





# Trans and Non-Binary Discrimination: Troubled Waters and Unknown Futures

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## This event will cover:

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- Trans and non-binary people who face discrimination in the workplace: protections and remedies;
- Anti-trans beliefs in the workplace;
- Future of legislation/development in these areas: biological sex in Equality Act 2010 and separate legislation for non-binary people.
- Q&As.



# Trans and non-binary people who face discrimination in the workplace: protections and remedies



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# Equality Act 2010

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- The Equality Act 2010 (“EqA 2010”) prohibits **direct discrimination, indirect discrimination, harassment and victimisation** of people with certain protected characteristics.
- Summary:
  - **Gender reassignment** is a protected characteristic (s.7 EqA 2010).
  - Gender reassignment refers to people who are **proposing to undergo, are undergoing or have undergone a process** (or part of a process) for the purpose of **reassigning the person's sex** by changing **physiological or other** attributes of sex.
  - This definition covers a **wide range of gender identities**, such as gender fluid and non-binary.
  - A person need *not* have had gender affirming surgery or other medical care to fall within the definition.



# Meaning of Gender Reassignment

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- So what does ‘gender reassignment’ mean in practice?
- The Employment Tribunal in *Taylor v Jaguar Land Rover* 1304471/2018 (judgment handed down on 14 September 2020) made it clear that ‘gender reassignment’ under s. 7 EqA 2010 covers a broad range of gender identities:

*“178. We thought it was very clear that Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum. That would be so, whether they described themselves as “non-binary” i.e. not at point A or point Z, “gender fluid” i.e. at different places between point A and point Z at different times, or “transitioning” i.e. moving from point A, but not necessarily ending at point Z, where A and Z are biological sex. We concluded that it was beyond any doubt that somebody in the situation of the Claimant was (and is) protected by the legislation because they are on that spectrum and they are on a journey which will not be the same in any two cases. It will end up where it does. The wording of section 7(1) accommodates that interpretation without any violence to the statutory language. Consequently, there is jurisdiction to hear the gender reassignment claim.”*



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- The Employment Tribunal in *Taylor v Jaguar Land Rover* relied on **Hansard** passages when coming to this conclusion. One such passage was:  
*“At what point [proposing to undergo] amounts to “considering undergoing” a gender reassignment is pretty unclear. However, “proposing” suggests a more definite decision point, at which the person’s protected characteristic would immediately come into being. There are lots of ways in which that can be manifested – for instance, by making their intention known. Even if they do not take a single further step, they will be protected straight away. Alternatively, a person might start to dress, or behave, like someone who is changing their gender or is living in an identity of the opposite sex. That too, would mean they were protected. If an employer is notified of that proposal, they will have a clear obligation not to discriminate against them.”*



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- In addition, the Employment Tribunal in *Taylor v Jaguar Land Rover* concluded that a person does not have to have had gender affirming surgery to fall under s. 7 EqA:

*“174. ...Be that as it may, in terms of gender-reassignment, the intention was to make it clear that a person need not intend to have surgery, or indeed ever have surgery, in order to identify as a different gender to their birth sex. We consider that the words we have highlighted in paragraph 173 make it clear, and beyond dispute, that gender reassignment need never be a medical process.”*

- The highlighted text in para 173:

*“The remainder of section 7(1) “”is undergoing, or has undergone, a process (or part of a process).... by changing physiological or other attributes of sex”*





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The Employment Tribunal's interpretation of the protected characteristic of gender reassignment in *Taylor v Jaguar Land Rover* was upheld by the High Court (Chamberlain J) in *R (AA and others) v National Health Service Commissioning Board* [2023] EWCA Civ 902.



## Equality Act 2010: Prohibited Conduct

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- **Direct discrimination** (s. 13): A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
  - Includes less favourable treatment by perception and by association.
- **Schedule 9** – occupational requirements – exception to what would otherwise be unlawful direct discrimination; applies where employer can show that requirement not to be a trans person is crucial part of a particular post and that applying the requirement was a proportionate means of achieving a legitimate aim.
- **Indirect discrimination** (s. 19): A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (“PCP”) which is discriminatory in relation to a relevant protected characteristic of B’s. A PCP is discriminatory if:
  - A applies, or would apply, it to persons with whom B does not share the characteristic,
  - it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - it puts, or would put, B at that disadvantage, and
  - A cannot show it to be a proportionate means of achieving a legitimate aim.



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- **Cases of absence from work (s.16)::** A discriminates against B if, in relation to an absence of B's that is because of gender reassignment, A treats B less favourably than A would treat B if (a) B's absence was because of sickness or injury, or (b) B's absence was for some other reason and it is not reasonable for B to be treated less favourably.
  - **Harassment (s. 26):** A person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Was it reasonable for the conduct to have that effect, taking into account the perception of B and the other circumstances of the case?
  - **Victimisation (s. 27):** A person (A) victimises another person (B) if A subjects B to a detriment because (a) B brings proceedings, gives evidence or does anything in connection with EqA, or makes an allegation that A/someone else has contravened EqA (referred to as 'a protected act'), or (b) A believes that B has done, or may do, a protected act.
  - Specific protection for cases involving absences from work relating to gender reassignment.



# Equality Act 2010: Employer's Liability

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- As per **s. 109 EqA 2010**, an employer may be liable for the acts of their employees:
  - (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer
  - (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
  - (3) It does not matter whether that the thing is done with the employer's or principal's knowledge or approval
  - (4) ... it is a defence for B [the employer] to show that B took all reasonable steps to prevent A
    - (a) from doing that thing, or
    - (b) from doing anything of that description.



# What remedies may be available?

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- **How to complain?** Informal grievance, formal grievance, ACAS Early Conciliation, Employment Tribunal claim.
- If bringing Employment Tribunal claim, can seek **declaration, compensation and/or recommendations**. Be aware of strict time limits.
- Compensation:
  - **Injury to feelings:**
    - ‘Vento bands’ for claims presented on or after 6 April 2023: £1,100 to £11,200 (less serious cases), £11,200 to £33,700 (cases that do not merit an award in the upper band), £33,700 to £56,200 (the most serious cases), and over £56,200 (the most exceptional cases).
  - **Psychiatric injury**
  - **Financial loss:**
    - Loss of earnings
    - Pension loss
  - **Uplift** for employer’s unreasonable failure to comply with ACAS Code of Practice on disciplinary and grievance procedures (up to 25%). Award can be reduced by up to 25% for employee’s unreasonable failure to follow Code.
  - **Interest**



# Anti-trans beliefs in the workplace



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# Equality Act 2010: Section 10

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- Section 10 of EqA 2010 provides:

“(1) **Religion** means any religion and a reference to religion includes a reference to a lack of religion.

(2) **Belief** means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

(3) In relation to the protected characteristic of religion or belief—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.”



## Belief: *Grainger* Criteria

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*Grainger plc v Nicholson* [2010] IRLR 4 (EAT) set out 5 criteria that must be followed (now within the Equality Act 2010 Explanatory Notes):

- (i) The belief must be **genuinely held**.
- (ii) It must be a belief and **not an opinion or viewpoint** based on the present state of information available.
- (iii) It must be a belief as to **a weighty and substantial aspect of human life** and behaviour.
- (iv) It must attain a certain level of **cogency, seriousness, cohesion and importance**.
- (v) It must be **worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others**.





# Grainger V as the focus of litigation

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- The Employment Appeal Tribunal in *Forstater v CDG Europe* UKEAT/0105/20/JOJ, handed down on 10 June 2021, concluded that the gender critical views (“sex is immutable”) are a protected belief under s. 10 EqA. Choudhury P.’s (as he then was) rationale turned on Grainger V:

*“A philosophical belief would only be excluded for failing to satisfy Grainger V if it was the kind of belief the expression of which would be akin to Nazism or totalitarianism and thereby liable to be excluded from the protection of rights under Articles 9 and 10 of the European Convention of Human Rights (ECHR) by virtue of Article 17 thereof. The Claimant’s gender-critical beliefs, which were widely shared, and which did not seek to destroy the rights of trans persons, clearly did not fall into that category. The Claimant’s belief, whilst offensive to some, and notwithstanding its potential to result in the harassment of trans persons in some circumstances, fell within the protection under Article 9(1), ECHR and therefore within s.10, EqA.” [case summary]*

- **Interplay between Convention articles 9, 10, 17.**
- **Also in many trans related cases, Article 8.**



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- However, a manifestation of a ‘Gender Critical’ belief is **subject to EqA prohibitions. This must be a starting point to protect trans/non-binary people in the workplace:**

*“118...b. This judgment does not mean that those with gender-critical beliefs can ‘misgender’ trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment that apply to everyone else. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of EqA will be for a tribunal to determine in a given case.”*

*“c. This judgment does not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would continue to be liable (subject to any defence under s.109(4), EqA) for acts of harassment and discrimination against trans persons committed in the course of employment.*

*d. This judgment does not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would be liable (subject to any defence under s.109(4), EqA) for acts of harassment and discrimination against trans persons committed in the course of employment.”*



## Expression/manifestation – 2 categories? (Forstater cont.)

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“66. It is clear from these judgments that, in assessing whether a person’s rights under Article 9 or Article 10 have been infringed, there is a preliminary question as to whether the person qualifies for protection at all, or, to use the ECtHR’s terminology, as to whether the person “fall[s] outside the scope of protection of Article 10 of the Convention by virtue of Article 17”: *Lilliendahl* at para 39. Where the expression amounts to the “gravest form of hate speech” then the protection would not apply, as Article 17 would operate to deprive the person of the protection that they seek to invoke.

However, if the expression does not fall into that first category, then the question is whether the steps taken by the State to restrict such expression are justified within the meaning of Article 10(2). Thus even comments which are “serious, severely hurtful and prejudicial”, or which promote intolerance and detestation of homosexuals would not fall outside the scope of Article 10 altogether. However, that does not mean that the individual making such comments has free rein to make them in any circumstance at all. The individual’s freedom to express their views is limited to the extent provided for by Article 10(2) and it will then be for the Court to assess whether any limitation imposed by the State is justified.



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**So once a belief is protected, then what?**



## *Higgs v Farmor's School and another* [2023] EAT 89

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- The claimant worked as a pastoral administrator and work experience manager in a secondary school. The school received complaints after she posted comments on Facebook about relationships education in primary schools so she was suspended, an investigation took place and she was dismissed. The claimant issued proceedings in the ET claiming direct discrimination or harassment due her protected beliefs but the ET concluded the respondent's actions had been because the claimant's posts could be reasonably considered to show she held homophobic and transphobic views. Accordingly their actions were not related to the protected beliefs.
- The President, Mrs Justice Eady, allowed the appeal as the ET had failed to engage with the question identified in *Eweida* - *i.e.* **whether there was a sufficiently close or direct nexus between the claimant's protected beliefs and her posts.**
- Had it done so, it would have concluded there was a close or direct nexus between the claimant's posts and her protected beliefs. As the ET had erred in its approach to the determination of the "reason why" question in this case, the matter was remitted for re-hearing on this issue. At [94] The President sets out some guidance on the approach the ET should adopt.



## The beliefs in *Higgs v Farmor's School*

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“79. This case concerns claims of direct discrimination because of religion or belief, and of harassment relating to religion or belief (see sections 13 and 26 EqA). The ET had accepted that the claimant held (or did not hold) beliefs that fell within the protection of the EqA, as follows:

- (a) a lack of belief in “gender fluidity”;
- (b) a lack of belief that someone could change their biological sex/gender;
- (c) a belief in marriage as a divinely instituted life-long union between one man and one woman;
- (d) a lack of belief in “same sex marriage” (as contrary to Biblical teaching);
- (e) an opposition to sex and/or relationship education for primary school children;
- (f) a belief that when unbiblical ideas or ideologies are promoted, she should publicly witness to Biblical truth;
- (g) a belief in the literal truth of the Bible (in particular Genesis 1v 27).

It was the claimant’s contention that the respondent’s actions against her (her suspension; the disciplinary process; her dismissal; the refusal of her appeal) were all either because of, or related to, this protected characteristic. The key question for the ET, therefore, was why, in each of the respects complained of, the respondent had acted as it did: was that because of, or related to, the claimant’s protected characteristic of belief?”



## Guidance from Eady P in *Higgs v Farmor's School*

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“91. It will, however, be for the ET on the remitted hearing to determine, recognising the essential nature of the claimant’s rights to freedom of belief and freedom of expression: (1) whether the measures adopted by the respondent were **prescribed by law**; and, if so, (2) whether those measures were necessary **in pursuit of the protection of the rights, freedoms or reputation of others**. Undertaking that analysis will enable the ET to determine whether the respondent’s actions were because of, or related to, the manifestation of the claimant’s protected beliefs, or were in fact due to a justified objection to the manner of that manifestation, in respect of which there was a clear legal basis for the claimant’s rights to freedom of belief and expression to be limited to the extent necessary for the legitimate protection of the rights of others.”

- This would suggest that for a direct belief discrimination case, the direct discrimination may still be justified (normally a remit for indirect discrimination in E&W law) if the restriction is **prescribed by law and in pursuit of protections of rights** etc. of others as per the derogation in Art 9(2) and Art 10(2) respectively.
- There must be a **balancing exercise** done with **competing rights** when deciding whether the restriction was justified (para 84).



## Guiding principles from Eady P in *Higgs v Farmor's School*

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“94. All that said, I can see that, within the employment context, it may be helpful for there to at least be some mutual understanding of the basic principles that will underpin the approach adopted when assessing the proportionality of any interference with rights to freedom of religion and belief and of freedom of expression.

(1) First, the foundational nature of the rights must be recognised: the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.

(2) Second, those rights are, however, qualified. The manifestation of belief, and free expression, will be protected but not where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedoms of others. Where such limitation or restriction is objectively justified given the manner of the manifestation or expression, that is not, properly understood, action taken because of, or relating to, the exercise of the rights in question but is by reason of the objectionable manner of the manifestation or expression.

(3) Whether a limitation or restriction is objectively justified will always be context-specific. The fact that the issue arises within a relationship of employment will be relevant, but different considerations will inevitably arise, depending on the nature of that employment...





## Guiding principles from Eady P in *Higgs v Farmor's School*

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(4) It will always be necessary to ask (per **Bank Mellat**): (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question; (ii) whether the limitation is rationally connected to that objective; (iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question; and (iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.

(5) In answering those questions, within the context of a relationship of employment, the considerations identified by the intervenor are likely to be relevant, such that regard should be had to: (i) the **content** of the manifestation; (ii) the **tone** used; (iii) the **extent** of the manifestation; (iv) the worker's understanding of the likely **audience**; (v) the extent and nature of the **intrusion on the rights of others**, and any **consequential impact on the employer's ability to run its business**; (vi) whether the worker has made clear that the views **expressed are personal**, or whether they might be seen as representing the views of the employer, and whether that might present a **reputational risk**; (vii) whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon; (viii) the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; (ix) whether the limitation imposed is the least intrusive measure open to the employer.



## Going forwards...

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- Employers should think **very carefully and not act hastily** when a ‘gender critical’ employee comes up. If acting hastily, can fall under the scope of gender critical cases that have been won by those claimants.
- **What is the actual scope of the belief?** Is it merely sex is immutable? Or is it something more? Important the ET gets it right as a preliminary issue.
- If the employer has a **harassment policy** which says e.g. trans people must not be harassed, and a gender critical person harasses a trans person at work, the trans person is entitled to safety. If a gender critical person says this is a manifestation of their belief (e.g. not using trans person’s correct pronouns) this is not likely to be protected and any direct discrimination there may be against the gender critical person could well be justified as per Convention law.
- For Claimants, if you are a trans/non-binary person who has been directly affected by anti-trans views being raised in the workplace, you may have a direct/indirect/victimisation claim.
- If the views are raised outside of the workplace and not to you, *think more carefully about whether to bring a claim*, as it is not directly affecting you.



## Other 'gender critical' cases...

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- *Forstater v CGD Europe and others* UKEAT/0105/20
- *Bailey v Stonewall Equality Ltd and others*: 2202172/202
- *Mackereth v Department for Work and Pensions* [2022] EAT 99
- *Higgs v Farmor's School and another* [2023] EAT 89.
- *Joanna Phoenix -v- The Open University v and others*: 3322700/2021 and 3323841/2021
- *Ms D Fahmy v Arts Council England*: 6000042/2022



# Future of legislation/development in these areas: biological sex in Equality Act 2010 and separate legislation for non-binary people



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## Equality Act 2010 changes?

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- On **21 February 2023**, the Minister for Women and Equalities asked for Equality and Human Rights Commission's (**EHRC**) advice on the definition of the protected characteristic of sex in the Equality Act 2010. The change by the equalities secretary would redefine sex in the 2010 act to specifically refer to legal protections for "**biological sex**" – the sex assigned at birth.
- **April 2023**: The EHRC's initial response to this request is set out in a letter sent to the Minister on 3 April 2023.
- Kemi Badenoch is considering changing the Equality Act to allow organisations to bar trans women from single-sex spaces and events, including hospital wards and sports.
- The 'equalities watchdog' EHRC said the new definition would make it possible to exclude trans people from same-sex spaces even if they hold a gender recognition certificate (**GRC**).



## However...

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- **Defining “sex” in this way could significantly erode the legal rights of trans people.** A petition stating that “The proposed change would remove a legal protection for trans people and encourage discrimination. We ask the Government to refuse this change to the Equality Act 2010” has received over 130,000 signatures and will now be given a date for parliamentary debate. It can also be argued that the proposal would overturn some of the purposes of the GRA.
- **If having a GRC would not affect someone’s sex as viewed by the law, it is challenging to see what the purpose of it would be** - and how that would marry up with the human rights requirement which led to the birth of the GRA.
- The letter even argues that human rights law may require “sex” to be defined as “biological sex”, **although the basis for this is unclear.** It is worth bearing in mind that the Equality Act was drafted after the GRA, and could have specified that “sex” should mean “biological sex” had that been parliament’s intention.
- The letter’s recommendation is also at odds with **recent guidance from Scotland, where a 2022 judicial review rejected the proposal that “sex” should mean “biological sex” under the Equality Act, and held that trans people with a GRC are to be treated as their legal (affirmed) sex.** Although this Scottish case does not bind English and Welsh courts, we might expect it to be treated as persuasive in English and Welsh cases...



# In the works: Supreme Court to hear *For Women Scotland Ltd v Lord Advocate* [2022] SC 150



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 37  
P578/22

Lord Justice Clerk  
Lord Malcolm  
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the reclaiming motion

by

FOR WOMEN SCOTLAND LIMITED

Petitioner and reclaimer

against

THE SCOTTISH MINISTERS

Respondents

**Petitioner and reclaimer:** O'Neill KC; Balfour & Manson  
**Respondents:** Crawford KC, Irvine; SGLD

1 November 2023

[1] Section 1 of the Gender Representation on Public Boards (Scotland) Act 2018

P578/22 Pet: For Women Scotland Ltd For J/R  
Balfour + Manson LLP Scottish Government

Edinburgh 16 February 2024

Lord Justice Clerk  
Lord Malcolm  
Lord Pentland

Act: O'Neill KC

Alt: Crawford KC and Irvine

The Lords, having heard counsel on the single bills, grant the applicant permission to appeal to the United Kingdom Supreme Court against the decision of the Inner House of 1 November 2023 and decern.

Note of Reasons

The applicant seeks permission to appeal to the UKSC against this court's decision of 1 November 2023. Eight grounds of appeal are stated in some detail. We need not address these individually since we are satisfied that, as the respondent concedes, the issue of the correct interpretation of, and interplay between, the Gender Recognition Act 2004 and the Equality Act 2010, in particular in relation to the use of the term "woman" and as to the consequence of the grant of a GRC under the 2004 Act, raise issues which involve arguable points of law of general public importance which ought to be considered by the UKSC at this time. On that basis we are satisfied that leave should be granted.



# Non-binary legislation?

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- By the time this Women's Select Committee Report emerged in December 2021, there had already been a number of petitions calling for non-binary people to be legally recognised, with one petition attaining over **140,000 signatures calling for non-binary legal recognition**, and eventually being discussed before Parliament in May 2022. Yet nothing has been done by the government.
- At present, in the UK, non-binary people are not recognised by legislation. This is despite the 2021 Census which recorded more than 30,000 non-binary people in the UK. There will be substantially more non-binary people who either don't declare or who were forced to choose a binary option (e.g. trans man/trans woman) when they are also non-binary (50% of trans people also identify as non-binary).
- Current government has no plans to recognise 'non-binary' or 'gender fluid' identity in legislation. Various campaign groups are lobbying to make this happen.
- TBC whether protection is written into legislation or whether it needs to come up through the courts/tribunals in cases such as *Taylor v Jaguar Land Rover* and *R (AA and others) v National Health Service Commissioning Board* [2023] EWCA Civ 902.





# Thank you

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## Q&A

