1 The initial view of Scottish Government is that applicants for legal gender recognition should no longer need to produce medical evidence or evidence that they have lived in their acquired gender for a defined period. The Scottish Government proposes to bring forward legislation to introduce a self-declaratory system for legal gender recognition instead.

Agree

If you want, you can give reasons for your answer, or make comments:
We agree with a self-declaration system for gender recognition because:

- Transgender people find the current system humiliating, offensive, expensive and bureaucratic. A process which requires transgender people to submit intrusive psychiatric evidence to a tribunal panel, sometimes years after they transitioned, seems unduly oppressive.
- The current system is detrimental to transgender people’s mental health.
- It would create consistency if birth certificates were brought into line with the self-declaration process already used to change all other identity documents when transgender people start living in their new identity.
- The expense of the current system discriminates against young people and people on low incomes, including students.
- The current system is unduly complex and difficult for young people to navigate.

2 Should applicants to the proposed gender recognition system in Scotland have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death?

No

If you want, you can give reasons for your answer or make comments:
We think this is unnecessary. Changing gender is not something that people do lightly, and this provision would imply that applicants are likely to treat it as less of a considered and difficult decision and process than is the case. It suggests that individuals may treat the application process with frivolity when in actual fact, the decision to make such an application, will, in many cases, have been arrived at after significant mental and emotional struggle, both with self and with others.

Some individuals may be happy to commit to this, but other individuals might find it problematic, fearing it could entrench gender stereotypes. The wording ‘live in their acquired gender until death’ could be difficult for people who identify as non-binary.

3 Should there be a limit on the number of times a person can get legal gender recognition?

No

If you want, you can give reasons for your answer or make comments:
We think this is unnecessary. As stated above, changing gender is not something that people do lightly, or on a whim, and this provision would imply that it is less of a considered and difficult decision and process for transgender individuals to undertake than is the case. Seeking a new gender identity is not an easy option, so systems should make it easier to record a chosen identity, where possible. Support should be available for anyone who chooses to de-transition.

Extensive support for educational institutions and professionals is required in this regard. It could cause difficulties for teachers if someone changes their gender identity or expression, and teaching staff are not made aware of this and inadvertently offend them, for example, by using the wrong name or pronoun. Schools, colleges and universities will need to have robust policy and practice on this, which minimises the likelihood of offence being caused, and which distinguishes between accidental and deliberate mis-gendering.

It will be very important for teachers and lecturers to have access to meaningful professional learning on these matters, and to be made aware of gender identity issues during Initial Teacher Education. Employers also have an ongoing responsibility to support education staff in developing the skills and knowledge to respond to emerging issues, and they will need to make continued efforts to support teachers around changes to gender identity legislation, policy, and practice.

4 If the Scottish Government takes forward legislation to adopt a self-declaration system for legal gender recognition, should this arrangement be open:

B. to everyone?

If you want, you can give reasons for your answer or make comments:
We agree that self-declaration should be open to everyone, in line with the EIS position on welcoming refugees to Scotland. People who have become refugees or asylum seekers because of having experienced persecution on the grounds of their sexual orientation or gender identity in their home country should be able to use the Scottish system to enable them to move forward in their chosen identity. A system which was based on country of birth would exclude such people, potentially further traumatising them. Opening this system to everybody would recognise the importance of international solidarity with people who don’t have these rights.

5 The Scottish Government proposes that people aged 16 and 17 should be able to apply for and obtain legal recognition of their acquired gender. Do you agree or disagree?
None of these options seems appropriate. We think there needs to be further discussion, deliberation and consultation, and that teachers supporting under 16s who identify as transgender at present, need more help to meet those children’s needs, including professional learning, as discussed above.

Marriage and Civil Partnership

7 Should it be possible to apply for and obtain legal gender recognition without any need for spousal consent?

Yes

If you want, you can give reasons for your answer or add comments.: Spousal consent should not be needed to obtain legal gender recognition. Marriage is a contract freely entered into by adults with capacity. At any point either of those adults can choose to end the contract of marriage if they wish. If a person’s spouse was not happy with their decision to change their gender then they are free to end the marriage, but they should not have a legal power to block that person’s decision. That would send concerning messages about spousal rights, which would undermine efforts made in Scotland to challenge domestic abuse and other forms of interpersonal violence.

8 Civil partnership is only available to same sex couples. This means that the civil partners cannot remain in their civil partnership if one of them wishes to obtain a full Gender Recognition Certificate.

Yes
If you want, you can give reasons for your answer or add comments:.

It was always anomalous that only same sex couples could apply for a Civil Partnership (CP) (and, since December 2014, the option of a marriage) while mixed sex couples had the option of marriage only. While separate structures for same sex partnerships pertained it was a case of ‘separate but not equal’. Now that marriage law has been extended to same sex couples, CPs should be extended to mixed sex couples, if they wish. Some people associate the institution of marriage with cultures which oppress women and see them as property, and would prefer to have a purely administrative/less historically laden arrangement such as a CP.

9 Should legal gender recognition stop being a ground of divorce or dissolution?

Yes

If you want, you can give reasons for your answer or add comments:.

Other aspects of the 2004 Act

10 Are any changes to section 22 (prohibition on disclosure of information) necessary?

Yes

If you answered Yes, describe the changes you consider are needed:.

In principle, the right to privacy should extend to anyone covered by a Gender Recognition Certificate, but the implementation of this as regards young people needs careful consideration. Confidentially would be overridden where there are child protection concerns about a young person under 18, but professionals will need to be made aware that identifying as transgender does not automatically give rise to child protection concerns. Information sharing about a transgender young person, e.g. between a primary and a secondary school or a secondary school and an FE college should be handled sensitively, and should be in consultation and with the consent of the young person, other than in child protection/safety situations.

The issue of disclosure of information to parents needs careful consideration.

In the post-16 education sector, clear policies and training are also required to protect the privacy of adult returners to education. In some cases, learners may have transitioned many years before returning to education and may not wish to disclose their transgender status. This may be an issue where old documents are required e.g. qualifications, criminal record checks, etc.

11 Should a person who has been recognised in their acquired gender under the law of another jurisdiction be automatically recognised in Scotland without having to make an application?

Yes

If you want, you can give reasons for your answer or add comments:.

This would support people who have experienced oppression in countries which display serious and persistent prejudice against LGBT+ people.

Non-binary people

12 Should Scotland take action to recognise non-binary people?

Yes

If you answered No, and if you want, you can give reasons for your answer:.

Yes. People who do not identify as male or female should have that gender expression recognised.

However, it will be important for teachers to participate in professional learning during which they can explore issues relating to sex, gender, gender identity, gender expression, etc. Many of these concepts are new, and unfamiliar to some teachers and lecturers.

A person who says that they are non-binary is rejecting the norms and stereotypes associated with their sex (male or female), but so do a great many people who do not describe themselves as non-binary, and this should be recognised as part of efforts to challenge stereotypes and harmful norms. Some people who identify as non-binary reject the whole concept of gender or simply say that they don’t feel either male or female, while recognising that others do.

It will remain important for organisations to keep records based on sex, as women and girls in particular still experience sex-based oppressions, deriving from their biological functions such as being able to menstruate, become pregnant, give birth, and experience the menopause. Trade unions will still want to organise around women’s inequalities and hold women’s events and conferences, etc. These events should be transgender and non-binary inclusive.

The possible implications for young people’s mental health if they are not allowed to be legally recognised as non-binary should be taken into account, particularly at a time when there is growing awareness of the importance of mental health and wellbeing, when the number of children with mental health needs is rising and the service provision to meet those needs is inadequate.
There will be wider implications for schools of moving towards a culture of recognising different gender identities. Schools in particular have for many years been used to very gendered language such as ‘boys and girls’ and teachers being referred to as ‘Miss’ and ‘Sir’. Professional learning about the issues this can give rise to is very much needed and wanted by EIS members.

There are substantial challenges facing non-binary teachers, and schools, colleges and universities need to have clear policies to support all LGBT+ staff.

We would be concerned if teachers who had not had sufficient time or training to fully understand these new concepts were adversely affected by a mistake. We are aware of cases of teachers being disciplined for using a wrong pronoun, or for using gendered collective nouns (guys, girls, etc.). Any supporting guidance around this legislation should make clear that inadvertent mis-gendering or slip-ups of language should be considered as evidence of the need for professional learning and a whole school approach to LGBT+ inclusion, not as disciplinary matters. There is, of course, a distinction between mistakes and consistent, intentional mis-gendering, which should be treated as a harassment/disciplinary issue.

13 If you answered Yes to Question 12, which of the identified options to give recognition to non-binary people do you support? You can select more than one option.

Option 5: Incremental approach

If you want, you can give reasons for your answer, add comments or, if you think none of Options 1 to 6 is suitable, describe your preferred option.

An incremental approach to this issue is needed as many of the ideas are and much of the language is new and still evolving. Professionals such as teachers will need time to become familiar with these concepts.

If the Equality Act were to be amended, then there would be a significant need for professional learning for teachers around the changes- indeed there is significant need for professional learning for teachers on equality and the Equality Act at present; and it may be that a change of terminology would be useful, changing ‘gender reassignment’ (one of the nine protected characteristics) to ‘gender identity’, to reduce the emphasis on a medical process.

It would be important for ‘sex’ to be retained as a protected characteristic.

Funded, planned and accessible professional learning (not merely online learning) will be needed to go alongside any changes.

14 At paragraph 7.26. and in Annex J we have identified the consequential legal impacts if non-binary people could obtain legal gender recognition using the proposed self-declaration system.

Yes

If you answered Yes, describe the impacts you have identified.

We believe that there may be implications for the Equality Act; the provision of residential units; restricted employment; and sex-specific services such as vaccinations provided within schools.

Conclusion

15 Do you have any comments about, or evidence relevant to:

No

16 Do you have any further comments about the review of the Gender Recognition Act 2004?

Yes

If you answered Yes, add your comments:

We see this proposal in a wider context in which equality matters are being squeezed in schools as teachers and Headteachers are struggling with immense workloads and external pressures such as the development of SNSAs. There is a significant need for schools to have more time and resources to support all aspects of the equality agenda, including LGBT+ equality.

While this reform proceeds, schools will need to continue to develop robust policies around supporting transgender and non-binary young people, challenging sex discrimination, and on child protection and meeting children’s needs.

We take the view that transgender equality and women’s equality are not in competition with each other, but we would wish to see continued concerted efforts to challenge sex stereotypes and misogynistic attitudes throughout society, including in educational establishments.

Our consistent concern is that without systematic, meaningful, funded, ongoing, accessible professional learning/continued professional development, and strong coverage of equality matters in teachers’ professional standards and ITE, legislative reform will deliver little in the way of changed practice. Legislation is only one part of the jigsaw. Services and people which educate and support young people need proper investment in order to make real the law’s aspirations.

Such learning should also be available to other school and college support staff, such as playground assistants and catering staff, as part of a whole-establishment approach to equality and inclusion.

About You
What is your name?

Name: 

What is your email address?

Email: 

Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:
Educational Institute of Scotland (EIS)

If you are responding as an organisation and want to tell us more about your organisation’s purpose and its aims and objectives, you can do so here.

The Educational Institute of Scotland (EIS) is the largest teaching union in Scotland. Founded in 1847 the EIS is also the oldest teaching union in the world. We have a commitment to high standards of education and to a society which offers young people the best opportunities in education, training as well as social and cultural development. With over 50,000 members, we represent 80% of teachers in Scotland, working in all sectors of education from early years to primary and secondary schools and Further and Higher establishments.

Where are you resident?

Scotland

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