

Reforming the Sex Discrimination Ordinance in Hong Kong to achieve gender justice in workplace

1. Preface

The Gay Games 2023 is going to take place in Hong Kong in November. Given its motto is to provide a “Games for All”, perhaps it is also a good time for the government of the city to think about how to move towards a more inclusive society, making the protection against discrimination “the game for all”. This policy brief is proposing amendments to the current *Sex Discrimination Ordinance* (SDO) in Hong Kong to incorporate all genders including intersex, transgender and gender non-binary persons as a wish to achieve gender justice in various area, including employment, education, provision of service etc. Due to the limitation of space, the discussion here will center around employment.

2. Audience

This policy brief, despite directed towards the government, also targeted at the Equal Opportunities Commission (EOC), the statutory body responsible for implementing the discrimination ordinances in Hong Kong, and also NGOs, other organisations or even individuals who work for or are allies of intersex, transgender and gender non-binary persons in Hong Kong.

3. Terminology and acronyms

To facilitate the discussion, here are the definition of terms and acronyms that are being used in this policy brief.

Intersex: Individuals who are “born with (or develop later in life) ambiguous external genitalia and/or a combination of chromosomes, gonads, external genitalia, and hormones that do not align as typical male or typical female”. (Kelly, 2004)

Transgender: Individuals who feel that their biological sex is incongruent with their sense of self. (Burdge, 2007)

Gender non-binary (NB) persons¹: Individuals who gender identities somehow differ from the notions of women and men. (Holzer, 2018)

When mentioning all of the above gender identities together, the acronym **ITNB** would be used.

¹ The term “non-binary” instead of “third gender” is used here to denote that there are not only three gender identities as suggested by Dritte Option (Dritte Option, as cited in Holzer, 2018).

4. Background

4.1 Current Protection against Discrimination in Workplace

At the moment, there are four discrimination ordinances in Hong Kong protecting employees in any employment type against discrimination based on gender², disabilities, family status and race. If employees face discrimination in employment in terms of hiring, dismissal, terms of employment, opportunities for promotion, transfer or training, or to any other benefits and harassment due to their gender, disabilities, family status and race, they can lodge a complaint to EOC. EOC will then try to settle the incident by conciliation, and if conciliation cannot reach a satisfactory settlement, EOC will provide suggestions and support for further actions like legal assistance (EOC, n.d.). Besides, the employees can also bring the case to the court directly under the ordinances. The decision of the court would serve as precedent for courts to determine similar cases in the future.

4.2 Discrimination of ITNB employees

Despite the discrimination ordinances is an effective tool in protecting employees against discrimination in workplace, it does not cover employees with gender identity other than “man” or “woman”, including intersex and gender non-binary persons. As these group are under-researched in Hong Kong and are not included in any government census, the actual number and the situation of discrimination in workplace of this population is facing remains unknown. However, according to a telephone survey conducted by EOC (2016), 12.3% of respondents will terminate the contract of the employees if they know they are intersex. This showed the discrimination of employees who do not fall in the categories of “man” or “woman” face potential discrimination in workplace.

For transgenders, they are all under the protection of the *Disability Discrimination Ordinance* (DDO) as they are perceived as having gender dysphoria, a mental disorder under the classification of DSM-5-TR. However, 34.8% of them still faces discrimination in employment (Suen et al., 2021). From 2002 to 2017, 53 complaints were received by the EOC from transgender under DDO (EOC, 2017). Some of them are facing dismissal, or less favourable treatment or even harassment in employment. One should keep in mind that this number may not fully represents how common they face discrimination in workplace, as they may not be aware of their “right” to take legal actions under DDO and most importantly, using DDO as the basis to take legal actions is an action that forcing them to pathologizing themselves, which makes them hesitate to do so.

² Despite the ordinance is named as “*Sex Discrimination Ordinance*”, some part of the law associate male and female to specific occupation – like if “a prison or other establishment for persons requiring special care, supervision or attention” thus the employer prefer male employee, it is legal under the Ordinance (*Sex Discrimination Ordinance* [SDO], s12(1)(e)(i)). Therefore, here I use “gender” instead of “sex” as some sections of the Ordinance also have some assumption towards the capability of different sex. Further amendments are certainly needed for these parts, but this would not be the focus of this policy brief.

5. Proposed amendments to the Sex Discrimination Ordinance

In view of the above situation, this policy brief proposed to rename the *Sex Discrimination Ordinance* into *Sex and Gender Identity Discrimination Ordinance* and expand the coverage of the Ordinance to intersex, transgender and gender non-binary persons.

The amendment shall take reference to the 2013 amendment of SDO, which expand the coverage of the Ordinance from woman to man by adding one section under Part 2 of the Ordinance – “Discrimination to which Ordinance Applies”.

Sample of the section to be add is as follows:

Discrimination against intersex, transgender and gender non-binary persons

Section 5, and the provisions of Parts 3 and 4 relating to sex discrimination against women, shall be read as applying equally to the treatment of intersex, transgender and gender non-binary persons, and for that purpose shall have effect with such modifications as are necessary.

(modified from SDO, s6)

This modification has taken reference from similar laws in different jurisdictions. For example, the Swedish government uses “non-conforming gender identities or expressions” (“könsöverskridande identitet eller uttryck”) in their legislation. However, “non-conforming” could be stigmatising (Garland et al., 2018). Therefore, “gender non-binary persons” is used in the proposed amendment. Apart from the stigmatising effect, lack of clarity is another problem. Therefore, the proposed amendment follows South African’s *Judicial Matters Amendment Act 2005* and Australia’s *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* - to list out the categories explicitly to prevent the possibility of the ITNB employees “being ignored, misunderstood or overlooked within case law” (Garland et al., 2018, p.32).

6. Effectiveness in achieving gender justice for ITNB employees

The above amendment is expected to achieve gender justice for ITNB employees in following ways:

6.1 Combat Inequality Regimes

As suggested by Acker (2006), certain organizational practices in workplace including recruitment and hiring process, general requirement of work and supervisory practices produce and reproduce the inequality in workplace. The low visibility and high legitimacy of the inequality help to sustain the inequality regime. By amending the SDO, differential treatments between ITNB and other employees would then become illegal and thus can stop the production and reproduction of the inequality regime in workplace. The amendment of the law can also increase the visibility of inequality in workplace, as

ITNB employees can make complaints to the EOC or bring their case to the court. By this, the discrimination that ITNB employees are facing can bring to the public and the authorities' eyes.

6.2 Achieving Gender Justice in a Bifocal Approach

On top of combating inequality regimes in workplace, the amendment of SDO can also lead to gender justice by rectifying the gender maldistribution and gender misrecognition – i.e. the bifocal approach in achieving gender justice proposed by Fraser (2006). By incorporating all genders in the SDO, the ITNB employees can receive equal protection against discrimination in workplace as the male and female employee currently do. They can get the equal opportunities to employment and equal wages as the male and female employee do. Therefore, such amendment can lead to a redistribution of right and economic status between gender binary employees and ITNB employees.

Besides, by introducing different gender categories into the SDO, their existence and legal status will be officially recognised. Such amendment also open up the opportunity for companies, schools and the general public to understand about gender diversity.

7. Feasibility of the Amendments

7.1 General Support for the Change

Public support is crucial for changes in policies. According to a survey on public attitudes towards transgender people and anti-discrimination legislation conducted by The University of Hong Kong in 2017, 72% of the respondents agreed that “people should be free to express their gender identity”. 67% completely or somewhat agree that there should be legislation to protect transgender against discrimination (Loper et al., 2017). An earlier survey conducted by the EOC (2016) also showed that more than half of the respondents (55.7%) support legal protection against discrimination for people of different sexual orientation, gender identity and intersex status in Hong Kong. These two surveys showed that at least half of the population in Hong Kong support would support such amendment. As both surveys conducted at least five years ago, it is expected that the support towards anti-discrimination legislation would be higher if a similar survey is conducted now as there are more discussion about gender diversity in society in comparison to five years ago.

7.2 Political Opportunity for the Change

As mentioned in the preface, the Gay Game 2023 is going to be held this November. This is probably a good timing for the EOC and other NGOs in Hong Kong to join forces in pressing the government to table such an amendment bill to the Legislative Council, as it would be unethical for the government supporting the Gay Game 2023 and enjoying the economic revenue from it on one hand but acting indifferent towards the right of ITNB employees on the other hand.

Lobbying with the government can also be done by presenting the economic value of creating a fair and inclusive society – namely how this would help in attracting expats to Hong Kong, especially when “grabbing talent from overseas” is a theme repeatedly appear in the Policy Address 2022 and Hong Kong’s economy is still suffering from COVID-19.

7.3 Administrative Practicalities

As the proposed amendment only involve local legislation, therefore, the government can follow the standard procedures in making the amendments. While for the implementation part, the EOC shall remain responsible for it, as it has a well-established system and solid experience in handling complaints raised according to the current discrimination ordinances.

8. Conclusion: Way to move forward

There is a saying that “justice delayed is justice denied”. Despite Basic Law Article 25 guaranteed “All Hong Kong residents shall be equal before the law” since the day when the sovereignty of Hong Kong has been transferred to China, some people has never enjoyed the same level of protection against discrimination as the others does. Therefore, action shall be taken by the government to protect ITNB’s rights immediately. EOC, NGOs, and individuals shall act together to pressurise the government on this proposal given the political opportunity at the moment.

Incorporating different genders in the SDO is the first step, but a very decisive step in achieving gender justice in workplace, as this is a legal binding way to eliminate discrimination in employment on the bases of gender identity. This also opens the window to raise public awareness of gender diversity.

As mentioned in footnote 2, there are still some further amendments to the Ordinance shall be make, in order to achieve a truly gender justice workplace – no matter for female, male and ITBN employees. In the long run, the government shall minimize the extent to which a specific gender categorization is used to distribute rights and benefits. This can help Hong Kong to move towards a just and inclusive society.

(1989 words)

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