



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

Executive Summary

1. Introduction

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.

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

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. 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. The EOC has done a range of work promoting equality for transgender people, including handling complaints, conducting research relating to introducing LGBTI anti-discrimination legislation; and advocating for gender recognition legislation.

1. Complaints of discrimination received by transgender people

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. 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.

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.¹

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.²

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.

¹ 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>

² Page 6, http://www.eoc.org.hk/EOC/Upload/UserFiles/File/ResearchReport/201603/SOGI-Project_supplementary-info_En_20160229.pdf

3. EOC work on the issues of legal gender recognition

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 v Registrar of Marriages* case decision.³ 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.

Chapter 2: Concerns with the approaches in the public consultation

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. In summary these are:

1. Insufficient focus on the human rights relating to gender recognition of transgender people;
2. Lack of recognition that there are international human rights positions on a number of the issues relating to gender recognition;
3. Arguments against introducing gender recognition legislation are sometimes mis-founded or unsubstantiated;
4. Lack of recognition of the inter-dependence between introducing anti-discrimination legislation on grounds of gender identity and a gender recognition scheme;
5. Lack of consideration of the issues relating to intersex and gender fluid or non-conforming people;
6. Delay in the introduction of Gender Recognition legislation and conducting the consultation.

³ 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 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, 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.

Chapter 4: Medical requirements for gender recognition

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

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)

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. The UK has also committed to removing all medical requirements from its system of gender recognition.

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

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

The EOC 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 the International Classification of Diseases (ICD) 11, of only several months. The relevant evidence to be provided could be a statutory declaration from a medical practitioner that they have been living in their affirmed gender for at least several months. The EOC also believes that it would be reasonable to have a requirement that the person intends to live permanently in their affirmed gender, and that a statutory declaration by the transgender person could be used for that purpose.

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

The EOC believes that there should be no mandatory requirements for a change in gender to have hormonal treatment and/ or other medical treatment. It is clear from recommendations and statements by a number of international human rights and health bodies, that such treatment should not be mandatory, but rather should be dependent on the wishes and the particular circumstances of the person.

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

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 international and Hong Kong 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.

Any mandatory requirements for surgery for a transgender person to change gender should be:

- removed from the current administrative system; and

- not included in any gender recognition scheme.

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

For the same reasons the EOC stated 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.

Chapter 5: Non-medical requirements for gender recognition

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

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

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, 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.

3. Issue 9: Requirements related to marital status

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.

The married partner of a transgender person who has changed gender, should if they wish be able to apply to dissolve a marriage. However, 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. Similarly, a transgender person should not have to wait until a spouse dies before they are granted legal gender recognition, as this would unreasonably delay or deny the transgender person of their human rights.

4. Issue 10: Requirements related to parental status

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.

5. Issue 11: Recognition of foreign gender change

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.

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.

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

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

Chapter 6: Options for a gender recognition scheme

1. Issue 13: Type of gender recognition scheme

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).

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

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.

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;
- 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;
- 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;
- section 22 which provides details of a transgender person's right to privacy regarding their change in gender;
- 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;
- section 20 regarding gender specific offences, to ensure that a person would not be able to avoid liability for a sexual offence if they have changed gender.

In terms of other models, the EOC believes that the Maltese legislation 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. Issue 15: The authority to determine applications for gender recognition

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.

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 conducted by Government officials, which is used in many countries and is likely to be less time consuming.

However, the EOC does believe that it would be appropriate and helpful to provide training about transgender people to the Government officials that would make decisions on legal gender recognition.

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

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/ 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.