

Promoting transgender people's right to equality with a Gender Recognition Ordinance

Submission on the Marriage (Amendment) Bill 2014



平等機會委員會
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1. Introduction

- 1.1 Transgender people in Hong Kong, as in all parts of the world, face substantial prejudice, discrimination and violence in society.¹ A crucial issue for transgender equality is the extent and criteria by which the government officially recognises their right to change their gender and related rights including marriage.
- 1.2 The landmark W decision by the Court of Final Appeal in May 2013 decided that the Marriage Ordinance and the Matrimonial Causes Ordinance were in breach of the right to marriage of a post operative transsexual woman who wished to marry her male partner.² The decision also raised much broader issues by recommending that the government introduce comprehensive legislation regarding gender recognition and related rights for transgender people.
- 1.3 The EOC believes that everyone in Hong Kong society, including transgender people, should be free from discrimination and have equal opportunities to participate in all aspects of life. **Appendix 1** explains who transgender people are in Hong Kong and their experiences of inequality and discrimination.
- 1.4 The EOC has developed a three year strategic work plan for the period 2013-15 and one of our five strategic priorities is to advocate for protection from discrimination and promotion of equality for people identified by their sexual orientation or gender identity.³
- 1.5 We have on a number of occasions already called on the government to introduce discrimination legislation relating to sexual orientation and gender identity, similar in scope to the current four existing Discrimination Ordinances. We welcomed the W decision and called on the government to implement the judgment by introducing a comprehensive Gender Recognition Ordinance.⁴
- 1.6 We have also met with officials from the Hospital Authority calling on it to introduce a multidisciplinary transgender health service centre for the treatment

¹ Report of the United Nations High Commissioner for Human Rights, 17 November 2011, A/HRC/19/41, http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41_english.pdf.

² W v Registrar for Marriages FACV No4 of 2012.

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>

⁴ EOC press release 13 May 2013, <http://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=11342>

of the various needs of transgender people.⁵ We are pleased that the Hospital Authority has agreed to our request.

- 1.7 This document is the EOC's submission to the government and Legislative Council on the Marriage (Amendment) Bill 2014 (the "Marriage Bill") which seeks to implement the W judgment. The EOC believes that the Bill in its current form is not appropriate for two reasons. Firstly, by requiring full sex-reassignment surgery in order to marry in an acquired gender, we believe that this may be in breach of such persons' human rights under the Bill of Rights. Secondly, it is not a comprehensive Gender Recognition Bill to provide all the rights of people that have changed gender. **Appendix 2** examines the main issues directly raised by the proposed provisions in the Marriage Bill.
- 1.8 Although the government has established an interdepartmental group to consider the wider issues of the process for gender recognition and rights of transgender people, we are concerned that the Marriage Bill will entrench into primary legislation problems under the current system.
- 1.9 The submission is structured as follows:
- Recommendations to the government;
 - Human rights concerns with current requirements for gender recognition;
 - The arguments for a Gender Recognition Ordinance (based on principles of health, well being as well as human rights) and the UK model;
 - Appendix 1: Transgender people and their experiences of inequality and discrimination in Hong Kong;
 - Appendix 2: Issues under the Marriage Bill.

2. Recommendations to the government

2.1 The EOC recommends to the government that it:

- **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**

⁵ The centre will have specialists including psychologists, psychiatrists, paediatricians, chronologists, plastic surgeons, neurologists and gynaecologists that provide specialist advice and treatment for transgender people.

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.

3. Human rights concerns with current requirements for gender recognition

3.1 There are three aspects of the current system for recognizing a transgender person's change in gender that raise human rights concerns. Firstly, the requirement that persons undergo full genital reassignment surgery may breach their rights under the Bill of Rights to be free from inhumane and degrading treatment, as well as their rights to privacy, family life and non-discrimination. Secondly, for those persons who cannot or do not wish to undergo surgery, the resultant inconsistency between identity documents and their affirmed gender can make discrimination in areas such as employment, the provision of goods and services, and government functions more likely. Thirdly, we are concerned that a requirement of full sex re-assignment surgery may in future be used as the definition of who is protected under gender identity discrimination legislation. Each of these issues is examined below.

(a) Requirements regarding genital reassignment surgery: proposed section 40A

3.2 The current administrative system requires a person to have undergone full genital sex reassignment surgery before the government will make changes to their identity documents. This involves removing current genitals and replacing them with genitals of the affirmed gender. It will also normally result in sterilization of the person.

3.3 The draft section 40A of the Marriage Bill mirrors the current administrative system by proposing that if a person has received full sex-reassignment surgery, the person is for the purpose of the Marriage Ordinance to be treated as being of the sex to which the person is re-assigned after surgery.

3.4 A problem with introducing a legislative requirement for full sex-reassignment surgery is that it will be more difficult to change the requirements in the future. The EOC is therefore recommending that amendments are made to the Marriage Bill so that the requirements for gender recognition are dealt with

administratively; that those administrative requirements be amended to not require surgery; and that a Gender Recognition Ordinance be introduced as soon as possible.

- 3.5 Internationally it has been recognised that there are many situations where it may not be appropriate for transgender people to undergo surgery. For example such treatment may not be appropriate for physical or psychological reasons when a person has a pre-existing health or mental condition.⁶ Surgery for female to male transgender people is also more complex and difficult. Further, some transgender people may not wish to undergo surgery as they feel comfortable in their affirmed gender without genital surgery. For example a person may be comfortable with undergoing hormonal treatment and making physical changes to their appearance.
- 3.6 The requirement for genital surgery and resultant sterilization is not compliant with international and domestic human rights obligations regarding people's right to be free from inhuman and degrading treatment, and the rights to privacy, family life and non-discrimination.
- 3.7 The United Nations has raised human rights concerns with requirements for surgery and sterilization.⁷ Most recently in February 2013, a United Nations report examined the human rights abuses in health care settings.⁸ It highlighted concerns that in many countries there was a requirement for transgender people to undergo surgery or sterilization, and that such treatment was a form of unlawful inhuman or degrading treatment.⁹ The report called on all States to outlaw "...forced or coerced sterilization in all circumstances."¹⁰
- 3.8 Similar concerns were raised by the Commissioner for Human Rights in the Council of Europe. In a recent 2011 report on discrimination faced by lesbian, gay, bisexual and transgender people in Europe, it recommended that Member States should:

⁶ 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>

⁷ Report of the United Nations High Commissioner for Human Rights, 17 November 2011, A/HRC/19/41, *Ibid* paragraphs 72 and 84(h).

⁸ 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

⁹ *Ibid* paragraph 78.

¹⁰ *Ibid* paragraph 88.

“Abolish sterilisation and other compulsory medical treatment which may seriously impair the autonomy, health or well-being of the individual, as necessary requirements for the legal recognition of a transgender person’s preferred gender.”¹¹

- 3.9 Further, in 2010 the World Professional Association for Transgender Health issued the following statement:

“No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person’s lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.”¹²

- 3.10 In a number of countries around the world there have been decisions by national courts that requirements for transgender people to undergo surgery and/or sterilization breached their human rights.

- 3.11 In 2009, the Austrian Administrative High Court held that mandatory sex reassignment surgery as a condition of recognising a gender change was unlawful.¹³ In 2011, the Constitutional Court of Germany also held that a requirement to undergo sex reassignment surgery or sterilization was unconstitutional, in breach of the person’s right to physical integrity and self-determination.¹⁴

- 3.12 In Sweden in 2012 its Court of Appeal held that the requirement of transgender people to be sterilized in order to have their change in gender recognized was unconstitutional and in breach of the right to privacy, family life and non-discrimination under articles 8 and 14 of the European Convention of Human Rights.¹⁵ As a result, in 2013 the Swedish government abolished the requirement for sterilization.

¹¹ Discrimination on grounds of sexual orientation, and gender identity in Europe, Council of Europe, September 2011, http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf page 13.

¹² <http://www.wpath.org/documents/Identity%20Recognition%20Statement%206-10%20on%20letterhead.pdf>

¹³ Administrative High Court, No. 2008/17/0054, judgement of 27 February 2009.

¹⁴ Federal Constitutional Court, 1 BvR 3295/07. Available from www.bundesverfassungsgericht.de/entscheidungen/rs20110111_1bvr329507.html.

¹⁵ Mål nr 1968-12, Kammarrätten i Stockholm, Avdelning 03, http://du2.pentagonvillan.se/images/stories/Kammarrtens_dom_-_121219.pdf, p. 4.

- 3.13 Similar decisions have been made in countries in the Asia Pacific region. For example, in New Zealand in 2008 it was held that a person does not need to undergo genital surgery in order to be recognised as changing gender. What is treatment is appropriate will vary depending on the needs and wishes of the particular transgender person.¹⁶
- 3.14 There are a number of countries or jurisdictions around the world that have taken a progressive human rights based approach to recognizing transgender people's change in gender. Many have introduced legislation or administrative procedures which do not require sex reassignment surgery and/ or sterilization in order for a transgender person to change their gender on relevant identity documents. These countries are the UK, Portugal, Spain, Hungary, Argentina, South Africa, New Zealand, and Australia (some States).
- 3.15 Most recently in December 2013, the Taiwanese government has announced that it will be removing the requirement to undergo sex reassignment surgery in order for a transgender person's change in gender to be legally recognized.¹⁷
- 3.16 As a result, the EOC believes that the current system which requires transgender people to undergo genital sex reassignment surgery and the resultant sterilization it causes may be in breach of the rights to be free from inhuman and degrading treatment, privacy, family life and non-discrimination under articles 3, 14 and 22 of the Bill of Rights. This is also why we recommend to the government that it should remove a requirement for full sex reassignment surgery as pre-requisite for recognition of a change in gender under the current administrative requirements, and a proposed Gender Recognition Ordinance.
- 3.17 We also note as previously mentioned, that the Hospital Authority will establish a multidisciplinary transgender health service centre. In future the centre could provide medical advice to the government as to the appropriateness of particular treatment in individual cases in order to be recognized as changing gender, in accordance with a Gender Recognition Ordinance.

(b) Possible discriminatory impact of not recognising changes in gender

¹⁶ Michael v Registrar-General of Births, Deaths and Marriages, FAM-2006-004-002325, 9 June 2008.

¹⁷ See <http://www.gaystarnews.com/article/taiwan-allows-legal-gender-changes-without-transitioning091213>

3.18 Transgender people who are not able or do not wish to undergo genital sex reassignment surgery cannot have a change in their gender legally recognised. As a result, it is more likely for a person to be discriminated against in different aspects of their lives. This is because the current system can create situations where there is inconsistency between a person's official identity documents and their affirmed gender.

3.19 Some areas where they may be prejudicially affected include employment, obtaining services such as with financial institutions and in other situations where proof of identity is important such as the Police and Immigration Department. The Commissioner of Human Rights recognised these concerns:

“The difficulty of living with documents that reflect the wrong gender identity or wrong name cannot be exaggerated. Transgender persons who have been unable to change their passport or ID experience problems every time they have to identify themselves, for example when paying with a credit card, taking out a library book, opening a bank account or crossing a border. As a result of having inadequate documents, transgender persons can spend long periods of life effectively barred from meaningful and full participation in society, education or employment, as they may face continual problems “justifying” their identities. Transgender persons may also face practical problems in institutional settings such as hospitals, public toilets, police stations and prisons.”¹⁸

3.20 These concerns are another reason why we believe it would be appropriate to develop a Gender Recognition Ordinance which provides a broader approach to recognizing a transgender person's change in gender.

(c) Test for future gender identity discrimination legislation

3.21 As indicated in the introduction to this submission, the EOC has called on the government to introduce new discrimination legislation relating to both sexual orientation and gender identity.

3.22 The EOC currently considers complaints of gender identity discrimination (see Appendix 1) under the Disability Discrimination Ordinance as the current definition of trans-sexualism is that it is a mental disorder. The EOC considers

¹⁸ Ibid, Discrimination on grounds of sexual orientation, and gender identity in Europe, Council of Europe, September 2011, page 90.

complaints from the point a person has been diagnosed with gender dysphoria, rather than only persons that have undergone full sex re-assignment surgery.

- 3.23 The EOC believes there is a need for discrete gender identity discrimination legislation and that it should protect persons as long as they have been diagnosed with gender dysphoria. We are concerned that if the amendments are made to the Marriage Ordinance, a narrow approach would also be taken in the future by the government to introducing gender identity discrimination legislation. In other words we are concerned it would only protect persons who have undergone full sex re-assignment surgery. This would not be consistent with a number of other similar common law jurisdictions discrimination legislation such as in the UK and Australia which provide a broad definition of protection relating to gender identity/ reassignment.¹⁹

4. The arguments for a Gender Recognition Ordinance and the UK model

- 4.1 Given the recommendation of the Court of Final Appeal to introduce a Gender Recognition Ordinance and the above concerns with the current system, the EOC believes that it is appropriate to introduce a comprehensive Gender Recognition Ordinance for Hong Kong. This section examines the international obligations and experience of introducing gender recognition legislation; and the UK model of the Gender Recognition Act 2004.

(a) International obligations and experience in other jurisdictions

- 4.2 The United Nations has emphasized the importance of introducing legislation to recognise transgender peoples' affirmed gender as a human rights issue.
- 4.3 In July 2011 the United Nations Human Rights Council adopted a resolution on sexual orientation and gender identity.²⁰ It recalled that the universality of human rights and expressed grave concern at discriminatory practices in all regions of the world relating to individuals' sexual orientation or gender identity.
- 4.4 In November 2011 the United Nations High Commissioner for Human Rights produced a detailed report documenting evidence of discriminatory laws and practices as well as acts of violence against individuals based on their sexual

¹⁹ See section 7 of the Equality Act 2010 UK and section 4 of the Sex Discrimination Act 1986 Australia.

²⁰ Human Rights Council, seventeenth session, 14 July 2011, A/HRC/RES/17/19

orientation and gender identity.²¹ The report stated in relation to gender recognition:

*“The Human Rights Committee has expressed concern regarding lack of arrangements for granting legal recognition of transgender people’s identities. It has urged States to recognize the right of transgender persons to change their gender **by permitting the issuance of new birth certificates and has noted with approval legislation facilitating legal recognition of a change of gender.**” (emphasis added)²²*

4.5 The report recommended that all Member States of the United Nations:

“Facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.”²³

4.6 In Hong Kong, as stated previously there is only an administrative procedure for granting a transgender person’s change in identity documents. This reduces transparency and clarity as to the process and decision making. Further, there are also no provisions which set out the related rights of persons in their affirmed gender for example regarding parenthood, benefits and privacy.

4.7 In other international jurisdictions, there is an increasingly trend for national legislation to be developed recognizing a change in gender. This is particularly notable in similar common law jurisdictions such as the United Kingdom, Australia, New Zealand and Canada.

4.8 Around the world approximately 31 countries have adopted legislation which sets out process and for a transgender person being recognised in their affirmed gender. There are 24 countries in the Council of Europe: Austria, Belgium, Cyprus, the Czech Republic, Denmark, Finland, Germany, Greece, Italy, Latvia, Malta, Montenegro, the Netherlands, Norway, Portugal, Romania, the Russian Federation, Slovakia, Spain, Sweden, Switzerland (some cantons), Turkey, Ukraine and the United Kingdom.²⁴ Other countries with legislation are Australia, New Zealand, South Africa, Canada (some Provinces), the United States of America (some States), Argentina and India (some States).

²¹ Report of the United Nations High Commissioner for Human Rights, 17 November 2011, A/HRC/19/41, http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41_english.pdf.

²² Ibid paragraph 73.

²³ Ibid paragraph 84(h).

²⁴ Discrimination on Grounds of sexual orientation and gender identity in Europe, Council of Europe, September 2011, pages 85-86, http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf

(b) The Gender Recognition Act 2004

4.9 In the UK the Gender Recognition Act (“GRA”) 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.

4.10 Applicants must submit 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.

4.11 Notably there is no requirement that a person have undergone sex reassignment surgery or hormonal treatment.

4.12 Applications are determined on the papers, without the applicant having to appear before the panel. 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.

4.13 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:

- the right to change all identity documents including issuing a new birth certificate;
- the right to marry or form civil partnerships in your acquired gender;²⁵
- the right to pensions and to retire at the age of your acquired 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.²⁶

²⁵ Note that in the United Kingdom since March 2014 marriage is now lawful for both heterosexual and homosexual couples pursuant to the Marriage (Same sex couples) Act 2013. Civil partnerships between same sex couples have been lawful since 2005 under the Civil Partnerships Act 2004.

²⁶ 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

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

4.15 As stated in paragraph 3.23 of this submission, 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 GRA in order that there are the same rights regarding non-discrimination.

4.16 The effectiveness of the GRA has been examined in a recent study conducted in 2010 by the University of Leeds in England.²⁷ 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.²⁸

4.17 The EOC believes that the government should introduce a Gender Recognition Ordinance, taking reference from the Gender Recognition Act in the UK. This is because it would:

- provide a system of gender recognition which respects the best health and well being interests, as well as the human rights of transgender people;
- ensure that there is clarity as to the effect of the gender change on different aspects of their lives.

person. Various exceptions apply, for example where it is necessary to disclose a change in gender to investigate and prosecute criminal offences.

²⁷ 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>

²⁸ 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.

Appendix 1: Transgender people and their experiences of inequality and discrimination in Hong Kong

1. Who are transgender people?

- 1.1 There is often misunderstanding in society as to who transgender people are and the different aspects of being transgender. As a result it is important to clearly define relevant concepts and how they relate to each other.
- 1.2 **Transgender** people are ‘individuals whose gender identity and/or expression of their gender differs from social norms related to their gender of birth’ (from the World Professional Association of Transgender Health (WPATH), Standards of Care, Edition 7).²⁹ 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.
- 1.3 **Transsexualism** has a special meaning in medicine. It 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). 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’ (ICD-10, available on the WHO website). 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.³⁰
- 1.4 **Gender dysphoria** is the incongruence between one’s personal gender identity (sometimes called affirmed gender) and the one assigned to them at birth and is expected to live in. People do not choose to be gender dysphoric, they are

²⁹ 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>

³⁰ Drescher, J., Cohen-Kettenis, P, and Winter, S. (2012). Minding the Body: situating gender identity diagnoses in the ICD-11. *International Review of Psychiatry*, 24(6), 568-577

innate feelings that often develop in childhood. These feelings of incongruence can cause great discomfort and distress.

- 1.5 Many transgender people, especially those who are gender dysphoric, experience a deeply felt need to live in their affirmed gender. The process of beginning to live in one's affirmed gender is often called **gender transition**. This consists of a social element (name, clothes, hair and where possible identity documents). It may also comprise a physical element (gender affirming hormones and/or surgery). Surgery may include, but not restricted to, breast surgery (removal or augmentation) and/ or genital surgery. The terms **sex reassignment surgery** usually refers to genital surgery.
- 1.6 **Sexual orientation** is a different concept to being transgender. 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**. Transgender people may be heterosexual, homosexual or bisexual. For example, a transgender woman (a person who was assigned at birth being 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.
- 1.7 **Intersex** people are distinct from both transgender people and people defined by their sexual orientation. 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."³¹
- 1.8 It is not known how large the transgender population is in Hong Kong. Recently a figure of 18,750 was estimated by transposing estimates from a study conducted in the United States. This was based on the United States figure of 0.3% of the adult population identifying privately as a gender other than that assigned to

³¹ United Nations Office of the High Commissioner for Human Rights, "Free & Equal campaign Fact Sheets, LGBT Rights: Frequently Asked Questions".

them at birth.³² The numbers of publicly identifying transgender people is significantly lower with previous media reports estimated between 300 and 3000 people.³³ Low levels of public self identification of transgender people is often connected to the fear of discrimination and prejudice that they would experience.

2. Experiences of and protection from discrimination

- 2.1 Prejudice, misunderstanding and discrimination against people in Hong Kong relating to their gender identity are reported as being widespread.³⁴ In 2003 a survey of people's attitudes to transgender people (183 secondary school teachers) found significant prejudice and stereotyping: for example 54% thought that transgender people were likely to have diseases requiring treatment, and 29% did not think that transgender people should be able to live without stigma and discrimination.³⁵
- 2.2 Discrimination exists in a number of different fields. In relation to discrimination in employment, discriminatory treatment has been reported particularly during or after a person has transitioned from one gender to another. Harassment was reported concerning a case at a university, as well as a person being excommunicated from the church she had worshipped at for over 30 years after she had undergone gender change.³⁶ Prejudice has also been reported in relation to the provision of healthcare.³⁷
- 2.3 Most recently, a study was conducted by the organization Community Business and the results published in May 2012. It examined the attitudes towards and experiences of lesbian, gay, bisexual, and transgender (LGBT) employees in Hong

³² It's time for Change: Towards a Gender Recognition Ordinance for Hong Kong, Sam Winter Associate Professor Faculty of Education, University of Hong Kong, October 2013, <http://www.procommons.org.hk/wp-content/uploads/2013/11/PC-GRO-Background-Paper-Oct03SW.pdf>

³³ Finding a Voice, Fighting for Rights: The Emergence of the Transgender Movement in Hong Kong, Robyn Emerton, *Inter-Asia Cultural Studies Journal*, 243-269, Volume 7 Number 2, 2006, page 6.

³⁴ Finding a Voice, Fighting for Rights: The Emergence of the Transgender Movement in Hong Kong, Robyn Emerton, *Inter-Asia Cultural Studies Journal*, 243-269, Volume 7 Number 2, 2006, page 6.

³⁵ Ibid page 9.

³⁶ Ibid page 9, the case relating to the Church of Jesus Christ of Latter Day Saints 2001.

³⁷ A systems approach to the social difficulties of transsexuals in Hong Kong, Joyce L C Ma, *Journal of Family Therapy* (1997) 19: 71-88, page 73

Kong.³⁸ It surveyed 1002 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.

2.4 Some key findings in relation to the 1002 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.³⁹

2.5 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

³⁸ Hong Kong LGBT Climate Study 2011-12, Community Business, May 2012, <http://www.communitybusiness.org/lgbt/climatestudy.html>

³⁹ Ibid as reported and detailed in It's time for Change: Towards a Gender Recognition Ordinance for Hong Kong, Appendix Two.

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 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.

2.6 Currently in Hong Kong there is no distinct discrimination legislation relating to gender identity. This can be contrasted with many other international jurisdictions around the world including the UK and Australia whose discrimination legislation was the basis for Hong Kong's discrimination legislation.⁴⁰

2.7 However, the EOC considers complaints of gender identity discrimination as part of its remit of disability discrimination. This is because the current international definition of trans-sexualism is that it is a mental disorder.⁴¹ However there are some concerns with that terminology as many transgender people do not wish to be viewed as having a mental disorder. Further, as there is no distinct protected characteristic of "gender identity", there is currently no definition and therefore clarity as to which types of transgender people would definitely be protected from discrimination (eg are they protected from the point of being diagnosed as having gender dysphoria).

2.8 Several complaints the EOC has received highlight the discrimination transgender people face in many aspects of their lives. One complaint concerned membership to clubs. A male to female transsexual woman was a member of a club who after her sex reassignment surgery married a man and was refused a spouse membership of the club. The case did not reach the courts as a settlement was reached between the parties.

⁴⁰ See the Equality Act 2010 (UK) and the Sex Discrimination Act 1984 (Aus).

⁴¹ World Health Organisation, International Classification of Diseases, Revision 10, ICD-10.

2.9 Another complaint related to education. A Hong Kong education body had agreed to reissue educational certificates to postoperative transgender people 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.⁴²

⁴² Emerton page 13.

Appendix 2: Issues under the Marriage Bill

1. Proposed section 40A: requiring full sex reassignment surgery

- 1.1 Concerns with the requirement of full sex re-assignment surgery were discussed in section 3 of this submission.

2. Proposed section 40B: presumption of sex as on identity document

- 2.1 A person will be presumed to be the sex of a party to a marriage as shown on an identification document, in the absence of evidence to the contrary.
- 2.2 The government states the provision is proposed in order to obviate the need for a person to present the relevant medical certificate to the Registrar of Marriages. The person will have already changed their identity document (HK ID card or passport) so it should not be necessary to show the medical certificate.
- 2.3 However, one problem is that a person is currently not able to change their birth certificate. In order to help prevent discrimination against transgender people, a person should be able to change all their identity documents to their affirmed gender including by applying for a new birth certificate. A system for issuing new birth certificates could be based on the UK system where a note is made in the original registry of births that a person has changed gender but that is not disclosed to the general public.⁴³

3. Amendments to Schedule 1 forms: changing terminology regarding widows and widowers

- 3.1 Proposed amendments are made to the marriage forms that refer to the current status of the person getting married. If a person changes gender after their spouse dies, the terms widow and widower will no longer be appropriate. As a result gender neutral language of “widowed person” is proposed which in our view is reasonable.

⁴³ See Schedule 3 of the Gender Recognition Act 2004.

4. Effect of change of gender on existing marriages: section 40A(1)

- 4.1 The Marriage Bill indicates what would be the effect of a person changing gender on existing marriages.
- 4.2 Proposed section 40A(1) states that references to male and female in section 20(1)(d) of the Matrimonial Causes Ordinance are to be construed such that a marriage would be void because the parties are not respectively male and female. This means that a husband or wife could petition the court under section 19 of the Matrimonial Causes Ordinance for a declaration that the marriage is null and void.
- 4.3 There is no proposed provision that a marriage will automatically be null and void if a person who is married has full sex reassignment surgery.
- 4.4 In other jurisdictions it has been recommended that where persons are in pre-existing marriages they should not be required to dissolve marriages if the persons wish to remain married. Requirements in jurisdictions to dissolve existing marriages before being granted a change in gender have been criticised by the Council of Europe Commissioner for Human Rights as infringing the human right to family life, and a recommendation was made for such requirements in countries to be removed.⁴⁴
- 4.5 In the UK previously under the Gender Recognition Act 2004 there was a requirement for existing marriages to be dissolved before a person could be granted a gender change recognition certificate. However this provision was criticised and it has since been repealed.
- 4.6 As a result, in our view the current proposal is reasonable. A person could apply to declare the marriage null and void on the ground that the person is no longer of the opposite sex, but there is no requirement to automatically make the existing marriage null and void. In our view it is appropriate that it is at the discretion of the married persons whether they wish to continue or dissolve the marriage.

5. Effect of a sex re-assignment in another country

- 5.1 On its face, section 40A could apply to a person wherever they have undergone full sex re-assignment surgery including overseas, but it may be preferable for that to be made clear in the provisions.

⁴⁴ Discrimination on grounds of sexual orientation, and gender identity in Europe, Council of Europe, September 2011, pages 13, 87-89.

- 5.2 The Bill also does not make it clear whether a person who has been certified in another country as changing their gender with some lesser process than full sex re-assignment surgery, will be able to marry in their acquired gender in Hong Kong.
- 5.3 In the UK under the Gender Recognition Act, there are provisions by which persons who have been recognised as changing their gender in other approved countries can be recognised in the UK.⁴⁵ There are currently 41 countries (including States and territories of countries) where the UK will recognise a change in gender in those countries for the purpose of the rights of the person in the UK, including the right to marry in the acquired gender. A number of those countries similarly to the UK do not require full sex reassignment surgery.
- 5.4 As the EOC does not believe that full sex reassignment surgery should be a requirement, we believe that the government should consider developing as part of a Gender Recognition Ordinance a system for recognising changes in gender from other jurisdictions, including where full sex re-assignment surgery is not required.

6. Concerns with impact on connected legislation

- 6.1 We note that the Legal Services Division of the Legislative Council has raised in a letter to the government a number of questions and concerns as to what impact the amendments in the Marriage Bill would have on connected legislation.⁴⁶ These relate to issues such as the effect of a change in gender on children's rights, pension rights, and succession. The Legal Services Division is concerned that as the current amendments to the Marriage Bill do not make amendments or clarify the effect on these related pieces of legislation, there will be uncertainty as to people's rights in law. The EOC agrees with these concerns.

⁴⁵ <http://www.justice.gov.uk/downloads/tribunals/gender-recognition-panel/list-of-approved-countries-or-territories/table-approved-countries.pdf>

⁴⁶ Letter of the Legal Services Division of the Legislative Council to the Security Bureau, dated 5 March 2014, <http://www.legco.gov.hk/yr13-14/english/bc/bc52/papers/bc520401cb2-1203-3-e.pdf>