

EQUAL OPPORTUNITIES COMMISSION
QUESTIONS AND ANSWERS ON
THE RIGHTS OF TRANSEXUAL PEOPLE IN HONG KONG

1. Who are transsexual people and how are they distinct from other groups?

1.1 Who are transgender people?

Transgender is a broad description of *“individuals whose gender identity and/or expression of their gender differs from social norms related to their gender of birth.”*¹ It 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.

1.2 Who are transsexual people?

Transsexualism has a special meaning in medicine and applies to a narrower group of people than the term transgender. It applies to persons who display *“a desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex and a wish to have hormonal treatment and surgery to make one's body as congruent as possible with the preferred sex”.*²

The incongruence between one's personal gender identity (sometimes called affirmed gender) and the one which one is expected to live (sometimes called assigned gender) can cause great discomfort and distress. These feelings are often called **gender dysphoria**.³ A person does not choose to be gender dysphoric: it is not a lifestyle choice.

The *W v Registrar of Marriages* judgment discussed below and the proposals for a Gender Recognition Ordinance in Hong Kong only relate to the transsexual people that have been medically diagnosed with the condition of transsexualism, and wish to live in their affirmed gender.

¹ 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. <http://www.wpath.org/documents/IJT%20SOC,%20V7.pdf>

² World Health Organisation (WHO), *International Classification of Diseases and Related health Problems, (ICD-10)*, Geneva 10th ed, 1990.

³ *It's Time for Change: Towards a Gender Recognition Ordinance for Hong Kong*, Sam Winter, Associate Professor, Division of Policy Studies in Education, Faculty of Education, University of Hong Kong.

1.3 What is the difference between transsexualism and sexual orientation?

Sexual orientation is a different concept to being transsexual. Sexual orientation relates to a person's sexual attraction towards different sexes. People may be attracted towards persons of the opposite sex (heterosexual), the same sex (homosexual), or both sexes (bisexual). Homosexual women are often described as **lesbians** and homosexual men are often described as **gay**. Transsexual people may be heterosexual, homosexual or bisexual.

For example, a transsexual woman (a person who was assigned at birth to be a man but whose affirmed gender is a woman) may be attracted to men and described as heterosexual. If she was attracted to other women she may be described as homosexual.

1.4 What is the difference between transsexualism and intersex condition?

Intersex people are distinct from both transsexual people and people defined by their sexual orientation. Intersex people are defined 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."⁴

2. What are the current required procedures for transsexual people to be accepted for sex re-assignment surgery and change their gender on identity cards?

In Hong Kong, to be accepted for sex re-assignment surgery, a person must:

- be medically diagnosed with gender dysphoria;
- have undergone treatment for the condition by psychiatrists and clinical psychologists;
- live in the person's affirmed gender under professional supervision.

In relation to surgery, the following is required:

(i) for sex change from female to male:

- removal of the uterus and ovaries; and
- construction of a penis or some form of a penis;

(ii) for sex change from male to female:

- removal of the penis and testes; and

⁴ United Nations Office of the High Commissioner for Human Rights, "Free & Equal campaign Fact Sheets, LGBT Rights: Frequently Asked Questions"

- construction of a vagina;

After this process, a person will be issued with a letter from the Hospital Authority certifying that the surgery has been performed and that person's gender should be changed. The Department of Immigration then issues the person a new ID card and passport.

The process for changing gender is currently an administrative one overseen by the Department of Immigration. It is not set out in legislation. Details of the process are set out on the Immigration Department's website.⁵

3. Do transsexual people in Hong Kong experience discrimination?

3.1 Does the EOC have evidence that transsexual people in Hong Kong experience discrimination?

Yes, we believe there is clear evidence that transsexual people in Hong Kong face discrimination in a range of sectors including employment, the provision of goods and services and education.

The EOC currently considers complaints of discrimination by transsexual people under the Disability Discrimination Ordinance. This is because transsexualism is considered a mental disorder by the World Health Organisation⁶. Each year the EOC receives a number of complaints. For example, in during the last five years from 2009 to 2013, EOC received 8 complaints from 3 complainants with gender dysphoria on issues relating to disability discrimination.

A major area of complaints relates to identity or other documents where there are differences between the person's affirmed name and former name. For example, the EOC received a complaint that a Hong Kong education body had agreed to reissue educational certificates to transgender people who have undergone sex reassignment surgery in their new name and affirmed gender, but the certificates also referred to the person's former name and sex at birth. The case was successfully conciliated by the EOC and the education body changed its policy by removing any reference to the former name and sex of the transgender person on the education certificates.

3.2 What studies have there been on discrimination of transgender people in Hong Kong?

There have been several independent studies and surveys examining discrimination experienced by transgender people. A study was conducted by the organization, Community Business, and the

⁵ http://www.gov.hk/tc/residents/immigration/idcard/hkic/faq_hkic.htm (Frequently Asked Questions no.22)

⁶ Transsexualism is the name of a specific diagnosis currently employed in the World Health Organisation (WHO) diagnostic manual International Classification of Diseases, Revision 10 (ICD-10). However, there are some concerns with that terminology as many transgender people do not wish to be viewed as having a mental disorder. It should be noted that current WHO proposals for the next edition of ICD, due for publication in 2015, are that the transsexualism diagnosis will be removed, and replaced by one called gender incongruence.

results were published in May 2012. It examined the attitudes towards and experiences of lesbian, gay, bisexual, and transgender (LGBT) employees in Hong Kong.⁷ It surveyed 1,002 people from the Hong Kong working population to gauge their level of understanding, acceptance and openness towards LGBT employees. It also surveyed 626 LGBT employees to examine their experience and concerns in the workplace.

Some key findings in relation to the 1,002 people of the working population sampled were:

- 25% explicitly described themselves as unaccepting towards transgender persons;
- 20% said that they would be shocked, disgusted and/or uncomfortable, and would not want to be friends with any person introduced to them as transgender, with 81% of persons in the 56+ age group reporting these feelings;
- 59% believed that trans people in Hong Kong are subjected to discrimination or prejudice, with 45% saying they suffer verbal assault or mockery, 42% saying they face social stigma or exclusion, 42% saying they are ignored or disregarded, and 13% saying they face violence and bullying;
- 45% believed transgender people face negative treatment in the community, with 22% saying they face it in the workplace.⁸

In relation to the survey of 626 LGBT individuals seeking or in employment, 78 transgender people were interviewed. The findings indicated that:

- When those who were employed (56 participants) were asked if they were open about their transgender status in the workplace, few appeared to be fully out, either with human resources department (16%), boss/supervisor (20%), colleagues in general (18%), subordinates (18%), or even close workplace friends (32%). They were even less likely to be open with clients (5%) and other external parties (7%);
- There were a wide range of reasons for not being fully open in the workplace. Common were fears about: what other people would think (30 participants); being stereotyped as mentally ill, HIV positive or promiscuous etc (27); losing connections or relationships with co-workers (30); making people feel uncomfortable (26); not being able to advance one's career (23); being fired (21); or being excluded from meetings and discussions (18). Some (14) reported that they already knew of someone who was humiliated at work on account of being transgender. Alarming, a small number (4) feared for their personal safety; Only 23% reported ever experiencing any positive treatment at the workplace on account of their gender identity;
- 28% reported explicitly negative treatment in the workplace, with the most common examples including: being treated with less respect (17 participants); verbal insult or mockery (12); being deliberately put in difficult situations (8); being overlooked or

⁷ Hong Kong LGBT Climate Study 2011-12, Community Business, May 2012, <http://www.communitybusiness.org/lgbt/climatestudy.html>

mistreated in work projects (7); and being denied a promotion for which one was qualified (7). Five reported being fired on account of their gender identity. Other examples of negative treatment included: being excluded from meetings, workplace and social activities; being given less favourable training and development opportunities; being denied a job offer; and sexual harassment, bullying and physical violence.⁹

4. What are the problems associated with the requirement of sex reassignment surgery for those that want to change gender?

4.1 Not all transsexual people wish to or are able to undergo sex reassignment surgery

A significant proportion of transsexual people may not wish to undergo sex re-assignment surgery, or, for medical reasons, it may not be appropriate to have surgery.

A recent study at a local gender clinic of 91 transsexual people indicated that although 77% had a desire for surgery, a sizable group of 23% did not.¹⁰

Internationally, it has been recognised that there are many situations where it may not be appropriate for transsexual people to undergo surgery. For example such treatment may not be appropriate for physical or psychological reasons when a person has a pre-existing health or mental condition.¹¹

4.2 Requirements of sex reassignment surgery are likely to breach the human rights of transsexual people

The requirement for sex reassignment surgery and resultant sterilization is likely to not be compliant with both international and domestic human rights obligations.

In relation to international human rights obligations, the Hong Kong government is, as most countries around the world, a party to key United Nations international human rights treaties. These include the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and the Convention Against Torture. This means that the Hong Kong government must comply with the obligations under each treaty.

A number of United Nations bodies have raised particular concerns about requirements in countries for sex reassignment surgery and sterilization for a transsexual person to have their gender change

⁹ Ibid as reported and detailed in It's time for Change: Towards a Gender Recognition Ordinance for Hong Kong, Appendix Two.

¹⁰ CCC Chan (2013). "Prevalence of Psychiatric Morbidity in Chinese Subjects with Gender Identity Disorder in Hong Kong". Unpublished thesis, fellowship examination, HK College of Psychiatrists.

¹¹ World Professional Association for Transgender Health. (2011). *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (Seventh ed.). Minneapolis: WPATH. <http://www.wpath.org/documents/IJT%20SOC,%20V7.pdf>

recognized, including the United Nations Human Rights Council in a report of 2011,¹² and the United Nations Special Rapporteur on Torture in 2013.¹³ The Special Rapporteur recommended in relation to transgender people:

“The Special Rapporteur calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital normalizing surgery, involuntary sterilization, unethical experimentation, medical display, ‘reparative therapies’ or ‘conversion therapies’, when enforced or administered without the free and informed consent of the person concerned. He also calls upon them to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.”¹⁴

The Hong Kong Bill of Rights implements into domestic law the ICCPR. The government and all public bodies must comply with the Bill of Rights. We believe that the requirement for sex reassignment surgery is likely to be in breach of the rights to be free from inhuman and degrading treatment (article 3); the rights to privacy and family life (article 14); and non-discrimination (article 22).

4.3 Persons who do not wish or are unable to undergo sex reassignment surgery are more likely to be subjected to discrimination

As some transsexual people in Hong Kong either do not wish to or cannot for medical reasons undergo sex reassignment surgery, they are unable to legally change their identity documents.

This makes them much more likely to be subjected to discrimination in a range of sectors including employment and the provision of services. This is because the current system can create situations where there is inconsistency between a person’s official identity documents and their affirmed gender.¹⁵

5. What did the case of W v Registrar of Marriages decide and what is its effect?

5.1 What were the relevant facts and findings of the court?

The Appellant W was a post-operative male-to-female transsexual person who had been issued a letter certifying that her gender had been changed by the Hospital Authority. After her treatment, she and her male partner wished to get married however the Registrar of Marriages decided she did not qualify as a “woman” under the Marriage Ordinance and the Matrimonial Causes Ordinance.

¹² Report of the United Nations High Commissioner for Human Rights, 17 November 2011, A/HRC/19/41, *Ibid* paragraphs 72 and 84(h).

¹³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Human Rights Council, 22nd session, A/HRC/22/53, 1 February 2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

¹⁴ *Ibid* paragraph 88.

¹⁵ Identity Recognition without the Knife: Towards a Gender Recognition Ordinance for Hong Kong’s Transsexual People, (2014) HKLJ Vol 44 Part 1, page 7 and Appendix 1 case studies.

W brought judicial review proceedings to challenge the decision as a breach of the human rights of W to marry under the Basic Law and Bill of Rights.

The Court decided that the Marriage Ordinance in not permitting male to female transsexuals to marry (after having undergone gender reassignment treatment and been certified as changing gender), was in breach of article 37 of the Basic Law and article 19(2) of the Bill of Rights.

5.2 What recommendations did the court make?

The court recommended that the government should develop comprehensive Gender Recognition legislation. This should set out the process for determining applications for gender recognition in an affirmed gender, as well as key related rights. They referred to the model in the UK Gender Recognition Act 2004 as a “compelling model” for Hong Kong.¹⁶

The court further recommended that Gender Recognition legislation should cover issues such as the right to change identity documents, rights to privacy regarding a change of gender, the impact on responsibilities of being a parent, entitlements to benefits and pensions, gender specific offences, and discrimination.¹⁷

5.3 Did the court make any decision on whether same sex marriage or civil unions must be legalised to comply with the Bill of Rights?

No. The court specifically stated that the decision does not address the issue of same sex marriage. The decision concerned whether a transsexual person who has changed gender is entitled to marry someone of the opposite sex.¹⁸

5.4 Why did the court delay the effect of the order for one year until July 2014?

The court wanted to provide the government and the Legislative Council with sufficient time to consider the issues relating to developing comprehensive Gender Recognition legislation.¹⁹

5.5 What is the status of the decision and what would be the consequence if the Marriage (Amendment) Bill 2014 was not passed?

¹⁶ W v Registrar for Marriages FACV No4 of 2012, Court of Final Appeal, paragraph 138.

¹⁷ Ibid paragraphs 141 to 144.

¹⁸ Ibid paragraph 2.

¹⁹ Ibid paragraph 128.

The Court of Final Appeal is the highest court in Hong Kong. As the court found that the government was in breach of the Bill of Rights the government must implement the decision. There is no discretion to not implement it.

The government decided to implement the decision by introducing the Marriage (Amendment) Bill. But even if that Bill is not passed, the government must still interpret the Marriage Ordinance and the Matrimonial Causes Ordinance so as to allow transsexual persons who have completed sex reassignment surgery to marry their partners of the opposite sex.²⁰

6. How does the Gender Recognition Act in the United Kingdom work and what benefits would a similar model provide for Hong Kong?

6.1 How is it decided, and what is required to be established for a transsexual person to legally change their gender?

In the UK the Gender Recognition Act 2004 creates a comprehensive regime by which transgender people can apply to the Gender Recognition Panel to have a change in their gender recognized, as well as providing for related rights of those persons. The Panel consists of medical practitioners, psychologists and members of the legal profession.

The process of demonstrating a person is entitled to change gender is rigorous and objective based on medical evidence. In order to prove that a person has gender dysphoria, two reports must be submitted: one from a medical practitioner or psychologist practising in gender dysphoria; and second from another medical practitioner.

Applicants must submit detailed written applications for a Gender Recognition Certificate which demonstrate the required criteria being fulfilled:

- They have or have had gender dysphoria;
- They have lived fully for the last two years in their acquired gender; and
- They intend to live permanently in their acquired gender.

There is no requirement that a person must have undergone sex reassignment surgery or hormonal treatment.

6.2 What are some of the key related rights of transsexual persons once they have changed gender?

If the Panel decides to accept the application and issue a Gender Recognition Certificate, from that point the person is considered in all aspects of the law to be of the acquired gender. The key effects of the change in gender are:

²⁰ Ibid paragraphs 123 and 124.

- the right to change all identity documents including issuing a new birth certificate;
- the right to marry in the affirmed gender;
- the right to pensions and to retire at the age of the affirmed gender;
- the right to privacy regarding a person's gender change which prohibits disclosure of that information in areas such as employment, and work of public authorities.²¹

The Gender Recognition Act also affirms that some key aspects of life would not be affected by the gender change such as succession where a transsexual person is a beneficiary in a will.

Separately the Equality Act 2010 provides comprehensive protection from discrimination on grounds of gender reassignment. This defines gender reassignment in a consistent way to the Gender Recognition Act in order that there are the same rights regarding non-discrimination.

6.3 What has been the effectiveness of the Gender Recognition Act?

The effectiveness of the GRA has been examined in a recent study conducted in 2010 by the University of Leeds in England.²² The study involved in depth interviews of 25 transgender people, asking them a range of questions relating to their experiences of the GRA and the process of applying for a change in gender. Some key findings were:

- the majority of participants believed that the GRA was an important law in terms of the rights and recognition it provided for transgender people wanting to change gender;
- the majority of participants felt it was correct that the GRA does not require that an applicant has undergone gender reassignment surgery;
- the majority criticised the previous requirement that for persons who were married before applying for gender change, it was necessary to divorce before being granted a Gender Recognition Certificate.²³

²¹ See section 22 of the Gender Recognition Act 2004. It is a criminal offence for relevant persons that hold information about a person who has changed gender to release that information without the consent of the person. Various exceptions apply, for example where it is necessary to disclose a change in gender to investigate and prosecute criminal offences.

²² Gender, Diversity, Recognition and Citizenship: Exploring the significance and experiences of the UK Gender Recognition Act, University of Leeds, <http://www.gender-studies.leeds.ac.uk/assets/files/staff/hines/ESRC%20Research%20Report%20Gender%20Diversity,%20Recognition%20and%20Citizenship.pdf>

²³ This requirement existed because previously same sex couples could not marry, only form civil partnerships. The requirement was repealed in 2013 by the Marriage (Same sex couples) Act 2013 and which from 2014 will make same sex marriages in the UK lawful.

7. What are the problems with the Marriage (Amendment) Bill 2014?

There are two main problems with the Marriage (Amendment) Bill 2014 introduced by the government to implement the *W v Registrar of Marriages*.

Firstly, it maintains and would incorporate into legislation for the first time the current administrative requirement that transsexual persons must undergo sex reassignment surgery in order to have their change in gender legally recognized. As indicated, the requirement for sex reassignment surgery is likely to breach a number of transsexual persons' human rights.

Secondly, the Bill fails to implement the recommendation of the Court of Final Appeal that the government introduce a comprehensive Gender Recognition Bill to provide both the process for changing gender, and all relevant rights of transsexual persons once they have changed gender.

Although the government has established an Intergovernmental Working Group (IWG) to consider the issue of Gender Recognition legislation, the government has indicated this Working Group will take two years to examine the issues and report. This would mean a lack in clarity of the rights of transsexual persons for a considerable period. Further, it is not clear whether or not in the future a Gender Recognition Bill will in fact be recommended by the IWG.

Equal Opportunities Commission

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