



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

**Future of Legal Gender Project**  
Overview

# About the researchers

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## Principal Investigator

**1. Davina Cooper** is a Research Professor in Law and Political Theory at King's College London. Her empirical and theoretical work explores questions of radical governance, gender and sexuality, and new conceptual methodologies. She is the author of six books, including *Feeling Like a State: Desire, Denial, and the Recasting of Authority* (2019) and *Everyday Utopias: The Conceptual Life of Promising Spaces* (2014). She has been a magistrate, London councillor, and chair of Haringey Council Women's Committee.

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## Co-Investigators

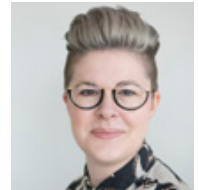
**2. Emily Grabham** is a Professor of Law at the University of Kent, specialising in feminist legal studies. She is the author of *Brewing Legal Times: Things, Form, and the Enactment of Law* (2016).

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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).

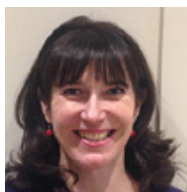
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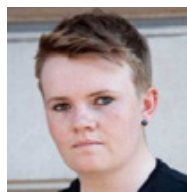
**4. Flora Renz** is a Senior Lecturer in Law at Kent Law School, University of Kent where she is the Co-Director of the Centre for Sexuality, Race and Gender Justice. Her work focuses on equality law and the legal regulation of gender and sexuality. Her forthcoming book is *Gender Recognition and Law: Troubling Transgender Peoples' Engagement with Legal Regulation* (Routledge). She has also published in the *International Review of Victimology*, *feminists@law*, and *Feminist Legal Studies*.



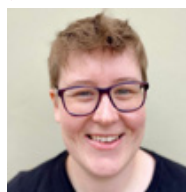
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## Research Associates

**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 of the full report). 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 2](#) of this overview document (section 9 of the full report) we set out some possible principles for a law decertifying sex and gender.







## 2. 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.

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

### 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.

#### 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-specific<sup>1</sup> provision, activities, and membership criteria would remain legally valid where this is done to address social subordination,<sup>2</sup> 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.

<sup>1</sup> 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.

<sup>2</sup> '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.

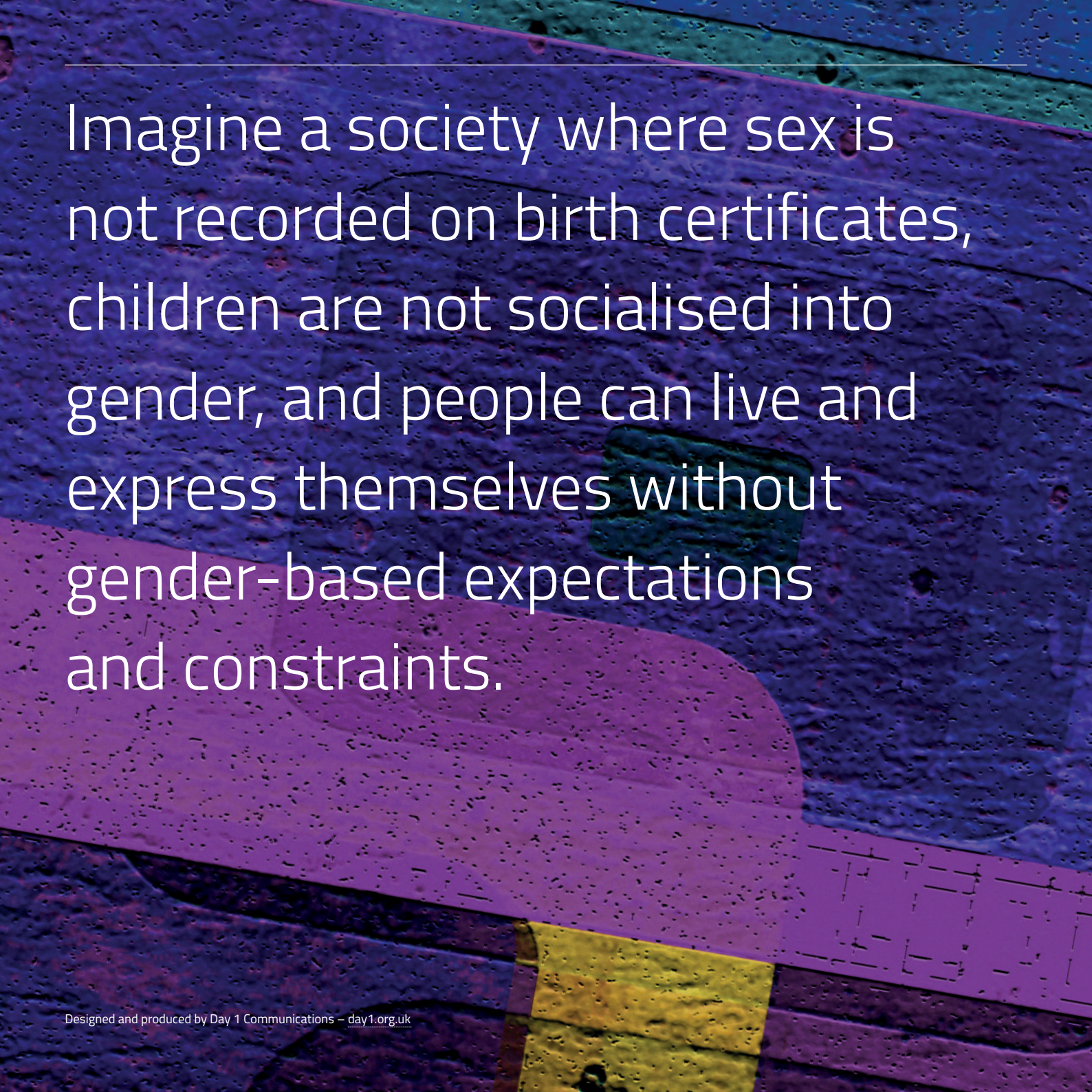
### Question

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.



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.