Cambridge Law Journal, page 1 of 29 © The Author(s), 2024. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge.
doi:10.1017/S0008197324000461

TRANS PARENTHOOD IN THE UK: THE "UNANSWERED QUESTIONS" OF THE *MCCONNELL* LITIGATION

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ABSTRACT. This article considers three "unanswered questions" raised by *R. (McConnell) v Registrar General for England and Wales (AIRE Centre Intervening)* [2020] EWCA Civ. 559, which held that a trans man (with a Gender Recognition Certificate) who gave birth must be registered as "mother" on his child's birth certificate. This article considers these questions to clearly situate *McConnell* within the context of the UK's legal regimes concerning access to fertility treatment, gender recognition and legal parenthood in cases involving assisted reproduction. The article argues that clearly establishing the current legal position will provide the proper context to facilitate any subsequent legal reforms.

KEYWORDS: parentage, gender identity, Gender Recognition Act 2004, assisted reproduction, Human Fertilisation and Embryology Act 1990, motherhood, family law.

I. INTRODUCTION

This article explores the unanswered questions of the high-profile litigation in *R. (McConnell) v Registrar General for England and Wales (AIRE Centre Intervening)* ("*McConnell*").[1] Centring on the experiences of a trans man, Freddy McConnell, who gave birth after he had obtained a Gender Recognition Certificate ("GRC"), the case has precipitated wider academic and political conversations about the nature of motherhood, fatherhood and parentage in England and Wales and beyond.

*Senior Lecturer, University of Bristol. This work was supported by United Kingdom Research and Innovation (UKRI) (Grant No. MR/W011654/1). No data were created during this study. The authors are indebted to the following colleagues for their generous advice and comments while drafting this article: Sheelagh McGuinness, Des Ryan, Robert Greally, Matthew Burton, Julie McCandless, Kirsty Horsey, Claire Fenton-Glynn, Sally Sheldon, Katherine Wade, Meghan Campbell and Lois Bibbings. The authors are also grateful for comments received at the Society of Legal Scholars Annual Conference 2023 (Oxford Brookes University), Queering Private Law Workshop (UCL, 2023) and the International Society of Family Law Conference (University of Antwerp, 2023). The authors benefitted from the research assistance of Samiya Saif Ullah. All errors are the responsibility of the authors. Peter Dunne acted as the Government's Expert in the McConnell litigation.
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[1] [2020] EWCA Civ 559, [2021] Fam. 77.

In *McConnell*, the courts determined that, irrespective of their legal sex, trans individuals must be registered as parents according to their birth-assigned sex. Section 12 of the Gender Recognition Act 2004 (GRA 2004) operates as both a retrospective and prospective exception to a GRC, so that all people who give birth, including trans people who are legally male, must be recorded as the "mother".[2] A trans woman who provides sperm must also be registered as the "father" of her child. Although assigning Freddy McConnell the status of "mother" did engage his rights under Article 8 of the European Convention on Human Rights (ECHR), the judgments held that any interference was justified by the need for a coherent system of birth registration and the right of children to know their origins.[3]

Since 2020, the judgments in *McConnell* – both of Sir Andrew McFarlane P. ("the President") at first instance[4] and the decision on appeal – have generated a considerable body of scholarly literature,[5] provoked an intense policy debate,[6] and encouraged the Law Commission of England and Wales and the Scottish Law Commission to alter their approach to birth registration in their recent report on surrogacy.[7]

Yet, an under-explored aspect of the *McConnell* litigation is the broader questions about trans reproduction, which arise but were not answered by the courts. From the decision of the President, it is possible to identify three additional questions, which cut to the heart of whether and how trans people bear and beget children within the legal regime. Although none of these questions were required to be decided in *McConnell*, their resolution may ultimately have a more significant, long-term impact on the reproductive rights of trans people in the UK.[8]

The three questions are, first, is it currently unlawful under UK law to provide licensed assisted reproductive services to help a trans man with a GRC become pregnant? Second, should section 12 of the GRA 2004, as interpreted in *McConnell*, apply to donor-assisted reproduction (DAR) under the Human Fertilisation and Embryology Act 2008 (HFEA 2008), or should trans people be registered as parents in accordance with their

[2] Ibid., at [28]–[43] (Lord Burnett C.J., King and Singh L.JJ.).
[3] Ibid., at [52]–[82] (Lord Burnett C.J., King and Singh L.JJ.).
[4] *R. (TT) v Registrar General for England and Wales (AIRE Centre intervening)* [2019] EWHC (Fam) 2384, [2020] Fam. 45.
[5] See e.g. A. Brown, "Trans (Legal) Parenthood and the Gender of Legal Parenthood" (2024) 44 Legal Studies 168; L. Davis, "The Evolution of Birth Registration in England and Wales and its Place in Contemporary Law and Society" (2024) 87 M.L.R. 317; K. Horsey and E. Jackson, "The Human Fertilisation and Embryology Act 1990 and Non-Traditional Families" (2023) 86 M.L.R. 1472.
[6] See e.g: HC Deb. vol. 690 cols. 51–61 (1 March 2021); HL Deb. vol. 810 cols. 924–68 (25 February 2021); HL Deb. vol. 810 cols. 635–91 (22 February 2021).
[7] Law Commission of England and Wales and Scottish Law Commission, "Building Families through Surrogacy: A New Law: Volume II: Full Report" (Law Com. No. 411, Scot. Law Com. No. 262, 2023), [4.244]–[4.268].
[8] The three questions concern UK-wide legislation and thus have an impact on trans family law beyond England and Wales.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

legal sex when their female partner uses donor sperm to conceive? Finally, does a trans man commit fraud if he applies for a GRC where he intends to subsequently undergo fertility treatment to carry a child? These questions can all be identified, either explicitly or implicitly, from the judgments in *McConnell*, yet their answers are not substantively considered by either the President or the Court of Appeal.

This article sets out to explore, and to resolve, these three "unanswered questions". Analysing each question within the existing statutory, case law and socio-political context, the article seeks not simply to identify the current legal requirements, but to assess the merits of that legal position, to ask what the law should be, and to reflect upon the need for any future reforms. Ultimately, the article argues that, despite textual barriers, trans men with GRCs can access medical help to become pregnant and that an intention to subsequently carry a child should not bar trans men from applying for legal gender recognition (LGR). The article also concludes that, for intellectual and biological coherence, trans people who have GRCs should be registered as parents according to their legal sex under the DAR provisions of the HFEA 2008.

At the outset – against a backdrop of growing tension around trans rights in the UK[9] – it is important to acknowledge that this article's proposed aims touch upon issues, which are complex and sensitive. For many people, these three unanswered questions are neither academic nor purely intellectual in nature. The resolution of these questions has the potential to significantly alter the provision of reproductive services for trans people, with profound consequences for service users, providers and regulators. Some stakeholders may find it preferable to leave the questions without a definitive answer, seeing room for manoeuvre and the possibility of discretion if the law remains ambiguous.

Yet, as the past ten years, and a growing body of case law, illustrate, there are real disadvantages where the law, particularly family law, is unclear concerning the rights of trans individuals. From marriage rules[10] to decision-making for children,[11] and from name change[12] to non-binary recognition,[13] domestic courts are increasingly being asked to decipher and determine the application of uncertain laws to disputes involving

[9] See e.g. *Scottish Ministers, Petitioners* [2023] CSOH 89, 2023 G.W.D. 48-398; *Fair Play for Women Ltd. v Registrar General for Scotland* [2022] CSIH 7, 2022 S.C. 199; Letter from K. Falkner to K. Badenoch (3 April 2023), available at https://dev.equalityhumanrights.com/sites/default/files/2023/letter-to-mfwe-definition-of-sex-in-ea-210-3-april-2023_0.pdf (last accessed 12 June 2024).

[10] *P v P (Transgender Applicant for Declaration of Valid Marriage)* [2019] EWHC (Fam) 3105, [2020] 1 F.L.R. 807.

[11] *Bell and another v Tavistock and Portman NHS Foundation Trust (University College London Hospitals NHS Foundation Trust and others intervening)* [2021] EWCA Civ 1363, [2022] 1 All E.R. 416; *Re S (Inherent Jurisdiction: Transgender Surgery Abroad)* [2023] EWHC (Fam) 347, [2023] 4 W.L.R. 25.

[12] *Re W, F, C and D (minors) (name changes disclosing gender reassignment and other matters)* [2020] EWHC 279 (Q.B.).

[13] *R. (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] A.C. 559.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

gender identity and gender expression. Rather than allowing for nuance or common-sense discretion, ambiguity in the law has only increased public confusion, encouraged contentious litigation, and contributed to a political environment which external observers have described as "toxic".[14] Irrespective of one's normative position on how the law *should* treat trans people, there is merit in having greater understanding about what the law *does* currently require. Indeed, even for advocates of reform, progressive or otherwise, there is a need to understand what the law actually requires before it can be changed.

This article contributes to that work of mapping the application of law onto the lives and experiences of trans people. By exploring the three unanswered questions of *McConnell*, the article seeks to provide clarity on the legal framework through which trans individuals access assisted reproductive services and become legal parents. Following this introduction, the article proceeds in three substantive parts – each tackling one of the three questions and considering their answers against the wider statutory, case law and policy context in which trans reproduction takes place. Ultimately, in an area of growing legal and political contestation, the article aims to promote better understanding of the current law and to facilitate a more informed conversation about the rights of trans people in the UK.

II. Trans Men and Access to Treatment Services to Carry Children

The first "unanswered question" of *McConnell* relates to the right of trans men with GRCs to access treatment services for the purposes of carrying a child. In his judgment at first instance, McFarlane P. questioned whether the fertility treatment that Freddy McConnell received was lawful.[15]

The President's reasoning proceeded as follows:[16] in order to provide lawful fertility care, a clinic must operate within the terms of its licence. The Human Fertilisation and Embryology Act 1990 (HFEA 1990) limits the Human Fertilisation and Embryology Authority to granting licences for the provision of "treatment services" – a concept defined in section 2(1) as "medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting *women to carry children*" (emphasis added).[17] While clinics can offer treatment services

[14] Victor Madrigal-Borloz, "United Nations Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity: Country Visit to the United Kingdom of Great Britain and Northern Ireland (24 April–5 May 2023): End of Mission Statement", available at https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/statements/eom-statement-UK-IE-SOGI-2023-05-10.pdf (last accessed 12 June 2024).

[15] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [150]–[159]; see also T. Harrill, "Modern Families and Assisted Reproduction – Part 1" [2020] Fam. Law 1198.

[16] See ibid; see a summary of the reasoning in Horsey and Jackson, "Human Fertilisation and Embryology Act 1990", 1475–77.

[17] In addition, see sections 3(2) and 3ZA of the HFEA 1990, which also use explicitly gendered language.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

to both men and women, the intended purpose of any care must be for a *woman* to conceive. Where, as in *McConnell*, a clinic provides assistance for a legal man to conceive, this falls outside both the definition of "treatment services" and the terms of the clinic's licence. Such care would, therefore, appear to be unlawful under the HFEA 1990.

While clearly concerning the President,[18] the legality of providing fertility treatment for a trans man with a GRC to carry a child was not conclusively determined by either the High Court or the Court of Appeal.[19] The issue had not been fully argued nor was it central to whether Freddy McConnell was the mother, father or parent of his son. Furthermore, both McConnell and the Government appeared to agree that the HFEA 1990 should be interpreted to permit the provision of treatment services to assist trans men with GRCs to carry children, although they diverged on the reasons of how such inclusion should be achieved.[20]

Yet, it is not hard to understand the importance of this question nor why the President was concerned by the apparent lack of clarity in the law. First, the only reason that the dispute in *McConnell* arose was because Freddy McConnell was able to access reproductive treatments. Although it may be possible for some trans men with GRCs to conceive through home insemination or penile-vaginal intercourse, many individuals may require or prefer assisted reproduction to become pregnant. If the HFEA 1990 excludes trans men with GRCs from receiving treatment services, that could serve as an absolute bar on the ability of those men to bear children.

Second, a legal prohibition on trans men with GRCs obtaining such treatment services appears to conflict with the general purpose of the GRA 2004. A key innovation of that law was that, unlike statutes in other countries at the time, it allowed trans people to obtain LGR without compromising their capacity to reproduce.[21] The omission of a sterilisation requirement from the GRA 2004 would be substantially undermined if the HFEA 1990 simultaneously prevents trans men, once they obtain a GRC, from accessing medical assistance to carry children. Indeed, in such circumstances, the exclusion of trans men with GRCs could dissuade many individuals from applying for LGR because it would involve the "impossible" choice to forgo bearing children.[22]

[18] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [54], [124].
[19] *R. (McConnell) v Registrar General* [2020] EWCA Civ 559, at [25]–[26] (Lord Burnett C.J., King and Singh L.JJ.).
[20] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [127] (Sir Andrew McFarlane P.).
[21] *R. (McConnell) v Registrar General* [2020] EWCA Civ 559, at [46] (Lord Burnett C.J., King and Singh L.JJ.); see also House of Commons Women and Equalities Committee, *Transgender Equality: First Report of Session 2015–16* (HC 390, 14 January 2016), [30]; P. Dunne, "Ten Years of Gender Recognition in the United Kingdom: Still a 'Model for Reform'?" [2015] P.L. 530, 531–33.
[22] *A.P., Garçon and Nicot v France* [2017] ECHR 338, at [132].

A. The Position of Trans Men with GRCs under Section 2(1) of the HFEA 1990

The question therefore arises as to whether it is currently unlawful under the HFEA 1990 to provide treatment services to assist trans men with GRCs to carry children. The starting point must be the wording of section 2(1) of the HFEA 1990, which unambiguously defines "treatment services" to include only the provision of healthcare to assist *women* to carry children. Can trans men with GRCs be considered "women" for these purposes?

Under section 9(1) of the GRA 2004, where trans people obtain a GRC, their legal sex becomes "for all purposes" their acquired gender. Indeed, in recent years, senior courts in the UK have confirmed that trans individuals with a GRC have a legal sex, which is consistent with their acquired gender.[23] As such, prima facie, a trans man with a GRC is not a woman under UK law and he cannot avail of services which, like "treatment services", are reserved for women.

The GRA 2004 contains several exceptions to section 9(1) where, despite having a GRC, trans people will be treated as retaining their birth-assigned sex.[24] For example, *McConnell* is the leading authority on the operation of section 12, according to which LGR has no impact on the gendered designation of parental status. Yet, despite being introduced more than a decade after the HFEA 1990, there is no indication in the GRA 2004 that trans men with GRCs retain their birth-assigned sex when accessing treatment services for assisted reproduction. Similarly, although the framework of the HFEA 1990 was extensively reformed four years after the GRA 2004, the more recent HFEA 2008 does not explicitly provide access to "treatment services" to trans men with GRCs, nor does it extend the definition of "women" in section 2(1) to cover such men.

The Equality Act 2010 (EA 2010) also sets out several situations where people with a "gender reassignment" characteristic (including all trans men with GRCs) can be treated differently from individuals with the same legal sex,[25] such as accessing single-sex services or communal accommodations.[26] For example, under the EA 2010, a fertility clinic might lawfully be able to exclude trans men from an all-male ward even though they have a GRC. However, there is nothing in the EA 2010 which permits fertility clinics to treat such men as if they have their birth-assigned female sex when administering "treatment services". It is perhaps instructive that, in recent advice to the Minister for Women and Equalities, the Equality and Human Rights Commission (EHRC) advised

[23] See e.g. *Fair Play for Women v Registrar General* [2022] CSIH 7, at [65].
[24] See GRA 2004, ss. 12, 15, 16, 20.
[25] See e.g. Equality Act 2010, s. 195 (sport), sched. 9, para. 1 (occupational requirements), sched. 9, para. 4 (armed forces).
[26] Ibid., sched. 3, para. 28; sched. 23, para. 3.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

that trans men with GRCs are excluded from pregnancy non-discrimination protections under the EA 2010 precisely because those safeguards only apply to women.[27]

B. Interpreting Section 2(1) of the HFEA 1990 to Cover Trans Men with GRCs

At least on first reading of the statutes, it appears that UK law does currently make it unlawful to provide "treatment services" to assist trans men with GRCs to carry a child. Therefore, the question arises as to whether it is possible *or* necessary for courts to interpret section 2(1) of the HFEA 1990 as including such men. In this regard, there are four possible avenues for broadening the scope of "treatment services": (1) Interpretation Act 1978; (2) Equality Act 2010; (3) purposive interpretation of the HFEA 1990; and (4) section 3 of the Human Rights Act 1998.

1. Interpretation Act 1978

Under section 6(b) of the Interpretation Act 1978 (IA 1978), where a statute uses words, which "impor[t] the feminine gender", this should be read to "include the masculine" unless a "contrary intention" appears. Thus, rules intended to apply to all car drivers irrespective of sex must be interpreted to have general application even where Parliament uses words, such as "she" and "her", in the statute. In that context, where lawmakers were seeking to regulate the provision of reproductive care, one could argue that, for the purposes of section 2(1) of the HFEA 1990, the word "women" should be read to also cover any men who seek treatment services to carry a child.

Although, as noted below, in adopting the term "women" in section 2(1), it is not clear that Parliament consciously decided to exclude trans men with GRCs from obtaining "treatment services" (not least because the GRA was not passed until 2004), the legislative debates around the HFEA 1990 and the HFEA 2008 do suggest that lawmakers did not intend to use the term "women" in a general or gender-neutral manner.[28] As only women were understood to become pregnant,[29] Parliament focused on women in their choice of statutory language. While it may be possible or necessary to expand the scope of section 2(1) for human rights reasons (discussed below), this result cannot be achieved relying solely upon the IA 1978.

[27] Letter from K. Falkner to K. Badenoch.

[28] See Hansard Debates on the Human Fertilisation and Embryology Bill, Find Debates (Hansard website), https://hansard.parliament.uk/search/Debates?endDate=1990-12-31&searchTerm=Human+Fertilisation+and+Embryology+&sortOrder=1&startDate=1989-01-01&page=1 (last accessed 13 June 2024).

[29] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [107] (Sir Andrew McFarlane P.).

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

2. Equality Act 2010

Before McFarlane P., the Government argued that section 2(1) had to be read together with the EA 2010 and that preventing trans men with GRCs from obtaining "treatment services" to become pregnant would constitute unlawful discrimination on the basis of "gender reassignment".[30] However, while there is an arguable case that excluding trans men with GRCs violates the ECHR,[31] it is more difficult to sustain a discrimination claim under the EA 2010.

Part 3 of the EA 2010 sets out a general framework whereby it is unlawful for service providers to discriminate based upon the nine protected characteristics in sections 4–12. For example, an agency providing adoption and fostering services cannot discriminate on the basis of sexual orientation in recruiting prospective foster carers.[32] In the *McConnell* litigation, the Government claimed that omitting trans men with GRCs, such as Freddy McConnell, from section 2(1) of the HFEA 1990 would result in an illegal refusal of treatment services because of the gender reassignment characteristic of men who want to carry children.

Yet, the Government's argument about the EA 2010 appears to misstate the nature of the distinction being drawn in section 2(1). Part 3 applies to generally available services, which Parliament has not reserved to groups with specific characteristics. Through section 2(1), lawmakers have expressly limited the provision of "treatment services" to assist *women* to carry a child. In the context of section 2(1), trans men with GRCs are not being excluded because of their gender reassignment characteristic. Rather, like any other person who requests services to assist a legal male to become pregnant, they are being denied treatment because the person who is intended to conceive the child is not a woman as required by section 2(1). It is on the basis of sex (of the intended pregnant person), rather than gender reassignment (of the trans man), that trans men with GRCs are excluded from treatment services which would enable them to become pregnant. This is a sex-based difference which: (a) Parliament itself has created through section 2(1); and (b) the EA 2010 neither repealed nor amended to include trans men with GRCs.

In the context of "treatment services" under section 2(1), a claim for gender reassignment discrimination would require trans men to show that they are similarly situated to a non-trans female comparator and that they are being treated less favourably than that comparator because they are trans. However, according to the HFEA 1990, the fact that the man has a GRC, and consequently has a male legal sex, means that he is in a

[30] Ibid., at [158].

[31] Horsey and Jackson, "Human Fertilisation and Embryology Act 1990", 1476–77 (suggesting that there may also be a violation of Article 14 of the ECHR read with Article 8 of the ECHR).

[32] *R. (on the application of Cornerstone (North East) Adoption and Fostering Service Ltd.) v HM Chief Inspector of Education, Children's Services and Skills (Ofsted)* [2021] EWCA Civ 1390, [2022] 2 All E.R. 516.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

fundamentally different legal position to people with a female legal sex. While section 12 of the GRA 2004 operates to maintain or assign parental status as father or mother according to birth-assigned sex, there is nothing in that provision to suggest that it overrides the existence of a GRC in terms of deciding whether a person can access treatment services under the HFEA 1990. As such, section 12 cannot have the effect of placing trans men with GRCs in a similar position as non-trans women for the purposes of making a claim under the EA 2010.

Where a trans man has not yet obtained a GRC, and retains his female legal sex, it would be unlawful discrimination (on the basis of gender reassignment) to refuse treatment services merely because that man had undertaken a medical or social transition. However, where, as in *McConnell*, a trans man has already obtained a male legal sex, the law appears to both permit and require fertility clinics to withhold treatment to assist that man to carry a child, and it does not seem that the EA 2010 offers any applicable remedy.

3. Purposive interpretation of the HFEA 1990

The Government also argued that there was a public policy justification for adopting a purposive interpretation to extend the scope of "women" in section 2(1) of the HFEA 1990 to include trans men with GRCs who want to carry a child.[33] Where the provision of treatment services to such men falls outside the framework of the HFEA 1990 and the HFEA 2008, this would mean, the Government warned, that a donor would be the legal father of any resulting child, with a possible financial liability to maintain that child over an extended period of time.[34]

At the outset, it is important to acknowledge that the potential (unintended) status of a donor as the father of a child where trans men with GRCs receive treatment services would be an important lacuna in the statutory scheme. If section 2(1) does currently exclude trans men with GRCs, consideration for the donor should, along with other factors, encourage Parliament to adopt swift reforms to fill such a legislative gap. However, detriment to the donor cannot, by itself, change the meaning of section 2(1) nor can it justify the courts going beyond the normal rules of statutory interpretation. If a donor does suffer a loss because a fertility clinic has handled his sperm outside the terms of the clinic's licence, the appropriate remedy lies in an action in tort or contract against the clinic rather than in the courts overstepping their powers of purposive interpretation.[35]

[33] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [122], [156] (Sir Andrew McFarlane P.).
[34] See e.g. Child Support Act 1991; Children Act 1989, sched. 1.
[35] However, cf. potential problems, which a donor might encounter in bringing an action where the loss experienced is the cost of raising a healthy child: *McFarlane and Another v Tayside Health Board* [2000] 2 A.C. 59 (H.L.); *ARB v IVF Hammersmith* [2018] EWCA Civ 2803, [2020] Q.B. 93.

What does the "purposive" interpretation of legislation permit, and can section 2(1) of the HFEA 1990 be purposively interpreted to include trans men with GRCs who want to carry a child?

In *R. (Quintavalle) v Secretary of State for Health*,[36] the House of Lords adopted a purposive approach to the concept of embryos under the HFEA 1990 to include embryos, which were created through processes not foreseen in 1990. According to the majority, Parliament had wanted to establish a comprehensive regulatory framework for the use and creation of embryos, and it was legitimate for the courts to interpret the law so as to reflect developments in an area that lawmakers had clearly intended to cover.[37] Therefore, one might similarly argue that, through the HFEA 1990, Parliament had wanted to establish a comprehensive scheme to regulate assisted reproduction and, by including trans men with GRCs in the concept of "treatment services", the courts would merely be acknowledging developments in reproductive care that Parliament had undoubtedly intended to cover.

There are, however, at least two important and relevant limitations. First, unlike under section 3 of the Human Rights Act 1998 (HRA 1998) (discussed below), a purposive reading does not permit judges to expand what are clearly more "restrictive or circumscribed" statutory terms.[38] For example, in *Fitzpatrick v Sterling Housing Association Ltd*,[39] while the House of Lords was willing to use a purposive interpretation to expand the undefined term "family" to include same-sex couples in paragraph 3 of Schedule 1 to the Rent Act 1977 (RA 1977), their Lordships refused to come to a similar conclusion for the term "spouse" which, it was held, only applied to different-sex relationships.[40] A purposive interpretation did not entitle judges to expand the relevant legal sex, which a person would have to possess in order to be "treated as the spouse of the original tenant" (i.e. only a man could be living with a female original tenant as her husband, and only a woman could be living with a male original tenant as his wife).[41] For section 2(1) of the HFEA 1990, courts may be similarly reluctant to use a purposive interpretation to expand the scope of "women" (i.e. the relevant legal sex) to allow trans men with GRCs to access treatment services to carry children.

[36] [2003] UKHL 13, [2003] 2 A.C. 687.
[37] See e.g. ibid., at [15]–[19] (Lord Bingham), [37]–[54] (Lord Millet).
[38] *Royal College of Nursing of the United Kingdom v Department of Health and Social* Security [1981] A.C. 800, 822 (H.L.) (Lord Wilberforce in dissent).
[39] [2001] 1 A.C. 27 (H.L.).
[40] Ibid.
[41] Ibid., at 34, 43, 47, 48. At the time, paragraph 2(2) of Schedule 1 to the RA 1977 provided that "a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant".

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Second, although the courts can purposively interpret a statute to reflect subsequent developments in an area firmly within the contemplation of Parliament, they cannot "fill gaps" or speculate as to how lawmakers would have answered a question to which Parliament never turned its attention.[42] This is particularly relevant in the context of section 2(1) because, although there is no evidence that Parliament in either 1990 or 2008 explicitly intended to exclude trans men with GRCs, there is a strong argument that such men were simply not in the contemplation of lawmakers.[43] As such, the omission of trans men with GRCs from section 2(1) is a gap in the statutory framework which courts, at least using a purposive interpretation, are not competent to fill.

In conclusion, the Government's public policy arguments in relation to the status of donors are insufficient to justify purposively interpreting section 2(1) to cover trans men with GRCs who wish to carry a child.

4. Section 3 of the Human Rights Act 1998

The final potential mechanism for reading section 2(1) to cover trans men with GRCs is the interpretative obligation under section 3 of the HRA 1998. This provision requires courts, "so far as is possible to do so", to interpret statutes and secondary legislation in a manner which is compatible with the ECHR. The interpretative duty under section 3 of the HRA 1998 is a "strong obligation that requires courts to go to considerable lengths to interpret legislation compatibly with the Convention rights".[44] While courts cannot alter a "fundamental feature"[45] or completely change a law,[46] nor can they set aside a statutory obligation, which is unavoidable,[47] section 3 does permit judges to move away from the "unambiguous meaning" of a statute,[48] to "depart from the intention of the Parliament"[49] and, in appropriate cases, even to read in words omitted by lawmakers.[50]

In *Fitzpatrick*, a purposive interpretation could not bring same-sex couples within the concept of "living with the original tenant as his or her wife or husband" so as to be "treated as a spouse" for the purposes of the RA 1977. However, in the subsequent case of *Ghaidan v Godin-Mendoza*, a majority of the House of Lords was willing to rely upon section 3 of the HRA 1998 to find that the spousal protections in the RA

[42] *Royal College of Nursing v Department of Health and Social Security* [1981] A.C. 800, 822.
[43] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [103], [123], [131] (Sir Andrew McFarlane P.). See also S. McGuinness and A. Alghrani, "Gender and Parenthood: The Case for Realignment" (2008) 16 Medical Law Review 261, 265–66, 272; Horsey and Jackson, "Human Fertilisation and Embryology Act 1990", 1475, 1479.
[44] M. Elliott and R. Thomas, *Public Law*, 4th ed. (Oxford 2020), 777.
[45] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557, at [33].
[46] Ibid., at [110].
[47] Ibid., at [108].
[48] Ibid., at [30].
[49] Ibid.
[50] Ibid., at [32].

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

1977 did apply to survivors in same-sex relationships who were living with the original tenant "as if" they were a wife or husband.[51] *Ghaidan* (and the contrast with *Fitzpatrick*) is a powerful illustration of the tools available to courts seeking to achieve compatibility between UK legislation and the ECHR.

Against that background, two questions arise: first, does the exclusion of trans men with GRCs under section 2(1) of the HFEA 1990 comply with the UK's obligations under the ECHR? Second, if not, does the interpretative obligation under section 3 of the HRA 1998 empower courts to read trans men with GRCs into section 2(1) and to resolve the violation of the Convention?

Compliance with the Convention? There is a substantial body of case law from the European Court of Human Rights ("the ECtHR"), which confirms the right of trans people under Article 8 of the ECHR to develop – including through medical and legal transitions – their gender identity[52] and to undertake that process without compromising their reproductive capacities or right to physical integrity.[53] While the existing judgments focus on sterilisation as a pre-condition for gender-affirming surgery and LGR, there is little doubt that, viewed against the relevant case law, a domestic statute which prevents trans men from accessing assisted reproduction merely because they have exercised their right to obtain LGR interferes with respect for both private and family life.

Article 8 of the ECHR is a qualified right. As such, it is necessary to consider whether the UK Government could argue a legitimate and proportionate justification for that interference. A striking feature of recent ECtHR jurisprudence on gender identity is the unpredictability of the Strasbourg judges in defining the margin of appreciation allowed to Member States. While questions of gender identity and filiation involve an important facet of a person's existence and identity[54] – a fact which has historically narrowed the margin[55] – the ECtHR is likely to balance that fact against the sensitive moral and ethical issues raised by section 2(1) and a lack of express consensus[56] across Europe on whether and how trans men with a male legal sex can access healthcare treatments to conceive children.

Yet, whatever conclusion the ECtHR reaches on the applicable margin of appreciation, and the level of scrutiny applied by the Court, there is a compelling argument that the UK Government would not be able to

[51] Ibid., at [51] (emphasis removed).
[52] See *Van Kuck v Germany* (2003) 37 E.H.R.R. 51; *Christine Goodwin v The United Kingdom* (2002) 35 E.H.R.R. 18.
[53] *YY v Turkey* [2015] ECHR 257; *A.P., Garçon and Nicot v France* [2017] ECHR 338; *X and Y v Romania* [2021] ECHR 41.
[54] *YY v Turkey* [2015] ECHR 257, at [101]; *O.H. and G.H. v Germany* [2023] ECHR 305, at [113].
[55] *Hamalainen v Finland* [2014] ECHR 787, at [75].
[56] *Y v France* [2023] ECHR 101, at [75]–[80].

justify the interference with respect for private and family life occasioned by section 2(1) of the HFEA 1990.

First, the Government evidently cannot suggest that there is a need to prevent or limit the ability of trans men with GRCs to conceive children because maintaining that ability post-LGR was a central purpose in the design and enactment of the GRA 2004. It would be irrational for the Government to argue that trans men should not have to undergo unwanted sterilisation as the price for accessing LGR while at the same time claiming that the UK has an important interest in restricting the ability of such men to use their reproductive capacities once LGR is achieved.

Second, the Government might seek to justify the proportionality of excluding trans men with GRCs from section 2(1) on the basis that – within a domestic legal framework where the person who gives birth is always the "mother" of a child – there is a need to avoid pregnant men and an obligation to register birth parents as fathers. Yet, as *McConnell* illustrates, allowing trans men with GRCs to obtain "treatment services" does not, as a matter of law, result in the recognition of birth parents as fathers. Rather, *McConnell* makes clear that, even when a trans man with a GRC receives assistance to carry a child, domestic family law can still register the parentage of that man according to his birth-assigned sex.[57] The legality of the *McConnell* reasoning has recently been confirmed by the ECtHR in two similar cases from Germany.[58] As such, withholding treatment services to maintain the coherence of birth registration cannot justify the interference with the right to respect for private and family life.

Interpreting "treatment services" in compliance with the Convention under section 3 of the HRA 1998? Having regard to the existing case law, the conclusion appears to "flow naturally"[59] that excluding trans men with GRCs from section 2(1) *is* an unjustified interference with Article 8 of the ECHR.[60] Although the ECtHR has not yet addressed this precise point, "the principles established in [their case] law" mean that UK courts "can be confident" when they – to borrow the recent expression of Lord Reed –"develop the law in relation to Convention rights beyond the limits of the Strasbourg case law" and find a violation of Article 8 of the ECHR.[61]

[57] See the conclusion of both Sir Andrew McFarlane P. in *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384 and the Court of Appeal in *R. (McConnell) v Registrar General* [2020] EWCA Civ 559.
[58] *O.H. and G.H. v Germany* [2023] ECHR 305; *A.H. and others v Germany* [2023] ECHR 306.
[59] *R. (Maguire) v Blackpool and Fylde Senior Coroner and others* [2020] EWCA Civ 738, [2021] Q.B. 409, at [99] (Lord Burnett C.J.).
[60] Horsey and Jackson, "Human Fertilisation and Embryology Act 1990", 1476–77 (arguing that withholding treatment services would also breach Article 14 of the ECHR read with Article 8 of the ECHR).
[61] *R. (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, at [63].

In those circumstances, the second question is whether, using section 3 of the HRA 1998, the courts can interpret section 2(1) to comply with the UK's obligations under the Convention? Compatibility with Article 8 of the ECHR might be achieved in one of (at least) three ways. First, judges could read the term "women" in section 2(1) to cover all people who can carry children. This is the simplest remedy and appears to conform with judges' preference to "indicate that the legislation is to be read in a particular way rather than to specify actual textual amendments".[62] The solution is likely to be favoured by both the courts and the Government – although it may raise objections from trans men on the basis that it ignores their social and legal male identity. Two other possibilities would be to read the words "and men" into section 2(1) or to explicitly read in the word "people" in substitution for "women" in that section. While these latter options would better capture the lived experience of trans men who become pregnant, they may be less appealing to cautious judges who might worry both that they go beyond what is strictly necessary to achieve compliance with Article 8 of the ECHR and that the remedies could embroil the judiciary in "culture wars" around the alleged "erasure" of women in reproductive health policy.[63]

Whichever of these possibilities the courts choose, they would appear to be acting within their interpretive obligation under section 3. Although all three solutions require a departure from the unambiguous language of the HFEA 1990, prior case law illustrates that, in appropriate circumstances, this is both permitted and necessary under section 3.[64] Allowing trans men with GRCs to access treatment services goes "with the grain of the legislation"[65] and it would not alter a fundamental feature of the statute.[66]

The HFEA 1990 was intended to create a comprehensive regime to regulate assisted reproduction and it is clearly "compatible with the underlying thrust of the legislation" to ensure that all people who can carry children are included.[67] There is nothing in either the HFEAs 1990 or 2008, nor in the prior legislative debates, to suggest that Parliament intended to exclude trans men with GRCs or to place an unavoidable

[62] H.W.R. Wade, C.F. Forsyth and I.J. Ghosh, *Wade & Forsyth's Administrative Law*, 12th ed. (Oxford 2023), 172.

[63] See e.g. R.L. Cosslett, "The Language of Maternity Is Alive and Well – So Why Not Expand It to Include Trans Parents?", *The Guardian*, available at https://www.theguardian.com/commentisfree/2022/may/05/language-maternity-trans-parents-parenthood-gender (last accessed 12 June 2024); E. Somerville, "NHS Must Reinstate 'Woman' in Cancer and Pregnancy Webpages, Staff Demand', *The Telegraph*, available at https://www.telegraph.co.uk/news/2023/03/06/nhs-must-reinstate-woman-cancer-pregnancy-webpages-staff-demand/ (last accessed 12 June 2024). Reading in a gender-neutral approach to women and reproduction would also conflict with recent UK Government proposals to amend the National Health Service Constitution: see Department of Health and Social Care, "NHS Constitution: 10 Year Review" (2024), available at https://www.gov.uk/government/consultations/nhs-constitution-10-year-review/nhs-constitution-10-year-review (last accessed 12 June 2024).

[64] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, at [30] (Lord Nicholls).

[65] Ibid., at [33].

[66] Ibid.

[67] Ibid.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

obligation on fertility clinics to withhold treatment services from such men. At most, lawmakers simply failed to contemplate a scenario where a person with a male legal sex may request treatment. The interpretative obligation under section 3 is an appropriate vehicle to remedy this oversight and to resolve any conflict with Article 8 of the ECHR. Indeed, in their recent research on how judges apply section 3, Florence Powell and Stephanie Needleman observe how courts often use the interpretative power to "address unforeseen drafting issues or factual situations that clearly fell within the overall intention of the legislative scheme".[68] Although a purposive interpretation of the law would not allow courts to fill the gap in section 2(1) of the HFEA 1990, this can be achieved under the HRA 1998.

Thus, while it appears that section 2(1) currently does exclude trans men with GRCs from obtaining treatment services to carry a child, there is a strong argument that courts, using section 3 of the HRA 1998, can and should interpret section 2(1) to include such men.

A declaration of incompatibility? There is, however, one final note of caution. In recent years, the rights of trans individuals have become a source of heightened legal and political contestation in the UK. In particular, there have been high-profile debates around GRA 2004 reform,[69] medical transition for trans youth,[70] and the rights of trans people under the EA 2010.[71] Within that context, judges may be less inclined to intervene in what they perceive as a politically sensitive issue, where – as Lord Nicholls suggested in *Ghaidan* – Parliament may be better equipped to undertake the necessary "legislative deliberation".[72] This is so even where, as in the case of section 2(1), there is an apparent violation of Article 8 of the ECHR, and the potential remedies require only a light-touch and logical re-interpretation of the statute.

In the landmark case of *Bellinger v Bellinger*, where the House of Lords concluded that the absolute prohibition on trans women from marrying their non-trans male partners violated Articles 8 and 12 of the ECHR, their Lordships declined to use section 3 of the HRA 1998 to hold that Mrs Bellinger's marriage was valid *ab initio*.[73] Rather, the court issued a declaration of incompatibility[74] (declaration) encouraging Parliament to resolve the existing non-compliance with the Convention. Similarly, in more recent cases involving sensitive issues, such as different-sex civil

[68] F. Powell and S. Needleman, "How Radical an Instrument Is Section 3 of the Human Rights Act 1998?", *UK Constitutional Law Association*, 24 March 2021, available at https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998/ (last accessed 12 June 2024).
[69] United Nations Independent SOGI Expert, at [23]–[30].
[70] *Bell v Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363.
[71] Letter from K. Falkner to K. Badenoch.
[72] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, at [33].
[73] *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] UKHL 21, [2003] 2 A.C. 467.
[74] HRA 1998, s. 4.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

partnerships[75] and single-person surrogacy applications,[76] the courts have also preferred to issue a declaration under section 4 of the HRA 1998 rather than to invoke their interpretive powers under section 3. For section 2(1) of the HFEA 1990, is there a possibility that judges – while recognising section 4 of the HRA 1998 as a "measure of last resort"[77] – would opt to use a declaration rather than interpret "treatment services" as covering trans men with GRCs who want to carry a child?

There are potentially two reasons why courts might feel more comfortable using their interpretative powers under section 3 in this context than they have in previous cases. First, unlike in *Bellinger*, where the appellant was asking the House of Lords to overturn an established legal precedent against the availability of LGR in UK law,[78] clarifying that section 2(1) covers trans men with GRCs would not require judges to go beyond the "constitutional limits of the courts' policy-making role".[79] Rather, it would merely confirm what all actors in the *McConnell* litigation, including the fertility clinic and the Government, already seem to have believed: that the HFEA 1990 permits trans men with GRCs to access treatment services to assist them to carry children.

Second, in the other sensitive cases mentioned, including different-sex civil partnerships and surrogacy, there was a stronger justification for the courts to eschew their interpretative powers in favour of section 4. In those situations, the relevant incompatibility with the Convention was a "fundamental feature" of the statute. In the context of the Civil Partnership Act 2004, while reserving access to same-sex couples was a violation of Article 14 read with Article 8 of the ECHR, the primary purpose of the legislation was to create an alternative relationship structure for only same-sex couples.[80] Therefore, it would have been impossible for the Supreme Court to invoke section 3. Similarly, while excluding single applicants from surrogacy under section 54 of the HFEA 2008 was also unlawful discrimination, it was a "clear and prominent feature" of the legislation that only couples could apply for a Parental Order.[81] In both circumstances, re-interpreting the law to comply with the ECHR would have required the courts to "change the substance of a provision completely".[82] However, interpreting section 2(1) to cover

[75] *R. (Steinfeld and another) v Secretary of State for International Development* [2018] UKSC 32, [2020] A.C. 1.
[76] *In re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73, [2015] 1 W.L.R 4993; *In re Z (A Child) (Surrogate Father: Parental Order) (No. 2)* [2016] EWHC (Fam) 1191, [2017] Fam. 25.
[77] *R. v A (No. 2)* [2001] UKHL 25, [2002] 1 A.C. 45, at [44] (Lord Steyn).
[78] *Corbett v Corbett (Otherwise Ashley)* [1971] P. 83; *R. v Tan and Others* [1983] Q.B. 1053 (C.A.); *Re P and G (Transsexuals)* [1996] 2 F.L.R. 90 (Q.B.).
[79] Elliott and Thomas, *Public Law*, 782.
[80] Civil Partnership Act 2004, s. 1(1) (as originally enacted) provided that "[a] civil partnership is a relationship between two people of the same sex".
[81] *In re Z (A Child)* [2015] EWFC 73, at [36]–[39] (Sir James Munby P.).
[82] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, at [110] (Lord Rodger).

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

trans men with GRCs would not touch upon the core features of the legislation but would merely involve a logical extension into an area, which, although not contemplated by Parliament, is clearly "compatible with the underlying thrust of the legislation".[83]

On this analysis, there is, as noted, a compelling argument for the courts to read section 2(1) of the HFEA 1990 as covering trans men with GRCs who want to carry children. Considerations which have previously persuaded judges to prefer a declaration under section 4 of the HRA 1998 appear less relevant in the context of access to treatment services.

III. The Parental Status of Trans People with a GRC when Their Partner Conceives and Gives Birth through Donor-Assisted Reproduction

The *McConnell* litigation centred on the parental status of trans men who carry children after having obtained a GRC. Both judgments concluded that, under section 12 of the GRA 2004, irrespective of their legal sex, trans individuals must be registered as parents in accordance with their birth-assigned sex.

The focus in *McConnell* was on trans people with GRCs who play a biological role in the conception and birth of children. Yet, the breadth of the reasoning in both judgments, and the broad application of section 12, means that the ratio in *McConnell* applies in any situation where a trans person with a GRC registers as a parent. In particular, where individuals seek recognition as a parent under sections 35–37 and 42–44 of the HFEA 2008 (where their female partner becomes pregnant through DAR and the trans person has no biological connection with the resulting child), a trans woman with a GRC will become a legal "father", while a trans man with a GRC will become a second female "parent". Although neither McFarlane P. nor the Court of Appeal addressed the status of trans people under these provisions of the HFEA 2008, the UK Government did expressly recommend extending the rule in *McConnell* to DAR.[84]

Yet, even accepting the reasoning in *McConnell* regarding trans men who give birth, there is – as a matter of both biology and legal consistency – a compelling argument that section 12 of the GRA 2004 should not apply to the parenthood of the partner of a person who gives birth after DAR. Rather, considering the circumstances in which people, irrespective of their gender identity, become parents under sections 35–37 and 42–44 of the HFEA 2008, there is a strong case for registering trans individuals according to their legal sex. In fact, to the extent (as acknowledged in *McConnell*)

[83] Ibid., at [33] (Lord Nicholls).
[84] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [98].

that registering parental status in line with birth-assigned sex interferes with respect for the private and family life of trans people with GRCs, it is questionable whether the policy aims which justified that interference in *McConnell* – coherence in the birth registration system and the right of children to know their origins – either apply or have the same relevance for DAR. Given that many trans people, particularly trans men, may prefer to become parents through DAR rather than using their own gametes (e.g. trans men using their ova), the parental status of these individuals has important implications for the wider reproductive and family rights of trans people across the UK.

Section 2 responds to this second "unanswered question" of *McConnell*: should section 12 of the GRA 2004 apply to DAR, or should trans people be registered according to their legal sex under sections 35–37 and 42–44 of the HFEA 2008? Exploring the legal and biological intricacies of DAR, and the competing policy and human rights arguments, this section concludes that DAR should operate as an exception to section 12 of the GRA 2004 and that the parental status of all people who become parents through DAR should be consistent with their legal sex.

A. The Donor-Assisted Reproduction Provisions of the HFEA 2008

In determining the application of section 12 to DAR, the basis upon which the provisions of the HFEA 2008 assign legal parenthood is crucial. The starting point for sections 35–37 and 42–44 is that either the male or female partner of the "mother"[85] of a child can become the legal parent at birth.[86] The legislative scheme contains different provisions for male and female parents, and it distinguishes between individuals based upon their relationship status.

Section 35 applies to men in registered relationships (either marriage or civil partnership)[87] with the mother, and section 42 applies to women in those registered relationships with the mother.[88] Both section 35 and section 42 determine legal parenthood on the same basis: consent of the mother's partner – to the DAR treatment – and this consent is presumed due to the registered relationship. The only differences between sections 35 and 42 are the language used to describe legal parenthood – "the father" for men and "a parent" for women – and that the provisions apply, respectively, only to men (section 35) and women (section 42).

[85] Defined as "[t]he woman who is carrying or has carried a child": HFEA 2008, s. 33(1).
[86] HFEA 1990, ss. 27–29, applied only to men. Allowing legal parenthood from birth for both members of female same-sex couples was central to the reforms of the HFEA 2008.
[87] HFEA 2008, s. 35, was amended after the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 opened civil partnership to different-sex couples.
[88] HFEA 2008, s. 42, was amended after the Marriage (Same Sex Couples) Act 2013 allowed marriage for same-sex couples.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

For people not in registered relationships with the mother, the "agreed fatherhood conditions"[89] apply to men (sections 36 and 37) and the "agreed female parenthood conditions"[90] apply to women (sections 43 and 44). Under these "conditions", legal parenthood is similarly determined on the same basis for women and men: the consent of both the "mother" and the "father"/"parent" to that person being treated as the "father"/"parent".[91] Once again, men who wish to become a parent under sections 36 and 37 are "fathers" while women are second female "parents" under sections 43 and 44.

Kirsty Horsey and Emily Jackson observe that, "while the mechanisms for the attribution of parenthood are the same, there is a significant terminological difference: male non-genetic parents are fathers, whereas female non-gestational parents are not second mothers, but second parents".[92] Under these DAR provisions, legal parenthood is assigned on the same substantive basis for men and women, and this basis does not relate to a biological or genetic contribution to the reproductive process.[93] Applying section 12 of the GRA 2004 to these provisions, however, and determining the language used to describe legal parenthood on the basis of birth-assigned sex, a trans man with a GRC would be a "parent", whereas a trans woman with a GRC would be a "father". This would occur even though the manner in which trans people become parents through these provisions is identical to the manner in which non-trans people become parents.

To illustrate this, a trans man with a GRC is a legal male (and a trans woman with a GRC is a legal female) who is using donor sperm with his (or her) partner who subsequently gives birth. This is exactly the same legal status and lack of biological contribution that describes non-trans men and women in these reproductive circumstances. The only difference between trans and non-trans people who become parents because their female partner gives birth through DAR is their gender identity and their gender history. One of the authors has previously described the application of section 12 to these provisions as producing "a particularly unsatisfactory result, given that the partner of the mother becomes a legal parent based upon the same substantive rules in both situations".[94] In this way, the basis on which legal parenthood is determined in different reproductive contexts

[89] HFEA 2008, ss. 36, 37.
[90] Ibid., ss. 43, 44.
[91] Unlike for registered relationships, this consent is not presumed and must be shown by satisfying the relevant statutory conditions.
[92] Horsey and Jackson, "Human Fertilisation and Embryology Act 1990", 1481.
[93] HFEA 2008, s. 41 (for men) and s. 48 (for women), state that the provision of genetic material does result in legal parenthood under the legislative scheme.
[94] Brown, "Trans (Legal) Parenthood", 183.

significantly impacts the potential application of those rules to trans parents.[95]

B. Reconsidering the Human Rights Arguments from McConnell

The application of section 12 to DAR raises two (related) questions: does registering a trans man with a GRC as a "parent"[96] and a trans woman with a GRC as a "father"[97] violate the ECHR when all other people are registered according to their legal sex? Second, if trans reproduction does not operate differently from non-trans reproduction in these circumstances, how can there be any lawful justification for requiring trans parents to be registered according to different provisions and for using different language from non-trans parents?

The starting position is that the parental status of trans parents was addressed by the Court of Appeal in *McConnell*. Indeed, as noted, this issue has also been considered by the ECtHR in two recent judgments concerning birth registration in Germany: *O.H. and G.H. v Germany* ("*O.H.*")[98] and *A.H. and others v Germany* ("*A.H.*").[99] These cases involved the parental status of a trans man who gave birth in *O.H.* and the parental status of a trans woman who provided sperm in *A.H.* – in both cases, the individual had already obtained LGR. In their judgments, as in *McConnell*, the German courts and the ECtHR accepted the legitimacy of registering trans people according to their birth-assigned sex.

The facts of these cases, however, all involved trans parents using their biological reproductive capacities in contexts where legal parenthood is determined by gendered biological contributions to reproduction: legal motherhood due to gestation and legal fatherhood due to a genetic connection. In contrast, legal parenthood determined under the DAR provisions of the HFEA 2008 does not involve trans parents using their biological reproductive capacities. Rather, for both trans men and trans women, the female partner becomes pregnant using donor sperm. These provisions do not determine legal parenthood based upon biological contributions to reproduction. Instead, consent is the determinative factor. Therefore, the reasoning concerning the "proportionality" of the interference with Article 8 of the ECHR in *McConnell* requires to be reconsidered in this different factual and reproductive context.

[95] Horsey and Jackson, "Human Fertilisation and Embryology Act 1990", 1483, observed that, when a parental order is granted after a surrogacy arrangement, trans parents would have their legal parenthood recorded in the gender-neutral language of "parent", which might be "their preferred legal outcome". This may encourage the use of surrogacy amongst trans parents to enable such recognition, counter to the general policy of discouraging surrogacy arrangements. We would like to thank Kirsty Horsey for raising this point.

[96] HFEA 2008, ss. 35, 36.

[97] Ibid., ss. 42, 43.

[98] [2023] ECHR 305.

[99] [2023] ECHR 306.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

1. McConnell *and the proportionality of registering trans parents according to birth-assigned sex*

To briefly summarise, in the *McConnell* litigation, the Court of Appeal described the "legitimate aim" of the interference with Freddy McConnell's Article 8 rights as consisting "of the protection of the rights of others, including any children who are born to a transgender person, and the maintenance of a clear and coherent scheme of registration of births".[100] At first instance, McFarlane P. put this more expansively as: "The human existence is marked by birth at the first moment of life, and death at the last. The importance of a modern society having a reliable and consistent system of registration of each of these two events is clear."[101] From these statements, it is apparent that the overarching consistency and coherence of the birth registration system – and concern that registering the person who gives birth (regardless of their legal sex) as anything other than "mother" would jeopardise that coherence[102] – underpinned the reasoning in both judgments in the *McConnell* litigation.

The Court of Appeal further observed, when considering proportionality, that "the policy choice of Parliament is that the person who gives birth to a child is always described as the mother of that child, even if (for example) it was not her egg which was fertilised. Moreover, the law is clear that a child only ever has one mother, although there may be more than one 'parent'".[103] Thus, the reasoning is premised upon upholding the consistency of the rules that determine legal motherhood, which is always based upon gestation.[104] As the President commented, "[t]he attribution of motherhood is a consequence of the individual's unique role in the biological process of pregnancy and birth".[105]

This article does not dispute that these statements accurately describe the determination of legal motherhood.[106] However, their applicability to other forms of legal parenthood is less obvious because, in other contexts, legal parenthood is not determined on the same indivisible basis as motherhood.[107] The Court of Appeal ended its discussion of proportionality by noting that the absence of a "European consensus"[108] on the issue of the parental status of trans men with GRCs results in a

[100] *R. (McConnell) v Registrar General* [2020] EWCA Civ 559, at [58] (Lord Burnett C.J., King and Singh L.JJ.).
[101] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [266].
[102] Ibid., at [272].
[103] *R. (McConnell) v Registrar General* [2020] EWCA Civ 559, at [66] (Lord Burnett C.J., King and Singh L.JJ.).
[104] Encapsulated by the Latin maxim *mater est quam gestatio demonstrat*.
[105] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [135].
[106] For analysis and critique of the determination of legal motherhood, see e.g. G. Douglas, "The Intention to Be a Parent and the Making of Mothers" (1994) 57 M.L.R 636; Z. Mahmoud and E.C. Romanis, "On Gestation and Motherhood" (2023) 31 Medical Law Review 109.
[107] See Brown, "Trans (Legal) Parenthood", 183–84.
[108] *R. (McConnell) v Registrar General* [2020] EWCA Civ 559, at [79] (Lord Burnett C.J., King and Singh L.JJ.).

"margin of judgment" being afforded to Parliament in this area of "difficult or controversial social policy"[109] and that "the courts should be slow to occupy"[110] this margin. As such, any law reform was understood as a matter for Parliament rather than the courts.[111] However, there are three reasons why this judicial reasoning is not applicable to determining the parental status of trans parents under sections 35–37 and 42–44 of the HFEA 2008.

These reasons are as follows: (1) that *McConnell* and the German cases considered by the ECtHR[112] involved trans people with LGR who were using their biological reproductive capacities in a manner that is inconsistent with traditional, gendered understandings of human reproduction, whereas this "inconsistency" does not apply if trans people become parents through DAR; (2) that one crucial strand of the *McConnell* reasoning – the need to maintain the coherence of the birth registration system[113] – does not apply to trans parenthood formed through sperm donation because of how the DAR provisions of the HFEA 2008 determine and record legal parenthood; and (3) that another key strand of that reasoning – the need to ensure the child's right to know their origins[114] – similarly does not apply to children born through donor conception, due to the operation of the birth registration regime (and the fact that only identity-release or "known donors" are allowed) for all children born in such circumstances. If these "legitimate aims" do not apply or are less relevant in the circumstances of DAR, this reduces the proportionality of any interference with the rights of trans parents under Article 8 of the ECHR and may require exempting DAR from the operation of section 12 of the GRA 2004.

2. Reason One: Differentiating between biological roles in reproduction

It is axiomatic that the factual circumstances of trans men with GRCs who give birth (or trans women with GRCs whose sperm is used to conceive a child) are very different from trans people (of either sex) who use DAR for their female partner to become pregnant. In the latter scenario, the "biological contribution" of trans people does not represent a challenge to the orthodox, gendered understanding of biological contributions to human reproduction (women gestate, give birth and provide eggs, while men provide sperm). These differences mean that different policy

[109] Ibid., at [80]–[82].
[110] Ibid., at [82].
[111] Ibid., at [81].
[112] *O.H. and G.H. v Germany* [2023] ECHR 305; *A.H. v Germany* [2023] ECHR 306.
[113] *R. (McConnell) v Registrar General* [2020] EWCA Civ 559, at [58]; see further *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [265]–[272].
[114] *R. (McConnell) v Registrar General* [2020] EWCA Civ 559, at [58]; see further *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [255]–[264].

considerations must be applied when deciding if, when and why trans people should be registered according to their legal sex.[115]

The starting point should not be that the reasoning in *McConnell* and the ECtHR cases resolves the legal questions relating to trans parenthood where there is DAR. Instead, it must be considered whether the different biological role played by trans individuals requires an alternative analysis and conclusion in terms of Convention rights. The second and third reasons consider two key differences between the circumstances in *McConnell* and a trans parent becoming a "father"/"parent" under the DAR provisions of the HFEA 2008 and how these differences undermine the arguments which justified the interference with Article 8 rights in *McConnell*.

3. Reason Two: A coherent system for registering children conceived through DAR?

A key factor justifying the registration of trans men who give birth as "mothers" is avoiding incoherence in the birth registration system. Simply put: because the systems of legal parenthood and birth registration are premised upon every person who gives birth being registered as "mother",[116] registering any person who gives birth using any other term (whether "father" or "parent") would create potential problems for that coherence.[117]

However, as described above, legal parenthood under sections 35–37, 43 and 44 of the HFEA 2008 operates in a substantively identical manner for male and female parents (who are not genetically related) – based upon consent.[118] The lack of any biological basis (either genetic or gestational) for this attribution of legal parenthood means that there is no difference between how trans and non-trans people become parents in the circumstances covered by these provisions. Therefore, it is difficult to

[115] Our argument does not aim to suggest that some trans people *should* be privileged over others in the language used to describe their legal parenthood, nor that trans people who hold GRCs should be penalised for using their biological reproductive capacities, but rather acknowledges the simpler point that different factual situations often require different legal responses within the existing human rights regime.

[116] Law Commission of England and Wales and Scottish Law Commission, "Building Families through Surrogacy", proposes a "new pathway" to parenthood after "regulated" surrogacy arrangements: chs. 2, 4. If enacted, intended parents could become legal parents from birth, meaning that there would be circumstances where the person who gave birth would not be the legal mother. This would weaken the arguments about coherence in *McConnell*, reflected at [4.224]–[4.268], where both a "preferred model" and an "alternative model" of birth registration under the "new pathway" are proposed.

[117] This argument has been disputed, as not describing trans parents using their gender identity and their legally recognised sex and gender also creates coherence problems. See further e.g. A. Brown, "Trans Parenthood and the Meaning of 'Mother', 'Father' and 'Parent' – *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559" (2021) 29 M.L.R. 157, 168–69. However, consideration of this point is not necessary for the arguments made in this article.

[118] With the only differences being how that consent is shown depending upon relationship status: HFEA 2008, ss. 35–37, 42–44.

understand how registration according to legal sex would affect the coherence of the birth registration scheme because the designation of parental status would operate identically irrespective of the gender identity of the parent.[119]

This is in stark contrast to *McConnell*, where the relationship between gender identity and the gendered basis on which legal parenthood is determined represented the fundamental reason for the dispute. In that litigation, the argument raised was that all people who gave birth were registered as mothers and, to the extent that they are registered as a legal parent, all other persons who provide sperm were registered as fathers. However, where parenthood is assigned to the partner of the person who gives birth when there is DAR, assigning a trans individual according to their legal sex would not involve a fundamental change to the registration system. It would – as in all cases where a person has a child with a partner but does not provide a gamete and a donor is used – simply result in the continuation of men being designated as fathers and women being designated as second "parents". As such, recourse to "coherence" offers a less compelling justification for the proportionality of registering trans people with GRCs according to their birth-assigned sex if they are becoming legal parents under sections 35–37 and 42–44.

4. Reason Three: The right of children to know their origins where there is DAR

Another argument in *McConnell* justifying the registration of trans men with GRCs as "mother" is the right of the child to know their origins.[120] This relates to the previous argument, because it is based upon the person who gives birth always being registered as the "mother". Here, the argument is that there are significant identity implications for children born to trans men if their birth certificates do not list the person who gave birth to them as "mother".

Similar to the claims relating to "coherence", this argument appears less applicable in circumstances involving children born to trans parents through DAR. This is because of how the child's right to know their origins is addressed in all cases involving donated genetic material.[121] Under the existing legislative scheme, no birth certificate will include an indication

[119] Arguably a different coherence problem would be created by registering trans parents according to their legal sex when parenthood is determined through the provisions of the HFEA 2008, but according to their birth-assigned sex when they gestate or provide sperm. However, this "incoherence" is a consequence of the reasoning in *McConnell* and consequently would not justify the interference with Article 8 rights for trans parents through DAR. We would like to thank Claire Fenton-Glynn for raising this point.

[120] See e.g. *Mikulić v Croatia* [2002] ECHR 27; *Jäggi v Switzerland* (2008) 47 E.H.R.R. 30.

[121] HFEA 1990, s. 31ZA(4) ("identifying information" about donors is accessible to those born through donor conception at age 18); s. 31ZA(1) ("non-identifying information" is accessible at age 16). The information is set out by the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

that a child has been born through donor conception.[122] Therefore, the current legal regime allows for parents of children born through donor conception not to inform the children of that fact. Based upon longitudinal research with such families,[123] Susan Golombok has observed that "[u]ntil recently, the majority of parents who gave birth to donor-conceived children did not tell their children about their genetic origins".[124] Therefore, openness about genetic origins is not necessarily the norm for non-trans parents of donor-conceived children and Alan Brown and Katherine Wade have argued that "simply providing a statutory right to access origin information does not create a substantive right to knowledge about one's origins".[125]

Given this, there is no difference between a trans parent and a non-trans parent who uses DAR in terms of how the legal regime addresses the child's right to know their origins. The language used to register the trans parent of a donor-conceived child does not impact that child's ability to access information about their origins. Instead, any issues regarding such child's access are a consequence of the operation of the legal rules regarding gamete donation, legal parenthood and the registration of births, not a consequence of the fact that the parent is trans.[126] As with the argument regarding the coherence of the birth registration system, the child's right to know their origins cannot be used to justify treating trans parents differently from non-trans parents in circumstances involving DAR. Therefore, another key argument from *McConnell* concerning the proportionality of the interference cannot justify the registration of such trans parents (of either sex) in their birth-assigned sex rather than their legal sex.

5. Remedying the breach of Article 8 ECHR: interpretative obligation or declaration of incompatibility?

To summarise, due to the significant biological and legal differences between the facts in *McConnell* and reproduction through DAR, two of the core arguments used to justify the registration of Freddy McConnell

[122] For a critique of this approach to birth registration in donor conception cases, see A. Bainham, "Arguments About Parentage" [2008] C.L.J. 322.

[123] See e.g. J. Readings, L. Blake, P. Casey, V. Jadva and S. Golombok, "Secrecy, Disclosure and Everything In-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy" (2011) 22 Reproductive BioMedicine Online 485; T. Freeman, S. Zadeh, V. Smith and S. Golombok, "Disclosure of Sperm Donation: A Comparison Between Solo Mother and Two-Parent Families with Identifiable Donors" (2016) 33 Reproductive BioMedicine Online 592.

[124] S. Golombok, *Modern Families: Parents and Children in New Family Forms* (Cambridge 2015), 98.

[125] A. Brown and K. Wade, "Reform of the Legal Framework for Origin Information in Assisted Reproduction" in C. Bendall and R. Parveen (eds.), *Family Law Reform Now: Proposals and Critique* (Oxford forthcoming 2024), 8.

[126] Empirical research concerning donor-conceived children suggests that those born to LGBT+ parents are more likely to be informed of their donor-conceived status; see e.g. J.E. Scheib and A. Ruby, "Contact among Families Who Share the Same Sperm Donor" (2008) 90 Fertility and Sterility 33; T. Freeman, V. Jadva, W. Kramer and S. Golombok, "Gamete Donation: Parents' Experiences of Searching for their Child's Donor Siblings and Donor" (2009) 24 Human Reproduction 505. There is no reason to suggest that this would not be true for children of trans parents if the language used to describe their legal parenthood aligned with their legally recognised sex and gender.

as "mother" are not applicable where trans people with GRCs become parents under sections 35–37 and 42–44 of the HFEA 2008. To the extent that registering trans people according to their legal sex does not undermine administrative coherence or the right of children to know their origins, applying section 12 of the GRA 2004 to sections 35–37 and 42–44 of the HFEA 2008 appears to be a disproportionate interference with Article 8 of the ECHR – particularly given the negative impact, which inconsistent registration has on respect for private and family life. Rather, in order to uphold the UK's ECHR obligations, where trans individuals with GRCs do become parents through DAR, they should be registered according to their legal sex.

This raises the question of how the courts – if presented with a challenge to the application of section 12 of the GRA 2004 to these provisions of the HFEA 2008 – would respond. In such a case, and in contrast to section 2(1) of the HFEA 1990 discussed above, there are strong indications that judges would be more likely to issue a declaration under section 4 of the HRA 1998 rather than using their interpretative obligation under section 3. This is based upon the interpretation of section 12 of the GRA 2004 in *McConnell*[127] and the significance given to the gendered language of the "parenthood provisions" in the HFEA 2008. Regarding the latter, the Court of Appeal judgment observes: "it cannot simply be a question of this Court substituting a word such as 'parent' for the word 'mother'. This is because the word 'parent' has a distinct meaning which has been given to it by Parliament in other legislation".[128]

Given this, it seems unlikely that courts would disapply section 12 in the context of DAR to allow trans parents to be registered in their legal sex under sections 35–37 and 42–44 of the HFEA 2008. This would leave a declaration as the remaining mechanism to address this violation of Article 8.[129] However, there may be little political will to swiftly remedy any such breach of the ECHR in the current political context. Nonetheless, such political considerations do not influence the human rights analysis, which illustrates that the reasoning in *McConnell* cannot be applied to reach the same conclusion regarding the legal parenthood of trans parents with GRCs (of either sex) who have children through DAR.

IV. Securing a Gender Recognition Certificate "By Fraud": The Relevance of Intending to Subsequently Carry a Child

The final (and most straightforward) "unanswered question" relates to the required mindset of individuals when applying for a GRC. Under section

[127] *R. (McConnell) v Registrar General* [2020] EWCA Civ 559, at [28]–[39] (Lord Burnett C.J., King and Singh L.JJ.).
[128] Ibid., at [65].
[129] See Brown, "Trans Parenthood", 170.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

8(5) of the GRA 2004, where an applicant obtains a GRC, the Secretary of State may refer the case to the courts where he or she "considers that [the GRC's] grant was secured by fraud". As part of the application process, individuals must provide a pro forma statutory declaration confirming that they intend to "continue to live in the acquired gender until death".[130]

In *McConnell*, the President queried whether – in circumstances where Freddy McConnell submitted the requisite declaration despite intending to subsequently carry a child – the Secretary of State would make a referral under section 8(5).[131] The suggestion in this reasoning is clear:[132] as carrying a child is an inherently *female* act, a trans man who hopes to become pregnant after obtaining a GRC cannot intend to live in his acquired male gender until death. In providing the relevant declaration as to his intentions, it could be inferred that Freddy McConnell committed fraud, with the potential consequences that this could be referred to the High Court and the possible revocation of his GRC.

However, the Government confirmed that the Secretary of State did not intend to refer Freddy McConnell,[133] and the President's queries were not considered further either in his own judgment or by the Court of Appeal. Yet, it is not difficult to understand why the President flagged his concerns about this "potentially striking, aspect of the factual background".[134] To the extent that the *McConnell* litigation only came about because Freddy McConnell was a person with a male legal sex who carried a child, the central question for determination in the case – what is the parental status of a man who gives birth? – would be moot if the grant of the GRC was invalid and Freddy McConnell remained, as a matter of law, a woman.[135]

The question arises as to whether, in a situation where a trans man applies for LGR, that man necessarily secures his GRC by fraud where, at the time of his application, he declares his intention to live in his acquired gender until death even though he knows that he will subsequently attempt to conceive a child. While, prima facie, there may appear to be an intuitive case for referral in such circumstances, there are two compelling reasons why such conduct should not be considered as fraud under section 8(5).

A. Contradicting the General Framework of the GRA 2004

Defining an intention to carry a child post-GRC as fraud appears to contradict the general framework of the GRA 2004. As noted, a core innovation of the GRA 2004 is the right of applicants to obtain LGR

[130] GRA 2004, s. 2(1)(c).
[131] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [45].
[132] See M. Welstead, "Every Child Should Have a Mother" [2020] Fam. Law 1099, 1106.
[133] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [45].
[134] Ibid.
[135] Welstead, "Every Child", 1106.

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

while retaining their capacity to procreate. There would be a clear inconsistency within the legislative scheme if trans men could simultaneously preserve their abilities to conceive children while also running the risk of committing fraud if, when applying for GRCs, they intend to actually use those abilities to carry a child. Parliament cannot have intended such a perverse operation of the GRA 2004. Indeed, as *McConnell* illustrates, lawmakers included section 12 in the GRA 2004 to account for situations where trans people with GRCs use their capacity to have children. A contrary interpretation could mean that the revocation of a GRC arbitrarily depends upon when the decision to carry a child is made. For example, a trans man (Man A) who carries a child in circumstances where he always intended to become pregnant would be deemed to have secured his GRC by fraud, whereas another trans man (Man B) who obtains his GRC, accesses treatment services, and gives birth all on the same days as Man A would satisfy the GRA 2004 because his desire to carry a child arose after he submitted the statutory declaration under section 2(1)(c).

B. Pregnancy as a Non-Gendered "Physical and Biological" Process

To label pregnancy as an inherently female act, which contradicts an intention to live as a man until death, is also inconsistent with the President's own reasoning. While the Court of Appeal ultimately determined the issues using the narrow lens of section 12, McFarlane P.'s opinion is notable for his much broader overview of the concept of motherhood.[136] In his judgment, the President suggested that the term "mother" does not always imply a female legal sex but rather that it identifies "the role that a person has undertaken in the biological process of conception, pregnancy and birth".[137] Where a trans man with a GRC gives birth, he is the "mother" of his child because of the "physical and biological process" in which he engaged.[138] Yet, if that is the case, why would an intention to carry children after obtaining a GRC undermine a statutory declaration as to intention to live as a man? The President's reasoning confirms that a trans man with a GRC can undertake the gender-neutral acts of conceiving, gestating and giving birth to a child while also continuing to genuinely live in his acquired male gender. Thus, planning to carry a child after LGR should not mean that a trans man secures his GRC by fraud. It should also mean that, where a trans man gives birth during the two years prior to applying for a GRC, he can still be considered to have "lived in the acquired gender" for the purposes of section 2(1)(b) of the GRA 2004.

[136] *R. (TT) v Registrar General* [2019] EWHC (Fam) 2384, at [123]–[149].
[137] Ibid., at [280(b)].
[138] Ibid., at [279].

https://doi.org/10.1017/S0008197324000461 Published online by Cambridge University Press

V. Conclusion

This article has explored the "unanswered questions" of the *McConnell* litigation – three questions raised but not resolved by the High Court and the Court of Appeal in recent litigation concerning the parental status of trans people in England and Wales. Placing those questions within the wider legislative, human rights and political context, the article has not only attempted to clarify the current status of the law but also to assess the need (if any) for future reform.

The article suggests that obtaining a GRC should not preclude trans men from accessing "treatment services" to help them to carry a child, nor should an intention to subsequently become pregnant prevent trans individuals from applying to obtain LGR. Furthermore, irrespective of the merits of the substantive decision in *McConnell*, the article concludes that there are compelling legal and biological arguments to disapply section 12 of the GRA 2004 in the context of DAR.

Going beyond the three unanswered questions, this article also identifies more general features of the relationship between law and gender identity in the UK: legal structures which struggle to accommodate gender diversity; persisting assumptions and stereotypes about trans lives and experiences; and a statutory framework for LGR whose drafters had insufficient consideration for the broader legislative and political field in which that law would sit. These wider phenomena speak to a legal status quo which, in too many ways, is failing trans people, legal professionals and the wider public. Although this is an area of law into which policy-makers are increasingly reluctant to tread, this article illustrates the potential consequences where law omits to properly engage with the nuance, complexity and full spectrum of gender diversity.