

## ITEM No ...3.....

**REPORT TO:** POLICY AND RESOURCES COMMITTEE – 12 MARCH 2018

**REPORT ON:** REVIEW OF THE GENDER RECOGNITION ACT 2004 - PROPOSED RESPONSE TO CONSULTATION

**REPORT BY:** CHIEF EXECUTIVE

**REPORT NO:** 100-2018

### **1.0 PURPOSE OF REPORT**

1.1 The report aims to keep elected members informed of the consultation to reform the Gender Recognition Act 2004. The report also includes Dundee City Council's proposed response.

### **2.0 RECOMMENDATIONS**

2.1 It is recommended that Committee:

- i) approves Dundee City Council's formal response
- ii) notes the response attached, pending Committee approval, was submitted to the Scottish Government to meet the deadline for responses of 1 March 2018. It was agreed that any changes to this response suggested by Committee would also be accepted subsequently.

### **3.0 FINANCIAL IMPLICATIONS**

3.1 There are no direct financial implications as a result of this report.

### **4.0 MAIN TEXT**

4.1 The Scottish Government has issued a consultation paper on proposals to reform the Gender Recognition Act 2004, with a deadline for responses of 1 March 2018.

4.2 The Act allows transgender people over 18 to apply to change their legally recognised gender. At the time, the Act was seen as ground-breaking, but the Scottish Government believes it is now out of date and needs to be reformed and simplified, with less intrusive and onerous requirements, and more centred on the wishes of the individual. In the Fairer Scotland Action Plan, the Scottish Government committed to 'review and reform gender recognition law so it is in line with international best practice for people who are transgender or intersex'.

4.3 Proposed reforms set out in the consultation paper include:

- removing the requirements for applicants to provide medical reports and to have lived in their acquired gender for two years before applying.
- reducing the minimum age for applying for legal gender recognition from 18 to 16, in line with the law in Scotland generally which provides rights for people at age 16.

Applicants would still have to provide a statutory declaration to confirm they fully understand the implications for their application and intend to live in their acquired gender for the rest of their lives.

4.4 The consultation paper also discusses what arrangements should be put in place in relation to applications by, or on behalf of, those aged under 16. It also seeks views on what recognition should be given to non-binary people, who do not identify as either male or female. In both of these areas, the consultation paper outlines a number of potential options and seeks views.

4.5 The 2004 Act extends across the United Kingdom. However, gender recognition is a devolved matter. As a result, legislation in this area is within the competence of the Scottish Parliament. The Scottish Government say they will work closely with the UK Government on any potential consequential changes needed to reserved or cross-border legislation. For example, legislation may be needed to ensure mutual acceptance of Gender Recognition Certificates across the UK.

4.6 The consultation paper sets out a series of questions and the proposed response to these is attached.

## **5.0 POLICY IMPLICATIONS**

5.1 This report has been screened for any impacts on Equality and Diversity, Fairness and Poverty, Environment and Corporate Risk. There are no major issues.

5.2 Should the legislative changes proposed be subsequently enacted, they would have a positive impact on the rights of transgender people.

## **6.0 CONSULTATIONS**

6.1 The Council Management Team, corporate equalities group and Registrars were consulted in the preparation of this report and agree with its contents.

## **7.0 BACKGROUND PAPERS**

Scottish Government Consultation Paper  
Review of the Gender Recognition Act 2004

DAVID R MARTIN  
CHIEF EXECUTIVE

DATE: 24 FEBRUARY 2018

## REVIEW OF GENDER RECOGNITION ACT 2004 - CONSULTATION RESPONSE

### Question 1 (Paragraphs 3.01 - 3.29)

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-declaration system for legal gender recognition instead.

Do you agree or disagree with this proposal?

Agree   
 Disagree   
 Don't know

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

Q1

We agree that the system of requiring medical evidence to confirm gender identity may be contrary to Article 8 of the Human Rights Act and should be amended.

Any system for self-declaration should be simple and not cost prohibitive.

### Question 2 (Paragraphs 3.30 - 3.34)

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?

Yes   
 No   
 Don't know

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

Q2

It should be a point of principle that third party agencies (Gender Recognition Panel) or individuals should not have a power to determine an individual's gender identity.

Individuals will be making very serious decisions about their lives, so they need to be informed and aware of the implications of such changes. A statutory declaration by an applicant should be sufficient.

### Question 3 (Paragraphs 3.35 - 3.39)

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

Yes   
 No   
 Don't know

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

## Q3

In Question 2 we indicated that we agreed that those seeking legal gender recognition make a statutory declaration. The essence of this seems to be that such a declaration will be a major decision and almost final i.e. they intend to live in their acquired gender until death. There may however be exceptional circumstances that would lead to a subsequent declaration.

As such, we believe that there may need to be some flexibility so would suggest there be a limit on the number of times a person can get legal gender recognition. Perhaps a limit of two might be appropriate. It is important that changes to the Register are not made regularly with impunity.

**Question 4** (Paragraphs 3.40 - 3.47)

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

(A) only to people whose birth or adoption was registered in Scotland,  
or who are resident in Scotland?

or

(B) to everyone?

or

(C) don't know

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

## Q4

We believe that if the Scottish Government takes forward legislation to adopt the self-declaration system for legal gender recognition that this arrangement should only be open to people whose birth or adoption were registered in Scotland or who are resident in Scotland.

**Question 5** (Paragraphs 4.04 - 4.07)

(This question relates to the reduction of the minimum age of applicants for legal gender recognition to those aged 16 and over from the current age of 18. Question 6 will ask your views on the options for people younger than 16).

The Scottish Government proposes that people aged 16 and 17 should be able to apply and obtain legal recognition of their acquired gender. Do you agree or disagree?

Agree

Disagree

Don't know

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

## Q5

This would complement the existing legal and democratic rights of 16-17 year olds in Scotland.

**Question 6** (Paragraphs 4.08 - 4.41)

Which of the identified options for children under 16 do you most favour? (Please select only one answer).

- |   |                                     |
|---|-------------------------------------|
| Option 1 - do nothing for children under 16 | <input type="checkbox"/>            |
| Option 2 - court process                    | <input checked="" type="checkbox"/> |
| Option 3 - parental application             | <input type="checkbox"/>            |
| Option 4 - minimum age of 12                | <input type="checkbox"/>            |
| Option 5 - applications by capable children | <input type="checkbox"/>            |
| None of these options                       | <input type="checkbox"/>            |

Q6

We agree that children under 16 must have a right to determine their gender identity but this must be balanced by protections from abuse or coercion offered by our legal system.

It should also recognise that age is not always 'the' determining factor on the capability of a young person to make an informed decision and that 12-15 year olds may have that ability and that should be respected.

It would therefore seem appropriate that the question of capability for under 16s should be determined by a court process.

Any proposed changes must be compliant with the Children and Young People Act 2014 to ensure that the impact on their wellbeing is fully taken into account within the national practice model.

**Question 7** (Paragraphs 5.01 - 5.08)

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

- |            |                                     |
|------------|-------------------------------------|
| Yes        | <input checked="" type="checkbox"/> |
| No         | <input type="checkbox"/>            |
| Don't know | <input type="checkbox"/>            |

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

Q7

It should not be in the power of any individual to give or deny consent to an adult's gender identity regardless of their relationship.

**Question 8** (Paragraphs 5.10 - 5.16)

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

Should they instead be allowed to remain in their civil partnership? This would mean that a woman and a man would be in the civil partnership.

- |            |                                     |
|------------|-------------------------------------|
| Yes        | <input checked="" type="checkbox"/> |
| No         | <input type="checkbox"/>            |
| Don't know | <input type="checkbox"/>            |

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

Q8

We can find no rational justification why the state should deny any partnership their choice in the way they want to live their lives or how it is recognised.

The logic would be to amend the Civil Partnership legislation to reflect the proposed changes.

**Question 9** (Paragraphs 5.17 - 5.21)

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

Yes   
 No   
 Don't know

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

Q9

We can find no rational justification why the state should deny any partnership their choice in the way they want to live their lives.

It would be more beneficial to remove all reference to a need for 'grounds for divorce' for every married couple.

**Question 10** (Paragraphs 6.01 - 6.06)

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

Yes   
 No   
 Don't know

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

Q10

Section 22 prohibits a person who has acquired protected information in an official capacity to disclose the information to any other person. Protected information includes information about applying for gender recognition certificates and also includes information about the person's gender before it became the acquired gender. There are a number of limited exceptions to this including where the person has consented, in connection with a court order, for prevention / investigation of crime or in connection with social security or pensions.

The difficulty is in how this section has been interpreted since 2004. It appears to be accepted that section 22 grants a trans gender person the right to request that all references to former name and gender are removed to ensure that their former identity is not revealed. In order to achieve this, organisations would be expected to amend all electronic records and to replace paper records with new records. Material that needs to be kept and which contains information about the trans gender person's change of status should be sealed as confidential and kept by the HR manager and only viewed by other staff if this is deemed necessary to perform their duties. Whilst the Council has had only one or two requests of this nature, it should be noted that failure to comply with section 22 is a criminal offence.

This raises two issues for a local authority. Firstly there are documents that cannot be changed

retrospectively such as summary warrants, registered leases, dispositions and ASBO proceedings to name a few. The exemptions provided by the 2004 Act do not cover these and there is no official guidance on how these matters should be dealt with.

Secondly, in practice, this might be difficult for a local authority to comply with in that their computer systems may not technically allow such changes. Replacing and / or amending paper records could be a huge task and in some cases it will be obvious that these have been amended thus defeating the purpose of amending the records in the first place.

The expectations of the trans gender person in seeking to have their records amended will often be beyond what can be achieved in practice and clarification on these issues, either by amending section 22 or by providing more detailed guidance, would assist both local authorities in managing their records and the trans gender person in understanding what is required by those bodies holding their information.

**Question 11** (Paragraphs 6.23 - 6.31)

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   
 No   
 Don't know

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

Q11

We should not discriminate against a person with protected characteristics regardless of their origins.

**Question 12** (Paragraphs 7.01 - 7.06)

Should Scotland take action to recognise non-binary people?

Yes   
 No   
 Don't know

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

Q12

**Question 13** (Paragraphs 7.08 - 7.41)

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 1: Changes to administrative forms   
 Option 2: Book of Non-binary Identity   
 Option 3: Limited document changes   
 Option 4: Full recognition using proposed self-declaration system   
 Option 5: Incremental approach   
 Option 6: Amendment of the Equality Act 2010   
 None of the above options

If you want, you can give reasons for your answer, add comments or, if you think none of Options 1 to 5 is suitable, describe your preferred option.

Q13

As a public authority we are aware of the practical issues associated with creating a new protected characteristic. We have learned over the past 20+ years of equality laws that an incremental approach to enhanced data gathering and reporting is possible. However we also need the public's confidence that this information is being used to reduce barriers and promote equality and this takes time and trust.

**Question 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.

Are you aware of other impacts we have not identified?

Yes   
 No   
 Don't know

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

Q14

The Housing (Scotland) Act will almost certainly only be one of a number of areas in which there would be legal impacts of introducing a non-binary people category. For example, in the area of Building Control, Licensing and Planning, there will be issues regarding the provision of changing rooms or toilets which would be based on specific male and female gender.

Recent reports from the USA over transgender people facing discrimination over their use of toilets should provide a lesson that as a country we should proactively tackle such issues by having an agreed national guidance for local authorities based on best practice.

**Question 15** (Paragraphs 8.01 - 8.06)

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

- (a) the partial Business and Regulatory Impact Assessment;
- (b) the partial Equality Impact Assessment;
- (c) partial Child Rights and Wellbeing Impact Assessment; or
- (d) the partial Privacy Impact Assessment?

Yes   
 No

If you answered Yes, add your comments or evidence.

Q15



**Question 16**

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

Yes   
No

If you answered Yes, add your comments.

**Q16**

Dundee City Council welcomes the proposed changes to the Gender Recognition Act.

