

Transitioning to Transgender Friendly Policies in the Workplace

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- Transgender-friendly work policies are in the minority in Hong Kong. However, as the number of transgender employees who are “coming out” is gradually increasing, employers need to review and refresh their policies, practices and procedures to ensure an inclusive working environment for all.
- As company cultures evolve, diversity and inclusion have proven to be key differentiators for successful businesses and highlight the benefits of an inclusive workplace that provides for the needs of all employees.



Before talking about transgenders and the protection afforded to them under Hong Kong law, it is important to understand the terminology. “Sex” refers to either the male or female biological characteristics. Meanwhile, “Gender Identity” is the identity, whether male or female which a person identifies with. A “transgender” person is someone who relates to a gender which is different to the sex which they were born with. A

transgender female, for example, is a person whose sex at birth was male but who identifies as female. “Intersex” includes those who at birth are neither clearly male or female, also referred to as gender non-conforming.

In Hong Kong there is no gender recognition legislation which would allow a person to change the gender which is stated on their birth certificate. In the UK, following a case brought to the European Court of

Human Rights by a transgender person, who claimed the inability to change the gender on their birth certificate was a breach of their rights, the UK brought in the Gender Recognition Act. Under the Act, a transgender person can apply for a Gender Recognition Certificate which shows that a person has satisfied the criteria for legal recognition in the acquired gender. The Act gives people with gender dysphoria legal recognition as members of the sex appropriate to their gender identity.

Without any gender recognition legislation, transgender people in Hong Kong are unable to enjoy the same rights as those which most people take for granted. Some transgender people undergo sex reassignment surgery so that they may live with the biological characteristics of the gender that they identify with. After sex reassignment surgery, a transgender person can change their passport and Hong Kong Identity Card so that it reflects their reassigned gender. They can also get married as per their reassigned gender. However, sex reassignment surgery is a long process and not all transgender people want to take this final step of transition.

Transgender employees may face numerous difficulties in the workplace. Even completing an application form for a job interview can present issues to prospective transgender employees. Most application forms require the applicant to tick a box stating whether they are male or female. A transgender

female who is biologically male will not want to tick the box marked male especially if she is presenting as a female. However, if she ticks the box stating she is female, she may be accused of dishonesty in the event that her employer later finds out she is biologically male. To avoid this issue, transgender applicants often leave both boxes unticked.

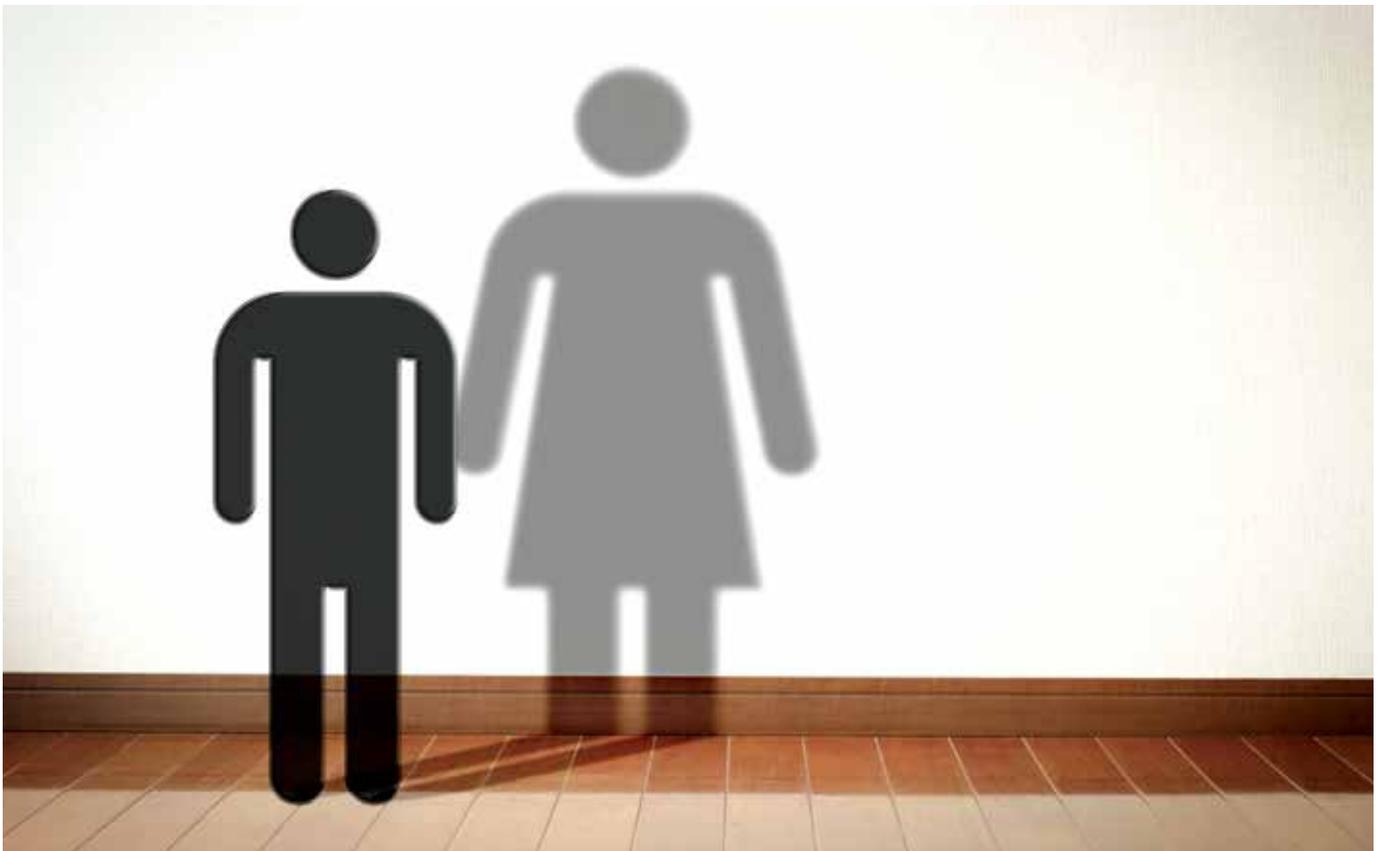
Transgenderers are not protected by Hong Kong's Sex Discrimination Ordinance, which covers only discrimination on the ground that a person is a woman or a man. This can be contrasted with the position in the UK where the Equality Act 2010 includes "gender reassignment" as a characteristic protected from discrimination. Gender or body dysphoria meanwhile is a recognised medical condition which relates to the distress a person suffers where they identify with a gender different from their assigned sex. A transgender person is therefore protected by Hong Kong's Disability Discrimination Ordinance.

Washroom issues

Practical issues such as the use of the washrooms are common issues faced by transgender employees. Employers will have issues with a person who is biologically male using the female washroom, for example. Often the employer will not allow a transgender female to use the female washroom out of concern that it will make female employees uncomfortable. The compromise often reached is to allow use of the disabled toilet which the transgender employee will consider inappropriate.

Privacy issues

The majority of employers have handbooks which do not have policies for transgender employees. Such policies deal with a transgender employee's right to privacy regarding their gender identity status, which should only be shared with the transgender employee's consent.



Bullying and harassment

Employer's handbooks generally prohibit bullying and harassment and give examples of unacceptable conduct in the workplace. However, they do not usually incorporate the types of examples which transgenders face. Transgender-friendly handbooks provide that all employees have the right to be addressed by the name and pronoun that correspond to the employee's gender identity. Where there is an intentional or persistent refusal to respect an employee's gender identity, such as intentionally referring to the employee by a name or pronoun that does not correspond to the employee's gender identity, this can constitute harassment.

Transitioning

A transgender employee may join an employer and thereafter seek to change their gender to their gender identity. There are many different ways to transition, but if not managed properly by the employer, this can result in the employee being subjected to ridicule, harassment and bullying. A transition may mean the employee tells co-workers about their gender identity. It can also include a change of name and/or sex on legal documents and undergoing medical treatment for hormones or surgery. Employers that want to be considered as providing an inclusive working environment should provide clear policies and support to any transitioning employee. Such policies should set out the procedure for implementing transition-related workplace changes which would include amending personnel records, changing the photographs on work security passes and preparing a communication plan to share the news with co-workers and clients.

Bullying or harassment could occur within the office during office hours but also outside of office hours and through social media. It is important that an employer makes it clear to staff that any bullying or harassment will not be tolerated, and that consequences could result in the event that such a claim is upheld.

Discrimination

It is not unlawful in Hong Kong to discriminate in any way against an employee because of their actual or perceived gender identity. However, it is incumbent on employers to provide a safe work environment for transgender and intersex employees. Where incidents of discrimination, harassment, or violence based on gender identity being committed, they will invariably be breaches of the Disability Discrimination Ordinance.

HR takeaways

HR practitioners should periodically review and update existing policies and procedures to ensure that transgender employees are protected. Therefore, it is good practice for an employer's anti-discrimination policy to be transgender-inclusive.

A restroom policy should be drawn up which gives employees access to the restroom corresponding to their gender identity. Employees who want increased privacy should be provided with access to a single-stall restroom, when available. However, employees should not be required to use such a restroom.

In the recruitment process, there should be flexibility in terms of the requirement for titles and genders on application forms. Where a transition is being planned any non-consensual disclosure must be avoided and HR practitioners should also carefully manage data and make a plan with the employee as to how relevant information will be updated. The HR function should only retain previous identity documents that are required, such as for pension purposes.

HR practitioners should be realistic about the training needs to be provided to employees so that they have a better understanding of the issues faced by transgender employees and to deal with any

employee prejudices. Workshops about diversity can help remove bias that many employees have. The Equal Opportunities Commission can provide training where necessary. HR practitioners should also keep information of organisations which support transgenders so that employees know where to find additional support. 

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制訂工作間跨性別友善政策

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- 工作間跨性別友善政策在香港甚為少有。然而，隨著「出櫃」的跨性別員工逐漸增多，僱主需要重新審視及更新他們的政策、處理方法和程序，以建立共融的工作環境。
- 隨著企業文化的演變，實行多元、共融的人力資源政策，既可以突顯企業成功之處，也可以宣揚顧及所有員工需要，提供共融工作環境所得的好處。



在談論跨性別人士及香港法律給予他們的保障之前，我們必須了解相關術語。「男」、「女」一般是按出生時的生理特徵界定，即是所謂「生理性別」。「性別認同」是指男性或女性對自己的性別理解。「跨性別人士」是指性別認同與原生生理性別不同的人士，例如跨性別女性是指原生生理性別是男性，但心理上自認為女性的人士。「雙性人」(Intersex)是指生理性別在出生時無法明確歸類為男性或女性的人，也可以稱為性別表現不一致 (gender non-conforming) 人士。

香港沒有性別承認法允許個別人士更改其出生證明書上所述的性別。自從有一名跨性別人士向歐洲人權法院提出訴訟，指無法改變其出生證明文件上的性別屬侵權行為後，英國制定了《性別承認法》

(Gender Recognition Act)。按該法例，跨性別人士可申請性別承認證明，當中顯示有關人士達到後天性別轉換法律承認所需的標準。該法例讓患有性別認同焦慮症 (gender dysphoria) 人士獲得法律承認其性別認同 (gender identity) 的身份。

在沒有任何性別承認法的情況下，香港的跨性別人士無法享有大多數人認為理所當然的權利。有些跨性別人士會做變性手術，從而擁有其性別認同的生理特徵。在完成手術後，變性人便可以更改其護照和香港身份證上的性別，以反映其在手術後的性別。他們也可以以變性後的性別結婚。然而，變性手術是一個漫長的過程，並非所有跨性別人士都想走這性別過渡的最後一步至完全變性。

跨性別員工在工作環境上可能會遇到不少困難。即使填寫求職面試申請表，也可能會給

跨性別人士帶來難題。大多數申請表上都有一個性別選項，要求申請人剔選是男性或是女性。跨性別女性雖然在生理上是男性，但假若是以女性裝扮人，她們便不會願意在該選項上剔選男性。可是如果剔選女性，若後來被僱主發現是男性，便有可能被指控為不誠實。為了避免這個問題，跨性別申請人通常會將該選項留空。

跨性別人士不受香港《性別歧視條例》的保障，因為該條例只涵蓋基於個別人士身份是女性或是男性所受到的歧視。這有別於英國的《2010年平等法》(Equality Act 2010)，該法例將「性別重置」納入為受歧視保障範疇其中一項。另一方面，性別或身體認同焦慮症被視為一種醫學病症，與一個人在心理上無法認同自己的生理性別而產生困擾有關，因此跨性別人士受到香港《殘疾歧視條例》保障。

洗手間問題

使用洗手間等實際情況是跨性別員工面對的常見問題。例如僱主對允許擁有男性生理特徵的人士使用女洗手間有所保留。他們通常不會允許跨性別女性使用女洗手間，擔心這會使女性員工感到不安；因此往往唯有允許跨性別員工使用殘疾人士洗手間，而跨性別員工會覺得這項安排並不恰當。

私隱問題

大多數僱主提供的職場手冊都沒有特別為保障跨性別員工訂立專門政策，例如就保障跨性別員工性別認同狀況隱私權的應有政策，而有關的性別認同狀況是應該得到當事人同意，才可向第三方透露。

欺凌及騷擾

僱主的職場手冊一般禁止欺凌及騷擾行為，並舉例說明工作間不可接受的行為。可是，這些例子通常不會包括跨性別員工所面對的各種情況。對跨性別人士友善的手冊，應確保所有員工皆有權只接受與其性別認同身份相匹配的稱呼和代名稱謂。若有人故意或持續拒絕尊重員工的性別認同，例如故意使用與員工性別認同不匹配的稱呼或代名稱謂，則有可能構成騷擾行為。

性別過渡

跨性別員工可能在入職後更改其性別至認同的性別身份。性別過渡有多種不同

方式，但若僱主處理不當，有可能會導致相關員工遭受嘲笑、騷擾以及欺凌。性別過渡可以是指相關員工告訴同事其性別認同，也可以包括更改法律文件上的姓名及/或性別，以及接受荷爾蒙治療或手術。僱主若希望建立有提供共融工作環境的形象，便應為經歷性別過渡的員工制定明確的政策並提供支援。此類政策應訂明因應性別過渡所作相關轉變的執行程序，包括修改人事紀錄、更改工作證上的照片，以及準備通知同事和客戶有關消息的溝通方案。

欺凌或騷擾行為有機會在工作時間內於辦公室發生，但亦可能在辦公時間以外透過社交媒體進行。僱主必須向員工明確表示不會容忍任何欺凌或騷擾行為，一經確認相關行為將會有嚴重後果。

歧視

在香港，出於僱員的性別認同，不論以何種形式歧視相關僱員，也不算違法。然而，僱主有責任為跨性別員工和雙性員工提供安全的工作環境。如果發生基於性別認同的歧視、騷擾或暴力行為，將視作違反《殘疾歧視條例》。

人力資源專才注意事項

人力資源人員應定期審視及更新現有政策和程序，以確保跨性別員工受到保障。因此，將跨性別員工納入反歧視政策內，是良好的做法。

僱主應制定洗手間使用政策，讓員工可以使用與其性別認同相符的洗手間。如設有性別中立的獨立洗手間，僱主亦應讓希望有更多私隱的員工使用，但不可規定相關員工必須使用。

在招聘過程中，對於在職位申請表上填寫稱謂和性別的要求，僱主應靈活處理。員工準備性別過渡時，僱主必須避免在未經當事人同意的情況下透露消息，而人力資源人員也要謹慎處理資料，並與有關員工制訂更新資料的計劃。人力資源部門只應保留必需的原有身份證明文件，例如處理退休金事宜所需的文件。

人力資源人員需要配合實際情況為員工提供培訓，讓他們對跨性別員工的處境有更深了解，消除偏見。舉辦多元工作坊有助心存偏見的員工改變看法。如有需要，平等機會委員會可以提供這類培訓。人力資源人員亦應備存支援跨性別人士機構的資料，以便讓員工知道如何向外尋找更多其他支援。

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