

**INTER-DEPARTMENTAL WORKING GROUP
ON GENDER RECOGNITION**

CONSULTATION PAPER: PART 1

GENDER RECOGNITION

EXECUTIVE SUMMARY

June 2017

INTER-DEPARTMENTAL WORKING GROUP ON GENDER RECOGNITION

CONSULTATION PAPER: PART 1

GENDER RECOGNITION

EXECUTIVE SUMMARY

The Inter-departmental Working Group on Gender Recognition (IWG) was set up in January 2014 to consider legislation and incidental administrative measures that may be required to protect the rights of transsexual persons in Hong Kong in all legal contexts and to make such recommendations for reform as may be appropriate.

This Executive Summary is an outline of the IWG's Consultation Paper on the first part of its study. Given the controversial nature of the issues involved, the IWG maintains an open mind and does not have any preferred position at this moment. Accordingly, the Consultation Paper seeks to discuss the relevant issues as objectively as possible so as to solicit views from the community.

Copies of the Consultation Paper can be obtained from the internet at <http://www.iwggr.gov.hk>.

The Consultation Paper includes a summary of issues for consultation, which is also appended to this Executive Summary, to seek the views of the public on a range of matters. The IWG would also welcome any views, comments or suggestions on any of the other relevant issues discussed in the Consultation Paper. The consultation period will last until 31 October 2017.

Introduction

1. There are people in society who have the feeling that they were born into the wrong body, because the gender¹ they identify with is incompatible with the gender they were assigned at birth. The Court of Final Appeal (“CFA”) in the case of *W v Registrar of Marriages* (“W’s case”)² observed that:

“[P]eople who have the misfortune of suffering from the gender identity disorder or gender dysphoria of transsexualism possess the chromosomal and other biological features of one sex but

1 The terms “gender” and “sex” are sometimes used interchangeably, or may be specific to certain contexts. For further discussion of the definitions of these terms, see Chapter 1 of the Consultation Paper.

2 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013) (CFA). The CFA judgment was handed down on 13 May 2013. The CFA’s final orders in the case were made on 16 July 2013.

*profoundly and unshakeably perceive themselves to be members of the opposite sex. They may persistently experience acute emotional distress, feeling themselves trapped in a body which does not correspond with what they firmly believe to be their 'real' sex".*³

2. Through services provided by the Hospital Authority, there are a range of treatment options available in Hong Kong for people having gender identity disorder or gender dysphoria. These include:

- initial psychiatric assessment of the condition of gender identity disorder or gender dysphoria;
- ongoing assessment of the person's ability to live in the preferred gender role (commonly referred to as the "real life experience");
- prescribed hormonal treatment of the opposite sex; and
- sex reassignment surgery ("SRS") (ie, the surgical treatment which is targeted at bringing a transsexual person's physical appearance or characteristics into conformity with his or her gender identity).⁴

3. As well as emotional and physical issues, people with gender identity disorder or gender dysphoria might face complex social and legal issues:

*"Gender underpins most of our societal arrangements and statutes. It is an essential quality, concerning our sense of who we are and what sort of people we identify with. The process of transition - of recognising and acting on the desire to 'come out' in the opposite gender - is a very significant step to take and one which may have profound effects on relationships - with families, employers and workmates, friends and acquaintances."*⁵

3 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013) (CFA), at paragraph 7.

4 In 2014, a retrospective analysis was conducted of all gender identity disorder or gender dysphoria patients who had been under treatment at the Hospital Authority's Psychiatric Clinics from 1 January 2010 to 31 December 2011. Under the analysis, 80 patients' clinical notes were reviewed. Of these 80 patients, 62 indicated a preference for undergoing SRS of different forms, in respect of 11 there was no record of SRS preference and 7 indicated they preferred not to undergo SRS. For the 7 patients preferring not to undergo SRS, it was felt that psychotherapy only was needed to manage their distress. Of the 62 patients indicating a preference for SRS, 50 have received or will receive SRS in different forms. These 50 patients experienced the "severe" form of gender identity disorder or gender dysphoria, ie, transsexualism, in that they have a strong desire to undergo transition to a sex other than that assigned at birth, typically through hormones and surgery. The Hospital Authority has estimated that around 30 new cases per year would be referred for psychiatric assessment for gender identity disorder or gender dysphoria, and that around one in 10 of these would require assessment for SRS.

5 See Department for Constitutional Affairs (UK), "Government Policy concerning

4. For those who are living in their acquired⁶ gender, privacy and possible discrimination are likely to be key concerns. They may want to keep their birth gender private and be legally recognised in their new gender for all purposes. Legal gender recognition generally refers to the official recognition of a person's gender identity (self-perception of being male or female) in law, and as reflected in public registries and key identification documents. It means that in the eyes of the law, a person is seen to be of his or her acquired gender, as opposed to the gender that he or she was assigned at birth, and usually leads to significant legal consequences.⁷

5. In certain circumstances, a change of gender is recognised in Hong Kong where the issue is one of identification rather than legal status, and a transsexual person who has undergone full SRS (ie, the removal of the original genital organs and construction of some form of genital organs of the opposite sex) may apply for a change in the sex entry on their Hong Kong Identity Card ("*HKIC*") and, if successful, will be issued with a replacement HKIC reflecting their reassigned gender.⁸ A successful applicant may also separately apply to make corresponding changes to other documents (eg, travel documents, driving licences, bank accounts and educational certificates) as necessary.

6. There is currently no legislation in Hong Kong which provides for the recognition of the reassigned, acquired or preferred gender of a person for all legal purposes. Government departments and private bodies are not required by law to accept the sex entry on a person's HKIC as that person's legal gender. Neither is there any mechanism to have the sex entry on a person's birth certificate amended to reflect his or her reassigned, acquired or preferred gender.⁹

Transsexual People" (Archived Content), available at:

<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/constitution/transsex/policy>.

6 The terms "*reassigned*" and "*preferred*" are sometimes used interchangeably with the term "*acquired*" in this context. Also, where appropriate, the terms "*they*" and "*their*" are used in place of "*he/she*" and "*his/her*" in the Consultation Paper.

7 Eg, in the United Kingdom, section 9(1) of the Gender Recognition Act 2004 provides that once a full gender recognition certificate is issued to an applicant, the person's gender becomes for all purposes the acquired gender.

8 Pursuant to Regulations 14 and 18 of the Registration of Persons Regulations (Cap 177A). The existing procedures and required evidence for amendment of sex entry on the HKIC are set out in the administrative guidelines of the Immigration Department: see guidelines on the procedures and supporting documents for applications to change the sex entry on identity cards, which are available at the website of the Immigration Department: http://www.immd.gov.hk/eng/faq/faq_hkic.html. (Such guidelines have been formulated in consultation with the Hospital Authority and the medical sector.)

9 Pursuant to section 27 of the Births and Deaths Registration Ordinance (Cap 174), a birth certificate cannot be amended unless there is any clerical error, or an error of fact or substance with the production of proof. Any correction of errors of fact or substance is done in the margin of the birth certificate without any alteration of the original entry.

Establishment of the IWG on Gender Recognition

Background

7. In May 2013, the CFA ruled in *W*'s case that a transsexual person who had undergone full SRS should be entitled to marry a person of the sex opposite to his or her reassigned gender.¹⁰

8. While the focus of *W*'s case was on the law of marriage, the CFA also commented on the problems facing transsexual persons in other areas of law, as well as the treatment of persons who have not undertaken any SRS or have not fully completed SRS. The CFA observed that the Government should consider how to address problems facing transsexual persons in all areas of law by drawing reference to overseas law and practice, such as the United Kingdom's Gender Recognition Act 2004.

9. In response, the Government established the Inter-departmental Working Group on Gender Recognition ("*IWG*") on 13 January 2014 to follow up on the said observations of the CFA. For the avoidance of doubt, it should be noted from the outset that same-sex marriage or civil partnership is outside the scope of the *IWG*'s study.

Terms of reference

10. The terms of reference of the *IWG* are:

- “1. To consider legislation and incidental administrative measures that may be required to protect the rights of transsexual persons¹¹ in all legal contexts, and to make such recommendations for reform as may be appropriate.
2. For the aforesaid purpose, to conduct consultations and to engage the assistance of such experts or professionals as may be appropriate.”

Membership

11. The *IWG* is chaired by the Secretary for Justice, with members from the legal community and representatives of relevant bureaux. The members are:

10 A more detailed discussion of *W*'s case is set out in Chapter 2 of the Consultation Paper.

11 “The World Health Organisation classifies transsexualism as a species of gender identity disorder involving: ‘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 anatomical sex, and a wish to have surgery and hormonal treatment to make one’s body as congruent as possible with one’s preferred sex.’”: see Court of Final Appeal judgment in *W v The Registrar of Marriages*, [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at para 5, quoting The World Health Organisation, *International Statistical Classification of Disease and Related Health Problems* (version 10), F64.

Mr Rimsky Yuen, SC, Secretary for Justice (Chairman)

Mr Stewart Wong, SC

Mr Eric Cheung, Principal Lecturer, University of Hong Kong

Miss Rosanna Law, JP, Deputy Secretary for Constitutional and Mainland Affairs¹²

Miss Amy Yuen, Deputy Secretary for Food and Health (Health)¹³

Ms Maggie Wong, JP, Deputy Secretary for Security.

12. Such a composition is needed because the scope of the IWG's work involves broad-ranging legal, health and social issues cutting across the portfolios of different bureaux and departments of Government, as well as detailed international legal and social research.¹⁴ (The CFA observed in *W's* case that in addressing potential problems which might arise in certain areas, it was necessary to strike a balance between the rights of transsexual persons on the one hand and the rights of others who might be affected by recognition of the gender change on the other.¹⁵ In the circumstances, a comprehensive and objective review of the relevant issues is necessary when considering the need for appropriate legal measures to address the problems facing transgender or transsexual people.)

Methodology adopted for the IWG's study

Meetings

13. The IWG commenced its work at the end of January 2014 and has held 27 meetings to-date, including 9 informal meetings to receive briefings from relevant experts and a range of stakeholders.

Scope of the overall study

14. The scope of the IWG's study covers a consideration of both recognition and post-recognition issues. For the first part of its study, the IWG has focused on recognition issues, which cover mainly overseas experiences and legal issues which would underlie the operation of a formal gender

12 Since September 2016. Miss Law was preceded by Mr Gordon Leung, JP, from January 2014 to September 2016, (then) Deputy Secretary for Constitutional and Mainland Affairs.

13 Since November 2016. Miss Yuen was preceded by Mr Davey Chung, from January 2014 to November 2015, (then) Deputy Secretary for Food and Health (Health), and Ms Wendy Au, (then) acting Deputy Secretary for Food and Health (Health) from November 2015 to May 2016.

14 The IWG's Secretary is Ms Michelle Ainsworth, Principal Government Counsel, assisted by Mr Godfrey Kan, Deputy Principal Government Counsel, Ms Jenny Law, Senior Government Counsel and Mr Winson So, Government Counsel.

15 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraphs 127 and 128.

recognition scheme in Hong Kong, if established.

15. The second part of the IWG's study will focus on post-recognition issues which will become relevant in the event that the IWG takes the view that a gender recognition scheme should be established in Hong Kong. In this connection, the IWG will review all the existing legislative provisions and administrative measures in Hong Kong which may be affected by a gender recognition scheme, so that any required legislative or administrative reform can be followed up by the Government.

16. As the scope of a possible gender recognition scheme has yet to be determined at this stage, the IWG's study has necessarily included looking at the broader position of transgender persons.¹⁶ However, for the avoidance of doubt, it should be noted that other issues – such as same-sex marriage, civil partnership and discrimination against sexual minorities – are outside the scope of the IWG's study.¹⁷

The Consultation Paper: Recognition issues

Scope of this part of the IWG's study

17. The Consultation Paper sets out the IWG's observations following its detailed study on recognition issues. For this study, the IWG has conducted research on matters relating to transgender or transsexual persons, both in Hong Kong and internationally, including the condition known as gender identity disorder, or gender dysphoria. The IWG has also undertaken a comparative study of the legislation, schemes and case law on gender recognition in other jurisdictions, as well as the standards of international bodies in this area.

18. Issues which the IWG has been considering in this context

16 The IWG acknowledges that the terminology used in this area is evolving, with different authors, organisations and jurisdictions adopting different terms, such as "*transsexual*", "*transgender*" and "*trans*", to describe groups of persons including transsexual persons. Without prejudice to the different meanings of the terms, the terms "*transsexual*" and "*transsexual person*" are the generic terms used in this Consultation Paper (unless the specific context indicates otherwise) to describe a person having "*transsexualism*" issues as defined by the World Health Organisation, and as applied in the CFA decision in *W's* case. In contrast, and unless the specific context appears otherwise, the terms "*transgender*" and "*transgender person*" are used in this Consultation Paper in a generic sense to refer to a broader range of people who live, or desire to live, in the role of a gender which is not the one assigned to that person at birth, with or without the intention to undergo any medical interventions to bring their physical selves into alignment with their gender identity. For detailed discussion of the terminology used in this area, see Chapter 1 of the Consultation Paper.

17 Matters relating to concerns about discrimination faced by sexual minorities in Hong Kong were considered by the Advisory Group on Eliminating Discrimination against Sexual Minorities which was established in 2013 by the Government. More details about the work of the Advisory Group are set out in Chapter 5 of the Consultation Paper.

include:

- (a) whether a gender recognition scheme should be established in Hong Kong;
- (b) the criteria for determining whether a person is eligible for gender recognition (which may include residential requirements, minimum age, marital status and the number of years the person has lived in the reassigned, acquired or preferred gender); and
- (c) the procedure for gender recognition (including the medical and evidential requirements, what type of authority should be given the power to determine applications for gender recognition and whether foreign gender recognition decisions should be recognised).

19. As a matter of clarification, the possible arguments set out in the Consultation Paper and this Executive Summary regarding the various issues above are solely for the purpose of consultation and do not necessarily represent the IWG's stance on any of the issues raised. Therefore, no conclusion as to the IWG's stance should be drawn from the wording and mode of presentation of the Consultation Paper and this Executive Summary, nor from the citing or referring to the comments or arguments made by individuals or organisations which may be included in the discussion. It is also acknowledged that the list of possible arguments discussed in the Consultation Paper and this Executive Summary is by no means exhaustive.

Summary of gender recognition schemes in other jurisdictions

20. As part of its study, the IWG has reviewed the legislation, schemes and case law in over 100 overseas jurisdictions, as well as standards of international bodies. This comparative research is presented in Chapters 3 and 4 and Annexes A and B of the Consultation Paper.

21. It is apparent from the research that the issue of legal gender recognition has been gaining increased attention across the international stage, and there is an accelerating trend towards establishing formal mechanisms to recognise a transgender or transsexual person's acquired gender. Although there appears to be no single uniform approach in overseas jurisdictions to gender recognition and the issues it raises, it is evident that there is a growing emphasis on human rights norms to be applied and a trend towards more liberalisation, both in terms of the scope of the recognition of gender change and the prerequisites for it.

The United Kingdom (UK) gender recognition scheme

22. The gender recognition scheme which applies in the UK was described as a "*compelling model*" by the CFA in *W's* case. The legislation underpinning the UK's gender recognition scheme is the Gender Recognition Act 2004 which came into effect in April 2005. Under the Act, legal

recognition follows from the issue of a Gender Recognition Certificate by a judicial Gender Recognition Panel comprising qualified members from the legal and medical fields. Based on specified evidence which the applicant must submit, the Gender Recognition Panel is required to be satisfied that the applicant:

- has, or has had, gender dysphoria;
- has lived in the acquired gender throughout the preceding two years; and
- intends to continue to live in the acquired gender until death.¹⁸

23. The issuing of the Gender Recognition Certificate signifies that the applicant's new gender is officially recognised for all purposes; thus a male-to-female transsexual person will be legally recognised as a woman in English law, and a female-to-male transsexual person will be legally recognised as a man. Further, if a UK birth register entry already exists for the applicant, he or she is also entitled to a new birth certificate reflecting the acquired gender.

Examples of other overseas gender recognition schemes

24. There are different approaches taken in other jurisdictions regarding gender recognition, including: whether the recognition scheme is statutory, administrative or judicial; the pre-conditions for granting recognition in some form; and the legal implications once recognition is granted. Examples of such models include, but are not limited to, the following.

- A self-declaration model, which allows change of gender identity by means of the applicant submitting a specific declaration self-identifying in a particular gender without any medical intervention requirements, personal status restrictions¹⁹ or any procedural complexity (examples of jurisdictions adopting this model are Argentina, Denmark, Malta and Ireland).
- A surgery-free but otherwise detailed model requiring medical evidence, such as proof of diagnosis of gender dysphoria or transsexualism and proof of real life test (examples of jurisdictions adopting this model are the UK, Iceland, Germany, Spain and New York State (US)).
- A surgery-requiring model, but with fewer other medical evidence requirements (or ambiguous as to whether such requirements

18 Section 2(1), Gender Recognition Act 2004.

19 There are still certain restrictions other than the medical and personal status restrictions in those jurisdictions. For example, Argentina, Denmark and Ireland impose a minimum age restriction of 18 years. Denmark also requires a six months' waiting time since the application for confirmation of an application for legal change of gender.

exist), though including certain other restrictions, such as marital status exclusion (examples of jurisdictions adopting this model are New South Wales (Australia), Queensland (Australia), Liechtenstein and New Brunswick (Canada)).

- A model which includes a wide range of requirements like surgery, medical diagnosis of gender dysphoria, marital status exclusion, etc (examples of jurisdictions adopting this type of model are Japan, Mainland China and Finland).

Should Hong Kong have a gender recognition scheme? (Chapter 5)

25. Chapter 5 of the Consultation Paper examines, from various different perspectives, the divergent considerations for having a gender recognition scheme; including, but not limited to, legal, medical, political and sociological considerations.²⁰ In the interests of clarity, the IWG reiterates paragraph 19 above as its position regarding the arguments presented in Chapter 5, which are summarised below.

Arguments in support

26. The arguments in support of having a gender recognition scheme in Hong Kong which are discussed in Chapter 5 are set out in brief below.

(1) Recognition of innate gender identities²¹

27. Some people's innate sense of gender identity may differ from their sex assigned at birth, resulting in them living with a conviction that their physical anatomy is incompatible with their true gender role. In many cases, the inconsistency between their innate gender identity and their physical anatomy may give rise to acute distress. Arguments have been made that congruent biological factors should not be decisive for the purposes of legal recognition of a person's gender identity. Accordingly, it is argued that a gender recognition scheme should be introduced to provide legal recognition of a person's innate gender identity if that is inconsistent with his or her biological sex.

(2) Elimination of discrimination²²

28. It has been argued that the lack of recognition of the gender identities of transgender persons would be a major contributing factor to the marginalisation of these people in society, who may experience harassment and abuse in their daily lives. Some people contend that gender recognition policies and laws, coupled with anti-discrimination laws, can help prevent and/or lessen the stigma, discrimination, harassment and abuse transgender

20 As to the types of gender recognition schemes which might be adopted (eg, whether a legislative, administrative or judicial scheme, or a mixture of these models), see discussion in Chapter 8 of the Consultation Paper, and below at paras 92 to 104.

21 See Chapter 5 of the Consultation Paper, at paras 5.5 to 5.12.

22 See Chapter 5 of the Consultation Paper, at paras 5.13 to 5.17.

people often experience.

(3) *Human rights implications*²³

29. The absence of gender recognition mechanisms or the imposition of highly restrictive laws or regulations for gender recognition may have implications in the context of a transgender person's enjoyment of the right to privacy and their right to recognition as a person before the law. In a growing number of overseas countries or jurisdictions, the lack of arrangements for granting legal recognition of transgender persons' identities has been found to have infringed their human rights.

(4) *Growing international trend*²⁴

30. Legal gender recognition of transgender persons has now been granted in many overseas jurisdictions, including Europe and the Asia Pacific region, under their new or amended legislation, administrative measures or judicial decisions. It has been argued that Hong Kong should consider introducing a legal gender recognition scheme so as to keep up with international developments.

(5) *Legal certainty*²⁵

31. In the absence of a gender recognition scheme, the authorities' policies and legislation affecting transgender persons may be subject to challenge by way of judicial review. Legislation for gender recognition is arguably the only way to provide legal certainty in addressing the relevant rights and obligations of transgender persons. The prompt introduction of such legislation would provide more comprehensive coverage of the issues affecting them than can be achieved in the courts, by judges considering such issues on a case by case basis.

Arguments against

32. Below are the arguments against having a gender recognition scheme in Hong Kong which are discussed in Chapter 5.

(1) *Birth sex being the law of nature*²⁶

33. Medically speaking, the genetic sex of a person cannot be changed by way of surgery. Whilst transsexuality or transgenderism is regarded by some people as a purely medical problem with a medical solution, some people may regard transsexuality or transgenderism as a moral problem or even a deviation from the norm of the creation of two "*opposite*" sexes by God. Under what might be called the "*order of creation*" argument, it has been argued that the law should not countenance a definition of "*male or*

23 See Chapter 5 of the Consultation Paper, at paras 5.18 to 5.27.

24 See Chapter 5 of the Consultation Paper, at paras 5.28 to 5.30.

25 See Chapter 5 of the Consultation Paper, at paras 5.31 to 5.32.

26 See Chapter 5 of the Consultation Paper, at paras 5.33 to 5.37.

female” which depends upon how a particular person views his or her own gender.

(2) *Lack of social acceptance*²⁷

34. There is no extensive study on the degree of social acceptance of transsexualism in Hong Kong. Some people consider that gender recognition is too controversial to be accepted by the society as a whole. It has also been argued that any change to the laws and policies that determine one’s sex based on biological sex would lead to social confusion and social costs, and thus public consensus should be sought.

(3) *A fully-fledged gender recognition scheme is unnecessary*²⁸

35. Some people may argue that the current administrative practice for amendment of the sex entry on the HKIC is already sufficient to protect transgender persons’ rights and interests. On the other hand, some transgender persons may consider that an anti-discrimination law which protects them from discrimination on the grounds of gender identity, and additional measures to raise public awareness and understanding of transgender persons’ issues, are more practical in addressing their issues than a fully-fledged gender recognition scheme.

(4) *Potential unintended consequences*²⁹

36. There have been concerns expressed that legal gender recognition may have unintended consequences, including, for example, misuse of the gender change mechanism to conceal a person’s identity, the deconstruction of the concept of gender within society, the emergence of *de facto* same sex marriage, and increased demand for sex reassignment treatments, especially for young children.

(5) *The “slippery slope” argument*³⁰

37. It has been suggested that, since *W*’s case, activists have been seeking an expansion of rights so that *pre-operative* transgender persons could also have the right to marry in their preferred gender, and have their preferred gender legally recognised. Some people have expressed concern that the scope, strength and frequency of such lobbying might continue to increase in the future, and might lead to severe social and family problems arising out of, what some may consider to be, excessive and undue freedoms given under the law.

Views being sought in the current consultation

38. In light of the divergent views in this area illustrated above, the

27 See Chapter 5 of the Consultation Paper, at paras 5.38 to 5.39.

28 See Chapter 5 of the Consultation Paper, at paras 5.40 to 5.44.

29 See Chapter 5 of the Consultation Paper, at paras 5.45 to 5.46.

30 See Chapter 5 of the Consultation Paper, at paras 5.47 to 5.49.

IWG would welcome views from the public on whether a gender recognition scheme should be introduced in Hong Kong to enable a person to acquire a legally recognised gender other than his or her birth gender.³¹

Medical requirements for gender recognition (Chapter 6)

39. Chapter 6 discusses the possible arguments both in support of and against various medical requirements for a gender recognition scheme, should one be introduced. In the interests of clarity, the IWG reiterates paragraph 19 above as its position regarding the various arguments presented in Chapter 6, which are summarised below.

Requirement of a medical diagnosis

Arguments in support

40. The arguments in support of having a requirement of a medical diagnosis for gender recognition, which are discussed more fully in Chapter 6, are set out below.

*(1) Recognised medical condition*³²

41. In many jurisdictions including Hong Kong, the medical diagnosis of gender dysphoria, gender identity disorder or transsexualism is a pre-condition for accessing the medical interventions or treatments for transgender persons, and thus arguably it would be a practical means to distinguish transgender people from other minority groups if it is decided that a gender recognition scheme is intended to address the problems facing transgender persons.

*(2) Diagnosis being the “gatekeeper”*³³

42. Medical diagnosis is usually the very first step in legally or administratively determining whether a person belongs to a gender other than his or her sex assigned at birth. Moreover, medical diagnosis is arguably a reliable determinant of one’s gender identity with the use of international classification standards, such as ICD and DSM guidelines. It has been argued that setting a pre-condition of medical diagnosis for gender recognition would likely reduce the risks of fraud or misuse of the scheme by people who should not be entitled to the protection under it.

*(3) Prevalence of overseas models*³⁴

43. A requirement that an applicant for gender recognition has to

31 Issue for Consultation 1: see Chapter 5 of the Consultation Paper, following para 5.49; Chapter 10 of the Consultation Paper, at 245; and the Annex to this Executive Summary, at 29.

32 See Chapter 6 of the Consultation Paper, at paras 6.3 to 6.5.

33 See Chapter 6 of the Consultation Paper, at paras 6.6 to 6.7.

34 See Chapter 6 of the Consultation Paper, at para 6.8.

prove that he or she has, or has had, gender dysphoria, gender identity disorder or transsexualism has been expressly adopted in many jurisdictions. In some jurisdictions, the regime requires proof by psychiatrists and/or psychologists as regards the applicant's gender identity or an irreversible conviction of belonging to another gender.

Arguments against

44. The arguments against having a requirement of a medical diagnosis, discussed in Chapter 6, are set out below.

(1) *Possibility of misdiagnosis*³⁵

45. The requirement of a medical diagnosis for gender recognition relies heavily on the decisions of psychologists or psychiatrists. There have been studies which have demonstrated that some people, especially children, originally diagnosed as having gender dysphoria or gender identity disorder might later turn out to be gay or lesbian persons instead. Psychological or psychiatric misdiagnosis in this context may occur for various reasons, and some people argue that relying on a medical diagnosis for gender recognition may lead to a flawed or discredited system.

(2) *Self-determination being a human right*³⁶

46. It has been argued that proof of medical diagnosis should not be a pre-condition for gender recognition because persons of diverse gender identities should enjoy the rights to autonomy and self-determination. Under this argument, a self-declaration scheme without any requirement of medical diagnosis and intervention is therefore considered a good example, as showing respect for an individual's autonomy, self-determination and human dignity.

(3) *Growing trend of de-psychopathologisation of transsexualism and transgenderism*³⁷

47. A growing number of people have been advocating for "*de-psychopathologisation*" of transsexualism and transgenderism in order to remove the stigma attached to a person whose gender identity is different from his or her birth sex. It has been argued that diagnosis requirements may have similar stigmatising effects.

35 See Chapter 6 of the Consultation Paper, at paras 6.9 to 6.11.

36 See Chapter 6 of the Consultation Paper, at paras 6.12 to 6.13.

37 See Chapter 6 of the Consultation Paper, at paras 6.14 to 6.18.

Requirement of real life test³⁸

Arguments in support

(1) *Helps confirm the applicant really has gender dysphoria*³⁹

48. An argument in support of having a “*real life test*” requirement is that a reasonable period of real life experience of living in the preferred gender may help an applicant for gender recognition to identify whether they are really experiencing gender dysphoria or whether they may experience other psychiatric disorders or be experiencing other gender-related issues. (Currently, a two-year real life test is a precondition to assess whether a patient could undergo SRS in Hong Kong.)

(2) *Helps confirm that the applicant will remain living in the preferred gender*⁴⁰

49. It has also been argued that a requirement of a real life test may serve as strong evidence to show that an applicant for gender recognition is unlikely to change his or her decision to live in the preferred gender.

Arguments against

(1) *Difficulties with long-term observation*⁴¹

50. On the other hand, the arguments against having a requirement of a “*real life test*” include the contention that the test could be inaccurate and/or biased, given the difficulties in observing the behaviour of a person undergoing the test over a long period of time.

(2) *May appear to require accentuated version of preferred gender*⁴²

51. Such a requirement may also cause transgender persons to feel obliged to express an accentuated version of their preferred gender prior to obtaining official recognition. It may be the case that they would prefer to change their appearance more gradually, in order not to jeopardise their employment situation, etc.

(3) *May presuppose validity and necessity of medical intervention requirements*⁴³

52. Further, it has been argued that imposing a real life test requirement may presuppose the validity and necessity of medical intervention

38 See Chapter 6 of the Consultation Paper, at paras 6.19 to 6.25.

39 See Chapter 6 of the Consultation Paper, at paras 6.19 to 6.20.

40 See Chapter 6 of the Consultation Paper, at para 6.21.

41 See Chapter 6 of the Consultation Paper, at para 6.22.

42 See Chapter 6 of the Consultation Paper, at para 6.24.

43 See Chapter 6 of the Consultation Paper, at para 6.25.

requirements which are regarded by some people as a violation of the fundamental rights of the persons concerned.

Requirement for hormonal treatment⁴⁴

Arguments in support

(1) *Usually part of treatment for gender dysphoria*⁴⁵

53. The arguments in support of having a requirement for hormonal treatment include the contention that hormonal therapy is usually medically necessary to alleviate gender identity disorder or gender dysphoria, and is normally part of the procedures for treating persons with these conditions, and thus having hormonal treatment as a requirement for gender recognition is considered natural and reasonable.

(2) *May be “halfway house solution” if SRS not required*⁴⁶

54. Some people might find requiring hormonal treatment as a minimum to be a “*halfway house solution*” between a self-determination scheme and a scheme based upon full SRS. In case SRS is not required under a gender recognition scheme, a requirement for hormonal treatment may arguably provide an additional ‘safeguard’ to prevent an applicant from reverting back from their affirmed gender identity once changed.

Arguments against

(1) *May not be preferred or medically necessary*⁴⁷

55. On the other hand, the arguments against having a hormonal treatment requirement for gender recognition include the contention that not all transgender persons need or wish to receive hormonal treatment.

(2) *Can have serious side-effects*⁴⁸

56. Hormone therapy may involve side-effects, aggravating effects and contraindications which may prejudice the health of the person concerned.

(3) *May be violation of human rights*⁴⁹

57. Further, it has been argued that any requirement of unwanted medical intervention in order to obtain recognition of preferred gender is a violation of the fundamental human rights of the persons concerned, particularly their right to physical integrity and private autonomy.

44 See Chapter 6 of the Consultation Paper, at paras 6.26 to 6.32.

45 See Chapter 6 of the Consultation Paper, at para 6.26.

46 See Chapter 6 of the Consultation Paper, at paras 6.27 to 6.28.

47 See Chapter 6 of the Consultation Paper, at paras 6.29 to 6.31.

48 See Chapter 6 of the Consultation Paper, at paras 6.29 to 6.31.

49 See Chapter 6 of the Consultation Paper, at para 6.32.

Requirement of SRS

58. SRS generally refers to the surgical treatment undertaken by transsexual or transgender persons, usually with the effect of reconstructing and/or reassigning a person's body into the gender which they desire or prefer.

Arguments in support

59. The arguments in support of having a requirement for an applicant to have undergone SRS for gender recognition, as discussed in Chapter 6, are set out below.

(1) Traditional values of parenthood and family⁵⁰

60. People who favour a SRS requirement for gender recognition may argue that any incongruence between a person's expressed gender (physical appearance) and his or her legal gender might cause anxiety to the general public, and a balance should be struck between individual rights and the public interest. Further, it has been argued that a scheme that does not impose a mandatory SRS requirement would cause confusion about the borderline for gender identity of "male" and "female" which would bring about multifarious social problems. Some people may also argue that the confusion of gender identity would adversely affect the development of children and traditional family values in the community.

(2) Concerns about sex-specific facilities and situations⁵¹

61. Concerns have been expressed regarding the use of sex-segregated public facilities (such as toilets and locker rooms in gyms) by pre-operative transgender persons according to their preferred gender. It has been argued further that sex-segregated institutions would need to ensure the privacy of other people and the prevention of possible sexual abuses and assaults.

(3) SRS being a medical necessity⁵²

62. Some people contend that SRS is a medical necessity to treat gender dysphoria or gender identity disorder, and transgender people consciously agree to undergo SRS on the advice of their doctors and are not forced by anyone to do so. Therefore, some people take the view that the assertion that a SRS requirement for gender recognition would constitute torture or cruel, inhuman or degrading treatment is misconceived.

50 See Chapter 6 of the Consultation Paper, at paras 6.36 to 6.40.

51 See Chapter 6 of the Consultation Paper, at paras 6.41 to 6.45.

52 See Chapter 6 of the Consultation Paper, at paras 6.46 to 6.48.

(4) *Permanence of the transition*⁵³

63. It has been argued that a SRS requirement for gender recognition would ensure permanence or irreversibility of the transition, so that the applicants would not easily switch back to their original sex after legally changing their gender identity under the gender recognition scheme.

(5) *Concerns about possible fraud or security*⁵⁴

64. A gender recognition scheme without a SRS requirement may give rise to fraudulent or dishonest changes of identity, and cause public security concerns or social chaos, as people may easily disguise their gender.

(6) *Overseas approaches*⁵⁵

65. Requirements of surgery and sterilisation for gender recognition remain commonplace in many countries. Some people may argue that the SRS-based models adopted by Asian countries such as Singapore and Japan would have more reference value than the regimes of the European countries when considering a gender recognition scheme in Hong Kong.

Arguments against

66. Below are arguments discussed in Chapter 6 against a requirement for an applicant to have undergone SRS for gender recognition.

(1) *International trend towards a surgery-free model*⁵⁶

67. In the past decade, there has been an emerging trend globally towards the elimination of surgical and sterilisation requirements for gender recognition. The courts in a number of jurisdictions have subjected medical intervention conditions to increasingly strict scrutiny, or have abolished the mandatory SRS requirements for legal gender recognition altogether on the grounds that such requirements are incompatible with the concept of physical integrity enshrined in the relevant national constitution or international human rights standards.

(2) *Human rights implications*⁵⁷

68. In the view of various international human rights bodies and experts, the requirement of SRS as a precondition for legal gender recognition may constitute torture or cruel, inhuman or degrading treatment. It has been argued that involuntary, coerced and forced sterilisation should not be made a condition for access to social benefits including recognition of gender identity. Further, the SRS requirement has been challenged before courts and tribunals

53 See Chapter 6 of the Consultation Paper, at paras 6.49 to 6.50.

54 See Chapter 6 of the Consultation Paper, at paras 6.51 to 6.52.

55 See Chapter 6 of the Consultation Paper, at paras 6.53 to 6.54.

56 See Chapter 6 of the Consultation Paper, at paras 6.55 to 6.57.

57 See Chapter 6 of the Consultation Paper, at paras 6.58 to 6.68.

in at least ten jurisdictions based on the right to personal or physical integrity of transgender persons, the right to private and family life, the right to non-discrimination, the right to recognition as a person before the law, and/or the right to the enjoyment of the highest attainable standard of physical and mental health.⁵⁸

(3) *Psychiatric diagnosis which leads to SRS could be inaccurate*⁵⁹

69. A surgical requirement for gender recognition would mean that transgender persons must undergo SRS in order to obtain legal gender recognition. If they were originally misdiagnosed to have experienced gender identity disorder or gender dysphoria, or they subsequently regretted having undergone SRS, there might not be any possibility for them to change back to their biological sex under the scheme, as SRS already performed is in most cases irreversible.

(4) *SRS not a medical necessity*⁶⁰

70. For some transgender persons, SRS is only one of a range of possible treatment options, and some may find it unnecessary or undesirable, or even not medically possible due to various medical, personal or practical reasons. A gender recognition scheme which imposes a SRS prerequisite may compel these transgender persons to decide between honouring their personal preference and undergoing unwanted surgery to obtain legal gender recognition.

(5) *Fraud or security concerns not evidentially supported*⁶¹

71. Regarding the concerns about security or privacy in sex-segregated public facilities, some may observe that there is little evidence that transgender individuals present a security risk to other users in public bathrooms and changing rooms. It has been argued that on a daily basis and in almost all social situations, a person's genitals remain entirely private, even inside sex-segregated facilities or in work situations where a person is performing gender-specific duties. The existence of a gender recognition law would not make it legal to commit sexual assault or other sexually related crimes in public facilities. It has been argued that potential abuse of legal gender recognition simply needs to be monitored like all other potential abuses.

58 A summary of some recent case-law is set out in Annex C of the Consultation Paper for reference purposes only.

59 See Chapter 6 of the Consultation Paper, at paras 6.69 to 6.73.

60 See Chapter 6 of the Consultation Paper, at paras 6.74 to 6.82.

61 See Chapter 6 of the Consultation Paper, at paras 6.83 to 6.88.

Recognising SRS performed overseas⁶²

Arguments for

72. If SRS were to be adopted as a pre-condition for gender recognition, a question arises as to whether SRS performed overseas should be recognised. For transgender applicants who would like to go through, or have already gone through, relevant surgical procedures overseas during gender transition, and who plan to obtain gender recognition at a later date, the acceptance in Hong Kong of evidence of SRS undertaken overseas could arguably provide more flexibility.

Arguments against

73. On the other hand, a counter-argument is that it may be difficult to ascertain the degree of completion of SRS performed abroad without a reassessment by a local Hong Kong medical practitioner, which might be deemed an undue intrusion into privacy by the applicant concerned.

Views being sought in the current consultation

74. Given the broad-ranging and different views in this area, the IWG welcomes feedback from the public on matters relating to having all or any of requirements discussed, including requirements of a medical diagnosis,⁶³ “real life test”,⁶⁴ hormonal treatment,⁶⁵ SRS⁶⁶ and other medical requirements⁶⁷ (eg, psychotherapy⁶⁸) for gender recognition. (These issues for consultation are set out in Chapter 6 and summarised in Chapter 10 of the Consultation Paper, as well as in the Annex to this Executive Summary.⁶⁹)

62 See Chapter 6 of the Consultation Paper, at paras 6.89 to 6.92.

63 Issue for Consultation 2: see Chapter 6 of the Consultation Paper, following para 6.18; Chapter 10 of the Consultation Paper, at 245; and Annex to this Executive Summary, at 29.

64 Issue for Consultation 3: see Chapter 6 of the Consultation Paper, following para 6.25; Chapter 10 of the Consultation Paper, at 245; and Annex to this Executive Summary, at 29.

65 Issue for Consultation 4: see Chapter 6 of the Consultation Paper, following para 6.34; Chapter 10 of the Consultation Paper, at 246; and Annex to this Executive Summary, at 30.

66 Issue for Consultation 5: see Chapter 6 of the Consultation Paper, following para 6.93; Chapter 10 of the Consultation Paper, at 246; and Annex to this Executive Summary, at 30.

67 Issue for Consultation 6: see Chapter 6 of the Consultation Paper, following para 6.94; Chapter 10 of the Consultation Paper, at 247; and Annex to this Executive Summary, at 31.

68 See Issues for Consultation 4 and 6. See Chapter 6 of the Consultation Paper, following paras 6.34 and 6.94, respectively; Chapter 10 of the Consultation Paper, at 246 and 247; and Annex to this Executive Summary, at 30 and 31. (We understand that psychotherapy is considered as a mainstay of care for adult patients diagnosed with gender dysphoria or gender identity disorder. While we have not elaborated in this Consultation Paper on arguments in support or against requirements for this type of treatment should a gender recognition scheme be introduced in Hong Kong, we would welcome views on this also.)

69 Issues for Consultation 2 to 6: see Chapter 6 of the Consultation Paper, following

Non-medical requirements for gender recognition (Chapter 7)

75. Chapter 7 discusses arguments both in support of and against various possible non-medical requirements for a gender recognition scheme, should one be introduced. These include requirements as to: nationality, citizenship, residency or domicile; minimum age; marital status; and parental status. In the interests of clarity, the IWG reiterates paragraph 19 above as its position regarding the arguments presented in Chapter 7, which are summarised below.

*Requirements relating to nationality, citizenship, residency or domicile*⁷⁰

76. If a gender recognition scheme were to be introduced in Hong Kong, one consideration would be whether the scheme should impose requirements on the applicants with regard to their legal position or civil status such as nationality, citizenship, residency, domicile, etc. In this context, there is no unified approach adopted by overseas jurisdictions.

77. In order to determine which requirement(s) (nationality, citizenship, residence or domicile) should apply under a gender recognition scheme, the rules of conflict of laws (an area of the law which deals with cases having a foreign element) should be taken into account. Based on our research so far, there appears to be little reference to the subject of gender recognition in this context.

78. Nationality, citizenship, residency and domicile are examples of “*connecting factors*”, a technical term frequently used in the conflict of laws context denoting the circumstances that create linkage between, *inter alia*, a person and a country. If a gender recognition scheme were to be introduced, it is arguable that Hong Kong would be entitled to determine which of these connecting factors should be applicable under its scheme, if any such factors were deemed necessary.

79. Chapter 7 sets out the general principles relating to the different types of connecting factors and their applicability under various Hong Kong laws, with a view to help determine which connecting factor(s), if any, may be the most suitable for a gender recognition scheme in Hong Kong.⁷¹

*Minimum age requirement*⁷²

Arguments in support

80. The arguments in support of having a minimum age requirement for gender recognition which are canvassed in Chapter 7 include: (i) medical interventions for legal gender recognition procedures are usually age-sensitive;

paras 6.18, 6.25, 6.34, 6.93 and 6.94, respectively; Chapter 10 of the Consultation Paper, at 290 to 292; and Annex to this Executive Summary, at 29 to 31.

70 See Chapter 7 of the Consultation Paper, at paras 7.3 to 7.34.

71 See Chapter 7 of the Consultation Paper, at paras 7.17 to 7.34.

72 See Chapter 7 of the Consultation Paper, at paras 7.35 to 7.45.

(ii) gender recognition is an important decision that a person has to be mature enough to make independently; and (iii) there are medical observations that gender dysphoria during childhood does not inevitably continue into adulthood.

Arguments against

81. On the other hand, counter-arguments include: (i) any age limit for gender recognition would be an arbitrary one, which may have implications on the applicant's right to non-discrimination on the grounds of age; (ii) children should have the right to preserve their identity as recognised by law without unlawful interference; and (iii) transgender children are able to express a consistent gender identity.

Requirement related to marital status⁷³

Arguments in support

82. A key argument made in support of having a requirement that an applicant for gender recognition should be unmarried or divorced is that such a requirement is necessary to avoid the situation where the transition of a spouse converts a heterosexual marriage into a same-sex marriage.

Arguments against

83. Counter-arguments against having such a requirement include: (i) as persons are permitted undergo SRS in Hong Kong while married, it would be illogical to then require them to divorce in order to obtain gender recognition; (ii) a marital status requirement for gender recognition might constitute an infringement of an applicant's rights to marry and to found a family, and to respect for private and family life, and their right to recognition before the law; and (iii) forced divorce might lead to other hardships on family life (eg, issues concerning custody of children of the family).

Requirement related to parental status⁷⁴

84. A requirement concerning parental status for gender recognition is not very common around the globe, and a stricter requirement, that an applicant must be "childless", is rarer.

Arguments in support

85. The main argument which has been put forward in support of this requirement is that granting gender recognition to a person who has a child might disturb the family order and the traditional concept of "family", and/or have an adverse impact on the child's welfare and his or her relationship with the parents.

73 See Chapter 7 of the Consultation Paper, at paras 7.46 to 7.63.

74 See Chapter 7 of the Consultation Paper, at paras 7.64 to 7.73.

Arguments against

86. On the other hand, the “childless” requirement has been criticised for being based on negative and stereotypical attitudes toward transgender people. This requirement might also have implications for a person’s right to respect for private life.

87. If, rather than requiring the applicant to be childless, the requirement is that the applicant has no child below a certain age, this is arguably more acceptable from the standpoint of striking a balance between child welfare and the self-determination of transgender persons. Nonetheless, the requirement of the absence of minor children is still considered as excessively strict by some, on the basis that it restricts the right to self-determination, and does not respect the individual dignity of, transgender persons.

Recognition of foreign gender change⁷⁵

88. As observed in Chapter 7, domestic recognition of a change of gender which has been legally recognised in a foreign jurisdiction is an issue within the context of conflict of laws, and as such, it is arguable that domestic recognition of the foreign gender change should be allowed when it is not inconsistent with the fundamental public policy of the domestic law and does not represent a serious infringement of human rights. To not provide this type of recognition might lead to cross-border administrative confusion due to different gender identities being stated on a transgender person’s identity documents issued by different jurisdictions.

89. If recognition of foreign gender change is to be allowed in Hong Kong, the next question is whether the foreign countries and territories to which this would apply should be limited to those which have certain requirements for gender recognition. This issue would hinge upon how a gender recognition scheme for Hong Kong is formulated, and what pre-conditions for gender recognition may be provided under the scheme.

Views being sought in the current consultation

90. In light of the discussion on the various issues above, the IWG welcomes views from the public on possible non-medical requirements for gender recognition, including those related to: nationality, citizenship, residency or domicile;⁷⁶ minimum age;⁷⁷ marital status;⁷⁸ parental status;⁷⁹

75 See Chapter 7 of the Consultation Paper, at paras 7.74 to 7.87.

76 Issue for Consultation 7: see Chapter 7 of the Consultation Paper, following para 7.34; Chapter 10 of the Consultation Paper, at 247; and Annex to this Executive Summary, at 31.

77 Issue for Consultation 8: see Chapter 7 of the Consultation Paper, following para 7.45; Chapter 10 of the Consultation Paper, at 248; and Annex to this Executive Summary, at 31.

78 Issue for Consultation 9: see Chapter 7 of the Consultation Paper, following para 7.63; Chapter 10 of the Consultation Paper, at 248; and Annex to this Executive Summary, at 31.

and recognition of foreign gender recognition in Hong Kong.⁸⁰ Views are also sought on whether any other non-medical requirements would be appropriate.⁸¹ (These issues for consultation are set out in Chapter 7 and summarised in Chapter 10 of the Consultation Paper, as well as in the Annex to this Executive Summary.⁸²)

Options for a gender recognition scheme (Chapter 8)

91. Chapter 8 discusses different types of gender recognition schemes and examines the possible arguments for and against the adoption of any of these models for Hong Kong. In the interest of clarity, the IWG reiterates paragraph 19 above as its position regarding the arguments presented in Chapter 8, which are summarised below.

An administrative scheme vs a legislative scheme⁸³

92. The first part of the discussion in Chapter 8 contrasts the possible advantages and disadvantages of an administrative scheme model with a legislative scheme model for gender recognition.

An administrative scheme for gender recognition

Arguments in support

93. It is observed that an administrative scheme might involve maintaining or improving on the existing administrative measures for amending the sex entry on the HKIC. An argument in support of this option is that it would be a simpler and less costly approach than a legislative scheme option (discussed below). It might also be more suitable for Hong Kong, given that a HKIC is the major identification document applicable to most people in their daily lives.

Arguments against

94. However, an argument against an administrative scheme is that it may not have the effect of recognising the applicant's acquired gender for all legal purposes, leading to possible confusion of legal status in some circumstances and further litigation.

79 Issue for Consultation 10: see Chapter 7 of the Consultation Paper, following para 7.73; Chapter 10 of the Consultation Paper, at 249; and Annex to this Executive Summary, at 32.

80 Issue for Consultation 11: see Chapter 7 of the Consultation Paper, following para 7.87; Chapter 10 of the Consultation Paper, at 249; and Annex to this Executive Summary, at 33.

81 Issue for Consultation 12: see Chapter 7 of the Consultation Paper, following para 7.88; Chapter 10 of the Consultation Paper, at 250; and Annex to this Executive Summary, at 34.

82 See Issues for Consultation 7 to 12. See Chapter 7 of the Consultation Paper, following paras 7.34, 7.45, 7.63, 7.73, 7.87 and 7.88, respectively; Chapter 10 of the Consultation Paper, at 292 to 295; and Annex to this Executive Summary, at 31 to 34.

83 See Chapter 8 of the Consultation Paper, at paras 8.5 to 8.10.

A legislative scheme for gender recognition

Arguments in support

95. A major argument in support of having a legislative scheme (such as a fully-fledged Gender Recognition Ordinance) is that it can provide legal certainty and deal with complex issues concerning the status of transgender persons for all legal purposes without the need to separately amend a substantial number of Hong Kong's gender-specific legislative provisions.

Arguments against

96. On the other hand, possible arguments against having a legislative scheme for gender recognition is that it may take some time to enact and to implement, and, depending on the precise features of the model adopted, may involve the setting up of a panel or a board for determination of gender recognition applications. This would arguably be costly and might be subject to practical problems, such as a shortage of expertise in this area and difficulties in obtaining the services of those with expertise to sit on the panel or board.

*Possibility of adopting the UK or another jurisdiction's model*⁸⁴

Arguments in support

97. The CFA in *W's* case described the UK gender recognition scheme as a "*compelling model*" for consideration, with its clear and transparent procedures for legal recognition, and its broad scope covering also post-recognition issues. It has been argued that the UK model represents a realistic approach for Hong Kong, given that it is likely to be "*too far-fetched*" to expect the Hong Kong community to accept a self-determination model for gender recognition at this stage.

Arguments against

98. However, on the other hand it has been observed that the laws in the UK and Hong Kong are different in significant respects; in particular, that the UK law has legalised civil unions and same-sex marriage whereas no similar laws have been passed in Hong Kong. Therefore, if legislation along the lines of the UK model were to be adopted in Hong Kong, certain modifications might have to be made (eg, in relation to the provisions relating to marital status of the applicants).

*The decision-making authority*⁸⁵

99. It has been argued that a specific authority resembling the UK Gender Recognition Panel, which would make an assessment on whether

84 See Chapter 8 of the Consultation Paper, at paras 8.11 to 8.16.

85 See Chapter 8 of the Consultation Paper, at paras 8.17 to 8.20.

recognition should be granted based on the evidence submitted by the applicants for gender recognition, could serve as a “*gate-keeper*” to safeguard against premature or frivolous applications being made. However, a potential obstacle to establishing this type of authority is the foreseeable difficulty of engaging sufficient medical experts with expertise in the field of transgenderism to sit on such an authority.

A “*dual-track*” gender recognition scheme⁸⁶

100. Another possible option to deal with applications for gender recognition is to implement a “*dual-track*” system, providing two different sets of procedures with: (a) different criteria for gender recognition (eg, SRS being a compulsory requirement under one track, while the other allows less stringent qualifications); and/or (b) different legal consequences arising from the different application tracks (eg, gender recognition granted for all or partial legal purposes under one track, or with changes of gender marker on different identification documents under another track). Various hypothetical dual-track models are set out in Chapter 8⁸⁷ as examples of how a dual-track model might work. For clarification, the hypothetical models are for illustration only and do not represent the IWG’s stance or preferences regarding any of them.

Arguments in support

101. Such a system may be able to provide flexibility to applicants with different personal circumstances and needs, and would constitute a “*halfway house*” between liberal and more restrictive approaches to requirements for gender recognition.

Arguments against

102. In terms of counter-arguments, there may be doubts about the practicality of a halfway house approach, because of the risk of the relatively easier track being overwhelmingly utilised while the more strict track(s) become redundant. Also, because of having different application tracks with different legal outcomes, this may cause more gender confusion in society, and consequential legal issues could arise from this.

Views being sought in the current consultation

103. The IWG welcomes any comments or views from the public on the various models and related issues discussed, including: the type of gender recognition scheme;⁸⁸ possible adoption of the UK or another jurisdiction’s gender recognition model;⁸⁹ the authority to determine applications for gender

86 See Chapter 8 of the Consultation Paper, at paras 8.21 to 8.34.

87 See Chapter 8 of the Consultation Paper, at paras 8.26 to 8.34.

88 Issue for Consultation 13: see Chapter 8 of the Consultation Paper, following para 8.10; Chapter 10 of the Consultation Paper, at 250; and Annex to this Executive Summary, at 34.

89 Issue for Consultation 14: see Chapter 8 of the Consultation Paper, following para

recognition;⁹⁰ a possible dual-track gender recognition scheme;⁹¹ and any other form of proposed gender recognition model. (The relevant issues for consultation are set out in Chapter 8 and summarised in Chapter 10 of the Consultation Paper, as well as in the Annex to this Executive Summary.⁹²)

Other related matters (Chapter 9)

104. Chapter 9 provides general information and discussion on two other related issues: (1) the alteration of an applicant's birth certificate following gender recognition; and (2) protection of gender history. As these matters are considered to be "*post-recognition*" issues pertaining to the effect of a recognised change of legal gender, the Consultation Paper does not pose specific questions on these topics for consultation. Nonetheless, the IWG would welcome views from the public on any issues arising from these matters. In the interest of clarity, the IWG reiterates paragraph 19 above as its position regarding the arguments presented in Chapter 9, which are summarised below.

*Alteration of birth certificate following gender recognition*⁹³

Arguments in support

105. With regard to the possibility of allowing alteration of a transgender person's birth certificate following recognition, arguments which have been made in support of such a proposal include: (i) the inability of transgender persons to change their birth certificates would cause their biological sex to be revealed against their wishes whenever they are required to produce their birth certificate, which would arguably make them vulnerable to prejudice and discrimination; and (ii) as there is already a mechanism in place under our current law to permit the alteration of birth certificates, the assertion that the function and integrity of the birth record system would be undermined if transgender persons are allowed to alter their birth certificates is misconceived.

Arguments against

106. On the other hand, the arguments against this proposal which are referred to in Chapter 9 include: (i) allowing changes to the historical record would undermine the function and integrity of the birth record system; (ii)

8.16; Chapter 10 of the Consultation Paper, at 250; and Annex to this Executive Summary, at 34.

90 Issue for Consultation 15: see Chapter 8 of the Consultation Paper, following para 8.20; Chapter 10 of the Consultation Paper, at 251; and Annex to this Executive Summary, at 35.

91 Issue for Consultation 16: see Chapter 8 of the Consultation Paper, following para 8.35; Chapter 10 of the Consultation Paper, at 251; and Annex to this Executive Summary, at 35.

92 See Issues for Consultation 13 to 16. See Chapter 8 of the Consultation Paper, following paras 8.10, 8.16, 8.20 and 8.35, respectively; Chapter 10 of the Consultation Paper, at 295 to 296; and Annex to this Executive Summary, at 34 to 35.

93 See Chapter 9 of the Consultation Paper, at paras 9.6 to 9.15 and 9.23.

verification of a transgender person's original sex could prevent forgery cases; and (iii) there are medical reasons for keeping the birth gender marker intact.

Protection of gender history⁹⁴

107. The considerations on whether or not to permit history of gender change to be searched and disclosed may have implications on the right to privacy guaranteed under Article 14 of the Hong Kong Bill of Rights. Some people may desire to keep information about their transgender status as private information. On the other hand, there might be situations where disclosure of a transgender person's gender history would be necessary for legal or policy reasons or for the sake of the public interest, even though the consent for disclosure of the person concerned is not obtained.

Consultation

108. It is evident from the research presented in the IWG's Consultation Paper that there is no single uniform approach around the world to the procedure of gender recognition and the complex issues that it raises. On the one hand, there are serious medical, social and legal issues at stake for those diagnosed of having gender dysphoria which need to be tackled; on the other hand, some groups and individuals have expressed concerns about the impact of possible legislation in this area, and the wider consequences for the community of legal recognition of gender change.

109. Before finalising its recommendations in this area, the IWG wishes to invite members of the public to express their views on the issues set out in Chapters 5 to 9, and summarised in Chapter 10, of the Consultation Paper. The summary of issues is also appended to this Executive Summary (see Annex).

110. We would also welcome any views, comments or suggestions on any other matters discussed in the Consultation Paper.

111. The consultation period will last until 31 October 2017.

Secretariat
Inter-departmental Working Group
on Gender Recognition
June 2017

94 See Chapter 9 of the Consultation Paper, at paras 9.16 to 9.22.

SUMMARY OF ISSUES FOR CONSULTATION

Issue 1: Whether a gender recognition scheme should be introduced in Hong Kong (see near paragraph 5.49)

We invite views from the public on whether a gender recognition scheme should be introduced in Hong Kong to enable a person to acquire a legally recognised gender other than his or her birth gender.

Issue 2: Requirement of medical diagnosis for gender recognition (see near paragraph 6.18)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement of a medical diagnosis of, for example, gender dysphoria or gender identity disorder, for gender recognition, and why.
- (2) If the answer to sub-paragraph (1) is “yes”, what kind of evidence should be provided by an applicant for gender recognition.

Issue 3: Requirement of “*real life test*” for gender recognition (see near paragraph 6.25)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement of “*real life test*” for gender recognition, and why.
- (2) If the answer to sub-paragraph (1) is “yes”,
 - (a) what should an applicant for gender recognition have undertaken in order to satisfy a requirement that he or she has undergone a “*real life test*”;
 - (b) what should be the duration of a “*real life test*”; and
 - (c) what kind of evidence should be provided by an applicant for gender recognition to show that he or she has undergone a “*real life test*” for the specified duration.

- (3) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement of intention on the part of the applicant to live permanently the acquired gender, and why.
- (4) If the answer to sub-paragraph (3) is “yes”, what kind of evidence should be required.

Issue 4: Requirement of hormonal treatment and psychotherapy for gender recognition (near paragraph 6.34)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement for hormonal treatment and/or other medical treatment(s) (eg, psychotherapy) for gender recognition, and why.
- (2) If the answer to sub-paragraph (1) is “yes”,
 - (a) what kind of treatment(s) should be required and/or to what effect the should the treatment(s) achieve; and
 - (b) what kind of evidence should an applicant for gender recognition provide on this.

Issue 5: Requirement of SRS and other surgical treatments for gender recognition (near paragraph 6.93)

We invite views from the public on the following matters:

- (1) Insofar as the practice in Hong Kong is concerned, full sex reassignment surgery requires removal of the original genital organs and construction of some form of genital organs of the opposite sex. In the event that a gender recognition scheme is to be introduced in Hong Kong, should there be a requirement for the applicant to have undergone partial/full sex reassignment surgery, and if so, why?
- (2) If the answer to sub-paragraph (1) is “yes”,
 - (a) regarding the extent of the surgery required, whether there should be a requirement of full sex reassignment surgery as currently adopted in Hong Kong, and why;
 - (b) if the answer to sub-paragraph (a) is “no”, what type of partial sex reassignment surgery (ie the extent of the partial surgery)

would be sufficient, and why;

- (c) other than a partial/full sex reassignment surgery, what kind of surgery should be required (including non-genital surgery such as plastic surgery, reconstruction of chest, etc), and why;
- (d) what kind of evidence in this respect should be provided by an applicant for gender recognition;
- (e) whether sex reassignment surgery carried out in a country or territory outside Hong Kong should be recognised in Hong Kong for the purposes of gender recognition, and why; and
- (f) if the answer to sub-paragraph (e) is “yes”, what kind of evidence should be provided by the applicant.

Issue 6: Requirement of other medical treatments for gender recognition (near paragraph 6.94)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be any other medical requirements for gender recognition, and why.
- (2) If the answer to sub-paragraph (1) is “yes”, what kind of further evidence in this regard should be required.

Issue 7: Residency requirement for gender recognition (near paragraph 7.34)

We invite views from the public on (in the event that a gender recognition scheme is to be introduced in Hong Kong) whether the scheme should be open to, for example, permanent residents of Hong Kong, non-permanent residents, and/or any other persons (such as visitors), and why.

Issue 8: Age requirement for gender recognition (near paragraph 7.45)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a minimum age requirement for applying for gender recognition.
- (2) If the answer to sub-paragraph (1) is “yes”, what should be the

minimum age for the application: 12 years of age, 18 years of age, 21 years of age or another age; and the basis for choosing that age as the minimum age for the application.

- (3) If the answer to sub-paragraph (1) is “no”,
- (a) whether a minor (under the age of 18 years)⁹⁵ should not be allowed to make an application unless with the consent of his or her parents and/or legal guardians, and why;
 - (b) whether there should be additional requirements for a minor applicant which would not be required for an adult applicant, and why; and
 - (c) if the answer to sub-paragraph (b) is “yes”, what kind of requirement(s) and evidence should be required.

Issue 9: Marital status requirement for gender recognition (near paragraph 7.63)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be requirements relating to marital status of the applicant, and why.
- (2) If the answer to sub-paragraph (1) is “yes”,
 - (a) whether an applicant for gender recognition should be unmarried or divorced before making an application, and why;
 - (b) if the answer to sub-paragraph (a) is “no”, whether a married applicant should be granted only an *interim* gender recognition status, which may be a new basis for dissolution of marriage in Hong Kong, and why; and
 - (c) whether a full gender recognition status should be granted to a married applicant only after his or her marriage has been dissolved or his or her spouse dies, and why.

Issue 10: Parental status requirement for gender recognition (near paragraph 7.73)

We invite views from the public on the following matters:

95 The definition of “*minor*” is provided in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1).

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be requirements relating to parental status of the applicant, and why.
- (2) If the answer to sub-paragraph (1) is “yes”,
 - (a) whether an applicant for gender recognition should *not* be a father or mother of any child, no matter the age of the child, and why;
 - (b) whether an applicant for gender recognition should not be a father or mother of any child below a certain age limit, and why;
 - (c) if the answer to sub-paragraph (b) is “yes”, what the age limit should be, and why.

Issue 11: Recognition of foreign gender change (near paragraph 7.87)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether a gender change which is recognised under the law of a country or territory outside Hong Kong should be recognised in Hong Kong, and why.
- (2) If the answer to sub-paragraph (1) is “yes”,
 - (a) whether the relevant countries and territories outside Hong Kong should be limited to those having certain requirements for gender recognition, and why;
 - (b) if the answer to sub-paragraph (a) is “yes”, what should those requirements be;
 - (c) what kind of evidence should be required to demonstrate that the applicant has been legally recognised in his or her acquired gender in that particular country or territory; and
 - (d) what kind of connection between the applicant and the foreign country or territory (such as citizenship in the country or territory where the gender change was recognised) should be required.

Issue 12: Other possible non-medical requirements for gender recognition (near paragraph 7.88)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be any other non-medical requirement for gender recognition, and why.
- (2) If the answer to sub-paragraph (1) is “yes”, what kind of further evidence in this regard should be required.

Issue 13: Type of gender recognition scheme, if adopted (near paragraph 8.10)

We invite views from the public on, in the event that a gender recognition scheme is to be introduced in Hong Kong, whether the scheme should be: (a) a legislative scheme, based on a (new) specific ordinance; (b) a judicial scheme, whereby issues related to gender recognition are considered by the courts on a case by case basis; (c) a scheme involving non-statutory, administrative measures only; or (d) a scheme comprising some combination of these approaches, and why.

Issue 14: Adopting a scheme similar to overseas gender recognition scheme (near paragraph 8.16)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether the UK Gender Recognition Scheme is a suitable model to be adopted in Hong Kong, and why.
- (2) Whether there are any particular aspects of the UK model that should be adopted, or not adopted, or modified to suit the circumstances of Hong Kong, and why.
- (3) Whether another jurisdiction’s gender recognition scheme (or any particular feature or features of any such scheme) would be more suitable to be adopted in Hong Kong than the UK model, and why.
- (4) Whether there is any particular gender recognition scheme in another jurisdiction (or any particular feature or features of any such scheme) that should not be adopted in Hong Kong, and why.

Issue 15: Authority to determine applications for gender recognition (near paragraph 8.20)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether the authority to determine applications for gender recognition should be a statutory body performing quasi-judicial or judicial functions (such as the UK's GRP), an administrative body, the courts, or any professional body, and why.
- (2) If an authority other than the courts in sub-paragraph (1) is opted for, whether there are any particular aspects of that type of authority that should be adopted, or *not* adopted, or modified to suit the circumstances of Hong Kong, and why.
- (3) If an authority other than an administrative body and the courts in paragraph (2) is opted for, what type of members should be on the authority (with regard to the composition of the authority to determine gender recognition applications). For example, whether medical experts, such as psychiatrists, psychologists and surgeons, lawyers, other type(s) of members (eg, social workers) and/or overseas experts should be included, and why.

Issue 16: Adopting a possible dual-track gender recognition scheme (near paragraph 8.35)

We invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether a dual-track gender recognition scheme should be introduced with differing requirements (so that, for example, one person seeking full gender recognition for all legal purposes would have to satisfy stricter medical requirements (eg, gender reassignment surgery), while another person wishing to have only the sex marker changed on their Identity Card could be required to satisfy less stringent requirements (eg, proof of "*real life test*" for a specific period).
- (2) If the answer to sub-paragraph (1) is "yes", what should be the model of the dual-track scheme, and why.
- (3) If the answer to sub-paragraph (1) is "no", why it is so.