

EIS Member briefing: the Gender Recognition Reform bill

Introduction

On the 3rd of March 2022, the Scottish Government published the Gender Recognition Reform bill, which sets out plans for amending the process transgender people have to go through to change their legal sex to match their gender identity. The process for changing legal sex has been in place in the UK since 2004 but has been described as intrusive and out of date.

Over recent years, the EIS has observed a rise in toxic debate and misinformation around the proposed changes, and the existing rights of transgender people, and is aware that many members will be unsure what the implications of the new Gender Recognition Reform bill are.

The EIS has a commitment to high standards of education rooted in equality and inclusivity. The EIS's overarching position is the principle that young people have the right to learn, and teachers and lecturers have the right to work, in an educational environment that is free from discrimination, where the rights of all are equally upheld.

This briefing intends to give an overview of the Gender Recognition Act (GRA), the proposed reforms, and the EIS position.

Transgender people in Scotland

There is no accurate figure of the transgender population in the UK, however estimates would suggest that there are around 30,000 transgender people in Scotland – roughly 0.2% of the population.

Transgender people are protected from discrimination, harassment, and victimisation under the Equality Act (2010). Unfortunately, many transgender people still experience discrimination and inequality because of who they are. In 2017, LGBT Youth Scotland found that 82% of trans young people experienced bullying in school.

There is widespread lack of awareness, visibility, and accurate representation of trans people across all spheres of society, although this has improved somewhat in recent years with some representation in TV-shows and other media productions.

The Gender Recognition Act

The Gender Recognition Act sets out the process in which transgender people can change their birth certificate, to have their gender identity recognised as their legal sex.

Trans people in Scotland can already legally change their sex without a GRC on their passport and drivers license, but not on their birth certificate, which they may need to obtain pension rights or get married.

Currently, to obtain a Gender Recognition Certificate, trans people are required to, amongst other criteria, be over 18 years of age, have obtained a formal diagnosis of gender dysphoria, provide evidence that they have lived in their 'acquired gender' for two years, and make an application to a panel of medical and legal experts who will either deny or approve the application. Currently, in the case where the applicant is married, they must have spousal consent to proceed with the application.

In comparison, many other European countries, such as Portugal, Ireland, and Norway, have already made it such that legal recognition can be obtained on the basis of self-declaration.

The EIS is supportive of a self-declaration system for gender recognition and for the process to be made more accessible, recognising the detrimental impact of the current process on transgender people's mental health and wellbeing. The EIS is clear that trans women are women and trans men are men.

The reform

The main reforms within the bill as announced on the 3rd March 2022 are:

- To lower the age at which a trans person can apply for a GRA, from 18 to 16, bringing this in line with voting rights in Scottish elections.
- To require a statutory self-declaration instead of medical evidence and a psychiatric diagnosis.
- To reduce the requirement to show evidence that you have lived in your gender for two years, to three months, with an added three-month reflection period after an application has been made.

There will be no changes, or new exemptions, to the Equality Act (2010) as a result of the GRA Reform.

The Equality Act (2010)

The Equality Act legally protects people from discrimination in the workplace and wider society, prohibiting discrimination on the basis of protected characteristics.

Protected characteristics are age, gender, sexuality, disability, pregnancy, race, religion, marital status, and gender reassignment.

There is a limited number of exemptions, for example, cases where it is permitted to provide a different service on the basis of a protected characteristic. With

relevance to schools, these can be found in the [Technical Guidance for Schools](#), which outlines the requirements of the Equality Act (2010) for schools in relation to the provision of education.

In late 2021, the EIS Equality Committee developed a [briefing](#) for members on the Scottish Government's updated guidance on supporting transgender pupils in schools. The purpose of the briefing is to inform members of the refreshed Scottish Government advice and provide details of key technical updates within it.

The briefing includes a question-and-answer section informed by EIS legal advice on the Equality Act (2010) and the technical guidance in relation to pupils protected by the characteristic of 'gender reassignment'. Members should consult this briefing, and the Scottish Government guidance, for advice on support transgender young people in schools.

Should the bill be passed, and it is likely that it will be, our guidance will be updated with further detail, as necessary, if there are changes to the current process in which young people have their gender identity recognised in school.

With relevance to the provision of single-sex activities within school, the EIS briefing confirms the position within the current technical guidance:

"Where there is a difference in service or activity between boys and girls, transgender people should be treated according to their gender identity – or, if they are non-binary, on the basis that they have a choice (and this might alter from time to time). So, if a school activity is divided between boys and girls, a transgender boy should as the standard, be with the rest of the boys."

Objections to the Bill

When the Gender Recognition Act (2004) first entered through UK parliament, a significant bulk of the opposition was on religious grounds, whereas today, members may come across frequent media attention on perceived risks. The bill will make the process of obtaining a birth certificate that matches a person's gender identity less intrusive, which is misunderstood by some to mean that trans people will have new rights and entitlements to single-sex services. This is wrong – trans people already have access to single-sex spaces such as toilets, changing rooms and services on a basis of their gender identity, and services are permitted under exemptions to the Equality Act (2010) to provide a different service to trans people, where it is legitimately necessary – for example, if it is safer for the trans person.

Some of the opposition to the bill reform is concerned that men, who are not trans, will pretend to be trans in order to obtain access to women-only spaces. This in theory, is already a possibility within existing legislation, as most women-only spaces are on the basis of self-identification, not proof of birth certificate.

Single-sex services such as Women's Aid and Rape Crisis have officially operated on the basis of self-identification for over a decade, and have robust risk

assessments to ensure the safety of their service users – including the right to refuse service to anyone who is a legitimate threat to others.

Unfortunately, much media rhetoric concerned with the dangers of legislation that aims to lessen the current stresses for trans people, reinforces harmful stereotypes, which can be detrimental to trans people's mental health, and their personal safety.

Tackling Gender Inequality

The EIS is equally clear that the risk to women's equality and safety is not the fault of trans people.

The EIS believes that Scotland is a patriarchal society in which women and girls continue to experience gender inequality, discrimination and stereotyping, as do gender-non conforming people.

Non-conformity with gender roles is still perceived as problematic by some, and children and young people are still mocked for and pressured around non-conformity, as we point out in our guidance 'Get it Right for Girls - challenging misogynistic attitudes among children and young people', which remains an essential advice on tackling misogyny in educational establishments. However, the EIS believes that the continuation of essential efforts to tackle sexism should neither advertently nor inadvertently deny rights to transgender people.

The EIS believes it will remain important for organisations to keep records based on sex, in particular in relation to sex-based oppressions, deriving from biological functions such as being able to menstruate, become pregnant, give birth, and experience the menopause. Organising around women's inequalities and holding women's events and conferences, etc. should be transgender and non-binary inclusive.

Timeline

2004 - The Gender Recognition Act (2004) enters into effect. The legislation was introduced after the European Court of Human Rights ruling in 2002 that a trans person's inability to change the sex on their birth certificate was a breach of their Human Rights.

2017 – the Scottish Government publishes a review of GRA and announces intentions to reform in line with international best practice, stating that the GRA (2004) is out of date and intrusive.

2018 – The Scottish Government receives 15,500 consultation responses regarding how the Gender Recognition Act (2004) could be improved. Two-thirds (65%) of respondents agreed with the proposal of a statutory declaration system.

December 2019 - The Scottish Government publishes a draft Gender Recognition Reform (Scotland) Bill, opening consultation until March 2020.

March 2020 – The Scottish Government receives 17,058 responses, including 215 from organisations on the GRA consultation. Only 55% of respondents are residents in Scotland.

April 2020 – The Scottish Government announces de-prioritisation of new primary or secondary legislation due to the public health crisis.

June 2020 – The European Commission places Scotland's GRA 2004 in the second to bottom category when comparing gender recognition access in 28 European countries, due to its intrusive medical requirements.

September 2020 – the UK Government publishes results of a public consultations showing majority support for reform but decides not to change the current law.

March 2022 – the Scottish Government publishes the Gender Recognition Reform Bill introducing improvements to the process of obtaining legal recognition for trans people.

Glossary

Assigned sex – is a term used to describe the sex on someone's birth certificate, which is determined usually by visual inspection of the genitals of a baby just after birth.

Gender dysphoria – is a term used to describe discomfort or distress experienced by someone because their gender identity does not match with the sex they were assigned at birth.

Gender identity – is a term used to describe our innate sense of self in relation to being a man or a woman or something in between or beyond this binary.

Gender non-conforming (adjective) – is used to describe someone who appears not to conform to societal expectations of what are appropriate expressions of their gender, for example in terms of roles, behaviours, appearance. Anyone of any gender identity can be gender non-conforming.

Gender reassignment – in the Equality Act (2010). This term is used to refer to any part of a process of transitioning away from the sex assigned at birth, this can be socially, surgically, hormonally, etc.

Non-binary (adjective) – is used to describe someone who does not identify strictly as a man or a woman.

Trans/transgender (adjective) – is an umbrella term used to describe anyone whose gender identity does not fully correspond with the sex they were ascribed at birth.

Trans man – a man who was assigned female as his sex at birth, but has a male gender identity.

Trans woman – a woman who was assigned male as her sex at birth, but who has a female gender identity.