



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

Response of the Equal Opportunities Commission

Inter-Departmental Working Group on Gender Recognition

Consultation Paper: Part 1 Gender Recognition

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Introduction

The Equal Opportunities Commission (the “EOC”) is Hong Kong’s statutory body tasked with eliminating discrimination and promoting equality for everyone in society. There are currently four anti-discrimination Ordinances in Hong Kong: the Sex Discrimination Ordinance which protects people from discrimination on grounds of sex, marital status and pregnancy; the Disability Discrimination Ordinance which protects people from discrimination on grounds of disability; the Family Status Discrimination Ordinance which protects people from discrimination on grounds of caring for a family member; and the Race Discrimination Ordinance which protects people from discrimination on grounds of race, colour, descent or national or ethnic origin. These Ordinances also provide protection from vilification and harassment, including sexual harassment.

The EOC welcomes the Government’s public consultation on whether a gender recognition scheme should be introduced in Hong Kong for transgender people wishing to change their gender, but is concerned with a number of aspects of the approach adopted by the Government in the consultation document, including that there is no commitment to the introduction of a legal gender recognition scheme. In the view of the EOC, the lack of commitment to introducing such a scheme is clearly not compliant with recommendations by many international human rights and health bodies (including the United Nations Office of the High Commissioner for Human Rights, United Nations Development Programme and the World Health Organisation), , that all countries and jurisdictions should have legal gender recognition schemes, in order to uphold the human rights of transgender people.

The EOC has done a range of work recently relating to promoting equality for transgender people in Hong Kong. The evidence from complaints by transgender people to the EOC, as well as the Commission’s comprehensive study on introducing anti-discrimination legislation on grounds of sexual orientation, gender identity and intersex status, is that transgender people face discrimination in many aspects of public life, such as employment, provision of services, and Government functions. This discrimination is also often linked to issues of lack of legal gender recognition, where there is an, i.e. inconsistency between their identity documents and their appearance in terms of their affirmed gender.

As a result, the EOC believes that both comprehensive gender recognition legislation, and anti-discrimination legislation that provides protection from gender identity discrimination should be introduced in Hong Kong as soon as possible.

Such gender recognition legislation should also comply with international and Hong Kong human rights obligations regarding gender recognition, for example, by not having medical requirements (such as mandatory sex reassignment surgery) or other requirements which breach human rights, such as the rights to self determination and self autonomy, to be free from inhumane and degrading treatment, the rights to privacy, family life, and to non-discrimination on grounds of gender identity, marital or family status.

Recently in May 2017, a group of international human rights experts from the United Nations, Inter-American Commission on Human Rights, African Commission on Human and Peoples’ Rights, and the

Council of Europe made a joint statement to highlight International Day against Homophobia, Transphobia and Biphobia and the issues faced by transgender youth:

“We urge States worldwide to adopt a legal and policy framework, with comprehensive implementation measures, to protect the rights of trans and gender diverse youth, respectful of gender diversity, and to enable the realisation of their fullest potential....

We call on States to adopt and implement effective measures prohibiting violence, anti-discrimination laws covering gender identity and expression – real or perceived – as well as sexual orientation as prohibited grounds for discrimination...

We call on States to facilitate quick, transparent and accessible legal gender recognition and without abusive conditions, guaranteeing human rights for all persons, respectful of free/informed choice and bodily autonomy. Coercive medical interventions/procedures should, therefore, never be employed.”¹

The EOC agrees with those recommendations, not just for young transgender people, but all transgender people.

In this EOC response, the Commission refers to the rights of transgender people rather than the narrower term of transsexuals. Transgender people have been defined as ‘individuals whose gender identity and/or expression of their gender differs from social norms related to their gender at birth’ (from the World Professional Association of Transgender Health (WPATH), Standards of Care, Edition 7).² The WPATH definition includes a wide range of people who personally identify as male, as female, or as genders beyond these two, for example identifying with elements of both genders. The term embraces those who are comfortable with their bodies and therefore feel no need for hormones, surgery or other body modifications, as well as those who seek to modify their bodies.

The EOC’s response to the public consultation is structured as follows:

- Chapter 1: describes the work and evidence of the EOC in relation to issues of equality for transgender people;
- Chapter 2: outlines the EOC’s main concerns with the approaches taken in the public consultation from a number of different perspectives;

¹ Embrace diversity and protect trans and gender diverse children and adolescents, 17 May 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21622>

² World Professional Association for Transgender Health (WPATH). (2011). *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (Seventh ed.). Minneapolis: WPATH. [https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf)

- Chapter 3: responds to points raised in Chapter 5 of the consultation, on whether Hong Kong should have a gender recognition scheme;
- Chapter 4: responds to Chapter 6 of the consultation on medical requirements for gender recognition;
- Chapter 5: responds to Chapter 7 of the consultation on non-medical requirements for gender recognition;
- Chapter 6: responds to Chapter 8 of the consultation on options for a gender recognition scheme; and
- Chapter 7: responds to Chapter 9 of the consultation on other related matters.

Chapter 1: EOC work on issues of equality for transgender people

The EOC has done a range of work relating to promoting the equality of transgender people in Hong Kong over the last few years. As the statutory body tasked with advancing equality for all, the EOC must make all endeavours towards the elimination of discrimination in the Hong Kong society. This is particularly so given that:

- the EOC has a duty to periodically review the effectiveness of the anti-discrimination legislation, and where it thinks appropriate, make recommendations for reforms of anti-discrimination legislation;
- there is clear evidence that transgender people in Hong Kong face discrimination in all aspects of their public life based on the complaints we receive by transgender people, and the research we have conducted;
- despite such discrimination, there is no comprehensive anti-discrimination legislation (equivalent to the current four anti-discrimination Ordinances) to promote equality and prevent discrimination against transgender people;
- there is no gender recognition legislation or other scheme to provide legal rights for transgender people to change their gender and related rights;
- some of the current requirements to change gender in the existing administrative arrangements in the view of the EOC may breach the human rights of transgender people, including the right to non-discrimination on grounds of gender identity.

Given the situation in Hong Kong, one of the five strategic priorities of the EOC's three-year strategic work plan for the period 2013-15 was to advocate for protection from discrimination and promotion of equality for people identified by their sexual orientation or gender identity.³ In the EOC's Strategic Plan 2016-19, one of the corporate goals is to foster a safe environment free from discrimination and harassment, including those on the grounds of sexual orientation, gender identity and intersex status. Below is a summary on the EOC's work on promoting equality for transgender people, including handling complaints, conducting research relating to introducing LGBTI anti-discrimination legislation; and advocating for gender recognition legislation.

³ See the power point presentation on the EOC Three Year Strategic Plan presented to the Stakeholder Forum on 23 September 2013, <http://www.eoc.org.hk/eoc/GraphicsFolder/EOForum/2013/index.html>

1. Complaints of discrimination received from transgender people

The EOC has a duty to consider complaints of discrimination made by the public under the anti-discrimination Ordinances, and attempt to resolve such complaints through conciliation. Where complaints cannot be resolved, the complainants can apply to the EOC for legal assistance and the EOC may provide such assistance with legal proceedings, if it believes there are reasonable grounds for doing so.

The EOC has received 53 complaints of discrimination lodged by transgender people under either the Disability Discrimination Ordinance or the Sex Discrimination Ordinance between 2002 and November 2017.⁴ The complaints related to a wide range of public life, such as discrimination in employment (e.g. dismissal, other less favourable treatment); provision of services; Government functions; participation in clubs; and education. The claims have been made of disability discrimination, disability harassment, disability vilification, disability victimisation, and sex discrimination. In relation to those complaints, 3 applications for legal assistance to the EOC have been made, and two were successful (relating to one incident). In relation to the three applications they related to two different situations: one was alleged discrimination in relation to membership of a club, and the second related to alleged discrimination in recruitment for employment. In relation to the application which was successful and concerned club membership, the case was eventually settled with the respondent paying the claimant \$100,000 in compensation.

The EOC has dealt with such complaints by transgender people as either disability discrimination or sex discrimination given that there is currently no comprehensive anti-discrimination on grounds of gender identity. However, several aspects of this should be noted. Firstly, there has no determination by any Hong Kong court that discrimination against transgender people could be considered as either disability or sex discrimination. Secondly, particularly in relation to disability discrimination, many transgender people and organisations working with transgender people do not wish to be considered as having a mental disability. This is also consistent with movement to de-pathologisation of transgender people by international health bodies. Thirdly, the EOC believes that the appropriate approach would be to introduce distinct comprehensive gender identity anti-discrimination legislation as the EOC recommended in our study report in January 2016.

The evidence of complaints received by the EOC, nevertheless demonstrates that transgender people face discrimination in many aspects of life.

⁴ It should be noted that the figure should not be taken as an indicator of the trends of levels of discrimination, given that there is no distinct anti-discrimination legislation to prohibit discrimination on the grounds of gender identity. For example, transgender people may not be aware that they could attempt to complain of discrimination under the DDO or SDO

2. EOC study on introducing LGBTI anti-discrimination legislation

In January 2016, the EOC published its report on the study commissioned to the Gender Research Centre of the Hong Kong Institute of Asia-Pacific Studies of The Chinese University of Hong Kong, on introducing legislation against discrimination on grounds of sexual orientation, gender identity and intersex status.⁵

The research was the most comprehensive study of its type to be conducted in Hong Kong. It involved focus groups and interviews with 61 LGBTI people to examine their experiences of discrimination; a survey of over 1,000 people regarding public attitudes towards introducing LGBTI anti-discrimination legislation; and a comparative analysis of other jurisdictions' LGBTI anti-discrimination legislation.

The research found evidence of discrimination against LGBTI people in all key aspects of public life, such as employment, education, provision of services and Government functions. For example, in the last 2 years, 88% had experienced discrimination, and 44% considered that they often/ very often encountered discrimination. Even more disturbingly, 30% had attempted suicide in their lifetime, and 7% had attempted suicide in the last two years. The study also examined the gender public's views about the seriousness of discrimination against LGBTI people. In relation to transgender people, 31.1% of the public surveyed believe that discrimination against transgender people is either very serious, or serious.⁶

The research also highlighted the clear relationship between discrimination and lack of legal gender recognition for transgender people. The discrimination experienced by transgender people is often linked to the fact that they cannot legally change their gender, and as a result, there is sometimes an inconsistency between the sex on their identity documents and their physical appearance. For example, in the context of employment, there was evidence that:

“When there were perceived discrepancies between individuals' gender appearance and their sex as shown on their Hong Kong Identity Card (ID Card), there were instances of discriminatory questions being asked of LGBT people before or during job interviews. A transgender respondent reported being rejected because the interviewers questioned her appearance as inconsistent with her sex as recorded on the identity card, even though she opined that she was qualified for the job:

‘In the resume, I wrote down my name, gender, and some basic information. But when they saw me, holding my ID card, I could see their facial expressions grew really suspicious.’ ”⁷

⁵ Report on Study on Legislation against discrimination on the grounds of sexual orientation, gender identity and intersex status, commissioned by the EOC and conducted by the Gender Research Centre of The Chinese University, January 2016, pages 59-60,

<http://www.eoc.org.hk/eoc/upload/ResearchReport/20161251750293418312.pdf>

⁶ Page 6, http://www.eoc.org.hk/EOC/Upload/UserFiles/File/ResearchReport/201603/SOGI-Project_supplementary-info_En_20160229.pdf

⁷ Ibid at page 61 Report.

In the context of the provision of services, for example, some transgender persons reported that they were excessively questioned by banking personnel in relation to the discrepancy between their gender appearance and the sex stated on their identity card.⁸

And in relation to the actions of Police and Immigration Department, there was evidence that:

“In detention, some transgender respondents indicated that some police officers treated them according to their sex at birth and refused to recognize them according to their self-recognized gender identity. The transgender respondents felt humiliated when they were searched by a police officer of the opposite sex or were held in custody in the opposite-sex cell. They considered these experiences as akin to sexual harassment. A transgender person said:

‘[The police officer] started taking off our [the transgender’s and her friend’s] clothes and tried to check our genitalia. When they found that we had no [male] genitalia, they became so agitated. You know, my body is that of a woman and I feel like a woman. And, [they] were checking us and removing all our clothes, everything ... It was very, very ... degrading on my part as a transgender person ...’

Immigration Department

Transgender people reported being discriminated by immigration officers when they were applying for travel documents and visas. When there were discrepancies between transgender people’s appearance and their sex as stated on their identification documents, they faced difficulties with the Immigration Department, which either refused to process their applications or treated them with suspicion in the process.”

In another survey conducted in 2014 by the Transgender Resource Centre and funded by the EOC, 17 transgender people were interviewed and expressed views about their negative experiences when interacting with the Police, Correctional Services Department and Immigration Department.⁹

The EOC’s study on introducing LGBTI anti-discrimination legislation made comprehensive recommendations to the Government on conducting a public consultation on introducing LGBTI anti-discrimination legislation, as well as other recommendations, for example, relating to training for frontline Government and public authority agents; developing a constructive dialogue between stakeholders on issues of LGBTI equality; and promoting greater public understanding and awareness of LGBTI people.¹⁰

⁸ Ibid page 74 Report.

⁹ <http://www.scmp.com/news/article/1751820/hong-kong-transgender-people-face-humiliation-law-enforcement-officers-says>

¹⁰ Report on Study on Legislation against discrimination on the grounds of sexual orientation, gender identity and intersex status, commissioned by the EOC and conducted by the Gender Research Centre of the Chinese University, January 2016, pages 196-204.

Given that the lack of a gender recognition scheme and discrimination are inter-related, the EOC reiterates its recommendation from the report that the Government should also consult on and introduce comprehensive anti-discrimination legislation on the grounds of gender identity, intersex status and sexual orientation.

3. EOC's work on the issues of legal gender recognition

The EOC has also done work on the issue of gender recognition for transgender people, since it is closely connected to issues of discrimination they face. The landmark *W v Registrar of Marriages* decision by the Court of Final Appeal in May 2013 ruled 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.¹¹ The decision also raised much broader issues by recommending that the Government introduce comprehensive legislation regarding gender recognition and related rights for transgender people. The EOC welcomed the *W* case decision and called on the Government to implement the judgment by introducing a comprehensive Gender Recognition Ordinance.¹²

Since the *W* case decision, the EOC made a submission in April 2014 to the Security Bureau, Department of Justice, and the Bills Committee on the Marriage (Amendment) Bill 2014, which was intended to implement the orders in the *W* case decision.¹³ The EOC's recommendations to the Government were that:

- the Government to make amendments to the Marriage Bill so that the requirement for gender recognition is dealt with administratively, and amend those administrative requirements to no longer require sex re-assignment surgery;
- introduce as soon as possible a comprehensive Gender Recognition Ordinance, which sets out the procedures for a change in gender to be legally recognized, as well as the related rights of the person on changing gender; and
- in the Gender Recognition Ordinance, ensure that there is no requirement for sex reassignment surgery to be a prerequisite for a change in gender to be legally recognised.

Since the establishment of the Inter-departmental Working Group on Gender Recognition, the EOC sent its submission on the Marriage Amendment Bill to the IWG in June 2014 and has since then provided the IWG with information on key international developments on issues of legal gender recognition for transgender people.

¹¹ *W v Registrar for Marriages* FACV No4 of 2012, <http://www.hklii.hk/eng/hk/cases/hkcfa/2013/39.html>

¹² EOC press release 13 May 2013, <http://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=11342>

¹³ Promoting transgender people's right to equality with a Gender Recognition Ordinance, 14 April 2014, <http://www.eoc.org.hk/eoc/upload/2014424105611969728.pdf>

Chapter 2: Concerns with the approaches in the public consultation

The EOC is pleased that the Government is conducting the public consultation and has provided comprehensive information on the current system in Hong Kong, as well as the comparative approaches to gender recognition schemes in many parts of the world. The EOC is also pleased that the Government has demonstrated its commitment to doing the consultation in its Policy Agenda in January 2017 and more recently October 2017.

However, the EOC is concerned with a number of aspects of the approaches taken in the consultation, which it believes are vital for the Government to take into account in considering the way forward. These concerns are discussed in summary below, and in more detail in relation to specific questions in the consultation.

1. Insufficient focus on the human rights relating to gender recognition of transgender people

A number of international human rights bodies, international courts and national legislation have highlighted that issues of legal gender recognition of transgender people must be considered as fundamental human rights issues. Legal gender recognition raises issues of human rights including to dignity, self determination, bodily integrity, to be free from inhumane and degrading treatment, privacy, family life and non-discrimination on grounds of gender identity. This is a crucial starting point in terms of analyzing the requirements and processes for legal gender recognition, as well as post-gender recognition issues.

Although the public consultation refers to legal gender recognition as a human right in terms of the arguments for a gender recognition scheme (see pages 127-130), the EOC believes that there is insufficient emphasis on this, as in our view it should be the primary consideration based on international human rights principles, rather than merely one factor that should be taken into account.

As a result we believe that the starting point for the consultation is incorrect in failing to recognise the necessity to take a human rights-based approach to all aspects of gender recognition, based on international human rights law and Hong Kong's Bill of Rights. This is discussed further in relation to the specific issues and consultation questions.

2. Lack of recognition that there are international human rights positions on a number of the issues relating to gender recognition

Related to the first issue of failing to take a human rights-based approach, the EOC is concerned that the consultation does not acknowledge that there are clear international human rights-based positions on a number of the issues consulted on.

Firstly, for example, there are clear positions and recommendations by a number of international human rights bodies that in order to comply with international human rights obligations, countries

or jurisdictions should introduce legally binding systems of gender recognition for transgender people, whether with legislation or administrative procedures.

Secondly, there are clear positions and recommendations by a number of international human rights bodies, and decisions by international and national courts indicating that it is a breach of transgender people's human rights to require mandatory sex-reassignment surgery or other medical procedures, such as hormonal treatment, in order to be able to change gender legally.

Despite these international positions, the IWG states at the outset of the public consultation:

“Given the controversial nature of the issues involved, the IWG maintains an open mind and does not have a preferred position at this moment.”

In the view of the EOC, given the international human rights principles and recommendations, the Government, as represented by the IWG, should have a clear position on some of the issues consulted on. This is discussed further in the responses to specific consultation questions.

3. Arguments against introducing gender recognition legislation are sometimes mis-founded or unsubstantiated

The EOC is also concerned about a number of the purported arguments against introducing gender recognition legislation, for example, as discussed in Chapter 3, on whether Hong Kong should have a gender recognition scheme.

Our concerns arise from the fact that there is reference to the lack of consensus in society (the EOC does not believe that this should be a determining factor in introducing a scheme); the insufficient evidence provided in support of the contentions made, for example merely bold assertions are sometimes made without any evidence or based on the views of only few people. These concerns are discussed in Chapter 3 on whether Hong Kong should have a gender recognition scheme.

4. Lack of recognition of the inter-dependence between introducing anti-discrimination legislation on grounds of gender identity and a gender recognition scheme

As stated in Chapter 1, the work of the EOC has highlighted that there is a clear link between the lack of a legal gender recognition scheme and discrimination faced by transgender people. The consultation document fails to sufficiently recognise the interdependence and need for introducing both a gender recognition scheme, and anti-discrimination legislation covering gender identity.

The EOC notes that the consultation refers to the findings of the EOC's study on introducing legislation against discrimination on grounds of sexual orientation, gender identity and intersex status, and the fact that there has been reported widespread discrimination against transgender people linked to lack of gender recognition (pages 7-8 of the consultation). However, the IWG and the Government does not acknowledge that. It is, therefore, vital that the Government should not only introduce a gender recognition scheme, but also anti-discrimination legislation on grounds of

gender identity. In fact, the Government has not responded to the EOC's recommendations in the 2016 study to commence public consultation on introducing such anti-discrimination legislation.

5. Lack of consideration of the issues relating to intersex and gender fluid or non-conforming people

The EOC notes that the focus of the public consultation is on transgender people and legal gender recognition. However, the issues that transgender people face may sometimes be related to the issues that intersex and gender fluid people face. As a result, the EOC believes that it would be important to consider the relationship between those groups, where appropriate, and how that may affect a gender recognition scheme.

The Office of the UN High Commissioner for Human Rights defines intersex people as:

*"An intersex person is born with sexual anatomy, reproductive organs, and/or chromosome patterns that do not fit the typical definition of male or female. 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 is not about sexual orientation or gender identity: intersex people experience the same range of sexual orientations and gender identities as non-intersex people."*¹⁴

Intersex people sometimes face similar issues as transgender people in terms of, for example, coercive surgery, so it is relevant to consider those in the context of medical requirements to change gender. International human rights bodies such as the United Nations have made recommendations regarding prohibiting surgical requirements not only for transgender people changing gender, but also in relation to intersex people where surgery is coercive. This is discussed where relevant in Chapter 3 on the medical requirements for gender recognition.

In addition, some people including some transgender or intersex people are gender fluid or gender non-conforming. The United Nations Development Program has defined this as:

*"Gender non-conforming encompasses people whose gender expression is different from societal expectations and/or stereotypes related to gender."*¹⁵

An issue relating to such persons is whether a third gender of people who do not identify as either being male or female, should be legally recognised as it is now in a number of countries, for example as gender "X".¹⁶

¹⁴ United Nations Office of the High Commissioner for Human Rights, "Free & Equal campaign Fact Sheets, LGBT Rights: Frequently Asked Questions".

¹⁵ Discussion Paper, Transgender Health and Human Rights, December 2013, UNDP, page 3, <http://www.undp.org/content/dam/undp/library/HIV-AIDS/Governance%20of%20HIV%20Responses/Trans%20Health%20&%20Human%20Rights.pdf>

6. Delay in the introduction of Gender Recognition legislation and conducting the consultation

Finally, the EOC is concerned with the long delay in the consultation process, and that there is a lack of clarity on the next steps.

Although the IWG was established in January 2014, it did not commence the public consultation on a gender recognition scheme until June 2017, approximately three and a half years later. Given that there is evidence of discrimination and that some aspects of the current administrative requirements may breach the human rights of transgender people, the EOC is concerned about the effect of the delay on their rights.

Further, the IWG has indicated that this is only Part 1 of the consultation dealing with recognition issues. A further Part 2 consultation is planned on post-recognition issues. It is not clear from the consultation whether the Government will wait completing the Part 2 consultation before deciding to introduce a gender recognition scheme. In the view of the EOC, the issues of post-recognition could be dealt with after a decision on whether to introduce a gender recognition scheme, and that a decision on such a scheme should be made as soon as possible.

¹⁶ A third gender is now recognised in for example Australia, Canada, India, Nepal, New Zealand and most recently will be in Germany, <http://www.independent.co.uk/news/world/europe/germany-third-gender-male-female-intersex-court-parliament-bundesverfassungsgericht-berlin-lgbt-a8043261.html>

Chapter 3: Should Hong Kong have a gender recognition scheme

Issue 1: Whether a gender recognition scheme should be introduced to enable a person to acquire a legally recognised gender other than his or her birth gender.

The EOC believes that a gender recognition scheme should definitely be introduced and preferably with a Gender Recognition Ordinance setting out all the relevant procedures and rights associated with changing gender. The EOC considers that there is a clear position on this issue based on international human rights standards and recommendations from a number of international human rights bodies. Further those standards have application in Hong Kong both via the international human rights obligations under key International Conventions, such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as domestic human rights obligations under the Bill of Rights, which implements most of the ICCPR rights.

Given the above and as stated in Chapter 2, the EOC does not believe that this is a matter the Government should be neutral on, but rather it should (based on the international and domestic human rights obligations) have a position that it will introduce a gender recognition scheme in order to comply with those obligations. The question therefore, should not be whether to introduce a scheme, but rather what type of system for gender recognition should be introduced.

Addressed below are the international human rights obligations and recommendations on the issue of introducing a scheme; the relationship with Hong Kong's human rights obligations; and the EOC's position on the arguments in favour of and against the introduction of a gender recognition scheme.

1. International Human Rights obligations

The starting point is that international human rights obligations (for example under the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights) recognize and require that transgender people have the same protections of their human rights as everyone else. In other words their rights to dignity, self-determination, equality and non-discrimination, privacy, to be free from inhumane and degrading treatment, family life and other related human rights must be protected.

For example, the Yogyakarta Principles were developed in 2007 by a group of 29 human rights experts from 25 countries, and set out the principles on the application of human rights law in relation to sexual orientation and gender identity.¹⁷ They are widely considered as one of the most comprehensive and authoritative set of principles on the issues, even though they are not legally binding.

¹⁷ The Yogyakarta Principles 2007, which serve as a universal guide to the human rights of LGBTI people, <http://www.yogyakartaprinciples.org/principles-en/>

Those Principles state:

“The Right to recognition before the law

*Everyone has the right to recognition everywhere as a person before the law. **Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.** No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.*

States shall:

- a) Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;*
- b) **Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity;***
- c) **Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person’s profound self-defined gender identity;***
- d) **Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;***
- e) **Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;...**” (emphasis added)¹⁸*

It is clear from these principles that States should introduce legislative, administrative or other measures to recognise a person’s self defined gender identity, and the right to change necessary identity documents.

More recently, the United Nations Office of the High Commissioner for Human Rights made similar comments on the human rights of transgender people in the context of a report on discrimination

¹⁸ Ibid pages 11-12.

and violence against people globally based on their sexual orientation and gender identity.¹⁹ The report stated that:

*“Application of international human rights law is guided by the fundamental principles of universality, equality and non-discrimination. **All human beings, irrespective of their sexual orientation and gender identity, are entitled to enjoy the protection of international human rights law with respect to the rights to life, security of person and privacy, to freedom from torture and ill-treatment, discrimination and arbitrary arrest and detention, and to freedom of expression, association and peaceful assembly, and all other civil, political, economic, social and cultural rights.**”* (emphasis added)²⁰

The report also noted in relation to legal gender recognition:

“In spite of recent advances in several countries, transgender persons are generally still unable to obtain legal recognition of their preferred gender, including a change in recorded sex and first name on State-issued identity documents. As a result, they face multiple rights challenges, including in employment and housing, applying for bank credit or State benefits, or when travelling abroad.”²¹

And as a result the report recommended to all UN Member States:

“States should address discrimination by...

(i) Issuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment and divorce...”²²

On 8 October 2015, a group of organisations, including the United Nations Development Programme, and the World Health Organization, published a comprehensive report on transgender health and human rights issues in the Asia Pacific region.²³ The report included references to the current situation and concerns regarding legal gender recognition of transgender people in Hong Kong:

“Gender recognition laws in Japan, Singapore, South Korea, Taiwan, Hong Kong SAR, China, and mainland China all require gender reassignment surgeries and sterilisation. In Singapore and Hong Kong SAR, China, even after undergoing these procedures, trans people can change the gender markers only on their National Registration Identity Cards, not their birth certificates.”²⁴

¹⁹ Discrimination and Violence against individuals based on their sexual orientation and gender identity, Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E

²⁰ Ibid paragraph 9.

²¹ Ibid paragraph 69.

²² Ibid paragraph 79.

²³ Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific, United Nations Development Programme, <file:///C:/Users/peterreading/Downloads/rbap-hhd-2015-asia-pacific-trans-health-blueprint.pdf>

²⁴ Ibid page 64.

The report contains a series of recommendations including on the specific issues of introducing anti-discrimination legislation and gender recognition legislation which fully respects transgender peoples' human rights.

The report recommended that governments in the Asia-Pacific region introduce anti-discrimination legislation:

“Ensure that trans people are protected under anti-discrimination provisions and audit other existing or proposed laws to ensure they protect trans people regardless of their gender identity, gender expression, or sex.” (emphasis added)²⁵

In relation to legal gender recognition the report also recommended that governments:

“Take all necessary legislative, administrative, and other measures to fully recognise each person’s self-defined gender identity, with no medical requirements or discrimination on any grounds

Review or repeal laws or policies that deny trans people the right to have their affirmed gender recognised in identification documents

*Ensure that gender recognition procedures are **accessible, fair, and nondiscriminatory, and respect trans people’s dignity and privacy; and that changes to identity documents will be recognised in all legal and administrative contexts***” (emphasis added)²⁶

These recommendations are of direct relevance and applicability to the issue of introducing a gender recognition scheme in Hong Kong.

The Council of Europe which has jurisdiction over promoting and protecting human rights in its 47 European Member States, has also made reports and recommendations relating to the issue of legal gender recognition for transgender people. In 2010 its Committee of Ministers made recommendations to its Member States on measures to combat discrimination on grounds of sexual orientation or gender identity.²⁷ It stated:

*“Member states should take appropriate measures to **guarantee the full legal recognition of a person’s gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way;** member states*

²⁵ Ibid page 111.

²⁶ Ibid page 112.

²⁷ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2010\)5&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)5&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true)

should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.” (emphasis added)²⁸

Although these recommendations are based on the obligations of the Members of the Council of Europe under the European Convention on Human Rights, they are similar to the rights and obligations which apply under the United Nations ICCPR, to which the Hong Kong Government is a party.

2. Hong Kong Human Rights Obligations under the Bill of Rights

The obligations to introduce a gender recognition scheme can be derived not just from the international human rights obligations, but also Hong Kong’s human rights obligations under the Bill of Rights. This is because the Bill of Rights implements into Hong Kong law most of the human rights contained in the ICCPR, including the rights to be free from inhumane and degrading treatment, the right to equality and to be free from discrimination, the right to privacy and the right to family life.

The EOC notes that the consultation document makes little reference (other than to the right to privacy and recognition before the law) to the link between the international human rights obligations and Hong Kong’s human rights obligations. As a result, the consultation fails to recognise or give sufficient weight to the applicability of the recommendations of the United Nations to the situation in Hong Kong. In the view of the EOC, this is a significant flaw in the reasoning of the consultation document.

3. EOC’s position on the arguments in favour of a gender recognition scheme

The EOC agrees with the stated arguments in favour of introducing a gender recognition scheme, which would:

- allow recognition of a person’s innate gender identity where it is different from a person’s biological sex;
- help eliminate discrimination against transgender people in both social and legal contexts (see Chapter 1 regarding EOC’s evidence of discrimination against transgender people);
- legal gender recognition is a human right of transgender people;

²⁸ Ibid paragraph 21.

- there is an international trend of increasing numbers of countries and jurisdictions allowing legal gender recognition, and more are including human rights protections within the system for legal gender recognition; and
- a gender recognition scheme would provide legal certainty.

It has already been stated above that the EOC does not believe sufficient emphasis has been placed on the human rights arguments given the international and Hong Kong human rights obligations. This is of even greater relevance, given the United Nations Human Rights Committees have made specific recommendations to the Hong Kong Government on issues relating to transgender people. The Human Rights Committee made recommendations to introduce anti-discrimination legislation covering sexual orientation and gender identity in relation to the ICCPR in 1999 and 2013, and the Committee on Economic, Social and Cultural Rights made similar recommendations in relation to the ICESCR in 2001, 2005 and 2014.²⁹

The Committee relating to the Convention Against Torture also made recommendations to the Hong Kong Government to end mandatory requirements of sex reassignment surgery to change gender.³⁰

4. EOC's position on the arguments against a gender recognition scheme

The following arguments have been raised in the consultation paper against a gender recognition scheme:

- the sex of a person is determined at birth and recognising a person's non birth gender opposes the law of nature;
- there is no evidence that the social acceptance of transsexualism in Hong Kong has been changed;
- the issues of gender recognition are unnecessary to be addressed by a new law in view of Hong Kong's situation;
- gender recognition may have unintended consequences;
- the slippery slope argument.

²⁹ ICCPR/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; E/C.12/CHN/CO/2, paragraph 41.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=E%2FC.12%2FCHN%2FCO%2F2

³⁰ 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>

The EOC believes that following points should be taken into account in relation to each of these arguments.

(i) The sex of a person is determined at birth and recognising a person's non birth gender opposes the law of nature

One aspect of this argument relates to religious beliefs. Reference is made to the position of Christian religious groups and the fact that many such groups do not accept transgenderism. The EOC believes a number of factors should be borne in mind.

Firstly, recent research conducted on the position of religious groups on transgenderism has indicated that there is an increasing number of Christian denominations globally that are more accepting of transgenderism, transgender people and that there are more diversity of views within and between different Christian religious groups.³¹ Duncan Dormor³² who authored the research referred to (at page 133 of the consultation document) has stated:

"The developing positions of these Churches illustrates that religion's perspective on transgenderism is less monolithic than is sometimes believed...It is important to remember that it is plural and accommodates a diversity of views. It seems highly likely that the developments we have seen over the last decade or so will continue."

Secondly, from a human rights perspective, it must be remembered that although persons have the human rights to freedom of religion and generally to manifest that religion, it is not an unlimited right. As article 15(3) of the Bill of Rights states:

*"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."*³³

In other words, freedom of religion can be limited to protect the human rights of other groups including transgender people. As international human rights obligations previously discussed in this chapter provide that transgender people should have the legal right to change gender, gender recognition is a situation where religious belief should not be used as a determining or overriding criteria as to whether or not a gender recognition scheme should be introduced.

Issues of balancing freedom of expression may however be relevant to a number of post-recognition issues, such as whether churches should have exceptions relating to matters concerning religious

³¹ "Transgenderism and the Christian church : an overview" Duncan Dormor, in Jens M Scherpe (ed), The Legal Status of Transsexual and Transgender Persons December 2015, pages 36 to 51.

³² Duncan Dormor is Director of Studies for Theology at St John's College, Cambridge University, <http://www.joh.cam.ac.uk/dean-chapel>.

³³ Bill of Rights Hong Kong, <http://www.hkllii.hk/eng/hk/legis/ord/383/>

doctrine. This could include for example, the option for churches not to perform marriages for transgender people who have changed gender.³⁴

(ii) There is no evidence that the social acceptance of transsexualism in Hong Kong has been changed

This argument states that there is still no social acceptance or consensus on the issues of gender recognition for transgender people in Hong Kong; that the situation in Hong Kong is different from Europe and the UK in terms of such acceptance; that there should not be a “single” interpretation or understanding of human rights of individual; and that one’s gender identity is not just an individual matter, but also relates to recognition of the society as a whole.

The EOC has a number of concerns with these arguments. Firstly, the EOC does not believe that “social acceptance” or consensus should be a key factor in protecting peoples’ human rights. Many minority groups which are often more vulnerable and lacking power in society, are in need of their human rights being protected, whether it is persons with disabilities, ethnic minorities, or sexual minorities. The key criteria should be whether there is evidence of a particular group having their human rights being violated or at risk of violation.

Secondly, in relation to the argument that human rights are culturally relative and should be applied differently in different parts of the world, this is contrary to the fundamental principles that human rights are universal and apply equally to all persons around the world. This has been emphasised for example by the United Nations in its report in 2015 on LGBTI discrimination globally when it said:

*“9. Application of international human rights law is guided by the **fundamental principles of universality, equality and non-discrimination.***

*10. States have well-established obligations to respect, protect and fulfil the human rights of all persons within their jurisdiction, including LGBT and intersex persons. These obligations extend to refraining from interference in the enjoyment of rights, preventing abuses by third parties and proactively tackling barriers to the enjoyment of human rights, including, in the present context, discriminatory attitudes and practices....” (emphasis added)*³⁵

Thirdly, we note that based on international human rights obligations already stated, gender recognition is primarily related to the rights of individuals to change gender as a matter of self-determination and the right to privacy. Whether or not there is “social acceptance” of transgender people should not a primary or overriding consideration.

³⁴ For example in the United Kingdom there is an exception which provides that it is not unlawful for a religious institution to refuse to conduct a marriage of a person who has changed gender under the Gender Recognition Act 2004: Equality Act 2010, Schedule 3, Part 6, Paragraph 24, <https://www.legislation.gov.uk/ukpga/2010/15/schedule/3>

³⁵ Discrimination and Violence against individuals based on their sexual orientation and gender identity, Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015, paragraphs 9 and 10, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E

(iii) The issues of gender recognition are unnecessary to be addressed by a new law in view of Hong Kong's situation

It is stated that it is unnecessary to introduce a gender recognition scheme for a number of purported reasons: for some transgender legal recognition is not a priority; there is already protection of transgender persons' human rights in terms of discrimination under the Disability Discrimination Ordinance, and under the Bill of Rights; gender identity anti-discrimination legislation is more important than gender recognition legislation in the view of some transgender people; and that changes in administrative procedures may be sufficient. Each of these issues requires addressing.

Firstly, in relation to legal gender recognition, we believe that most transgender people do strongly desire the ability to have legal gender recognition of their affirmed gender. The stated view that some transgender people are not concerned about legal gender recognition is unsubstantiated, with no reference to any study or other evidence to support that contention.

Secondly, in relation to current protections of human rights there are a number of points that need to be made. As the EOC stated in its study on introducing LGBTI anti-discrimination legislation in 2016, there is no comprehensive anti-discrimination legislation on grounds of gender identity. As stated, the EOC has considered complaints of discrimination by transgender people as possibly being disability or sex discrimination, however there has been no definitive determination by the courts that gender dysphoria is a disability protected under the Disability Discrimination Ordinance, or that gender identity discrimination is a form of sex discrimination.³⁶ In any event such provisions would not be sufficient as transgender persons do not wish to be considered as persons with disabilities. What is necessary, is comprehensive gender identity anti-discrimination legislation to deal with the specific issues relating to gender identity, as has been introduced in a number of other jurisdictions with similar legal systems such as the United Kingdom and Australia.

In addition, although transgender person's civil and political rights are protected under the Bill of Rights, this does not mean a gender recognition scheme is not needed. On the contrary, such a scheme is required in order to fulfil the obligations under the Bill of Rights. A gender recognition scheme is required to provide the detailed procedures for gender recognition, medical or non medical requirements, and other related rights. The Bill of Rights provides no such details.

Thirdly, it is argued that some transgender groups consider gender identity anti-discrimination as more important than a gender recognition scheme. Reference is made to the EOC's study in this regard. The EOC does not agree with the assessment of its study in paragraph 5.42 of the consultation document and the reference to paragraph 4.5.3 of the report from the EOC study. There was no finding in the EOC study that transgender people believe anti-discrimination legislation is more pressing than a gender recognition scheme. The consultation document therefore misrepresents the report, and the EOC is concerned that such a misrepresentation has been made of our study findings.

³⁶ See footnote 38 of the Report on Study on legislation against discrimination on grounds of sexual orientation, gender identity and intersex status. Commissioned by the Equal Opportunities Commission and conducted by the Gender Research Centre of the Hong Kong Institute of Asia-Pacific Studies of the Chinese University of Hong Kong, January 2016, <http://www.eoc.org.hk/eoc/upload/ResearchReport/20161251750293418312.pdf>

Finally, it should be noted that merely changing the current administrative procedures would not be, in the view of the EOC, sufficient. This is because as the creation of a legal gender recognition scheme should have legal effect on a number of aspects of a person's rights, as well as other legislation, it would be necessary for legislation to establish the scheme.

(iv) Gender recognition may have unintended consequences

In relation to consequences of gender recognition on marriages, this is discussed in Chapter 5 on the non-medical requirements for gender recognition.

(v) The slippery slope argument

In relation to the argument that transgender people are lobbying for more and more rights, contrary to this statement, what is being argued for in having a gender recognition scheme is that transgender people can have their existing human rights upheld, such as the right to be free from inhumane and degrading treatment, the right to privacy, non-discrimination and family life. These are the same rights that everyone in society is entitled to.

Chapter 4: Medical requirements for gender recognition

In relation to medical requirements for gender recognition, the following issues are covered in the consultation document:

- whether there should be a requirement of medical diagnosis;
- requirements relating to a “real life test”;
- requirements for hormonal treatment and/ or other medical treatment;
- requirement of sex reassignment surgery.

Each of these issues is examined below.

1. Issue 2: Whether there should be a requirement of medical diagnosis

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement of a medical diagnosis of, for example, gender dysphoria or gender identity disorder, for gender recognition, and why.

As stated previously, in relation to whether Hong Kong should have a gender recognition scheme, a number of international human rights bodies have made clear recommendations that transgender people’s right to self determination should be respected, and that processes to change gender should not involve medical requirements. This relates directly to the issue of whether there should be a requirement for medical diagnosis.

International, regional and national transgender civil society groups, health professional organizations and international human rights bodies have strongly advocated that gender identity should not be pathologized (considered to be a sign of illness) and that transgender people’s health needs should no longer be defined by a mental health diagnosis (de-psychopathologization).³⁷

A number of entities have called on the World Health Organization (WHO) to no longer classify “gender identity disorder” as a mental health disorder, and to provide an alternative solution for accessing gender affirming health services.³⁸ The WHO is in the process of revising the *International*

³⁷ World Professional Association for Transgender Health [WPATH] *De-psychopathologisation statement*, 26 May 2010; Global Action for Trans* Equality [GATE], *Depathologization*, 5 April 2017; Stop Trans Pathologization International Campaign, *Manifesto*, available at: <http://www.stp2012.info/old/en/manifesto>; APTN (2016) *Understanding the ICD: Its History, Organization, and Engaging Asia and the Pacific in the Revision Process*. APTN discussion paper, 22 October 2016.

³⁸ Council of Europe: Parliamentary Assembly (2015) *Resolution 2048: Discrimination Against Transgender People in Europe*; European Parliament (2015) *Report on the situation of fundamental rights in the European Union (2013–2014)*; Pan American Health Organization[PAHO], HPP (2015) *Blueprint for the Provision of*

Classification of Diseases and Related Health Problems (ICD). Current proposals of the WHO Secretariat include that codes relating to transgender people's gender identity and expression be removed from the ICD chapter on 'Mental and Behavioural Disorders' and new codes, entitled 'gender incongruence' be placed in a newly recommended chapter on 'Conditions Related to Sexual Health'. These recommended revisions aim to recognize gender identity and expression as a matter of self-determination, and transgender people's decision-making autonomy in regard to gender-affirming health care. Final decisions about the revision of ICD 11 are expected to be made by the World Health Assembly of the WHO in 2018.³⁹

It is also important to note the most recent revised statement by the World Professional Association for Transgender Health on Gender Identity, in which it states:

*“Medical and other barriers to gender recognition for transgender individuals may harm physical and mental health. WPATH opposes all medical requirements that act as barriers to those wishing to change legal sex or gender markers on documents. **These include requirements for diagnosis, counseling or therapy, puberty blockers, hormones, any form of surgery (including that which involves sterilization), or any other requirements for any form of clinical treatment or letters from doctors.**”* (emphasis added)⁴⁰

The EOC also notes, as highlighted in the consultation document, that a number of countries (Argentina, Belgium, Denmark, Malta, Ireland, and Columbia) do not require any proof of medical diagnosis. This is part of the same movement away from the pathologisation of transgender identities (ie seeing them as medical conditions), and from the stigma associated with transgender people being diagnosed as having a mental disorder.

For example, in Malta in 2015 it passed the Gender Identity, Gender Expression and Sex Characteristics Act. A person wishing to change gender must make a declaration that their gender identity does not correspond to the assigned sex in their birth certificate, but there is no requirement of psychiatric, psychological or medical documents.⁴¹

The Maltese Act makes it clear that it ensures the right to legal gender recognition of transgender people, without inappropriate medical or other requirements that breach transgender people's human rights:

*Comprehensive Care for Trans Persons and their Communities in the Caribbean and other Anglophone Countries; APTN, UNDP Programme (2015) *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities*; GATE (2013) *Critique and alternative proposal to the “Gender Incongruence of Childhood” Category in ICD-11*. Position developed by the GATE Civil Society Expert Working Group, Buenos Aires; Spanish Network for Depathologization of Trans Identities (2010) *Best Practices Guide to Trans Health Care in the National Health System*.*

³⁹ WHO (2015a) *ICD-11 Beta Version*; Drescher J., Cohen-Kettenis P. and Winter, S. (2012) 'Minding the body: Situating gender identity diagnoses in the ICD-11', *Int. Rev. Psychiatry*, 24 (6), pp. 568–571.

⁴⁰ Revised Statement on Identity Recognition; issued 15 November 2017 by World Professional Association for Transgender Health, <http://www.wpath.org/>

⁴¹ See section 5, Gender Identity, Gender Expression and Sex Characteristics Act Gender Identity, Gender Expression and Sex Characteristics Act 2015, https://tgeu.org/wp-content/uploads/2015/04/Malta_GIGESC_trans_law_2015.pdf

“3. (1) All persons being citizens of Malta have the right to –

(a) the recognition of their gender identity;

(b) the free development of their person according to their gender identity;

(c) be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and

d) bodily integrity and physical autonomy.

(2) Without prejudice to any provision of this Act –

(a) a person’s rights, relationship and obligations arising out of parenthood or marriage shall in no way be affected; and

(b) the person’s rights arising out of succession, including but not limited to any testamentary dispositions made in one’s favour, and any obligations and, or rights subjected to or acquired prior to the date of change of gender identity shall in no way be affected.

(c) any personal or real right already acquired by third parties or any privilege or hypothecary right of a creditor acquired before the change in the gender identity of the person shall in no way be affected.

(3) The gender identity of the individual shall be respected at all times. (4) The person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity.” (emphasis added)⁴²

Similarly, in 2015, Ireland passed the Gender Recognition Act. It requires a person to sign a statutory declaration providing that he or she:

“... (ii) has a settled and solemn intention of living in the preferred gender for the rest of his or her life,

(iii) understands the consequences of the application, and

*(iv) makes the application of his or her free will.”*⁴³

However, it does not require a medical diagnosis.

In the United Kingdom, the Government is currently reviewing the Gender Recognition Act 2004, including planning to remove the requirement of a medical diagnosis to change gender.⁴⁴ The Government has stated:

⁴² Section 3 Ibid.

⁴³ Section 10(1)(f) Gender Recognition Act 2015 (Ireland), <http://www.oireachtas.ie/documents/bills28/acts/2015/a2515.pdf>

“The consultation on the Gender Recognition Act, to be published in the Autumn, will look to improve the recognition process and reduce the stigma faced by the trans community. Proposals will include:

- *Removing the need for a medical diagnosis of gender dysphoria before being able to apply for gender recognition. The current need to be assessed and diagnosed by clinicians is seen as an intrusive requirement by the trans community...”*

Most recently the Prime Minister of the United Kingdom has announced that the Government will definitely be removing the medical requirements for a legal change in gender by transgender people under the Gender Recognition Act 2004, in order to reflect that being transgender is “not an illness”.⁴⁵

Another approach in some countries is to only require minimal medical involvement. For example, in 2013 the Netherlands passed gender recognition legislation which only requires a person wishing to change gender to have an expert medical statement affirming the person’s permanent conviction to belong to another gender.⁴⁶ The new legislation removed previous requirements for medical treatment, such as hormones and surgery.

Several States in Australia also require only minimal medical involvement. In the Australian Capital Territory a person wishing to change gender must submit a statutory declaration by a doctor or psychologist that the person has received “appropriate clinical treatment for alternation of the person’s sex”.⁴⁷ In South Australia, similarly, a person wishing to change gender must submit a statement by a medical practitioner or psychologist certifying that the person has undertaken “a sufficient amount of appropriate clinical treatment in relation to the person’s sex or gender identity”.⁴⁸ “Clinical treatment” has been defined to include treatment that need not involve invasive medical treatment and may include or constitute counselling.⁴⁹

In light of all the above factors, the EOC believes that the preferable approach to fully respect the human rights of transgender people is not requiring a medical diagnosis to change gender. Alternatively, an approach could be adopted which requires a statutory declaration from a medical practitioner or psychologist that the person has received appropriate clinical treatment relating to

⁴⁴ New Action to promote LGBT equality, 23 July 2017, <https://www.gov.uk/government/news/new-action-to-promote-lgbt-equality>

⁴⁵ Independent Newspaper, 19 October 2017, <http://www.independent.co.uk/news/uk/politics/theresa-may-transgender-not-illness-gender-recognition-act-lgbt-rights-sex-edution-homophobia-pink-a8008486.html>

⁴⁶ Human Rights Watch, 19 December 2013, <https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights>

⁴⁷ Sections 24 and 25 of the Births, deaths and Marriages Registration Amendment Act 2014, <http://www.legislation.act.gov.au/a/2014-8/20140426-57511/pdf/2014-8.pdf>

⁴⁸ Section 29K of the Births, Deaths and Marriages Registration Act 1996, <https://www.legislation.sa.gov.au/LZ/C/A/BIRTHS%20DEATHS%20AND%20MARRIAGES%20REGISTRATION%20ACT%201996/CURRENT/1996.6.UN.PDF>

⁴⁹ Ibid section 29H(1).

the person changing gender. But that should not require any medical treatment such as the use of hormones or surgery.

(2) If the answer to sub-paragraph (1) is “yes”, what kind of evidence should be provided by an applicant for gender recognition.

See the answer to (1) above.

2. Issue 3: Requirement of a “real life test” for gender recognition

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement of “real life test” for gender recognition, and why.

The EOC notes that in Hong Kong there is currently a two-year real life test for transgender people in order to undergo sex reassignment surgery. The issue of whether a real life test is required is linked to the previous issue of whether a medical diagnosis should be required, as it presupposes the necessity and validity of medical intervention. Consistent with this, the countries that have a self declaration model and no requirement of a medical diagnosis often do not require a real life test (eg Malta, Argentina, Columbia, Ireland and Denmark).

In the United Kingdom, although under the current Gender Recognition Act 2004, there is a requirement of a two-year real life test in order to be able to legally change gender, that system is under review. As previously stated, the UK Government has recently committed to reviewing and removing the requirement for medical diagnosis, which would also be likely to involve the removal of a real life test.

The recent United Kingdom parliamentary report on Transgender Equality noted in relation to the two-year real life test:

“The requirement for a minimum of two years living ‘in role’ was also seen as arbitrary and unreasonable, and we were told that this caused problems with identity documents (given that this must be done before legal gender recognition has been granted).”⁵⁰

The basis of the two-year real life test period is linked to the medical standards set out in WHO’s ICD-10 for diagnosis of gender dysphoria, and that a person has experienced such symptoms for a

⁵⁰ Transgender Equality, House of Commons Women and Equality Committee, first report of session 2015-16, 8 December 2015, paragraph 38, <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

two-year period. However, as stated previously, the WHO is planning to amend ICD-10 and remove the requirement of a two-year period, reducing it to “several months”.⁵¹

The EOC therefore believes that there should be no requirement for a real life test for gender recognition. Alternatively, if there is any requirement, it should be consistent with the new planned international standards (under ICD-11) of only several months.

(2) If the answer to sub-paragraph (1) is “yes”,

(a) what should an applicant for gender recognition have undertaken in order to satisfy a requirement that he or she has undergone a “real life test”;

(b) what should be the duration of a “real life test”; and

(c) what kind of evidence should be provided by an applicant for gender recognition to show that he or she has undergone a “real life test” for the specified duration.

As stated above, the EOC’s preference is that there is no real life test requirement. In the alternative if there was indeed a requirement of a real life test of several months, the EOC believes that evidence requirements should avoid bureaucracy and be consistent with international human rights recommendations that the procedures be quick, transparent and accessible to persons changing gender. This could, for example, require a person to provide a statutory declaration from a medical practitioner that they have been living in their affirmed gender for at least several months.

(3) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement of intention on the part of the applicant to live permanently the acquired gender, and why.

If a gender recognition scheme is introduced as recommended by the EOC, it would legally affect many aspects of a person’s life in terms of the identity and related documents. As a result, the EOC believes that it would be reasonable to require that a person who is changing gender is doing so with certainty and sincerity. One means to achieve that could be by requiring a person to declare that

⁵¹ Disorders related to sexuality and gender identity in the ICD-11: revising the ICD-10 classification based on current scientific evidence, best clinical practices, and human rights considerations, October 2016, World Psychiatry Journal,

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5032510/>

they intend to live permanently in their affirmed gender. This would also help to ensure that the system is not abused in any way.

A number of countries or jurisdictions around the world have such a requirement, including New Zealand, Belgium, Germany, Ireland, Netherlands, Sweden, the United Kingdom and many provinces of Canada. This is of note a requirement in a number of countries that do not require medical treatment, such as hormones or surgery in order to change gender. The logic of this is that while not requiring medical treatment, it would also be important to ensure that only those that genuinely wish to change gender do so.

The EOC therefore believes that it would be reasonable to have a requirement that the person intends to live permanently in their affirmed gender.

(4) If the answer to sub-paragraph (3) is “yes”, what kind of evidence should be required

In other jurisdictions which have such a requirement, common evidence required is a statutory declaration (or equivalent) by the person, given that a statutory declaration will normally have legal effect. If a person is found to have made a false declaration in a statutory declaration, it is a criminal offence in many jurisdictions and the person could be prosecuted.

For example, in Ireland a statutory declaration by the person applying to change gender is required that he or she:

“(ii) has a settled and solemn intention of living in the preferred gender for the rest of his or her life,

(iii) understands the consequences of the application, and

(iv) makes the application of his or her free will.”⁵²

In Hong Kong, as statutory declarations are already required or used in a number of legal contexts, it is recommended that the same system be used for persons wishing to change gender.

⁵² Section 10(1)(f) Gender Recognition Act 2015, Ireland.

3. Issue 4: Requirement of hormonal treatment and psychotherapy for gender recognition

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement for hormonal treatment and/or other medical treatment(s) (eg, psychotherapy) for gender recognition, and why.

The EOC believes that it is clear from recommendations and statements by a number of international human rights and health bodies, that there should be no mandatory requirements for a change in gender to have hormonal treatment and/ or other medical treatment. It should be noted that while many transgender people do wish to have such hormonal or other medical treatment, such treatment should be discretionary. Such recommendations are made from both a human rights perspective and a health perspective.

As stated previously, the Yogyakarta Principles affirm that:

*“No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation **or hormonal therapy**, as a requirement for legal recognition of their gender identity.”⁵³*

The 2015 report by the United Development Program and the World Health Organization has also stated in its recommendations to Asian countries that they should:

*“Take all necessary legislative, administrative, and other measures to fully recognise each person’s self-defined gender identity, **with no medical requirements** or discrimination on any grounds”⁵⁴*

From a medical and health perspective, the World Professional Association for Transgender Health, which is an international interdisciplinary professional and educational organization devoted to transgender health, has stated most recently in November 2017:

“The World Professional Association for Transgender Health (WPATH) recognizes that, for optimal physical and mental health, persons must be able to freely express their gender identity, whether or not that identity conforms to the expectations of others. WPATH further recognizes the right of all people to identity documents consistent with their gender identity, including those documents which confer legal gender status. Such documents are essential to the ability of all people to enjoy rights and opportunities equal to those available to others; to access accommodation, education, employment, and health care; to travel; to navigate everyday transactions; and to enjoy safety.

⁵³ Principle 3, the Right to Recognition before the Law, The Yogyakarta Principles 2007, <http://www.yogyakartaprinciples.org/principles-en/>

⁵⁴ Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific, United Nations Development Programme, page 112, <file:///C:/Users/peterreading/Downloads/rbap-hhd-2015-asia-pacific-trans-health-blueprint.pdf>

Transgender people, regardless of how they identify or appear, should enjoy the gender recognition all persons expect and deserve.

*Medical and other barriers to gender recognition for transgender individuals may harm physical and mental health. WPATH opposes all medical requirements that act as barriers to those wishing to change legal sex or gender markers on documents. **These include requirements for diagnosis, counseling or therapy, puberty blockers, hormones, any form of surgery (including that which involves sterilization), or any other requirements for any form of clinical treatment or letters from doctors.** WPATH argues that marital and parental status should not be barriers to recognition of gender change, and opposes requirements for persons to undergo periods living in their affirmed gender, or for enforced waiting or 'cooling off' periods after applying for a change in documents. Further, court and judicial hearings can produce psychological, as well as financial and logistical barriers to legal gender change, and may also violate personal privacy rights or needs.”⁵⁵*

Further, the Standards of Care relating to transgender people issued by WPATH make it clear that although many transgender people benefit from hormonal treatment, such treatment should only be made with the fully informed consent of a person and should be tailored to the particular circumstances of a person:

“Hormone therapy must be individualized based on a patient’s goals, the risk/benefit ratio of medications, the presence of other medical conditions, and consideration of social and economic issues.”⁵⁶

In other words, hormonal treatment should not be made a mandatory requirement to legally change gender and should only be prescribed depending on the particular circumstances and wishes of the person.

In conclusion, the EOC does not believe that there should be any mandatory requirement of hormonal or other medical treatment.

⁵⁵ WPATH Identity Recognition Statement, 15 November 2017, <http://www.wpath.org/>

⁵⁶ Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, WPATH, 2012 Page 33, [https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf)

(2) If the answer to sub-paragraph (1) is “yes”,

(a) what kind of treatment(s) should be required and/or to what effect the should the treatment(s) achieve; and

(b) what kind of evidence should an applicant for gender recognition provide on this.

Not applicable, since the EOC does not believe there should be any requirement of hormonal or other medical treatment.

4. Issue 5: Requirement of sex reassignment surgery and other surgical treatments for gender recognition

(1) Insofar as the practice in Hong Kong is concerned, full sex reassignment surgery requires removal of the original genital organs and construction of some form of genital organs of the opposite sex.

In the event that a gender recognition scheme is to be introduced in Hong Kong, should there be a requirement for the applicant to have undergone partial/full sex reassignment surgery, and if so, why?

The EOC believes that there definitely should not be a mandatory requirement for any sex reassignment surgery for a person to legally change gender. It is clear from many international human rights bodies’ recommendations, and specific recommendations to the Hong Kong Government, that requirements of surgery breach a number of fundamental human rights, including the right to be free from inhumane and degrading treatment, the rights to self determination, self autonomy, privacy and to be free from discrimination on grounds of gender identity. International bodies working on the right to health of people have also made clear recommendations that there should be no mandatory requirement of surgery. The position is even more overwhelmingly clear in relation to requirements of surgery which result in sterilization, as is the effect of the current surgery requirements in Hong Kong.

In relation to international human rights bodies there have been numerous statements and recommendations against surgery requirements. The Yogyakarta Principles state that:

*“No one shall be forced to undergo medical procedures, **including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.**”*
(emphasis added)⁵⁷

⁵⁷ The Yogyakarta Principles 2007, <http://www.yogyakartaprinciples.org/principles-en/>

In 2014 an Inter-agency Statement was issued by a number of United Nations bodies, including the OHCHR, UN Women, WHO and UNICEF.⁵⁸ It states:

*“In many countries , transgender and often also intersex persons are required to **undergo sterilization surgeries that are often unwanted, as a prerequisite to receiving gender affirmative treatment and gender-marker changes.***

According to international and regional human rights bodies and some constitutional courts, and as reflected in recent legal changes in several countries, these sterilization requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender and intersex persons.” (emphasis added)

The statement made clear recommendations to Member States that such practices involving surgery and sterilization should not be pre-requisites to changing gender.

More recently in 2015, the Office of High Commissioner for Human Rights stated in a report on discrimination faced by transgender people that:

“States should address discrimination by...

(i) Issuing legal identity documents, upon request, that reflect preferred gender, **eliminating abusive preconditions, such as sterilization**, forced treatment and divorce...” (emphasis added)⁵⁹

It should also be noted that there have been specific recommendations made to the Hong Kong Government on the issue of the current requirements of surgery. 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.

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.**”*

It also recommended that:

“29. Hong Kong, China should:

⁵⁸ Eliminating Forced, coercive and otherwise involuntary sterilization, Inter-agency statement, WHO 2014, page 7, http://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf

⁵⁹ Discrimination and Violence against individuals based on their sexual orientation and gender identity, Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E

(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..." (emphasis added)⁶⁰

From a medical and health perspective there has also been a number of statements by international bodies recommending that there should be no surgery requirements for transgender people to change gender.

In October 2015 the World Medical Association (WMA) made a statement on transgender people's rights.⁶¹ The WMA is an international organization representing physicians. It was founded in 1947 to ensure the independence of physicians, and to work for the highest possible standards of ethical behaviour and care by physicians at all times. Its work includes promoting human rights protection in relation to issues of healthcare.

The statement notes:

"Transgender people are often professionally and socially disadvantaged, and experience direct and indirect discrimination, as well as physical violence. In addition to being denied equal civil rights, anti-discrimination legislation, which protects other minority groups, may not extend to transgender people. Experiencing disadvantage and discrimination may have a negative impact upon physical and mental health."

The statement also makes a number of recommendations including:

"3. The WMA affirms that, in general, any health-related procedure or treatment related to an individual's transgender status, e.g. surgical interventions, hormone therapy or psychotherapy, requires the freely given informed and explicit consent of the patient..." (emphasis added)

Further, as referred to previously, the World Professional Association for Transgender Health stated in November 2017 in relation to the issues:

"Medical and other barriers to gender recognition for transgender individuals may harm physical and mental health. WPATH opposes all medical requirements that act as barriers to those wishing to

⁶⁰ 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>

⁶¹ <http://www.wma.net/en/30publications/10policies/t13/>

*change legal sex or gender markers on documents. These include requirements for diagnosis, counseling or therapy, puberty blockers, hormones, any form of surgery (including that which involves sterilization), or any other requirements for any form of clinical treatment or letters from doctors.” (emphasis added).*⁶²

This year there has also been a very important decision on the issue of requirements for sex reassignment surgery to change gender by the European Court of Human Rights which has jurisdiction over all 47 Council of Europe Member States. The decision of *AP, Garçon and Nicot v France*⁶³ concerned the regime in France for transgender people to legally change gender. At that time there was a requirement that a person undergo sex reassignment surgery, which usually resulted in sterilization, in order to change sex on a birth certificate. The Court held that the requirement of surgery and sterilization breached the positive obligations on the State to protect the right to privacy of transgender people under article 8 of the European Convention on Human Rights. This was the first time that the European Court of Human Rights had examined the issues of requirements of surgery to change gender, and as a result of the judgment, all countries in the Council of Europe which still require surgery will need to reform those requirements.⁶⁴

The EOC notes that although the consultation document refers to the same case (page 142) in another context of requirements for medical diagnosis, there is no reference at all to the decision in the context of requirements for surgery. This is a very important oversight in the consultation document.

The EOC also notes that the arguments referred to in the consultation paper (see pages 160-161) in support of a requirement for surgery are in the EOC’s view misconceived. The consultation paper states that some have argued that the requirement of surgery cannot be cruel, inhumane or degrading treatment, when such surgery is only carried out when a person requests it. Clearly there are many transgender people who wish to undergo surgery, and for them there is no issue of coercion. However, there are other transgender people who do not wish to or cannot (for medical reasons) have surgery but still wish to legally change their gender. For these persons, a mandatory requirement of surgery is cruel, inhumane or degrading treatment as stated by the United Nations Committee Against Torture.

Further, the EOC is concerned about the reference to the arguments in paragraph 6.41 (page 156) of the consultation document, that it is necessary to require surgery to change gender to “prevent possible sexual abuses and assaults”. The EOC believes that any requirements should be based on substantial evidence rather than opinions unsubstantiated by evidence. In relation to issues of possible sexual abuse by transgender people, we do not believe there is substantial evidence that for

⁶² WPATH Identity Recognition Statement, 15 November 2017, <http://www.wpath.org/>

⁶³ Applications No 79885/12, 52471/13 and 52596/13 of 6 April 2017, [https://hudoc.echr.coe.int/eng#{"itemid":\["001-172556"\]}](https://hudoc.echr.coe.int/eng#{)

⁶⁴ Human rights victory! European Court of Human Rights ends forced sterilization, https://tgeu.org/echr_end-sterilisation/

example transgender women are more likely to subject women to sexual abuse in bathrooms. On the contrary there is evidence that this is a misconception.⁶⁵ Further, there is also significant evidence that transgender people face high levels of violence and assault against them. For example the 2011 report by the United Nations noted:

“Homophobic and transphobic violence has been recorded in all regions. Such violence may be physical (including murder, beatings, kidnappings, rape and sexual assault) or psychological (including threats, coercion and arbitrary deprivations of liberty). These attacks constitute a form of gender-based violence, driven by a desire to punish those seen as defying gender norms.”⁶⁶

In another report by the United Nations Development Programme examining the situation of transgender people in Asia it was stated:

“Between January 2008 and December 2014, the TMM project identified 1,731 killings of trans people in 62 countries.¹⁸ These included 155 murders across 16 countries in Asia and a further two in the Pacific.¹⁹ In Asia, the highest numbers of murders recorded since January 2008 were in India (48), the Philippines (35), Pakistan (22), and Thailand (14).

All forms of physical, sexual, and emotional violence create a climate of fear for many trans people. Studies in Asia have documented rape and physical abuse of trans women, including those selling sex....”⁶⁷

In the United States as another example, the Human Rights Campaign has reported that 102 transgender people have been killed in the last five years, and there is an “epidemic of violence” against them.⁶⁸

⁶⁵ See for example in the United States <http://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019>; and <http://time.com/4314896/transgender-bathroom-bill-male-predators-argument/>

⁶⁶ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, Report of the United Nations High Commissioner for Human Rights, 17 November 2011, A/HRC/19/41, paragraph 20, http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf

⁶⁷ Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific, United Nations Development Programme, page 16, <file:///C:/Users/peterreading/Downloads/rbap-hhd-2015-asia-pacific-trans-health-blueprint.pdf>

⁶⁸ Independent, 17 November 2017, <http://www.independent.co.uk/news/world/americas/transgender-people-us-epidemic-violence-discrimination-prejudice-attacks-a8061456.html>

The EOC therefore concludes that any requirement of mandatory surgery for a transgender person to change gender should be:

- removed from the current administrative system; and
- not included in any gender recognition scheme;

as such requirements breach or are likely to breach both international and Hong Kong human rights obligations.

(2) If the answer to sub-paragraph (1) is “yes”,

(a) regarding the extent of the surgery required, whether there should be a requirement of full sex reassignment surgery as currently adopted in Hong Kong, and why;

(b) if the answer to sub-paragraph (a) is “no”, what type of partial sex reassignment surgery (ie the extent of the partial surgery) would be sufficient, and why;

(c) other than a partial/full sex reassignment surgery, what kind of surgery should be required (including non-genital surgery such as plastic surgery, reconstruction of chest, etc), and why;

(d) what kind of evidence in this respect should be provided by an applicant for gender recognition;

(e) whether sex reassignment surgery carried out in a country or territory outside Hong Kong should be recognised in Hong Kong for the purposes of gender recognition, and why; and

(f) if the answer to sub-paragraph (e) is “yes”, what kind of evidence should be provided by the applicant.

Not applicable as the EOC does not believe there should be any mandatory requirement of surgery for transgender people to change gender.

5. Issue 6: Requirement of other medical treatments for gender recognition

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be any other medical requirements or further evidence for gender recognition, and why.

For the same reasons as stated by the EOC in relation to Issues 2-5 above, the EOC does not believe there should be any other mandatory medical requirements or further evidence required for gender recognition.

(2) If the answer to sub-paragraph (1) is “yes”, what kind of further evidence in this regard should be required

Not applicable.

Chapter 5: Non-medical requirements for gender recognition

In relation to non-medical requirements for gender recognition, the following issues are consulted on:

- requirements related to nationality, citizenship residency or domicile;
- minimum age requirement;
- requirement related to marital status;
- requirement related to parental status;
- recognition of foreign gender change.

Each of these issues is examined below.

1. Issue 7: Requirements related to nationality, citizenship residency or domicile

In the event that a gender recognition scheme is to be introduced in Hong Kong, whether the scheme should be open to, for example, permanent residents of Hong Kong, non-permanent residents, and/or any other persons (such as visitors), and why.

The issue of residency requirements raises issues of equality of treatment between different groups based on nationality, citizenship, or residency status. As a result it raises issues of possible discrimination under the Basic Law and Bill of Rights.

The EOC notes that the current administrative system in Hong Kong for a transgender person to change their gender on their ID card does not require that a person be a permanent resident. Persons who are non-permanent residents can also change their ID card.

The EOC also notes that there is a variety of approaches to this issue in other jurisdictions with some requiring citizenship of the country, some requiring either citizenship or residency of the country, while Germany also allows persons who are not residents but have the right of asylum or are refugees living in Germany to apply for gender change.

There have been several decision by the Hong Kong courts relating to whether or not requirements relating to residency status (in relation to benefits or other rights) were lawful under the Basic Law and Bill of Rights. These have highlighted that consistent with the four anti-discrimination Ordinances, a test of whether the discrimination is justified can be applied (ie whether the

difference in treatment pursues a legitimate aim and is proportionate) to the particular situation.⁶⁹ As was stated in the decision of *Fok Chun Wa v Hospital Authority* by the Court of Final Appeal, whether or not any discrimination is justified depends on three elements: (1) the difference in treatment pursued a legitimate aim; was rationally connected to the legitimate aim; and the difference in treatment was no more than necessary to accomplish the legitimate aim.⁷⁰

It was also pointed out in *Fok Chun Wa v Hospital Authority* that in relation to claims of discrimination under the Basic Law and Bill of Rights, the fact that a person is not a resident of Hong Kong (ie they are a visitor) does not prevent a claim from being made by a visitor.⁷¹ In that case, the claim of discrimination was made under article 25 of the Basic Law and article 22 of the Bill of Rights regarding higher hospital costs for mainland women (who were not Hong Kong residents) wishing to give birth in Hong Kong hospitals.

The *Fok Chun Wa v Hospital Authority* decision distinguished between the degree of scrutiny of Government policies where the socio-economic rights were concerned (as in that case of the hospital charges which differentiated costs based on whether persons were Hong Kong residents or not), and fundamental characteristics such as race, sex, or sexual orientation:

“Where, for example, the reason for unequal treatment strikes at the heart of core-values relating to personal or human characteristics (such as race, colour, gender, sexual orientation, religion, politics, or social origin), the courts would extremely rarely (if at all) find this acceptable. These characteristics involve the respect and dignity that society accords to a human being. They are fundamental societal values. On the other hand, where other characteristics or status which do not relate to such notions or values are involved, and here I would include residence status, the courts will hesitate much more before interfering; in other words, more leeway is given to the Executive, Legislature or other authorities. I have found useful in this context the analysis contained in the speech of Lord Hoffmann in Carson at 182E-183B (paras 15–16). As Lord Hoffmann observed, there can of course be borderline cases but generally there ought to be little difficulty in differentiating between a core value and a mere question of general, social or economic policy: at 183C (para 17). In the present case, using residence status as the dividing line in relation to health benefits clearly falls within the latter. This status has less to do with personal characteristics (in the sense used above) than with social and economic considerations.”⁷²

The Court decided that it was justifiable to have different charges between Hong Kong residents and non-residents for the hospital services and to give preference to Hong Kong residents, in light of the large numbers of non-resident mainland women coming to Hong Kong to give birth.

In contrast, the case of *Kong Yunming v Director of Social Welfare* involved the issue of the lawfulness of the Comprehensive Social Security Assistance Scheme and whether a requirement to be a Hong Kong resident for 7 years (as opposed the previous one year residency requirement) was unlawful discrimination. The court found that the 7-year residency requirement was not justifiable as it did not pursue any legitimate aim. The system was therefore declared to be unconstitutional,

⁶⁹ *Fok Chun Wa v Hospital Authority*, Court of Final Appeal (2012) 15 HKCFAR 409; *Kong Yunming v Director of Social Welfare* Court of Final Appeal [2014] 1 HKC 518.

⁷⁰ Paragraph 56 of *Fok Chun Wa v Hospital Authority*, Court of Final Appeal.

⁷¹ *Ibid* paragraph 53.

⁷² *Ibid* paragraph 77.

discriminatory and the former 1 year residency requirement for social security benefits was reinstalled.

The EOC believes that based on the above decisions, and the particular factors associated with gender recognition, it would be appropriate that anyone who is a resident of Hong Kong (whether a permanent or non-permanent resident) can apply for gender recognition.

In relation to applying for gender recognition, this would not involve the same socio-economic considerations as for example hospital charges for giving birth, or payments of social security. Rather it raises core civil and political rights, such as the right to dignity, self-determination, privacy and family life. In such circumstances, it is less likely that a distinction between permanent residents and non-permanent residents would be justified.

In relation to the issue of whether a gender recognition scheme should be available to non-residents of Hong Kong as opposed to residents, there may be situations where it may be appropriate for non-residents to be able to apply for gender recognition. This is particularly the case where visitors are not able to apply for gender recognition in their home countries, or if they are at risk of violence or other persecution in their home country because of being transgender. The Hong Kong case of *Recassa v Commissioner for Correctional Services* HCAL 93 of 2015⁷³ illustrates the possible concerns of non-resident transgender people. Recassa was a transgender woman and Filipino citizen sentenced to imprisonment in a male prison in Hong Kong, given that her citizenship indicated that at birth she was a man. This is because in the Philippines there is no system for legal gender recognition. She brought claims of breach of her human rights such as discrimination on grounds of her gender identity. If a gender recognition scheme was introduced, but it was only available to persons who are residents, non-resident transgender people would continue to face the same concerns of placement in prisons not consistent with their affirmed gender. The judgement in the case is yet to be handed down.

It may also be appropriate to consider whether the gender recognition scheme should be available to non-resident protection claimants under the Convention Against Torture. This could apply where transgender people are fleeing persecution and risk of torture or other violence in their home country because of being transgender. Principle 23 of the Yogyakarta Principles states:

“Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.”⁷⁴

⁷³ <http://www.scmp.com/lifestyle/article/1994926/transgender-prisoners-hong-kong-suffer-sexual-assault-denial-hormones>

⁷⁴ <http://www.yogyakartaprinciples.org/principle-23/>

This would also be helpful given that there is clear evidence that transgender people in many countries are often at risk of violence and being killed. The United Nations reported in 2011:

“In addition to ‘street’ violence and other spontaneous attacks in public settings, those perceived as LGBT may be targets of more organized abuse, including by religious extremists, paramilitary groups, neo-Nazis and extreme nationalists. Young LGBT people and those of all ages who are seen to be transgressing social norms are at risk of family and community violence. Lesbians and transgender women are at particular risk because of gender inequality and power relations within families and wider society....

Since 1999, the Special Rapporteur on extrajudicial, summary or arbitrary executions has regularly referred to persons being subjected to death threats or killed because of sexual orientation and gender identity...⁷⁵

The EOC therefore believes that the Government should consider situations where it may be important to allow non-residents to apply for gender recognition.

In conclusion the EOC believes the gender recognition scheme should be open to permanent and non-permanent residents, and that the Government should give consideration as to whether there are circumstances where non-residents should be able to apply for gender recognition, particularly in situations where it would protect their human rights.

2. Issue 8: Minimum age requirements

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a minimum age requirement for applying for gender recognition.

The EOC believes that based on human rights obligations under the Convention on the Rights of the Child (CRC), there should not be a minimum age requirement for a person to apply for gender recognition. However, as discussed in (3) below, the EOC believes that it would be reasonable to require a child, at least from the age of under 16 to have consent of parents or a guardian to apply for gender recognition.

Although many countries do require persons to be at least of adult age (often 18 years old), there is a clear trend of growing numbers of countries or jurisdictions that enable children to apply for gender recognition.

⁷⁵ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, Report of the United Nations High Commissioner for Human Rights, 17 November 2011, A/HRC/19/41, paragraphs 21 and 24, http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf

In Germany, in 1982, the Federal Constitutional Court struck down the mandatory age provisions in the Transsexuals Act 1980.⁷⁶ Central to the Court's reasoning was the idea that it would be inconsistent for the law to permit medical transitions, but require young people to wait until a later stage for legal recognition. Thus, in principle, there is no age limit on who can obtain legal gender recognition in Germany, although age requirements for gender confirming treatments have historically obstructed young applicants.

In 2013, the Netherlands adopted new gender recognition rules which expressly include 16 and 17 year old individuals.⁷⁷ Under the current Dutch model, 16 and 17 year olds follow the same application procedure as persons who have already reached the age of majority. In Ireland, the Gender Recognition Act 2015 allows 16 and 17 year olds to obtain recognition where they (a) have the support of two psychiatrists or endocrinologists; (b) have the consent of all parents or guardians; and (c) the Family Circuit Court permits recognition having determined that it does not contravene the best interests of the child.⁷⁸

The parliaments in Argentina and Malta have now gone even further in providing recognition for transgender youth. Under recent reforms in both jurisdictions, transgender children and minors, irrespective of age, can make an application for gender recognition through their parents or guardians.⁷⁹

Under the new Norwegian gender recognition legislation which came into force in June 2016, young people from the age of 16 years can to apply for legal recognition, and on the basis of self-determination.⁸⁰ The parents of Norwegian transgender children will also be able to apply for recognition on their child's behalf from the age of 7 years.⁸¹ Under the Swedish Gender Recognition Act, children who are at least 12 years old can apply for gender recognition, provided they have parental consent.⁸²

As stated in the consultation document, the situation in the United Kingdom is that there have been recent recommendations in 2016 made by a House of Commons parliamentary committee for a reduction in the current age limit from 18 years to 16 years.⁸³ This was based partly on evidence that young individuals hold a stable gender identity from early childhood; providing treatment for transgender children can substantially improve both mental and physical well-being; transgender young persons are engaging in earlier social transitions, developing important networks of peer-support; and enjoying formative experiences in their preferred gender.⁸⁴

⁷⁶ BVerfG 16 March 1982, BVerfGE 60, 123

⁷⁷ Dutch Civil Code, art. 28, para 1

⁷⁸ The Gender Recognition Act 2015, s. 12.

⁷⁹ For Argentina, see the Gender Identity Act 2012 (Act No. 26.743), art. 5; For Malta, see the Gender Identity, Gender Expression and Sex Characteristics Act (Act No. XI of 2015), s. 7

⁸⁰ <https://www.hrw.org/news/2016/06/07/dispatches-norways-transgender-rights-transformation>

⁸¹ "Norway proposes extending Transgender Rights to Children" (Reuters, June 25 2015) [Accessed September 30, 2015] <http://www.reuters.com/article/2015/06/25/norway-gender-idUSL8N0ZB3FE20150625>

⁸² <https://tgeu.org/sweden-gender-recognition-act-reformed-2012/>

⁸³ Transgender Equality, House of Commons Women and Equality Committee, first report of session 2015-16, 8 December 2015, <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

⁸⁴ Ibid paragraph 66.

In relation to international human rights obligations, the Government should apply both the CRC and other human rights obligations on the issue of gender recognition for children

In May 2017 a group of human rights experts from the United Nations, Inter-American Commission on Human Rights, African Commission on Human and Peoples' Rights, and Council of Europe issued a statement setting out the human rights obligations regarding transgender youth.⁸⁵ They stated:

“In most countries, transgender people are refused legal recognition of their self-defined gender, which can lead to further human rights violations in education, employment, healthcare, and beyond. Many States that do permit the modification of gender markers on identity documents impose abusive requirements, such as forced or otherwise involuntary surgery, sterilization, mental health diagnosis, psychiatric interventions or other coercive medical procedures.

Many of these practices violate the physical and mental integrity of individuals and related rights, amounting to ill-treatment or torture, and infringing their inherent dignity.

We call on States to facilitate quick, transparent and accessible legal gender recognition and without abusive conditions, guaranteeing human rights for all persons, respectful of free/informed choice and bodily autonomy. Coercive medical interventions/procedures should, therefore, never be employed.”

In relation to the CRC, the Hong Kong Government is a party to the Convention. There are several key rights or obligations under the CRC which are relevant to the issue of legal gender recognition for children. Firstly, in all actions concerning children, the best interests of the child shall be the primary consideration.⁸⁶ Secondly, children have the right to be heard and their views taken into account in all matters affecting them.⁸⁷ This includes in matters of legal gender recognition as highlighted by the Council of Europe Commissioner for Human Rights.⁸⁸ Thirdly, the rights in the CRC must be enjoyed by all children without discrimination on any ground, including “other status” which includes gender identity of transgender children.⁸⁹

Several studies have highlighted that legal gender recognition should be available to transgender children in order to comply with their human rights under the CRC.⁹⁰ For example the “Back me up” research states:

“Excluding children from being taken into account and being heard through strict age limitations for legal gender recognition violates their rights in art. 3 para. 1, art. 8 para. 1, art. 12 para 1, art. 24

⁸⁵ Embrace diversity and protect trans and gender diverse children and adolescents, 17 May 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21622>

⁸⁶ Article 3(1) Convention on the Rights of the Child, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

⁸⁷ Ibid Article 12(1)

⁸⁸ “LGBTI children have the right to safety and equality”, Commissioner’s for Human Rights Comment, 2 October 2014, <https://www.coe.int/en/web/commissioner/-/lgbti-children-have-the-right-to-safety-and-equality?desktop=true>

⁸⁹ Ibid Article 2(1).

⁹⁰ See for example “Back me up! Rights of Trans children under the Convention on the Rights of the Child”, Lina Henzel, Working Paper Number 13, 2016, Humboldt Law Clinic, <http://hlcmr.de/wp-content/uploads/2017/01/Back-Me-Up.pdf>. “Children Speak Out on Transgender Issues”, Children’s Rights Alliance for England, August 2016, http://www.crae.org.uk/media/118087/CRAE-BULLETIN_TRANS_FINAL.pdf.

and art. 6 para. 2 of the Convention. To ensure the fulfilment of children's rights, trans children must have access to legal gender recognition in quick, easy and accessible procedures that are based on their right to self-determination."⁹¹

The same study also highlights the problems such as discrimination that transgender children face in Europe in being unable to change their identity documents to their affirmed gender:

*"Trans children face similar distress and discrimination because of their gender identity as their adult peers. However, they are limited in their ability to claim their rights. Children who are visibly trans or transgressing gender norms can face different problems if official documents do not reflect their name and gender identity; access to gender/sex-segregated activities and facilities in schools and in the leisure-time may be denied... According to the EU Fundamental Rights Agency's survey, 29% of trans students said they felt personally discriminated against by school or university personnel in the 12 months before research was conducted."*⁹²

The study conducted by Children's Rights Alliance for England indicated:

*"Transgender children told us about difficulties with changing identity documents. This included official student records and examination certificates. Some examination boards had not allowed children to change their gender or name on exam certificates."*⁹³

Given the above discrimination and other difficulties transgender children face, both studies concluded that legal gender recognition should be available for children.

In conclusion, the EOC believes that there should not be a minimum age requirement for applying for gender recognition in order to comply with human rights obligations regarding children, but that at least from the age of under 16 years old, they should be required to have consent of parents or a guardian.

(2) If the answer to sub-paragraph (1) is "yes", what should be the minimum age for the application: 12 years of age, 18 years of age, 21 years of age or another age; and the basis for choosing that age as the minimum age for the application.

Not applicable.

⁹¹ "Back me up", page 17.

⁹² Ibid page 12.

⁹³ "Children Speak Out on Transgender Issues" page 3.

(3) If the answer to sub-paragraph (1) is “no”,

(a) whether a minor (under the age of 18 years) should not be allowed to make an application unless with the consent of his or her parents and/or legal guardians, and why;

Given the human rights obligations under the CRC regarding the best interests principle, and the requirement to take into account the views of a child on matters that affect them, the EOC does not believe that for older children (16 and 17 year olds) there should be a requirement to have the consent of a parent or legal guardian.

However, in relation to children below 16 who may not be as mature in their thinking, the EOC believes it would be reasonable and proportionate to require that the parents or legal guardians must provide consent to legal gender recognition for the child. This would also be consistent with the practice in a number of countries that do permit children to legally change gender.

(b) whether there should be additional requirements for a minor applicant which would not be required for an adult applicant, and why; and

Please see (a) above requiring parental consent, at least from when a child is under the age of 16.

(c) if the answer to sub-paragraph (b) is “yes”, what kind of requirement(s) and evidence should be required.

Not applicable.

3. Issue 9: Requirements related to marital status

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be requirements relating to marital status of the applicant, and why.

The EOC believes that it may be a breach of international and Hong Kong human rights obligations to introduce a requirement regarding gender recognition regarding marital status (eg to be unmarried or get divorced). As a result, the EOC does not believe there should be any requirement regarding marital status.

Currently in Hong Kong under the administrative arrangements for a transgender person to change their sex on their ID card, there are no requirements regarding marital status (eg to be unmarried or to get divorced if one is married).

A number of international human rights bodies, as well as national courts, have found that it is a breach of a person's human rights to require a transgender person to be unmarried or get divorced in order to legally change gender.

The Yogyakarta Principles state:

*"No status, such as **marriage** or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity."*⁹⁴

The United Nations Office of the High Commissioner for Human Rights has also recommended:

"States should address discrimination by...

(i) Issuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment **and divorce...**"⁹⁵

The Commissioner of Human Rights in the Council of Europe has also made specific recommendations on the issue of removing restrictions regarding marital status in a report on human rights of transgender people:

"Remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender."⁹⁶

The same report also noted that requiring a married couple to divorce could have particularly adverse consequences on family life where the married couple wish to remain together and already have children:

*"Indeed, forced divorce may have a negative impact on the children in the marriage. In several countries the parent who has undergone the gender change will lose custody rights of the children. In other states ambiguous legislation is in place and hardly any attention is given to the best interests of the child. This can lead to hardship as in the case where both spouses wished to remain married so that the non-transsexual male partner would not lose custody of the child and could continue to receive state benefits in addition to his part-time work, in order to support his disabled, and now transsexual, spouse in providing care for the joint child."*⁹⁷

⁹⁴ Principle 3, the Right to Recognition before the law, Yogyakarta Principles, <http://www.yogyakartaprinciples.org/principles-en/>

⁹⁵ Discrimination and Violence against individuals based on their sexual orientation and gender identity, Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015, paragraph 79, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E

⁹⁶ Human Rights and Gender Identity, Commissioner for Human Rights, 29 July 2009, page 18, <https://rm.coe.int/16806da753>

⁹⁷ Ibid page 9.

As at 2015, 18 Council of Europe Member States no longer have a requirement for transgender people to get divorced in order to be able to legally change gender.⁹⁸

There have also been a number of decisions by national, regional or international human rights bodies on the issue of requirements as to marital status.

Several decisions by national courts have found that a requirement that a transgender person get divorced when changing gender was a breach of their human rights. In 2008 the German Constitutional Court ruled that the change of sex on a birth certificate must not lead to a mandatory divorce, as this would breach the right to marriage under Article 12 of the European Convention on Human Rights.⁹⁹ In 2006, the Austrian Constitutional Court also granted a transgender woman the right to have her gender recognised while remaining married to her wife. The Court ruled that “changing a sex entry in a birth certificate cannot be hindered by marriage”.¹⁰⁰ Most recently in Italy, the Italian Constitutional Court found that a married couple would be denied their human rights if they were stripped of all their legal rights because one spouse obtained legal gender recognition.¹⁰¹ It is worth noting that in none of the three countries, was same-sex marriage legalized at the time, and yet the courts held that a requirement of divorce was a breach of human rights.

The consultation document also refers to the decision of the European Court of Human Rights in the case of *Hämäläinen v. Finland*.¹⁰² The Court held that it was not disproportionate to require the conversion of the marriage of a transgender woman into a registered partnership as a precondition of having her acquired female gender legally recognised. However, a crucial factor in that decision is that the legal concepts of marriage and registered partnership were almost identical in Finland. The Court held that there had been no violation of the right to respect for family life as the conversion of the transgender woman’s marriage into a registered partnership did not have any implications on the paternity of her biological child or on the responsibility for the care, custody and maintenance of the child. The judgment should be interpreted as allowing for the change of civil status as a precondition of legal gender recognition, but only when an equivalent to marriage that safeguards the rights of the spouses and their children exists.

Finally and most recently, the United Nations Human Rights Committee in June 2017 made a decision regarding the situation in the Australian State of New South Wales. There was a requirement that in order for a transgender person to legally change their birth certificate, they needed to be unmarried. The claimant was a male to female transgender person who remained in her marriage to a woman after her change in gender. The New South Wales Government refused to change her birth certificate because she was married. The requirement linked to the fact that same-sex marriage is not lawful in New South Wales or anywhere currently in Australia. Despite this, the

⁹⁸ Austria, Belgium, Croatia, Denmark, Estonia, Georgia, German, Iceland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland. See Transgender Europe’s Trans Rights Europe Map 2015, available at: http://tgeu.org/wp-content/uploads/2015/05/trans-map-Side-B-may-2015_image.png.

⁹⁹ German Constitutional Court (BVerfG), Case 1 BvL 10/05 (2008).

¹⁰⁰ Austrian Constitutional Court (VfGH), Case V 4/06 (2006).

¹⁰¹ Italian Constitutional Court, No 170 [2014], 11 June 2014.

¹⁰² *Hämäläinen v. Finland*, No. 37359/09 (2014).

Human Rights Committee found that the Government has breached the right to family life (article 17) and the right to non-discrimination on grounds of marital status and transgender status (article 26).¹⁰³ Again it should be noted that the fact same-sex marriage was not lawful in Australia was not considered a justification for requiring transgender persons changing gender to be unmarried.

In Hong Kong under the Bill of Rights the same human rights under the ICCPR apply, including the right to marry, to family life and non-discrimination.¹⁰⁴ This would include the right to non-discrimination on grounds of marital status or gender identity.

The EOC believes that to require transgender persons wishing to legally change gender to be either unmarried or to get divorced would likely breach their human rights to marry, to family life and to non-discrimination on grounds of marital status and gender identity. The EOC therefore concludes that there should be no requirements as to marital status.

(2) If the answer to sub-paragraph (1) is “yes”,

(a) whether an applicant for gender recognition should be unmarried or divorced before making an application, and why;

Not applicable.

(b) if the answer to sub-paragraph (a) is “no”, whether a married applicant should be granted only an interim gender recognition status, which may be a new basis for dissolution of marriage in Hong Kong, and why;

For the reasons stated above, the EOC believes that a person who is married and changes gender should be granted full gender recognition.

However there is a related issue of whether the married partner of the transgender person should be able to seek the dissolution of the marriage. These issues have arisen in the UK under the Gender Recognition Act 2004 and recent amendments following the introduction of same-sex marriage in the UK.

Since the passing of the Marriage (Same Sex Couples) Act 2013, marriage in the law of England and Wales takes the form of a contract between two people of different sexes or two people of the same sex. Therefore, the law as it currently stands requires both parties to agree to the status of a marriage being changed. Consequently, where one party transitions, the non-trans party must give their consent to the change of marriage status before a full gender recognition certificate (GRC) can be issued. If such consent is withheld, the marriage must be dissolved by divorce or annulled before a full GRC can be issued.¹⁰⁵

¹⁰³ G v Australia, ICCPR Human Rights Committee, CCPR/C/119/D/2172/2012, 15 June 2017, <http://juris.ohchr.org/Search/Details/2220>

¹⁰⁴ Under the Bill of Rights the right to marry (article 19), family life (article 14) and the right to non-discrimination (article 22), <http://www.hkii.hk/eng/hk/legis/ord/383/>

¹⁰⁵ See sections 4A and 5 of the Gender Recognition Act 2004.

The issue of consent of a married partner in such circumstances has been examined by the UK Parliament in its recent report on Transgender Equality.¹⁰⁶ The report notes that many transgender groups are concerned by the requirement of spousal consent, as they feel it affects their human rights with partners having a “veto” about whether they are granted a full GRC. Some have also raised concerns about the potential unreasonable delay by partners giving consent, for example where the divorce is a difficult one or the partner is in a coma and unable to give consent.¹⁰⁷

At the same time, a marriage is a form of contract between both parties, and therefore both parties need to agree to its existence. As has been said in the UK Parliament report:

“The nature of marriage (whether same-sex or different-sex) is that of a legal contract between two consenting parties, the terms of which cannot be changed without the consent of both parties. This means that in a marriage where one party transitions, the non-trans spouse does have a legal right to be consulted if it is proposed to change the terms of the marriage contract in consequence—and this right must also be given due weight.”¹⁰⁸

The EOC, therefore, believes that the married partner of a transgender person who has changed gender, should they wish, be able to apply to dissolve a marriage. However, given the concerns with the system in the UK, we do not believe that a refusal of consent of that partner to continue the marriage should be able to prevent or unreasonably delay the legal gender recognition of the transgender person.

(c) whether a full gender recognition status should be granted to a married applicant only after his or her marriage has been dissolved or his or her spouse dies, and why.

As stated above, legal gender recognition should not be dependent on prior dissolution of a marriage. Firstly, the couple may wish to continue in the marriage. Secondly, the partner should not be able to prevent the transgender person from being granted gender recognition as this would deny the transgender person’s human rights.

In relation to the issue of a spouse dying, the same principles apply. A transgender person should not have to wait until a spouse dies until legal gender recognition is granted, as this would unreasonably delay or deny the transgender person of their human rights.

¹⁰⁶ Transgender Equality, House of Commons Women and Equality Committee, first report of session 2015-16, 8 December 2015, paragraphs 46 to 63, <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

¹⁰⁷ Ibid paragraph 51.

¹⁰⁸ Ibid paragraph 62.

4. Issue 10: Requirements related to parental status

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be requirements relating to parental status of the applicant, and why.

The EOC believes that there should be no requirements regarding parental status (eg that the person should be without children, or without children below a certain age). Such requirements would likely breach both international and Hong Kong human rights obligations under the Bill of Rights, such as the right to family life, privacy, and non-discrimination on grounds of gender identity and family status.

The EOC notes that under the current administrative arrangements for a transgender person to change their ID card, there is no requirement to be without children.

As previously indicated, the Yogyakarta Principles state:

*“No status, such as marriage or **parenthood**, may be invoked as such to prevent the legal recognition of a person’s gender identity.”¹⁰⁹*

Further, as stated in the consultation document, there are very few countries in the world that have a requirement of being without children to legally change gender (South Korea, Turkey and Japan to extent of minor children). And as stated in the consultation document, the requirements in those countries regarding parenthood have been strongly criticised by various stakeholders as breaching the human rights of transgender people, and supporting stereotypes that it would adversely affect children to have a transgender parent.

The gender recognition legislation of several countries, such as the United Kingdom, Ireland and Malta, actually makes it explicit that a change in gender does not affect the status as a parent of any children.¹¹⁰ The EOC believes a similar provision should be included in Hong Kong gender recognition legislation.

¹⁰⁹ Principle 3, the Right to Recognition before the law, Yogyakarta Principles, <http://www.yogyakartaprinciples.org/principles-en/>

¹¹⁰ See for example section 12 of the Gender Recognition Act 2004 UK; section 19 of the Gender Recognition Act 2015 (Ireland), <http://www.oireachtas.ie/documents/bills28/acts/2015/a2515.pdf>; and section 3(2)(a) Gender Identity, Gender Expression and Sex Characteristics Act 2015.

(2) If the answer to sub-paragraph (1) is “yes”,

(a) whether an applicant for gender recognition should not be a father or mother of any child, no matter the age of the child, and why;

(b) whether an applicant for gender recognition should not be a father or mother of any child below a certain age limit, and why;

(c) if the answer to sub-paragraph (b) is “yes”, what the age limit should be, and why.

Not applicable.

5. Issue 11: Recognition of foreign gender change

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether a gender change which is recognised under the law of a country or territory outside Hong Kong should be recognised in Hong Kong, and why.

The EOC believes that as part of the gender recognition scheme in Hong Kong, there should be provisions permitting recognition of changes in gender from other countries or jurisdictions. This would help to prevent discrimination against transgender persons from overseas who move to or are visiting Hong Kong; recognise the reality of the fact that there are more people moving internationally around the world for work or other purposes, which would include more transgender people wishing for their identity to be recognised when moving; as well as avoid unnecessary bureaucracy of having the person to go through the process of applying for gender recognition, when they have already done so in their home countries.

As stated in the consultation document, there are a number of countries and jurisdictions that have provisions to recognise overseas changes in gender. The United Kingdom’s Gender Recognition Act has supplementary secondary legislation that lists the countries and territories where a gender in gender is recognised in the UK.¹¹¹ It is important to note that those countries and territories for which gender recognition is recognised include countries which have more restrictive and more progressive approach to gender recognition than the UK, including for example countries like Malta, Denmark and Argentina with a self declaration model.

¹¹¹ Gender Recognition (Approved Countries and Territories) Order 2011, <http://www.legislation.gov.uk/ukxi/2011/1630/contents/made>

(2) If the answer to sub-paragraph (1) is “yes”,

(a) whether the relevant countries and territories outside Hong Kong should be limited to those having certain requirements for gender recognition, and why;

The consultation document refers to the possibility of restricting the recognition of foreign changes in gender to countries which have at least as stringent requirements to any system established in Hong Kong. The EOC does not believe that this would be appropriate for a number of reasons:

- it could create discrimination against transgender people from overseas who are moving to or visiting Hong Kong. If for example Hong Kong introduced a gender recognition scheme requiring sex reassignment surgery and also required the same criteria for recognition of overseas changes in gender, it would mean that transgender people from a large and increasing number of countries (which do not require surgery) would not have their change in gender recognised; and
- as stated in the consultation document, it would be difficult to assess whether or not overseas gender recognition schemes were more or less stringent than the Hong Kong system, given there may be a number of criteria for gender recognition.

The EOC believes that the approach that should be adopted is to recognize a foreign change in gender where that person has complied with the requirements of that particular country or jurisdiction, whatever those requirements. For example, in Malta the gender recognition legislation states that:

“A final decision about a person’s gender identity, which has been determined by a competent foreign court or responsible authority acting in accordance with the law of that country, shall be recognized in Malta.”¹¹²

The EOC believes that a similar approach could be adopted in a Hong Kong gender recognition scheme. Consideration could also be given to listing those relevant countries or jurisdictions to provide greater clarity and certainty, as has been done in the UK.

(b) if the answer to sub-paragraph (a) is “yes”, what should those requirements be;

See above.

¹¹² Section 10(1) Gender Identity, Gender Expression and Sex Characteristics Act, 2014.

(c) what kind of evidence should be required to demonstrate that the applicant has been legally recognised in his or her acquired gender in that particular country or territory; and

The evidence required should be proof that they have legally changed gender in their home country or territory, and that evidence will depend on the particular system in the relevant country or jurisdiction.

(d) what kind of connection between the applicant and the foreign country or territory (such as citizenship in the country or territory where the gender change was recognised) should be required.

The system in different countries varies as to who they will recognise for the purposes of gender recognition, varying from requirements of citizenship, residency, to for example in the case of Germany, permitting refugees to obtain a legal change in gender. As a result, the EOC does not believe that the Hong Kong gender recognition scheme should specify a required relationship between the person and the foreign country or jurisdiction. A similar approach could be adopted as in the Maltese legislation, which does not refer to the status of the person in the foreign country.

6. Issue 12: Further non-medical requirements for gender recognition

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be any other non-medical requirement or further evidence for gender recognition, and why.

The EOC does not believe that any other non-medical requirements or further evidence should be required for gender recognition.

(2) If the answer to sub-paragraph (1) is “yes”, what kind of further evidence in this regard should be required.

Not applicable.

Chapter 6: Options for a gender recognition scheme

Chapter 8 of the consultation document discusses a series of issues relating to the possible system of a gender recognition scheme. This also links to the requirements for legal gender recognition which has been discussed in the previous chapters. Each of the issues consulted on is examined below.

1. Issue 13: Type of gender recognition scheme

In the event that a gender recognition scheme is to be introduced in Hong Kong, whether the scheme should be:

(a) a legislative scheme, based on a (new) specific ordinance;

The EOC believes that the preference should be a comprehensive legislative scheme by introducing a Gender Recognition Ordinance. In the EOC's view, this legislation should cover all the relevant aspects of gender recognition including human rights principles to be applied in relation to gender recognition; who can apply for gender recognition; the requirements for gender recognition; the effect of gender recognition in terms of relevant documents; other relevant rights and obligations (eg regarding parenthood, and the right to privacy); and any other relevant provisions including post-recognition issues (eg recognition of changes in gender from other countries or jurisdictions).

The EOC believes that a gender recognition ordinance would be preferable as it would:

- provide legal certainty of a transgender person's rights and obligations regarding a change of gender;
- ensure there is consistency and transparency with the process of gender recognition; and
- avoid the possible disadvantages of an administrative scheme whereby, for example, the criteria for gender recognition or other elements of the scheme could be more easily changed by the Government periodically. This could create confusion and lack of clarity.

The EOC also notes that the approach in most countries and jurisdictions is to introduce legislation which specifically deals with key elements of gender recognition.

Another alternative could be to set out some aspects of gender recognition in an Ordinance, but to provide a power to develop supplementary secondary legislation which may provide for detailed aspects of the scheme (for example the system for which a change in gender from other countries or jurisdictions will be recognised in Hong Kong). This could reduce the burden on the Legislative Council in terms of passing a single Ordinance which deals with all aspects of gender recognition.

Such an approach has been taken in the UK under the Gender Recognition Ordinance, as it has secondary legislation dealing with issues of recognition of foreign changes in gender, as well as aspects relating to privacy.

(b) a judicial scheme, whereby issues related to gender recognition are considered by the courts on a case by case basis;

The EOC does not believe that a judicial or quasi judicial scheme should be introduced which deals with the issues on a case-by-case basis. Such an approach would greatly increase the costs of a system and unnecessarily burden the courts. Secondly it could create a lack of consistency given a “case by case basis” approach. Thirdly, the EOC does not believe that such approach is consistent with international human rights obligations which have recommended that legal gender recognition schemes should be without unnecessary burden. For example, the Council of Europe has stated:

*“Member states should take appropriate measures to guarantee the full legal recognition of a person’s gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a **quick, transparent and accessible way...**”¹¹³*

(c) a scheme involving non-statutory, administrative measures only; or

The EOC does not believe that a purely non-statutory scheme should be introduced, as it would not be appropriate for a number of reasons.

The consultation document at paragraph 8.9 states that one argument in support of an administrative scheme is that it would be sufficient for a person to legally change their ID card. However this fails to recognize that a key element of gender recognition is that a person can legally change their identity on all relevant documents including passports, birth certificates and other documents, such as education certificates. It would be appropriate for primary legislation to set out such changes, not administrative provisions.

Secondly, an administrative scheme would not be sufficient to provide for other aspects of gender recognition where other primary legislation would be affected, for example in relation to issues of marriage, succession, the right to privacy, recognition of foreign changes in gender and so on.

¹¹³ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2010\)5&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)5&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true)

(d) a scheme comprising some combination of these approaches, and why.

As stated above, the EOC believes that a legislative scheme should be introduced.

2. Issue 14: Issues relating to adopting a scheme similar to the UK or other jurisdictions

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether the UK gender recognition scheme is a suitable model to be adopted in Hong Kong, and why.

When the UK Gender Recognition Act 2004 was first introduced in 2004, it was considered one of the most progressive pieces of gender recognition legislations globally. However, in the 13 years since it was introduced, there have been rapid changes in international human rights approaches, recommendations and other countries' national gender recognition legislation. There has been a clear movement towards a human rights-based approach for legal gender recognition which focuses on the human rights of transgender people, including to dignity, self determination, privacy, family life, and non-discrimination.

Such development has also been accompanied in the medical and health sector by a de-pathologisation of transgender people, away from considering that they have an illness or mental disorder. As a result, a growing number of countries or jurisdictions are adopting a self-declaration model without (or with minimal) medical requirements to change gender.

Given these developments, the current Gender Recognition Act 2004 in the UK has been criticised in a number of ways, for example by the UK Parliament in their recent 2016 report.¹¹⁴ Some key concerns raised have been the requirements of medical diagnosis and a two-year real life test (ie in contrast to a self declaration model that de-pathologizes issues relating to gender identity) and the bureaucratic processes; the age limit of 18 to apply for gender recognition; requirements for spousal consent from a partner regarding continuing marriages, which could delay the transgender person from being granted legal gender recognition; and inappropriate requests for gender recognition certificates.

¹¹⁴ Transgender Equality, House of Commons Women and Equality Committee, first report of session 2015-16, 8 December 2015, <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

As a result of this report and other calls for reform, the UK Government and British Prime Minister Theresa May have recently committed to amending the legislation to remove the medical requirements to legally change gender.¹¹⁵

The EOC believes, as stated previously, that the optimum model for gender recognition legislation is one that allows self declaration with no or minimal medical requirements (such as evidence of receiving treatment from a medical practitioner or psychiatrist). We believe that the elements in the current UK model of requiring medical diagnosis, having an 18 years old age limit and the effect of a spousal consent requirement (possibly delaying or denying gender recognition to a transgender person) should not be applied in Hong Kong.

(2) Whether there are any particular aspects of the UK model that should be adopted, or not adopted, or modified to suit the circumstances of Hong Kong, and why.

In relation to the elements of the UK model that should not be adopted, please see above. In relation to elements of the UK model that the EOC believes are useful and appropriate to apply in Hong Kong, these are:

- section 9 which confirms that where a person has changed gender, the person's gender becomes that gender for all purposes. The EOC believes that is important to make this point clear in gender recognition legislation, so that a transgender person's rights are protected in all circumstances;
- section 12 which confirms the fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child. This is important to protect a transgender person's right to family life;
- section 15 which confirms that the fact that a person's gender has become the affirmed gender does not affect the disposal or devolution of property under a will or other instrument made before the appointed day. This is important for example in situations where a person in their will specifies that they give their property to a "son" or "daughter". The provision makes clear that the person's rights to the property are not in any way affected by a change in gender;
- section 22 which provides details of a transgender person's right to privacy regarding their change in gender. A key aspect of a person changing gender is that they often wish to protect their privacy regarding the change in gender. As a result, it is important that gender recognition make clear that a person's human right to privacy is protected, and that it is a criminal offence to breach that right;

¹¹⁵ Independent Newspaper, 19 October 2017, <http://www.independent.co.uk/news/uk/politics/theresa-may-transgender-not-illness-gender-recognition-act-lgbt-rights-sex-edution-homophobia-pink-a8008486.html>

- section 1(1)(b) and the Gender Recognition (Approved Countries and Territories) Order 2011 which provides for legal gender recognition of persons that have changed gender in other listed countries and territories. The EOC previously explained why this is important;

- section 20 regarding gender specific offences. It states that where a relevant gender-specific offence could be committed or attempted only if the gender of a person to whom a full gender recognition certificate has been issued were not the acquired gender, the fact that the person's gender has become the acquired gender does not prevent the offence being committed or attempted. Such a provision is important to ensure that a person would not be able to avoid liability for a sexual offence if they have changed gender.

(3) Whether another jurisdiction's gender recognition scheme (or any particular feature or features of any such scheme) would be more suitable to be adopted in Hong Kong than the UK model, and why.

As stated previously, the EOC believes that the self declaration models which exist in a number of countries such as Ireland, Malta, Denmark, Argentina are the best models as they provide the maximum protection of transgender people's human rights.

The EOC believes that the Maltese model is particularly clear and high standard as it refers to the specific human rights of transgender people in changing gender, such as their right to their self determined gender identity, bodily integrity, physical autonomy and not to be required to undergo any medical procedures including surgery:

"3.(1) All persons being citizens of Malta have the right to -

(a) the recognition of their gender identity;

(b) the free development of their person according to their gender identity;

(c) be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and

(d) bodily integrity and physical autonomy.

(2) Without prejudice to any provision of this Act –

(a) a person's rights, relationship and obligations arising out of parenthood or marriage shall in no way be affected;

(b) the person's rights arising out of succession, including but not limited to any testamentary dispositions made in one's favour, and any obligations and, or rights subjected to or acquired prior to the date of change of gender identity shall in no way be affected; and

(c) any personal or real right already acquired by third parties or any privilege or hypothecary right of a creditor acquired before the change in the gender identity of the person shall in no way be affected.

(3) The gender identity of the individual shall be respected at all times.

(4) The person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity.

4.(1) It shall be the right of every person who is a Maltese citizen to request the Director to change the recorded gender and, or first name, if the person so wishes to change the first name, in order to reflect that person's self determined gender identity."¹¹⁶

(4) Whether there is any particular gender recognition scheme in another jurisdiction (or any particular feature or features of any such scheme) that should not be adopted in Hong Kong, and why.

Please see our responses in relation to the issues consulted on relating to medical and non-medical requirements for gender recognition.

3. Issue 15: The authority to determine applications for gender recognition

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether the authority to determine applications for gender recognition should be a statutory body performing quasi-judicial or judicial functions (such as the UK's GRP), an administrative body, the courts, or any professional body, and why.

As stated previously, international human rights bodies have recommended that the process for transgender people to legally change gender should be quick, accessible and not be overly bureaucratic.

¹¹⁶ Sections 3 and 4, Gender Identity, Gender Expression and Sex Characteristics Act 2015, <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>

The system of a gender recognition panel under the Gender Recognition Act has been criticised in the 2016 report by the UK Parliament:

“The current process of applying for a GRC was described to us as ‘bureaucratic’, ‘expensive’ and ‘humiliating’. Witnesses told us that it required the collection and submission of substantial quantities of evidence of a type which ought to have no bearing on the granting of gender recognition.”¹¹⁷

The EOC does not believe that it is necessary to have a statutory body performing quasi-judicial or judicial functions like the Gender Recognition Panel in the UK system. Rather, the EOC believes that it should be sufficient to have an administrative procedure. For example, in Ireland, a transgender person makes an application to the Minister of Social Protection, including relevant information. The Minister must give notice in writing to the applicant of a decision either to grant or refuse a gender recognition certificate as soon as practicable after it is made, including the reason, and that the applicant may appeal the decision within 90 days of the date of the notice.¹¹⁸ The person must provide the Minister the following information:

- his or her name, address, identification number and contact details;
- the forename and surname by which he or she wishes to be known;
- proof of his or her identity and proof of birth;
- information and evidence to satisfy the Minister that the applicant is ordinarily resident in Ireland;
and
- a statutory declaration which includes a declaration that he or she has a settled and solemn intention of living in the preferred gender for the rest of his or her life, understands the consequences of the application, and makes the application of his or her free will.

The EOC believes the Irish model could be a useful reference for Hong Kong as it is efficient, clear and not overly bureaucratic. One option could be for the Hong Kong Births and Deaths General Registrar to be responsible for considering such applications to change gender.

¹¹⁷ Transgender Equality, House of Commons Women and Equality Committee, first report of session 2015-16, 8 December 2015, paragraph 33, <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

¹¹⁸ Section 8(5) Gender Recognition Act 2015, <http://www.oireachtas.ie/documents/bills28/acts/2015/a2515.pdf>

(2) If an authority other than the courts in paragraph (1) is opted for, whether there are any particular aspects of that type of authority that should be adopted, or not adopted, or modified to suit the circumstances of Hong Kong, and why.

See above.

(3) If an authority other than an administrative body and the courts in paragraph (2) is opted for, what type of members should be on the authority (with regard to the composition of the authority to determine gender recognition applications). For example, whether medical experts, such as psychiatrists, psychologists and surgeons, lawyers, other type(s) of members (eg, social workers) and/or overseas experts should be included, and why.

Given that the EOC recommends a model based on self declaration and without pathologisation of transgender people, we do not believe that it is necessary to have medical experts such as psychiatrists, psychologists or surgeons involved in making a decision on gender recognition. Neither do we believe that it is necessary to have lawyers involved, given that we recommend an administrative process. In countries such as Malta, Ireland, and Argentina, the application is made to public officials within the government but there is no requirement that they are experts in any field.

However, the EOC does believe that it would be appropriate and helpful to provide training on transgender people to the Government officials that would make decisions on legal gender recognition. This could include training by transgender people or other experts on issues of who transgender people are, what issues they face in society, how to prevent discrimination against transgender people and other related issues, such as ensuring their right to privacy.

4. Issue 16: Possibility of establishing a dual track procedure

(1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether a dual-track gender recognition scheme should be introduced with differing requirements (so that, for example, one person seeking full gender recognition for all legal purposes would have to satisfy stricter medical requirements (eg, gender reassignment surgery), while another person wishing to have only the sex marker changed on their Identity Card could be required to satisfy less stringent requirements (eg, proof of “real life test” for a specific period).

The EOC believes that there are fundamental concerns with the suggestion of having a dual track procedure and strongly believes that no such system should be introduced in Hong Kong.

There are a number of concerns with such a dual track system:

- it presumes that it is appropriate that sex reassignment surgery is necessary for a person seeking “full” gender recognition, whereas a person that has less medical treatment should have lesser recognition. As stated previously, the EOC believes that there should be no medical requirements to change gender, and in particular no requirements of surgery as it breaches the fundamental human rights of transgender people that do not wish/are not able to have such surgery;
- it is appropriate to have a clear and consistent system for gender recognition whereby all transgender people have the same rights to change gender. A dual track system would be confusing and could lead to disputes as to what degree of treatment a person has had, and therefore what degree of legal recognition they should have;
- it would create discrimination between different transgender people whereby those that have had more invasive medical treatment would have more rights than those without that treatment. All transgender people should have the same rights to change gender; and
- a dual track approach is not supported internationally at all. No international human rights body or medical body supports a dual track approach, and as noted in the consultation document no national or regional system of legal gender recognition has a dual track.

In conclusion there are strong arguments against any form of dual track system for gender recognition being introduced.

(2) If the answer to sub-paragraph (1) is “yes”, what should be the model of the dual-track scheme, and why.

Not applicable.

(3) If the answer to sub-paragraph (1) is “no”, why this is so.

See answer in (1) above.

Chapter 7: Other related matters

Chapter 9 of the consultation document refers to a range of issues concerning post recognition. In particular it focuses on transgender people changing their birth certificate and to issues of privacy given that they relate to issues of recognition. The position of the EOC on those issues is discussed below.

1. Alteration of birth certificates following gender recognition

The EOC believes that a transgender person should be able to change their birth certificate after their change in gender. International human rights obligations and recommendations make it clear that legal gender recognition requires a person to be able to change their sex on all relevant identity documents, including birth certificates.

For example the Yogyakarta Principles recommend that States:

*“c) Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex — **including birth certificates**, passports, electoral records and other documents — reflect the person’s profound self-defined gender identity;”¹¹⁹*

In 2010 the Council of Europe recommended:

*“Member states should take appropriate measures to guarantee the full legal recognition of a person’s gender reassignment **in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way**; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.”¹²⁰*

To enable a person to change their birth certificate would ensure compliance with international human rights obligations, as well as helping to prevent discrimination against transgender person. This is because if a change is not permitted, in any situation where a transgender person is asked to provide their birth certificate, the apparent inconsistency between their sex on their birth certificate and their appearance could lead to discrimination against them.

¹¹⁹ The Yogyakarta Principles 2007, <http://www.yogyakartaprinciples.org/principles-en/>

¹²⁰ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2010\)5&Language=lanEnglish&Ver=original&BackColorInter=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)5&Language=lanEnglish&Ver=original&BackColorInter=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true)

We also note and as indicated in the consultation document on page 241, that there are already exceptions which permit the alteration of a birth certificate under the Adoption Ordinance and the Births and Deaths Registration Ordinance. So allowing a change in the birth certificate would not be inconsistent with the existing practice.

2. Privacy regarding a change in gender

The EOC believes that it would be important to provide in the gender recognition legislation for the right to privacy of transgender people regarding their change in gender. This is for a number of reasons:

- transgender people as others have a human right to privacy as protected under the ICCPR and Hong Kong's Bill of Rights;
- often transgender people do not want others to know that they have changed gender as they wish to be only recognised in their affirmed gender; and
- the privacy concerning a person's change in gender will also help to prevent discrimination against transgender people, for example by employers, service providers or in the education sector. These are all areas where in the experience of the EOC and our study regarding introducing LGBTI anti-discrimination legislation, transgender people often face discrimination.¹²¹

The EOC believes that the model in the Gender Recognition Act 2004 of the UK is a suitable one that could be adapted to the needs of Hong Kong. It has a general prohibition on disclosing information about a person's change in gender and it is a criminal offence. However, it also provides for a series of exceptions to such disclosure, for example:

- the information does not enable that person to be identified;
- that person has agreed to the disclosure of the information;
- the disclosure is in accordance with an order of a court or tribunal;
- the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal;
- the disclosure is for the purpose of preventing or investigating crime; and
- the disclosure is made for the purposes of the social security system or a pension scheme.¹²²

¹²¹ Report on Study on legislation against discrimination on grounds of sexual orientation, gender identity and intersex status. Commissioned by the Equal Opportunities Commission and conducted by the Gender Research Centre of the Hong Kong Institute of Asia-Pacific Studies of the Chinese University of Hong Kong, January 2016, <http://www.eoc.org.hk/eoc/upload/ResearchReport/20161251750293418312.pdf>

¹²² Section 22(4) Gender Recognition Act 2004, <https://www.legislation.gov.uk/ukpga/2004/7/section/22>;

As stated in the consultation document on pages 242-243, the Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No 2) Order also provides that there is no breach of the obligation not to disclose where it is for the purpose of legal advice, certain religious purposes, medical purposes, by a credit reference agency, and for the purposes related to insolvency or bankruptcy.¹²³

The EOC believes that there should be consideration of possible exceptions to the general prohibition on disclosure, but that a test should be applied as to whether such exceptions have a legitimate aim, and are proportionate.

¹²³ <https://www.legislation.gov.uk/uksi/2005/916/contents/made>