research methodology

Prefigurative law reform

Law reform projects typically start with a social, political, and/or legal problem before working towards its resolution. *The Future of Legal Gender* took a different approach. Adopting a prefigurative approach to law reform, our project started with a legal 'solution' – decertification – to follow the hopes, promises, challenges, and risks associated with it.

Prefiguration is a new way of doing sociolegal research and was a methodology the project sought to develop.⁶⁷ More commonly applied to grassroots practices, prefiguration involves rehearsing or anticipating a sought-after future by enacting it in the present, usually on a small scale. In research or design contexts, prefiguration can involve a prototyping process of imagining, designing, and enacting possible futures. Our aim was to explore the social, legal, and policy implications of legislating decertification, attitudes towards it as an imagined future law, and the extent to which it was already being informally prefigured by a range of public actors developing innovative policies and practices.⁶⁸ Adopting this approach allowed us both to develop and consider a possible future law reform initiative, and to reflect on the present through the critical distance that an imagined future law reform provided.

Decertification provided a prompt to critically explore legal options which might advance equality and help to dismantle the current gender order. It was not something we sought to advocate or promote but something that we considered deserving of fuller attention – both for its own potential benefits and for the light it could shed on how gender and sex categories operate in law, and what different groups of people think about the existence and use of these sex and gender categories.

The Future of Legal Gender was a collaborative and interdisciplinary research project which brought together researchers from socio-legal and feminist legal studies, political theory, and social psychology. The research process unfolded in the following cycles. Phase One looked at current international developments and activist arguments for possible pathways for legal gender reform in England and Wales. Phase Two explored the implications of abolishing the legal gendering of personhood through four interconnected dimensions: legal gender in everyday life; single-sex and gender-specific provision; social justice and equality; and legislative drafting and equal pay. Phase Three provided a concluding assessment of potential principles underlying law reform whilst engaging a range of actors, organisations, and wider publics on the law and policy issues raised.

⁶⁷ Cooper, D. (2020) 'Towards an adventurous institutional politics: The prefigurative 'as if' and the reposing of what's real', *Sociological Review*, 68(5): 893-916.

⁶⁸ For further discussion on this methodology, see Cooper, D. 'Do-it-yourself law-making in turbulent times: Decertification as a feminist law reform project', *under review*.

We adopted a mixed methods approach to collecting data in each of these phases – as set out in further detail below.

Legal gender in everyday life: A social psychology approach

Our feminist psychologists explored legal gender in everyday life through a survey and in-depth interviews with members of the public.⁶⁹ In 2018, we launched an online survey, 'Attitudes to Gender', which was publicised and circulated via stakeholders, project networks, and other contacts. The survey was open to anyone 18 or over regardless of their locations.⁷⁰ Our aim was to generate wide-ranging understandings of public attitudes to gender and to legal gender reform. The survey was structured in three sections: demographic information about participants; views on gender in everyday life; and attitudes towards legal gender and options for reform. We received 3,101 usable survey responses, 2,555 of which were from the UK.⁷¹

The survey encouraged participants to reflect on legal gender by rating and commenting on opinion statements. For instance, we asked participants to reflect on statements such as 'Identification as male/female should be removed from birth certificates'.

Participants were able to explain their attitudinal choice (i.e. from strongly disagree to strongly agree) and provide further detail by writing in open text spaces that accompanied each opinion statement. We analysed the quantitative survey data using descriptive statistics, and coded the free text comments into categories, guided by our focus on understanding perceptions of legal gender and reform.⁷²

Our psychologists followed-up the survey with interview data. We conducted 44 semi-structured, one-to-one interviews with members of different publics to further explore their understandings, interpretations, and experiences of gender, and their views on reforming how sex and gender are used as legal categories. We initially recruited interview participants via expressions of interest on completion of the survey before extending invitations using a range of methods. We circulated interview recruitment material via social media platforms such as Twitter, and sent emails to charities, organisations, and community groups with an interest in gender, faith, law, or equality.

⁶⁹ Our aim was to include perspectives of people with diverse backgrounds in both the survey and interview components. As the recruitment process continued, these efforts were targeted towards groups underrepresented in our survey and interview samples (e.g. men). Information on the demographic characteristics of both samples are available in Peel, E. and Newman, H.J.H. (2020) 'Gender's wider stakes: Lay attitudes to legal gender reform', *feminists@law*, 10(2): 1-65; Newman, H.J.H. and Peel, E. (2022) "An impossible dream? Non-binary people's perceptions of legal gender status and reform in the UK", *Psychology & Sexuality*, DOI: [10.1080/19419899.2022.2039753](https://doi.org/10.1080/19419899.2022.2039753).

⁷⁰ The survey ran from October to December 2018 in partial overlap with the UK Government's public consultation on reforming the Gender Recognition Act 2004 (GRA) in England and Wales. Visual charts outlining the demographic characteristics of those participating in the survey are available at the project's website: <https://futureoflegalgender.kcl.ac.uk/project/>.

⁷¹ The heightened public consciousness around legal gender, in part due to the UK Government's public consultation on reforming the GRA 2004, meant we received more responses than originally anticipated. The public interest in legal gender was also beneficial in generating detailed engagement with the free text questions.

⁷² For analyses of the survey and interview data, see Peel, E. and Newman, H.J.H. (2020) 'Gender's wider stakes: Lay attitudes to legal gender reform', *feminists@law*, 10(2): 1-65; Newman, H.J.H. and Peel, E. (2022). "An impossible dream? Non-binary people's perceptions of legal gender status and reform in the UK", *Psychology & Sexuality*, DOI: [10.1080/19419899.2022.2039753](https://doi.org/10.1080/19419899.2022.2039753); Peel, E. and Newman, H.J.H. "I don't think that's something I've ever thought about really before": Lay participants' 'before', 'with', and 'against' legal gender discourse', *under review*.

We also distributed publicity material to children's clubs and organisations, to encourage participation by parents of dependent children. The interviews were transcribed verbatim and analysed using a reflexive thematic analysis approach – a method for identifying, analysing, and reporting patterns (themes) across a dataset.⁷³ Our thematic analysis led to a focused exploration of legal gender in everyday life, appetite for reform, and the abolition of legal gender.

Law, social justice, and equality

We conducted 156 interviews with public bodies, service providers, NGOs, regulatory bodies, religious communities, trade unions, legislative drafters, and others working in related fields to explore single-sex and gender-specific provision; the implications of decertification for social justice and equality; and the challenges raised for legislative drafting. Interview participants came from sports, local government, equality organisations, schools, domestic violence shelters, and women, trans, and intersex campaigning organisations, among many others. Our rolling research programme focused on sectors and organisations dealing with legal gender in everyday life. For example, we identified a range of organisations, including regulatory and governmental bodies, who were responding to new gender identities and gender transitioning, facing political pressure to retain the legal language of sex, and/or advancing policies to address structural gender inequality.

This purposive approach to interview recruitment was designed to enrich our analysis of decertification as a prefigurative law reform proposal.

Interview participants were invited because of their relevant professional capacity. Although we did not seek a demographically representative sample, our decisions about which organisations to interview were informed by the importance of attending to diverse experiences, and the impact of social relations of gender, socioeconomic class, race, disability, religion, sexuality, age, and nationality on people's lives. Our sampling approach also varied by sector. For domestic violence services, all publicly listed single-sex services in England and Wales were approached to gauge interest in interview participation. Elsewhere, we contacted organisations identified by ourselves or others as innovators, as actively engaging with the changing politics of gender, or as operating in fields, for instance, refugee support services, where decertification might raise distinctive or complex issues.

The interviews were in-depth and semi-structured, with questions designed to elicit views and feelings towards decertification as an imagined future law as well as participants' experiences of 'soft decertification' in their policy and practice. Interviews for all parts of the project were conducted face-to-face, in person, via video conferencing software, or by telephone, where this was the interviewee's preference.⁷⁴ Interviews were transcribed verbatim either in full or in part, depending on the content of each individual interview.

⁷³ See for instance, Braun, V. and Clarke, V. (2022) *Thematic Analysis: A Practical Guide* (Sage).

⁷⁴ Our interviews were largely completed by March 2020. Subsequent interviews were conducted via online methods, due to the COVID-19 restrictions. Focus groups, interviews, and research events, after March 2020, were also only conducted online due to COVID-19.

We used a range of interdisciplinary methods to analyse the interview data, including legal policy, critical design, thematic, and conceptual analysis.

Prototyping the law

As a prefigurative law reform project, we used an iterative process of legal prototyping to illustrate and explore what decertification could look like as an imagined future law, drawing on design studies.⁷⁵ Our legal prototype went through several stages of development between 2019 and 2022, drawing on interview and survey findings as well as focus groups, seminars, and workshops discussions on the evolving text, which we held with academics, NGOs, regulatory bodies, lawyers, and legislative drafters. The aim of these events was to work through the policy choices and legal techniques involved in drafting an experimental decertification law. We encouraged participants to critically engage with both the content and form of the legal prototype, with presentations followed by open discussion.⁷⁶

Events held to discuss our legal prototype prompted discussion on a wide range of social, legal, political, and cultural issues, including issues that extended beyond the text of the legal prototype. Participants reflected on the use of 'gender' and 'sex' as equality categories, self-identification, single-sex spaces, structural inequality, and gender-based violence.

These discussions also helped guide how we designed the legal prototype, as participants discussed whether the text should aim to be comprehensive or selective, technically detailed or principle-based, and whether it should adopt a conventional or more experimental form. The text which was arrived at by the end of the project is included as [section 9](#).

Our 'legislative principles for decertification' is intended as a legal framework to encourage discussion of decertification – what it should be like and whether it would be a good idea. The principles identified are not a definitive statement. Decertification may start with the removal of sex from birth certificates, but it is a more comprehensive legal reform project involving many areas of law where sex and gender make a legal difference. In developing these principles, we surveyed a wide range of legal and policy areas including parenthood, schooling, equality law, marriage, and sports. We also considered the use of sex and gender as legal categories in judicial decision-making, including in contexts where formally neutral legislation is applied in ways that treat sex and gender as relevant descriptive 'facts';⁷⁷ or where formally neutral legislation is applied in ways which reproduce gender-based structural inequalities, for instance in areas of property law.

⁷⁵ For further details, see Cooper, D. 'Do-it-yourself law-making in turbulent times: Decertification as a feminist law reform project', *under review*. Design studies is not widely used in legal scholarship. For innovative legal scholarship that incorporates design studies, see Perry-Kessaris, A. (2021) *Doing Sociolegal Research in Design Mode* (Routledge); Perry-Kessaris, A. (2019) 'Legal design for practice, activism, policy, and research', *Journal of Law and Society*, 46(2): 185-210.

⁷⁶ Towards the end of the research process, our aim was to fine-tune the prototype for wider public discussion, and so we guided the discussion with pre-selected questions.

⁷⁷ See for instance, Sharpe, A. (2018). *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal and Ethical Debate* (Routledge).

Our selection of relevant legal areas was structured by sites of concern identified by critics of decertification, by areas that remained less addressed in policy or public discussion, and by areas where decertification would prove complex or challenging in policy terms. The principles provided in [section 9](#) aim to provide a broad sketch of some of these areas. We decided that working with general principles, rather than lengthy technical discussion, would be most helpful for wider public conversations, for considering decertification in other jurisdictions, and for its possible future development in Britain.



