


RESEARCH ARTICLE

# Legal sex status: the attitudes of non-binary people towards reform in England and Wales

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## Abstract

The merits and means of accommodating non-binary populations into UK law is becoming an increasingly important issue for policymakers, judges, scholars and legal professionals. Following Elan-Cane's Supreme Court challenge to binary passport sex markers in 2021, the UK Government face another challenge this year concerning non-binary recognition on birth certificates. While an additional third sex option is perhaps the most well-known reform option for the current binary system, other options have been suggested, including additional multiple sex options and/or removing sex from the birth certificate. While scholars and policymakers debate the merits of these, little is known about non-binary people's own preferences towards these options. This paper therefore presents original empirical data on non-binary attitudes towards these options, demonstrating the various perceived opportunities and drawbacks of each, and reflecting on the possible consequences of reform.

**Keywords:** human rights; legal gender recognition; Gender Recognition Act; public law; family law; United Kingdom

## Introduction

The Gender Recognition Act 2004 (GRA 2004) makes provision for a change in legal sex status to accord with someone's gender identity subject to certain criteria. While the Act was generally considered world-leading at the time of its introduction, the binary structure of gender underpinning the Act has attracted sustained criticism.<sup>1</sup> In 2018, the UK Government announced a public consultation into reform of the GRA 2004 which included an 'open question' on non-binary transgender (trans) recognition, but made it clear that they were not proposing to introduce such reform.<sup>2</sup> The Government described this question as supplementary to a future planned call for evidence on non-binary people and that their intention at this stage was to 'merely [seek] initial views on [the] complex issue'<sup>3</sup> of non-binary recognition. Non-binary legal recognition was therefore rejected early on in this consultation process, citing concerns of legal uncertainty while failing to use the consultation as a means to further investigate such uncertainties. This is regrettable, given the growing social and legal visibility of non-

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<sup>1</sup>See generally A Sharpe 'A critique of the Gender Recognition Act 2004' (2007) 4 *Bioethical Inquiry* 33; S Cowan "'Gender is no substitute for sex": a comparative human rights analysis of the legal regulation of sexual identity' (2005) 13 *Feminist Legal Studies* 67.

<sup>2</sup>Government Equalities Office *Reform of the Gender Recognition Act – Government Consultation* (2018) para 136.

<sup>3</sup>*Ibid.*

binary identities,<sup>4</sup> the awareness that non-binary people experience multiple difficulties and barriers in their private and public lives,<sup>5</sup> evolving human rights standards on non-binary inclusion,<sup>6</sup> and comparative law developments. Governments across Europe and further afield are increasingly undertaking work to explore non-binary legal recognition.<sup>7</sup> While it is an uncommon feature of most jurisdictions, some states already provide for non-binary recognition in certain contexts. This includes, for example, Nepal (2007), Pakistan (2009), Bangladesh (2011), Australia (2013), India (2014), Malta (2018), Iceland (2019), Germany (2019), Canada (2020), and New Zealand (2021).<sup>8</sup>

The increasing visibility of non-binary identities has been reflected in the growing number of UK cases on the subject in recent years. The UK Employment Tribunal and Upper Tribunal have held that non-binary people may be protected against discrimination under the protected characteristic of ‘gender reassignment’ under the Equality Act 2010,<sup>9</sup> and that a non-binary identity could form the basis of an asylum claim.<sup>10</sup> The UK Supreme Court has also heard, but rejected, arguments that a person’s non-gendered identity should be recognised on their passport in the form of an ‘X’ marker.<sup>11</sup> The Crown Prosecution Service has also stated that non-binary identities may be included under the definition of ‘transgender identity’ for the purposes of hate crime legislation.<sup>12</sup> Moreover, in 2023 the High Court is due to hear a claim from Ryan Castellucci, an American citizen with non-binary recognition on their official US documents but is seeking equal recognition in the UK. They argue that they face significant legal uncertainty owing to the failure of the UK Government to unequivocally provide for recognition as non-binary on the birth certificate.

While the Government have recently rejected reform, laws and systems which exclude non-binary people are increasingly being challenged in courts to varying degrees of success and these challenges are likely to continue. It is therefore imperative that a body of scholarship exists which addresses various options for reform from the perspective of non-binary populations. This study seeks to respond to this need by presenting data on the attitudes of non-binary people towards these reform options and discusses these findings in light of the wider legal, political and social context.

## 1. Existing literature

The binary structure of legal sex under the GRA 2004 has been criticised in the scholarship since its inception.<sup>13</sup> Sharpe described the Act as demonstrating a ‘reluctance to contemplate gender in non-

<sup>4</sup>For example, *Mx M (gender identity – HJ (Iran) – terminology) El Salvador* [2020] UKUT 313 (IAC); *Taylor v Jaguar Land Rover Ltd* [2020] UKET 1304471/2018; *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56.

<sup>5</sup>See generally Government Equalities Office *National LGBT Survey: Research Report* (GEO, 2018); V Valentine *Non-binary People’s Experiences in the UK* (Scottish Trans Equality Network, 2016) pp 68–80.

<sup>6</sup>For example, Resolution 2048 of the Council of Europe which calls on member states to ‘consider including a third gender option in identity documents for those who seek it’: Parliamentary Assembly *Resolution 2048: Discrimination against Transgender People in Europe* (Council of Europe, 2015) para 6.2.4.

<sup>7</sup>For example, in Scotland and Belgium, see Working Group for Non-binary People’s Equality *Non-Binary Working Group Report and Recommendations March 2022* (Scottish Government, July 2022) pp 36–40 and E Bribosia et al *Rapport au sujet de l’arrêt n° 099-2019 de la Cour constitutionnelle du 19 juin 2019 annulant partiellement la loi du 25 juin 2017 réformant des régimes relatifs aux personnes transgenres, et de ses conséquences en droit belge à la lumière du droit compare* (Institut pour l’Égalité entre les Femmes et les Hommes, 2019).

<sup>8</sup>Though sometimes the ability to obtain recognition using a non-binary marker is limited to intersex people who have to provide medical evidence, as in Germany: see BVerfG, Order of the First Senate of 10 October 2017 – 1 BvR 2019/16 at [1]–[57].

<sup>9</sup>*Taylor v Jaguar Land Rover Ltd*, above n 4. It is worth noting that this was a first instance, non-binding decision.

<sup>10</sup>*Mx M (gender identity – HJ (Iran) – terminology) El Salvador*, above n 4.

<sup>11</sup>*R (Elan-Cane) v Secretary of State for the Home Department*, above n 4.

<sup>12</sup>Crown Prosecution Service *Hate Crime: Public Statement on Prosecuting Homophobic, Biphobic and Transphobic Hate Crime* (August 2017) p 3.

<sup>13</sup>On feminist critiques of the gender binary generally see (eg) F Olsen ‘The family and the market: a study of ideology and legal reform’ (1983) *Harvard Law Review* 1497 at 1578; J Butler *Gender Trouble: Feminism and the Subversion of Identity* (originally published 1990, Routledge, 2006).

binary ways',<sup>14</sup> while Cowan noted that the GRA 2004 rests on the presumption that there are 'only two sexes and two genders, even if we are never absolutely clear as to how that distinction is to be made'.<sup>15</sup> Soon after 2004, a third sex option was described as 'inconceivable' within law,<sup>16</sup> though Sharpe argued that the binary structure of the 2004 Act would have to be addressed in future reform to 'create spaces for the diversity of gender identities'.<sup>17</sup> Meanwhile, Hines has also called for legal recognition to be extended to 'all trans people'.<sup>18</sup>

While some scholars have advocated for a third sex option, others have observed that if we accept that a binary structure 'unreasonably restricts people's sexual identity into one of two sexes, it becomes hard to deny that restricting people to three identities is open to identical objections'.<sup>19</sup> Furthermore, while some argue that a third sex option problematises gender normativity,<sup>20</sup> others have cautioned against a third option operating as a catch-all for non-normative sex and gender identities, such that it serves to 'preserve normative ideals of male/female'.<sup>21</sup> Instead, there have been invitations to imagine a legal discourse where the 'continuum of sexual identities' could be accommodated in law.<sup>22</sup> To address the problem of '[channelling] gender non-conformity away from two pre-existing categories'<sup>23</sup> to a third option, some have suggested that multiple sex options could 'encompass a variety of identifications whilst retaining the specificity to both validate and differentiate' diverse gendered identities.<sup>24</sup>

One of the most prominent critiques of non-binary recognition is that such reform relies on a politics of recognition which fails to interrogate the presumed importance attached to legal sex status.<sup>25</sup> Researchers have increasingly advocated for, and explored the implications of, removing sex status from the birth certificate, also known as decertification.<sup>26</sup> Decertification has been posited as holding the potential to address social inequalities, support gender expression, and remove restrictions on people who want their legal sex status to be changed.<sup>27</sup> However, there are some concerns that such a move may have negative implications for the provision of single- and separate-sex services, data collection, violence and positive action measures.<sup>28</sup> Cooper and Renz do not consider such problems as insurmountable though, pointing out that 'just because states withdraw from determining and assigning gender [on the birth certificate] does not mean they cannot recognise gender determinations by others'.<sup>29</sup> Consequently, while decertification raises complicated questions, it does not mean that

<sup>14</sup>Sharpe, above n 1, at 39.

<sup>15</sup>Cowan, above n 1, at 92.

<sup>16</sup>Sharpe, above n 1, at 39.

<sup>17</sup>Ibid, at 41.

<sup>18</sup>S Hines 'Recognising diversity? The Gender Recognition Act and transgender citizenship' in S Hines and T Sangers (eds) *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge, 2010) pp 99–101.

<sup>19</sup>PL Chau and J Herring 'Defining, assigning and designing sex' (2002) 16 *International Journal of Law, Policy and the Family* 327 at 356.

<sup>20</sup>S Monro 'Beyond male and female: poststructuralism and the spectrum of gender' (2005) 8(1) *International Journal of Transgenderism* 3 at 15.

<sup>21</sup>T Bennett 'No man's land: non-binary sex identification in Australian law and policy' (2014) 37(3) *University of New South Wales Law Journal* 847 at 858–859.

<sup>22</sup>Cowan, above n 1, at 93.

<sup>23</sup>F Renz 'Genders that don't matter: non-binary people and the Gender Recognition Act' in S Raj and P Dunne (eds) *The Queer Outside in Law* (Palgrave Macmillan, 2021) p 160.

<sup>24</sup>Bennett, above n 21, at 861.

<sup>25</sup>MJ Hird 'Gender's nature: intersexuality, transsexualism and the "sex"/"gender" binary' (2000) 1(3) *Feminist Theory* 347 at 358; Renz, above n 23, p 160; Hines, above n 18, pp 101–102.

<sup>26</sup>P Cannoot and M Decoster 'The abolition of sex/gender registration in the age of gender self-determination: an interdisciplinary queer, feminist, and human rights analysis' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 26 at 49; D Cooper et al *Abolishing Legal Sex Status: The Challenge and Consequences of Gender-related Law Reform: Final Report* (King's College London, 2022).

<sup>27</sup>Cooper et al, *ibid*, p 42.

<sup>28</sup>Ibid.

<sup>29</sup>D Cooper and F Renz 'If the state decertified gender, what might happen to its meaning and value?' (2016) 43(4) *Journal of Law and Society* 483 at 496.

the law would not be able to continue to recognise, and accommodate, sex and/or gender identity in certain instances.

Furthermore, it is worth noting that much (though not all) of the literature on decertification adopts a critical methodology which draws on themes from post-structuralist thought and queer theory.<sup>30</sup> These disruptive theories and perspectives have been valuable in problematising taken-for-granted legal concepts and regimes.<sup>31</sup> However, they arguably afford comparatively less weight to non-binary people's attitudes towards legal sex recognition and how they evaluate different reform options. Such approaches are also predominantly associated with a 'rejection of civil rights strategies in favour of a politics of carnival, transgression, and parody which leads to deconstruction, decentring, revisionist readings, and an antiassimilationist politics'.<sup>32</sup> This arguably risks reform suggestions being inadvertently paternalistic if they are primarily based on an evaluation of what is 'good' for non-binary people, and comparatively less weight attached to their own preferences based on their lived experience. It also perhaps risks overlooking the wider policy context surrounding reform discussions including what is realistic, feasible, and/or practical. This is where the need for empirical research with non-binary populations appears most evident, in order to assess what non-binary people want for themselves and how they evaluate the merits of respective reform options while showing an appreciation for the wider social and political context.<sup>33</sup>

There is little existing empirical data on non-binary people's preferences towards these various reform options, though a notable exception to this is the work of Peel and Newman. Their research found that non-binary participants demonstrated a 'large appetite for reform to the legal gender system including for reform that would introduce a third, or multiple, legal gender categories outside of female and male, and for reform to a self-identification model'.<sup>34</sup> The work was part of a broader project on decertification, with conclusions on decertification drawn from quantitative data involving 193 non-binary participants.<sup>35</sup> Meanwhile, conclusions related to non-binary recognition were drawn from a qualitative data set of five interviews. This paper builds on that research but offers a direct comparison of quantitative data on all three options, collected under the same survey conditions. The findings therefore intend to fill the gaps in existing knowledge surrounding the preferences of non-binary people towards reform, which is imperative to wider discussions surrounding reform to legal sex status.

## 2. Focus, scope and outline of the study

The focus of this paper is to present empirical findings and discuss reform primarily from the perspective of the non-binary population. There is no robust data on the number of trans or non-binary people in the UK, but it is estimated that non-binary populations make up a relatively large minority group. In the UK Government's nationwide LGBT Survey in 2018, roughly half of the trans sample (52%) – nearly 7% of the total sample – identified as non-binary.<sup>36</sup> This figure was described by the UK Government as 'larger than we might have thought'.<sup>37</sup> This suggests the non-binary population in the UK is therefore a relatively large minority group and the number of those identifying as

<sup>30</sup>See generally L Braunschweig 'Abolishing gender registration: a feminist defence' (2020) 1(1) *International Journal of Gender, Sexuality and Law* 76; Cannoot and Decoster, above n 26; Renz, above n 23.

<sup>31</sup>See also DB Cruz 'Disestablishing sex and gender' (2002) 90(4) *California Law Review* 997.

<sup>32</sup>A Stein and K Plummer "I can't even think straight": "queer" theory and the missing sexual revolution in sociology' (1994) 12(2) *Sociological Theory* 178 at 182.

<sup>33</sup>This is not to suggest that each of these factors – feasibility, politics of carnival and transgression, lived experience of non-binary people – are mutually exclusive. Rather, greater empirical research is necessary to mitigate the risks highlighted.

<sup>34</sup>HJH Newman and E Peel "An impossible dream"? Non-binary people's perceptions of legal gender status and reform in the UK' (2022) *Psychology and Sexuality* 1 at 11.

<sup>35</sup>*Ibid*, at 4.

<sup>36</sup>Above n 2, para 138.

<sup>37</sup>Above n 2, paras 137–138.

non-binary is growing. The population are therefore already engaging with various areas of law and regulation, warranting empirical investigation as to their attitudes towards, and experiences of, such governance.

Research also shows that binary and non-binary trans groups report different experiences and attitudes across a range of issues, including accessing and navigating healthcare<sup>38</sup> and the extent to which they are open about their identity.<sup>39</sup> Despite this, there is also apparently no empirical data on the extent to which non-binary and binary trans groups differ in their support/opposition towards macro-reform options like non-binary recognition and decertification. Non-binary groups are sometimes subsumed within a larger cisgender and transgender sample,<sup>40</sup> or are the only group surveyed,<sup>41</sup> or are compared with a single cisgender and binary trans sample.<sup>42</sup> Consequently, this study also reports differences observed between non-binary and binary groups on their attitudes towards reform. The purpose of the study is not necessarily to explore why such differences may exist, but to use the binary trans group as an anchor of comparison to reveal which reform options are of particular interest to non-binary groups.

It is also important to recognise that the GRA 2004 reform prompts questions on a range of issues. Most notably, there have been high-profile debates related to trans inclusion/exclusion in/from single- and separate-sex spaces and services, and the extent to which bad faith actors may seek to make fraudulent applications. These debates and so-called critical approaches to ‘gender identity ideology’<sup>43</sup> are not new to recent discussions of reform<sup>44</sup> and many scholarly contributions on these issues already exist,<sup>45</sup> meaning they will not be substantively addressed here. However, the recent consultation process attracted criticism for facilitating an increasingly ‘toxic’ discourse surrounding trans people.<sup>46</sup> While the legal scholarship has already addressed such issues in detail, this wider context is important when interpreting these research findings. It is likely that the considerable public interest in legal sex status and the prevalence of anti-trans views in mainstream media throughout this period would have impacted how participants evaluated the merits of different reform options. This is a theme which likely applies to all of the empirical data gathered, but has also been highlighted in this paper where applicable.

The following discussion is split into two sections. First, the methodological choices of the study are outlined. The study adopted a mixed-methods, empirical research design using an online survey and interviews. Second, the research findings are analysed, showing the range of factors non-binary populations take into account in weighing up the respective merits of reform. In particular, while each option raised potential problems, non-binary participants place great emphasis on the relative feasibility and sufficiency of introducing a third sex option. The paper concludes by calling for the introduction of a third sex option, while also reflecting on the wider impact of reform.

<sup>38</sup>Government Equalities Office *National LGBT Survey: Research Report* (GEO, 2018) pp 183–184.

<sup>39</sup>*Ibid*, pp 33, 53–54.

<sup>40</sup>Government Equalities Office, above n 5.

<sup>41</sup>Valentine, above n 5.

<sup>42</sup>Above n 34.

<sup>43</sup>H Lawford-Smith *Gender-Critical Feminism* (Oxford University Press, 2022).

<sup>44</sup>S Jeffreys ‘They know it when they see it: the UK Gender Recognition Act 2004’ (2008) 10(2) *British Journal of Politics and International Relations* 328 at 342.

<sup>45</sup>See, for example, A Sharpe ‘Will gender self-declaration undermine women’s rights and lead to an increase in harms?’ (2020) 83(3) *Modern Law Review* 539; S Cowan et al ‘Sex and gender equality law and policy: a response to Murray, Hunter Blackburn and MacKenzie’ (2020) *Scottish Affairs* 1; P Dunne ‘(Trans)forming single-gender services and communal accommodations’ (2017) 26(5) *Social and Legal Studies* 537; F Renz ‘Gender-based violence without a legal gender: imagining single-sex services in conditions of decertification’ (2023) 31 *Feminist Legal Studies* 43.

<sup>46</sup>S Whittle and F Simkiss ‘A perfect storm: the UK Government’s failed consultation on the Gender Recognition Act 2004’ in C Ashford and A Maine (eds) *Research Handbook on Gender Sexuality and the Law* (Edward Elgar, 2020).

### 3. Methodology

A mixed methods design – based on the combination of quantitative and qualitative empirical methods – was selected. An online survey, open to binary and non-binary trans people, was used to gather data on attitudes towards the reform options. Meanwhile, semi-structured interviews were conducted with non-binary participants to provide greater depth and nuance to the survey data. Ethics approval was obtained from the University of Exeter College of Social Sciences and International Studies' Ethics Committee on 31 January 2020 (ref: 201920-035).

The survey was designed using Qualtrics and a 'call for participants' poster was shared across various social media platforms and online groups. The survey was open to those who identified as transgender and/or non-binary, were aged 16 years or over, and were from, or currently living in, the UK.<sup>47</sup> The study was launched on 2 March 2020, just days before the World Health Organization designated Covid-19 as a pandemic and the UK Government implemented national lockdown measures. This posed unique challenges to the project, including participant recruitment and the ability to conduct face-to-face interviewing. Participant recruitment was therefore largely reliant on online social media platforms rather than through various in-person events as planned, and face-to-face interviews could no longer take place, with telephone/video conference interviews offered instead.<sup>48</sup>

Survey respondents were asked whether they supported or opposed each reform option, and then asked which reform option they felt was 'best'. Participants were also asked to select up to three reform priorities which would make them more likely to apply for a Gender Recognition Certificate (GRC) under the GRA 2004. This included removing various individual requirements and/or introducing non-binary recognition.<sup>49</sup> The aim was to ascertain the extent to which introducing non-binary recognition would increase the number of GRC applications compared to reform to other requirements. Ascertaining whether such reform would increase applications was important for this study, which was designed to be sensitive to wider policy concerns, as increasing applications is a relevant aim of policymakers in this area.<sup>50</sup>

Quantitative data was analysed in SPSS – a statistical package – for descriptive statistics on the extent to which participants supported the reform options. Univariate and bivariate descriptive analyses were conducted to give a brief snapshot of the average support or opposition towards the option, and to compare the scores of binary and non-binary groups. To establish the strength of the relationship, chi-square statistical testing was used. Values less than .05 represent a statistically significant difference between the groups, meaning that there is less than a 5% chance that the difference arose by chance, ie it is likely that the difference is real. This approach relies on probability theory and there is still a risk that such results are by chance, but such risk is relatively small. Meanwhile, qualitative data was analysed using thematic analysis, coding for general themes of different reform options before being compared with other transcripts. The qualitative data was then analysed and compared with the quantitative data to further enrich the understanding of participants' attitudes towards each option.

There were 140 non-binary respondents and 136 trans respondents to the survey, giving 276 total valid responses. Most non-binary respondents were aged between 16 and 25 years (55.7%,  $n = 78$ ), followed by those aged 26–45 years (32.9%,  $n = 46$ ), and those 46 years or above (11.4%,  $n = 16$ ). The ages of participants in the binary group were similarly distributed to those within the non-binary group. Interviews were conducted with 21 non-binary people between 10 March and 11 April 2020. Most interviewees described themselves as non-binary while some described their identity in other ways, including (eg) gender-queer, transmasculine, transfeminine, and agender. Nine

<sup>47</sup>Non-resident UK nationals were included as they may have previously been through the process or might be reasonably considered to do so in the future. The UK was the geographical limitation for participants, reflecting the territorial application of the GRA 2004. Future research will have to be aware of the potential differing approaches following the Gender Recognition Reform (Scotland) Bill 2022.

<sup>48</sup>A Chapple 'The use of telephone interviewing for qualitative research' (1999) 6(3) *Nurse Researcher* 85.

<sup>49</sup>Decertification was not an option here, as being 'more likely to apply for a GRC' implies that there is a system of certification in place.

<sup>50</sup>Above  $n = 2$ , paras 27–29.

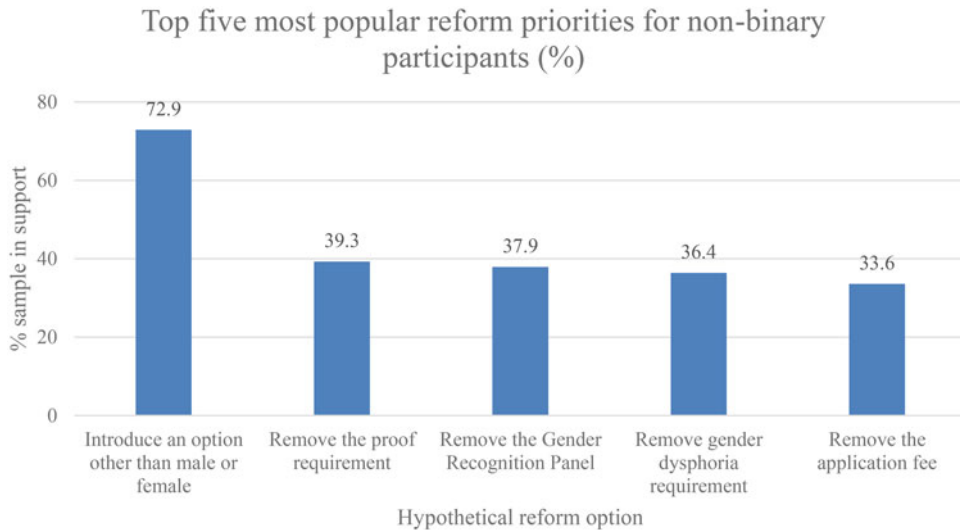


Figure 1. Top five most popular reform priorities for non-binary participants

interviewees were aged 16–25 years old, nine were aged 26–45 years old, with the remaining three aged 46 years old or above.

#### 4. Research findings

##### (a) General attitudes towards legal recognition and reform

Participants were asked to select which reform options would make them most likely to apply for a GRC. The aim was to assess the extent to which participants supported introducing legal recognition compared with reforming other requirements of a GRC, including (eg) removing the gender dysphoria diagnosis requirement.<sup>51</sup> Overall, non-binary people were supportive of expanding legal recognition beyond the binary. Introducing non-binary recognition was selected as a greater reform priority than reform to any of the current requirements (Figure 1). Just under three-quarters (72.9%,  $n = 102$ ) said that a non-binary option would make them more likely to apply for a GRC, compared with the next-best option (removing the requirement to provide proof of living in one's gender) which was selected by just 39.3% ( $n = 55$ ). The level of support for this reform option from non-binary participants was also notably much greater than binary trans respondents, where the introduction of non-binary recognition was selected by just 5% ( $n = 7$ ). This difference was statistically significant, suggesting this represents a real difference between the groups ( $P < .001$ ).

Introducing a third sex option attracted the greatest support from non-binary participants (95%,  $n = 133$ ), followed by introducing multiple sex options (62.9%,  $n = 88$ ) and decertification (56.4%,  $n = 79$ ) (Figure 2). It is notable that zero non-binary participants were opposed to the prospect of a third sex option, with the remaining 5% reporting that they were merely 'unsure' of the proposal.

Non-binary participants were more likely to support all three reform options compared with binary trans respondents. However, they were much more likely, to a statistically significant extent, to support the introduction of a third sex option and decertification compared with binary trans participants. The differences between the groups on both of these options were statistically significant, indicating that a real difference exists between them on these options ( $P = .001$ ,  $P = .02$ ).

<sup>51</sup>Gender Recognition Act 2004, s 2(1)(a).

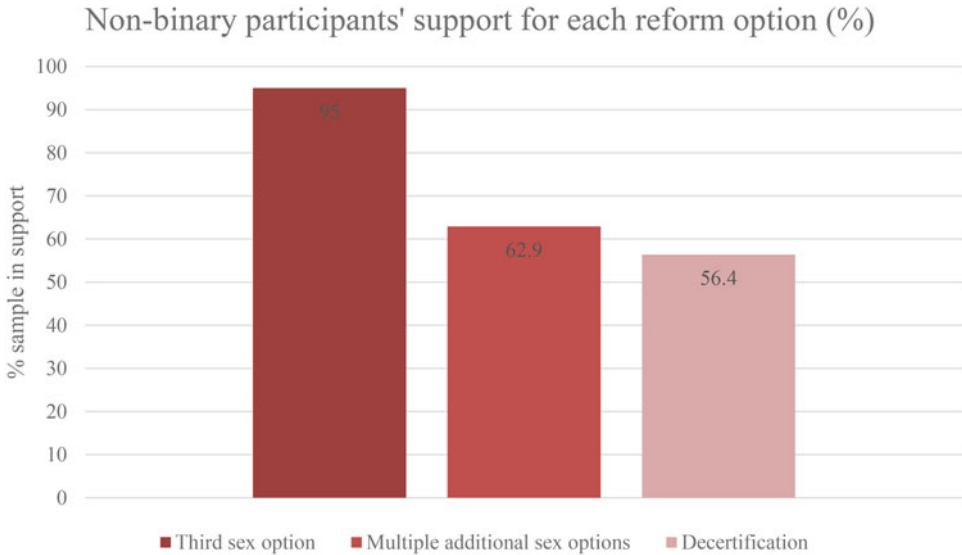


Figure 2. Non-binary participants' support for each reform option

### (b) Decertification

Many participants in favour of decertification reflected Cannoot and Decoster's perception of sex on the birth certificate as an 'unconscious habit' rather than serving a useful purpose.<sup>52</sup> One survey respondent felt that legal sex is merely 'a symbolic letter [on] legal documents'. Similarly, another argued that 'having such importance placed on "sex" on birth certificates is very old fashioned and pointless'. Criticism was mostly directed to the practice of recording sex *on the birth certificate*, as many felt there were instances where information about sex and gender could be useful. For example, one participant cited healthcare, and statistics used to help 'fight the oppression of women and gender minorities' as instances where information about sex and gender could serve a useful purpose. However, the birth certificate was not considered to be a desirable, or even effective, way to achieve these aims. Instead, recording sex on the birth certificate was seen as (just) 'one symbol' and potentially reductive if relied upon across a wide range of contexts which may serve different purposes. Participants, therefore, perceived certification on the birth certificate as a failure to recognise the nuance of human experience in relation to sex and gendered experience.<sup>53</sup> Therefore, it appeared that while non-binary participants perceived there to be legitimate aims in collecting/recording personal information, it is incorrect to presume that the birth certificate is necessary to achieving these aims. In fact, issues of data collection have attracted considerable attention in recent years, with high profile cases on the Census in England and Wales,<sup>54</sup> and Scotland.<sup>55</sup> Such cases prompt complex questions surrounding data collection, including the purpose and function of a binary sex question in data collection methods; the active role that the quantitative researcher plays in delimiting acceptable response categories and therefore producing knowledge,<sup>56</sup> as well as how quantitative researchers should balance the need to formulate clear and unambiguous questions in a way which

<sup>52</sup>Cannoot and Decoster, above n 26, at 41; D Spade *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press, 2011).

<sup>53</sup>B Collier and S Cowan 'Queer conflicts, concept capture and category co-option: the importance of context in the state collection and recording of sex/gender data' (2022) 31(5) *Social and Legal Studies* 746.

<sup>54</sup>*R (Fair Play for Women) v UK Statistics Authority and the Minister for the Cabinet Office* [2021] EWHC 940 (Admin).

<sup>55</sup>*Fair Play for Women v National Records of Scotland* [2022] CSOH 20.

<sup>56</sup>See generally GC Bowker and S Leigh Star *Sorting Things Out: Classification and Its Consequences* (MIT Press, 2000).



does not negatively impact on response rates of trans populations.<sup>57</sup> While such debates continue among scholars and policymakers, it was clear from participants in this study that non-binary people recognise the value in collecting personal data in certain contexts where relevant, but express confusion at the assertion that birth certificates are necessary for these purposes.

Another participant argued that ‘gender is just like ... religion and should not be mandatory as part of identification in the first place. There is no need for it on official documentation’. The comparison to religion recognises that, while these aspects of identity are important, this does not necessarily justify mandatory certification on the birth certificate. Furthermore, religion – like other characteristics such as race, sexual orientation and disability – is not certified but can still give rise to rights and responsibilities in law such as protection from discrimination.<sup>58</sup> Decertification would therefore not necessarily mean that the state would have to withdraw from recognising someone’s sex in certain instances.<sup>59</sup>

When asked which reform option was ‘the best option’, though, decertification was the most popular (37.9%, n = 53) compared with a third (27.9%, n = 39) or multiple sex options (30%, n = 42). Non-binary preference for decertification over the other options was greater (though statistically non-significant ( $P = .13$ )) than the binary group’s preference for this option. Therefore, despite decertification attracting less support than other requirements, it was ultimately considered the ‘best’ option overall by the non-binary group. This appeared to be reflected by the participants who placed emphasis on the perceived transformative effect of decertification on gender norms compared with non-binary recognition. One participant argued that decertification would be ‘a statement about the importance of gender roles in society... The more gender is seen as fluid and conceptual rather than concrete, the easier trans people’s lives will become’.

If the state were to withdraw from legally certifying sex, it is accepted that this *could* impact social perceptions of the importance of gender in certain circumstances. However, whether law reform can have such a significant impact on social perceptions of gender is subject to debate. There is a risk that such expectations of decertification risk overestimating the extent to which law and legal institutions can have a transformative effect on social attitudes towards gender diverse populations. While the law is a powerful discourse, which gives meaning to social and cultural norms,<sup>60</sup> it arguably cannot equally ‘undo’ those social attitudes and cultural norms. The practical, legal, and social consequences of decertification therefore remain uncertain.<sup>61</sup>

While there is also uncertainty surrounding other options, part of the problem for decertification may be because the meaning of decertification is variable and may also depend on the extent to which non-state actors place emphasis on a sex and gender. It can include ‘soft’<sup>62</sup> forms of decertification such as reducing the use of sex markers in ID documents<sup>63</sup> or reducing the prevalence of sex-based distinctions in legislation.<sup>64</sup> Hard forms of decertification might represent a fully degendered legal system, where the state does not recognise sex or gender in any setting including to protect against discrimination. While some scholars might envisage harder forms of decertification, most refer to softer forms where the law may still retain some legitimate interests in sex but remove it from the birth

<sup>57</sup>See generally K Guyan *Queer Data: Using Gender, Sex and Sexuality Data for Action* (Bloomsbury, 2022).

<sup>58</sup>Equality Act 2010, s 10; F Renz and D Cooper ‘Reimagining gender through equality law: what legal thoughtways do inclusion and disability offer?’ (2021) 30 *Feminist Legal Studies* 129.

<sup>59</sup>Above n 29.

<sup>60</sup>C Smart ‘Law’s power, the sexed body, and feminist discourse’ (1990) 17(2) *Journal of Law and Society* 194 at 198–200.

<sup>61</sup>D Cooper and R Emerton ‘Pulling the thread of decertification: what challenges are raised by the proposal to reform legal gender status?’ (2020) 10(2) *feminists@law* 1 at 25–26.

<sup>62</sup>D Cooper ‘Taking public responsibility for gender: When personal identity and institutional feminist politics meet’ (2020) 10(2) *feminists@law* 1 at 1, 4; Cooper and Emerton, *ibid*, fn 12.

<sup>63</sup>AJ Wipfler ‘Identity crisis: the limitations of expanding government recognition of gender identity and the possibility of genderless identity documents’ (2016) 39 *Harvard Journal of Law and Gender* 491.

<sup>64</sup>C Williams ‘The end of the “masculine rule”?’ *Gender-neutral legislative drafting in the United Kingdom and Ireland* (2008) 29 *Statute Law Review* 139; DL Revell and J Vapnek ‘Gender-silent legislative drafting in a non-binary world’ (2020) 48 *Capital University Law Review* 103.

certificate. This distinction between removing sex from the birth certificate and the state withdrawing from recognising sex in any circumstances is important, as these are often conflated. Additionally, given the differences between these models, the potential transformative consequences arguably depend on the model adopted. This uncertainty is problematic, as without situating decertification within a 'broader social justice programme',<sup>65</sup> decertification carries the risk of acting as a framework through which the state withdraws from 'taking responsibility for countering social inequality'.<sup>66</sup>

In addition, while decertification was perceived as an 'ideal' solution, it was also considered less realistic to achieve than non-binary recognition. One participant said:

I think it's good to be idealistic [about reform] but you also have to be pragmatic and realise what the reality of the situation is and figure out a way that can minimise as much damage as possible. And then at some point in the future things can be more like an idealistic version of things.

Similarly, another participant stated that 'in an ideal world we would [remove sex from the birth certificate] however they're not going to stop doing that ... and getting our hopes up that they will is foolish ... Nice idea but I just don't think that will happen'. This opinion was commonly held among non-binary participants and has also been observed in other research projects too.<sup>67</sup>

While scholarly discussion of removing sex from the birth certificate is not new, decertification is relatively novel in practice as most jurisdictions across the world retain a system of certification. Decertification was also not a proposal given substantive consideration by the UK Government or the Women and Equalities Committee in the public consultation for England and Wales, nor has the Scottish Government expressed an interest in removing sex from the birth certificate. The UK Government expressed an interest in removing 'unnecessary requests for gender information'<sup>68</sup> including in official documents but not necessarily the birth certificate. This is reflected in other jurisdictions, such as Belgium and the Netherlands, where there have been proposals to remove sex markers from documents in relation to identity cards but not the civil registry. Nevertheless, Tasmania is a well-known exception to this, with the Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 providing for birth certificates to not specify sex unless requested by the parents or the child when they reach 16 years of age.<sup>69</sup>

On the contrary, while other reform based on the certification of sex – such as non-binary recognition and self-identification – are not necessarily common features of legal systems, the fact that they have been implemented in some jurisdictions makes them more feasible options than decertification. These reform options have also received much greater policy interest from the UK Government where they did seek 'initial views on non-binary recognition as it relates to the Gender Recognition Act' during the public consultation.<sup>70</sup> Similarly, while the Scottish Government declined to recognise non-binary identities in their most recent proposals, they did set up a Working Group for Non-binary People's Equality which has recommended that the Scottish Government undertake further research with a view to introducing non-binary legal recognition.<sup>71</sup> In other jurisdictions, Governments have also already undertaken reviews and scoping exercises on how to implement non-binary recognition.<sup>72</sup>

<sup>65</sup>Cooper et al, above n 26, p 35.

<sup>66</sup>Ibid.

<sup>67</sup>Above n 34.

<sup>68</sup>Government Equalities Office *Government Response to the Women and Equalities Committee Report on Transgender Equality*, Cm 9301 (Government Equalities Office, 2016) p 5.

<sup>69</sup>Births, Deaths and Marriages Registration Act 1999, s 46 as amended by Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, s 22. See generally: L Richardson-Self "'There are only two genders – male and female...'" An Analysis of Online Responses to Tasmania Removing "Gender" from Birth Certificates' (2020) 1 International Journal of Gender, Sexuality and Law 295.

<sup>70</sup>Above n 2, paras 12, 134.

<sup>71</sup>Above n 7.

<sup>72</sup>Ibid.

Decertification therefore faces significant barriers, with the relative likelihood of its adoption being much lower compared to other options.

It is also important to note that while this study focused on the perspective of non-binary populations, as a legal study it is a relevant consideration that most people do not object to the certification of sex on the birth certificate.<sup>73</sup> This includes some cis and trans (and non-binary) people for whom the certification of legal sex provides an affirmative function. This affirmative function was recognised by the European Court of Human Rights in *Goodwin*, where the Court connected legal recognition for trans people with dignity and imposed an obligation on the UK Government to provide a means for ‘post-operative transsexuals’ to obtain legal sex recognition.<sup>74</sup> Arguably this obligation on states to provide for a means to receive recognition implicitly relies on there being a system of certification in the first place. It is also noteworthy that the Council of Europe’s Parliamentary Assembly in Resolution 2191 called on states to ‘consider making the registration of sex on birth certificates and other identity documents *optional* for everyone’,<sup>75</sup> rather than calling on states to remove it entirely. This raises an additional legal question over the prospect of decertification and its implications for other groups.

### (c) *The opportunities and challenges of non-binary recognition*

Many participants argued that the lack of non-binary recognition was exclusionary and undermined their identity. The current binary structure was perceived as the state ‘trying to force folk into an extremely small, rigid box’. Participants felt that this position undermined autonomy, by ‘forcing’ non-binary people to live according to a status which does not reflect their identity.

Some participants perceived non-binary recognition as offering practical benefits in navigating spaces safely. One noted the potential safety issues with the current system, stating that they felt ‘always on edge’ when using identification documents in case ‘someone questions’ them about their gender identity. Another also argued that the current position causes many to have to undertake significant admin to prove their identity and needing to have ‘painful conversations’ with service providers. They reported that, ‘there’s so much anxiety before getting a driving licence, passport and ID, every interaction you have is wrong... [non-binary recognition] would just get rid of that’.

Human rights actors have long recognised a connection between legal recognition and discrimination against trans people. The UN Independent Expert on Sexual Orientation (SOGI) has argued that a lack of legal recognition for non-binary persons ‘fuels discrimination, exclusion and bullying’<sup>76</sup> as the state’s marginalisation implicitly legitimises discriminatory attitudes among the general population.<sup>77</sup> The Annual Report of the United Nations High Commissioner for Human Rights also connects legal recognition to other rights in the context of employment, housing, state benefits and travelling.<sup>78</sup> It recognises that non-recognition may contribute to discrimination and the ability for non-binary people to fully realise their rights in these areas.<sup>79</sup> Resolution 2048 also connected the right to recognition of gender identity to discrimination and access to rights to work, housing and health services.<sup>80</sup> While non-recognition arguably represents an implicit acceptance of non-binary marginalisation which indirectly reinforces discrimination, there is a problematic assumption that the law reversing this position will translate into markedly improved social acceptance of non-binary identities. Arguably, if social tension exists around gender diversity and expression, then there would remain

<sup>73</sup>E Peel and H Newman ‘Gender’s wider stakes: lay attitudes to legal gender reform’ (2020) 10(2) *feminists@law* 1 at 15.

<sup>74</sup>*Christine Goodwin v United Kingdom* [2002] ECHR 588.

<sup>75</sup>Council of Europe *Resolution 2191* (Council of Europe, 2017) (emphasis added).

<sup>76</sup>V Madrigal-Borloz *Report on Gender Identity* (United Nations, 2018) p 3.

<sup>77</sup>S Duffy ‘Contested subjects of human rights: trans- and gender-variant subjects of international human rights law’ (2021) 84(5) *Modern Law Review* 1041 at 1057.

<sup>78</sup>Office of the United Nations High Commissioner for Human Rights *Discrimination and Violence against Individuals Based on their Sexual Orientation and Gender Identity, A/HRC/29/23* (UNGA, 4 May 2015) para 69.

<sup>79</sup>*Ibid.*

<sup>80</sup>Above n 6, para 1.

the potential for social expectations of androgyny from those who have a third sex marker and therefore gender policing could continue for non-binary populations. The assumption underlying these accounts is that the law can create *and remove* social norms and social tensions around gender diversity, which is at least questionable.

Instead, it could be argued that the introduction of non-binary recognition could create additional risk for non-binary individuals. One participant cautioned against expecting non-binary recognition to improve their safety, explaining that ‘as a non-binary person, having my gender legally recognised would automatically out me as trans’. Another also appeared cautious of the assumed benefit of non-binary recognition to their safety. They said that their current preferred binary marker helped them to ‘pass’ in public spaces and since changing their ID marker to ‘male’, they had been less likely to be refused entry to places and/or questioned. They expressed concern that if their documents displayed a non-binary marker, this would ‘immediately out [them] as trans or non-binary or different’. This is a compelling point which demonstrates how concerns around safety can be utilised by those in favour of or against non-binary recognition. Non-binary markers to a certain extent raise, rather than reduce, the risk of outing (and the subsequent risk of discrimination or violence) because it is evidence of a non-cisgender gender identity. Whereas arguments in favour of binary legal recognition have often explicitly or implicitly been about reducing the risk of outing, this is substantively different for non-binary people and arguably less applicable.<sup>81</sup>

However, many participants compellingly emphasised the symbolic and/or internal benefits of recognition, such as helping them feel like a ‘valued member of society’ and helping them to not feel ‘erased’. One participant felt legal recognition could empower them to ‘assert’ their identity and their right to be treated with respect, and reduce the frustration of having to ‘prove’ their identity to others. Participants therefore perceived legal recognition as potentially reducing feelings of exclusion from other groups and wider society. Non-recognition was seen as having an ‘othering’ effect, furthering the ‘division between the trans citizen who is able and/or willing to fulfil the requirements of law, and the trans person who is unable or unwilling to meet the demands of recognition’.<sup>82</sup> This inability to have one’s identity recognised and affirmed by others is likely to have a negative impact on wellbeing,<sup>83</sup> as it positions non-binary groups as ‘target[s] or scapegoat[s]’, while potentially contributing to internally seeing themselves ‘through the lens of such hatred’.<sup>84</sup> This reflects the link made by the Council of Europe between the ‘cycle of discrimination’ trans people face due to ‘obstacles in obtaining [...] legal recognition’<sup>85</sup> with the relatively high suicide rate among trans people.<sup>86</sup> This argument in favour of reform therefore recognises and emphasises the personal and internal positive impact that legal recognition can have on non-binary people.

#### **(d) Comparison of third sex and multiple sex options**

In addition to the quantitative data on the non-binary recognition reform options (see section (a)), participants were asked in the interviews for their comparative preferences towards these options. This section presents the key themes relevant to participants’ preferences to reform.

<sup>81</sup>J Theilen ‘Beyond the gender binary: rethinking the right to legal gender recognition’ (2018) 3 European Human Rights Law Review 249.

<sup>82</sup>Above n 18, p 102.

<sup>83</sup>B Colliver et al ‘The “online othering” of transgender people in relation to “gender neutral toilets”’ in K Lumsden and E Harmer (eds) *Online Othering: Exploring Digital Violence and Discrimination on the Web* (Palgrave Macmillan, 2019).

<sup>84</sup>RM Juang ‘Transgendering the politics of recognition’ in P Currah et al (eds) *Transgender Rights* (University of Minnesota Press, 2006) p 242.

<sup>85</sup>Parliamentary Assembly *Resolution 1728: Discrimination on the Basis of Sexual Orientation and Gender Identity* (Council of Europe, 2010) para 4.

<sup>86</sup>*Ibid.*

*(i) Inclusivity*

In comparing the introduction of a third or multiple additional sex option/s, participants generally perceived multiple sex options as more inclusive. Participants referenced the ‘vast number of gender identities’ which exist, and their belief that each one should be ‘normalised, accepted and recognised as valid’.

One participant preferred the prospect of multiple sex options being introduced because they felt that a third sex option would simply turn the ‘gender binary into a gender trinary’. Two other participants also felt that a singular additional option was ‘too restrictive’ and would be ‘sticking a plaster over the situation, casting anyone who doesn’t fit the traditional binary as abnormal’. This reflects various arguments in the scholarship whereby an additional third option may recreate an equally problematic ternary system where gender non-conformity is funnelled away into a separate category.<sup>87</sup>

Nevertheless, the notion that multiple options was necessarily more inclusive than a third option was not a universally held opinion. Both third and multiple additional sex options could arguably be seen to ‘reify sex as a natural, necessary, and defining feature of personhood to the detriment of non-binary people, gender nonconforming people, and all people who seek a less gender-presumptive world’.<sup>88</sup> Moreover, one felt that an additional third option could still be considered a ‘radical’ reform option, which could undermine the ‘oppressive aspects of sex/gender normativity’ by showing that a ‘chunk of the population just can’t fit in with that system’. Arguably, both the third and multiple sex options could be considered radical and potentially transformative compared to the status quo, as they represent a fundamental departure from a binary status which has formed the basis of civil registration since its inception. Although, given the relatively small population numbers of trans and non-binary citizens, both reform options could also serve to reinforce that binary.

However, as has already been noted in relation to decertification above, there remains the need to caution against arguments in favour of a particular reform option based on how potentially radical or transformative it could be. Changing social attitudes towards gender may help to raise awareness of gender diversity, but that is arguably unlikely to have a significant transformative effect. Moreover, even if we accept that transformative law reform has the potential to affect social attitudes in a positive way, then it is equally possible for it to impact social attitudes in a negative way. This might include contributing to backlash, which was a concern expressed by several participants (discussed in greater detail below), as well as furthering social marginalisation and exclusion, and reinforcing normative boundaries of gender identity. The case for reform must take into account broader issues of social attitudes towards gender diversity, but not overstate this when weighing up respective reform proposals.

*(ii) Uncertainty surrounding the multiple additional sex options proposal*

Participants demonstrated diverse perceptions of what a system based on introducing multiple additional sex options would look like in practice, including how many options might be available and whether there would be an option to self-define. These factors have a significant impact on the evaluation of the proposed reform because they fundamentally change the nature of the proposed system. Further, depending on these factors, it could also limit the perceived benefits of multiple sex options mooted above. One respondent pointed out that the supposed inclusivity of multiple options could not be guaranteed because this might still involve a finite list of sex statuses being available, which risks excluding some groups. Consequently, they argued in favour of a third sex option on the basis that it would be ‘more inclusive for everyone’.

Another respondent who preferred multiple sex options said that this was because non-binary identities existed on ‘a spectrum and [therefore] all genders should be recognised’. Here, participants appeared critical of what they perceived to be a ‘fixed’ and ‘bordered’ conceptualisation of sex in

<sup>87</sup> Above n 23, p 160.

<sup>88</sup> Above n 63, at 542.

contrast to the ‘malleable’ and ‘unfixed’ nature of gender.<sup>89</sup> Another felt that introducing multiple options would be positive because ‘it would mean that people could self-identify’. These participants appear to presume that multiple sex options would mean a potentially open list of options would be available rather than a closed list. Some participants suggested that a multiple sex system should operate on a similar basis to names, where people could define their own gender. This was similar to another respondent who said that ‘like titles, people should have a selection [of sex options] and then an option to self-define’. Another respondent suggested having ‘an open field or multiple independent checkboxes that could be selected in combination’. This would be similar to the system in Tasmania, where those aged 16 or over can select one of five options, including one providing space for applicants to specify their identity. However, this could still be subject to criticism, as the decision for certain identities to be classed as permanent specified identities could be argued to constitute the ‘othering’ of identities not afforded this status.

Meanwhile, others suggested more limited models of recognition. For example, one felt that a system of multiple sex options could involve the introduction of just a few additional sex options beyond male and female, for example ‘X’ and ‘N/A’. Another participant felt that a model with just two or three additional options beyond male/female would ‘at least give people more options’, even if it was not as inclusive as the more expansive multiple sex systems outlined above. Participants, therefore, demonstrated significant variation in what they thought a system which offered multiple sex options could (and should) look like.

These accounts raise an important point about inclusivity and the inherent limitations of a third sex option. Such an option can be criticised as being both under and over inclusive,<sup>90</sup> in creating a single ‘other’ category for those who do not identify with the binary categories of male or female. This is underinclusive in failing to recognise the different identities and experiences among people within the non-binary community (including those who are agender),<sup>91</sup> which arguably reinforces the normativity of the gender binary. However, a third sex option has also served in other jurisdictions to be over inclusive, as it is a category only open to those with variations in sex characteristics, problematically relying on the assumption that intersex people identify with a non-binary identity.<sup>92</sup> Nevertheless, multiple sex options are also not without critique on this basis, as its inclusivity would depend on the type of system introduced. A system which allowed for the individual to write in their legal sex status appeared to be perceived as most inclusive, but this then raises broader questions of the practicality of such reform. If legal sex status could be written in on a completely unique and individual basis, this would arguably operate as *de facto* decertification. Such a system would also raise questions as to whether certain terms or phrases could be rejected as not being appropriate as a legal sex status. In Tasmania, where an applicant selects ‘other’ and specifies their gender identity, the Registrar must determine if the gender term provided fits with the definition of gender under the 1999 Act before it can be accepted as someone’s legal sex status. This could be criticised on the basis that it affords the Registrar considerable discretion to determine the suitability (or not) of someone’s gender identity as a legal sex status before registering it. Therefore, while on the face of it, multiple sex options may be perceived to be more inclusive, there would still remain questions as to the form of such a system, including the number of prescribed options, whether someone could write in their own identity, and the powers of the Registrar.

<sup>89</sup>This is reflective of Katyal’s thesis that sex is to gender as property is to intellectual property: see SK Katyal ‘The numerous clauses of sex’ (2017) 84(1) *University of Chicago Law Review* 389.

<sup>90</sup>P Cannoot ‘The right to personal autonomy regarding sex (characteristics), gender (identity and/or expression) and sexual orientation: towards an inclusive legal system’ (PhD thesis, University of Ghent, 2019) p 409.

<sup>91</sup>*Ibid.*

<sup>92</sup>F Garland and M Travis ‘Queering the queer/non-queer binary: problematising the “I” in LGBTI+’ in Raj and Dunne (eds), above n 23.

*(iii) Realistic reform*

An apparently decisive point for many participants in weighing up the respective merits of reform was that a third sex option was perceived as much more realistic and feasible than other options. A common reason for this was because of a current difficult climate surrounding social attitudes towards trans and non-binary populations, and the lack of support that multiple sex options would attract. Participants described a third sex option as the ‘most politically viable’, the ‘most plausible’, the ‘most likely’ option, and the ‘only thing standing a chance to get accepted’, given the ‘kind of opposition’ multiple options would face. Notwithstanding the merits of multiple sex options, a third sex option was still considered capable of making a ‘big difference’ to their lives, while also being most realistic.

There were a range of reasons that participants felt multiple sex options were less realistic, including the heated social and political discourse surrounding trans and non-binary populations which ‘might be better with time, but not yet’. One participant felt that a third sex option would cause the ‘least conflict’ between non-binary populations and the general population. There was therefore concern from participants who felt that multiple options could lead to a societal backlash against trans and non-binary people. One respondent expressed concern that ‘multiple options would cause more complication and potential mocking/outrage from transphobic groups/people’. Another respondent reflected this, saying that ‘an extensive list of every other gender...may cause confusion and backlash’.

A third option was therefore perceived as being ‘easier’ and ‘more straightforward’, compared with introducing multiple additional sex options. Several participants reflected the points raised above, problematising the perceived inclusivity of multiple sex options. One participant felt that it would be ‘simpler to just add a third [option] than create a potentially infinite (definitely vast) system’. The prospect of multiple sex options was therefore described as ‘adding significant complexity to the system’, being ‘very complicated’, ‘unmaintainable’, and a move that would ‘push us further into bureaucracy’. One participant felt that ‘transness is too various and too unstable ... to be contained within a list of options’. Another reflected this sentiment, arguing:

While there’s definitely a need to recognise non-binary identities, it’d be incredibly difficult to codify all the beautiful and diverse ways non-binary people identify (and the evolving terms we use to do so) in a way that wouldn’t exclude and delegitimise identities which weren’t included on the ‘approved list’.

The perceived complexity of multiple options contrasted with how one participant described a third option as preferable because it would accommodate non-binary people without ‘disrupting the current system’. Arguably, though, this downplays the disruption which a third sex option would cause, including potentially requiring reform to other laws to ensure consistency across government departments. However, when conducting a relative comparison between third and multiple sex options, it does appear reasonable to suggest that a third sex option would cause less disruption.

The perceived complexity of multiple sex options led one respondent to argue that there needed to be ‘more research before instituting a system involving multiple genders’. For example, one participant questioned whether the state would have to be ‘constantly updating a list of “valid” gender identities that will probably change in the future’. This again raises questions of the Registrar’s hypothetical powers and/or the extent to which officials or politicians (influenced by party ideology) would be tasked with exercising discretion in accepting or rejecting certain descriptors.

*(iv) Sufficiency of reform*

Despite its perceived imperfections, the third sex option generally received support and was considered sufficient for improving the lives of participants. While some felt a single category for all forms of non-binary experiences was problematic, many others felt an ‘umbrella’ category would be able to cater for many different minority gender identities. Another also argued that a third sex option would be

'broadly encompassing of anyone who doesn't identify as male or female and... in being not specific, it allows for that degree of variability'.

One possible criticism of a third sex option is that it is not inclusive for agender people, because a third option implies that the individual identifies with a gender identity. However, one participant who identified as agender said that a third option would be an 'adequate' option for them. Another agender participant also felt that 'many non-binary people, and those of other genders, would be happy to be registered as a third gender'. This indicates a degree of optimism among non-binary participants that a third sex option could still be desirable for many in the non-binary community, including those who are sometimes considered to be marginalised by a third sex option. While further empirical research with minority non-binary groups would be valuable, the non-binary group in this study did include people who identified with a range of minority gender identities, eg gender queer, gender flux, agender. Therefore, where the quantitative data indicated overwhelming support (and zero opposition) for a third sex option, this would have included those with minority gender identities.

To summarise, non-binary populations were broadly supportive of the three reform options, though each one raised slightly distinct and unique issues. Decertification was considered promising and the 'best' reform option, though participants appeared sceptical of how realistic this reform is in the short to medium term and there remain wider social and legal uncertainties over this option. Meanwhile, participants were supportive of non-binary recognition, with a third sex option attracting the most support. Multiple sex options were perceived to be more inclusive, though issues of form and practicality raise questions as to how inclusive such an option would be in practice. Participants placed emphasis on how realistic and feasible reform proposals should be, and consequently, a third sex option was considered preferable in this regard.

## Conclusion

Legal sex status potentially permeates various interrelated areas of law and governance, making reform to the current binary framework relevant to a range of academics and professionals. Reform considerations, however, also require consultation with the non-binary population directly. This study has demonstrated that non-binary people are supportive of reform in this area, including the introduction of non-binary recognition and decertification, considering a range of issues when weighing up the respective merits of reform, including practicality, feasibility, and inclusivity. Non-binary people demonstrate enthusiasm for an ongoing critical investigation into the role and purpose of legal sex regulation, but also emphasise that it is equally important to minimise problems caused by the status quo in the meantime. For participants in this study, a third sex option appeared to offer promise in this regard, attracting the most support of the reform options while also being considered a generally inclusive improvement on the current exclusion they face.

Nevertheless, while participants considered a third sex option to be more realistic than other options surveyed, there remains uncertainty surrounding the implications of such a move and this is often cited in rejecting calls for reform. The 'complex practical consequences' of non-binary recognition to 'other areas of law, service provision and public life' were cited by the Government in their response to a petition which attracted 140,000 signatures in support of non-binary recognition.<sup>93</sup> Similarly, the Supreme Court, in rejecting Elan-Cane's appeal, concluded that non-binary recognition raises 'complex issues with wide implications'.<sup>94</sup> Various areas of law rely on the presumption of a binary sex status,<sup>95</sup> which would at least require clarification or fundamental reform if a third sex option were introduced, such as the Equality Act 2010. There are already considerable wider debates

<sup>93</sup>UK Government and Parliament 'Petitions: make non-binary a legally recognised gender identity in the UK' (UK Government and Parliament 2021), available at <https://petition.parliament.uk/petitions/580220>.

<sup>94</sup>Above n 11, at [54].

<sup>95</sup>Above n 11, at [53].



surrounding the definition of sex under this Act.<sup>96</sup> For the purposes of a hypothetical third sex option, though, it would be necessary to consider how someone with a non-binary marker would fit into this framework, including whether a non-binary individual would be able to rely on section 11 (sex) and/or section 7 (gender reassignment) in the event of discrimination based on their non-binary identity. Alternatively, more substantive reform to the Act could be undertaken to address this potential inconsistency, as some scholars have already suggested that a general protected characteristic of gender identity could merge the characteristics of sex and gender reassignment.<sup>97</sup> This kind of additional reform would likely increase the level of disruption rather than just providing for clarifications on how non-binary people are to be accommodated within the current structure of the Act, though it would address existing problems with the law.<sup>98</sup> Other areas of reform may include legislative drafting techniques, where emphasis could be placed on gender-silent drafting rather than gender-neutral drafting, adopting use of the singular ‘they’ pronoun and using alternative phrases such as ‘chairperson’ in place of chairman or chairwoman.<sup>99</sup>

As Clarke notes, it is ‘indisputable’ that non-binary identities pose ‘challenges to legal interests, but these challenges are not insurmountable’.<sup>100</sup> Indeed, as the European Court of Human Rights in *Goodwin* noted, society ought to be,

reasonably ... expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.<sup>101</sup>

Other jurisdictions have started to explore non-binary recognition, with Belgium commissioning an in-depth report and Scotland having set up a Non-binary Working Group which explores non-binary legal recognition.<sup>102</sup> Such investigation is crucial to addressing areas of particular concern and identifying mitigating measures to address concerns. This might include, for example, conducting an in-depth review of areas of concern to those opposed to non-binary recognition such as the impact on, for example, the Equality Act. There are also measures, such as post-legislative reviews, which could be used to provide the public and policymakers with the opportunity to reflect on the impact that a third sex option is having and highlight areas in need of additional reform or clarification.

Furthermore, it is important to recognise the ongoing disruption caused by the current binary framework. There has already been litigation related to gender-neutral parent markers,<sup>103</sup> non-gendered passports,<sup>104</sup> non-binary discrimination,<sup>105</sup> asylum claims based on a non-binary identity,<sup>106</sup> and most recently non-binary recognition on the birth certificate.<sup>107</sup> There has also been considerable debate surrounding how to incorporate non-binary people into existing laws and public

<sup>96</sup>See eg recent calls from the Equality and Human Rights Commission to clarify the definition of sex under the Act: EHRC ‘Clarifying the definition of “sex” in the Equality Act’ (EHRC, 2023), available at <https://www.equalityhumanrights.com/en/our-work/news/clarifying-definition-%E2%80%98sex%E2%80%99-equality-act>.

<sup>97</sup>Renz and Cooper, above n 58.

<sup>98</sup>Women and Equalities Committee *Transgender Equality, First Report of Session 2015–16*, HC 390 (House of Commons, 2015) para 108; above n 6, para 6.

<sup>99</sup>Revell and Vapnek, above n 64, at 107.

<sup>100</sup>JA Clarke ‘They, them and theirs’ (2019) 132 *Harvard Law Review* 894 at 991.

<sup>101</sup>Above n 74 at [91].

<sup>102</sup>Above n 7.

<sup>103</sup>*R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2021] Fam 77. See also L Davis ‘Deconstructing tradition: trans reproduction and the need to reform birth registration in England and Wales’ (2020) 22(1–2) *International Journal of Transgender Health* 179.

<sup>104</sup>Above n 11.

<sup>105</sup>Above n 9.

<sup>106</sup>Above n 10.

<sup>107</sup>Leigh Day ‘Legal challenges urges Government to give legal recognition to nonbinary people’ (29 March 2023), available at <https://www.leighday.co.uk/news/news/2023-news/legal-challenge-urges-government-to-give-legal-recognition-to-nonbinary-people/>

services.<sup>108</sup> The prospect of inclusion is therefore increasingly less ‘unimaginable’ and more ‘inevitable’<sup>109</sup> which requires comprehensive consideration by policymakers. Arguably, a review of the laws and policies which are already subject to criticism based on their exclusionary impact, and consideration of how to alleviate these issues, taking into account the views of a range of stakeholders, is already necessary. Rather than causing disruption, prospective reform could prompt policymakers to address these pre-existing issues and minimise disruption in the long term. Given the prominence placed on concerns of disruption, it is hoped that this study will help to prompt a broader conversation on the implications of introducing a third sex option to other areas of law. This is likely to be crucial for when – not if – there are future efforts by policymakers to substantively consider how reform to legal sex status could better accommodate non-binary populations.

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<sup>108</sup>See eg Recommendations 22, 23 and 26 in Women and Equalities Committee *Reform of the Gender Recognition Act: Government Response to the Committee’s Third Report, Fifth Special Report of Session 2021–22, HC 129* (House of Commons, 2022).

<sup>109</sup>Above n 100.