

## **Response to the United Nations**

# **PUBLIC CONSULTATION ON PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY**

**January 2017**

**Equal Opportunities Commission  
Hong Kong, China**



平等機會委員會  
EQUAL OPPORTUNITIES COMMISSION

## **1. Introduction**

The Equal Opportunities Commission (EOC) was established in 1996 and is Hong Kong's independent statutory body with responsibility for promoting equality and eliminating discrimination.<sup>1</sup> It has duties and powers under four anti-discrimination Ordinances: the Sex Discrimination Ordinance (SDO); the Disability Discrimination Ordinance (DDO); the Family Status Discrimination Ordinance (FSDO); and the Race Discrimination Ordinance (RDO). These provide protection from discrimination to everyone in Hong Kong on grounds of sex, pregnancy, marital status, disability, family status, and race.

The EOC has a number of duties including to enforce the anti-discrimination legislation, conduct conciliation of complaints of discrimination, to review the effectiveness of the anti-discrimination legislation, and where appropriate make recommendations for reform. The EOC also has a broad range of powers such as providing legal assistance in legal claims of discrimination, conducting formal investigations, producing guidance on the anti-discrimination legislation, as well as conducting research and education of the public.

The EOC welcomes the appointment of the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (UN IE SOGI). The EOC believes that the role is very important in order to better protect Lesbian, Gay Bisexual, Transgender and Intersex People (LGBTI) from violence and discrimination which remain prevalent in many countries around the world.

The EOC also welcomes the public consultation in order that relevant stakeholders can provide their views on the proposed mandate of the Independent Expert, and the planned areas of focus.

The EOC has done a wide range of work relating to advancing LGBTI rights in Hong Kong over the last few years and hopes that our response provides valuable evidence on the concerns in Hong Kong, our EOC work to address those concerns, and useful suggestions on the areas of focus.

## **2. The major areas of concern in Hong Kong and EOC work**

In Hong Kong there remain significant concerns in relation to the protection from discrimination, and other human rights of LGBTI people which broadly relate to the following issues: criminalisation of homosexual sexual activity; lack of comprehensive LGBTI anti-discrimination legislation; lack of protection from discrimination and recognition of same sex relationships; the rights of transgender people relating to the lack of gender

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<sup>1</sup> The EOC is not currently recognised as a National Human Rights Institution (NHRI) under the United Nations Paris Principles, but its duties and powers in relation to issues of equality are similar in a number of respects to NHRIs.

recognition legislation and surgical requirements to change gender; the practice of conversion therapy; and the rights of intersex people.

It should be noted that many of the concerns in Hong Kong are similar or related to the global concerns identified by the Independent Expert as “five linchpins” instrumental to the protection against violence and discrimination based on sexual orientation and gender identity: decriminalization; destigmatization; legal recognition of gender identity; cultural inclusion with gender and sexual diversity; and empathization.

## 2.1 Criminalization

Until 1991, it was unlawful and a criminal offence for homosexual men to engage in sexual activity. After that time there remained discrimination in the age of consent for homosexual sexual activity as the age of consent was 21, whereas for heterosexual sexual activity it was 16.

The difference in ages of consent was challenged in the courts, and the Court of Appeal held in 2006 that it was sexual orientation discrimination under Hong Kong’s Basic Law and Bill of Rights to have such a difference.<sup>2</sup>

In 2007 the Court of Final Appeal also considered section 118F(1) of the Crimes Ordinance which prohibited sexual intercourse between men in public. The Court decided that the provision also breached Articles 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the Bill of Rights.<sup>3</sup>

The Government made amendments to the Crimes Ordinance in 2014 to implement the orders of the Courts in the *Leung* and *Zigo* decisions.<sup>4</sup>

There are however a number of criminal laws which still exist which discriminate against people on grounds of their sexual orientation by only applying to homosexual sexual activity: in particular the offence of homosexual buggery with a man under 16,<sup>5</sup> and gross indecency with a man under 16.<sup>6</sup>

The Hong Kong Government recently launched in November 2016 a public consultation on reforming sexual offences involving children, which includes consultation on repealing the

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<sup>2</sup> *Leung TC William Roy v. Secretary for Justice* [2006] 4 HKLRD 211 (CA) [http://legalref.judiciary.gov.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=54227&QS=%2B&TP=JU](http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=54227&QS=%2B&TP=JU). The Court of Appeal found that sections 118C, 118F(2)(a), 118H and 118J(2)(a) of the of the Crimes Ordinance breached of Articles 25 and 39 of the Basic Law as well as Articles 1, 14 and 22 of the Hong Kong Bill of Rights.

<sup>3</sup> *Secretary for Justice v. Yau Yuk Lung Zigo and Lee Kam Chuen* [2006] 4 HKLRD 196 (CFA)

<sup>4</sup> Statute Law (Miscellaneous Provisions) Ordinance of 2014 .

<sup>5</sup> Section 118C of the Crimes Ordinance.

<sup>6</sup> Section 118H of the Crimes Ordinance.

above provisions and replacing them with gender neutral provisions which do not discriminate on grounds of sexual orientation.<sup>7</sup>

The EOC is pleased that the Government is making the proposals as it considers that there should be no criminal laws which apply to people based on their sexual orientation or gender identity, particularly when the offences involve serious sanctions of imprisonment. The EOC will be making submissions in response to the public consultation to that effect and call for the repeal of the laws as soon as possible.

## **2.2 LGBTI anti-discrimination legislation**

There is currently no comprehensive legislation against discrimination on the grounds of sexual orientation, gender identity or intersex status in Hong Kong.<sup>8</sup> This can be contrasted with the protections from discrimination on grounds of sex, pregnancy, marital status, disability, family status, and race.<sup>9</sup>

There is only more limited protection from discrimination under Hong Kong's constitutional laws of the Basic Law and Bill of Rights, which include provisions prohibiting discrimination.

The Basic Law sets out the legal system in Hong Kong under the "one country, two systems" of the People's Republic of China. It came into operation on 1 July 1997. Chapter 3 of the Basic Law contains a number of provisions protecting people's human rights. These include provisions that the ICCPR and ICESCR continue to have force in Hong Kong<sup>10</sup>, and that Hong Kong residents are equal before the law.<sup>11</sup>

The Hong Kong Bill of Rights Ordinance (BORO) was enacted on 6 June 1991 and came into operation on 8 June 1991. It implements into Hong Kong law the ICCPR and is therefore, together with the Basic Law, Hong Kong's primary human rights legislation. The BORO provides that all persons are equal before the law and prohibits discrimination by the Government and public authorities on any grounds, including "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other

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<sup>7</sup> The Law Reform Commission of Hong Kong, Review of Sexual Offences Sub-Committee, Sexual Offences involving children and persons with mental impairment, [http://www.hkreform.gov.hk/en/docs/sexoffchild\\_e.pdf](http://www.hkreform.gov.hk/en/docs/sexoffchild_e.pdf)

<sup>8</sup> The EOC does consider complaints of discrimination by transgender people under the Disability Discrimination Ordinance (where a person has been medically diagnosed with gender identity disorder or gender dysphoria) or the Sex Discrimination Ordinance. However, some transgender people and groups working with them prefer not to be characterized as having a disability. Further, to date there has been no definitive determination by any court in Hong Kong that gender identity disorder is considered as a disability under the DDO, or as sex discrimination under the SDO.

<sup>9</sup> Under the Sex Discrimination Ordinance (SDO); the Disability Discrimination Ordinance (DDO); the Family Status Discrimination Ordinance (FSDO); and the Race Discrimination Ordinance (RDO).

<sup>10</sup> Article 39 Basic Law.

<sup>11</sup> Article 25 Basic Law

status”.<sup>12</sup>

Both the BORO and the Basic Law are legally binding<sup>13</sup> on the Government, all public authorities, and those acting on their behalf. However, this means the provisions of BORO and the Basic Law are generally not legally binding upon private bodies or individuals. In addition, the EOC has no duties or powers in relation to enforcing the BORO or Basic Law.

To date, there have been several decisions by the courts of Hong Kong that have recognized that sexual orientation is a protected characteristic under the Basic Law and BORO non-discrimination provisions in terms of being an “other status”.<sup>14</sup>

It is also relevant to note that various human rights monitoring bodies of the United Nations have repeatedly made specific recommendations to the Hong Kong Government to adopt anti-discrimination legislation relating to sexual orientation and gender identity: the Human Rights Committee in relation to the ICCPR in 1999 and 2013<sup>15</sup>; and the Committee on Economic, Social and Cultural Rights in relation to the ICESCR in 2001, 2005 and 2014<sup>16</sup>. For example in 2013, the Human Rights Committee, which has responsibility for monitoring compliance with the ICCPR, noted and recommended:

*“The Committee is concerned about the absence of legislation explicitly prohibiting discrimination on the basis of sexual orientation and reported discrimination against lesbian, gay, bisexual and transgender persons in the private sector (arts. 2 and 26). Hong Kong, China, should consider enacting legislation that specifically prohibits discrimination on ground of sexual orientation and gender identity, take the necessary steps to put an end to prejudice and social stigmatization of homosexuality and send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation or gender identity. Furthermore, Hong Kong, China, should ensure that benefits granted to unmarried cohabiting opposite-sex couples are equally granted to unmarried cohabiting same-sex couples, in line with article 26 of the Covenant.”*

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<sup>12</sup> Art. 22, Hong Kong Bill of Rights Ordinance, Cap. 383, which mirrors Art. 26 of the International Covenant on Civil and Political Rights (ICCPR).

<sup>13</sup> Legal binding means that the Government and all public authorities are bound by the law and should comply with the requirements of the law.

<sup>14</sup> Leung TC William Roy v. Secretary for Justice [2006] 4 HKLRD 211 (CA) and Secretary for Justice v. Yau Yuk Lung Zigo and Lee Kam Chuen [2006] 4 HKLRD 196 (CFA)

<sup>15</sup> CCPR/C/CHN-HKG/CO/3 paragraph 23, dated 29 April 2013.

[http://www.cmab.gov.hk/doc/en/documents/policy\\_responsibilities/the\\_rights\\_of\\_the\\_individuals/Advance\\_Version\\_2013\\_ICCPR\\_e.pdf](http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/Advance_Version_2013_ICCPR_e.pdf)

<sup>16</sup> E/C.12/CHN/CO/2, paragraph 41.

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FCHN%2FCO%2F2](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FCHN%2FCO%2F2)

The EOC commissioned detailed research into the issue of introducing LGBTI anti-discrimination legislation in Hong Kong which was conducted by the Gender Research Centre of the Chinese University and published in January 2016.<sup>17</sup>

The study was the most comprehensive of its kind in Hong Kong, employing both qualitative and quantitative approaches to systematically examine both the experience of discrimination faced by LGBTI individuals, as well as public views about possible remedies against such discrimination. It was also the first study to analyze similar legislation in other jurisdictions as to how the legislation could be structured, including possible exceptions where they serve a legitimate aim and are proportionate.

The evidence from the study indicated that discrimination against LGBTI people is a common occurrence in Hong Kong in all aspects of public life such as employment, education, the provision of services, and government functions. Importantly, the study also found that public opinion has visibly shifted in favour of legislation against discrimination on the grounds of sexual orientation, gender identity, and intersex status. Over half (55.7%) of the telephone survey respondents agreed with legislation – nearly double the comparable figure from a decade ago. Notably, the vast majority (91.8%) of young people (18-24 year olds) considered anti-discrimination legislation necessary, while nearly half (48.9%) of those with religious views also concurred.

The report made a number of recommendations to the Government, including most importantly that the Government should consult on and introduce LGBTI anti-discrimination legislation.

It is now almost one year since the report from the study was released. The EOC is pleased that in its recent Policy Agenda which sets out the Government's planned work for 2017 it has indicated that it will:

*“Promoting a culture of diversity, inclusiveness and mutual respect in the community, including following up on the measures as listed below:*

- providing training and resources for personnel in specific fields to enhance their knowledge of and sensitivity towards sexual minorities;*
- drawing up a charter on non-discrimination of sexual minorities for voluntary adoption by relevant organisations and individuals;*
- enhancing public education and publicity to promote the message of non-discrimination;*
- reviewing and reinforcing the relevant support services; and*
- conducting further study on the experience of other jurisdictions in implementing anti-discrimination measures to*

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<sup>17</sup> Report on Study on Legislation against discrimination on the grounds of sexual orientation, gender identity, and intersex status, January 2016, <http://www.eoc.org.hk/eoc/upload/ResearchReport/20161251750293418312.pdf>

*provide a basis for future consultations.*<sup>18</sup>

However, the EOC believes that the Government measures do not go far enough, as there is no commitment to consult on and introduce LGBTI anti-discrimination legislation.

### **2.3 Lack of protection from discrimination and recognition of same-sex relationships**

People in same sex relationships in Hong Kong also face discrimination in many aspects of their lives because there is no legal recognition of same sex relationships, and there is no protection from discrimination relating to such relationships. This also adversely affects the right to family life of such same sex couples.

In Hong Kong, there is currently no legal right of same-sex couples to marry or enter into legal relationships similar to marriage such as civil unions. There is also no legal recognition of same-sex marriages or civil unions from other countries or jurisdictions which do permit such marriages or civil unions.

There is also no legal recognition in Hong Kong in most circumstances for de facto cohabiting couples, whether heterosexual couples or same sex couples.

There are two situations where there is some limited recognition of same-sex relationships. Firstly, there is recognition in the context of protecting people from domestic violence under the Domestic and Cohabitation Relationships Violence Ordinance.<sup>19</sup> The legislation was amended in 2009 to extend protection to persons in cohabiting relationships, whether heterosexual or same sex relationships. It now provides protection from domestic violence for people in marriages, plus persons in unmarried cohabiting relationships.

Secondly, there is recognition in the context of medical treatment of partners. On 13 July 2015, the Government enacted the Electronic Health Record Sharing System Ordinance.<sup>20</sup> The legislation includes provisions by which cohabiting partners (heterosexual or same-sex) are recognized as having rights regarding the medical treatment of their partners, where they themselves are unable (e.g. they are in a coma, unconscious, or mentally incapable ) to make decisions.

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<sup>18</sup> Hong Kong Government, Policy Agenda published 18 January 2017, <http://www.policyaddress.gov.hk/2017/eng/pdf/Agenda.pdf>

<sup>19</sup> A cohabitation relationship:

“(a) means a relationship between 2 persons (whether of the same sex or of the opposite sex) who live together as a couple in an intimate relationship; and

(b) includes such a relationship that has come to an end”: section 2, Domestic and Cohabitation Relationships Violence Ordinance.

<sup>20</sup> Electronic Health Record Sharing System Ordinance:

[http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/56D8E9DD28796B4848257E8B005B8A38/\\$FILE/CAP\\_625\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/56D8E9DD28796B4848257E8B005B8A38/$FILE/CAP_625_e_b5.pdf)

The non-recognition of same-sex relationships applies to many aspects of life such as employment benefits for partners, taxation benefits, immigration, public housing, inheritance rights and family rights, and IVF treatment. This is because for many public or private entitlements, there is a condition that they are only provided to persons in heterosexual marriages.

For example, in relation to employment, the Government civil service only provides employment benefits such as medical benefits to partners of an employee where the couple is in a heterosexual marriage. In relation to tax benefits, similarly there is only an entitlement to a reduction in tax for heterosexual married couples.<sup>21</sup> In relation to inheritance rights, there is no automatic right of a person to inherit a same sex cohabiting partner's estate if they die without a will.<sup>22</sup> In relation to immigration, where a person moves to Hong Kong on a work visa, their partner is only entitled to a dependent visa if they are in a heterosexual marriage.<sup>23</sup> In relation to IVF treatment, the Human Reproductive Technology Ordinance (HRTTO) states that reproductive technology services are only available to married persons.<sup>24</sup>

The EOC has considered the discriminatory nature of the current legal system in Hong Kong in the context of its Discrimination Law Review (DLR) of the four existing anti-discrimination Ordinances.<sup>25</sup> In particular, one of the main issues the DLR examined was the discrimination against persons in cohabiting relationships whether heterosexual or same sex, given there is no legal recognition of such relationships.

In relation to the protections from discrimination, currently the Sex Discrimination Ordinance provides protection from discrimination on grounds of marital status, which is defined as:

*"The state or condition of being:*

- (a) Single;*
- (b) Married;*
- (c) Married but living separately and apart from one's spouse;*
- (d) Divorced; or*
- (e) Widowed"*<sup>26</sup>

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<sup>21</sup> It should be noted that a judicial review claim was heard in December 2016 on these issues under the Bill of Rights, *Leung v Director of Immigration and Inland Revenue Department*, <http://www.scmp.com/news/hong-kong/law-crime/article/2054890/hong-kong-government-move-refuse-married-gay-employee>

<sup>22</sup> Section 4, Intestate Estate Ordinance. A person would need to apply for maintenance and prove that they were maintained by the deceased person before their death: section 3(1)(b)(ix) of the Inheritance (Provision for Family and Dependants) Ordinance.

<sup>23</sup> This issue is also the subject of a judicial review claim under the Bill of Rights, *QT v Director of Immigration*, HCAL 124/2014.

<sup>24</sup> Section 15(5) Human Reproductive Technology Ordinance.

<sup>25</sup> Equal Opportunities Commission, *Discrimination Law Review*, March 2016, see pages 111 to 132, <http://www.eoc.org.hk/eoc/upload/DLR/2016330179502227490.pdf>

<sup>26</sup> Section 2 SDO.

Unlike a number of other jurisdictions such as Australia and New Zealand, there is no protection from discrimination of de facto cohabiting couples, whether heterosexual or same sex couples. Further as stated above there are many aspects of life where entitlements are conditional on being in a heterosexual marriage.

In light of all of the above, the EOC recommended in March 2016 to the Government that it should:

- Consult on providing protection from discrimination for persons in cohabiting relationships in relation to the marital status protection under the Sex Discrimination Ordinance, including the possible repeal, amendment or addition of specific exceptions;
- Consider all the other potentially discriminatory legislation and policies as to whether it is appropriate to reform them;
- Consider the possible different methods of recognising such relationships, including coverage of heterosexual and homosexual relationships.<sup>27</sup>

To date, the Government has not commenced any public consultation on those issues.

## **2.4 Rights of transgender people in Hong Kong**

It is not known exactly how many transgender people there are in Hong Kong. The first sex reassignment surgery conducted in a publicly funded hospital was in 1981. The numbers of people diagnosed and treated for gender dysphoria in Hong Kong has been increasing between 2010 and 2015.<sup>28</sup> There would also be many more transgender people that have not been diagnosed, or have moved to Hong Kong from overseas.

There are two major issues of concern regarding transgender peoples' rights in Hong Kong: requirements for surgery to change gender; and the lack of comprehensive legislation relating to issues of gender recognition.

Firstly, if a transgender person wishes to legally change their gender on their identity documents (eg ID card and passport), the Government requires that they undergo genital sex reassignment surgery which results in their sterilization. It is only after such surgery that a person will be issued with a new identity card and passport with their affirmed gender.

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<sup>27</sup> Discrimination Law Review, page 129.

<sup>28</sup> The figures for numbers of transgender people diagnosed with gender dysphoria are: 58 in 2010/11; 75 in 2011/12; 108 in 2012/13; 121 in 2013/14; and 133 in 2014/15, <http://www.info.gov.hk/gia/general/201512/09/P201512090358.htm>

Internationally it has been recognised that there are many situations where it may not be appropriate for transgender people to undergo surgery. For example such treatment may not be appropriate for physical or psychological reasons when a person has a pre-existing health or mental condition.<sup>29</sup> Surgery for female to male transgender people is also more complex and difficult. Further, some transgender people may not wish to undergo surgery as they feel comfortable in their affirmed gender without genital surgery. For example a person may be comfortable with undergoing hormonal treatment and making physical changes to their appearance.

The requirement for genital surgery and resultant sterilization is not compliant with international human rights obligations regarding people's right to be free from inhuman and degrading treatment, and the rights to privacy, family life and non-discrimination.

The United Nations has raised human rights concerns with requirements for surgery and sterilization.<sup>30</sup> Most recently in February 2013, a United Nations report examined the human rights abuses in health care settings.<sup>31</sup> It highlighted concerns that in many countries there was a requirement for transgender people to undergo surgery or sterilization, and that such treatment was a form of unlawful inhumane or degrading treatment.<sup>32</sup> The report called on all States to outlaw "...forced or coerced sterilization in all circumstances."<sup>33</sup>

In addition, on 3 February 2016, the United Nations Committee Against Torture published its Concluding Observations in relation to the Hong Kong Government's compliance with the Convention Against Torture.<sup>34</sup>

In relation to transgender persons the Committee stated:

*"28. While welcoming the set up of an interdepartmental working group on gender recognition..., the Committee is concerned about reports that transgender persons are required to have completed sex-reassignment surgery, which includes removal of reproductive organs, sterilization and genital reconstruction, in order to obtain legal recognition of their gender identity."*<sup>35</sup>

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<sup>29</sup> World Professional Association for Transgender Health. (2011). *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (Seventh ed.). Minneapolis: WPATH. <http://www.wpath.org/documents/IJT%20SOC,%20V7.pdf>

<sup>30</sup> Report of the United Nations High Commissioner for Human Rights, 17 November 2011, A/HRC/19/41, Ibid paragraphs 72 and 84(h).

<sup>31</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Human Rights Council, 22<sup>nd</sup> session, A/HRC/22/53, 1 February 2013, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)

<sup>32</sup> Ibid paragraph 78.

<sup>33</sup> Ibid paragraph 88.

<sup>34</sup> Concluding Observations on the fifth periodic report of China with respect to Hong Kong China, Committee Against Torture, CAT/C/CHN-HKG/CO/5, 3 February 2016, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/017/38/PDF/G1601738.pdf?OpenElement>

<sup>35</sup> Ibid paragraph 28.

It also recommended:

*“29. Hong Kong, China should:*

*(a) Take the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex persons, including by removing abusive preconditions for the legal recognition of the gender identity of transgender persons, such as sterilization...”<sup>36</sup>*

Secondly, there is no comprehensive gender recognition to provide for the process for changing gender, as well as relevant related rights such as privacy, and family relationships such as marriages. There currently is only an administrative procedure for granting a transgender person’s change in identity documents. This reduces transparency and clarity as to the process and decision making.

The landmark *W* decision by the Court of Final Appeal in May 2013 decided that the Marriage Ordinance and the Matrimonial Causes Ordinance were in breach of the right to marriage of a post operative transsexual woman who wished to marry her male partner.<sup>37</sup> The decision also raised much broader issues by recommending that the Government introduce comprehensive legislation regarding gender recognition and related rights for transgender people.

In response, in January 2014 the Government established an Inter-Departmental Working Group (IWG) to follow up on the *W v Registrar of Marriages* decision.<sup>38</sup> Its role is to consider legislation and incidental administrative measures that may be required to protect the rights of transsexual persons in all legal contexts and to make such recommendations for reform as may be appropriate. Its remit includes considering the legal requirements to change gender. However, to date the IWG is yet to launch any formal public consultation or recommendations for the introduction of gender recognition legislation.<sup>39</sup>

The EOC has sent submissions to the Government, the Legislative Council of Hong Kong and the IWG calling for the reform of requirements for transgender people to undergo surgery to change gender, and to introduce comprehensive gender recognition legislation. The submissions are being sent to the UN together with this response.

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<sup>36</sup> Ibid paragraph 29.

<sup>37</sup> *W v Registrar for Marriages* FACV No4 of 2012.

<sup>38</sup> <http://www.info.gov.hk/gia/general/201401/13/P201401130474.htm>

<sup>39</sup> The Government has indicated that they plan to commence a public consultation on gender recognition issues in 2017, Policy Agenda published 18 January 2017, <http://www.policyaddress.gov.hk/2017/eng/pdf/Agenda.pdf>

## 2.5 The practice of conversion therapy

There is evidence that in Hong Kong conversion therapy is still practiced by some social workers. This involves counselling and other non-medical treatment of homosexual people aimed at converting them to heterosexuality. It inappropriately treats homosexuality as a mental disorder which can be “cured”.

The United Nations has referred to conversion therapy as a form of torture or inhumane and degrading treatment, breaching peoples’ human rights.<sup>40</sup> The UN also recommended that such treatments be banned.<sup>41</sup>

The practice has not been banned in Hong Kong despite calls from a number of organisations.<sup>42</sup> It is also relevant to note that some other similar Asian jurisdictions such as Taiwan are planning on banning conversion therapy this year.<sup>43</sup>

## 2.6 Rights of Intersex people in Hong Kong

Intersex people are born with sexual anatomy, reproductive organs, and/or chromosome patterns that do not fit the typical definition of man or woman. This may be apparent at birth or become so later in life. An intersex person may identify as male or female or as neither. Intersex status can be related to but not is necessarily about a person’s sexual orientation or gender identity.<sup>44</sup>

The Government does not compile any statistics on children who are born with intersex status. However the Government has confirmed that the Hospital Authority conducts approximately 50 operations on patients under the age of 18 with Disorders of Sex Development (“DSD”) annually.<sup>45</sup>

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<sup>40</sup> Discrimination and violence against individuals based on their sexual orientation and gender identity, Human Rights Council, UN High Commissioner for Human Rights, 4 May 2015, A/HRC/29/23, paragraph 14.

<sup>41</sup> Ibid paragraph 78(g).

<sup>42</sup> <http://www.scmp.com/news/hong-kong/health-environment/article/2051225/hong-kongs-lgbti-youth-still-risk-authorities>

<sup>43</sup> <https://www.hongkongfp.com/2017/01/03/taiwan-mulls-ban-on-controversial-gay-conversion-therapy/>

<sup>44</sup> UN Free & Equal Campaign’s Fact Sheet, [https://www.unfe.org/system/unfe-7-UN\\_Fact\\_Sheets\\_v6\\_-\\_FAQ.pdf](https://www.unfe.org/system/unfe-7-UN_Fact_Sheets_v6_-_FAQ.pdf), (assessed 20 November 2015)

<sup>45</sup> The Hong Kong Special Administrative Region (HKSAR) Government’s Response to the List of Issues adopted by the United Nations Committee against Torture in relation to the sixth periodic report of the People’s Republic of China, 2015, paragraph 29.1

The EOC commissioned study on introducing LGBTI anti-discrimination legislation took evidence from intersex people on their concerns in Hong Kong.<sup>46</sup>

The issue of greatest concern was when medical treatment and decision were applied to them at an early age without their fully informed consent. As it is generally practiced presently, a sex is assigned to an intersex baby by the doctor in consultation with the parents who are usually little informed of the possible consequences and other options. Such operations sometimes resulted in the dysfunction of sex organs or the excretory system.

Because of the often extensive period of surgeries involved, significant adverse physical and mental consequences were reported. The stress to cope with everyday sufferings as well as the discrepancy between self-perceived gender and the sex assigned at birth was grave. Some intersex people were reported to resort to committing suicide.

The United Nations has also condemned the practice of conducting unnecessary surgery on intersex children as a breach of their human rights:

*“Many intersex children, born with atypical sex characteristics, are subjected to medically unnecessary surgery and treatment in an attempt to force their physical appearance to align with binary sex stereotypes. Such procedures are typically irreversible and can cause severe, long-term physical and psychological suffering. Those to have called for an end to the practice include the Committee on the Rights of the Child, the Committee against Torture, the special procedures mandate holders on the right to health and on torture.”<sup>47</sup>*

The UN also recommended that unnecessary medical procedures on intersex children be prohibited.<sup>48</sup>

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<sup>46</sup> See pages 83-84 of the Study,  
<http://www.eoc.org.hk/eoc/upload/ResearchReport/20161251750293418312.pdf>

<sup>47</sup> Discrimination and violence against individuals based on their sexual orientation and gender identity, Human Rights Council, UN High Commissioner for Human Rights, 4 May 2015, A/HRC/29/23, paragraph 53

<sup>48</sup> Ibid paragraph 78(g).

### **3. The proposed scope, priorities and strategies of the Independent Expert**

The consultation document refers to the session on 24-25 January 2017 that will be held with stakeholders to discuss the scope of work of the Independent Expert, setting priorities and developing effective strategies. The following questions are suggested to focus on, and the EOC responses are set out below.

#### **3.1 What is the scope of coverage of the mandate and what are the most urgent and challenging issues that require the attention of the Independent Expert, including cross-cutting themes, as well as specific activities, and situations?**

The EOC supports and generally agrees with the proposed scope of the planned mandate of the Independent Expert. The EOC believes that is only by a multifaceted approach that the situation regarding LGBTI peoples' rights can be improved at international, regional and national levels. This includes taking action where there have been violations of international conventions (eg country visits and communications with States); working in cooperation with States to develop and implement measures to prevent discrimination and violence; and working with key stakeholders such as civil society organisations to provide advice and capacity building.

The EOC believes that there are several key issues, which are not only relevant to Hong Kong but also globally, that should be focused on by the Independent Expert.

##### **(a) Anti-discrimination legislation**

Firstly, in order to better protect LGBTI people from discrimination, the EOC believes it is important to encourage States (or jurisdictions within States) to introduce comprehensive anti-discrimination, including by having an NHRI or similar independent equality body to enforce the legislation and promote equality.

The lack of anti-discrimination legislation is one of the major concerns in Hong Kong as described in section 2 of this response. Without such anti-discrimination legislation there is no deterrent to discrimination and no access to justice by victims of discrimination.

The EOC notes that there is no specific reference in the five identified areas to encouraging States to develop and implement anti-discrimination legislation which we believe would be important.

## **(b) Relationship rights**

A particular issue of discrimination faced by same sex couples in many States is the absence of legal recognition of same sex relationships which also affects those persons right to family life. Often the absence of legal recognition impacts on many aspects of same sex couples' lives such as employment rights such as insurance, taxation, and pensions; inheritance and property rights; parental and other family rights; immigration rights.

In Hong Kong as described in section 2 there is no protection from discrimination for persons in same sex relationships, and there is no legal recognition of such relationships even where persons are in legal relationships in other countries. This is an ever increasing concern given that more countries globally now recognise same sex relationships in some way, and there are increasing numbers of people that immigrate particularly for work purposes.

The EOC believes that this area of discrimination would also be important for the Independent Expert to focus on.

## **(c) Legal recognition for transgender people**

The EOC agrees with the proposed specific focus on legal recognition of gender identity. As described in section 2, this is a major concern in Hong Kong given that there is a requirement to undergo genital sex reassignment surgery resulting in sterilization in order for a person to legally change their gender. Such requirements breach transgender peoples' human rights to be free from inhumane and degrading treatment.

In addition, the fact that transgender people can only change gender by surgery also creates situations where they face further discrimination and potential breach of their human rights. This is because there is an inconsistency between their gender identity and their legal gender on their identity documents such as Hong Kong Identity Cards.

For example, in relation transgender people who are imprisoned in Hong Kong they are usually detained in a prison which corresponds with their identified sex on their identity documents, even where the person identifies as and their physical appearance is of being the opposite sex. For example a transgender woman who was born as a man but identifies as a woman and her physical appearance is a woman, would be detained in a male prison if she has not undergone genital sex reassignment surgery. This creates situations where they are potentially vulnerable to abuse by male prisoners, and where male staff conduct searches of them.

The concerns with these issues have been analysed in a recent report by Amnesty International on the treatment of transgender sex workers in Hong Kong, including when imprisoned.<sup>49</sup> The report states that since 2011, there have been at least 35 transgender women detained in prisons in Hong Kong, with 24 being detained in the male prison, and 8 in the women's prison (those who are post-operative). Only two persons have received hormone treatment.<sup>50</sup> The issue of placement and treatment of a transgender woman in a male prison is also being challenged in the Hong Kong courts in a claim under the Bill of Rights.<sup>51</sup>

The report recommended that:

*“The Hong Kong Police Force, Hong Kong Immigration Department, and Hong Kong Correctional Services should develop and implement gender and human rights training for law enforcement officials to ensure that people are not discriminated against or ill-treated in custody because of their sexual orientation or gender identity – including procedures to ensure that transgender have prompt access to hormone therapy as required, that they are detained in a facility consistent with their gender identity and are not searched by male officers if they request a search by a female officer.”<sup>52</sup>*

A further example of a practical concern is the Police stopping transgender people using the bathroom facilities different from the sex on their ID cards. This has arisen for example where transgender women who identify as women use a female public toilet, but their ID card identifies them as a male. A recent example of such a situation was documented in the media.<sup>53</sup>

The EOC has also addressed these issues by calling for gender identity anti-discrimination legislation, a change in the policy requiring genital sex reassignment surgery for a transgender person to legally change gender, and its relation to public facilities calling on the Government to have more unisex public bathrooms.<sup>54</sup>

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<sup>49</sup> Harmfully Isolated, Criminalizing sex work in Hong Kong, Amnesty International 2016.

<sup>50</sup> Ibid page 36.

<sup>51</sup> *Recassa v Commissioner for Correctional Services* HCAL 93/ 2015, South China Morning Post, 8 August 2016, <http://www.scmp.com/news/hong-kong/law-crime/article/2000881/transgender-womans-detention-hong-kong-all-male-prison>

<sup>52</sup> Ibid page 67.

<sup>53</sup> Hong Kong Free Press, 29 May 2016, <https://www.hongkongfp.com/2016/05/29/the-bathroom-hurdle-a-transgender-womans-fight-for-legal-recognition-and-safe-spaces/>

<sup>54</sup> South China Morning Post, 5 September 2016, <http://www.scmp.com/comment/insight-opinion/article/2014839/going-public-bathroom-should-not-be-trial-anyone-least-all>

#### **(d) LGBT rights to equality and rights of religious groups**

A fourth issue of global concern which also applies in Hong Kong is potential conflicts between the rights of LGBTI people and the rights of religious groups to freedom of religion and expression. We agree with the proposal to focus on this issue as detailed in the fourth area of “cultural inclusion with gender and sexual diversity”.

In the experience of the EOC working on issues of LGBTI equality in Hong Kong, the greatest opposition to the introduction of LGBTI anti-discrimination legislation, the recognition of same sex relationships or improved rights for transgender people has been from some religious and family groups. The EOC/ Chinese University Study on introducing LGBTI anti-discrimination legislation considered these issues in detail by interviewing people from religious groups. It found that some religious groups have concerns that if such LGBTI anti-discrimination legislation was introduced it would result in discrimination against religious people, and breach their rights to freedom of religion, as well as to freedom of expression.

The study also examined the experiences of other similar jurisdictions such as the UK, Australia, New Zealand, and Canada which highlight that the LGBTI anti-discrimination legislation in those countries does strike a balance between the rights of LGBTI persons to equality, and the rights of religious groups to freedom of religion and freedom of expression. For example this is done with specific exceptions for religious groups where they serve a legitimate aim and are proportionate.

The EOC believes that these principles need to be applied globally to the sensitive issues of the relationship between LGBTI right and religious rights in developing anti-discrimination legislation, legal recognition of same sex relationships, as well as encouraging greater understanding and mutual respect between the groups.

#### **3.2 What should the Independent Expert aim at accomplishing over the next three years?**

The EOC believes that there should be three broad aims of the Independent Expert:

- to strengthen the legal protections from discrimination, violence and other human rights violations of LGBTI people at national levels;
- to improve the education of key stakeholders such as Governments, public authorities, parliamentarians, about who LGBTI people are and the concerns they face, in order that they are more likely to take action to prevent discrimination and violence; and

- encourage more understanding, dialogue and mutual respect between LGBTI people and religious groups in order that solutions can be found to advancing LGBTI rights globally, regionally and nationally while respecting the rights of religious groups where appropriate.

### **3.3 How should the Independent Expert achieve these objectives?**

The EOC believes that where possible the Independent Expert should seek to work directly with national Governments, public authorities, parliamentarians, religious groups, NGOs to achieve these objectives.

For example it is suggested that the Independent Expert could develop events on the relationship between LGBTI rights and the rights of people in religious groups, examining the issues from legal, social and religious perspectives and inviting key stakeholders to attend: for example Governments, parliamentarians, NGOs, religious groups.

The EOC recently engaged in a similar process by supporting a conference organised by the European Union Office of Hong Kong and the Chinese University on LGBTI rights and freedom of religion.<sup>55</sup> The international conference brought together experts from Asian and the EU to discuss the relationship between the issues and make recommendations on the way forward. The conference report will be published shortly.

In addition, where appropriate the EOC believes that country visits and acting on individual cases would be a vital means to try to protect people from discrimination and violence, as is employed by some other UN Special Rapporteurs.

### **3.4 What multiple, intersecting and aggravated forms of violence and discrimination faced by persons on the basis of their sexual orientation and gender identity should the Independent Expert cover, in particular?**

Please see the EOC main concerns identified in section 3.1 above.

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<sup>55</sup> South China Morning Post, 9 January 2017, <http://www.scmp.com/news/hong-kong/article/2060575/conflicts-between-protecting-rights-hong-kongs-lgbti-people-and>

**3.5 What are the reflections on the five linchpins mentioned above (i.e. decriminalization; destigmatization; legal recognition of gender identity; cultural inclusion with gender-and-sexual diversity; empathization)? Are there any other considerations to be borne in mind?”**

As stated in section 3.1, the EOC is generally agrees with the five proposed areas of focus but considers that some particular aspects should also be taken into account.

**(a) Intersex people**

One area which has not been addressed at all in the proposed areas of focus is working on the particular issues relating to intersex people. As discussed in section 2.6, intersex status and people have been recognised internationally as distinct from a person’s sexual orientation or gender identity.

Further there are particular issues relating to the treatment of intersex people that should be addressed and have been raised by the United Nations previously. A most pressing concern in Hong Kong as in some other parts of the world is intersex children being made to have surgical procedures without their informed consent. The EOC has also recommended that anti-discrimination legislation be introduced in Hong Kong to cover sexual orientation, gender identity and intersex status.

The EOC therefore believes that issues of discrimination and violence against intersex people should also be addressed in the Independent Expert’s work.

**(b) Are Asian values incompatible with LGBTI rights?**

An argument that is sometimes made in Hong Kong and other parts of Asia is that LGBTI rights are incompatible with Asian values and traditions. For example some argue that in Asian culture, as there is more emphasis on family and having children, there is less acceptance of homosexual men or women.

The EOC believes that human rights are universal, including the right to non-discrimination for LGBTI people and to be free from violence. The EOC does therefore not consider that significant weight should be given to such arguments.

Further, we note that increasingly in Asia there is growing acceptance of LGBTI rights in a number of Asian countries and jurisdictions. For example, Taiwan has anti-discrimination legislation on grounds of sexual orientation and gender identity in the fields of employment and education.<sup>56</sup> There is also a Bill currently in its parliament to pass same sex marriage. Thailand as another example, passed LGBTI anti-discrimination legislation in 2015.<sup>57</sup>

**4. The proposed five areas relevant to protection against violence and discrimination based on sexual orientation and gender identity**

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<sup>56</sup> Gender Equity Education Act 2003, <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=H0080067>, and the Gender Equality in Employment Act 2007, <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=N0030014>.

<sup>57</sup> <https://www.hrw.org/news/2015/09/21/dispatches-thailand-acts-end-lgbt-discrimination>

The Independent Expert has identified five areas that are instrumental in the protection against violence and discrimination based on sexual orientation and gender identity: decriminalization; destigmatization; legal recognition of gender identity; cultural inclusion with gender-and-sexual diversity; and empathization.

A number of questions are asked in relation to those areas and our EOC responses are provided below.

#### **4.1 What are the root causes leading to violence and discrimination against persons on the basis of their SOGI and what are the actions needed to overcome them?**

The EOC believes that there are a number of factors leading to violence and discrimination against LGBTI people.

Firstly, Government inaction is a cause. Governments are responsible for ensuring that there is adequate protection both in law and practice from violence and discrimination. Without Government action in all countries and jurisdictions, LGBTI people will continue to face discrimination and other human rights violations. Governments need to demonstrate greater leadership and commitment to protecting minority rights, including LGBTI people.

Secondly, there remain significant misunderstandings by the general public about who LGBTI are, what challenges they face in life and why it is important for their rights to be protected. Greater education needs to be provided by Governments, NGOs and other relevant stakeholders to the general public about LGBTI people in the context of work on equality.

Thirdly, the views and actions of some religious groups or individuals may lead to discrimination against LGBTI people when they are expressed in public in particular fields such as employment or the provision of services. There needs to be greater dialogue and hopefully mutual respect and understanding between some religious groups and LGBTI people.

#### **4.2 How should the Independent Expert address these issues, especially from the angle of improved implementation of human rights to protect from violence and discrimination based on SOGI?**

The Independent Expert can address the above issues by:

- encouraging national Governments to develop and implement LGBTI anti-discrimination and other relevant legislation in compliance with international human rights obligations, and if possible provide technical assistance;
- develop or refer to other UN materials which can be used by Governments and NGOs to educate the public about LGBTI issues and equality;
- hold conferences or develop guidance on the issues of LGBTI rights and freedom of religion so that LGBTI and religious people can better understand the relationship between the rights, and to be develop greater mutual respect between groups.

#### **4.3 What are the good practices and gaps in law, policy and practice that can be identified at the international, regional and national levels?**

The EOC believes that the United Nations international human rights conventions and periodic monitoring of those conventions remain important methods to scrutinise the performance of countries and jurisdictions on LGBTI rights. However a clear gap is that there remains no binding international convention on LGBTI rights which could comprehensively set out the specific rights relating to those groups, similarly to CEADW, CERD, CRPD for example in relation to women, racial groups and persons with disabilities.

At regional level, the EOC is concerned that the work being done by the United Nations Development Program (UNDP) in Asia on LGBTI rights<sup>58</sup> does not cover Hong Kong. Whilst their work does focus on mainland China, as Hong Kong is considered to be a developed jurisdiction their research and other work does not take it into account. This creates an inconsistent situation where only part of a country is considered for the purpose of UNDP work.

In terms of good practices in Hong Kong, the EOC believes that the European Union has played a very important role in promoting equality for LGBTI people. For example the European Union has co-hosted two international conferences on LGBTI rights in 2014<sup>59</sup> and 2016<sup>60</sup> which have been invaluable in creating a forum for all stakeholders to discuss and advance the issues.

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<sup>58</sup> Being LGBT in Asia, <http://www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-lgbt-in-asia.html>

<sup>59</sup> "Working Together for an Inclusive Society: LGBTI Rights in Comparative Perspective", 28-29 August 2014, [http://www.eoc.org.hk/eoc/otherproject/lgbti/materials/report\\_2.pdf](http://www.eoc.org.hk/eoc/otherproject/lgbti/materials/report_2.pdf)

<sup>60</sup> LGBTI rights and freedom of religion, 28 November 2016. The conference was organized by the European Union Office of Hong Kong and Macau, the Gender Research Centre at Chinese University, the German Consulate with the support of the Equal Opportunities Commission.

In addition, in Hong Kong the business sector has played an increasingly significant role in promoting LGBTI equality from a number of perspectives. This has included promoting LGBTI equality in their workplaces for example by having employment policies that prohibit discrimination and provide benefits for employees with same sex partners; advocating the business case for LGBTI equality particularly in employment; and advocating for legislative changes, such as the legal recognition of couples in same sex relationships.

#### **4.4 Are there examples of strategies and measures to protect against violence and discrimination based on SOGI, used successfully at the national level?**

In Hong Kong as described in section 2, the Government has not to date introduced sufficient legislation or policies to better protect LGBTI people from discrimination and other human rights violations.

However, one strategy that has been employed to try to address the situation with some effect is strategic litigation under the Bill of Rights, which implements into Hong Kong constitutional law the ICCPR.

A number of human rights cases have been brought by individuals to challenge the Government or other public authorities in relation to the treatment of LGBTI people in a wide range of contexts. This has included challenges to criminal laws and the different ages of consent between homosexuals and heterosexuals for sexual activity; issues of freedom of expression on television regarding homosexual life; challenging discrimination against same sex couples by non-recognition of their overseas legal relationships; and a claim relating to the right to marry of a transgender woman. A number of these cases have been successful and an important means to advance the human rights of LGBTI people in Hong Kong.

#### **4.5 Which actors should be involved and how? What are the key areas for dissemination and cooperation?**

There is a need for all key stakeholders in society to be involved in order for the work to be successful. Some example and their role are:

- Governments and relevant public authorities to introduce and promote legislation and policies to better protect LGBTI people from discrimination and violence;
- parliamentarians, who have a role introducing relevant legislation (eg anti-discrimination hate crime) and monitoring the performance of the Government and NHRIs;
- NHRIs given their independent role to promote and enforce human rights and anti-discrimination legislation, as well as to advocate for better protections;
- NGOs to advocate for legislative and policy change, educate the public and hold the Governments to account;
- lawyers working on the issues to advocate for legislative change, bring cases and advise relevant stakeholders;
- academics in relation to developing evidence bases to understand issues better or support legislative and policy change;
- the medical psychiatry professions, for example in relation to issues of requirements for legal recognition of transgender people and conversion therapy;
- all religious groups and leaders in relation to the relationship between LGBTI rights and freedom of religion, and encouraging respect for all persons irrespective of their sexual orientation, gender identity or intersex status;
- the business sector in terms of the business case for LGBTI equality, for example highlighting the importance of equal opportunities and non-discrimination in terms of improving productivity of individuals and businesses;
- the media in terms of improving the general public's understanding of LGBTI people and avoiding stereotypes and prejudice.

In terms of key areas of cooperation, the EOC believes that cooperation would be particularly helpful between the above stakeholders on the particular issues of greatest concern in any country or jurisdiction.

For example, in Hong Kong on the issue of introducing LGBTI anti-discrimination legislation, the EOC has collaborated with academics, the European Union, NGOs, parliamentarians and the business sector to seek to advance the issues such as with international conferences.