

**PCPD’s Submission in Response to the**  
**Consultation Paper: Part 1 – Gender Recognition**

**Scope of PCPD’s Submission**

This Submission is made by the Office of the Privacy Commissioner for Personal Data, Hong Kong (“**PCPD**”) in response to the privacy issues raised in Chapter 9 of the Consultation Paper: Part 1 – Gender Recognition prepared by the Inter-departmental Working Group on Gender Recognition (“**IWG**”) (“**Consultation Paper**”). The IWG was set up to study and consider the legislation and incidental administrative measures that may be required to protect the rights of transsexual persons in Hong Kong in all legal contexts. The first part of the study focused mainly on the overseas experiences and legal issues which would underlie the operation of a formal gender recognition scheme in Hong Kong, if established, and following this first part of the study, 16 specific “recognition” issues were raised for consultation. In this Submission, the PCPD will not render comments on all those 16 specific “recognition” issues as they do not involve data privacy consideration. The prospective second part of the study will focus on post-recognition issues including official documentation and privacy related matters (such as protection of gender history) as raised in Chapter 9 of the Consultation Paper which will become relevant only if the IWG takes the view that a gender recognition scheme should be established in Hong Kong. In this connection, the PCPD provides below our preliminary views on the privacy issues in light of the requirements under the Personal Data (Privacy) Ordinance (Cap 486) (“**PDPO**”).

## **Personal Data of Transsexual Persons**

2. The gender of an individual and any history of gender change amount to his personal data<sup>1</sup>, the processing of which must be in compliance of the PDPO, in particular the six Data Protection Principles (“**DPP**”) in Schedule 1 thereof. By reason of the intrinsic nature, and that mishandling may lead to prejudicial and discriminatory consequences, information about an individual’s gender change (including the medical diagnosis or treatments) is considered sensitive personal data and must be carefully protected.

3. If it is decided that a gender recognition scheme should be introduced in Hong Kong, there will be two sets of gender data concerning a transsexual person, namely the birth gender and the legally recognised gender, both of which should be handled with due care in order to protect the personal data privacy of the transsexual person. The PCPD will explain below the privacy concerns arising from the two sets of gender data and the applicable data protection principles.

## **Data Protection Principles**

4. For the purpose of this Submission, the following DPPs and provisions of the PDPO are applicable to both the birth gender and the legally recognised gender of a transsexual person: -

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<sup>1</sup> “Personal data” is defined under the PDPO as meaning any data – (a) relating directly or indirectly to a living individual; (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and (c) in a form in which access to or processing of the data is practicable.

- (i) Accuracy and Erasure - DPP2(1)(a) provides that a data user must take all reasonably practicable steps to ensure that personal data is accurate having regard to the purpose for which the personal data is or is to be used. Further, DPP2(2) and section 26 of the PDPO stipulate that a data user must take all reasonably practicable steps to erase personal data which is no longer required for the purpose for which the data was used, unless such erasure is prohibited by law or it is in the public interest not to erase the data;
- (ii) Use - DPP3 provides that personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than the original purpose for which the data was to be used at the time of collection or a directly related purpose; and
- (iii) Access and Correction - DPP6 and Part 5 of the PDPO confer on a data subject the rights to request access to and correction of his personal data held by a data user.

### **Accuracy of Birth Gender**

5. Whether a data user has taken all reasonably practicable steps to ensure the accuracy of personal data as required under DPP2(1)(a) should be determined with regard to the purpose for which the data is or is to be used. In Hong Kong, the registration of births is maintained by the Registrar of Births and Deaths. Although the purpose of keeping the register of births is not explicitly spelt out in the Births and Deaths Registration Ordinance (Cap 174),

it is specified in Form DBR93A that the collection of information about a child (including the gender) is for various purposes, namely (1) to process the births and deaths registration, search and issue of births and deaths records; (2) to administer the births and deaths registration related ordinances; (3) to administer/ enforce the Immigration Ordinance (Cap 115) and Immigration Service Ordinance (Cap 331); (4) to process other person's application for immigration facilities; (5) statistics and research purposes; and (6) other legitimate purposes.

6. The birth gender of a transsexual person may be accurate for some of the purposes as mentioned in the paragraph 5 above but not be so for others. For example, in processing births registration or compiling statistics on births by reference to gender ratio, the birth gender would be accurate. However, in registering a marriage to which a transsexual person is a party, as recognised by the Court of Final Appeal in *W v. The Registrar of Marriage* (FACV 4/2012), the legally recognised gender rather than the birth gender would be accurate for that purpose. Hence, to comply with the requirements of data accuracy under DPP2(1)(a), the Government shall take into account the various legitimate purposes of keeping a person's gender information in order to ascertain whether the birth gender or the legally recognised gender is considered accurate personal data of a transsexual person.

### **Whether “Outdated” Gender Information Should be Erased?**

7. Strictly speaking, the birth gender as appeared on the birth certificate (even after gender change) is arguably accurate as it shows the information at

the time of birth. However, one may also argue that such information which no longer reflects the current status of a transsexual person is considered outdated. Questions then arise as to whether the “outdated” birth gender of a transsexual person should be erased. It is to be noted that the requirements under DPP2(2) and section 26 of the PDPO to erase personal data which is no longer required for the collection purpose are subject to exceptional circumstances, namely (1) such erasure is prohibited under any law; or (2) it is in the public interest (including historical interest) for the data not to be erased.

8. The PCPD acknowledges that the keeping of a transsexual person’s birth gender by the Government is justified in some circumstances. For example, the information is necessary for verifying the criminal records of a transsexual person by law enforcement authorities. The birth gender may also be relevant in determining the medical diagnosis or treatment of a transsexual person especially when he is too ill to provide the information to the doctor. It is thus recognised that maintaining a person’s birth gender is necessary for legal or medical purposes. The questions are how such information is to be maintained and under what circumstances it may be revealed, bearing in mind that protection of the personal data privacy of a transsexual person must be balanced against other public and social interests.

9. Reference may also be made to the privacy landscape in the European Union (“EU”) which has undergone significant changes. The EU General Data Protection Regulation explicitly provides data subject with a right to

erasure in specified circumstances<sup>2</sup>, for example, where personal data is no longer necessary for the purposes they were collected, or where the data subject withdraws his consent for processing, etc. Further, data controllers that make public disclosure of personal data (e.g. disclosure on the Internet) are also required to take reasonable steps, to inform other relevant controllers about the data subject's request for erasure of any links or copy of the data. However, it is to be noted that data controllers may object to the request for erasure by demonstrating the overriding legitimate grounds for continued processing.

### **Use of Birth Gender**

10. The PCPD recognises that a transsexual person is vulnerable to discrimination, and hence, the birth gender of a transsexual person is considered sensitive as it reveals the fact that the person had indeed undergone gender change. Generally speaking, the use (which includes transfer and disclosure) of birth gender for the purpose of processing a search of the birth records shall fall within the specified purposes of collecting the data by the Registrar of Births and Deaths (see paragraph 5 above), and therefore the prescribed consent of the data subject for such use or disclosure is not required under DPP3. However, given the sensitivity of the gender information of a transsexual person, special caution should be exercised in processing a search of birth records.

11. The personal data privacy of a transsexual person may be jeopardised under the current system of search of birth records. At present,

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<sup>2</sup> See Article 17 of the General Data Protection Regulation, to be effective on 25 May 2018

any person may apply to the Registrar of Births and Deaths for a search of the birth record of an identified individual by providing the exact name and/or date of birth. If the exact name and/or date of birth are not available, a person may still conduct a general search of the birth records by reference to other information such as name of parents, address of birth/hospital in Hong Kong, and period for the search, etc. In other words, the birth gender of a transsexual person could possibly be exposed to anyone against his wish under the current system. From the perspective of data privacy protection, the PCPD recommends the Government to review the current system with regard to the above privacy consideration and in light of the recommendations made by the PCPD in the Survey of Public Registers Maintained by Government and Public Bodies issued on 28 July 2015<sup>3</sup>. Reference may also be drawn to the UK system which is discussed in more details below under the topic of use of the legally recognised gender.

### **Access and Correction Rights in respect of Birth Data**

12. It is the right of an individual to have access to his own personal data and to correct the same as guaranteed under DPP6 and Part 5 of the PDPO. Controversies over the accuracy of a transsexual person's birth gender may result in serious disputes between a data user and the transsexual person in processing a data correction request. A transsexual person who has acquired a legally recognised gender may seek to amend his birth gender as appeared on any documents (whether official or not) on the ground that such record is not

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<sup>3</sup> Available at [https://www.pcpd.org.hk/english/resources\\_centre/publications/surveys/files/survey\\_public\\_registers.pdf](https://www.pcpd.org.hk/english/resources_centre/publications/surveys/files/survey_public_registers.pdf)

accurate<sup>4</sup>. As explained in paragraph 6 above, the birth gender of a transsexual person is still accurate for certain purposes but may be considered not accurate for others. The matter must be carefully considered in Part 2 of the IWG's study and is particularly relevant for issues including official documentation and data privacy protection of the transsexual person.

### **Accuracy of Legally Recognised Gender**

13. As mentioned above, data accuracy should be determined having regard to the purpose for which the data is or is to be used. While the legally recognised gender which represents the transgender status of a transsexual person is considered accurate for various legal purposes, such as when the person is involved in gender specific offences, or exercising the right of succession by his legally recognised gender (assuming the relevant laws have been established or amended following introduction of the gender recognition scheme), it does not mean that the birth gender must be inaccurate for all purposes and should be deleted. Hence, the Government is recommended to formulate a mechanism for maintaining an "updated" record of the legally recognised gender of a transsexual person on the one hand, but without prejudice to the legitimate purposes for keeping proper record of the birth gender on the other.

### **Use of Legally Recognised Gender**

14. Compared with the birth gender, the legally recognised gender may be

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<sup>4</sup> By exercising his data correction right under DPP6 and section 22(1) of the PDPO



considered less sensitive as it is consistent with the physical appearance of a transsexual person. However, this legally recognised gender is equally protected under the PDPO which prohibits its use (which includes transfer and disclosure) for a new purpose without the prescribed consent of the transsexual person pursuant to DPP3. The Government must exercise due care in maintaining the two sets of gender records of transsexual persons and ensure that the information would not be used in a way exposing the transsexual persons to embarrassment or discrimination.

15. Concerning the mechanism of keeping two sets of gender records of transsexual persons, reference may be made to the UK gender recognition scheme as explained in paragraphs 3.62 and 9.17 of the Consultation Paper. It is noted that the recognition under the Gender Recognition Act 2004 is not retrospective, and the Gender Recognition Certificate issued by the Gender Recognition Panel does not re-write the gender history of the transsexual person. Instead, the Registrar General is required to maintain a separate Gender Recognition Register (“GRR”) apart from the UK birth register. The Registrar General will secure that the UK birth register is marked to show that the original entry for the birth of the transsexual person is superseded. However, such marking will not be shown on any certified copy of certificate compiled from the UK birth register. It is worth noting that the GRR will not be open to public inspection or search. In addition, an offence is created under the Gender Recognition Act 2004 for disclosing any gender recognition application or a person’s previous gender. To cater for the exceptional situations where disclosure of the protected information is justified, the Gender Recognition (Disclosure of Information) Order 2010 prescribes the

circumstances in which disclosure will not constitute an offence.

### **Protection of History of Gender Change**

16. The PCPD takes the view that the history of gender change should be protected and should not be made generally available to the public. An individual should be entitled to obtain an official record of his own history of gender change, being his personal data, by making a data access request under section 18(1) of the PDPO. In any other situation where consent of the individual concerned is not obtained, access to or disclosure of such history should be allowed only if the use of the data is for its original collection purpose or a directly related purpose. Disclosure of the information is also permissible if any of the exemption provisions under the PDPO apply. For example, the various situations as mentioned in paragraph 9.21 of the Consultation Paper in which the gender history is important can indeed be addressed by different exemption provisions. A party to a marriage who relies on the non-disclosure by the other party of his transsexual status to prove invalidity of consent to marriage may invoke the exemption for use of personal data in legal proceedings under section 60B of the PDPO. Law enforcement authorities may invoke section 58(2) of the PDPO for using personal data for the prevention or investigation of a crime. The exemption for health data under section 59 of the PDPO may be relevant if the information is required to prevent serious harm to the physical or mental health of the transsexual person or another individual.

## **Access and Correction Rights in respect of Legally Recognised Gender**

17. The PCPD repeats paragraph 12 above which applies to both the birth gender and the legally recognised gender of a transsexual person. The Government is further reminded to consider the issues arising from the discrepancies in gender records appearing on different documents and explore possible ways to achieve harmonisation.

## **Other Issue: Records Relating to Gender Recognition Maintained in the Electronic Health Record Sharing System (“eHRSS”)**

18. Information about an individual’s participation in the gender recognition scheme including the diagnosis of gender identity disorder and the treatments (surgical, hormonal or others) received is considered highly sensitive health data. If the individual receives the aforesaid treatment or assessment in public hospitals, it is likely that such sensitive health data would be shared in the eHRSS, and further shared with private healthcare providers to whom he has provided sharing consent, as long as it falls within the scope of eHR sharable data. Despite that the healthcare providers are under a general duty to ensure that the eHR data is accessed on a need-to-know basis, patients are not entitled to opt out from the sharing system in respect of any information that is considered sensitive from the patients’ own perspective. From the data privacy perspective, it is the PCPD’s stance that patients should be given autonomy and more control over such highly sensitive information. The Government may consider how this added aspect be further explored and taken forward in order to give full protection to the privacy of transsexual person in

the gender recognition scheme.

## **Concluding Remarks**

19. To conclude, the PCPD submits that the personal data privacy rights of transsexual persons should be respected in both the recognition stage and the post-recognition stage. In maintaining the two sets of gender data (i.e. the birth gender and the legally recognised gender) of transsexual persons, the Government is recommended to observe the PDPO in ensuring accuracy and lawful use or disclosure of the data and that the requests for access to or correction of the data would be properly handled. As to whether the alteration of a transsexual person's birth certificate should be allowed following recognition, it is recommended that the Government should formulate a mechanism for maintaining an "updated" record of the legally recognised gender on the one hand, but without prejudice to the legitimate purpose for keeping the record of the birth gender on the other. Access to the history of gender change should not be allowed without the prescribed consent of the individual unless such use of the data is for its original collection purpose or a directly related purpose, or where any exemption under the PDPO applies. The Government is also recommended to enhance patients' control over sensitive personal data (including information relating to gender recognition) maintained in the eHRSS.

20. The views set out in this Submission are general observations on data privacy issues arising from a gender recognition scheme if it is to be introduced in Hong Kong. The PCPD stands ready to offer further views on specific

issues from data privacy perspective when the policy decision and detailed plans in relation to gender recognition are available.

*Privacy Commissioner for Personal Data, Hong Kong*

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