

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

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**CONSULTATION PAPER: PART 1  
GENDER RECOGNITION**

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**June 2017**



*This Consultation Paper has been prepared by the Inter-departmental Working Group on Gender Recognition (IWG). The English and Chinese versions of the Consultation Paper as well as the English version of the Annexes (not enclosed with the printed version of the Consultation Paper due to its length) can be found on the Internet at <http://www.iwggr.gov.hk>.*

*This Consultation Paper does not represent the final views of the IWG, and is circulated for comment and discussion only. This Consultation Paper seeks the views of the public on a number of issues, which are summarised in Chapter 10. The IWG would be grateful for comments on these issues, and any other views, comments or suggestions on any of the other relevant issues discussed in this Consultation Paper by 31 October 2017. All correspondence should be addressed to:*

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*It may be helpful for the IWG, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the IWG will assume that the response is not intended to be confidential.*

*The IWG may acknowledge by name in subsequent document or report anyone who responds to this Consultation Paper. If you do not wish such an acknowledgment, please say so in your response.*



# INTER-DEPARTMENTAL WORKING GROUP ON GENDER RECOGNITION

## CONSULTATION PAPER: PART 1 GENDER RECOGNITION

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## List of abbreviations

CA	The Court of Appeal
CFA	The Court of Final Appeal
CFI	The Court of First Instance
CRC	Convention on the Rights of the Child
DSM-5	Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GI Act	Births, Deaths and Marriages Registration Act 2017 (South Australia)
GIL	<i>Ley de Identidad de Género</i> (Gender Identity Law) (Argentina)
GRA	Gender Recognition Act 2004 (United Kingdom)
GRC	Gender Recognition Certificate (United Kingdom)
GRP	Gender Recognition Panel (United Kingdom)
GRR	Gender Recognition Register (United Kingdom)
HA	Hospital Authority
HKBOR	Hong Kong Bill of Rights
HKIC	Hong Kong Identity Card
ICCPR	International Covenant on Civil and Political Rights
ICD-10	International Statistical Classification of Diseases and Related Health Problems (10th Revision)

Icelandic GID Act	The Act on the legal status of individuals with gender identity disorder No. 57/2012 (Iceland)
ICESCR	International Covenant on Economic, Social and Cultural Rights
IWG	The Inter-departmental Working Group on Gender Recognition
Japanese GID Act	The Act on Special Cases in Handling Gender for People with Gender Identity Disorder (Japan)
LGBTI	Lesbian, gay, bisexual, transgender and intersex
MCO	Matrimonial Causes Ordinance (Cap 179)
MO	Marriage Ordinance (Cap 181)
NRIC	National Registration Identity Card (Singapore)
SOPCs	Specialist Outpatient Clinics
SRS	Sex Reassignment Surgery
The Team	National University Hospital Gender Identity Disorder Team (Iceland)
US	United States
<i>W's case</i>	<i>W v Registrar of Marriages</i> (FACV 4/2012)
WHO	World Health Organisation
WPATH	World Professional Association for Transgender Health
Yogyakarta Principles	Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity



# PREFACE

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## Introduction

1. The Inter-departmental Working Group on Gender Recognition (“IWG”) was established 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. This paper sets out the IWG’s observations on the first part of its study up to May 2017. 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, this paper seeks to discuss the relevant issues as objectively as possible so as to solicit views from the community.

2. At the outset, the IWG wishes to acknowledge 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. While a detailed discussion of the terminology used in this area is set out in Chapter 1, it should be noted that the terms “*transsexual*” and “*transsexual person*” are the generic terms used in this paper (unless the specific context indicates otherwise) to describe a person having “*transsexualism*” issues as defined by the World Health Organisation (“WHO”), and as applied in the Court of Final Appeal (“CFA”) decision in *W v Registrar of Marriages* (“W’s case”).<sup>1</sup> The WHO 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.’”<sup>2</sup>*

3. In contrast, and unless the specific context indicates otherwise, the terms “*transgender*” and “*transgender person*” are used in this 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

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

2 WHO, *International Statistical Classification of Diseases and Related Health Problems* (10th Revision) (“*ICD-10*”), F64, as quoted in the CFA judgment in *W’s case* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraph 5. The CFA also observed in paragraph 5, immediately before quoting the WHO’s definition, that, “it is now well-established that transsexualism is a condition requiring medical treatment.”

physical selves into alignment with their gender identity (self-perception of being male or female).

## **Background to the establishment of the IWG**

4. In *W's* case, the CFA ruled that a transsexual person who had undergone full sex reassignment surgery (“SRS”) should be entitled to marry a person of the sex opposite to his or her reassigned sex.

5. While the focus of *W's* case was on the law of marriage, in the course of its judgment given on 13 May 2013, the CFA also made comments 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.

6. In response, the Government established the 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***

7. 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 persons 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***

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

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 Affairs<sup>3</sup>

Miss Amy Yuen, Deputy Secretary for Food and Health (Health)<sup>4</sup>

Ms Maggie Wong, JP, Deputy Secretary for Security.

9. 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.<sup>5</sup>

## **Methodology adopted for the IWG's study**

10. 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 stakeholders.

### ***Scope of the IWG's study***

11. 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 recognition scheme in Hong Kong, if established. The second part of the IWG's study will focus on post-recognition issues which will become relevant in the event that a gender recognition scheme is eventually established in Hong Kong.

12. 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. 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.<sup>6</sup>

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3 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.

4 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.

5 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.

6 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.

### ***Recognition issues***

13. For the study on recognition issues, 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.

14. Within its study on recognition issues, the IWG has also been undertaking 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. The IWG observes that there is no single common approach to issues of gender recognition in the international arena, and the comparative information contained in this paper represents the findings of the IWG up to this point and is included for reference proposes only.

15. Issues that the IWG has been considering in this context 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 sex or gender); and
- (c) the procedure for gender recognition (including 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).

### ***Post-recognition issues***

16. With regard to the impact of gender recognition on *existing* laws and practice, it is anticipated that a major part of the work for the IWG will involve conducting a review of all the legislative provisions and administrative measures in Hong Kong which may be potentially affected by the recognition of a change of gender, so that any required legislative or administrative reform can be followed up by the Government.

17. The subject of gender recognition may touch on a wide range of legal areas, including administrative law, constitutional law, criminal law, data protection law, family law, human rights law, medical law, mental health law, property law and other areas.

18. Based on the information we have gathered so far, the number of statutory provisions potentially affected appears to be very substantial, with possibly many complicated consequential legal issues to be addressed. For example, the IWG may need to consider the effect of a recognised change of

gender on:

- (a) official documentation;
- (b) privacy and related matters (such as the need for legal protection of data about a person's gender history);
- (c) family and parenthood matters (such as the status of a subsisting marriage to which the applicant is a party and the applicant's parental rights and responsibilities);
- (d) criminal law, procedure and evidence matters (such as gender specific offences);
- (e) property and succession matters (such as the right of succession to property and the small house policy);
- (f) compensation and benefits matters (such as the right to receive social welfare benefits and pensions); and
- (g) tax related matters (such as entitlement to a married person's allowance).

## **Acknowledgements**

19. The IWG wishes to thank all the individuals and organisations it has consulted to-date for their invaluable assistance in providing information and advice during the preparation of this paper.

# CHAPTER 1

## INTRODUCTION AND RELEVANT TERMINOLOGY

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### Introduction

1.1 There are people in society who have the feeling that they were born into the wrong body.<sup>7</sup> This is because the gender<sup>8</sup> that they identify with is incompatible with the gender they were assigned at birth. The Government of the United Kingdom observed that:

*“The deep conviction that gender identity (believing oneself to be a man or a woman) does not match one’s appearance and/or anatomy is called gender dysphoria or gender identity disorder. The incongruity between identity and body can be so strong that individuals are driven to presenting themselves in the opposite gender. Some people experience this incompatibility of identity and body in childhood; others later in life. Once experienced, the feelings are unlikely to disappear but it may take many years to cross over - or ‘transition’ - completely from the original into the acquired gender.”<sup>9</sup>*

1.2 The situation for these people is a very complex one, not only from the emotional and physical perspectives, but also socially and legally:

*“Gender underpins most of our societal arrangements and*

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7 There is no official statistic on how many transgender and transsexual people there are in Hong Kong. In 2014, Joanne Leung, Chairperson of “Transgender Resource Centre”, estimated that there were around 200 to 300 transgender persons in Hong Kong, and amongst them about 100 had completed sex reassignment surgery in Hong Kong. See Hong Kong Christian Institute, Leslovestudy, Out and Vote and Queer Theology Academy (Collaborative), “同志及跨性別平權報告” (transliterated as “Tongzhi and Transgender Equality Report”), March 2014, available at: <https://issuu.com/makmingyee/docs/1>, at 10. According to the Food and Health Bureau, from 2010 to 2015, there were 495 patients diagnosed with gender identity disorder, and 40 persons have received partial or full sex reassignment surgery: see Annex 1 and Annex 2 to the government’s Press Release dated 9 December 2015, “LCQ7: Gender identity disorder-related services provided by public hospitals”, available at: <http://www.info.gov.hk/gia/general/201512/09/P201512090358.htm>.

8 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 paragraph 1.8, and following, below.

9 See Department for Constitutional Affairs (UK), “Government Policy concerning Transsexual People” (Archived Content), available at: <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/constitution/transsex/policy.htm>.

*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.*<sup>10</sup>

1.3 The CFA in *W's* case also recognised that “*people 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 profoundly and unshakeably perceive themselves to be members of the opposite sex*” and “[*t*]hey 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.”<sup>11</sup>

1.4 Research has revealed that people having gender dysphoria may also experience some other type of emotional stress or psychological disorder, such as depression, particularly in the workplace setting, where they may have to conceal their gender identity for avoidance of making colleagues feel uncomfortable or being stereotyped as mentally ill, HIV positive or promiscuous, etc. A significant relationship has been found to exist between gender identity disorder or gender dysphoria and unemployment, with higher unemployment levels amongst people having gender identity disorder or gender dysphoria than that in the general population of Hong Kong, as well as their experiencing negative treatment at work (such as being mocked or verbal insulted).<sup>12</sup> It has been reported that a significant proportion of transgender persons in Hong Kong have experienced discrimination in the areas of education, employment, service provision, disposal and management of premises as well as government functions, etc.<sup>13</sup> Further, it has been suggested that transgender people, especially those who are unable to get

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10 Same as above.

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

12 See CCC Chan, “Prevalence of Psychiatric Morbidity in Chinese Subjects with Gender Identity Disorder in Hong Kong” (Unpublished thesis, fellowship examination, Hong Kong College of Psychiatrists, 2013). See also Community Business, “Hong Kong LGBT Climate Study 2011-12: Survey Report” (2012); and Sam Winter, “Identity Recognition Without The Knife: Towards A Gender Recognition Ordinance For Hong Kong’s Transsexual People” (2014) 44 HKLJ 115, at 140 to 144.

13 See Hong Kong Christian Institute, Leslovestudy, Out and Vote and Queer Theology Academy (Collaborative), “同志及跨性別平權報告” (transliterated as “Tongzhi and Transgender Equality Report”), March 2014, available at:

[https://issuu.com/makmingyee/docs/\\_\\_\\_\\_\\_/1](https://issuu.com/makmingyee/docs/_____/1), at 12. See also Suen, Y.T., Wong, A.W.C., Barrow, A., Wong, M.Y., Mak, W.S., Choi, P.K., Lam, C.M., Lau, T.F., *Report on Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status*, Equal Opportunities Commission and Gender Research Centre of the Chinese University of Hong Kong, January 2016, at Chapter 4. At paragraph 5.2.1.2 of the said report, it was also observed that there are arguments that the prevalence of discrimination faced by LGBTI people in Hong Kong was not serious, and that the experiences of discrimination reported by them might be due to their over-sensitivity to some unpleasant encounters which had not been backed up with concrete evidence.

gender-affirming identity cards, are vulnerable to prejudice and discrimination whenever their transgender status is revealed.<sup>14</sup> This can in turn make it difficult to obtain and keep jobs and educational opportunities, access rented housing, banking and other basic services, maintain social relationship with their schoolmates, employers and colleagues, as well as put them at risk of prosecution when they use what to them are gender-appropriate toilet facilities, and at risk of being placed in gender-inappropriate accommodation when hospitalised or detained.<sup>15</sup>

1.5 Different transgender or transsexual people deal with their situation in different ways. Some may benefit from psychological or psychiatric treatment and others may also wish to have hormonal and surgical treatments to make their body as congruent as possible with their self-perception. The process of gender reassignment usually follows a series of recognised stages:<sup>16</sup>

- (1) *Social changes.* Socially, the person assumes a new name and gender, informs family and friends, lives and works in the chosen gender role (this stage is known as “*real life experience*” or “*real life test*”).
- (2) *Hormonal and other treatments.* Following psychiatric assessment, the person may be provided with cross-gender hormone prescriptions (where medically suitable) and possibly cosmetic means to aid appearance in the acquired gender.
- (3) *Surgical sex or gender reassignment.* Primary surgery may be performed to remove the sexual and reproductive characteristics of the original gender, and/or to create characteristics appropriate to the new gender. Such surgery is not usually performed,

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14 See Suen, Y.T., Wong, A.W.C., Barrow, A., Wong, M.Y., Mak, W.S., Choi, P.K., Lam, C.M., Lau, T.F., *Report on Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status*, Equal Opportunities Commission and Gender Research Centre of the Chinese University of Hong Kong, January 2016, at Chapter 4. It was noted at page 62 of the said report that a few transgender persons reported immediate dismissal when their transgender identity was made known to their employers.

15 See Sam Winter, “Identity Recognition Without The Knife: Towards A Gender Recognition Ordinance For Hong Kong’s Transsexual People” (2014) 44 HKLJ 115, at 121. See also Robyn Emerton, “Neither Here Nor There: The Current Status Of Transsexual And Other Transgender Persons Under Hong Kong Law” (2004) 34 HKLJ 245; Robyn Emerton, “Finding a voice, fighting for rights: the emergence of the transgender movement in Hong Kong”, *Inter-Asia Cultural Studies*, Volume 7, Number 2, 2006, at 254; and Suen, Y.T., Wong, A.W.C., Barrow, A., Wong, M.Y., Mak, W.S., Choi, P.K., Lam, C.M., Lau, T.F., *Report on Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status*, Equal Opportunities Commission and Gender Research Centre of the Chinese University of Hong Kong, January 2016, at paragraphs 4.2.1.7, 4.2.2.5, 4.3 and 5.2.1.2.

16 See Department for Constitutional Affairs (UK), “Government Policy concerning Transsexual People” (Archived Content), available at: <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/constitution/transsex/policy.htm>.

however, until the person has spent a significant period living successfully in the “*real life experience*”.

1.6 It has been observed that many people who are living in their acquired<sup>17</sup> gender want to keep their birth gender private, and want to be recognised legally in their new gender for all purposes. Many object to having to produce a birth certificate in their former name and gender as this may lead to embarrassment or discrimination. They consider that full recognition of their new gender for all legal purposes would ease many of the difficulties faced by them, as a person’s gender identity is important for many activities in daily life. They would wish their official documentation (such as birth certificates, passports, and national identity cards) to reflect their new gender identity. This may also extend to other certification or documentation related to identity or qualifications, such as diplomas, driver’s licences, national health insurance cards, etc. As noted by the Institute of Development Studies in the United Kingdom,

*“Since identification is required for most activities in daily life (enrolling in school, finding a job, opening a bank account, renting an apartment, or travelling across a border), the issue is one that is significant to the individuals concerned. An individual’s right to change the sex on his or her identity documents protects privacy and prevents discrimination and stigma on the basis of gender identity or gender reassignment.”*<sup>18</sup>

1.7 On the other hand, many groups or individuals in society have expressed concerns about the extent of legislative intervention and the possible implications of recognition of gender change. Further, there is no single uniform approach around the globe to the process of gender recognition and the complex issues that it raises. The CFA in *W*’s case recognised that in addressing potential problems which might arise in certain areas, it was necessary to strike a balance between the rights of transsexual persons and the rights of others who might be affected by recognition of the gender change.<sup>19</sup> 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.

## Terminology

1.8 In order to fully consider the issues relevant to the topic of gender recognition, it is desirable first to gain an understanding of certain key

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17 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 this Consultation Paper.

18 Institute of Development Studies, “Sexuality and Social Justice: A Toolkit”, available at: <http://www.spl.ids.ac.uk/sexuality-and-social-justice-toolkit/2-policy-and-law-what-you-need-know/21-how-law-works/215>.

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

definitions used in this area. (The discussion below aims to provide some background on how these terms are applied in this Consultation Paper, and is not intended to be an exhaustive discussion of the definitions of these terms.)

### ***Legal gender recognition***

1.9 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. Obtaining legal recognition in a person's acquired gender usually leads to significant legal consequences. For example, in the United Kingdom, 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.<sup>20</sup>

### ***Distinction between the terms "gender" and "sex"***

1.10 There appears to be no universally accepted definition of the terms "sex" and "gender" and a discussion of some of the definitions suggested in the literature is set out below. (As will be seen, although the terms "sex" and "gender" are sometimes used interchangeably, they are clearly distinguished in some contexts.)

1.11 The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* ("DSM-5") states that the terms "sex" and "sexual" refer to the "*biological indicators of male and female (understood in the context of reproductive capacity), such as sex chromosomes, gonads, sex hormones, and non-ambiguous internal and external genitalia*".<sup>21</sup>

1.12 In contrast, the definition of "gender" has been stated to relate to "*culturally and socially specific expectations of behaviour and attitude, mapped onto men and women by society. It include[s] self-definition, that is to say, what a person recognise[s] himself to be.*"<sup>22</sup> As such, a person's gender is not determined at birth.

1.13 Defined another way by the American Psychiatric Association in the DSM-5:

*"[G]ender is used to denote the public (and usually legally recognized) lived role as boy or girl, man or woman, but, in contrast to certain social constructionist theories, biological factors are seen as contributing, in interaction with social and*

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20 Section 9(1) of the Gender Recognition Act 2004 (UK).

21 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5), Arlington, VA: American Psychiatric Association; 2013, at 451.

22 *Bellinger v Bellinger* [2001] EWCA Civ 1140 (CA), paragraph 23.



*psychological factors, to gender development.*<sup>23</sup>

1.14 The CFA in *W's* case drew reference to the expert testimony of Dr Ho Pui Tat<sup>24</sup> in stating that:

*“It is possible to regard the sexual identity of an adult individual as determinable by reference to psychological and biological factors. The psychological aspects include gender identity (self perception of being male or female); social sex role (living as male or female); sex orientation (homosexual, heterosexual, asexual or bisexual); and sex of rearing (whether brought up as male or female).*

*The biological aspects include the genetic (the presence or absence of the Y chromosome); the gonadal (the presence of ovaries or testes); the hormonal (circulating hormones and end organ sensitivity); internal genital morphology (the presence or absence of male or female internal structures such as the prostate gland and the uterus); external genital morphology (the structure of male or female external genitalia); and secondary sexual characteristics (body hair, breasts and fat distribution).*

*In the vast majority of people, these indicia are all congruent, that is, they all point in the same direction, identifying the individual as either male or female. However, people 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 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.*<sup>25</sup>

### ***Distinction between “assigned gender” and “affirmed gender”***

1.15 The gender in which a person is expected to live is sometimes called “natal gender” or “assigned gender”, while his or her personal gender identity is sometimes referred to as “affirmed gender” or “experienced gender”.<sup>26</sup> It has been observed that “[t]he incongruence between the two can cause great discomfort and distress. These feelings are often called gender dysphoria.”<sup>27</sup>

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23 DSM-5, above, at 451.

24 Associate Consultant in Psychiatry at Kwai Chung Hospital.

25 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraphs 6 and 7.

26 Jack Drescher, Peggy Cohen-Kettenis and Sam Winter, “Minding the body: Situating gender identity diagnoses in the ICD-11,” *International Review of Psychiatry*, December 2012; 24(6): 568 to 577, at 569. It is noted that in the Court of Appeal in *W's* case, the term “psychological sex” was used: see (CACV 266/2010), at paragraph 11 (CA).

27 Jack Drescher, Peggy Cohen-Kettenis and Sam Winter, “Minding the body: Situating gender identity diagnoses in the ICD-11,” *International Review of Psychiatry*,

## **“Transsexualism” and “gender identity disorder” or “gender dysphoria”**

1.16 The terms “*transsexualism*”, “*gender identity disorder*” and “*gender dysphoria*” appear in authoritative medical diagnostic and classification manuals,<sup>28</sup> and there are explicit definitions for the formal diagnoses of these terms within the medical community.

1.17 The Court of First Instance (“CFI”) in *W*’s case defined “*transsexualism*” as:

*“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.”*<sup>29</sup>

1.18 The Court of Appeal (“CA”) in *W*’s case stated that:

*“Transsexuals are not content with living as a member of the sex they do not identify themselves with. They genuinely believe that they are members of the opposite sex and that their bodies are inconsistent with the sex to which they believe they belong and this often causes acute distress. The sex identity which a person believes he or she may have is known as the person’s psychological sex. Such a person suffers from a medically recognized condition known as transsexualism, also known as gender identity disorder or gender dysphoria.”*<sup>30</sup>

1.19 According to the World Professional Association for Transgender Health (“WPATH”):<sup>31</sup>

*“Gender dysphoria refers to discomfort or distress that is caused*

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December 2012; 24(6): 568 to 577, at 569.

28 le, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, text revision, 2013) (DSM-5); and World Health Organization, *International Statistical Classification of Diseases and Related Health Problems* (10th ed, 1994) (ICD-10).

29 (HCAL 120/2009), at paragraph 25 (CFI). See also the WHO’s classification of “*transsexualism*” in ICD-10 at paragraph 2 of the Preface to this paper.

30 (CACV 266/2010), at paragraph 11 (CA).

31 WPATH, formerly known as the Harry Benjamin International Gender Dysphoria Association (HBIIGDA), is an international multidisciplinary professional association that aims to promote evidence based care, education, research, advocacy, public policy and respect in transgender health. The WPATH published the *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, which are non-binding protocols aiming to articulate a professional consensus about the psychiatric, psychological, medical, and surgical management of gender identity disorders, and help professionals understand the parameters within which they may offer assistance to those with these conditions. The sixth version of the WPATH’s *Standards of Care* (also known as “The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders, Sixth Version (February 2001)”) was referred to by Cheung J in *W v Registrar of Marriages*, HCAL 120/2009 (CFI), judgment of 5 October 2010, at paragraph 30.

*by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics).<sup>32</sup>*

1.20 It is stated in DSM-5 that:

*"Gender dysphoria refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender. Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and/or surgery are not available."<sup>33</sup>*

1.21 Some commentators have observed that:

*"Gender dysphoria almost always has a social component; a sense of discomfort or distress associated with identifying as a gender other than the one that society recognises one to be (the social dysphoria).*

*It may also have a physical component; discomfort or distress about one's physical sexual characteristics, primary and/or secondary (the physical dysphoria, sometimes called bodily or anatomic dysphoria).*

*Clearly these two can be related; a trans person who feels that his/her body undermines his/her ability to be recognised in his/her experienced gender will inevitably also experience physical dysphoria.*

*Note that a trans person may experience social dysphoria without experiencing physical dysphoria. Such persons may not seek hormonal or surgical treatment, except in so far as they may help the person become better recognised in the experienced gender."<sup>34</sup>*

### ***Distinction between the terms "transsexual" and "transgender"***

1.22 There are no universally accepted definitions of the terms "*transsexual*" and "*transgender*". Some consider that the terms should be treated as synonymous. However, others consider "*transsexual*" to refer to a

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32 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 5. The WPATH goes on to comment: "*Gender nonconformity refers to the extent to which a person's gender identity, role, or expression differs from the cultural norms prescribed for people of a particular sex. ... Only some gender-nonconforming people experience gender dysphoria at some point in their lives*", same as above.

33 DSM-5, above, at 451.

34 The Professional Commons, "Task Force on Transgender Law Reform: Background Paper", including Sam Winter, "It's really time for change: Towards a Gender Recognition Ordinance for Hong Kong" (updated on 3 October 2013), at 2.

more restricted class of persons who usually desire to undergo hormonal treatment and SRS, as in *W's* case, while “*transgender*” tends to be more loosely defined and used to describe a wide range of gender nonconforming phenomena collectively. Some of the differing views on how these two terms should be defined are set out below.

#### *References in W's case*

1.23 In *W's* case, the CFI described the distinction between the terms “*transsexual*” and “*transgender*” as follows:

*“‘Transgender’ is a medically non-specific, broad term describing a wide spectrum of cross-gender experience by different people. It is not a medical diagnosis or condition. A transgender individual may be taken as somebody who seeks to take on the social role of the other gender, either full time or part time, often with the assistance of hormone therapy, but who may not desire sex reassignment surgery. On the other hand, transsexuals usually desire full hormonal transition and SRS.”*<sup>35</sup>

#### *Academics' approaches*

1.24 The CFI in *W's* case referred to two articles by Robyn Emerton, former Research Assistant Professor, Faculty of Law, University of Hong Kong, on the law relating to “*transsexual and other transgender persons*” in Hong Kong.<sup>36</sup>

1.25 In both articles, namely, “*Neither Here Nor There: The Current Status Of Transsexual And Other Transgender Persons Under Hong Kong Law*”<sup>37</sup> and “*Time For Change: A Call For The Legal Recognition Of Transsexual And Other Transgender Persons In Hong Kong*”,<sup>38</sup> Emerton gave a similar description of the terms “*transgender*” and “*transsexual*” as follows:

*“... the term ‘transgender’ is used as an umbrella term for all those persons who have a deep conviction that their biological sex, as designated at birth, is incompatible with their gender, that is, their psychological or inner sense of being male or female, and who have an overwhelming desire permanently to live and function in the opposite gender to their biological sex (their ‘chosen gender’). It includes transsexual persons, who intend to undergo surgical procedures to bring their physical self in alignment with their gender identity (usually referred to as ‘pre-operative transsexual persons’), and those who have already undergone such gender reassignment surgery (‘post-operative transsexual persons’). It also encompasses those other transgender persons who, for whatever reason, be it*

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35 HCAL 120/2009, at paragraph 27 (CFI).

36 HCAL 120/2009, at paragraph 37 (CFI).

37 (2004) 34 HKLJ 245.

38 (2004) 34 HKLJ 515.

*health-related or otherwise, do not intend to undergo surgery (although they may be receiving hormonal treatment), but who have nevertheless permanently adopted the opposite gender to their biological sex or have an overwhelming desire to do so. Sometimes, a broader meaning of the term ‘transgender’ is adopted in the literature, which also includes cross-dressers (colloquially referred to as ‘transvestites’). ...<sup>39</sup>*

1.26 In his 2015 book, *The Legal Status of Transsexual and Transgender Persons*, Dr Jens Scherpe<sup>40</sup> adopted the terminology coined by Professor Stephen Whittle OBE of Manchester Metropolitan University who defined “*transgender person*” to indicate all persons who live, or desire to live, in the role of a gender which is not the one designated to that person at birth, while “*transsexual person*” is meant to refer to those transgender persons who desire or have undergone gender reassignment treatment/surgery.<sup>41</sup>

1.27 Another academic, Dr Sam Winter,<sup>42</sup> takes a different view on the scope of the terms “*transgender*” and “*transsexual*”. He said:

*“8. I emphasise that this paper, and the case presented for a [Gender Recognition Ordinance (GRO)], only concerns transsexual people. The term ‘Transsexualism’ here is used in the way it is described in ICD-10 (the tenth revision of the International Statistical Classification of Diseases and Related Health Problems), published by the World Health Organisation. ICD-10 limits the transsexualism diagnosis to persons who display ‘a desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one’s anatomic sex and a wish to have hormonal treatment and surgery to make one’s body as congruent as possible with one’s preferred sex’.*

*9. ICD-10’s description of the transsexualism diagnosis spotlights the clinically core characteristic. It is an incongruence between, on one hand, an individual’s experienced (or affirmed) gender) and, on the other hand, the gender assigned, along with the individual’s sex, at birth (sometimes called assigned gender). It is this fact (not hormones or surgery) that sets transsexual people apart from those other sexual and gender minorities; for example, individuals who for whatever reasons enjoy crossdressing (transvestites, drag queens etc.), and gays and*

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39 (2004) 34 HKLJ 515, at 518 and 519.

40 Senior Lecturer at the University of Cambridge, UK and Visiting Professor at the University of Hong Kong.

41 See Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons*, (1st ed, December 2015), at 2, citing S Whittle, *Respect and Equality: Transsexual and Transgender Rights* (Routledge-Cavendish 2002), pp. xxii f.

42 Former Associate Professor, Faculty of Education, University of Hong Kong; Associate Professor, Department of Sexology, Curtin University; Member of Board of Directors of the WPATH.

lesbians (whose distinguishing features concern patterns of sexual attraction).

10. ICD-10's focus on the incongruence between experienced and assigned gender highlights the fact that, while many transsexual people may wish to undergo medical procedures aimed at bringing their bodies into line with their personal gender identity (indeed some may experience a need so deeply felt that for them such medical procedures constitute medical necessity), others do not. In the recent LegCo debate some of the speakers appeared entirely unaware of this fact, instead viewing genital and gonadal surgery ('sex reassignment surgery') as a defining feature of transsexualism, with all those who do not undergo such surgery being consigned to another group called 'transgender people' (who, it appeared, did not merit legal gender recognition). To define transsexualism in terms of surgical history (or surgical intention) is to make an error. 'Transsexual' does not equal hormones and sex reassignment surgery. This point is of fundamental importance for the GRO case being made in this paper."<sup>43</sup>

#### *References in other overseas publications*

1.28 The terms "transsexual" and "transgender" have been defined in other publications as set out below.

#### *International Commission of Jurists*

*"A transgender person is someone whose deeply held sense of gender is different from their physical characteristics at the time of birth. A person may be a female-to-male transgender (FTM) in that he has a gender identity that is predominantly male, even though he was born with a female body. Similarly, a person may be male-to-female transgender (MTF) in that she has a gender identity that is predominantly female, even though she was born with a male body or physical characteristics.*

*A transsexual person is one who has undergone physical or hormonal alterations by surgery or therapy, in order to assume new physical gender characteristics."*<sup>44</sup>

#### *Council of Europe Parliamentary Assembly*

*"The term 'transgender people' (or just 'trans people') includes those people who have a gender identity which is different from*

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43 Sam Winter, "It's really time for change: Towards a Gender Recognition Ordinance for Hong Kong's transsexual people" (3 January 2014), at paragraphs 8 to 10: see LC Paper No. CB(2)612/13-14(02).

44 International Commission of Jurists, "Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners Guide No 4" (2009), at 21.

*the gender assigned at birth and those people who wish to portray their gender identity in a different way to the gender assigned at birth; it includes those people who feel they have to, or prefer or choose to, whether by clothing, accessories, cosmetics or body modification, present themselves differently from the expectations of the gender role assigned to them at birth;*

*A transsexual is a person who prefers another gender than his/her birth gender and feels the need to undergo physical alterations to the body to express this feeling, such as hormone treatment and/or surgery”<sup>45</sup>*

*European Commission, European Union*

*“Transsexual people identify with the gender role opposite to the sex assigned to them at birth and seek to live permanently in the preferred gender role. This is often accompanied by strong rejection of their physical primary and secondary sex characteristics and a wish to align their body with their preferred gender. Transsexual people might intend to undergo, be undergoing or have undergone gender reassignment treatment (which may or may not involve hormone therapy or surgery). Men and women with a transsexual past fully identify with their acquired gender and seek to be recognised in it without any references to their previous sex and/or the transition process that they undertook to align their sex with their gender.*

*Transgender people live permanently in their preferred gender. Unlike transsexuals, however, they may not necessarily wish to or need to undergo any medical interventions. [Footnote: Until recently, this term was also the primary umbrella term referring to all trans people, but this use is now losing favour to the term ‘trans’ which is perceived to be more inclusive of all trans communities.]”<sup>46</sup>*

1.29 As already noted in the Preface of this paper, without prejudice to the different meaning of the terms “*transsexual*” and “*transgender*”, the term “*transsexual persons*” is used in a generic sense in this Consultation Paper to refer to persons experiencing transsexualism as defined by the WHO and adopted by the CFA in *W’s* case, whereas the term “*transgender persons*” is used in a generic sense in this Consultation Paper to refer to a broader range

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45 Explanatory Memorandum to Recommendation 1915 (2010) of the Council of Europe Parliamentary Assembly on “*discrimination on the basis of sexual orientation and gender identity*”, in the Report by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, “*Discrimination on the basis of sexual orientation and gender identity*” (Rapporteur: Mr Andreas Gross, Switzerland), Doc 12185, 23 March 2010, Part C, at paragraph 4.

46 “*Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression*” (Luxembourg: European Union, 2012), prepared for the use of the European Commission, Directorate-General for Justice, and drafted by Silvan Agius and Christa Tobler under the supervision of Migration Policy Group, at 12.

of people than “*transsexual persons*”, including any person who live, or have a desire to live, in the role of a gender which is not the one assigned to that person at birth, with or without the necessity to have an intention to undergo any medical interventions to bring his or her physical self in alignment with his or her gender identity.

### ***Distinction between “gender identity” and “sexual orientation”***

1.30 It has been noted that a complicating issue in this area is the “*unhelpful conflation of issues of gender identity [how one feels about oneself] and sexual orientation [how one feels about another person].*”<sup>47</sup> Dr Sam Winter has commented:

*“It is usual to talk of trans women (assigned males who grow up identifying as female) and trans men (assigned females who grow up identifying as male). The terms ‘MtF’ and ‘FtM’ are sometimes used.*

*Trans people are a gender minority, not a sexual minority. Gender identity is unrelated to sexual orientation. The former is about one’s sense of one’s gender, the latter about who one happens to be attracted to. Some trans people are heterosexual. Some are homosexual. A trans woman who was attracted to men (as in the recent case of W) may be described as heterosexual. If she is attracted to other women she may be described as homosexual.”*<sup>48</sup>

1.31 The above discussion of terminology aims to provide a better understanding of the wide range of concepts and distinctions that must be kept in view when considering the complex question of gender recognition, which will be discussed later in this Consultation Paper.

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47 See Centre for Medical Ethics and Law, Faculty of Law of the University of Hong Kong, “Submission to the Legislative Council and the Security Bureau of the Hong Kong SAR on the Legal Status of Transsexual and Transgender Persons in Hong Kong” [in Relation to the Marriage (Amendment) Bill 2014] (Occasional Paper No 1, March 2014; LC Paper No. CB(2)1052/13-14(01)).

48 The Professional Commons, “Task Force on Transgender Law Reform: Background Paper”, including Sam Winter, “It’s really time for change: Towards a Gender Recognition Ordinance for Hong Kong” (updated on 3 October 2013), at 2.



## CHAPTER 2

### THE CURRENT SITUATION IN HONG KONG

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#### Introduction

2.1 At present, there is no legislation in Hong Kong which provides for the recognition of the reassigned, acquired or preferred gender of a person for all legal purposes. In certain circumstances, a change of gender is recognised where the issue is one of identification rather than legal status. Thus, on the production of evidence, a post-operative transsexual person may apply for a change in the sex entry on their Hong Kong Identity Card (“*HKIC*”). The current practice requires medical evidence to show that a person’s gender has been changed after completion of the course of treatment.

2.2 This chapter examines the current situation in Hong Kong pertaining to: (i) the scope and procedures for post-operative transsexual persons to seek a change in the sex entry on the *HKIC* under the Registration of Persons Ordinance (Cap 177) and the CFA decision in *W’s* case; and (ii) the diagnostic criteria and various methods of treatment available in Hong Kong for persons experiencing gender identity disorder or gender dysphoria.

#### Current administrative system

##### *Medical Care and Services*

2.3 The public hospitals under the Hospital Authority (“*HA*”) provide medical care and services for persons experiencing gender identity disorder or gender dysphoria. Management of gender identity disorder or gender dysphoria patients often involves a multidisciplinary team of healthcare professionals including psychiatrists, surgeons, endocrinologists, clinical psychologists, and other allied health professionals. A person with gender identity disorder or gender dysphoria will receive comprehensive assessment by a psychiatrist, clinical psychologist and other allied health professionals to ascertain the appropriate psychiatric, medical and/or surgical treatment, as well as counselling services required. The psychiatrist of the team, in addition to providing the required psychiatric assessment and treatment, will manage the whole patient journey and coordinate the referral(s) to appropriate specialists and/or allied health professionals for treatment/counselling. The treatment may include medical treatment by endocrinologists and SRS. Before undergoing SRS, a person with gender identity disorder or gender dysphoria is required to go through real life experience in the preferred gender for a period of time.

2.4 Further details of the system of psychiatric, hormonal and surgical treatment currently provided to persons with gender identity disorder or gender dysphoria in Hong Kong are outlined below in this chapter.

### ***Amendment of sex entry on the HKIC***

2.5 In general, persons who have undergone full SRS (ie, removal of the original genital organs and construction of some form of genital organs of the opposite sex) will be issued a medical certificate by the HA certifying the surgical procedures which they have undergone for the completion of full SRS. According to the HA, the following procedures of the SRS process have to be completed in order for the medical certificate to be issued in support of the application for amendment of the sex entry on the HKIC:<sup>49</sup>

From female to male:

- (1) Hysterectomy (removal of uterus/ovaries and upper vagina); and
- (2) Phalloplasty (construction of a phallus like structure) or metiodioplasty (elongating the enlarged clitoris);

From male to female:

- (1) Bilateral orchiectomy (removal of testes);
- (2) Penectomy (removal of the penis); and
- (3) Vaginoplasty (creation of vaginal space).

2.6 Based on the medical certificate, the persons concerned may apply to change the sex entry on their HKICs pursuant to Regulations 14 and 18 of the Registration of Persons Regulations (Cap 177A)<sup>50</sup> to reflect their reassigned sex. If the SRS was performed outside Hong Kong, the medical proof should include the doctor's medical qualification, place where the medical qualification was obtained and other contact information of the doctor. Where there are difficulties in obtaining the relevant medical proof from the doctor who performed the SRS outside Hong Kong, the applicant may request a Hong Kong registered doctor to give an assessment of the SRS that has been undertaken.<sup>51</sup>

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49 The general procedures of the SRS process that might be undertaken by a transgender person, including optional ones, are illustrated in paragraph 2.52 of this chapter.

50 Regulation 14 of the Registration of Persons Regulations (Cap 177A) provides that an application for alteration of an identity card shall be made to a registration officer who shall only issue a replacement identity card:

- (a) after the identity card has been surrendered to him;
- (b) after the production of such evidence, under oath or otherwise as he may require; and
- (c) after such investigation as he may consider necessary.

51 See the relevant 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](http://www.immd.gov.hk/eng/faq/faq_hkic.html). Such guidelines have been formulated in consultation with the HA and the medical sector.

2.7 The existing procedures and required evidence for amendment of the sex entry on the HKIC are set out in the administrative guidelines of the Immigration Department. Upon receipt of the relevant documents, consideration will be given as to whether to allow amendment of the personal particulars sought by an applicant having regard to the specific circumstances of the case. Further information may be required for processing the application depending on the circumstances of the case.<sup>52</sup>

2.8 At present, there is no minimum age requirement for an application for amendment of sex entry on the HKIC.<sup>53</sup> Further, there is no requirement relating to the marital status or parental status of the application. Regarding the residency requirement, a holder of a HKIC (including a permanent resident or a non-permanent resident) may apply for an amendment of sex entry on the HKIC.<sup>54</sup>

2.9 It should also be noted that under Regulations 18(1)(a) and 19 of the Registration of Persons Regulations (Cap 177A), any person who, without reasonable excuse, fails to report a change of particulars (including his or her sex) previously submitted for the purpose of registering and applying for a HKIC, is guilty of an offence liable to a fine at Level 3 and imprisonment for one year.

2.10 In Hong Kong, between January 2006 and December 2016, the Immigration Department received a total of 136 applications from transsexual persons who had undergone SRS seeking to amend the sex entry on their HKICs. Among these applications, 86 were from male-to-female transsexual persons and the remaining were from female-to-male transsexual persons. Of these, 125 applications were approved and the remaining 11 were withdrawn by the applicant or were being processed as at the end of December 2016.

### **Other documents**

2.11 A successful applicant above will be issued a replacement HKIC reflecting his/her reassigned sex. He/she may separately apply to make corresponding changes to other documents (eg, travel documents, driving licences, bank accounts and educational certificates) as necessary. However, 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.<sup>55</sup>

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52 Same as above.

53 In Hong Kong, patients aged 18 years or older are eligible for SRS. This age limit was adopted in accordance with the WPATH's *Standards of Care* which recommended that genital surgery should not be carried out until patients reach the legal age of majority to give consent for medical procedures. (See the WPATH's *Standards of Care* (7th version), at 21.) However, applicants below 18 who have undergone full SRS outside Hong Kong may still apply for amendment of their HKICs with the necessary supporting evidence.

54 Regulation 14(1) of Cap 177A.

55 Section 5 of the Registration of Persons Ordinance (Cap 177) provides, among others, that every person who is registered with an identity card under the Ordinance has the

2.12 Further, there is currently no mechanism to have the sex entry on a person's birth certificate amended to reflect his or her reassigned, acquired or preferred gender.<sup>56</sup>

### ***W v Registrar of Marriages (W's case)***

2.13 The discussion below summarises the course of the litigation in the landmark case of *W*.

#### ***The Application***

2.14 The Applicant in *W's* case was a post-operative male-to-female transsexual person who had undergone full SRS at a hospital managed by the HA in Hong Kong and the sex entry on her HKIC was changed to "*female*". She and her male partner wished to marry in Hong Kong.<sup>57</sup>

2.15 Section 40 of the Marriage Ordinance (Cap 181) ("*MO*") provides that every marriage under the Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage, implying a formal ceremony recognised by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others.

2.16 The Registrar of Marriages declined to celebrate the marriage of *W* and her male partner under the *MO*, taking the view that, for the purposes of marriage, the sex of a party referred to biological sex by birth and the Applicant therefore did not qualify as "*a woman*" under the *MO* and the Matrimonial

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duty to use his or her registered name and number of identity card in all dealings with the Government. There is, however, no similar requirement as regards other registered particulars, including "*sex*". The relevant provision is set out as follows –

*"(1) Notwithstanding the provisions of any law to the contrary, every person who is registered under this Ordinance shall in all dealings with Government-*

*(a) use the personal name and surname entered on the identity card issued to such person; and*

*(b) furnish the number of his identity card to the satisfaction of the public officer requiring such number; and*

*(c) when he is required by law to furnish particulars of any other person, so far as he is able-*

*(i) submit the personal name and surname entered on the identity card issued to such other person; and*

*(ii) furnish the number of the identity card relating to such person to the satisfaction of the public officer requiring it.*

*(2) Any person who fails to comply with subsection (1) commits an offence and is liable to a fine at level 5 and to imprisonment for 1 year."*

56 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.

57 See the Government's paper to LegCo Security Panel Meeting on 7 January 2014, at paragraph 2.

Causes Ordinance (Cap 179) (“MCO”).

### **Judicial Review**

2.17 The Applicant brought judicial review proceedings to challenge the Registrar’s decision. She argued that:

- (a) on a true and proper construction, the words “*woman*” and “*female*” in sections 21 and 40 of the MO include a post-operative male-to-female transsexual person; and
- (b) if not, these two sections are unconstitutional having regard to her right to marry under section 37 of the Basic Law and/or Article 19(2) of the Hong Kong Bill of Rights (“HKBOR”) and/or her right to privacy under Article 14 of the HKBOR.

### **The Court of First Instance (CFI) and Court of Appeal (CA) judgments**

2.18 Both the CFI and CA dismissed the Applicant’s application, upholding the Registrar’s decision that the Applicant did not qualify as “a *woman*” under the MO and the MCO, and that provisions of the MO as properly construed are not inconsistent with the relevant provisions in the Basic Law and the HKBOR.

### **The Court of Final Appeal (“CFA”) majority judgment**

2.19 The CFA held unanimously that, as a matter purely of statutory construction, the Registrar was correct in construing that under section 40 of the MO, biological factors were the only appropriate criteria for assessing the sex of an individual for the purpose of marriage (the “*construction*” issue).<sup>58</sup> In other words, a male-to-female transsexual person should still be considered a “*man*” under the existing MO, even after completion of full SRS.

2.20 However, the CFA held by a 4:1 majority that the provision was unconstitutional because it is inconsistent with, and fails to give proper effect to, the constitutional right to marry protected by Article 37 of the Basic Law<sup>59</sup> (BL 37) and Article 19(2) of the HKBOR<sup>60</sup> (the “*constitutional*” issue).

2.21 The CFA judgment on both issues applies equally to section 20(1)(d) of the MCO, which provides, amongst other things, that a marriage

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58 Based on the CFA’s finding (at paragraphs 30 to 39 of the *W* case) that the legislative intent behind the enactment of section 20 of the MCO was to adopt equivalent provisions in the UK Nullity of Marriage Act 1971, which in turn had endorsed the decision of *Corbett v Corbett (otherwise Ashley)* [1971] P 83, in which was held (*per* Ormrod J) that procreative intercourse was an essential constituent of a marriage at common law.

59 Article 37 of the Basic Law provides that: “*The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.*”

60 Article 19(2) of the HKBOR provides that: “*The right of men and women of marriageable age to marry and to found a family shall be recognized.*”

shall be void,<sup>61</sup> among other things, on the ground that the parties (to the marriage) are not respectively male and female (at the time of marriage registration).

2.22 The CFA allowed the Applicant's appeal, ruling that:

*“ ... a transsexual in W's situation, that is, one who has gone through full SRS,<sup>62</sup> should in principle be granted a declaration that, consistently with BL 37 and HKBOR 19(2), she is in law entitled to be included as 'a woman' within the meaning of section 40 of the MO and section 20(1)(d) of the MCO and therefore eligible to marry a man.”*

### ***The CFA's comments on gender recognition generally***

2.23 In the judgment, the CFA also made some comments on problems facing transsexual persons in other areas of law and the treatment of persons who have not undertaken any SRS or have not fully completed SRS in these areas, including drawing the line as to who qualifies as “a woman” or “a man” for marriage and other purposes, and the impact of a legally recognised gender change in all legal contexts.

2.24 The CFA remarked that the Government should consider how to address problems facing transsexual persons in all areas of law by drawing reference to overseas practice, such as the United Kingdom's Gender Recognition Act 2004.

2.25 In his dissenting judgment, Mr Justice Chan PJ saw a strong case for a comprehensive review of the relevant legislation, with a view to proposing changes in the law as soon as possible concerning the problems facing transsexual persons.

### ***Dissenting judgment of Chan PJ***

2.26 Chan PJ held that recognition of transsexual marriages is a radical change to the traditional concept of marriage, and marriage is an important social institution which has its basis in the social attitudes of the community.

2.27 He observed that changes in the laws of overseas jurisdictions to allow transsexual persons to marry in their post-operative sex have been

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61 A marriage that is void in law is taken as not having taken place and no status of matrimony as ever having been conferred: see Security Panel Paper, at footnote 3.

62 In his affirmation made on 28 January 2010 in relation to the *W* case, the Consultant Surgeon and the Chief of Surgical Service of the Ruttonjee Hospital of the HA affirmed that insofar as the practice in Hong Kong is concerned, a person should have removed the original genital organs and constructed some form of genital organs of the opposite sex in order to be provided with the certificate that he/she has undergone SRS. These procedures as essential steps of the SRS are generally accepted among the medical profession.

informed by social consultation which indicated changes in social attitudes towards marriage. He said that there is no evidence whether social attitudes in Hong Kong have changed to the extent of abandoning or fundamentally altering the traditional concept of marriage.

2.28 Chan PJ stated that the Court should not invoke its power of constitutional interpretation to recognise transsexual marriages in the absence of such evidence. He stated that to do so would amount to making a new policy on a social issue which has far-reaching ramifications and which can only be made after public consultation, and this is not the business of the Court.

2.29 Chan PJ was sympathetic to the problems facing transsexual persons and, as noted earlier, called for a comprehensive review of the relevant legislation with a view to proposing changes in the law as soon as practicable.

### ***The CFA's court orders***

2.30 In its final orders in *W's* case, made on 16 July 2013, the CFA granted declarations:

- (a) that section 40 of the MO must be read and given effect to so as to include within the meaning of the words “*woman*” and “*female*” a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of the SRS; and
- (b) that the Appellant is in law entitled to be included as “*a woman*” within the meaning of section 20(1)(d) of the MCO and section 40 of the MO, and is accordingly eligible to marry a man.<sup>63</sup>

2.31 However, the CFA suspended the effect of the declarations for 12 months (ie, until 16 July 2014) in order to allow time for any corrective legislative amendments to be considered.

### ***Implementation of the CFA decision***

2.32 Apart from the establishment of the IWG, the means by which the Government proposed to implement the judgment included:

- (a) amending the MCO and the MO before July 2014, to provide that a person who has undergone full SRS shall be identified as being of the sex to which the person has been reassigned for the purpose of marriage under the Ordinance(s); and
- (b) administratively, the Immigration Department will maintain the

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63 *W v Registrar of Marriages* (FACV 4/2012), Orders and Costs, 16 July 2013, at paragraph 2(c).

prevailing guidelines for considering post-operative transsexual persons' applications for changing the sex entry on the HKICs, pending the outcome of the results of the IWG's study on a gender recognition scheme for Hong Kong.

## **Marriage (Amendment) Bill 2014**

2.33 To implement the CFA's order within the 12-month period, the Government proposed to amend the MO so as to provide that, for the purpose of marriage registration under the Ordinance: a person who has undergone full SRS (ie, removal of the original genital organs and construction of some form of genital organs of the opposite sex) shall be identified as being of the sex to which the person has been reassigned.

2.34 To obviate the need for persons who have undergone full SRS (and have already had the sex entry on their HKICs changed) to present the relevant medical certificate to the Registrar at the point of marriage registration, the Government intended to make it clear in the MO that the sex of any party to a marriage as stated at the time of the marriage in his or her personal identification document shall be *prima facie* evidence of the sex of that party.

2.35 The Government introduced the Marriage (Amendment) Bill 2014, incorporating the required legislative amendments specified above, on 28 February 2014. In addition to amending the MO, the legislative amendment would apply also to the MCO, so that a person who has undergone full SRS and registered the marriage in his or her reassigned sex under the MO will also be identified as his or her reassigned sex under section 20(1)(d) of the MCO, lest that marriage be void on the ground that the parties are not respectively male and female.

2.36 The motion for the Marriage (Amendment) Bill to be read for the second time did not pass the Legislative Council on 22 October 2014. Nevertheless, the fact that the Marriage (Amendment) Bill was not passed does not affect the right of post-operative transsexual persons who have received full SRS to marry, as the Registrar of Marriages has been implementing the CFA's order since 17 July 2014 (as directed by the CFA).

2.37 Administratively, the Immigration Department maintains the prevailing guidelines for considering post-operative transsexual persons' applications for changing the sex entry on their HKICs.

## **Diagnostic criteria and treatment options**

2.38 This part examines the diagnostic criteria and treatment options for gender identity disorder or gender dysphoria. The management of persons with the relevant symptoms usually begins with a psychiatric assessment. If the diagnosis of gender identity disorder or gender dysphoria



is confirmed, there is a variety of psychological and medical treatment options. The number and type of interventions applied and the order in which these take place may differ from person to person. Generally speaking, the treatment process usually comprises initial 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 with prescribed hormonal treatment of the opposite sex, and SRS. Below is an illustration of the usual steps for treating people with gender identity disorder or gender dysphoria in Hong Kong.

### ***Diagnostics criteria***

2.39 According to the *“ICD-10 Classification of Mental and Behavioural Disorders: Clinical descriptions and diagnostic guidelines”* issued by the WHO, for a diagnosis of *“transsexualism”* under the category of gender identity disorder to be made, *“the transsexual identity should have been present persistently for at least 2 years, and must not be a symptom of another mental disorder, such as schizophrenia, or associated with any intersex, genetic, or sex chromosome abnormality.”*<sup>64</sup>

2.40 Regarding the diagnosis of *“gender dysphoria”*, it is stated in DSM-5 that individuals with gender dysphoria have a marked incongruence between the gender they have been assigned to (usually at birth, referred to as natal gender) and their experienced/expressed gender.<sup>65</sup> This discrepancy is considered as the core component of the diagnosis and there must also be evidence of distress about this incongruence.<sup>66</sup> It is also stated in DSM-5 that *“experienced gender may include alternative gender identities beyond binary stereotypes, thus the distress is not limited to a desire to simply be of the other gender, but may include a desire to be of an alternative gender, provided that it differs from the individual’s assigned gender.”*<sup>67</sup>

2.41 Under DSM-5, the diagnostic criteria for gender dysphoria in children include:

*“(A) A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months’ duration, as manifested by at least six of the following (one of which must be Criterion A1):*

*(1) A strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one’s assigned gender).*

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64 WHO, *ICD-10 Classification of Mental and Behavioural Disorders: Clinical descriptions and diagnostic guidelines*, at 168.

65 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)*, Arlington, VA: American Psychiatric Association; 2013, at 453.

66 Same as above.

67 Same as above.

- (2) *In boys (assigned gender), a strong preference for cross-dressing or simulating female attire; or in girls (assigned gender), a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical feminine clothing.*
- (3) *A strong preference for cross-gender roles in make-believe or fantasy play.*
- (4) *A strong preference for the toys, games, or activities stereotypically used or engaged in by the other gender.*
- (5) *A strong preference for playmates of the other gender.*
- (6) *In boys (assigned gender), a strong rejection of typically masculine toys, games, and activities and a strong avoidance of rough-and-tumble play; or in girls (assigned gender), a strong rejection of typically feminine toys, games, and activities.*
- (7) *A strong dislike of one's sexual anatomy.*
- (8) *A strong desire for the primary and/or secondary sex characteristics that match one's experienced gender."*

*(B) The condition is associated with clinically significant distress or impairment in social, school, or other important areas of functioning.<sup>68</sup>*

2.42 Separately, the diagnostic criteria for gender dysphoria in adolescents and adults include:

- “(A) A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following:*
  - (1) A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).*
  - (2) A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed*

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68 Same as above, at 452.

- gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).*
- (3) *A strong desire for the primary and/or secondary sex characteristics of the other gender.*
  - (4) *A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).*
  - (5) *A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).*
  - (6) *A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).*
- (B) *The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.*<sup>69</sup>

**Non-surgical treatment, including psychological/psychiatric counselling and hormonal treatment**

2.43 The CFA in *W*'s case stated that:

*"It is now well established that transsexualism is a condition requiring medical treatment. ...*

*It is generally recognised that transsexualism does not respond to psychological or psychiatric treatment. The only accepted therapy involves effecting hormonal and surgical changes to make the patient's body conform sexually as closely as possible with his or her self-perception and thus to address his or her psychological needs. ...*

*[T]he management of persons with the relevant symptoms begins with a full psychiatric assessment. If the diagnosis of gender identity disorder is confirmed, the patient is usually required to go through a 'Real Life Experience', living in the preferred gender for about two years while having hormones of the opposite sex administered to produce reversible physical changes in the body and to ease the patient's psychological discomfort. If it appears from this process that the patient can successfully live as a person of the opposite sex, he or she is considered medically eligible for sex reassignment surgery ("SRS")."*<sup>70</sup>

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69 Same as above, at 452 and 453.

70 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraph 11.

2.44 Medical facilities for treating persons with gender identity disorder or gender dysphoria were first established in Hong Kong in 1980, with the first documented instance of SRS performed locally occurring in 1981.<sup>71</sup> The HA has observed that more people are now seeking help for gender identity disorder or gender dysphoria in Hong Kong, as reflected in the increasing number of such people attending the Specialist Outpatient Clinics (“SOPCs”) under HA for counselling service. It was noted that the number of people being followed up by psychiatric specialist services increased from 45 in 2009/10 to 133 in 2014/15.<sup>72</sup> Amongst these people, the number diagnosed with transsexualism also increased, from 34 to 70 in the same period. A retrospective analysis of all people experiencing gender identity disorder/gender dysphoria under HA Psychiatric Clinics from 1 January 2010 to 31 December 2011 was conducted in 2014, wherein 80 patients’ clinical notes were reviewed. Of these 80 patients, 62 indicated preference for SRS of different forms, 11 had no record of SRS preference and 7 did not prefer SRS. For the 7 patients not preferring SRS, psychotherapy only was needed to manage their distress. Of the 62 patients indicating preference for SRS, 50 have received or will receive SRS of different forms. These 50 patients experienced the “severe” form of gender identity disorder/gender dysphoria, ie, Transsexualism (易性症), in that they have strong desire to undergo transition to a sex other than that assigned at birth typically through hormones and surgery. The HA estimated that around 30 new cases with gender identity disorder or gender dysphoria would be referred for psychiatric assessment per year, and that around one in 10 of these would require assessment for SRS. According to the HA, the number of gender identity disorder/gender dysphoria patients who underwent partial or full SRS in each of the five years from 2010/11 to 2014/15 is, respectively, 4, 2, 6, 12 and 16.<sup>73</sup>

2.45 In Hong Kong, the HA provides preliminary assessment and medical services for people with gender identity disorder/gender dysphoria. Any registered medical practitioner can refer patients with gender identity disorder or gender dysphoria to SOPCs under the HA in various clusters where a multi-disciplinary approach will be adopted in the provision of services, with the coordination of care by psychiatrists, clinical psychologists, geneticists, endocrinologists, plastic surgeons, urologists, gynaecologists, social workers, etc.

2.46 The treatment process for patients referred from their registered medical practitioners to SOPCs normally begins with assessment and confirmation of the diagnosis by interviewing the patients and their family members or significant others. The HA has put in place an established triage

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

72 See Annex 1 to the government’s Press Release dated 9 December 2015, “LCQ7: Gender identity disorder-related services provided by public hospitals”, available at: <http://www.info.gov.hk/gia/general/201512/09/P201512090358.htm>.

73 See the Annex 2 to the government’s Press Release dated 9 December 2015, “LCQ7: Gender identity disorder-related services provided by public hospitals”, available at: <http://www.info.gov.hk/gia/general/201512/09/P201512090358.htm>.

system for new cases at the psychiatric SOPCs to ensure that patients with urgent healthcare needs are given medical attention within a reasonable time.<sup>74</sup> Patients will be provided with information and support, followed by discussion on treatment goals and options based on individual needs and reference to international guidelines, for example, the WPATH's *Standards of Care for the Health of Transsexual, Transgender and Gender-Nonconforming People (7th version)*,<sup>75</sup> the *Good Practice Guidelines For The Assessment And Treatment Of Adults With Gender Dysphoria* issued by the UK's Royal College of Psychiatrists,<sup>76</sup> the *Gender Dysphoria Services: A Guide For General Practitioners And Other Healthcare Staff* published by representatives of Gender Identity Clinics across England<sup>77</sup> and *Endocrine Treatment Of Transsexual Persons: An Endocrine Society Clinical Practice Guideline* published by the US National Guideline Clearinghouse.<sup>78</sup>

2.47 Patients have full autonomy in making decisions for treatment options and no treatment will be provided without patients' informed consent. Normally, patients will receive counselling to consolidate their gender identity and to strengthen their understanding, coping and resilience. After the diagnosis of gender identity disorder or gender dysphoria, the treatment varies with the age and desires of the patient. For children and adolescents, the mainstay of treatment is psychological counselling. For an exceptional adolescence case, hormones of the opposite sex may be prescribed. For patients under the age of 18, parents' or guardians' consent will be essential for hormonal treatment. For adults, the mainstays of treatment are hormones and surgery. Psychotherapy is also a mainstay of care for adult patients.<sup>79</sup>

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74 New cases received at the psychiatric SOPCs will be triaged into priority 1 (urgent), priority 2 (semi-urgent) and routine (stable) cases according to their severity and urgency to ensure that more urgent and severe cases are followed up promptly. The HA seeks to keep the median waiting time for first appointment at the psychiatric SOPCs for priority 1 and priority 2 cases within two and eight weeks respectively. This performance pledge has been fulfilled. The waiting time for new cases in non-urgent and stable condition is relatively longer, as more patients are under this category. In 2014/15, the median waiting time for first appointment at the psychiatric SOPCs for cases in stable condition was 22 weeks. If a patient's mental condition changes before the appointment, he or she may request the psychiatric SOPC concerned for re-assessment to determine whether his/her original appointment should be advanced. Patients whose condition drastically deteriorates or who require urgent medical attention may consider seeking medical treatment from the accident and emergency department, and the HA will provide suitable services for them according to their needs. See the Government's Press Release dated 9 December 2015, "LCQ7: Gender identity disorder-related services provided by public hospitals", available at: <http://www.info.gov.hk/gia/general/201512/09/P201512090358.htm>.

75 The most updated version is the 7th version published in 2011 (since the original 1979 document) in the *International Journal of Transgenderism*, 13(4), 165–232.

76 Published in October 2013 in the *College Report CR181*.

77 Published in 2012.

78 Published in *J Clin Endocrinol Metab*, September 2009, 94(9): 3132-3154.

79 Psychotherapy aims to help the patients explore gender concerns, look for ways to alleviate gender discomfort, improve body image and enhance social and peer support. The goal is to help the persons achieve long-term comfort in their gender identity expression, promote resilience, improve the quality of life, and attain self-fulfilment. More information about when psychotherapy sessions are to be recommended and the goals of psychotherapy for adults with gender concerns can be found in the

They will also be required to live in the role of the desired gender for a period, for transition into the new gender role under the support and guidance from mental health professionals. This is commonly referred to as the “*Real Life Experience*”.

2.48 Patients will usually be prescribed hormones of the opposite sex to produce reversible physical changes to body shape and some sexual characteristics, and to enhance psychological well-being.<sup>80</sup> Hormones of the opposite sex produce significant changes to their external appearance such as breast, skin, muscle, hair and voice, as well as physiological changes such as cessation of menses in a female and loss of libido in a male. At the same time, psychiatrists will closely observe the psychological well-being of the patients undergoing a major change in appearance and life style, and see if they will be able to cope with these changes. This will also be the stage when psychiatrists jointly decide with patients if irreversible surgical reassignment surgery is indicated. If the patients’ distress is not relieved by hormones, they may, upon consultation with psychiatrist(s), resort to surgical operations. Before a surgical operation is considered, they are required to undergo “*Real Life Experience*”. It should also be noted that some of the effects of hormones are not reversible, like deepening of voice by testosterone. Hormonal therapy must be continued, even after surgical sex reassignment.

### ***Sex reassignment surgery (“SRS”)***

2.49 “SRS” refers to the surgical treatment which is targeted at bringing a transsexual person’s physical appearance or characteristics into conformity with his or her gender identity.<sup>81</sup> In Hong Kong, persons who have received different forms of treatments by professional psychiatrists and clinical psychologists, including psychotherapy, hormonal treatment and Real Life Experience of the chosen gender role for a period of time may be recommended for SRS. People experiencing gender identity disorder or gender dysphoria who are considered medically eligible for SRS are referred for surgical treatment. Generally, patients aged 18 years or older are eligible for SRS. Given the time needed for assessment and Real Life Experience, most of them have SRS at 20 years or older.

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WPATH’s *Standards of Care* (7th version), at 28 to 31.

80 According to the HA, the prescribing of hormonal treatment aims to let transgender persons go through a period of time when they will develop the physical characteristics of the desired gender. This involves a hormone regimen that will:

- (1) suppress their (original) biological hormone secretion;
- (2) maintain sex hormone levels within the normal range for the person’s desired gender to induce the secondary sex characteristics of the new sex.

During the period of hormone intake, patients undergo the transition period under medical supervision. Endocrinologists will make sure the dosage of hormone can achieve the above two purposes, remain safe and have minimal side effects. It is important to communicate to patients that supraphysiologic doses of sex steroids are potentially harmful. Detailed history, physical examination and monitoring of the effects as well as potential complications would be needed. From time to time, titration of doses or change to different preparations would be needed.

81 Athena Liu, “Gender recognition: Two legal implications for marriage” (2013) 43 HKLJ 497, at 504. See also *W v Registrar of Marriages*, HCAL 120/2009 (CFI), judgment of 5 October 2010, at paragraph 30.

2.50 Where the decision is made to proceed with SRS, the surgery comprises at least two elements: breast and genital surgery,<sup>82</sup> with the procedures differing for male-to-female and female-to-male patients.<sup>83</sup> In the case of a male-to-female patient, SRS would involve the removal of the testes and the penis (orchidectomy and penectomy) and the construction of a vagina. In the case of a female-to-male patient, SRS would involve the removal of the breasts (bilateral mastectomy), uterus and ovaries (hysterectomy) and the reconstruction of a penis (phalloplasty), or alternatively, less complicated surgery involving elongation of the clitoris (metoidioplasty). In both cases, the effect of a complete (or full) SRS is sterility.<sup>84</sup>

2.51 Expert evidence on the details of the relevant surgical procedures, and what can and cannot be achieved by surgical intervention, was provided in *W's* case by Dr Albert Yuen Wai Cheung,<sup>85</sup> as follows:

*“For male-to-female transsexual surgery, breast augmentation is done for patients whom the breast enlargement after hormone treatment is not sufficient for comfort in the social gender role. Genital surgery includes at least orchidectomy (removal of both testes), penectomy (removal of penis), creation of a new vagina. The new vagina enables penetration of penis during sexual intercourse. There is preservation of erotic sexual sensation. However, surgery cannot remove the prostate organ or provide a functional uterus or ovaries, or otherwise establish fertility or child-bearing ability. Neither can it change the sex chromosomes of the person, which remains that of a male (XY).*

*For female-to-male transsexual surgery, the female breasts would be removed. The uterus, ovaries and vagina are removed. Construction of some form of penis is performed. There are different ways of constructing the penis, depending on the desire of person who would balance the risk of physical injuries inflicted on one's body due to the surgery with the benefits. The form of penis construction ranges from an elongation of patient's clitoris (metoidioplasty), raising an abdominal skin tube flap to mimic a penis, to the micro-vascular transfer of tissue from other parts of body to perineum to have a full construction of a penis inside which there is a passage for urine. The best outcome at present is that after surgery, the person can void urine while standing and*

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82 It was noted in *W's* case that other surgical procedures may be also involved, for example, the shortening of vocal chords in the case of a male-to-female transsexual: see *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at footnote 12.

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

84 Athena Liu, “Gender recognition: Two legal implications for marriage” (2013) 43 HKLJ 497, at 505.

85 Former Consultant surgeon and Chief of Surgical Service of Ruttonjee Hospital of the Hospital Authority, who had been performing sex reassignment surgery from 1987 to 2015, affirmation made on 28 January 2010: see *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at footnote 11.

*can have a rigid penis which means it is rigid all the time, as opposed to an erected penis which is flaccid normally but becomes rigid when sexually aroused. However, the new penis, even fully constructed, cannot ejaculate or erect on stimulation, although it will not affect the person's ability to have sexual intercourse and the person can still penetrate a vagina and have sensation in the penis and achieve orgasm because the clitoris and its nerve endings are preserved. The person cannot be provided with prostate (a male sex organ which secretes prostatic fluid which when combined with sperms produced by the testes forms the semen; a female does not have such an organ) or any functioning testes and will have no ability to produce semen, to reproduce or otherwise to impregnate a female. The sex chromosomes also remain those of a female (XX).<sup>86</sup>*

2.52 Surgically and technically speaking, the SRS process can stop at any point/stage as long as the patient is able to empty their bowel/bladder effectively and be free of surgical complications and morbidities. The process in Hong Kong would be, in general, as follows:

*For transition from female to male:*

- (1) Hysterectomy: Removal of uterus/ovaries and upper vagina. This can be done first, or after (2) below.
- (2)
  - (a) Phalloplasty: Construction of a phallus like structure from the forearm skin with a urethral tube that does not yet connect to the original female urethra.
  - (b) Some patients may opt for metoidioplasty (ie, elongating the enlarged clitoris), which is a less invasive surgery, instead of phalloplasty. Urethroplasty may or may not be conducted after metoidioplasty.
- (3) Urethroplasty: After three months or more, and after the hysterectomy, a urethroplasty procedure will connect up the tube previously made in the phallus to the original urethra.
- (4) Optional glansplasty, ie, creation of a more 'natural' looking penile tip.
- (5) Optional scrotal implants.
- (6) Optional penile implants for those who want to have a phallus capable of 'erection'. To be conducted at least one year after the phalloplasty to allow protective sensation to develop.

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



*For transition from male to female:*

- (1) Bilateral orchiectomy: removal of testes.
- (2) Penectomy: removal of the penis.
- (3) Vaginoplasty: creation of vaginal space.

2.53 According to the HA, from 2010/11 to 2014/15, 40 patients underwent partial or full SRS, including 22 male-to-female cases, and 18 female-to-male cases.<sup>87</sup> The CFA noted that it had been suggested during the proceedings that “*many more have undergone surgery privately, both in Hong Kong and, more commonly, overseas.*”<sup>88</sup>

2.54 After completion of the course of treatment, a letter certifying that the patient’s gender has been changed is issued by the HA and signed by the consultant surgeon in charge on the request of the patient. The practice is for such a letter to be issued only where a person has had the original genital organs removed and has had some form of the genital organs of the opposite sex constructed.<sup>89</sup> Such letter serves as the medical certificate mentioned in paragraph 2.6 above for the application to change the sex entry on a person’s HKIC (pursuant to Regulations 14 and 18 of the Registration of Persons Regulations (Cap 177A)).

### ***Recent enhancement of HA services***

2.55 Following consultation with patient groups, the HA has since enhanced the services provided to people with gender identity disorder, based on a “*multidisciplinary centre*” approach. Starting from October 2016, all gender identity disorder-related services are being centralised at the Gender Identity Disorder Clinic of the Prince of Wales Hospital by phases.<sup>90</sup>

2.56 With a view to facilitating provision of transgender patient care, on 16 July 2014 the Hospital Authority issued internal administrative guidelines on registration and admission of transgender patients in hospitals, inpatient arrangements (assigning transgender patients to wards according to their sex as shown in valid ID) and addressing those patients (by names rather than “*Miss*” or “*Mister*” to avoid misunderstandings).

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87 See the Annex 2 to the Government’s Press Release dated 9 December 2015, “LCQ7: Gender identity disorder-related services provided by public hospitals”, available at: <http://www.info.gov.hk/gia/general/201512/09/P201512090358.htm>.

88 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraph 15, where it was also noted that in the case of W herself, she had had the first of her operations (an orchidectomy) in Thailand.

89 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraph 16.

90 See the Government’s Press Release dated 9 December 2015, “LCQ7: Gender identity disorder-related services provided by public hospitals”, available at: <http://www.info.gov.hk/gia/general/201512/09/P201512090358.htm>.

2.57 The above discussion sets out the current position in relation to transgender or transsexual people in Hong Kong. In the following chapters, we will review some of the models in other jurisdictions, starting with the United Kingdom.

## CHAPTER 3

### United Kingdom Gender Recognition Scheme

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#### Introduction

3.1 As will be illustrated in the next chapter of this paper, there is no single uniform approach in overseas jurisdictions in relation to gender recognition and the issues that it raises. Currently, all EU Member States already give legal recognition to gender change, as do many other countries in Europe and the British Commonwealth and many American States. In this chapter we examine the gender recognition scheme that applies in the United Kingdom, which was described as a “*compelling model*” by the CFA in the *W*'s case.<sup>91</sup>

3.2 Following an overview of the scheme, provided below, this chapter examines the developments which led up to the scheme's introduction, including a review of the work of the UK's Interdepartmental Working Group on Transsexual People and the important judicial decisions which informed the resulting legislation. The Gender Recognition Act 2004 is then examined, followed by a discussion of the work of the Gender Recognition Panel set up to determine applications for gender recognition under the Act.

#### Overview of the UK gender recognition scheme

3.3 The legislation underpinning the UK's gender recognition scheme is the Gender Recognition Act 2004 (“*GRA*”) which came into effect in April 2005. The purpose of the Act is to provide transsexual people with legal recognition in their acquired gender.<sup>92</sup>

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

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91 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraph 138. See also Robyn Emerton, “Time for Change: a Call for the Legal Recognition of Transsexuals and Other Transgender Persons in Hong Kong” (2004) 34 HKLJ 515; and Jens M Scherpe, “Changing One's Legal Gender in Europe - The ‘W’ Case in Comparative Perspective” (2011) 41 HKLJ 109.

92 Under the UK Gender Recognition Act 2004 the “*acquired gender*”, in relation to a person by whom an application for a gender recognition certificate is or has been made, means, pursuant to section 1(2) of the Act, (a) in the case of an ordinary application, the gender in which the person is living, or (b) in the case of an application for recognition of overseas gender change, the gender to which the person has changed under the law of the foreign country or territory concerned.

- 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.<sup>93</sup>

3.5 The issue 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. The person is entitled to a new birth certificate reflecting his or her acquired gender (provided a UK birth register entry already exists for the person) and, under the previous version of the Act, would be able to marry someone of the opposite gender to his or her acquired gender provided any existing marriage or civil partnership was dissolved or annulled.<sup>94</sup> There have been developments allowing same-sex marriage<sup>95</sup> since the Act was introduced and under the current version of the Act, there is no longer a requirement for an existing marriage to be dissolved or annulled provided there was spousal consent to the marriage continuing after the issue of a Gender Recognition Certificate.

3.6 In addition to its comprehensiveness, the inclusiveness of the Act should be noted. Compared to similar laws in other jurisdictions, the Act does not require specific nationality, residence in the country, infertility and childlessness, hormonal treatment, or gender reassignment surgery.

## Background<sup>96</sup>

3.7 Prior to the enactment of the legislation, there was no provision under the law of any part of the UK to allow transsexual people to be officially recognised in the gender with which they identified.<sup>97</sup> The consequences of this included:

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93 Section 2(1), Gender Recognition Act 2004 (UK).

94 See Explanatory Notes on Gender Recognition Act 2004, at paragraphs 4 and 20, available at: <http://www.legislation.gov.uk/ukpga/2004/7/notes>.

If the applicant was legally married or a civil partner, an interim Gender Recognition Certificate would be issued which could be used as grounds for that marriage or civil partnership being voidable, but otherwise had no status. After annulment or dissolution of the marriage or civil partnership, a full Gender Recognition Certificate would be issued.

95 Ie, section 12 and Parts 1 and 2 of Schedule 5 of the Marriage (Same Sex Couples) Act 2013 (UK) and section 31 and Schedule 2 of the Marriage and Civil Partnership (Scotland) Act 2014.

96 For more information, see Stephen Gilmore, "The Legal Status Of Transsexual And Transgender Persons In England And Wales", in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 183 to 191.

97 Catherine Fairbairn, Home Affairs Section, House of Commons Library, "The Gender Recognition Bill [HL] - Bill 56 of 2003-04" (Research Paper 04/15, 17 February 2004),

- transsexual people could not marry in their adopted gender;
- although transsexual people could obtain some official documents in their new name and gender (eg, passports and driver's licences<sup>98</sup>), they were not entitled to have their birth certificates revised;
- the age of qualification for the state pension was the age appropriate for their birth certificate gender;
- it might be necessary to reveal the birth certificate gender when applying for a new job;
- if transsexual people did not disclose their legal gender for car insurance purposes, they might have the concern that this may amount to fraud, since premiums can be lower for women;
- transsexual people were not entitled to enjoy any rights legally confined to persons of the gender to which they felt they belonged.<sup>99</sup>

### ***The report of the Interdepartmental Working Group on Transsexual People***

3.8 The above issues were first considered by the Interdepartmental Working Group on Transsexual People which was set up by the UK Government in April 1999, *“to consider, with particular reference to birth certificates, the need for appropriate legal measures to address the problems experienced by transsexual people, having due regard to scientific and societal developments, and measures undertaken in other countries to deal with this issue.”*<sup>100</sup>

3.9 In July 2000, the Working Group presented its report to Parliament. As a significant observation, it had found that there was *“no common approach to the transsexual condition and the issues to which it gives*

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at 9.

98 For example, it is possible to have passport details amended without a Gender Recognition Certificate by providing a letter from a medical practitioner confirming that the change of gender is likely to be permanent and evidence of change of name such as deed poll: see HM Passport Office guidance note, “Applying for a passport: additional information for transgender and transsexual customers”, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229992/Applying\\_for\\_a\\_passport\\_additional\\_information\\_WEB.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229992/Applying_for_a_passport_additional_information_WEB.PDF).

99 Catherine Fairbairn, Home Affairs Section, House of Commons Library, “The Gender Recognition Bill [HL] - Bill 56 of 2003-04” (Research Paper 04/15, 17 February 2004), at 9 to 10.

100 See Home Office, *Report of the Interdepartmental Working Group on Transsexual People* (April 2000), terms of reference, available at: <http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf>.

rise”<sup>101</sup> in the European and Commonwealth countries studied. The Working Group stated:

*“Although there is a growing tendency to recognise a transsexual person’s acquired gender, the preconditions for and extent of such recognition vary considerably. Some countries have not yet addressed all the issues affected by the change.”*<sup>102</sup>

3.10 In terms of those issues, the Working Group noted that it had looked in particular at the following areas: birth registration, marriage, family law, the criminal justice system, pensions and benefits, insurance, employment, and sport.<sup>103</sup>

#### *Proposed options for consultation*

3.11 The Working Group proposed three options in its report for the Government to put out to public consultation:

Option 1: to retain the status quo and leave the then existing law unchanged;

Option 2: to issue birth certificates showing a transsexual person’s new name and, possibly, gender; and

Option 3: to grant full legal recognition of the transsexual person’s acquired gender, subject to certain criteria and procedures.<sup>104</sup>

#### (1) *Maintaining the status quo*

3.12 The Working Group observed that within the UK, measures had already been taken in a number of areas to assist transsexual people. One example, in the employment context, was the prohibition set out in the Sex Discrimination (Gender Reassignment) Regulations 1999 on discriminating against people on the basis of their transsexuality (whether pre- or post-operative). It was noted also that the criminal justice system (ie, the police, prisons and the courts) endeavoured *“to accommodate the needs of transsexual people as far as possible within operational constraints.”*<sup>105</sup> Instances cited included:

*“A transsexual offender will normally be charged in their acquired gender, and a post-operative prisoner will usually be sent to a prison appropriate to their new status. Transsexual victims and*

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101 Home Office, above, at paragraph 1.18 and Annex 4.

102 Home Office, above, at paragraph 1.18.

103 Home Office, above, at paragraph 1.17.

104 Home Office, above, at paragraphs 1.16 and 5.5.

105 Home Office, above, at paragraph 5.2.

witnesses will, in most circumstances, similarly be treated as belonging to their acquired gender.”<sup>106</sup>

3.13 The Working Group commented further that “official documents will often be issued in the acquired gender where the issue is identifying the individual rather than legal status. Thus, a transsexual person may obtain a passport, driving licence, medical card etc. in their new gender.”<sup>107</sup>

3.14 However, the limitations of these measures from the point of view of transsexual people were also noted:

*“Notwithstanding such provisions, transsexual people are conscious of certain problems which do not have to be faced by the majority of the population. Submissions to the Group suggested that the principal areas where the transsexual community is seeking change are birth certificates, the right to marry [in their new gender] and full recognition of their new gender for all legal purposes.”*<sup>108</sup>

(2) *The option of issuing new birth certificates*

3.15 At the time of the Working Group’s report, the birth certificate and birth register were a record of the facts applying at the time of birth, and the person’s sex was determined based on biological criteria, ie, chromosomal, gonadal and genital congruity.<sup>109</sup> Subsequent amendments to the birth register could be made only where medical evidence showed that an apparent error had been made at the time of registration.<sup>110</sup> It was therefore impossible for a revised birth certificate to be issued to a transsexual person on the basis of gender reassignment.

3.16 With a view to easing the potentially embarrassing position of transsexual people in circumstances when they might be called upon to produce their birth certificates (for example, in relation to employment), the Working Group considered the option of procedures being put in place for the issue of short birth certificates, showing either:<sup>111</sup>

- a person’s new name, with no indication of his/her gender; or

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106 Home Office, above, at paragraph 5.2.

107 Home Office, above, at paragraph 5.3. In addition, the Working Group mentioned that: “We understand that many non-governmental bodies, such as examination authorities, will often re-issue examination certificates etc. (or otherwise provide evidence of qualifications) showing the acquired gender. We also found that at least one insurance company will issue policies to transsexual people in their acquired gender.”

108 Home Office, above, at paragraph 5.4.

109 Home Office, above, at paragraphs 2.2 to 2.6.

110 Home Office, above, at paragraphs 2.2 to 2.6. Amendments were possible “only in cases of clerical error, or where the apparent sex of the child was wrongly identified, or where the biological criteria were not congruent at birth.”

111 Home Office, above, at paragraph 3.2.

- both the person's new name and new gender (which would require primary legislation affecting all parts of the UK<sup>112</sup>).

3.17 However, the Working Group thought that, unless the issuing of new birth certificates carried with it recognition for some or all legal purposes, it would do little to relieve the underlying concerns of transsexual people, *“as it would not constitute evidence of a person's identity and they would still for all legal purposes be of their birth sex as recorded on their full birth certificate.”*<sup>113</sup>

3.18 The Working Group also considered whether, following the issue of a short certificate showing the holder's new name and gender, it might be possible for a transsexual person to be formally recognised as a member of the new gender *“for certain specific purposes but not in all respects.”* The Working Group went on to comment, however:

*“[But] we have not been able to identify any areas in which recognition could be given without leading to confusion and uncertainty. We were very doubtful whether there could be a halfway house between the present position and full legal recognition for all purposes.”*<sup>114</sup>

(3) *The option of a full legal recognition scheme*

3.19 Under this head, the Working Group considered that:

- there would need to be a formal stage when the change of gender would be recognised so that the legal position is clear, *“even though the stage at which a transsexual person may apply for the order may not be fixed”*,<sup>115</sup>
- full legal recognition could be given by means of a Court Order which would define the date and process from which the applicant acquired the new gender;
- legislation would be needed to define the grounds on which such an Order could be made;
- the Registrar General would re-register the birth on the basis of the information provided by the Court (as happens where a person is adopted);

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112 Home Office, above, at paragraph 3.6. The Working Group noted that procedures currently followed by, for example, the Passport Office could be adopted (requiring a letter from the applicant's doctor saying that the applicant is living permanently in the new gender together with evidence such as deed poll of a change of name).

113 Home Office, above, at paragraph 3.5.

114 Home Office, above, at paragraph 3.8.

115 Home Office, above, at paragraph 4.3.



- after that point, the transsexual person would be treated as of his or her acquired gender for all purposes.<sup>116</sup>

The Working Group also added the following rider:

- *“But there would be no rewriting of history and the legislation would have to make it clear that in certain circumstances access could be given to records held in the person’s previous identity, for example in connection with criminal investigations or medical treatment.”*<sup>117</sup>

3.20 The report noted that transsexual people deal with their gender identity condition in different ways, and the extent of treatment undertaken may be determined by individual choice or other factors including but not limited to financial resources and/or medical contra-indications to undergoing surgery. It was recognised that “[m]any people revert to their biological sex after living for some time in the opposite sex, and some alternate between the two sexes throughout their lives”.<sup>118</sup>

3.21 The Working Group observed that there were three stages of gender change, “each of which might be considered as the point at which full recognition could be given.”<sup>119</sup>

Stage 1: *Living in the role of the new gender* – the person would still bear most of the physical characteristics of the birth sex (and “there is a significant chance that some people will revert to their birth gender”<sup>120</sup>).

Stage 2: *Hormonal treatment* – the person would have sought medical intervention and their body would have at least some of the physical characteristics of the opposite sex. Although they will still have many physical characteristics of their birth gender, they would likely be rendered infertile after a few years of hormone treatment. There is however still a chance of reversion to the birth gender.<sup>121</sup>

Stage 3: *After surgery.*

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116 Home Office, above, at paragraphs 4.3 and 4.4. To accommodate persons who did not meet the criteria for full recognition, the Working Group recommended that the then existing arrangements for providing transsexual people with new driving licences, passports and national insurance cards should not be withdrawn, provided that they could not be used to obtain other legal rights to which the person was not entitled. Same as above, at paragraph 4.11.

117 Home Office, above, at paragraph 4.4.

118 Home Office, above, at paragraph 5.1.

119 Home Office, above, at paragraph 4.6.

120 Home Office, above, at paragraph 4.7.

121 Home Office, above, at paragraph 4.8.

3.22 Under the “After surgery” stage, the Working Group made the following observations:

*“Not all transsexuals, particularly female to male transsexuals, can undergo full reassignment surgery. For most the process is complete (apart from continuing hormonal treatment) after surgery which may not cover the gonads or the genitals.”<sup>122</sup>*

*“A transsexual person who has had, for example, breast implantations or a double mastectomy, combined with hormone treatment, will have clear physical attributes of the opposite gender. There is a reasonable expectation that the change of gender will be permanent, although the possibility of a reversion to the birth sex cannot be ruled out. They would probably not be able to consummate a marriage with someone of their birth sex: but it would almost certainly be impossible for them to father or bear a child.”<sup>123</sup>*

3.23 The Working Group then went on to consider a range of possible pre-conditions to the grant of full recognition.

*Sterility:* Noting that this was a pre-condition in some jurisdictions, but was opposed by the transsexual community,<sup>124</sup> the Working Group commented that there might be great public concern “if someone who was legally a man gave birth to a child or someone who was legally a woman became the father of one.”<sup>125</sup> Related to this would be implications for artificial fertilisation and surrogacy (ie, if a transsexual woman’s preserved sperm were used through a surrogate, she could in theory “become biologically the father but legally the mother of the same child.”)<sup>126</sup>

*Marriage:* The Working Group noted that legal recognition of a change of gender would have implications for pre-existing marriages. “If a subsisting marriage continued after one of the partners had changed sex, this would conflict with the [then current] legal position that a person can be married only to someone of the opposite (legal) sex. It might therefore be necessary to require, as in most countries which allow marriage after a change of sex, that any previous marriage should be dissolved before the change of sex could be legally recognised.”<sup>127</sup>

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122 Home Office, above, at paragraph 4.9.

123 Home Office, above, at paragraph 4.10.

124 Home Office, above, at paragraph 4.12. The report refers to the transgender community’s view that the requirement is unnecessary because, “after a few years, the hormone treatment undertaken by transsexual people will have rendered them infertile”, also that “the requirement is discriminatory as some transsexual people, for health reasons, cannot take the high hormone levels normally prescribed, nor can they necessarily undergo extensive surgery.”

125 Home Office, above, at paragraph 4.14.

126 Home Office, above, at paragraph 4.16.

127 Home Office, above, at paragraph 4.17.

3.24 In relation to the suggested pre-condition on existing marriages, the Working Group referred to a counter argument they had received, that care should be taken not to disadvantage those few persons whose marriages, conducted in their former gender role, had survived gender change. The argument was that no purpose would be served by insisting that a couple should divorce in order for the transsexual partner's acquired gender to be recognised, and that *"the rights and interests of the non-transsexual partner should be borne in mind since divorce inevitably involved a loss of security and financial benefits for at least one person."*<sup>128</sup> The Working Group concluded, however, that it would be very difficult *"to allow same-sex marriages in this context but no other, and that it seems reasonable to expect the transsexual partner in a subsisting marriage to take into account the effects on the other partner before seeking legal recognition of a change of sex."*<sup>129</sup>

### *Suggestions for legislative changes*

#### *(1) Marriage*

3.25 At the time of the Working Group's report, the marriage law in the UK only permitted marriage between one biological male and one biological female. Further, the case of *Corbett v Corbett* (1971)<sup>130</sup> had established that the three biological criteria (chromosomal, gonadal and genital tests) were relevant in determining the sex of a person for the purpose of marriage. This resulted in the situation that a transsexual person could legally marry only a person of his/her acquired gender, creating what was, to all appearances, a same sex marriage.<sup>131</sup>

3.26 It was therefore suggested that legislation providing for the grant of recognition of a transsexual person's new gender for all legal purposes should include a requirement that any subsisting marriage must have been annulled or would be treated as ended from the date of the grant of official recognition.<sup>132</sup>

#### *(2) Parenthood*

3.27 At the time of the Working Group's report, a female-to-male transsexual person could not be legally recognised as the father of children born to his partner, or a male-to-female transsexual person could not be recognised as the mother.<sup>133</sup> The Working Group suggested that, following

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128 Home Office, above, at paragraph 4.19.

129 Home Office, above, at paragraph 4.19.

130 *Corbett v Corbett* (otherwise Ashley) [1971] P 83.

131 Home Office, above, at paragraphs 2.14, 2.18 to 2.20.

132 Home Office, above, at paragraph 4.18.

133 Home Office, above, at paragraphs 2.22 and 2.38. It has been observed that problems for such families would complicate relationships with schools, Social Security and the Inland Revenue. Worse still, if the relationship of the parents encounters difficulties, or one of them dies, the family would be hit by the reality that the 'dad' in fact had no legal tie to the children he had brought up. See Stephen Whittle, "The Gender Recognition Act 2004: Its Impact on Transsexual People's

formal legal recognition of a change of gender, the transsexual person would keep (or acquire in their new gender) all, or all pre-existing, parental rights and responsibilities subject to intervention of the courts.<sup>134</sup>

### (3) *Criminal Justice System*

3.28 The Working Group noticed that most offences did not identify the gender of the offender or of the victim, and thus it suggested that a transsexual person ought to be in exactly the same position as any other person who commits, or is a victim of, crime in the substantive criminal law.

3.29 At the time of the report, there were a number of criminal offences where the gender of the offender or the victim was specified; such as rape, indecent assault, incest, etc, where the courts, in determining the gender of one party, would have regard to case law such as *Corbett*, which rested on the medical evidence of the biological position at birth. A possible outcome would be that a female-to-male transsexual person could not commit rape (according to the biological position at birth), as this was an offence that could only be committed by a man. Further, it was doubtful whether a transsexual person who used a public lavatory or changing room of his or her acquired gender would be committing an offence of outraging public decency and/or breach of the peace or (in Scotland) shameless indecency.<sup>135</sup>

3.30 In light of this, the Working Group considered that it was necessary for transsexual people to be treated as their acquired gender for all legal purposes, including within and by the legal system. There should also be a requirement that in certain circumstances, a transsexual person's former identity and gender could be disclosed, for example, to allow criminal record checks to be made.<sup>136</sup>

### (4) *Employment*

3.31 The Sex Discrimination (Gender Reassignment) Regulations 1999 afforded a measure to prevent discrimination against transsexual people in employment, whether before, during or after reassignment surgery.<sup>137</sup> The Working Group suggested that where the existing regulations would continue to serve their protective purpose, provision might need to be made in the current employment regulations for the continuation of certain exceptions, for example, in respect of the period of transition for the transsexual person, and in relation to the taking of intimate searches by police and prison officers.<sup>138</sup>

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Families" (Childright, 210, October 2004), at 10 to 11.

134 Home Office, above, at paragraph 4.20.

135 Home Office, above, at paragraphs 2.42 to 2.49.

136 Home Office, above, at paragraph 4.22.

137 Home Office, above, at paragraphs 2.86 and 2.87.

138 Thus, a male-to-female transsexual police and prison officers would be able to, after legal recognition of change of gender, search female prisoners and female-to-male transsexual officers could search male prisoners. See Home Office, above, at paragraphs 4.23 and 4.25.

(5) *Social Security*

3.32 At the time of the Working Group's report, legislation in the UK covering social security benefits provided that where sex was relevant, this must be the sex on the birth certificate. Further, other benefits might be dependent on a valid marriage which could disadvantage transsexual people who were unable to claim or marry in their acquired gender.<sup>139</sup> The Working Group considered that legal recognition of transsexual people in their new gender, and their ability to marry in that gender, would solve such problems (for example, a couple in which one party was a transsexual person, even if unmarried, could be regarded as a married couple for Income Related Benefit purposes).<sup>140</sup>

(6) *Insurance*

3.33 The Working Group considered that the terms and conditions of insurance policies were a commercial matter for the insurance industry and it would not be appropriate for the Government to try to regulate these matters.<sup>141</sup>

(7) *Sport*

3.34 The Working Group took the view that the question of transsexual people in sport did not appear to have been addressed by the sporting authorities,<sup>142</sup> but practical issues might arise where, for example, a male-to-female transsexual would retain a physical advantage over other women despite reassignment treatment. The Working Group deemed this issue not a purely domestic one and thus it would be for the governing bodies of individual sports to decide how to address the issues raised by transsexual athletes.<sup>143</sup>

### ***Developments following the Working Group's report***

#### *Reconvening of the Working Group*

3.35 In 2002, the UK Government reconvened the Interdepartmental Working Group on Transsexual People. On 9 July 2002, the Working Group resumed meeting, with a view to examining the implications of granting full legal status to transsexual people in their acquired gender and reporting to Government.<sup>144</sup>

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139 Home Office, above, at paragraphs 2.89 to 2.102.

140 Home Office, above, at paragraph 4.32.

141 Home Office, above, at paragraphs 2.103 and 4.33.

142 Home Office, above, at paragraph 2.105.

143 Home Office, above, at paragraph 4.35.

144 Catherine Fairbairn, Home Affairs Section, House of Commons Library, "The Gender Recognition Bill" [HL] - *Bill 56 of 2003-04* (Research Paper 04/15, 17 February 2004), at 11.

## *Christine Goodwin v The United Kingdom and I v The United Kingdom*

3.36 On 11 July 2002, the European Court of Human Rights (“ECtHR”) delivered judgments in the cases of *Christine Goodwin v The United Kingdom*<sup>145</sup> and *I v The United Kingdom*<sup>146</sup> in favour of two transsexual people, “*in effect obliging the United Kingdom Government to recognise sex changes as legally valid.*”<sup>147</sup> In each of the two cases, the applicant had undergone gender reassignment surgery provided by the National Health Service and had lived in society as a female, but because of the UK law then applying, had remained a male for legal purposes.<sup>148</sup> Goodwin argued that the refusal by the Government of the UK to change her listed gender in a number of official documents amounted to a violation of Article 8 and Article 12 of the European Convention on Human Rights (“ECHR”) (the right to respect for private life and the right to marry). The ECtHR found that the UK had breached these Convention rights. The Court also ruled that a Contracting State could “*determine inter alia the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses).*”<sup>149</sup> However, the Court found no justification for barring transsexuals from enjoying the right to marry under any circumstances.<sup>150</sup>

### *Draft legislation*

3.37 On 13 December 2002, the Government announced its intention to bring forward legislation in this area to implement the European Court’s judgments and “*to give transsexual people their Convention rights.*”<sup>151</sup> It stated also that the Interdepartmental Working Group on Transsexual People “*was being tasked additionally with considering urgently the implications of the judgments*” in *Goodwin v The United Kingdom and I v The United Kingdom*.<sup>152</sup>

### *Bellinger v Bellinger*

3.38 In 2003, a year after the ECtHR judgment in *Goodwin*, the case of *Bellinger v Bellinger*<sup>153</sup> was decided by the House of Lords. The case

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145 (2002) 35 EHRR 18.

146 (2002) 36 EHRR 53.

147 Catherine Fairbairn, above, at 11.

148 Ie, when defining a person’s gender, the courts in the UK at that time followed the three criteria laid down by Ormrod J in *Corbett v Corbett (otherwise Ashley)* [1971] P 83, including for the purposes of marriage, social security, employment and pension. Thus, despite gender reassignment surgery, a transsexual person continued to be regarded under UK law as being of the sex recorded in his or her birth certificate. See discussion of *Goodwin* and other related cases in Patrick Jiang, “Legislating for Transgender People: a Comparative Study of the Change of Legal Gender in Hong Kong, Singapore, Japan and the United Kingdom” (2013) 7 HKJLS 31, at 35 to 38.

149 *Goodwin*, above, at paragraph 103.

150 *Goodwin*, above, at paragraph 103.

151 Catherine Fairbairn, above, at 14.

152 Catherine Fairbairn, above, at 13.

153 *Bellinger v Bellinger* [2003] 2 AC 467 (HL).

concerned a male-to-female transsexual person who sought legal recognition of her 1981 marriage to a man. While expressing sympathy for Mrs Bellinger's plight, the Law Lords ruled that the marriage was void. They considered the fact that recognition of the post-operative sex of a transsexual person for the purposes of marriage would give a novel and extended meaning to the words 'male' and 'female' in the Matrimonial Causes Act 1973,<sup>154</sup> and that the issues raised (including what should be the prerequisites for the recognition of gender change and its effect on other areas such as criminal law, child care and pension), "*required extensive enquiries and the widest public consultation and discussion.*"<sup>155</sup> The Lords considered the problem best dealt with as a whole and not in piecemeal fashion, and in effect, deferred the issue to Parliament, which, at that time, had expressed intention to bring forward legislation to allow transsexuals to change their legal gender.<sup>156</sup> Pursuant to the decision in *Goodwin*, the Law Lords issued a declaration of incompatibility of section 11(c) of the Matrimonial Causes Act 1973 with the ECHR.

## The Gender Recognition Act 2004

### *Introduction of the Act*

3.39 A draft Gender Recognition Bill was published on 11 July 2003 and, after consultation and scrutiny of the draft Bill by the Joint Committee on Human Rights,<sup>157</sup> the Bill was introduced in the House of Lords on 27 November 2003. The GRA came into effect on 4 April 2005. It applies to England and Wales, Northern Ireland and Scotland.<sup>158</sup>

3.40 The GRA specifies the criteria, evidence and procedure by which a person can acquire legal recognition of his or her change of gender, and defines the legal consequences of such a change. It contains 29 sections arranged in the following parts:

- applications for a Gender Recognition Certificate ("GRC") (sections 1 to 8);
- consequences of the issue of a GRC (sections 9 to 21);
- supplementary provisions which deal with the legal issues arising from the issuance of a full GRC concerning marriage, parenthood, succession, duty of trustees and personal representatives, birth certificates, sexual offences, social security benefits and pensions, discrimination, and sports (sections 22 to 29); and

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154 *Bellinger*, above, at 36.

155 *Bellinger*, above, at 37.

156 *Bellinger*, above, at 37.

157 Which made various recommendations on a number of issues in its report. See Joint Committee on Human Rights, "Draft Gender Recognition Bill", 20 November 2003, *HL Paper 188-I & II, HC 1276-I & II*:

<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/188/188.pdf>.

158 See section 28 of UK GRA.

- six schedules.<sup>159</sup>

## ***Features of the UK gender recognition scheme under the GRA***

### *Type of gender recognition scheme*

3.41 With the enactment of the GRA, a *legislative* scheme was put in place in the UK for the legal recognition of transsexual people.

### *Authority to determine the applications*

3.42 Applications for gender recognition are determined by the GRPs, which are *judicial* bodies under HM Courts and Tribunals Service (section 1(3) and Schedule 1). The features of the GRPs, and the steps in the application process, are discussed in detail in the latter part of this chapter.

### *Minimum age requirement*

3.43 An applicant for a Gender Recognition Certificate should be at least 18 years old (section 1(1)).<sup>160</sup>

### *No residency requirement*

3.44 No residency or citizenship requirements are stipulated under the GRA.<sup>161</sup> (Information on recognition of an overseas gender change is set out below.)

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159 Schedule 1: Gender Recognition Panels; Schedule 2: Interim certificates: marriage; Schedule 3: Registration; Schedule 4: Effect on marriage; Schedule 5: Benefits and pensions; and Schedule 6: Sex discrimination.

160 The UK experience indicates that treatment to modify sexual characteristics is rarely provided before a young person is 16 years of age. Also, because of the apparent concerns of medical practitioners in providing irreversible treatments to adolescents, what is provided is generally hormonal blockers to prevent pubertal changes in the old gender role. See Stephen Whittle, "The Gender Recognition Act 2004: Its Impact on Transsexual People's Families", *Childright*, 210, October 2004, at 10 to 11. Since May 2012, the Tavistock Portman Childhood and Adolescent Gender Identity Service Clinic in London has been providing pubertal postponement treatment for carefully screened adolescents and there was, as of October 2013, a provisional protocol for gender reassignment treatment. Further, the Family Law Reform Act 1969, section 8 allows a 16 or 17 year-old trans person to consent, as if an adult, to surgical, medical and dental treatment which otherwise would constitute a trespass to his person, and parental consent is not needed in these circumstances. This includes any diagnostic procedure or any ancillary treatment, such as administration of an anaesthetic if needed to carry out the treatment. See Stephen Whittle, "UK Transgender Law Factsheet 03: The Gender Variant Child's Right to Attend School: A Guide to UK Law for the Transgender Community, Parents & Schools", published by *Press for Change*, May 2013, at paragraphs 2.2.2 to 2.4.2.

161 For example, a person who is a citizen of Spain, and has had their new gender recognised for all legal purposes in Spain (one of the approved countries under sections 1(1)(b) and 2 of the GRA), can apply for a GRC under section 1(1)(b) of the GRA. Further, a trans person may be living inside or outside the UK at the time of the application. See more examples in Press for Change's website available at:



## Requirements relating to marital status

3.45 There is no imperative for an applicant to be unmarried before making an application under the GRA. However, the applicant has to produce a statutory declaration as to his or her marital status (section 3(6)). The reason behind this is that the applicant may be granted a full GRC only if he or she is unmarried, is not in a civil partnership, or is in a protected marriage or civil partnership and, in case the applicant is in a protected marriage, the applicant and the applicant's spouse both consent to the marriage continuing after the GRC is issued, or the applicant is a party to a protected civil partnership and the panel has decided to issue full GRCs to both the applicant and the applicant's civil partner.<sup>162</sup> In other cases, only an interim GRC will be granted (although if the marriage is annulled within six months, a full GRC will be issued by the court).<sup>163</sup> The grant of either a full or interim GRC by a GRP (section 4(1)) is subject to a right of appeal (section 8).<sup>164</sup>

3.46 For a married applicant (who or whose spouse does not agree to stay married), the interim GRC will be a ground for his or her marriage being voidable in England, Wales and Northern Ireland<sup>165</sup> and a ground for divorce in Scotland (section 4(4) and Schedule 2). A decree of nullity will be granted on this ground only if proceedings were instituted within six months from the

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[http://www.pfc.org.uk/GRC\\_Applications.html](http://www.pfc.org.uk/GRC_Applications.html).

162 Alternative grounds for granting applications were introduced under the Marriage (Same Sex Couples) Act 2013 which commenced on 10 December 2014. See Schedule 5, paragraphs 17 to 20, which allow a full GRC to be granted to applicants to a protected marriage or a protected civil partnership and those who have been living in the acquired gender for six years before the commencement of the 2013 Act. Similar provisions are provided in Schedule 2 of the Marriage and Civil Partnership (Scotland) Act 2014 which came into force on 16 December 2014.

163 The requirement of annulling a marriage before obtaining a full GRC has been heavily criticised as imposing on a transsexual the burden of choosing between either maintaining his or her existing marriage or gender recognition. The Marriage (Same Sex Couples) Act 2013 and the Marriage and Civil Partnership (Scotland) Act 2014 have changed this situation for those married under the law of England and Wales and Scotland by allowing couples to convert their civil partnerships into marriage, and vice versa, and will enable some married people to be granted gender recognition while remaining married (if the marriage is a protected marriage and the applicant's spouse has issued a statutory declaration of consent) or remain in a civil partnership (if it is a protected civil partnership and the GRP has decided to issue the other party to the civil partnership with a full GRC).

164 Appeals may be made on a point of law to the High Court of England and Wales, or Court of Session in Scotland, and subsection (5) provides the Secretary of State with the right to refer a case to the High Court or Court of Session if he considers that the grant of an application was secured by fraud (subsection (1)). Subsection (4) stipulates that if an application under section 1(1) is rejected the applicant may not make a further application until six months have elapsed.

165 This is because in England and Wales and Northern Ireland, non-consummation of marriage is a voidable ground under section 12(a) of the Matrimonial Causes Act 1973. Section 12 (a) of the Matrimonial Causes Act 1973 provides that a marriage celebrated after 31 July 1971 shall be voidable on the ground: "(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it." This appears to be particularly relevant to a transsexual person. As the UK GRA does not mention this point, the position in *Corbett v Corbett (otherwise Ashley)* [1971] P 83 remains unchanged by legislation, ie, that intercourse using an artificial cavity does not amount to consummation.

date of issue of the interim GRC (section 4(4) and Schedule 2, paragraph 3). Once a decree of nullity is made absolute by the court, it (not the GRP) will issue a full GRC to the applicant (section 5).

#### *No requirements relating to parental status*

3.47 Parental status is not relevant for gender recognition purposes under the GRA, and the status of a successful applicant as the father or mother of a child will not be affected by the acquired gender (section 12).<sup>166</sup>

#### *Requirement of gender dysphoria/ gender identity disorder diagnosis*

3.48 A standard application<sup>167</sup> has to satisfy the GRP that the applicant has or has had gender dysphoria (section 2(1)(a)). “Gender dysphoria” is defined as “the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism” (section 25).<sup>168</sup>

3.49 It should be noted that two reports are required under section 3, including one by a registered medical practitioner or a registered psychologist practising in the field of gender dysphoria, together with another report made by another medical practitioner who need not necessarily be such a specialist.<sup>169</sup>) The diagnosis of the applicant’s gender dysphoria must be included in detail in a report made by a registered medical practitioner or a registered psychologist practising in the field of gender dysphoria (section 3(2)).

#### *Requirement of “real life test”*

3.50 A standard application has to satisfy the GRP that the applicant has lived in the acquired gender throughout the period of two years ending with

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166 As to what stands for “acquired gender”, see paragraph 3.51. One of the implications under this provision is that a child’s birth registration need not be altered to reflect the fact that, for example, his or her mother who was a “father”, is now of female gender. It has been observed that this should be regarded as the correct approach, on the ground that a person’s change of gender should not affect a child’s need for the care of a parent (although the parties may need to re-adjust in light of a parent’s gender reassignment surgery): see Athena Liu, “Gender Recognition: Two Legal Implications for Marriage” (2013) 43 HKLJ 497, at footnote 11.

167 As to what stands for “standard application”, see paragraph 3.60.

168 Transsexualism or “gender dysphoria” is a widely recognised medical condition that the UK Government’s Chief Medical Officer has confirmed may properly be treated under the National Health Service as well as privately. See “Government Policy concerning Transsexual People”, Department for Constitutional Affairs (UK) website (Archived Content) at: <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/constitution/transsex/policy.htm>. For a more detailed discussion of “gender dysphoria”, see Chapter 1 of this paper.

169 A medical practitioner must also hold a licence to practice. See HM Courts & Tribunals Service, *Guidelines for registered medical practitioners and registered psychologists – to facilitate completion of the medical Report Proforma for Gender Recognition* (Booklet T452), at 1.

the date on which the application is made (section 2(1)(b)). Further, the applicant must make a statutory declaration in this respect (section 3(4)).

3.51 The gender in which the transsexual person is living (or, as the case may be, to which the person has changed under the law of another country or territory) is referred to in the GRA as “*the acquired gender*” (section 1(2)), although the term “*gender*” itself is not defined in the Act.

*Requirement of intention to live permanently in acquired gender*

3.52 A standard application has to satisfy the GRP that the applicant intends to continue to live in the acquired gender until death (section 2(1)(c)). The applicant must make a statutory declaration to this effect (section 3(4)).

*No requirement for gender reassignment surgery leading to sterilisation*

3.53 The GRA covers both pre- and post-operative transsexual adult persons, that is, it encompasses those who have not undertaken any gender reassignment surgery of any kind or those not taking prescribed hormones. The express provisions of the GRA therefore do not demand the sterilisation of transsexual people.

3.54 There would appear to be, nonetheless, a perception that the UK Government expects that surgery will occur, and this can be inferred from some provisions in the GRA<sup>170</sup> and the guidance notes published by the Government in relation to the Act. For example, the guidelines for registered medical practitioners and registered psychologists provide that an applicant having not had surgery should produce a medical report explaining why no surgery has been undertaken.<sup>171</sup> Moreover, the fact that an applicant has not undertaken any surgery may hinder a diagnosis of gender dysphoria, the reason being that the failure to resort to surgery might have a bearing on the perceived seriousness of the applicant’s intent to live permanently in the acquired gender.<sup>172</sup>

*No requirement of hormonal treatment*

3.55 As stated earlier, hormonal treatment is not a legal prerequisite for gender recognition under the Act.

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170 See Andrew N Sharpe, “Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category” (2007) 15(1) *Feminist Legal Studies* 57 to 84, available at: [https://www.academia.edu/attachments/30515465/download\\_file](https://www.academia.edu/attachments/30515465/download_file).

See also UK Hansard, Hon David Lammy, “House of Commons Standing Committee A”, 9 March 2004, Col 19.

171 HM Courts & Tribunals Service, *Guidelines for registered medical practitioners and registered psychologists – to facilitate completion of the medical Report Proforma for Gender Recognition* (Booklet T452), at 1.

172 See Lord Filkin (Parliamentary Under-Secretary of State, Department for Constitutional Affairs) at House of Lords second reading on the Bill, 13 January 2004, Column GC10, available at: <http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040113/text/40113-10.htm>.

*No requirement of physical adaptation (including non-genital surgery)*

3.56 As with hormonal treatment, there is no requirement under the GRA for the applicant to have undergone physical adaptation. However, in the application for gender recognition, details of treatment undergone, or that is prescribed or planned must be included in one of the two reports to be submitted (section 3(3)).<sup>173</sup>

*Further evidence*

3.57 It is stipulated that the applicant must provide additional evidence as required by the Secretary of State or the GRP (reasons for requiring further information or evidence must be given – section 3(8)), or as the applicant so wishes (section 3(6)).<sup>174</sup>

*Official documents, etc, affected*

3.58 Individuals who have been granted recognition in the acquired gender will have new entries created in the UK birth register entry to reflect the acquired gender, and a new birth certificate will be issued recognising the new legal gender, provided that he or she was born in the UK (or has parents who registered the birth when serving with the British Forces Overseas or the Consular Service) (Schedule 3, paragraph 3).

3.59 For those whose birth was registered in another country, the Government is unable to issue a new certificate but this will not have any impact on their new legal status. They would normally apply for a UK Residency Card which may take the form of an endorsement in their passport or a separate “immigration status document” confirming their right to work status.<sup>175</sup>

*Recognition of foreign gender change*

3.60 There are two types of application for gender recognition under the GRA: a “*standard application*” for those living in the other gender (section 1(1)(a)); or an “*overseas application*” for those who have changed gender under the law of a country or territory outside the UK (section 1(1)(b)). The overseas application requires applicants to demonstrate that they have been

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173 As to how detailed the information and evidence that is required for an application, see the latter part of this chapter.

174 There are now new sections 3(6A) and 3(6B) inserted by the Marriage (Same Sex Couples) Act 2013 (section 12 and Schedule 5 paragraph 2) which provide that if the applicant is married, he or she has to submit a statutory declaration as to whether the marriage was registered (an existing marriage registered in England and Wales or outside the UK as defined under the new section 25(a) of the GRA), and, if the marriage is a protected marriage, a statutory declaration of consent to the continuity of the marriage by the applicant’s spouse or the applicant’s declaration that no such consent was made.

175 Stephen Whittle, “UK Transgender Law Factsheet 01: Changing Names & Changing Legal Gender: A Guide to UK Law for Organisations, Employers & the Trans Community”, published by *Press For Change*, May 2013, at paragraph 8.5.

legally recognised in their acquired gender in a country or territory that is listed in the Gender Recognition (Approved Countries and Territories) Order 2011 (sections 1(1)(b) and 2). To-date, there are 41 countries listed (not counting the territories within a country).<sup>176</sup>

### *Scope of recognition*

3.61 The GRA grants transsexual people legal recognition in their acquired gender for all purposes (including legal purposes), as provided by the issue of a full GRC (section 9(1)), subject to exceptions made by the remainder of the GRA (under sections 11 to 21) and, for the future, by any other enactment or subordinate legislation (section 9(3)).<sup>177</sup>

### **Post-recognition matters**

#### *Confidentiality*

3.62 The recognition under the GRA is not retrospective, so that the GRC does not re-write the gender history of the transsexual person. Although the recognition does not affect things done, or events occurring before the GRC is issued,<sup>178</sup> it does operate for the interpretation of enactments, instruments and documents whether made before or after the GRC is issued (section 9(2)). However, Schedule 3 of the GRA enjoins the Registrar General to maintain a Gender Recognition Register (“GRR”) which is not open to public inspection or search.<sup>179</sup>

3.63 The applicant’s confidentiality is further protected under various provisions:

- paragraph 4 of Schedule 3 stipulates that the annual index to birth records will not disclose the fact that an entry relates to a record in the GRR;

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176 See the Gender Recognition (Approved Countries and Territories) Order 2011 (SI 2011/1630).

177 Section 9(1) of the GRA provides that where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (“so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman”). Section 9(3) further provides that subsection (1) “is subject to provision made by this Act or any other enactment or any subordinate legislation.”

178 For example, prior marriage and prior obligations such as financial maintenance on a previous divorce will continue to be valid so that transsexual people cannot escape any responsibilities incurred prior to reassignment such as child maintenance.

179 If applicants for a birth certificate provide details of the name recorded on the birth certificate, they will be issued with a certificate from the birth record. If they supply the details recorded on the GRR, they will receive a certificate compiled from the entry in the GRR. The mark linking the two entries will be chosen carefully to ensure that the fact that an entry is contained in the GRR is not apparent. The mark will not be included in any certificate compiled from the entries on the register. See Explanatory Notes on Gender Recognition Act 2004, at paragraph 32.

- paragraphs 5 and 6 of Schedule 3, dealing with provision of certified copies of any entry in the GRR, ensure that it will not be apparent from the certified copy that it is compiled from the GRR and such certificates will look the same as any other birth (or adoption) certificate;
- section 22 which, subject to defences in section 22(4), makes it an offence for a person to disclose information, acquired in an official capacity, concerning the application or the person's previous gender.<sup>180</sup>

*What the acquired gender does not affect*

3.64 The acquired gender does not affect:

- *Parenthood*: change of gender does not affect the person's status as the father or mother of a child (section 12);<sup>181</sup>
- *Social security benefits and pensions*: entitlement based on a person's acquired gender;
- *Discrimination*: the anti-discrimination laws have been amended to protect persons with GRC;
- *Succession*: change of gender does not affect the disposal or devolution of property under a will made before the day on which the GRA came into force (ie, before 5 April 2005) (section 15);<sup>182</sup>

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180 See The Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No. 2) Order, which came into force on 4 April 2005, prescribing circumstances where the disclosure of protected information does not constitute an offence under section 22 of the GRA. These concern disclosure for the purpose of obtaining legal advice (Art 3), disclosure for religious purposes (Art 4) or medical purposes (Art 5), disclosure by or on behalf of a credit reference agency (Art 6) and disclosure for purposes in relation to insolvency or bankruptcy (Art 7). This is a strict liability offence where there is no room for pleading 'reasonableness' as a defence. See Stephen Whittle, "Born Identity: New Confidentiality Responsibilities to Transsexual People", 3 June 2005.

181 This provision attracted legal challenge in *R (on the application of JK) v Registrar General for England and Wales* [2015] EWHC 990 (Admin) that will be discussed later in this chapter from paragraphs 3.105 to 3.107.

182 The High Court is granted power to redistribute property under section 18 where the disposition or devolution of any property under a will or other instrument (made on or after the day that the GRA came into effect) is different from what it would be but for the fact that a person's gender has become the acquired gender. If, for example, an instrument governs succession by reference to the "*eldest daughter*" of the settlor, and there is an older brother whose gender becomes female under the Act, then the person who was previously the "*eldest daughter*" may cease to enjoy that position. Then, the person who is adversely affected by the different disposition or devolution of the property may make an application to the High Court. The court, if it is satisfied that it is just to do so, may make such order as it considers appropriate in relation to the person benefiting from the different disposition of the property. See Explanatory Notes on Gender Recognition Act 2004, at paragraph 82. Further, a trustee or personal representative, when making distribution or conveyance,

- *Sports*: sports organisations may exclude transsexual people if it is necessary for “*fair competition or the safety of the competitors*” (section 19);
- *Peerages*: hereditary titles are not affected by change of gender (section 16);
- *Gender-specific offences*: change of gender does not prevent gender-specific offences being committed or attempted by GRC holders (section 20).<sup>183</sup>

### *Consequential legislative amendments*

3.65 A number of amendments to the law of marriage, pensions and discrimination were made under the GRA in the light of legal recognition of the acquired gender.

#### (1) *Marriage*

3.66 Schedule 4 has amended the law of marriage in three ways:

- (1) The law in section 1 of the Marriage Act 1949 concerning marriage within the prohibited degrees of relationship was amended to accommodate necessary modification in the case of a person whose gender has become the acquired gender (Schedule 4, paragraphs 1 and 2).<sup>184</sup>
- (2) An additional exception was provided to the obligation on clergy in the Church of England and the Church in Wales to solemnise marriages of persons whose gender have become the acquired gender (Schedule 4, paragraph 3).<sup>185</sup>

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does not have any duty to inquire whether a GRC has been issued or revoked to any person even if that fact could affect entitlement to property which he is responsible for distributing (section 17). Yet, the beneficiary will nevertheless retain his or her claim to the property and may enforce this claim, eg, by following the property into the hands of another person who has received it instead. See Explanatory Notes on Gender Recognition Act 2004, at paragraph 81.

183 The Sexual Offences Act 2003 introduced gender-neutral terms for England and Wales, but, in any event, section 20 of the GRA extends to England and Wales, as well as Scotland and Northern Ireland, in order to ensure that there is no residual problem.

184 There are, for example, restrictions on marriage between a woman and her ex-husband’s father. The adjustments made here will mean that where one party to the marriage is regarded as being of the acquired gender, the restrictions cover relationships flowing from any previous marriage in the birth gender, ie, a woman who is a male-to-female transsexual person may not marry her ex-wife’s father. This provision is mirrored for Scotland in paragraph 7 and for Northern Ireland in paragraph 8 of Schedule 4 of the GRA. See Explanatory Notes on Gender Recognition Act 2004, at paragraph 40.

185 No such provision is needed for Northern Ireland or Scotland as there is no obligation to solemnise marriages on the clergy of churches in those jurisdictions. See Explanatory Notes on Gender Recognition Act 2004, at paragraph 41.

- (3) A marriage will be voidable if the respondent is a person whose gender at the time of the marriage had become the acquired gender (Schedule 4, paragraph 4).<sup>186</sup>

3.67 Section 21 makes explicit that “a person who has changed gender in another country or territory is not thereby recognised in the acquired gender in the UK.”<sup>187</sup> A person in that position will have to make an application for gender recognition under section 1 of the GRA. An exception applies for a national of another country within the European Union or European Economic Area.<sup>188</sup>

(2) *Social security benefits and pensions*

3.68 Schedule 5 makes provision to deal with the effect of the acquired gender on Widowed Mother’s Allowance (paragraph 3), Widow’s Pension (paragraph 4), Widowed Parent’s Allowance (paragraph 5), Incapacity Benefit (paragraph 6), Retirement Pensions (paragraphs 7 to 11), graduated retirement benefit (paragraphs 12 and 13), Guaranteed Minimum Pension (paragraphs 14 and 15) and equivalent pension benefits (paragraphs 16 and 17).<sup>189</sup>

(3) *Discrimination*

3.69 The Sex Discrimination Act 1975 and the Sex Discrimination (Northern Ireland) Order 1976<sup>190</sup> were amended by Schedule 6 of the GRA to the effect that it would be unlawful to discriminate against a person who has been recognised in the acquired gender under the GRA, and the exceptions based on “genuine occupational qualifications”<sup>191</sup> would not be available once

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186 Equivalent provision is made for Northern Ireland in paragraphs 9 to 11. Scotland does not have the same concept of voidable marriage. See Explanatory Notes on Gender Recognition Act 2004, at paragraph 42.

187 See Explanatory Notes on Gender Recognition Act 2004, at paragraph 85.

188 It means that a national of another country within the European Union or European Economic Area who has been granted legal recognition of their gender change under the law of that country, and has an enforceable right under EC law to recognition of their acquired gender in the UK, will not need to make an application under section 1 of the GRA, and, similarly, a post-recognition opposite-sex marriage where one of the parties is a EU or EEA national and there is an enforceable right to recognition under European Law will be accepted as a valid marriage in the UK without the need for further application under section 1 of the GRA.

189 Examples illustrating how the amendments to the law work in relation to the benefits and pensions specific to the UK can be found in the Explanatory Notes on Gender Recognition Act 2004, at paragraphs 45 to 76.

190 S.I. 1976/1042 (N.I. 15). This is now covered by the Equality Act 2010, which replaces the former discrimination law in England and Wales almost in its entirety. Most of its provisions came into force on 1 October 2010. The Equality Act incorporates provisions protecting an individual against gender reassignment discrimination.

191 If, for example, the nature of the job requires a woman, it is open to the employer to show that it is reasonable to treat a male-to-female transsexual person as being unsuitable for that job. This situation is no longer an exception to discrimination pursuant to the GRA.



a person has been recognised in the acquired gender. They are then, for the purposes of employment, to be treated as being of their acquired gender.<sup>192</sup>

*Areas of concern in House of Lords' debates not reflected in the GRA*

3.70 Before enactment of the GRA, some provisions and underlying assumptions of the Bill proved controversial at the scrutiny stages. In particular, during its passage through the House of Lords general concerns were raised<sup>193</sup> by some peers on the following areas: (1) religious issues; (2) medical issues; (3) effect of recognition on others; (4) reversal of recognition in acquired gender; and (5) availability of historical records.<sup>194</sup> The proposed amendments to the Bill pertaining to these areas were defeated in the House of Lords and were not reflected in the GRA, but debates over these matters may shed light on what consequential amendments to the GRA may need to be made in future.

(1) *Religious issues*

3.71 Religious issues were debated in the context of proposed amendments to a number of clauses in the Bill, including: (a) giving the religious ministers or religious organisations the entitlement to seek a copy of a birth certificate which showed clearly whether a person seeking his/her marriage to be solemnised by a clergyman was a transsexual person; and (b) allowing religious organisations to prohibit or restrict participation by any person with an acquired gender in its religious activities or ceremonies if the prohibition was necessary to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of the religion's followers. Both proposals were objected to for reasons including: (a) disclosure of personal details was an issue best left to the transsexual individual who should be protected from being exposed; and (b) the freedom for religious bodies to discriminate against transsexuals already existed in law.<sup>195</sup> Nevertheless, the Church of England had played a significant role in determining the shape of legislation for the UK in that they had, at least, successfully sought provision to protect the personal consciences of clergy opposed to solemnising marriages involving transsexual persons.<sup>196</sup>

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192 The exceptions in section 19 of the Sex Discrimination Act 1975 and Article 21 of the Sex Discrimination (Northern Ireland) Order 1976, which exempted discrimination in relation to employment, authorisation or qualification for the purposes of an organised religion where that employment, authorisation or qualification is limited to persons who are not undergoing and have not undergone gender reassignment, continue to apply in relation to people who have been recognised in the acquired gender under the GRA.

193 The Second Reading of the Bill was moved on 18 December 2003 by Lord Filkin, Parliamentary Under-Secretary of State, Department for Constitutional Affairs. The Third Reading of the Bill was moved in the House of Lords on 10 February 2004.

194 Catherine Fairbairn, "The Gender Recognition Bill [HL] - Bill 56 of 2003-04" (Research Paper 04/15, 17 February 2004), at 57 to 68.

195 Catherine Fairbairn, above, at 58 to 62.

196 For a detailed analysis of how the influence was exerted, see Duncan Dormor, "Transgenderism and the Christian Church: An Overview", in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 67 to 73.

(2) *Medical issues*

3.72 There were debates on the issues of transsexualism, the sex/gender disparity and whether a requirement for gender reassignment surgery should be included. The UK Government took the stance that the issue of gender was a legal one where medical diversity was not central to the debate, and, as the ECtHR viewed in the *Goodwin and I* judgments, the continuing debate over the nature and aetiology of transsexualism should no longer stand in the way of transsexual people enjoying their human rights as others do.<sup>197</sup>

(3) *Effect of recognition on others*

3.73 In response to the concern on the potential conflict of the human rights of a transsexual person who has not undergone surgery with those of someone of their acquired gender who might have to share, for example, a prison cell, nurses' quarters or sports changing facilities, the House of Lords expressed the view that the vast majority of transsexuals did not wish to cause embarrassment to others and the issues raised were already being dealt with in society.

3.74 Whilst there was a proposal to impose on the GRP a duty to have due regard to the effect of issuing a GRC on the spouse and/or children of the applicant, the House of Lords maintained that the proposed amendment threatened to change the nature of the application for gender recognition and, as a practical consideration, firm decisions have already been taken once the application stage is reached. The way in which the views of the family should be taken into account is when the divorce takes place, in which case the Court would consider whether appropriate ancillary relief decisions have been made in the interests of the children of the family.<sup>198</sup>

(4) *Reversal of recognition in acquired gender*

3.75 Concern was expressed on the Working Group's finding that some transsexuals oscillated between the two sexes throughout their lives,<sup>199</sup> but the House of Lords considered that this might only apply to a small percentage, and the GRP would need to be convinced that a person was committed to a permanent change of gender before granting any application.<sup>200</sup>

(5) *Availability of historical records*

3.76 It was suggested that details held in the GRR should not be accessible to the public during the lifetime of the registered person concerned or for 75 years. The House of Lords referred to the general consultation on

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197 Catherine Fairbairn, above, at 62 to 65.

198 Catherine Fairbairn, above, at 65 to 67.

199 See earlier discussion in this chapter.

200 Catherine Fairbairn, above, at 67 and 68.

civil registration records and suggested it was better to consider the issue of opening historic records alongside those other registration issues.<sup>201</sup>

## **The Gender Recognition Panel**

### ***Role and structure***

3.77 The GRP is a constituent tribunal of HM Courts and Tribunal Service and consists of legal and medical members.<sup>202</sup>

3.78 The UK gender recognition system requires an applicant for gender recognition to submit specified evidence to the GRP. The GRP would reach its decision based on the documentary evidence submitted. The GRP meets at regular intervals throughout the year.

3.79 The GRA envisages the setting up of the GRP (under sections 1(3) and 1(4) and Schedule 1) to perform a judicial function of adjudicating on whether recognition of an acquired gender is to be given upon application by a transsexual person and examining the portfolio of documentation submitted by the applicant. The GRP was placed with the responsibility of ensuring that the requirements of sections 2 and 3 of the GRA are complied with before an application is granted.

3.80 Those eligible to sit on the GRP fall into two categories: legal and medical members whose eligibility criteria are prescribed under paragraph 1 of Schedule 1 of the GRA. The President is given the power to determine the membership of the GRP within the requirements for the constitution under paragraphs 4 and 5 of Schedule 1 of the GRA. In practice, the GRP consists of a judicial panel (made up of legal and medical members responsible for assessing applications) and an administrative team (supporting the judicial panel).

3.81 The GRP is under the supervision of the Council on Tribunals which will keep the constitution and working of the GRP under review, and their comments on the administration of the GRP will be included in an annual report which is laid before Parliament by the Lord Chancellor, and before the Scottish Parliament by Scottish Ministers.<sup>203</sup>

### ***Procedures for handling applications***

3.82 An application under sections 1(1)(a) and 1(1)(b) of the GRA will undergo the following process stages:<sup>204</sup>

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201 Catherine Fairbairn, above, at 68.

202 See Gender Recognition Advisory Group's report to Joan Burton, TD, Minister for Social Protection dated 15 June 2011, available at: <http://www.welfare.ie/en/downloads/Report-of-the-Gender-Recognition-Advisory-Group.pdf>.

203 See Explanatory Notes on Gender Recognition Act 2004, at paragraph 13.

204 See the guidance published by the UK Government, available at:

- (1) On receipt of an application form with the prescribed statutory declaration and the requisite information and evidence, the administrative team of the GRP will send the applicant an acknowledgement and then take payment for the application after which a confirmation letter will be posted to the applicant within 5 days. (The form, manner and fee to be paid for an application are to be specified by the Secretary of State (section 7).)
- (2) The administrative team will examine and verify the application, and may write to ask for other information or evidence as they require.
- (3) Once the administrative team has collected all the evidence, the application will be passed to the judicial panel of the GRP.
- (4) The judicial panel may issue “*directions*” requesting further information or documents for the application.<sup>205</sup> Only the judicial panel considering an application can decide what evidence is required in a particular case.
- (5) The judicial panel will then decide whether the application is successful or not by taking a majority vote (the President has a casting vote in case of split voting). Save for exceptional circumstances, all applications will be decided on the papers in private and a hearing is not required (GRA, Schedule 1, paragraph 6).
- (6) For an unsuccessful application, the administrative team will write to inform the applicant of the reasons for the objection. For a successful application, the administrative team will inform the Registrar General’s Office and the Inland Revenue and send a full or interim GRC to the applicant.
- (7) On receipt of a full GRC, the Registrar General will send the successful applicant a draft of the information to be recorded in the GRR, and upon confirmation of the correctness of the information therein a new record will be created in the GRR and a free short birth certificate will be sent to the applicant together with any additional full birth certificates having been purchased.

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<http://www.justice.gov.uk/tribunals/gender-recognition-panel/process>. See also HM Courts & Tribunals Service, *A general guide for all users – Gender Recognition Act 2004* (Booklet T455).

205 The professed aim of the GRP is to grant applications, wherever legally possible, which is why directions are given rather than making final decisions which might not be in favour of the applicant. See Gender Identity Research and Education Society, “Obtaining your Gender Recognition Certificate”, available at: <http://www.gires.org.uk/law-archive/obtaining-your-gender-recognition-certificate>.

### ***Evidence required for gender recognition***

3.83 Sections 3(2) and 3(3) of the GRA require the applicant to provide two reports in support of the application under section 1(1)(a).<sup>206</sup> Whereas details of the diagnosis of gender dysphoria should be included in the report of the medical practitioner or psychologist practising the field of gender dysphoria, details of treatment undergone, prescribed or planned may be provided in either of the two reports. Questions arise on how comprehensive are the details required by the GRP. Judge Michael Harris, current President of the GRP, has commented that it would be impossible to set out precisely what should be required in all cases as each will have its own individual facts and the detail which might be sufficient in one case may be inadequate in another. In the main, what the GRP needs is sufficient detail to satisfy itself that the doctor's diagnosis is soundly based and that the treatment received or planned is consistent with and supports that diagnosis.<sup>207</sup>

3.84 Judge Michael Harris further observed that the detail required should normally be no greater than can be set out in the space provided in the medical report pro forma, including:<sup>208</sup>

- (1) the diagnosis;
- (2) details of when and by whom the diagnosis was made;
- (3) the principal evidence relied on in making the diagnosis;
- (4) details of the non-surgical (eg, hormonal) treatment to-date (giving details of medications prescribed, with dates) and an indication of treatment planned;<sup>209</sup>
- (5) date of referral for surgery, or, if no referral, the reasons for non-referral;
- (6) details of the surgical procedures which have been carried out and their dates, together with any surgery planned and reference made to each individual procedure; and

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206 See earlier discussion in this chapter.

207 See Judge Michael Harris, "President's Guidance No.1 – Evidential requirements for applications under section 1(1)(a) of the Gender Recognition Act 2004". It is pertinent to note that sections 3(2) and 3(3) attracted legal challenge in *Carpenter v Secretary of State for Justice* [2015] EWHC 464 (Admin), which will be discussed later in this chapter at paragraphs 3.108 and 3.110.

208 See Michael Harris, above.

209 When the applicant has to demonstrate that he/she has lived permanently in the adopted gender for at least two years, the treating specialists will have insisted on a two-year "*real life experience*" before agreeing to surgical intervention, but this does not necessarily lead to the accumulation of the document trail needed to satisfy the exacting requirements of the GRP, which will make a critical assessment based upon the precise evidence presented in different categories. See Gender Identity Research and Education Society, "Evidence to support your application for a Gender Recognition Certificate", available at: <http://www.gires.org.uk/law-archive/obtaining-your-gender-recognition-certificate>.

- (7) if the report is prepared by a registered medical practitioner or by a registered psychologist who did not make the initial diagnosis of gender dysphoria, a confirmation of the diagnosis and the basis upon which that confirmation is made prepared by the person writing the report.

## **Subsequent findings on the application process and evidential requirements for gender recognition**

### ***Effectiveness of the application process***

3.85 It was anticipated that, following the introduction of the GRA, an initial rush of applicants would have been received from people who had made the transition many years earlier. However, this rush of applications did not materialise. The official statistics on GRCs applied for and granted by GRP and the courts are as follows (updated as at September 2014).<sup>210</sup>

<b>Time period</b>	<b>Outcome of Applications dealt with</b>					
	Applications received by the GRP	Total applications dealt with	Full GRC granted by the GRP	Interim GRC granted	Application refused or no fee paid	Application withdrawn
2004/05 <sup>1</sup>	395	0	0	0	0	0
2005/06	1,007	1,253	1,181	33	21	18
2006/07	693	588	532	22	23	11
2007/08	294	448	392	24	27	5
2008/09	278	274	241	25	8	0
2009/10	286	273	239	16	15	3
2010/11	303	316	260	16	28	12
2011/12	320	309	263	13	23	10
2012/13	301	277	236	9	15	17

210 The quarterly national statistics on Gender Recognition Certificates applied for and granted by Tribunals Service's GRP and the courts were released by the Ministry of Justice and produced in accordance with arrangements approved by the UK Statistics Authority. Up to the issuance of this Consultation Paper, the latest update of the statistics was done in September 2014. See: <https://www.gov.uk/government/collections/gender-recognition-certificate-statistics>.

2013/14	311	371	318	16	20	17
2014/15 <sup>2</sup>	151	122	101	5	8	8
<b>Total:</b>	<b>4,339</b>	<b>4,231</b>	<b>3,763</b>	<b>179<sup>3</sup></b>	<b>188</b>	<b>101</b>

1 Each time interval starts from April and ends at March of the next year.

2 The information collected is up to September 2014.

3 Of the 179 interim GRCs granted between 1 April 2005 and 31 September 2014, 23 have been converted to a full GRC granted by the courts.

3.86 As can be seen in the above table, since 2006/2007, the number of applicants has been steady, comprising approximately 300 cases per annum. Until 2013, the number of pending applications to the GRP for gender recognition had been increasing annually.

3.87 The GRP User Group Meeting in London in March 2010 revealed that 82% of applications were disposed of within 20 weeks of receipt (original target was 14 weeks<sup>211</sup>), and each session of disposal tended to handle 16 applications (mixture of first and second plus hearings).<sup>212</sup> It was observed that a significant reason for delay in the system was the UK National Health Service's waiting list for access to gender reassignment hormone therapy or surgery, with applicants for treatment having to wait several years.

3.88 A Customer Satisfaction Survey was commissioned by the GRP during spring 2010 in which applicants receiving the final decisions from the GRPs were invited to complete and return a questionnaire. The feedback was positive, with 100% of respondents who took part stating that they were "very or fairly satisfied" with the administrative process of the gender recognition application.<sup>213</sup>

3.89 It was noted, however, that parts of the administrative process were still not as straightforward as they should be. For example, applicants were not kept informed and more advice on how to obtain medical reports was called for.<sup>214</sup>

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211 See Minutes for the GRP User Group Meeting (5 November 2008, London), at paragraph 3, available at:

[https://www.justice.gov.uk/downloads/tribunals/gender-recognition-panel/grp\\_minutes\\_05Nov2008\\_final.pdf](https://www.justice.gov.uk/downloads/tribunals/gender-recognition-panel/grp_minutes_05Nov2008_final.pdf).

212 See Minutes for the GRP User Group Meeting (March 2010, London), at paragraph 3, available at:

[http://www.justice.gov.uk/downloads/tribunals/gender-recognition-panel/grp\\_minutes\\_18Mar10.pdf.pdf](http://www.justice.gov.uk/downloads/tribunals/gender-recognition-panel/grp_minutes_18Mar10.pdf.pdf).

213 See related information disclosed by the GRP available at:

<http://webarchive.nationalarchives.gov.uk/20110206182821/http://www.grp.gov.uk/aboutus.htm>.

214 Same as above.

3.90 According to a study conducted by the University of Leeds which took place between May 2008 and May 2010 (with 25 transsexual people participating in in-depth interviews relating to their experience of the GRA and the process of applying for a change of gender), most of the participants who had successfully acquired a GRC took the view that the application process was “*straightforward*” or “*easy*,” whereas some others had found it a complex and problematic procedure, particularly in relation to the required evidence from general practitioners and psychiatrists.<sup>215</sup>

3.91 Nevertheless, there appears to be general consensus that the system introduced by the GRA has been working well. Some concerns were expressed initially that the legal/judicial character of the GRP resulted in an overly legalistic approach – but these concerns appear to have abated.<sup>216</sup>

### ***The ‘problematic’ two-year pre-recognition period***

3.92 For transsexual people who would like to apply for a GRC under section 1(1)(a) of the GRA, one prerequisite is to live in the acquired gender throughout the preceding period of two years. That period involves proof of change of name and documentation to coincide with the applicant’s gender presentation. A view expressed by the Equality and Human Rights Commission<sup>217</sup> is that undergoing these changes is “*paradoxical but also places additional barriers to transitioning*.”<sup>218</sup> The Commission found that there was evidence that some employers and service providers were using the GRA effectively to place further barriers on transsexual people wishing to be recognised in their expressed gender. There were organisations which requested a GRC or proof of surgical status as proof of gender and name change, rather than a letter from a general practitioner or consultant psychiatrist and a legal change of name document. One example was a University’s refusal to change names and genders on a Degree certificate until the former student obtained a GRC, and as a result the student concerned was unable to take up a further postgraduate course without disclosing his former status.<sup>219</sup>

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215 Hines, S and Davy, Z, “Gender Diversity, Recognition and Citizenship: Exploring the Significance and Experiences of the UK Gender Recognition Act (GRA, 2004)” (University of Leeds & Economic & Social Research Council, undated paper), at 13 and 14.

216 See (Ireland) Gender Recognition Advisory Group, *Report to Joan Burton TD, Minister for Social Protection* (15 June 2011), at 11 and 12.

217 The Commission is a non-departmental public body in Great Britain that was established by the Equality Act 2006 and came into being on 1 October 2007, taking the responsibility for the promotion and enforcement of equality and non-discrimination laws in England, Scotland and Wales (see its homepage at: <http://equalityhumanrights.com>).

218 Equality and Human Rights Commission, “Submission on the UK’s sixth periodic report under the International Covenant on Civil and Political Rights” (June 2008), at 23.

219 Equality and Human Rights Commission, *above*. See also Stephen Whittle, Lewis Turner and Maryam Al-Alami, “Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination” (Press For Change, February 2007), at paragraph 7.3, available at: <http://www.pfc.org.uk/pdf/EngenderedPenalties.pdf>.



3.93 It appears that many transsexual people experience difficulties in changing their name and gender on a variety of ‘day to day’ documentation, since some organisations may be unhelpful in dealing with a request for change of documentation (eg, driving licence, passport, medical and workplace records) and thus require a GRC before making the changes. However, one cannot apply for a GRC until there is proof that one has been living full-time in one’s acquired gender for two years (by providing documents in one’s acquired gender). Some people contend that this causes difficulty for a transsexual person (especially those having not undergone treatment for the purpose of modifying sexual characteristics) beginning to live their life for the first time in their expressed or acquired gender, the cause attributed largely to the lack of appropriate procedures in place for the organisations and the transsexual people to follow for the latter’s requests or applications for name and gender changes in documentation.

3.94 *Press for Change*, a UK organisation supporting trans people, had recommended that a government resource be set up to implement such procedures, and that there be legislation to stipulate the legal consequences for failing to comply, and such information should be sent to large service organisations such as government departments, insurance companies, the Driver and Vehicle Licensing Agency, general practitioner surgeries, banks and also to employers.<sup>220</sup>

3.95 These problems were addressed when the Equality Act 2010 commenced on 1 October 2010, making it unlawful to discriminate, harass or victimize a trans person, including direct or indirect discrimination. With this in effect, a transsexual person can ask an employer or service provider to make changes to his or her name and gender in public or private records by notifying them of their intention to transition (ie, when the transsexual person starts the process of living permanently in the preferred gender role prior to any gender reassignment treatment or surgery), and by providing a statutory declaration of name and gender change.<sup>221</sup> The organisations concerned must respect these changes as well as the change of ordinary titles of the transsexual person and change of details on such person’s records, and reissue relevant documents as required.<sup>222</sup>

### ***Rigorous diagnostic requirements***

3.96 The non-surgical criteria for a GRC under the GRA was praised by the majority of the 25 participants in the 2010 study conducted by the

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220 Stephen Whittle, Lewis Turner and Maryam Al-Alami, “Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination” (*Press For Change*, February 2007), at paragraph 5.3.1.

221 A deed poll is an alternative but it would be more expensive to get a deed poll and it is not a sworn document and thus does not carry the same weight in law.

222 A summary of the combining effect of the Equality Act 2010 and the GRA in protecting the trans people from being discriminated at work can be seen in *Press For Change’s* article (written by Stephen Whittle in May 2011), “Changing Names and Gender; A Guide For Employers And Other Organisations”, available at: [http://www.lgbt Wolverhampton.org.uk/uploads/3/0/2/4/30245599/2013\\_pfc-fagsht\\_02\\_name\\_changes\\_4\\_orgs.pdf](http://www.lgbt Wolverhampton.org.uk/uploads/3/0/2/4/30245599/2013_pfc-fagsht_02_name_changes_4_orgs.pdf).

University of Leeds, as it was felt that surgical criteria would have been discriminatory against people who could not afford private surgery or were unable to have surgery due to medical reasons. Yet, it was often highlighted that the continuation of the “*real life test*” undermined such a freedom of choice.<sup>223</sup>

3.97 Further, some argued that the diagnostic statement demanded by the GRP is rigorous in that it requires details of the many early assessment sessions and how the diagnosis was reached. One possible solution is to be reassessed by a registered psychiatrist in the UK, yet as many transsexual people will say, they are no longer distressed about their gender identity after long years of treatment and gender reassignment – which is a major factor in the diagnosis. The long National Health Service waiting list mentioned earlier would make obtaining a re-diagnosis not a realistically option for many trans people who desire gender recognition.<sup>224</sup>

### **Other observations**

3.98 Views have also been expressed on the issue of depathologisation of transgenderism, endorsing the approach that medical and psychiatric professionals should not be involved in the process of gender recognition.<sup>225</sup> Around half of the 25 participants in the University of Leeds study felt strongly that issues around gender and identity and recognition should not be left in the hands of psychiatrists, which was a requirement of the UK system rarely found, they argued, in gender recognition legislation in other jurisdictions.

3.99 Further, that ‘gender dysphoria’ remains a listed mental illness on the Diagnostic and Statistical Manual of Mental Disorders (DSM)<sup>226</sup> was criticised by many participants, who thought that it is not a mental illness requiring the involvement of medical practitioners for gender recognition.

3.100 Some participants believed that the guiding framework of gender recognition should be separated altogether from a biological model of sex and gender. They called for a more simplified application process and less requirements for medical evidence as well as less involvement of medical practitioners in the legal process of gender recognition.<sup>227</sup>

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223 Hines, S and Davy, Z, “Gender Diversity, Recognition and Citizenship: Exploring the Significance and Experiences of the UK Gender Recognition Act (GRA, 2004)” (University of Leeds and Economic & Social Research Council, undated paper), at 8 and 16.

224 See Stephen Whittle and Dr Lewis Turner, “Leading Trans Equality: A Toolkit for Colleges – The need for a Trans Positive environment at colleges, and what this toolkit can do for you” (CEL Research Programme 2007-08, March 2008), at 83, available at: [http://issuu.com/lgbtexcellencecentre/docs/transgender\\_school\\_toolkit/1](http://issuu.com/lgbtexcellencecentre/docs/transgender_school_toolkit/1).

225 See Jens T. Theilen, “Depathologisation of Transgenderism and International Human Rights Law”, *Human Rights Law Review* (2014) 14(2): 327 to 342.

226 DSM is a standard published by the American Psychiatric Association (<http://www.dsm5.org/Pages/Default.aspx>) and provides a common language and standard criteria for the classification of mental disorders.

227 Hines, S and Davy, Z, “Gender Diversity, Recognition and Citizenship: Exploring the

3.101 Further, the majority of the participants felt that the GRA excluded people whose gender identities fell outside the categories of male or female and thus inappropriately forced them to fit into these two categories. In this way, the GRA was criticised for reproducing a binary gender model which was unfair for those whose gender identities were not binary.<sup>228</sup>

### **Reform proposals**

3.102 During the stage of considering the Bill, a campaigning organisation namely *Liberty* recommended, amongst other things, that contemporaneous medical reports should be acceptable as the evidence required by the GRP when considering an application for gender recognition, so as to simplify the requirements for the applicants to obtain further medical reports after years of diagnosis that he or she experienced gender dysphoria.<sup>229</sup> This recommendation has not yet been adopted in law or by the GRP.

3.103 There have recently been calls for re-evaluation of the structure of the current gender recognition scheme in the UK, particularly after the emergence of self-declaration models in countries like Argentina, Denmark and Malta (summaries of the gender recognition schemes in these jurisdictions can be found in Chapter 4 and Annex B of this Consultation Paper), as well as the 2014 report published by the European Union Agency for Fundamental Rights which reported on the high rates of discrimination experienced by transgender individuals in, *inter alia*, the UK, attributing significantly to their inability to access proper identity documents and the stigmatising pre-requisites which they must satisfy to obtain recognition.<sup>230</sup>

3.104 In January 2016, the Women and Equalities Committee (a Parliamentary committee in the UK appointed by the House of Commons in June 2015 to oversee equalities issues)<sup>231</sup> released a report on *Transgender Equality* calling for, *inter alia*, proposals to update the GRA in line with the principles of gender self-declaration that have been developed in some other jurisdictions.<sup>232</sup> In place of the present medicalised, quasi-judicial application process, the Committee recommended that an administrative process should be developed, centred on the wishes of the individual applicant, rather than on intensive analysis by doctors and lawyers. The Committee also

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Significance and Experiences of the UK Gender Recognition Act (GRA, 2004)" (University of Leeds and Economic & Social Research Council, undated paper), at 18.

228 Hines, above, at 19.

229 Catherine Fairbairn, Home Affairs Section, House of Commons Library, "The Gender Recognition Bill [HL], Bill 56 of 2003-04", (17 February 2004), at 78.

230 European Union Agency for Fundamental Rights, "Being Trans in the European Union – Comparative Analysis of the EU LGBT Survey Data", *Luxembourg: European Union Agency for Fundamental Rights*, 2014.

231 For more information about the Women and Equalities Committee, please see: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/role/>

232 See Women and Equalities Committee, *Transgender Equality* (First Report of Session 2015-16), published on 14 January 2016 by *authority of the House of Commons*, at paragraph 45.

recommended that the gender recognition process should be opened up to applicants aged 16 and 17, with appropriate support, on the basis of self-declaration,<sup>233</sup> and that there should be an option to record gender as “X” on a passport.<sup>234</sup>

### ***Judicial challenges related to the GRA***

3.105 Prior to the reform proposals above being put forward, there were two High Court decisions in 2015 concerning the means by which the UK legally recognises a transsexual person’s acquired gender under the GRA, namely *R (on the application of JK) v Registrar General for England and Wales* (2015)<sup>235</sup> and *Carpenter v Secretary of State for Justice* (2015).<sup>236</sup> Both cases required the court to consider the impact of the GRA on the rights of transsexual persons to respect for their private and family lives pursuant to Article 8 of the ECHR, as well as their right not to be discriminated against in their enjoyment of the ECHR rights by virtue of Article 14.

3.106 The main issue in the *JK* case was whether the Registrar General’s refusal to allow the alteration of the birth certificates of two children of a male-to-female transsexual person recognised under the GRA was a breach of Articles 8 and 14 of the ECHR. The applicant challenged the requirement that she be recorded as “*father*” on the children’s birth certificates, rather than “*parent*” or “*father/parent*”, as, it was argued, there may be circumstances in which the children might disclose their birth certificates which would expose the fact of the transsexual person’s previous gender identity. JK’s requests for her to be recorded as her children’s “*parent*” rather than “*father*” on their birth certificates were declined by virtue of section 12 of the GRA.

3.107 The Court dismissed JK’s application, ruling that the requirement for JK to be listed as “*father*” on the birth certificate of a child was not a breach of her human rights under Article 8, as this requirement did not stray outside the state’s “*wide margin of appreciation in giving effect to the right of transsexual people to have their new gender recognised*” and “*in respect of ensuring that the right to privacy is properly respected in a sensitive moral and ethical area.*”<sup>237</sup> The Court took the view that there were pros and cons for the children if JK’s gender marker was allowed to be altered on their birth certificates: whilst it could reduce the risks of stress resulting from the disclosure of JK’s transsexuality, it would increase the risks inherent in their birth certificates showing no father and suggestive of two female parents from birth: “*if their birth certificates were altered to show their father as ‘parent’ (or, if it were possible, ‘father/parent’) that itself would interfere with the child’s article 8 right to have his or her fundamental identity recognised. In some cases, such alteration may be adverse to the best interests of the relevant*

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233 Same as above, at paragraph 70.

234 Same as above, at paragraph 298.

235 [2015] EWHC 990 (Admin), [2015] All ER (D) 128 (Apr).

236 [2015] EWHC 464 (Admin), [2015] All ER (D) 08 (Mar).

237 *R (on the application of JK) v Registrar General for England and Wales* [2015] EWHC 990 (Admin), at paragraphs 61, 63 and 100.

children.”<sup>238</sup> Further, if a transsexual person like JK has an entitlement to change his or her children’s birth certificate, “*that may override the rights of the children and others (such as another parent)*” and “*will provoke disputes that will be contrary to the public interest in gender change being a non-adversarial process.*”<sup>239</sup> The Court therefore found that, insofar as the scheme interferes with the Article 8 rights of JK and/or her children (which was held to be the case), the interference was outweighed by the interference with the rights and interests of other individuals and the public interest that would be caused by not having such a restriction, and was therefore justified under Article 8(2).<sup>240</sup>

3.108 On the other hand, the central dispute in the *Carpenter* case was whether the evidential requirements under section 3(3) of the GRA (requiring an applicant who has had or intends to have medical procedures to reveal details of the medical procedures to the GRP to support the application for a GRC) were incompatible with Articles 8 and 14 of the ECHR, as interfering unnecessarily or disproportionately with the privacy of transsexual persons who plan to have or have had such medical treatment.

3.109 The claim was rejected by the High Court on the grounds that the information about medical treatment was necessary to the decision to be taken by the GRP, and thus its dissemination was necessary and proportionate to the legitimate aim, and there was no incompatibility with Article 8. It was a material consideration for the court that the disclosure of the details of SRS would be limited, since the list of the surgical procedures undergone was only reported on by a medical practitioner to the GRP and disseminated no further.<sup>241</sup> In addition, just because a person who has undergone treatment for modifying their sexual characteristics must provide details of the treatment would not make it more difficult for them to obtain a certificate than a transsexual person who has not undergone surgery.<sup>242</sup>

3.110 A commentator has nonetheless queried the *Carpenter* ruling on the basis that it was not clear why the GRP needed to know precisely what procedures were performed by an applicant for gender recognition under the GRA when he or she may have already satisfied the statutory criteria (ie, has or has had gender dysphoria, has lived in the acquired gender for two years prior to the application, and intends to live in the acquired gender for the rest of his or her life (section 2(1)).<sup>243</sup> It was further contended that although the

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238 Same as above, at paragraph 123(ii).

239 Same as above, at paragraph 123(iii).

240 Article 8(2) of the ECHR provides that: “*There shall be no interference by a public authority with the exercise of [the right to respect for a person’s private and family life, his home and his correspondence] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*”

241 *Carpenter v Secretary of State for Justice* [2015] EWHC 464 (Admin), at paragraph 25.

242 *Carpenter v Secretary of State for Justice* [2015] EWHC 464 (Admin), at paragraph 35.

243 See Rory Brown (representing the applicant in the *Carpenter* case), “Gender recognition: what legal recognition and rights can post-operative transsexuals expect in the UK?”, 26 May 2015 (*Halsbury’s Law Exchange*).

GRP would usually inquire into why an applicant has not undergone treatment for reassignment, the fact that the GRP would ask whether someone has had surgery (and if not, why not) does not particularly justify a legal requirement to give the GRP details of such surgery.<sup>244</sup>

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244 Thinking Legally Blog, "Gender Recognition Act and an issue of privacy", 3 March 2015.

## CHAPTER 4

### Summary of gender recognition schemes in other jurisdictions

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#### Introduction

4.1 It appears that the issue of legal gender recognition has been gaining increased attention across the international stage, and in this current study, we have reviewed the legal position in more than 110 jurisdictions.<sup>245</sup> Although there remains little uniformity in the legal approaches adopted, it is evident that there is a growing emphasis on human rights norms to be applied in this area.<sup>246</sup>

4.2 This chapter sets out examples of the differing approaches taken in other jurisdictions regarding gender recognition, including their legal bases, the criteria applied for granting recognition in some form, and the legal implications once recognition is granted. To illustrate a range of approaches, various models are discussed across four geographical regions, including Asia-Pacific, Europe, North America and South America. (It should be noted that the United Kingdom, which was the subject of the previous chapter, is not included in this analysis.) Examples of such models include, but are not limited to:

- 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 restrictions<sup>247</sup> or any procedural complexity (examples of jurisdictions adopting this model are Argentina, Denmark, Malta and Ireland);

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245 For further information on these jurisdictions, see Annex A and Annex B to this paper.

246 In terms of human rights mechanisms, in 2013, for example, the Human Rights Committee made detailed recommendations critiquing the current legal gender recognition process in Ukraine, which requires “*compulsory confinement*” in a psychiatric institution and “*mandatory corrective surgery*”: see Human Rights Committee, “Concluding Observations on the seventh periodic report of Ukraine” (8-26 July 2013, CCPR/C/UKR/CO/7), at 10. The said requirement was then abolished in late 2016.

Also in 2013, the United Nations Special Rapporteur on Torture called on States to outlaw the forced or coerced sterilisation as a prerequisite for recognising the legal gender of transgender people: see Juan E Méndez, United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (1 February 2013, A/HRC/22/53), at 38 and 78.

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

- a surgery-free but otherwise detailed model demanding 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);
- a surgery-requiring model, but with few other medical evidence requirements (or ambiguous as to whether such requirements 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)); and
- 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 model are Japan, Mainland China, and Finland).

4.3 It is pertinent to note that the involvement of the judiciary is very significant in determining issues related to gender recognition in some jurisdictions, notwithstanding whether such issues are already included in the statutory law. As shown in the previous chapter, there have been occasional legal challenges on the UK GRA brought on the basis of violation of human rights. Similar situations have also arisen in some other jurisdictions, where eligibility of the gender recognition law might be clarified, extended or altered pursuant to court decisions (eg, Germany's court decision to extend the scope of applicants for gender recognition to stateless persons and refugees, the Italian Supreme Court's decision in July 2015 ruling that medical intervention was not necessary for gender recognition, the Swedish Administrative Court of Appeal's ruling in June 2012 that a forced sterilisation requirement intrudes on an applicant's physical integrity, Alberta's court ruling in April 2014 that the surgical proof requirement was inconsistent with the Canadian Charter of Rights and Freedoms, etc). In some jurisdictions without any legislation dealing with gender recognition matters, the court would take the role of determining the requirements for allowing gender recognition or change of gender marker on transgender persons' identification documents (typical examples are India, Austria, Luxembourg and Serbia).<sup>248</sup> Further, in various jurisdictions a specific court has been mandated by the gender recognition law as the authority to determine applications (typical examples are Japan, New Zealand, Ireland, Poland, Switzerland and California (US)), or a court ruling on certain matters such as the approval of sex change has been made a prerequisite before an application can be made to the relevant authority (see Romania, Alaska (US), Arizona (US) and Indiana (US)). Various influential judicial decisions are summarised in Annex B of this paper.

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248 It is noted that there have been legislative attempts for law reform in the area of gender recognition in both India and Luxembourg. See Annex B of this paper.



4.4 Given the rapid developments in this area, the information contained in this chapter only represents the laws as known to the IWG up to May 2017 and it is not intended to offer a comprehensive review of the relevant overseas schemes.

## Asia-Pacific

### Overview

4.5 This chapter covers 16 jurisdictions across the Asia-Pacific region, including eight Asian countries and the eight jurisdictions of Australia (including six states and two territories).

4.6 Amongst these jurisdictions, three have enacted legislation to specifically address the issues of gender recognition, namely Japan, South Australia and Western Australia. Vietnam has, in November 2015, passed new legislation pertaining to gender recognition which came into effect in January 2017. The other 12 jurisdictions in this region (including India, Mainland China, New Zealand, Singapore, South Korea, Taiwan and, in Australia, Australian Capital Territory, Australian Northern Territory, New South Wales, Queensland, Tasmania and Victoria) deal with these issues in other ways.

4.7 Some of the recent developments of the laws affecting gender recognition in Asia-Pacific have taken place in Vietnam (in January 2017), South Australia (in May 2017), India (in April 2014), and Australian Capital Territory (in April 2014).

### *Types of measures allowing rectification of official documents*

4.8 The eight jurisdictions of Australia explicitly provide for gender corrections on birth certificates<sup>249</sup> in their respective Births, Deaths and Marriages Regulations or, in the case of both South Australia and Western Australia, their specific gender reassignment statutes.<sup>250</sup>

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249 Under Australia's identification systems the most important identity documents are known as cardinal documents. For people born in Australia, cardinal documents are birth certificates or change of name certificates. For people not born in Australia, cardinal documents are citizenship certificates or the information contained in the database held by the federal Department of Immigration and Citizenship.

250 On the variety of approaches to gender recognition taken in Australia, Grenfell and Hewitt have observed: "*The Australian legislative approach to the problems faced by transgender people is piecemeal, owing largely to Australia's federal system and the absence of a Bill of Rights at the federal level. Under the Constitution, the federal government does not have the power to pass legislation that would confer full recognition on transgender people for all purposes, thus transgender people must navigate the legislation enacted by state and territory governments as well as the federal government. While marriage, social security and passports are predominantly federal matters, registration of births is left to the States and Territories. In this complicated legal landscape, no single judicial approach has been taken consistently.*" See Laura Grenfell and Anne Hewitt, "Gender Regulation: Restrictive, Facilitative or Transformative Laws?" (2012) 34/4 Sydney Law Review 761 to 783, at

4.9 Of the eight Asian countries referred to in this chapter, all permit gender corrections in identity cards, household registry or other official documents/registries which have a significant bearing on one's gender marker.

#### *Authority to determine applications*

4.10 Of the 16 jurisdictions in this region under study, four require a court order for gender recognition,<sup>251</sup> and 12 utilise an administrative process under which the government bureau or department handling identity records is the determining authority.<sup>252</sup>

#### *Sex or gender reassignment surgery/procedure requirements*

4.11 Nine of the sixteen jurisdictions studied in this region require gender reassignment surgery or genital surgeries as a pre-condition to legal gender change, including the Australian Northern Territory, Japan, Mainland China, New South Wales, Queensland, Taiwan, Tasmania, Victoria and Vietnam. In contrast, the Australian Capital Territory, South Australia, India, New Zealand and South Korea have removed the surgical criteria originally provided in their statutes or government policies.

4.12 Western Australia requires "*gender reassignment procedure*" in its legislation, but a recent court decision has relaxed the surgical requirement for female-to-male transgender people, enabling them to apply for a recognition certificate without first undergoing a hysterectomy or a phalloplasty (see discussion below).

4.13 Singapore expressly requires completion of "*sex reassignment procedure*" for a person to change his or her gender status on the National Registration Identity Card ("*NRIC*"), but "*sex reassignment procedure*" is not defined in the law. This may render unclear the extent of the surgery and/or other medical treatments required in order for a person to be recognised as having undergone "*sex reassignment procedure*" for the purposes of the law.

#### *Medical diagnosis, hormonal treatment and "real life test" requirements*

4.14 A requirement of a medical diagnosis for gender recognition exists in India (requiring "*psychological test*" for identifying a transgender person as a "*third gender*" person), Japan (diagnosis of gender identity disorder needed), Mainland China (diagnosis of gender identity disorder and psychiatric/psychological counselling for 1 year), South Korea (long-term psychiatric treatment required) and Taiwan (diagnosis of gender identity disorder or gender dysphoria). Other Asia-Pacific jurisdictions are either

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251 These are India, Japan, New Zealand and South Korea. See Annex A and Annex B of this paper.

252 These are Australian Capital Territory, Australian Northern Territory, Mainland China, New South Wales, Queensland, Singapore, South Australia, Taiwan, Tasmania, Victoria, Vietnam and Western Australia. See Annex A and Annex B of this paper.

silent or unclear as to whether a medical diagnosis requirement is imposed.

4.15 Hormonal treatment requirements were expressly not required in India. No jurisdictions in the Asia-Pacific region have express requirement for hormonal treatment.

4.16 New Zealand requires, for change of sex entry on the birth certificate, that the applicant to indicate an intention to maintain his or her gender identity as a person of the nominated sex. Other jurisdictions in the Asia-Pacific region are either silent or unclear about this requirement or other physical or psychiatric requirements for gender recognition ie, the “*real life test*”, intention to live in the opposite gender and physical adaptation, etc.

#### *Requirements relating to pre-existing marriage*

4.17 Since August 2013, New Zealand has discarded the requirement that an applicant should be unmarried. South Australia also removed a similar requirement previously in its law relating to gender recognition. On the other hand, such a marital status exclusion is prescribed in the laws of the Australian Northern Territory, Japan, Mainland China, New South Wales, Queensland, South Korea, Tasmania, Victoria, Western Australia. The requirement is absent in the laws of India, Taiwan, Singapore and Vietnam.<sup>253</sup>

#### *Minimum age requirements*

4.18 The Australian Capital Territory, Australian Northern Territory, New South Wales, New Zealand, Queensland, Singapore, South Australia, Victoria and Western Australia, allow children to make the application to change the gender marker. In Mainland China, it appears that the Shanxi Province allows minors to apply for a gender change in the registry. However, it is unclear how this reconciles with the requirement that only persons over 21 years of age can apply to undergo sex reassignment surgery and only those having undergone such surgery can apply for gender change in their *Hukou*.

#### *Foreign gender recognition or foreign gender reassignment surgery*

4.19 It appears that most gender recognition schemes in countries across the Asia-Pacific region which have been studied are either not entirely clear or silent on whether foreign gender recognition or gender reassignment surgery performed in foreign countries should be recognised. Only Western Australia and the Henan province in Mainland China have provisions or regulations relating to gender reassignment surgery carried out overseas. South Australia may accept as evidence for an application a certificate or notification relating to the recognition of sex or gender identity issued under the law of another jurisdiction. Western Australia apparently recognises reassignment procedures undergone outside the State by people having their

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253 In the case of Australia, same-sex marriage is banned, although there have been successive endeavours made by the state legislature in the Australian Capital Territory to adopt legislation for civil union, civil partnership and marriage. These attempts have failed over the past decade.

birth registered in that State (or being a resident for not less than 12 months in Western Australia). Henan province in Mainland China allows change of sex entry in a citizen's *hukou* (Household Registration) if the gender reassignment surgery undergone in other countries is verified by hospitals designated by the Provisional Hygiene Administrative Department. However, it remains unclear as to whether or not other provinces in Mainland China adopt a similar approach.

### *Scope of the gender recognition*

4.20 Japan and Queensland have expressly stated in their gender recognition laws that the gender recognition granted renders the person to be a person of the recognised gender for all legal purposes. South Australia articulates that a successful applicant, ie, who has his/her sex or gender identity in the Register changed or has been issued an “*identity acknowledgment certificate*”, will be “*taken to have satisfied a requirement under another Act or law that the person provide details of their sex if the person provides details of their sex or gender identity as changed.*” For other jurisdictions, the scope of the recognition (ie, whether it applies for all legal purposes or something less than that) may depend on the type of official documents which can be rectified (ie, whether a birth certificate and/or identity card, etc), and the extent of the rectification (ie, issuing a full replacement or modified-only card).<sup>254</sup>

### ***Examples of Asia-Pacific jurisdictions which have enacted specific gender recognition legislation***

#### ***Japan***

##### *Legislative model for gender recognition*

4.21 Japan has put in place legislation to grant full legal recognition to post-operative transsexual persons in their chosen gender since July 2004, when its Law No 111, entitled the Act on Special Cases in Handling Gender for People with Gender Identity Disorder, came into effect (“*Japanese GID Act*”).<sup>255</sup> Considered “*the first for Asia in granting full recognition to the chosen gender of post-operative transsexual persons*”,<sup>256</sup> an objective of the Japanese GID Act was to increase social awareness of transgender issues,

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254 In India, the situation remains to be seen regarding enforcement of the recent Supreme Court judgment there (See *National Legal Services Authority v.s. Union of India and Others* (Writ Petition (Civil) No. 400 of 2012, Supreme Court of India, 15 April 2014), which recognised third gender persons. See also Kunal Kanodia, “The Third Gender: Be Yourself, But Don’t Have Sex”, *Columbia Undergraduate Law Review*, 31 July 2014.

255 The Japanese government provides no official translation of the Act which is, in Japanese, called 性同一性障害者の性別の取扱いの特例に関する法律. The English translation referred to in this Consultation Paper originates from Chiaki Ota, commissioned by the Asian-Pacific Law and Policy Journal editors.

256 See Robyn Emerton, “Time for Change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong”, (2004) 34 HKLJ 515, at 547.

helping people who were “psychologically or socially in trouble, such as receiving discrimination in employment opportunities.”<sup>257</sup>

#### *Judicial authority to process applications*

4.22 Under the Japanese GID Act, the Family Courts are authorised to handle applications for change of gender (Article 3(1)).

#### *Requirements relating to age and marriage*

4.23 The applicant must be at least 20 years of age (Article 3(1)(i)) and unmarried (Article 3(1)(ii)).

4.24 A previous requirement that “*the person has no child at present*” was relaxed to “*the person has no minor child at present*” on 18 June 2008, when the *Law No. 70 on Partial Amendments to the Law No. 111* was adopted.<sup>258</sup> The revised requirement was inserted as Article 3(1)(iii). A minor child means a child aged 19 years or younger under the Japanese law.<sup>259</sup> The underlying purpose of having this requirement was to avoid disturbances in parent-child relationships and to protect the welfare of the child so that the child could live in a stable and economically-sound environment.<sup>260</sup>

#### *Medical diagnosis, treatment and surgical requirements*

4.25 Only a person with gender identity disorder is eligible to make an application under the Japanese GID Act (Article 3(1)).<sup>261</sup> Article 2 defines

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257 See Anamura, Masayuki and Kitada, Mari, “Family Law (2010) Waseda Bulletin of Comparative Law”, Vol 28, 64 to 67, at 66. See also Koichi Taniguchi, “Sei Dōitsusei Shōgaisha no Seibetsu no Toriatsukai no Tokurei ni Kansuru Houritsu no Rippō Katei ni Kansuru Ichi Kōsatsu” (in Japanese, transliterated as “A Study on Legislative Process of the Exceptional Treatment Act for People with GID”), 2003 HOUTESTUGAKU NENPŌ (in Japanese, transliterated as “Annual Of Legal Philosophy”) 214 (2003).

258 The Law No. 111 (2004) required the applicant to be childless, which was criticised as draconian, as no other country’s legislation appeared to make childlessness a pre-condition for a legal change of gender. The revision of the Law No. 111 in this regard was deemed appropriate “*from the standpoint of balancing the child welfare and the self-determination of people with [gender identity disorder]*”. See Tanamura, Masayuki and Kitada, Mari, “Family Law” (2010) *Waseda Bulletin of Comparative Law*, Vol 28, 64 to 67, at 67.

259 The age of majority “*is reached when a person has attained the age of 20 years*” (pursuant to Article 4 of the Minpō transliterated as “*Civil Code*”, Act No. 89 of 27 April 1896).

260 See Hiroyuki Taniguchi, Ph.D., “Japan’s 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan”, *Asian-Pacific Law & Policy Journal*, Volume 14, Issue 2, at 113 and 114. However, this requirement has been criticised: see Tanamura Masayuki and Kim Yangwhan, “Waseda Bulletin of Comparative Law”, *Family Law* (2006), Vol. 24, 42 to 47, at 46; and Yuko Nishitani, “The Legal Status of Transsexual and Transgender Persons in Japan”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 376 to 378.

261 Nevertheless, in May 2014 the Japanese Society of Psychiatry and Neurology (JSPN) proposed that the terminology of gender identity disorder should be replaced by “*gender dysphoria*” (*seibetsu iwa*) pursuant to DSM-5. Pending the confirmation of

*“Gender Identity Disorder” as:*

*“a person, despite his/her biological sex being clear, who continually maintains a psychological identity with an alternative gender (hereinafter, “alternative gender”), who holds the intention to physically and socially conform to an alternative gender, and who has been medically diagnosed in such respects by two or more physicians generally recognized as holding competent knowledge and experience necessary for the task.”*

4.26 The applicant must submit medical certificates from two or more physicians indicating the diagnosis of gender identity disorder, the progress or results of any medical treatments and other matters as may be provided for by the Ordinance of the Ministry of Health, Labour and Welfare (Article 3(2)). There is, however, no express requirement for hormonal treatment under the Japanese GID Act.

4.27 It is stipulated that, for the application to succeed, the applicant must:

- (a) have no gonads or have permanently lost gonadal function (Article 3(1)(iv)); and
- (b) have a part of the body which assumes the external genital features of the opposite sex (Article 3(1)(v)).

4.28 Such wording would effectively require the applicant to undergo genital surgery and be sterile.<sup>262</sup>

*No express “real life test” requirements*

4.29 There are no express requirements for a real life test or stated intention to live in the opposite gender under the Japanese GID Act.

*No express residency or citizenship requirements, or recognition of foreign gender change*

4.30 Requirements relating to residency or citizenship are not stipulated in the Japanese GID Act. There is also no express provision for recognition of foreign gender change.

*Scope of the gender recognition*

4.31 A successful applicant’s legal change of gender will be registered

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this proposal by the legislative body in Japan, the legal definition of gender identity disorder provided by Article 2 of the Japanese GID Act will be utilised.

262 A female-to-male transsexual person, for instance, has to undergo a phalloplasty to create the penis. See Robyn Emerton, “Time for Change: A Call For the Legal Recognition of Transsexual and other Transgender Persons in Hong Kong” (2004) 34 HKLJ 515, at 549.

on the “*Koseki*”, which is the Japanese system of family registration, whereupon births, deaths, marriages and divorces of Japanese nationals are recorded and held in town offices.<sup>263</sup> *Koseki* is the conclusive family record in law in Japan, qualifying as “a root document for other legal identity cards”.<sup>264</sup> The gender marker on the *Koseki* “is reflected in most of the important legal documents including pension books and applications for national health insurance and unemployment insurance.”<sup>265</sup>

4.32 From the language of Article 4, the Japanese GID Act appears to cover all areas of law affected by gender. The Article provides that, from the point at which an applicant fulfils the conditions set out in the Act and the Family Court has recognised his or her legal change in gender, he or she is considered to be legally his or her new sex with respect to the application of the Civil Code<sup>266</sup> and all other laws and regulations (Article 4(1)). The personal status and/or any rights and obligations arising prior to the recognition of change in gender shall not be affected, save as may be specifically provided otherwise in the laws (Article 4(2)).

4.33 Nonetheless, recent cases in Japan indicate that the position may still need to be clarified. In early 2013, a female-to-male transsexual person, who had successfully applied for recognition of the chosen gender under the Japanese GID Act and had changed his gender marker on the *Koseki*, legally married a woman and tried to register as the father of the son born to the couple through artificial insemination with sperm of a third party. However, the officer refused to register him as a father for the reason that he was considered “*biologically female*” and consequently the child was treated as an illegitimate child. The transsexual man filed appeals several times but to no avail until reaching the Supreme Court, which reversed the previous rulings and recognised his legal status as the father of the child. (However, the transsexual man had also filed another similar suit in respect of another son which was denied by the Osaka Family Court and is currently pending a ruling from the Osaka High Court.<sup>267</sup>)

4.34 By the end of 2013, there were 4,353 individuals who had changed their legal gender since the Japanese GID Act came into operation in 2004, and the number of applications has been increasing gradually each year.<sup>268</sup> It has been observed, however, that this a relatively small number compared to the estimated number of 7,000 to 10,000 people with gender

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263 See Family Register Act (Act No. 224 of 22 December 1947).

264 See Gay Japan News, “Striving For Dignity And Respect – Experiences of Violence and Discrimination as Told by LBT Persons in Japan” (2014), at 10.

265 Same as above.

266 Act No. 89 of 27 April 1896.

267 See the related news report of *Japan Daily Press* (13 December 2013), “Transgender man recognized as legal father of IVF child in Supreme Court ruling”.

268 “NIHON SEI DŌITSUSEI SHŌGAI TO TOMO NI IKIRU HITOBITO NO KAI” (in Japanese, transliterated as “JAPAN ASS’N OF PEOPLE LIVING WITH GENDER IDENTITY DISORDER”), *Sei Dōitsusei Shōgai Tokurei Hou ni Yoru Seibetsu Kōsei Sū no Sui’i* (in Japanese, transliterated as “*Statistical Developments Regarding the Number of People Who Correct Their Gender in Accordance with the Japanese GID Act*”).

identity disorder in Japan.<sup>269</sup> This might be partly attributable to the lack of medical institutions that provide sex reassignment surgery in Japan, and the fact that “*treatment of gender identity disorder, including sex reassignment surgery, is not covered by public health insurance*”.<sup>270</sup>

## **South Australia**

### *Specific legislation on gender recognition*

4.35 South Australia was the first Australian State to provide for legal recognition of reassigned sexual identity in the Sexual Reassignment Act 1988. In May 2017, the Births, Deaths and Marriages Registration Act 2017 (“*GI Act*”) took effect, governing the gender recognition procedures in South Australia.

### *Authority to process applications*

4.36 The authority determining an application for change of sex or gender identity under the GI Act is the Registrar for Births, Deaths and Marriages (GI Act, s29I).

### *Requirements relating to age and marriage*

4.37 The applicant can be a person of or above the age of 18 years (GI Act, s29J(1)) or a child under the age of 18 years who may make an application by himself/herself or through a parent or guardian and with the Court’s approval.

4.38 It is expressly provided that an application may be made even if the person is married (GI Act, s29I(3)).

### *Requirements relating to residency or citizenship*

4.39 The applicant may be a person whose birth is registered in South Australia (GI Act, s29I(1)) or a person who was born in Australia but has been resident in South Australia for at least 12 consecutive months immediately

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269 SEI DŌITSUSEI SHŌGAI TO KOSEKI (in Japanese, transliterated as “*GENDER IDENTITY DISORDER AND THE FAMILY REGISTRY*”) 70-73, 97 (Katsuki Harima et. al eds, 2007), quoted in Hiroyuki Taniguchi, Ph.D., “Japan’s 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan”, *Asian-Pacific Law & Policy Journal*, Volume 14, Issue 2, at 110. It was revealed that around 5,000 people with gender identity disorder have visited medical offices in Japan. *Id.* at 97. However, the author of this essay takes into account the people with gender identity disorder who do not or cannot visit a medical clinic and estimates the total number of individuals with gender identity disorder to be between 7,000 to 10,000 people.

270 See Aki Nomiya et. al. eds., *SEI DŌITSUSEI SHŌGAI TTE NANI* (in Japanese, transliterated as “*WHAT IS GENDER IDENTITY DISORDER*”) 79 (2011), quoted in Hiroyuki Taniguchi, Ph.D., “Japan’s 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan”, *Asian-Pacific Law & Policy Journal*, Volume 14, Issue 2, at 111.



before the date of the application (GI Act, s29O). For a successful applicant of the latter type who does not have a birth registry in South Australia, a certificate that acknowledges his/her changed sex or gender identity will be issued to him/her (GI Act, s29O, s29Q).

*Requirement of “sufficient amount of appropriate clinical treatment” carried out anywhere*

4.40 For an application to succeed, the applicant must show to the satisfaction of the Registrar that he/she has undertaken a sufficient amount of appropriate clinical treatment in relation to his/her sex or gender identity (GI Act, s29K). “Clinical treatment” has been defined to include clinical treatment that need not involve invasive medical treatment (and may include or be constituted by counselling) (GI Act, s29H(1)). It is also provided that clinical treatment constituted by counselling only cannot be regarded as a sufficient amount of appropriate clinical treatment unless the period of the counselling is equal to or greater than the prescribed period (GI Act, s29H(3)).

4.41 The materials required to support an application are (GI Act, s29K):

- (a) a statement by a medical practitioner or psychologist certifying that the person is receiving or has received appropriate clinical treatment in relation to the person’s sex or gender identity (including in the case of a person whose sex or gender identity has now become determinate); or
- (b) in the case of an applicant in relation to whom
  - (I) a designated certificate relating to the recognition of sex or gender identity issued under the law of another jurisdiction and recognised by the Registrar for the purposes of the GI Act; or
  - (II) a prescribed notification issued by another registering authority and recognised by the Registrar for the purposes of the GI Act has been issued:
    - (i) a copy of the designated certificate or prescribed notification (as the case may be); and
    - (ii) a statement—
      - (A) of a kind described in paragraph (a); or
      - (B) by a medical practitioner or psychologist certifying that the person is receiving or has received appropriate clinical treatment in the jurisdiction that issued the designated certificate or prescribed notification.

### *No express “real life test” requirements*

4.42 There are no express requirements for a real life test or stated intention to live in the opposite gender under the GI Act.

### *Scope of the gender recognition*

4.43 For a successful applicant who has a birth registry in South Australia, the Registrar will make an entry about the change of his/her sex or gender identity in the Register (GI Act, s29L).

4.44 It is provided that a person who has changed their sex or gender identity or has been issued an identity acknowledgement certificate (for an applicant born outside Australia) will be taken to have satisfied a requirement under another Act or law that the person provide details of their sex if the person provides details of their sex or gender identity as changed (GI Act, s29U). From the language of this provision, the GI Act appears to cover all areas of law affected by gender.

### ***Examples of Asia-Pacific jurisdictions with other types of procedures to recognise gender change in official documents***

#### ***Singapore***

##### *Types of measures allowing rectification of official documents*

4.45 Similar to the position in Hong Kong, Singapore does not have a formal gender recognition scheme, and a person’s birth certificate cannot be changed unless it can be shown that it contained an error of fact or substance.<sup>271</sup> Therefore, even after sex reassignment surgery, a transsexual person’s birth certificate cannot be changed in Singapore. However, Singapore permits, amongst other things, changes to certain identity documents to reflect a transsexual person’s acquired gender.

4.46 Under Regulation 10 of the National Registration Regulations (NRR), a Singapore citizen in possession of a National Registration Identity Card (NRIC) containing particulars, other than address, which are to the person’s knowledge incorrect, should report this within 28 days and apply for a replacement. A policy has been instituted since about 1973 to require “sex reassignment procedure” to have been completed before a person may change his or her gender status on the NRIC.<sup>272</sup> Thus, although not expressly reflected in the law or official guidelines, it would appear that transsexual people who have undergone “sex reassignment procedure” can

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271 Registration of Births and Deaths Act (Cap 267), s 24.

272 See Lenore T Lyons, University of Wollongong, 2004, “Sexing the nation: normative heterosexuality and the ‘good’ Singaporean citizen”, in A Branach-Kallas & K Wieckowska (eds), “The Nation of the Other: Constructions of Nation in Contemporary Cultural and Literary Discourses”, *Uniwersytet Mikołaja Kopernika (Nicolas Copernicus University), Torun, Poland*, 2004, 79 to 96, at 90 and 91.

apply to change the sex entry on the NRIC pursuant to Regulation 10.<sup>273</sup> The application is to be made to the registration officer, defined in section 1 of the National Registration Act (Cap 201) as the Commissioner of National Registration, the Deputy Commissioner of National Registration, any Assistant Commissioner of National Registration and any person appointed by the Commissioner of National Registration as a registration officer under section 3 of the Act.

#### *Requirements for alteration of gender marker on identity document*

4.47 For the application to change the sex entry on the NRIC, there appears to be no express requirement as to the age, residence (ie, NRIC can be issued to Singaporean citizens or non-citizens (Regulation 5(2) of NRR)), citizenship, marital status, parental status, gender dysphoria diagnosis, the “*real life test*” or an intention to live in the opposite gender. The position in relation to the status of a pre-existing marriage is unclear.

#### *Impact of the Women’s Charter*<sup>274</sup>

4.48 In *Lim Ying v Hiok Kian Ming Eric* (1991),<sup>275</sup> the Singapore High Court ruled that marriage between a post-operative female-to-male transsexual and a woman was null and void as the former person must, for the purposes of contracting a monogamous marriage, be regarded as a woman.<sup>276</sup> This stance was effectively overruled in 1996, however, when amendments were passed to the Women’s Charter (Cap 353) which permitted marriage between a person who had undergone sex reassignment procedure and any person of the opposite sex, on the basis that the stated sex of a person at the time of marriage is *prima facie*<sup>277</sup> that stated on his or her NRIC.<sup>278</sup> It has

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273 Same as above.

274 For a historical development leading to the Women’s Charter, see Terry Sheung-Hung Kaan, “The Legal Status of Transsexual and Transgender Persons in Singapore”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 413 to 416.

275 [1991] SGHC 135.

276 See *Lim Ying v Hiok Kian Ming Eric* [1991] SGHC 135, from 194 to 196. In contrast, as early as 1971, transsexual persons in Singapore having undergone gender reassignment surgery could get married by presenting their identity cards as proof of identity and sex. However, following the decision in the *Lim Ying* case, the Registry of Marriages stopped allowing the use of identity cards as proof of sex and required the applicants to bring their birth certificates as evidence of their sex instead. Now subsections 12(2) and 12(3) of the Women’s Charter effectively override *Lim Ying* by deeming the sex in the NRIC as the *prima facie* evidence of the sex of the holder, and that the sex of a transsexual would be the post-operative sex.

277 It seems that it was not the intention of the legislature to allow for easy rebuttal of the evidence, as the relevant section in the Women’s Charter (Amendment) Bill previously read “*conclusive evidence*” instead of “*prima facie evidence*” of the sex of the party concerned. The change in wording was to avoid rigidity of the legislature in case of, for example, fraud or mistake in recording the sex in the identity card. See Select Committee on Women’s Charter (Amendment) Bill, “Report of the Select Committee on the Women’s Charter” (Amendment) Bill [Bill No. 5/96] (Second Session, Eighth Parliament of Singapore 1996), paragraph 5.2.2, B23-24, B77. See also Patrick Jiang, “Legislating for Transgender People: a Comparative Study of the Change of Legal Gender in Hong Kong, Singapore, Japan and the United Kingdom” (2013) 7

been observed that there is no requirement in relation to age, residency, citizenship, parental status, gender dysphoria diagnosis, the real life test, or intention to live in the opposite gender under the Women’s Charter provisions on marriage.<sup>279</sup>

4.49 One apparent difficulty with the relevant laws in Singapore, however, is that “*sex reassignment procedure*” is not defined in the legislation, nor do there appear to be administrative guidelines on this issue, so it may be unclear as to the extent of surgery or other medical treatment required (eg, hormonal treatment) in order for a person to be recognised as having undergone “*sex reassignment procedure*” for the purposes of the law. It has been observed by one writer that “*infertility*” is not required for the purposes of the Women’s Charter provisions on marriage.<sup>280</sup>

#### *Sex reassignment procedure and the impact of sexual offences legislation*

4.50 In October 2007, Singapore enacted the Penal Code (Amendment) Act 2007, leading to, amongst other changes, a new section 377C of the Penal Code (Cap 224) which legally recognises the reassigned sex of transsexual persons who have undergone “*sex reassignment procedure*” for the purposes of sexual offences. Section 377C of the Penal Code provides that for sexual offences, references to a part of the body stated in the provisions relating to the sexual offence (section 375 to section 377B) (eg, penis, vagina, anus or mouth)<sup>281</sup> include references to a part which is surgically constructed, in particular, through a sex reassignment procedure (section 377C(b)). It is also provided that the sex of a person as stated in that person’s NRIC at the time the sexual activity took place shall be *prima facie* evidence of the sex of that person, and a person who has undergone “*sex reassignment procedure*” shall be identified as being of the sex to which that person has been reassigned (section 377C(c)).

#### *Scope of the gender recognition*

4.51 Following a gender change to the NRIC under the NRR, a person is treated according to their acquired gender for many purposes including

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HKJLS 31, at 50.

278 Section 12(1) of the Women’s Charter (Cap 353) reads: “A marriage solemnized in Singapore or elsewhere between persons who, at the date of the marriage, are not respectively male and female shall be void.” S 12(3) reads

“For the purpose of this section —

(a) *the sex of any party to a marriage as stated at the time of the marriage in his or her identity card issued under the National Registration Act (Cap 201) shall be prima facie evidence of the sex of the party; and*

(b) *a person who has undergone a sex re-assignment procedure shall be identified as being of the sex to which the person has been re-assigned.”*

279 Patrick Jiang, “Legislating for Transgender People: a Comparative Study of the Change of Legal Gender in Hong Kong, Singapore, Japan and the United Kingdom” (2013) 7 HKJLS 31, at 50.

280 Same as above.

281 For example, an offence of sexual assault by penetration under s 376 means, *inter alia*, a man who penetrates, with his penis, the anus or mouth of another person without that person’s consent (s 376(1)(a)).

military service, marriage (section 12 of the Women’s Charter) and criminal punishment for sexual offences<sup>282</sup> (section 377C of the Penal Code).

*Impact on marriage, children, etc.*

4.52 It has been recognised that “[t]he status of transsexual marriages in relation to laws regulating consummation of marriage and adultery, and whether these couples have the same opportunities as ‘normal’ couples to adopt and/or raise children via other means, remains unclear”.<sup>283</sup> Further, it seems that in Singapore there are many areas of law in which transsexual individuals are still considered as being of their pre-operative gender.<sup>284</sup>

### **Australian Capital Territory**

*Types of measures allowing rectification of official documents*

4.53 The gender recognition framework in the Australian Capital Territory (ACT) is based on the statute regulating the registration of births, which permits the change of gender marker on birth certificates. Its Births, Deaths, and Marriages Registration Amendment Act 2014 was enacted on 26 April 2014, to amend the Births, Deaths and Marriages Registration Act 1997 (the ACT’s BDMR Act) and the Births, Deaths and Marriages Registration Regulation 1998 to ensure consistency with amendments made to the ACT’s BDMR Act.<sup>285</sup> A stated purpose of the amendments was “to improve legal recognition of sex and gender diverse people in the ACT community”.<sup>286</sup>

*Removal of sex reassignment surgery requirements*

4.54 To enhance official recognition of a person’s chosen gender, the amendments removed the requirement for sex reassignment surgery before a person could alter the sex in their birth registration document. By official

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282 Including rape (s 375), sexual assault by penetration (s 376), sexual penetration of minor under 16 (s 376A), commercial sex with minor under 18 (ss 376B, 376C and 376D), sexual grooming of minor under 16 (s 376E), procurement of sexual activity with person with mental disability (s 376F), incest (s 376G), sexual penetration of a corpse (s 377), outrages on decency (s 377A), sexual penetration with living animal (s 377B).

283 See Ong, Debbie S L 1998, “The Test of Sex for Marriage in Singapore”, *International Journal of Law, Policy and the Family*, 12: 161-79, quoted in Lenore T Lyons, University of Wollongong, 2004, “Sexing the nation: normative heterosexuality and the ‘good’ Singaporean citizen” (in A Branach-Kallas & K Wieckowska (eds)) and “The Nation of the Other: Constructions of Nation in Contemporary Cultural and Literary Discourses”, *Uniwersytet Mikolaja Kopernika (Nicolas Copernicus University), Torun, Poland*, 2004, 79-96, at 91.

284 Patrick Jiang, “Legislating for Transgender People: a Comparative Study of the Change of Legal Gender in Hong Kong, Singapore, Japan and the United Kingdom” (2013) 7 HKJLS 31, at 51.

285 A minor amendment was also made to section 168B of the Legislation Act 2001 to amend the definition of “intersex”.

286 See the Explanatory Statement on the Births, Deaths And Marriages Registration Amendments Bill 2013 presented by Simon Corbell MLA, Attorney – General (The Legislative Assembly For The Australian Capital Territory).

recognition of a person's chosen gender, the amendments were described to have positively engaged rights protected under the Human Rights Act 2004 including the right to recognition and equality before the law, the right of protection of the family and children and the right to privacy and reputation.<sup>287</sup>

#### *List of requirements for alteration of gender marker on birth record*

4.55 The ACT's BDMR Act now provides that an adult (over 18 years of age) may apply to the Registrar of Births, Deaths and Marriages for alteration of the record of the person's sex in the registration of the person's birth if (section 24(1)):

- (a) his or her birth is registered in the ACT;
- (b) he or she believes his or her sex to be the sex nominated in the application (the altered sex); and
- (c) he or she has received appropriate clinical treatment for alteration of the person's sex or is an intersex person (to be verified by a doctor or a psychologist (section 25(1))).

4.56 What amounts to an "*appropriate clinical treatment*" under section 24(1)(c) of the BDMR Act is determined by the registered medical practitioner,<sup>288</sup> but it was acknowledged that using this wording was aiming to "*avoid a specific diagnosis or medical treatment*" and "*discourage clinicians from providing any further medical information, in order to protect the applicant's privacy*".<sup>289</sup>

#### *Applications by children*

4.57 Applications are also open to children under 18 years old, to be made and submitted by the children's parents or persons with parental responsibility (section 24(2)), with an additional evidential requirement that the applicant provides a signed statement stating that he/she/they believe on reasonable grounds that alteration of the record is in the best interests of the children (sections 24(2)(b) and 25(2)(a)).

#### *Applications by married persons*

4.58 The Act does not specify that an applicant must be unmarried.

#### *Scope of the gender recognition*

4.59 Upon a successful application, a new birth certificate showing the

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287 Same as above.

288 See Laura Grenfell and Anne Hewitt, "Gender Regulation: Restrictive, Facilitative or Transformative Laws?" (2012) 34/4 Sydney Law Review 761 to 783, at 772.

289 See The Open Society Foundations, "License To Be Yourself: Laws and Advocacy for Legal Gender Recognition of Trans People", May 2014, at 17. See also the policy update in the Australian Government's website.

altered sex will be issued by the Registrar (section 27(1)). The new birth certificate will not include any word or statement to the effect that the person to whom the certificate relates has changed sex (section 27(3)). A person who has an entitlement under a will, trust or territory law does not lose the entitlement only because the person's sex has been altered on the register, unless the will, trust or territory law provides otherwise (section 29).

### **Concluding remarks on gender recognition in Asia-Pacific jurisdictions**

4.60 To recap, diverse legal arrangements exist on the issue of gender recognition across the 16 Asia-Pacific jurisdictions analysed in this chapter. There is no clear-cut line on the legal standards or administrative processes to be applied between the common law countries in the region (Australia, India, Singapore, New Zealand) and the non-common law countries (Japan, Mainland China, South Korea, Taiwan).

4.61 To-date, it appears that India adopts a scheme with the least requirements for gender recognition in this region, where it was decided by the Supreme Court on 15 April 2014 that "Psychological Test" instead of "Biological Test" should determine a person's sex and "*no one shall be forced to undergo medical procedures, including [sex reassignment surgery], sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity*".<sup>290</sup> South Australia has expressly eliminated the requirement for "*invasive medical treatment*", and now requires an applicant for change of sex or gender identity to, amongst others, undertake a sufficient amount of appropriate clinical treatment in relation to their sex or gender identity.

4.62 Japan and Mainland China appear to have more requirements than the other jurisdictions in the Asia-Pacific region, as they impose a number of pre-conditions including, but not limited to, a relatively high minimum age requirement (Japan: 20; China: 21), medical diagnosis of gender identity disorder,<sup>291</sup> genital surgery leading to infertility,<sup>292</sup> and the exclusion of married applicants.<sup>293</sup>

4.63 Japan and Queensland have made express provision in their

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290 *National Legal Services Authority v Union of India and Others*, Writ Petition (Civil) No. 400 of 2012, Supreme Court of India, 15 April 2014, at paragraphs 20 and 34. Notably, in August 2016, the Transgender Persons (Protection of Rights) Bill 2016 was introduced to the Indian Parliament. For more information thereof, see Annex B of this Consultation Paper.

291 For Japan, see Article 3(1) of the Japanese GID Act. For China, see "變性手術管理規範" in Chinese, transliterated as "Sex change operations and technology management standards", Health Office of Medical Affairs No. [2009]185.

292 Japan requires the applicant to have no gonads or have permanently lost gonadal function and a part of the body which assumes the external genital features of the opposite sex (Article 3(1), the Japanese GID Act); Mainland China requires sex reassignment surgery leading to removal of original sex organs, reconstruction of external sex organs and secondary sexual characteristics of the new gender: see "變性手術管理規範", *above*.

293 For Japan, see Article 3(1)(ii) of the Japanese GID Act. For Mainland China, see "變性手術管理規範" (same as above).

legislation to the effect that once the gender marker on a person's birth certificate has been changed, the person would accordingly be a person of the reassigned or acquired sex. In other jurisdictions (whereas there is no similar provision), those changes to the gender marker on the relevant official document(s) (ie, the entry about the change of sex or gender identity in the Register of South Australia or the "*identity acknowledgement certificate*" in that state, the birth certificate in the case of other Australian states and territories, the identity card in the case of Taiwan and Singapore, or the household registry in the case of Mainland China and South Korea) will not be shown on the face of the official documents, or accessible by the general public. This would seem to effectively enable the individual to live in the reassigned or acquired gender for most practical and legal purposes. (Though it is noted, for example, that in Singapore, the acquisition of a new NRIC showing the new gender does not entitle the person to make a similar change to their birth certificate.)

4.64 It is pertinent to note that Thailand (not amongst the jurisdictions studied in this paper), though known worldwide for its vibrant trans culture and prevalence of gender reassignment surgeries, does not yet have a gender recognition scheme or an administrative procedure for trans Thai citizens to change their gender marker on legally identifying documents.<sup>294</sup> The latest development in Thailand appears to be the Constitution Drafting Committee's announcement on 15 January 2015 that the proposed new nation constitution would include references to a "*third gender*" for the first time.<sup>295</sup>

## Europe

### Overview

4.65 Since 1992, the ECtHR has unequivocally established the positive obligation for Contracting States to provide for legal gender recognition.<sup>296</sup> Over a period of 20 years or so, important court cases in various jurisdictions have led to legislative reform, such as in the United Kingdom,<sup>297</sup> or to clarification of pre-existing legislation, such as in Germany,<sup>298</sup> with a view to progressing gender recognition law in those jurisdictions. In one leap, Denmark altered its law on transgender persons'

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294 See Mitch Kellaway, "Thailand Touts Accepting Society in Establishing 'Third Gender' in Constitution", *The Advocate* (17 January 2015).

295 See Amy Sawitta Lefevre, "Thailand to recognise 'third gender' in new constitution – panel", *Reuters* (15 January 2015).

296 *B v France* (1992) 16 EHRR 1, [1992] 2 FLR 249 (Application no. 13343/87 (ECHR), 25 March 1992).

297 See Chapter 3 of this paper.

298 It has been commented that the ECtHR's decision in *Van Kück v Germany*, no. 35968/97, 12 June 2003 has created new and significant rights for transgender people not only in Germany but also in Europe. In that case, the burden on the applicant to prove medical necessity of gender reassignment and genuine nature of her transsexualism during court proceedings concerning reimbursement of the costs of gender reassignment surgery was held unreasonable and a violation of Articles 6 and 8 of the ECHR.



rights on 11 June 2014, taking it from a country where sterilisation was essential for a person to be legally recognised as their reassigned gender, to one allowing self-determination of one's legal gender. Following that change, Malta, Ireland, Norway and Belgium also adopted similar schemes in April 2015, July 2015, July 2016 and May 2017 respectively.

#### *Types of measures allowing rectification of official documents*

4.66 The measures on gender recognition applying in 36 European countries are covered in this study (see Annex A and Annex B). Apart from the United Kingdom, fifteen countries have enacted legislation or use administrative guidance or processes specifically for the recognition of a transgender person's gender identity.<sup>299</sup> Sixteen of the European countries studied have provisions in their legislation relating to civil status which permit the alteration of gender markers on birth certificates or other official documents, including but not limited to identity cards or passports.<sup>300</sup> Four European countries studied provide no recognition provisions in legislation, but there have been court decisions in those jurisdictions with respect to this.<sup>301</sup>

#### *The process for gender recognition in some form*

4.67 Most European countries studied do not have a specific panel or committee to adjudicate on whether recognition of an acquired gender is to be granted. They either empower the local registrar for birth/vital statistics, or the court, to make decisions upon examination of a portfolio of documentation submitted by the applicants. Three countries are exceptions to this. As canvassed in the previous chapter, the United Kingdom has set up Gender Recognition Panels consisting of legal and medical experts to perform a judicial function in the determination process. In Estonia, the applications are processed and considered by a medical expert committee appointed by the Minister of Social Affairs.<sup>302</sup> In Iceland, an Expert Panel on Gender Identity Disorder, comprising two doctors and one lawyer, is responsible for confirming that the individual "*belongs to the other gender*" and, if it applies, whether the individual is "*eligible for reassignment surgery*".<sup>303</sup>

#### *Sex or gender reassignment surgery/procedure requirements*

4.68 Of the 36 countries in Europe studied, 10 require SRS and sterilisation as preconditions for a gender recognition procedure.<sup>304</sup> On the

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299 These countries are Denmark, Estonia, Finland, Germany, Iceland, Ireland, Italy, Latvia, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and Ukraine.

300 These countries are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, France, Hungary, Liechtenstein, Poland, Romania, Slovakia, Slovenia, Russian Federation, Switzerland and Turkey.

301 These countries are Greece, Luxembourg, Moldova and Serbia.

302 See General Requirements on Medical Procedures for the Change of Gender" issued by the Minister for Social Affairs (*Soovahetuse arstlike toimingute uhtsed nouded, of 07.05.1999, no 32*), summarised in Annex A.

303 See Article 4 of its "Act on the legal status of individuals with gender identity disorder No. 57/2012", to be illustrated in latter part of this chapter.

304 These countries are Cyprus, Czech Republic, Finland, Latvia, Liechtenstein,

other hand, there are 25 countries which have no surgical requirements whilst the situation in Romania is uncertain.

#### *Medical diagnosis, hormonal treatment and “real life test” requirements*

4.69 A medical diagnosis or psychological opinion on the applicant’s gender identity is required in the majority (26) of the European countries studied. Latvia, Liechtenstein, Serbia, Slovakia, Slovenia and Sweden are silent in this respect. Denmark, Ireland, Malta, France and Norway have expressly discarded the diagnosis prerequisite.

4.70 No other physical or psychiatric requirements are prevalent in Europe. A real life test is mandatory in six countries, namely Finland (6 to 12 months), Germany (3 years), Iceland (12 months), Spain (2 years), Turkey (2 years) and the United Kingdom (2 years). Spain further requires the applicants’ physical appearance to be transitioned to the characteristics associated with the preferred legal gender.

4.71 Germany, Ireland, the Netherlands, Sweden and the United Kingdom require proof of the applicant’s intention to live in the opposite gender. As self-declaration of one’s preferred gender is allowed in Denmark, Ireland Malta, Norway and France, these countries are not considered to have requirements regarding the applicants’ intention to live in the opposite gender. France also requires the applicant to have, amongst other things, publicly claimed to belong to the preferred gender.

4.72 Hormonal treatment is required in Finland, Poland and Slovakia. In Poland, a mastectomy was in some court cases held to be a prerequisite for female-to-male transgender person to have his preferred gender recognised.

#### *Minimum age requirements*

4.73 Applications are open to minors in Austria, Belgium, Croatia, Germany, Latvia, Luxembourg and Malta. Ireland allows children of 16 and 17 years of age to apply with requirements of medical certification, parental consent and a court order. In Norway, persons of ages between 6 and 16 may apply with parental permission. In France, a person having reached the age of 16 or having been pronounced as emancipated by the judge of guardianships are able to apply for change of sex entry in his/her civil status (see Annex A and Annex B for more details).

#### *Requirements relating to pre-existing marriage*

4.74 A condition that the applicant must be unmarried or seek a divorce can be found in the schemes of nine European countries.<sup>305</sup> Other countries are either silent on this issue (such as Belgium and Greece) or no

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Luxembourg, Serbia, Slovakia, Slovenia and Turkey.

305 These are Bulgaria, Croatia, Cyprus, Czech Republic, Finland, Hungary, United Kingdom, Moldova and Turkey.

longer impose the marital status exclusion (such as Estonia and France).

#### *Foreign gender recognition or foreign gender reassignment surgery*

4.75 Most gender recognition schemes in the European countries studied are either not entirely clear or silent on whether foreign gender recognition or SRS performed in foreign countries are recognised. Apart from the United Kingdom, which has detailed provisions on how this matter is addressed in the UK GRA (see Chapter 3 in this paper), Ireland allows a person who has changed gender under the law of a foreign jurisdiction to apply for gender recognition provided that requirements to be fulfilled under the law of that jurisdiction concerned are “*at least equivalent to the requirements to be fulfilled under*” the Irish Gender Recognition Act regarding self-declaration. Malta also recognises a final decision about a person’s gender identity determined by a competent foreign court or responsible authority. Dutch law applies to a foreign applicant if he or she has a valid residence permit and has been domiciled in the Netherlands for at least one year. Germany allows foreign nationals to make applications for legal gender recognition if the law in their country of nationality does not contain provisions comparable to the German Transsexuals Act and the foreign national concerned has legal status under German immigration law. Iceland, Portugal, Slovenia and Sweden have related provisions to recognise SRS or relevant treatments done overseas. These do not cover foreign gender recognition, however. Iceland may evaluate legal gender recognition granted from other countries. Sweden may recognise a verdict or a decision about a person’s changed gender, as determined by a foreign court or authority, if the person was a citizen in the foreign country or had residency there when the verdict or the decision was determined. Spain excludes foreign citizens from application for gender recognition.

#### *Scope of the gender recognition*

4.76 The types of official documents affected after recognition of a new gender vary across the different European countries. The gender marker on birth certificates or the birth registry is allowed to be amended in 24 countries,<sup>306</sup> but some of these (such as Moldova and Serbia) issue an amended birth certificate instead of a new one, which might disclose the previous gender of the transgender person. Birth certificates are hardly ever used in Finland; nonetheless, gender recognition in Finland will result in an update to the Population Information System, which is crucial for the everyday life of any Finnish person. In Cyprus, France, Iceland, Liechtenstein, Moldova, Russian Federation, Spain, Sweden, Switzerland, gender recognition entails rectification or amendment of one’s gender marker on the civil registry records but not the birth certificate.

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306 These are Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Ireland, Italy, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, United Kingdom, Moldova, Serbia, Turkey and Ukraine.

## **Examples of European jurisdictions which have enacted specific gender recognition legislation**

### **Denmark**

#### *Legislative model for gender recognition*

4.77 The so-called “avant-garde” new gender recognition law in Denmark received prominent coverage in many countries in mid-2014. On 11 June 2014, the Danish parliament introduced the Argentina-type model on gender recognition (to be discussed further in the latter part of this chapter) without requiring any surgical, psychiatric or medical requirements for a person to legally obtain their preferred gender. The new law came into force on 1 September 2014.<sup>307</sup>

4.78 Prior to such a legislative development, transgender people in Denmark could not obtain legal recognition of their preferred gender unless they obtained a psychiatric diagnosis of “*transsexualism*” and underwent psychiatric assessment and medical treatments including hormonal treatment, surgeries and irreversible sterilisation.<sup>308</sup> Denmark is known to be the first country in Europe where a gender identity disorder diagnosis or any psychological assessment or opinion is not required for a person to obtain gender recognition.<sup>309</sup>

#### *Minimal requirements for gender recognition*

4.79 In light of the new law, an applicant who is over the age of 18<sup>310</sup> can update the gender marker on his or her personal documents, including passports, birth certificates and social security numbers, by way of (a) submitting a written application to the Ministry of Economy and Domestic Affairs; (b) stating in the application that the wish is based on an experience of belonging to the other gender.<sup>311</sup> No medical intervention is required. After a period of no less than 6 months following the application, the applicant needs to reconfirm his or her application and thereafter the applicant’s legal gender indicated in the Central Person Registry (ie, the CPR number) would be changed.<sup>312</sup> Activists from Transgender Europe (TGEU) complained that the

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307 *Lovforslag L 182 and L 189* (Amendment Acts L182 and L189).

308 See Guidelines on Population Registration (*Vejledning om folkeregistrering*) no. 9273 of 14 June 2013 (in Danish), paragraph 2.1.3.

309 For a summary and analysis of the historic development leading up to the current legal framework and the evaluation of the legal framework by the Danish working group, see Natalie Videbæk Munkholm, “Legal Status of Transsexual and Transgender Persons in Denmark”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 151 to 161.

310 *Lov om ændring af CPR-loven*, nr. 752 af 25.06.2014, (Amendment Act to the CPR Act) §1, 1.

311 The self-declaration suffices, and the statement is not tested; no health professionals are involved, and the person’s mental or physical health is not assessed. See Natalie Videbæk Munkholm, “Legal Status of Transsexual and Transgender Persons in Denmark”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 167.

312 *Lov om ændring af lov om Det Centrale Personregister*, lov nr. 752 af 15.06.2014 § 1

6-month time lag prevented people from changing their documents quickly enough, for example, when applying for a job, travelling internationally or enrolling in school. The lawmakers in Denmark responded that the waiting period was meant to keep people from making hasty decisions they might later regret.<sup>313</sup>

4.80 The new CPR number is recorded in the registry, and the original CPR number is retained in the registry too, referring to the new CPR number. All information in the registry from the original number will be transferred to the new number, which will from then on be the basis for all new registrations.<sup>314</sup> The records are accessible only to public authorities or private persons who have been granted this right by law, by administrative order according to law, or have been authorised by the Ministry of Economy and Domestic Affairs.<sup>315</sup> With the new CPR number, the applicant will automatically receive a new National Health Card (*sundhedskort*).

## **Iceland**

### *Legislative model for gender recognition*

4.81 In June 2012, the Icelandic Parliament unanimously adopted the Act on the legal status of individuals with gender identity disorder No. 57/2012 (*“Icelandic GID Act”*), which came into force on 27 June 2012, with the objective to *“guarantee individuals with gender identity disorder equal legal status with others, in keeping with human rights and human integrity”* (Article 1).

### *Authority to process applications*

4.82 Applications under the Icelandic GID Act are examined and adjudicated by an Expert Panel on Gender Identity Disorder (appointed by the Minister of Welfare) which comprises three members: (1) the Medical Director of Health, who shall chair the Panel; (2) a physician appointed by the Minister of Welfare without nomination; and (3) a lawyer nominated by the Minister responsible for human rights (Article 5, paragraph 1). The Panel’s decision as to whether or not the applicant belongs to the other gender cannot be appealed to any higher authority (Article 6, paragraph 5). The Panel may also, if applicable, confirm that the applicant is *“eligible for gender reassignment surgery”* (Article 6, paragraph 3).

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no. 1.

313 See news report of *The New Civil Rights Movement, LLC* (5 September 2014), “Denmark’s New Gender Recognition Law Allows Danes To Self-Determine Gender Identity”.

314 The Minister of Economy and Domestic Affairs, remarks to the proposed Act. *Lovforslag L 182, Folketinget 2013-14, Fremsat 30.04.2014, Bemærkninger til lovforslaget*, section 3.1.

315 CPR Act § 34, 1.

### *List of requirements for gender recognition*

4.83 In order to be eligible to apply under the Icelandic GID Act, the applicant should (Article 6):

- (a) be of “*legal age*”, ie, 18 years old;
- (b) be “*legally domiciled in Iceland*”;
- (c) “*have resided continuously and lawfully in Iceland for the preceding two years, and be covered by health insurance under the Health Insurance Act*”;
- (d) be diagnosed and have received “*recognised treatment*” from the National University Hospital Gender Identity Disorder Team (“*the Team*”);
- (e) have been under the Team’s care for at least 18 months; and
- (f) have been “*living in the other gender*” for at least one year.

4.84 The Team, including specialists in psychiatry, endocrinology and psychology as nominated by the Chief Executive Officer of the National University Hospital of Iceland (*Landspítali*), is to “*supervise the diagnosis and recognised treatment of individuals with gender identity disorder*” (Article 4, paragraph 1).

4.85 Sex reassignment surgery or sterilisation is not required for official name change and gender recognition under the Icelandic GID Act.

### *Foreign gender recognition or foreign gender reassignment surgery*

4.86 An individual who is registered in the Icelandic population register but resides abroad, or has lived abroad, and has been granted legal gender recognition due to gender identity disorder or a change of name relating to the process of application for gender recognition, may request Registers Iceland (*Þjóðskrá*) to register these changes in the Icelandic population register. Registers Iceland evaluates the documentation submitted by the applicant, inter alia whether the name change and/or gender legal recognition were carried out under authority of the appropriate government body or court of law (Article 9). In the process of diagnosis, the Team may take into account any diagnosis of gender identity disorder and recognised treatment received in another country (Article 4, paragraph 2).

### *Scope of the gender recognition*

4.87 Once the Expert Panel concludes that an applicant belongs to the opposite sex, it will notify Registers Iceland and the individual will then be permitted to change his or her name (Article 6, paragraph 4 and Article 8, paragraph 1). After having received such recognition the individual will be

guaranteed all the same legal rights as people of this gender enjoy (Article 7).

4.88 When legal gender recognition and name change are registered in the population register, a new Identity Number may be issued to the individual by Registers Iceland (Article 8, paragraph 3). The previous Identity Number shall remain accessible to government authorities and other bodies which, due to the nature of their work, need to be aware of the link between the old and new Identity Numbers (Article 8, paragraph 3).

#### *Status of parent-child relationship*

4.89 The status quo in the legal relationship between a child and a parent who has been confirmed as legally belonging to the opposite sex is guaranteed (Article 10).

#### *Changing back to previous gender*

4.90 An individual may seek to return to their previous legal sex pursuant to Article 11.

### ***Example of European jurisdictions with other types of procedures to recognise gender change in official documents***

#### ***The Netherlands***

##### *2014 legislation on simplified procedure to amend official documents*

4.91 A new law on gender recognition, which came into force on 1 July 2014,<sup>316</sup> together with the Dutch Civil Code, enables transgender people to change the gender designation on their official identity papers (including birth certificate, passport and other official documents) in a simple administrative way.

#### *Minimal requirements*

4.92 An applicant for gender recognition in the Netherlands needs to produce a medical expert statement affirming that “*the conviction of [the applicant] to belong to the other sex is of a permanent nature*”. The application has to be accompanied by a report of an expert designated among the gender teams from the university hospitals in Amsterdam, Groningen and Leiden, issued at the latest six months before the date of the application.<sup>317</sup> The report has to mention that the applicant has declared before the expert that he or she holds the conviction that he or she is of a gender other than the one indicated on his or her birth certificate, and has to show that he or she understands his or her transgender status and that the application is

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316 Staatsblad van het Koninkrijk der Nederlanden 2014, 1. This law is to be evaluated within three years. See Jansen, “Rechtspositie transgenders” (2012) *Tijdschrift voor Families – en Jeugdrecht* (FJR) 62 ff.

317 See Jansen, “Rechtspositie transgenders” (2012) *Tijdschrift voor Families – en Jeugdrecht* (FJR), at 65.

deliberate.<sup>318</sup>

#### *Authority to process applications*

4.93 Applications can be made at the Civil Registry of births, deaths and marriages of the town where the applicant's birth was registered.<sup>319</sup>

#### *Minimum age requirements*

4.94 The minimum age to make an application is set at 16.<sup>320</sup> A minor may apply without the consent, or assistance, of his or her parents or legal representatives.<sup>321</sup>

#### *No medical treatment requirements*

4.95 This law of 2014 has eliminated the pre-existing prerequisites for an applicant to take hormones and undergo surgery, including irreversible sterilisation, and a court's ruling is no longer necessary.<sup>322</sup>

#### *No requirements relating to pre-existing marriage*

4.96 A pre-existing requirement that the applicant had to be unmarried was abolished by Article 1(D) of the same-sex marriage legislation of 2000.<sup>323</sup> Where a spouse obtains the legal recognition of his or her preferred gender, the couple's marriage is transformed from a marriage between persons of different sex into a marriage between persons of the same sex.<sup>324</sup>

#### *Applications by foreigners*

4.97 A person who is not of Dutch nationality may file a request for the legal recognition of his or her preferred gender if he or she has a valid residence permit and has been domiciled in the Netherlands for at least one year.<sup>325</sup>

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318 Art 28a, paragraph 2, Dutch Civil Code.

319 See news report of *Transgender Network Nederland* (30 June 2014, in Dutch), "Feestelijke bijeenkomst luidt op 1 juli nieuwe transgenderwet in".

320 Art 28, paragraph 1, Dutch Civil Code.

321 Art 28, paragraph 4, Dutch Civil Code.

322 The previous law was section 1.4.13 of the Dutch Civil Code which required an applicant for change of his or her gender marker on the birth certificate to, inter alia, be, "if he is marked on the birth certificate as a male, is definitely incapable of procreating children or, if he is marked on the birth certificate as female, is definitely incapable of giving birth to children", and have been "adjusted physically to the desired gender insofar this is possible and acceptable from a medical and psychological point of view". See the Dutch Civil Code at: <http://www.dutchcivillaw.com/civilcodebook01.htm>.

323 See news report of *The New York Times* (13 September 2000), "Dutch Legislators Approve Full Marriage Rights for Gays".

324 Wuyts, "De gevolgen van de juridische geslachtsaanpassing op familierechtelijk vlak", in Senaev and Uytterhoeven, "De rechtspositie van de transseksueel", Antwerp, 2008, at 217.

325 Art 28, paragraph 3, Dutch Civil Code.



### **Concluding remarks on gender recognition in European jurisdictions**

4.98 In 2009, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, published an issue paper on human rights and gender identity.<sup>326</sup> The issue paper contained 12 recommendations to Council of Europe member states. The following recommendations from the paper are directed specifically at gender recognition legislation:

- “(3) *Develop expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents;*
- (4) *Abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person’s gender identity in laws regulating the process for name and sex change;*
- (5) *Make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible for transgender persons, and ensure that they are reimbursed by public health insurance schemes;*
- (6) *Remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender; ...*<sup>327</sup>

4.99 These recommendations have been reflected in a recommendation of the Council of Europe’s Committee of Ministers in 2010,<sup>328</sup> which noted that *“requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.”*<sup>329</sup>

4.100 As illustrated earlier in this chapter, to-date the recommendations have not been fully implemented by many countries in Europe. Nonetheless, change appears to be gradually taking place. Apart from the remarkable legal reform and/or judicial changes in Denmark, Ireland, Malta, Iceland, Norway, France and the Netherlands noted above, Croatia has also amended its State Registries Law in June 2013 to include a provision under which a person can have their birth certificate amended with the preferred gender based on *“change of sex or life in a different gender identity”*,<sup>330</sup> Germany and

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326 Thomas Hammarbert, “Human Rights and Gender Identity”, CommDH/Issue Paper (2009) 2, 29 July 2009.

327 Same as above.

328 Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted in 31 March 2010 (available at: <https://wcd.coe.int/ViewDoc.jsp?id=1606669>).

329 Same as above, Appendix, at paragraph 20.

330 Law on Amendments on the Law on State Registers (No.71 -05-03/1-13-2), (official version in Croatian).

Sweden have by court decisions in, respectively, January 2011<sup>331</sup> and July 2013,<sup>332</sup> dropped the sterilisation requirement from their then gender recognition regimes.

4.101 It is noted that not all legal developments in Europe in this area are trending towards reducing restrictions for gender recognition. The Czech Republic, which apparently had been known for being relatively liberal with regard to lesbian, gay, bisexual, transgender and intersex (“*LGBTI*”) issues, in January 2014 reinforced its requirements for SRS and mandatory divorce in relation to gender recognition.<sup>333</sup> Separately, in *Hämäläinen v Finland* (2014),<sup>334</sup> the ECtHR affirmed the Finnish government’s decision to require a man, who had undergone SRS, to transform his marriage into a civil partnership if he wanted to update his national and travel identity documents. The scheme in Finland has imposed requirements on minimum age, citizenship, marital status exclusion (unless with the spouse’s consent), a medical diagnosis requirement that the applicant “*permanently experiences being a member of the opposite sex*”, a real life test of six to twelve months, hormonal treatment, SRS and sterilisation.<sup>335</sup>

## North America

### Overview

4.102 This paper has studied the gender recognition schemes in 60 jurisdictions across North America, including, in the United States (“*US*”), 46 states, the District of Columbia and New York City, 10 Provinces and one Territory in Canada, together with the Federal District of Mexico (see Annex A and Annex B of this paper for a full list of these jurisdictions).

4.103 None of the 60 North American jurisdictions examined has enacted a specific gender recognition law. The gender recognition schemes in these jurisdictions are instead set out in their laws governing corrections to gender markers on, mainly, birth certificates and, in some states and provinces, other official documents such as drivers’ licences and passports.

4.104 This chapter focuses more specifically on birth certificates, which are widely used in both the US and Canada as legal proof of citizenship, and in determining eligibility for employment, and the issuing of other identity documents such as driver’s licences, Social Security cards and passports,

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331 *Bundesverfassungsgericht* [Federal Constitutional Court], BVerfG, 1 BvR 3295/07, 28 January 2011.

332 See Equality for Lesbian, “Gay, Bisexual, Trans and Intersex People In Europe”, *Sweden - Annual Review 2013*.

333 See section 29 of the Civil Code no. 89/2012 Coll, which came into force on 1 January 2014.

334 Application no. 37359/09, 16 July 2014.

335 See the Act on the Recognition of the Sex of Transsexual Individuals (*laki transseksuaalin sukupuolen vahvistamisesta* (563/2002)) and Decree 1053/2002 issued by the Ministry of Social Affairs and Health in 2002.

etc.<sup>336</sup> Birth certificates are also conclusive in law of a person's sex in Federal District of Mexico where a birth certificate is required to exercise civil and political rights (for example, a birth certificate is required to obtain a voter identification card<sup>337</sup>).

4.105 For citizens of the US who were born overseas (thereby no birth record exists in the local US registries), they could obtain Consular Reports of Birth Abroad of US Citizens (CRBA), which are functionally equivalent to birth certificates for those born in the US in providing citizenship, identity and other information about the individual's circumstances of birth. According to the new policy promulgated by the US Department of State in June 2010, the requirement of "*sex reassignment surgery*" was abandoned and the applicant is now only required to provide a physician's letter certifying that he or he "*has had appropriate clinical treatment for gender transition to the new gender*" (terms not defined anywhere in legislation, etc).<sup>338</sup>

### **United States**<sup>339</sup>

#### *Types of measures allowing rectification of official documents*

4.106 In the US, a birth certificate is the primary means a person first uses as identity to obtain other legal documents. Across the US, laws governing corrections to gender markers on birth certificates vary from State to State, although they are relatively similar, in large part because such laws in many jurisdictions have emanated from the relevant provisions of the 1977 revision of the Model State Vital Statistics Act (MSVSA). The MSVSA, developed by the US Department of Health and Human Services, recommended that corrections to gender markers on birth certificates be granted "*upon receipt of a certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this State has been*

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336 For the purpose and significance of birth certificates in the United States, see Office of Inspector Gen, US Department Of Health And Human Services, OEI-07-99-00570, Birth Certificate Fraud at 2 and 6 (2000). In the United States, although generally not written formally into policy, a person's initial gender on a driver's licence/state ID will match that on one's birth certificate. Although it is less common, at least two state Departments of Motor Vehicles require a corrected gender on one's birth certificate before updating the gender on one's driver's license (Montana and Kentucky). See Driver's License Policy by State, "NAT'L CTR. FOR TRANSGENDER EQUAL." (available at: [http://transequality.org/Resources/DL/DL\\_policies.html](http://transequality.org/Resources/DL/DL_policies.html)). Similarly, to establish a person's initial gender on a passport, the birth certificate gender (or gender on other citizenship/identity evidence) is generally used. See DEPT. OF STATE FOREIGN AFF. MANUAL 1310 app. M (2011).

For Canada, see Civil Processing Bureau, "FAQs on Birth Certificates" (available at: <https://www.canadianbirthcertificate.com/FAQs.aspx?CertificateType=GeneralBirthFAQs&#Faq1>).

337 See IGLHRC (International Gay & Lesbian Human Rights Commission), "Mexico: Mexico City Amends Civil Code to Include Transgender Rights" (15 June 2004).

338 US Department Of State, "7 Foreign Affairs Manual 1320 app. M(b)(1)(g)" (2012).

339 For a detailed overview of the legal framework on gender recognition across the United States, see Jameson Garland, "The Legal Status of Transsexual and Transgender Persons in the United States", in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 586 to 588.

*changed by surgical procedure*” (terms not defined in the model statute nor in published case law).<sup>340</sup>

4.107 All the 48 jurisdictions in the US studied in this paper permit people to correct their gender marker on birth certificates by virtue of the express statutory provisions, regulations, policies or court orders in those States. Six jurisdictions in the US not canvassed in this paper do not follow this trend, however, as they either do not have clear policies on whether or not changes are allowed, or for various reasons deny individuals the right to correct their gender markers.<sup>341</sup>

#### *Authority to determine applications*

4.108 Of the 48 US jurisdictions studied, 23 require a court order confirming change of gender by surgical procedure, etc. before the administrative bureaus or entities (usually the local registrar for births or vital statistics) will approve the gender marker changes to birth certificates.<sup>342</sup> Twenty-two states utilise an administrative process,<sup>343</sup> and three allow either a judicial or administrative process.<sup>344</sup> It appears that no jurisdiction has established an expert panel or committee for assessing or determining the applications for gender marker change on birth certificates.<sup>345</sup>

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340 Model State Vital Statistics Act and Regulations § 21(d) and 21(e) (Ctr. for Disease Control & Prevention 1992). The MSVSA provides a general rule for any kind of amendment: it should be shown on the face of the document unless otherwise provided for by regulation: § 21(e).

341 Tennessee has the only explicit statutory ban on correcting gender markers, see Tenn. Code. Ann. Paragraph 68-3-203(d) (West 1997). For various reasons, Idaho, Ohio, and Puerto Rico also do not allow individuals to correct gender. See Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, 19 *Michigan Journal of Gender & Law* 373 to 470 (2013), at 381 and 382.

342 These are Alabama, Alaska, Arkansas, California, Colorado, Delaware, Georgia, Indiana, Louisiana, Missouri, Mississippi, Montana, New Hampshire, Nevada, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Vermont, Wisconsin and Wyoming.

343 These are Arizona, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Maine, Michigan, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Rhode Island, West Virginia, Washington, New York City.

344 These are Maryland, Minnesota and Oklahoma.

345 It has been argued that a court order process, in contrast to a direct-to-agency process, can be “an insurmountable practical or financial barrier to obtain a corrected birth certificate”, and such a process also “compromises privacy, leading to problems caused by lack of judicial expertise [i.e. individual judges are likely to establish or apply their own standards of eligibility for a gender correction based on their individual knowledge] and bias, as well as raising serious constitutional questions.” See Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, 19 *Michigan Journal of Gender & Law* 373 to 470 (2013), 431 to 435.

## *Sex or gender reassignment surgery*

4.109 In various US states, the requirement of gender reassignment surgeries is a determinative legal standard. For example:

- (a) Fourteen jurisdictions have explicit surgical criteria (irreversible sterilisation is likely to be required) in legislation or official regulations or policies.<sup>346</sup>
- (b) Eight jurisdictions have integrated into their statutes or regulations the language from the MSVSA (ie, referring to “*surgical procedure*”) but do not specify that irreversible sterilisation must be achieved.<sup>347</sup>
- (c) Two jurisdictions leave the statutory language or official regulations either not entirely clear or silent with regard to whether surgery or sterilisation is required: Kansas (affidavit that the sex was incorrectly recorded and medical records “*substantiating the registrant’s sex at the time of birth*”), South Carolina (no relevant language).
- (d) Sixteen jurisdictions have explicitly repudiated surgical or hormonal requirements, either jettisoning by the courts the requirement of genital reconstruction surgery (Illinois and Missouri) or with language in statute or regulations noting that “*surgery or other treatment*” (Iowa and District of Columbia), “*clinically appropriate treatment*” / “*appropriate clinical treatment*” (California, Connecticut, Hawaii, Maryland, Minnesota, New York State, Oregon and Pennsylvania) or “*surgical, hormonal, or other treatment*” (Rhode Island, Vermont and Washington) will suffice. In New York City, what has to be shown is that the requested gender “*more accurately reflects the applicant’s sex or gender identity*”.
- (e) In eight jurisdictions, a judge determines the standard because there is no *statutory* or regulatory language, or the language is too vague.<sup>348</sup>

## *Medical diagnosis and other requirements*

4.110 Medical diagnoses or other physical or psychiatric requirements (like the “*real life test*” and hormonal treatment) are not set out in the statutes

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346 These are Alabama, Arizona, Florida, Louisiana, Massachusetts, Michigan, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, Virginia, West Virginia and Wisconsin.

347 These are Arkansas, Colorado, Delaware, Georgia, Kentucky, Maine, Montana and New Mexico.

348 These are Alaska, Indiana, Mississippi (“gender reassignment”), New Hampshire (“*has had a sex change*”), Nevada, South Dakota, Utah (“*has had a sex change*”) and Wyoming.

or regulations or policies in most US jurisdictions. Only five jurisdictions have a diagnosis standard<sup>349</sup> and only three of these make it clear that a diagnosis of gender dysphoria or transsexualism is mandatory.

4.111 Only New York State mentions that the applicant should have been living in the opposite gender preceding the application.

4.112 The new statutory language in the District of Columbia, Vermont and Washington requires, unanimously, that the individual has undergone “surgical, hormonal or other treatment appropriate for the purpose of gender transition”, whereas a treatment “appropriate” to an individual may be limited to living full-time in one’s new gender role.

#### *Requirements relating to pre-existing marriage*

4.113 All the 48 jurisdictions studied do not stipulate whether an applicant has to be unmarried or the pre-existing marriage should be annulled upon gender recognition. It was noted that a marriage involving a transgender spouse may be nullified by the courts in jurisdictions where same-sex marriages are prohibited, as illustrated in a handful of cases across the US such as *Kantaros v Kantaras* (2004) in Florida<sup>350</sup> and *re Lovo-Lara* (2005) in Nebraska.<sup>351</sup> However, on 26 June 2015 the US Supreme Court ruled that the US Constitution guarantees the right for same-sex couples to marry in all 50 US states.<sup>352</sup> Therefore, it seems that any marriage could remain valid unless and until one or both spouses get(s) a divorce or annulment.<sup>353</sup>

#### *Minimum age requirements*

4.114 Eight jurisdictions explicitly allow applications by minors with the consent of their parents or legal guardians or legal representatives.<sup>354</sup>

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349 These are District of Columbia (“contemporary medical standards”), Louisiana (“transsexualism” or “pseudo-hermaphrodite”), Minnesota (“gender dysphoria” according to the WPATH standard), New York State (“gender dysphoria” according to the DSM standard or transsexualism according to the ICD standard) and Virginia (“preoperative diagnosis”).

350 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004). In this case where the custody of the children was in question, the Florida Second District Court of Appeals upheld the wife’s claim that the marriage was null and void because her ex-husband was a transsexual man and same-sex marriages are illegal in Florida, with the remark that the term ‘sex’ should refer to “*immutable traits determined at birth*” (eg, chromosomes). Review of the decision was denied by the Florida Supreme Court (*Kantaros v Kantaras*, 898 So. 2d 80 (Fla. 2005)). The couple settled the case with joint custody in 2005.

351 23 I. & N. Dec. 746, 753 (B.I.A. 2005). The Board of Immigration Appeals of Nebraska ruled that it “should rely on a person’s chromosomal pattern or the original birth record’s gender designation in determining whether a marriage is between persons of the opposite sex.”

352 *Obergefell v Hodges* No. 14-556, 576 U.S. (2015).

353 See American Civil Liberties Union, *Know Your Rights – Transgender People and the Law*, 24 April 2013.

354 These are Arizona, District of Columbia, Florida, Kansas, Michigan, Minnesota, South Carolina and West Virginia.

4.115 New York State requires the applicants to be at least 18 years of age. Thirty-eight jurisdictions are ambiguous in this context in their statutes or official regulations.

*Foreign gender recognition or foreign gender reassignment surgery*

4.116 In most US jurisdictions, there is no statutory language relating to acceptance of foreign gender recognition or SRS performed in other jurisdictions. Only Illinois and Utah have provisions permitting SRS or sex change performed outside the US to be recognised, provided that it is verified by a US physician or court. It is understood that Louisiana does not accept court orders or official recognition of name and gender changes from any other jurisdiction.

*Scope of the gender recognition*

4.117 Upon legal recognition of an applicant's acquired gender, 25 jurisdictions will issue a new birth certificate,<sup>355</sup> while 18 will issue only an amended one.<sup>356</sup> It is unclear whether a new certificate or an amended one will be issued in Florida, Montana, Rhode Island, Virginia and Washington.

4.118 Lisa Mottet, the Transgender Civil Rights Project Director at the National Gay and Lesbian Task Force in the US,<sup>357</sup> has observed that jurisdictions in the US vary in their policies regarding access to registry information relating to birth certificates and other personal records. *"Most States restrict access to immediate family members, representatives, and those that have a proven property interest. Some States allow either certified or informational copies of birth certificates to be provided to members of the public, and this would be unfavourable for the successful applicants who would not want their previous gender to be readily exposed."*<sup>358</sup>

4.119 Presumably, changing the gender marker on one's birth certificate should put to rest once and for all the question of his or her legal gender for any legal purposes. However, the marker shown on the amended certificates and the paucity of privacy in some jurisdictions (mentioned above)

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355 These are Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, Hampshire, New York State, New York City, North Carolina, Pennsylvania, South Dakota and Vermont.

356 These are Alabama, Alaska, Arkansas, Kansas, Kentucky, Massachusetts, Mississippi, Missouri, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, Utah, West Virginia, Wisconsin and Wyoming.

357 A LGBTI advocacy group, see its official website at: <http://www.thetaskforce.org>.

358 The public can receive certified copies in Kentucky, Ohio, Massachusetts, Vermont, and Washington, and can receive "informational" or "uncertified" copies in California, New Jersey (unclear if it includes gender), North Carolina, South Dakota, and Wisconsin (except in limited cases). See Lisa Mottet, "Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People", 19 *Michigan Journal of Gender & Law* 373 to 470 (2013), at 441 and 442, footnote 265.

may prevent the transgender persons, even after the legal change is effected, from living as entirely normal as other people in the community, in particular as far as matters like employment and marriages are concerned.<sup>359</sup>

4.120 It should be noted, however, that the issuing of a new birth certificate may not be a guarantee of full legal effect in every jurisdiction. There have been cases, usually involving marriages, where courts have ignored the corrected (either new or amended) birth certificates, such as the courts in Florida and Nebraska which have considered only the birth-assigned sex when ruling on a person's sex for the purpose of deciding on the validity of his or her marriage (see earlier discussion). Similarly, the appellate court of Illinois remarked in its ruling in *re Marriage of Simmons*<sup>360</sup> that, in determining the validity of a marriage, the issuance of marriage licences and new birth certificates should not be put much weight as they are "*ministerial acts that generally do not involve fact-finding*" whereas "[t]he courts, on the other hand, are fact-finding bodies".

4.121 In contrast, a court in New Jersey recognised a transgender woman's gender identity, which was also reflected on her birth certificate, when determining the validity of her marriage with a man. Additionally, the Board of Immigration Appeals approved a visa based on marriage to a man for a transgender woman whose North Carolina birth certificate had a female gender marker.<sup>361</sup>

4.122 In many jurisdictions in the US, laws governing corrections to gender markers on birth certificates are written in brief and potentially vague terms. By comparison, California, District of Columbia and New York State could be said to have sophisticated and nuanced schemes which are examined in Annex A. The scheme in New York State (where some recent developments on gender recognition in the US have taken place) is illustrated below.

### **New York State**

#### *Types of measures allowing rectification of official documents*

4.123 Any defect on a birth certificate can be rectified in accordance with section 4176 of the New York Public Health Law, but this regulation does not provide legal standards or procedures for transgender people to make corrections to the gender marker on a birth certificate, which would only be found in administrative guidelines for changing the gender marker on birth certificates. These guidelines were updated in mid-2014 by the New York

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359 See Lisa Mottet, "Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People", 19 *Michigan Journal of Gender & Law* 373 to 470 (2013), at 441 and 442, footnote 265.

360 825 N.E.2d 303, 310.

361 See American Civil Liberties Union, *Know Your Rights – Transgender People and the Law*, 24 April 2013.



State Department of Health, and commenced on 5 June 2014.<sup>362</sup> The amendments lifted the previous demand for proof of surgery, and provided a more detailed administrative procedure for applications.<sup>363</sup>

*Authority to determine applications*

4.124 Under the emerging guidelines, the New York State Department of Health, Bureau of Vital Records (the Department) has the responsibility of adjudicating applications.

*Evidential requirements*

4.125 It is provided that the following documents should be submitted in an application:

- (a) a completed Application for Correction of Certificate of Birth (DOH-297) signed by the applicant, indicating:
  - (i) the applicant's name, date of birth, parents' names on existing birth certificate, and place of birth, and
  - (ii) the change being requested, including the corrected gender designation and, if applicable, name change.
- (b) A certified copy of the applicant's current birth certificate or a notarised affidavit from the applicant confirming that they are 18 years of age or older. In each case they need to submit a Notarised Affidavit of Gender Error attesting that the applicant has been living in their correct gender immediately preceding the application.  
  
and either (c) or (d):
  - (c) A notarised affidavit from a physician or nurse practitioner or physician assistant, confirming that surgical procedures have been performed on the applicant to complete sex reassignment.
  - (d) A notarised affidavit on professional letterhead from a physician or nurse practitioner or physician assistant, licensed in the US that have treated, or reviewed and evaluated, the gender-related

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362 The new guidelines are available at: <http://www.empirejustice.org/assets/pdf/policy-advocacy/doh-bc.pdf>. See news report of *Washington Post* (19 December 2013), "New Mexico Supreme Court legalizes gay marriage". See also another news report of *Empire State Pride Agenda* (5 June 2014), "Breaking: New York Removes Surgical Requirement For Gender Marker Changes On Birth Certificates".

363 The previous policy could be seen in letters issued by the Department of Health to individuals seeking to change their gender on their birth certificates: see, eg, letter from New York State Department of Health Director of Bureau of Production Systems Management Peter M Carucci (20 September 2005).

medical history of the applicant. The notarised affidavit must include a statement noting that the provider is making his/her findings upon independent and unbiased review and evaluation and is not related to the applicant. The letter must include:

- (i) the physician or nurse practitioner or physician assistant's license number; and
- (ii) language stating that the applicant has undergone *appropriate clinical treatment* for a person diagnosed with *Gender Dysphoria* as defined in the most current edition of the Diagnostic and Statistical Manual of Mental Disorders or language stating that the applicant has undergone *appropriate clinical treatment* for a person diagnosed with *Transsexualism* as defined in the most current edition of International Statistical Classification of Diseases and Related Health Problems; or as these diagnoses may be referred to in future editions (*emphasis added*).

4.126 The guidelines also provide that all documentation submitted would be delivered to the Department's legal and medical staff for review. Processing takes approximately 3 months. In order to change the name on a birth certificate, a certified copy of a court order is required by section 4138 of the public Health Law.

#### *Medical treatment requirements*

4.127 It is specifically noted in the guidelines that, in reviewing an application, the Department shall not require proof of any particular treatment or request any documents other than those listed above.

#### *Requirements relating to pre-existing marriage*

4.128 As same-sex marriage has been legally allowed in New York State since 24 July 2011 when the Marriage Equality Act took effect,<sup>364</sup> it is likely that an applicant for corrections to the gender marker on his or her birth certificate does not have to be unmarried, or a marriage involving him or her does not need to be annulled upon recognition pursuant to the guidelines.

#### *Scope of the gender recognition*

4.129 The guidelines also provide that upon a successful application, the Department will issue a new birth certificate reflecting the requested changes of gender marker and name (if applicable), and the new certificate will not indicate that there was a change in the original sex or name, as the case may be. Presumably, this ensures that the gender change under this scheme is recognised for all legal purposes.

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364 See news report of *Glaad.org* (5 June 2014), "New York State updates birth certificate policy, but obstacles remain for those born in NYC".

4.130 Confidentiality is further assured under the new guidelines, which direct that: (a) the original certificate and all other documents relating to the changes should be retained in a sealed file, (b) the new certificate will substitute the old one in the file of the local registry, (c) the registrar shall hold the contents of the original local record confidential, and (d) the original state record and the local record will not be released or otherwise divulged except by order of a court of competent jurisdiction.

## **Canada**

### *Types of measures allowing rectification of official documents*

4.131 The laws governing corrections to gender markers on birth certificates in all the 10 provinces and one territory of Canada examined in this paper are based on their respective Vital Statistics Act, or Civil Code (in Québec) as amended from time to time.

### *Authority to determine applications*

4.132 The authority to determine applications in each Province is, uniformly, the local registrar of vital statistics or similar agency. No expert panel or committee is set up in any province.

### *Sex or gender reassignment surgery/procedure requirements*

4.133 All the 11 jurisdictions have had legislative reforms on gender marker corrections in the past few years. Following this, the previous requirements for SRS and sterilisation were abolished in nine jurisdictions: Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan. In the case of Alberta and Ontario, this originated from court decisions.<sup>365</sup> The legislative amendment in Alberta<sup>366</sup> did not directly follow the related court ruling to express that proof of surgery was no longer required. Instead, the statute included a new proviso relating to gender change, which stated, “[*amendment of the sex on a person’s record of birth may be allowed*] in a circumstance provided for in the regulations and subject to any conditions in the regulations.” The related regulations require, *inter alia*, medical confirmation that the applicant “*identifies with and is maintaining the gender identity that corresponds with the requested amendment to the sex on the record of birth.*”<sup>367</sup>

4.134 Two jurisdictions in Canada have surgical requirements, namely, New Brunswick (which requires “*transsexual surgery*”) and Yukon Territory (which requires a “*change of the anatomical sex structure*”), and in each case

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365 *CF v Alberta* (Vital Statistics), 2014 ABQB 237, and *XY v Ontario* (Government and Consumer Services), 2012 HRT0 726

366 The Statutes Amendment Act (SA 2014) c8, formerly Bill 12 which was introduced on 5 May 2014, received Royal Assent on May 14, 2014.

367 Vital Statistics Information Regulation (current version in force since 25 October 2016), Regulation 16.3.

to be verified by medical practitioners.

#### *Medical diagnosis and “real life test” requirements*

4.135 A medical diagnosis is currently required in eight jurisdictions, namely Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Ontario, and Saskatchewan, all of which have similar official language to the effect that the applicant should provide proof that the sex designation on his or her original birth registration does not correspond with his or her gender identity, and/or that the sex designation requested by the applicant is consistent with the gender identity he or she identifies with. Manitoba and Ontario additionally require the applicant to live full-time in the requested gender identity (similar to a “real life test” requirement). British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and Saskatchewan require the applicant to manifest an intention to maintain the requested gender identity to be verified in the form of a declaration.

#### *Minimum age requirements*

4.136 There is a minimum age requirement for gender recognition in Ontario (18 years old), Saskatchewan (18 years old), and Newfoundland and Labrador (16 years old). Alberta, British Columbia, Nova Scotia and Quebec permit minors to make the application with consent of the parents and the guardians. Other four jurisdictions do not have relevant express provisions.

#### *Requirements relating to pre-existing marriage*

4.137 Alberta allows a spouse to a monogamous marriage to correct the gender marker on his or her birth certificate with the consent of the other party to the marriage. In British Columbia, the law was amended in 2014 to, amongst other things, revoke the exclusion of married applicants. Similarly, the laws in Manitoba, Newfoundland and Labrador, Nova Scotia and Yukon Territory are explicit that marriage is not a bar. The other five jurisdictions (ie, New Brunswick, Ontario, Prince Edward Island, Québec and Saskatchewan) do not have a stipulation in their laws referring to an applicant’s marital status. Notably, all the 11 jurisdictions in Canada allow same-sex marriage,<sup>368</sup> which appears to reinforce that one’s marital status should not be a factor for a gender change in Canada.

#### *Foreign gender recognition or foreign medical intervention*

4.138 SRS or medical intervention performed in foreign jurisdictions may be recognised in New Brunswick (requires foreign medical practitioner’s confirmation that the transsexual surgery has been performed), British

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368 On July 20, 2005, Canada became the fourth country in the world, and the first country outside Europe, to legalise same-sex marriage nationwide with the enactment of the Civil Marriage Act which provided a gender-neutral marriage definition. See the news report of *The New York Times*, “Canada passes bill to legalize gay marriage”, 29 June 2005.

Columbia, Nova Scotia, Ontario and Saskatchewan (these four jurisdictions have similar requirement of foreign medical evidence that the applicant's gender identity does not accord with the sex designation on his/her birth registration).

4.139 With regard to foreign gender recognition, Manitoba may allow a change of sex designation on the birth registry of a person whose sex designation was changed in a jurisdiction outside Manitoba provided that the documentation effecting a change of sex designation "*is issued by a person, office or body in the jurisdiction that, in the [Director of Vital Statistics] opinion, has functions under the jurisdiction's laws relating to changes of sex designation*" and "*the legal requirements of the jurisdiction for such changes are, in the [Director of Vital Statistics] opinion, comparable to the requirements under [Manitoba's Vital Statistics Act].*"<sup>369</sup> Ontario uses language implying that it will recognise a gender change granted by a foreign jurisdiction in which the applicant was domiciled or ordinarily resident, provided that, in the opinion of the Registrar General of Ontario, the foreign gender change certificate confirms that "*the applicant's gender identity does not accord with the sex designation on the applicant's birth registration and it is appropriate that the sex designation be changed.*"<sup>370</sup>

4.140 The situation regarding both foreign gender recognition and foreign medical/surgical intervention is unclear in Alberta, Newfoundland and Labrador, Prince Edward Island, Quebec and Yukon Territory.

#### *Scope of the gender recognition & Confidentiality*

4.141 Upon gender recognition, nine jurisdictions in Canada<sup>371</sup> will issue a new birth certificate to give effect to the gender change for all legal purposes, and some of them provide further guarantee on the confidentiality of gender change (for example, Manitoba expresses that the new birth certificate "*must be issued as if the original registration had been made with the sex designation as changed.*"<sup>372</sup>) On the other hand, it is unclear whether Nova Scotia and Quebec have mechanisms to keep confidential a change of sex entry in the registry.

#### **Saskatchewan**

4.142 As an example of a Canadian scheme, the relevant provisions of the Saskatchewan system are discussed below.

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369 Section 25(9) of the Vital Statistics Act.

370 See the proforma form for Application for a Change of Sex Designation on a Birth Registration of an Adult, available at:  
[http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/007-11325E~1/\\$File/11325E.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/007-11325E~1/$File/11325E.pdf).

371 These are Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island, Saskatchewan and Yukon Territory.

372 Section 25.1(2) of the Vital Statistics Act.

*Types of measures allowing rectification of official documents*

4.143 The relevant provisions are contained in the Vital Statistics Act, with the latest version in force since 30 June 2016.

*Authority to determine applications*

4.144 Applications for gender change are dealt with by the Registrar of Vital Statistics (section 31(1)).

*Minimum age requirement*

4.145 According to section 31(2) of the Vital Statistics Act, a person can only apply for a change in sex designation if he or she is at least 18 years old and whose birth is in Saskatchewan.

*Evidential requirements*

4.146 The application must be made in good faith (s31(4)), and the Registrar requires evidence including (sections 31(2)(a) to 31(2)(d)):

- (a) an application in a form approved by the Registrar;
- (b) a statutory declaration made by the applicant, in a form approved by the Registrar, stating that the applicant has assumed, identifies with and intends to maintain the gender identity that corresponds with the requested amendment to the designation of sex on the applicant's statement;
- (c) a letter from a health care professional practising in Saskatchewan or in another province or territory of Canada:
  - (i) stating that:
    - (A) the health care professional has treated or evaluated the applicant;
    - (B) in the health care professional's opinion, the applicant has assumed, identifies with and is maintaining the gender identity that corresponds with the requested amendment to the designation of sex on the applicant's statement; and
    - (C) in the health care professional's opinion, the change of sex designation on the applicant's statement is appropriate; and
  - (ii) containing any other information required by the Registrar.

4.147 If the applicant resides outside of Canada, the Registrar may accept a letter containing the information required by subsection (c) referred to above from a health care professional practising in a jurisdiction outside of

Canada (section 31(3)).

#### *Scope of the gender recognition*

4.148 After the sex of an individual's registration of birth has been amended, any certificate of birth (which is a certified extract of the statement of live birth) subsequently issued must contain the amended or corrected sex (section 65(1)(d)).

4.149 The Registrar may also require any person to whom a certificate of birth was issued with respect to the individual before the sex was amended or corrected to return the certificate to the Registrar (section 65(3)(b)).

#### **Mexico – Federal District**

4.150 In August 2008, the Federal District of Mexico, a special political division that belongs to the Mexico federation as a whole, amended Article 498(II) in Chapter IV(II) of the Code of Civil Procedure for the Federal District which is entitled "*Special Hearing for the Raising of an Act to Match Gender Change.*"<sup>373</sup> City legislators considered that this was "*the first time any member of the transgender, transsexual and transvestite community will have the option to alter their documentation to fit their identity.*"<sup>374</sup>

4.151 Under Article 498(II), a new birth certificate denoting the gender change may be issued upon application to the civil court. The following requirements must be met by the applicant:

- (a) be of Mexican nationality;
- (b) be of age or, in the case of a minor, the application to be made by the child's parent or guardian;
- (c) provide a verdict or report issued by two professionals or experts with clinical experience in gender reassignment, where one of the experts is the applicant's treating professional, confirming that the applicant has been subject to the process of gender reassignment (eg, hormone treatment) for a minimum of 5 months, or that definitive action was taken to undergo sex change (surgery). If the trial judge is not satisfied with the report, he or she may request the participation of other experts. The applicant must attend a hearing with the experts who have issued the verdict. In light of the above requirements, a gender reassignment surgery or hormone therapy is no longer mandatory for gender recognition in the Federal District of

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373 See The Mex Files (20 August 2008), "Changing with times". See also Table of Gender Recognition Systems in Approved Countries and Territories Under the Gender Recognition Act 2004 (June 2011).

374 See International Gay and Lesbian Human Right Commission (undated), "Mexico: Mexico City extends official rights to transgender individuals".

Mexico.<sup>375</sup>

4.152 On 13 November 2014, Mexico City lawmakers approved a Bill that would legally allow transgender people to change their gender without the previously required court order.<sup>376</sup> As there is no medical requirement for the application for change of gender in Mexico City, applicants can just “*stop by the Registry with photo ID and make the change in minutes, with a minimal cost that anyone would incur in seeking a copy of their birth certificate*”.<sup>377</sup> As a result, Mexico City is recognised as having adopted legislation that would follow the Argentinean model of a non-medical simple administrative gender recognition procedure based on the person’s self-determination.

### ***Concluding remarks on gender recognition in North American jurisdictions***

4.153 It is noted that all the provinces in Canada and the Federal District of Mexico have made legislative changes to their gender recognition schemes in recent years. In the US, there were recent legislative and administrative changes regarding gender correction in Connecticut (2015), Hawaii (2015), Maryland (2015), and Pennsylvania (2016).

4.154 Two jurisdictions in the US, namely Illinois and Iowa, appear to impose the least requirements for the applicants, in which they (1) do not impose mandatory surgery and sterilisation requirements; (2) do not require medical diagnoses or hormonal treatment; (3) do not statutorily restrict applications to adults; (4) issue new birth certificates to successful applicants; and (5) do not require a court order.

4.155 In Canada, most of the jurisdictions have moved away from an approach requiring gender reassignment surgery in the past few years, whilst medical confirmation is required in these jurisdictions. New Brunswick and Yukon Territory are the only jurisdictions that continue to require gender reassignment surgery.

4.156 The approach taken in the Federal District of Mexico follows the Argentinean model of a non-medical simple administrative gender recognition procedure based on the person’s self-determination.

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375 See International Gay and Lesbian Human Rights Commission, International Human Rights Clinic, Human Rights Program, Harvard Law School Colectivo Binni Laanu A.C. (March 2010), “The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in MEXICO”, at 13.

376 See news reports at:  
<http://www.hrc.org/blog/entry/victory-for-transgender-community-in-mexico-city> and  
<http://www.mexicogulfreporter.com/2014/11/gender-change-in-mexicos-federal.html>.

377 This remark was made by Jorge Cruz Zepeda, President of the Federal District’s Committee on Vulnerable Groups to the legislators. See the news report of 13 November 2014 at:  
<http://www.mexicogulfreporter.com/2014/11/gender-change-in-mexicos-federal.html>.



## South America

### Overview

4.157 It has been noted that policy makers in certain South American countries have in recent years been taking steps in the area of the legal recognition of gender identity by rejecting some of the “*outdated gatekeeper requirements*” in the process (for example, medical diagnoses and panel assessment).<sup>378</sup> Uruguay passed the first gender recognition law in 2009, and then Argentina passed a landmark statute in 2012, which allows an applicant to change his or her gender identity by way of a simple request.<sup>379</sup> In addition, in June 2015, Colombia issued a decree on gender recognition which appeared to follow the Argentina approach.<sup>380</sup> In 2016, specific legislation in this area was introduced in both Bolivia and Ecuador. In Bolivia, a surgery-free model is adopted under which psychological proof is required. Ecuador requires an applicant to furnish proof that he/she has lived in the preferred gender for 2 years before the application. The legislative model of Argentina, as well as that introduced in Uruguay, is discussed below.

### Argentina

#### *Legislative model for gender recognition*

4.158 On 8 May 2012, the Senate of Argentina approved the *Ley de Identidad de Género* (Gender Identity Law) (“*GIL*”), which came into force in July 2012.<sup>381</sup>

4.159 The GIL has been seen as a hugely significant change for Argentina, as the right to identity “*has an immense normative weight*.”<sup>382</sup> In Argentina, since 2012, the GIL has inspired activists internationally and is held up by the WPATH as a best practice law.<sup>383</sup>

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378 See Peter Dunne, 21 October 2013, “Respecting Trans\* Identities: Recent Movements For the Legal Recognition On Gender Identity in Latin America”.

379 This statute has been once hailed as “the most progressive gender identity law in history”. See Salum, AN (2012), “Argentina has passed the most progressive gender identity legislation in existence”, *International Gay and Lesbian Human Rights Commission Blog* 13 May 2012.

380 The decree requires an applicant to attest his or her change of gender identity by way of a simple deed in which a notary attests. See news report of *El Espectador*, “Cambio de género en la cédula será ágil y simple: Minjusticia”, 6 June 2015 (Spanish).

381 See English Translation of Argentina’s Gender Identity Law as approved by the Senate of Argentina on 8 May 2012, available at: <http://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf>

382 See The Open Society Foundations, “License To Be Yourself: Law and Advocacy for Legal Gender Recognition of Trans People”, May 2014, at 28.

383 The WPATH Board has explicitly supported the approach taken in the Argentinean law as in August 2013 it provided advice to courts and governments in Ontario in Canada, South Korea and Ireland arguing that legal gender recognition should not require a diagnosis, medical treatments, or that a trans person has lived for a set period in their preferred gender role. See the President’s Note dated 5 August 2013 from the

4.160 The GIL consists of 15 Articles. The cornerstone of the GIL is “*the right to identity*” recognised in Article 1, which provides that all persons have the right to recognition of their gender identity, to the free development of their person according to their gender identity, and to be treated accordingly.

*Authority to process the application*

4.161 In most cases, the application process under the GIL is administrative, and includes the submission of a request for a person’s “*recorded sex*” to be amended (Article 3) and the “*first name and images*” in the National Bureau of Vital Statistics to be changed (Articles 3 and 4(2)). The public officer of the National Bureau of Vital Statistics or their corresponding district offices will examine and determine the applications (Articles 4(2) and 6). It is a relatively straightforward option where approval is automatically granted if all necessary paper work (proof that the applicant have reached the age of 18 years, a request stating that the applicant falls under the protection of the current law etc) is supplied (Article 4).<sup>384</sup> The procedures are expressed to be “*free, personal and do not require the intervention of any agent or lawyer*” (Article 6). The process typically takes between 2 and 3 weeks to complete, but the actual time period varies between provinces and in some areas it has taken up to 2 to 3 months.<sup>385</sup>

4.162 Article 2 of the GIL defines the term “*gender identity*” in its broadest sense, taking inspiration from the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (“*Yogyakarta Principles*”)<sup>386</sup>: “*Gender identity is the internal and individual way in which gender is perceived by persons that can correspond or not to the gender assigned at birth, including the personal experience of the body.*”

4.163 The GIL does not require any surgery to be done as a precondition for gender recognition. It is specifically provided in Article 4 that “*in no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place.*”

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WPATH President, Mr Lin Fraser.

384 Regionally, there are proposals being developed in Chile and Ecuador that are based on self-perceived gender identity. See The Open Society Foundations, “*License To Be Yourself: Law and Advocacy for Legal Gender Recognition of Trans People*”, May 2014, at 41.

385 See The Open Society Foundations, “*License To Be Yourself: Law and Advocacy for Legal Gender Recognition of Trans People*”, May 2014, at 23. See also Richard Köhler and Aleks Recher, *Legal Gender Recognition in Europe – Toolkit*, 2nd Revised Edition, November 2016, at 72.

386 The Yogyakarta Principles were adopted in 2006 by a panel of human rights experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law, including judges, academics, a former United Nations High Commissioner for Human Rights, United Nations Special Procedures, members of treaty bodies, NGOs and others. Although the Yogyakarta Principles are not legally binding, they have been cited by United Nations bodies, international and regional human rights bodies, national courts and many governments as a guiding tool.

4.164 The GIL does not require any diagnosis, or that the applicant has had any real life experience or lived continuously in a gender role matching his/her gender identity, or that the applicant should have an expressed intention to live in the opposite gender.

#### *Minimum age requirements*

4.165 Notwithstanding that there is a minimum age requirement of 18 (Article 4(1)), the GIL permits children under the age of 18 to change their gender under the same procedures as for adults (Article 5) if the request is submitted by the minor's legal representative with the minor's explicit agreement (and taking into account the evolving capacities and best interests of the minor as expressed in the Convention on the Rights of the Child and in Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents<sup>387</sup>). The minor must also be assisted by a children's lawyer (Article 5).<sup>388</sup>

4.166 Summary proceedings before a judge are used for applications by those under the age of 18 if a legal guardian's consent is denied or cannot be obtained (Article 5). A judge's authorisation is also required for any second or subsequent applications (Article 8).

#### *No residency or citizenship requirement*

4.167 No residency or citizenship requirement was stipulated under the GIL. However, the general rule is that only citizens can apply for legal gender recognition in Argentina.<sup>389</sup> Nevertheless, under a number of administrative guidelines,<sup>390</sup> a non-citizen who are applying for, or have already been granted permanent resident status in Argentina can apply for legal gender recognition in Argentina. If the applicant concerned had obtained legal gender recognition in their country of citizenship, he or she may provide appropriate evidence of that extra-territorial recognition (eg, national identity card or birth certificate) for the application to amend the gender marker on his or her residence card, National Identity Card for Foreign Residents and any other documentation issued by the Argentine state. If the applicant has not obtained legal gender recognition in his or her country of origin, he or she must produce to the National Migration Office evidence of his or her permanent resident status in Argentina, the National Identity Card for Foreign Residents, and notification from the Consular Office of the country of citizenship which affirms that the laws of that country do not permit the individual to obtain legal gender recognition. One important difference between gender recognition granted to citizens and non-citizens is that the documentation issued to non-citizens is only valid for use within Argentina so that the individual

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387 26 Oct 2005, B.O. Oct. 26, 2005.

388 In November 2013, a six-year-old girl was able to change her documents under the GIL. See Huffington Post, "Argentina grants Lulu, 6-year-old transgender child, female ID card", 10 October 2013.

389 See Decree 1007/2012.

390 These include Decree 1007/2012 and Joint Resolution 1/2012 and 2/2012 passed by the National Bureau of Vital Statistics and the National Migration Office.

concerned must continue to rely upon his or her travel documentation issued by the country of citizenship, even if this documentation retains the birth-assigned legal gender.

*No requirements relating to pre-existing marriage*

4.168 There is no direct reference to any requirements relating to marriage in the GIL. One of the reasons that divorce in relation to a prior marriage may not be mandatory for the application under the GIL is that Argentina has recognised the right of same-sex couples to marry since the passage of the Equal Marriage Act on 2 July 2010.<sup>391</sup>

*No impact on parental status*

4.169 There is no requirement regarding the parental status of the applicant, though it is noted that, under Article 7, a successful applicant's legal entitlements to rights and legal obligations derived from the relationships consecrated by family law at all levels and degrees will remain unchanged, including adoption.

*Scope of the gender recognition*

4.170 Once the required information stated in Article 4 has been provided, the public officer will proceed "*without any additional legal or administrative procedure required*" to notify the amendment of the sex and change of first name to the Civil Registry corresponding to the jurisdiction where the birth certificate was filed (Article 6), and will notify the change to the other government bureaus as necessary (Article 10).

4.171 The gender recognition under the GIL is for full legal purposes by virtue of Articles 1(a) and 1(c), which guarantee the rights of all persons to the recognition of their gender identity and to be treated according to their gender identity. Article 7 also provides that, from the point of first legal recognition, an individual's preferred gender and name are enforceable as against third parties.

4.172 Confidentiality is regulated under Article 9, which prohibits the disclosure of the original birth certificate to anybody or without the explicit authorisation of the document holder, except in the case of a "*well-founded judicial authorisation*", and prohibits any publicising of amendments made to the recorded sex and first name of a person except with the authorisation of the document holder. Further, Article 6 forbids any reference to the GIL in the new birth certificate and national identity card.

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391 See the related news report of *UT San Diego* (21 July 2010), "Argentina's gay marriage law signed by President", and the news report of *Changing Attitude* (7 October 2011), "Equal marriage in the Argentine military is an important advance in democratic rights". See also commentary on the GIL and the Equal Marriage Act by Salum, AN (2012) in his article, "Argentina has passed the most progressive gender identity legislation in existence", *International Gay and Lesbian Human Rights Commission Blog* 13 May 2012.

4.173 Article 12 ensures the dignified treatment of people with first name and sex changed according to the GIL.

4.174 Unofficial statistics indicate that in its first year of operation, more than 3,000 trans people applied to change their sex entry and name under the GIL.<sup>392</sup>

## **Uruguay**

### *Legislative model for gender recognition*

4.175 In October 2009, the Parliament in Uruguay passed Law No. 18.620, which begins by affirming that “*everyone has the right to the free development of their personality according to their own gender identity, independent of his or her sex, be it biological, genetic, anatomical, morphological, hormonal, by assignment, any other consideration*” (Article 1). This law permits individuals to amend their name and gender (either male or female) in the official civil register and on all identity documentation, such as passports and birth certificates.

### *Judicial authority to determine applications*

4.176 The Family Courts are responsible for assessing and determining applications under the 2009 Law. The Family Courts will rely heavily on the technical report issued by the multi-disciplinary team specialised in gender identity and diversity within the Civil Registry,<sup>393</sup> which would take into account the testimonies of people who may know the daily lifestyle of the applicant and of the professionals who have treated the applicant for social, mental or physical matters.

### *List of requirements: expert report on gender dissonance*

4.177 The applicant should submit to the courts a technical report issued by the said multi-disciplinary team stating, *inter alia* (Article 3):

- (a) the name and/or sex in the birth certificate are dissonant with his or her own gender identity; and
- (b) the stability and persistence of the dissonance between the gender assigned to the applicant at birth and his or her acquired gender has lasted for at least 2 years (not an imperative precondition for those who have undergone sex reassignment surgery).

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392 See the article published in the official media agency (TELAM), “A un año de la sanción de la ley, tres mil personas trans gestionaron su nuevo DNI” (in Spanish), available at: <http://www.telam.com.ar/notas/201305/17099-a-un-ano-de-la-sancion-de-la-ley-3000-personas-trans-gestionaron-su-nuevo-dni.html>.

393 See Tobin, HJ (14 October 2009), “Uruguay passes landmark gender identity law”, *TransEquality Blog*.

*Requirements relating to pre-existing marriages*

4.178 An existing marriage will not be affected by the gender change (Article 7). It is hereby noted that same-sex marriage became legalised on 5 August 2013 after enactment of the Equal Marriage Law (Law No. 19.075).<sup>394</sup>

*Scope of the gender recognition*

4.179 Upon a successful application under the 2009 Law, changes of gender will be made to the identification documents as well as documents that record the applicant's rights and obligations (Article 4). The gender change will have legal effect from the date on which such change becomes effective on the birth certificate, and accordingly, it allows the individual to exercise all the rights attached to the acquired gender (Article 5).

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394 See news report of *Pink News* (5 August 2013), "Uruguay: Equal marriage law comes into effect".

## CHAPTER 5

# SHOULD HONG KONG HAVE A GENDER RECOGNITION SCHEME?

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### Introduction

5.1 As we saw in Chapter 2 of this Consultation Paper, the CFA in *W's* case remarked that the Government should consider how to address problems facing transsexual persons in all areas of the law, and should do so by drawing reference to overseas practice such as the UK GRA. We have therefore examined the UK's gender recognition scheme in detail in Chapter 3 of this Consultation Paper, and the gender recognition schemes applying in a wide range of other jurisdictions in Chapter 4, as well as in Annexes A and B of this paper.

5.2 The purpose of this and the following chapters is to set out a number of key issues that need to be addressed in considering the way forward on a possible gender recognition scheme for Hong Kong. With a view to be as objective as possible, these are set out in the form of a list of issues, focusing on the arguments in support of and against the type of scheme which should apply, the pre-conditions for recognition of a person's gender other than his or her birth gender and other ancillary issues.

5.3 In this chapter, we will examine the divergent considerations for having a gender recognition scheme from different perspectives, including, but not limited to, legal, medical, political and sociological considerations.

5.4 As a matter of clarification, the possible arguments discussed in this chapter are solely for the purposes of consultation and do not necessarily represent the IWG's stance on any of the issues raised. No conclusion as to the IWG's stance should therefore be drawn from the wording and mode of presentation of this chapter, nor from the citing or referring to the comments, observations or arguments made by individuals or organisations mentioned in this chapter. It should also be stressed that pending the result of the consultation, the IWG has not reached any conclusion on any of the issues. Further, it should be borne in mind that the list of possible arguments discussed below is by no means exhaustive, and that the IWG is prepared to consider such other arguments as may be appropriate.

## Arguments in support of having a gender recognition scheme

### ***Argument (1): Recognition of the innate gender identity, instead of the biological sex, of a transgender person***

5.5 It has been argued that people may not experience and perceive their gender identities according to one standardised pattern.<sup>395</sup> An argument for having a gender recognition scheme is that a person's innate sense of gender identity may differ from the person's sex assigned at birth,<sup>396</sup> and accordingly, a person's inborn gender identity, instead of his or her biological sex, should be recognised. This is generally referred to as the "brain-sex theories" which argue, amongst other things, that there is a possible biological basis underlying transgenderism or transsexuality.<sup>397</sup>

5.6 Moreover, it has been argued that the principal unchanging biological aspect of gender identity, ie, the chromosomal element, should not be decisive for the purposes of legal attribution of a person's gender identity. The ECtHR held in the case of *Goodwin*<sup>398</sup> that a test of congruent biological factors might no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual person. The Court stated that there are other important factors to consider; for example, the acceptance of the condition of gender identity disorder or gender dysphoria by the medical professions and health authorities, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong, and the assumption by the individual of the social role of the preferred gender.<sup>399</sup>

5.7 It was observed by Lockhart J, sitting in the Australian Federal Court, General Division, NSW District Registry, in *Secretary, Dept of Social Security v 'SRA'* that:<sup>400</sup>

*"Sex is not merely a matter of chromosomes, although chromosomes are a very relevant consideration. Sex is also partly a psychological question (a question of self perception) and partly a social question (how society perceives the individual)."*

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395 See Amnesty International, 2014, "The State Decides Who I Am: Lack of Recognition For Transgender People", at 9.

396 Same as above. See also Wallace Swan, *Gay, Lesbian, Bisexual and Transgender Civil Rights: A Public Policy Agenda for Uniting a Divided America*, CRC Press, 26 September 2014, at 60.

397 See, eg, Kruijver, F P, Zhou, J N, Pool, C W, Hofman, M A, Gooren, L J, & Swaab, D F (2000), "Male-to-female transsexuals have female neuron numbers in a limbic nucleus", *Journal of Clinical Endocrinology and Metabolism*, 85, 2034-2041. A summary of the scientific evidence in relation to the "brain-sex theories" is found in Sam Winter's article, "Transgender Science: How Might It Shape The Way We Think About Transgender Rights?" (2011) 41 HKLJ 139, at 149 to 152.

398 *Goodwin v The United Kingdom* (2002) 35 EHRR 18. The summary and discussion of this case can be found in Chapter 3, above, at paragraph 3.36 *et seq.*

399 *Goodwin v The United Kingdom* (2002) 35 EHRR 18, at paragraphs 82 and 100.

400 (1993) 43 FCR 299, at 325. The same was quoted in *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraph 97.



5.8 The argument that one's gender identity is immutable was canvassed in the report of the Interdepartmental Working Group on Transsexual People set up by the Home Office in the UK, in which it was stated that:<sup>401</sup>

*“People with gender dysphoria or gender identity disorder live with a conviction that their physical anatomy is incompatible with their true gender role. They have an overwhelming desire to live and function in the opposite biological sex. Some people become aware of their transsexualism as children while others discover their feelings later in life. Once experienced these feelings are unlikely to disappear.”*

5.9 There is a viewpoint that because of the inconsistency between one's innate gender identity and his/her physical anatomy, many cases of gender identity disorder or gender dysphoria (especially the severe ones) may give rise to distress and possibly self-destructive behaviour. In *W's* case, Ma CJ and Ribeiro PJ quoted Dr Sam Winter's affidavit which had stated that:

*“[Male-to-female transsexual persons] consider themselves females imprisoned in the male bodies, or vice versa, and intensely resent their own sexual organs which constantly remind them of their biological sex. They go to great lengths to relieve themselves of their psychological distress. For example, transsexual men put on make-up, remove facial and pubic hair, and use oestrogen to promote the development of female breasts. They implore doctors to perform operations to remove their male genital organs and construct for them a vagina from their penis. Some of them mutilate themselves in order to be rid of the gonads and genitalia they detest. ... [T]he inner turmoil transsexuals experience prompts some of them to undergo prolonged and painful surgery or even take their own lives.”<sup>402</sup>*

5.10 Further, the dissenting judge in *W's* case, Chan PJ, stated that:

*“I am mindful of the problems facing transsexuals. If their reassigned gender is not recognised, this may cause them great distress. ... I can see the force of the reasoning of Ellis J in AG v Otahuhu Family Court [1995] 1 NZLR 603, 607:*

*‘If society allows such persons to undergo therapy and surgery in order to fulfill that desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to*

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401 See the UK Home Office, *Report of the Interdepartmental Working Group on Transsexual People* (April 2000), at paragraph 1.1.

402 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraph 8.

marry.’”<sup>403</sup>

5.11 From the medical perspective, there have been arguments that psychotherapy could help transgender persons re-orient to become “cisgender”.<sup>404</sup> In Hong Kong, the HA experts consider that psychotherapy, apart from hormones and surgery, is a mainstay of care for adult patients diagnosed with gender dysphoria or gender identity disorder. However, some medical specialists have indicated that psychotherapy on its own has not been proved to be a successful treatment for transgender persons.<sup>405</sup>

5.12 Whilst it may be that the discomfort of a transgender person would not be relieved or cured by way of medical assistance only, a law that recognises his/her new gender identity in all respects might arguably complete their “rebirth”. Such views were envisaged in the dissenting judgment in *Cossey v the United Kingdom*<sup>406</sup> where Judge Martens of the ECtHR pointed out that:

*“ . . . [medical] experts in this field have time and again stated that for a transsexual the ‘rebirth’ he seeks to achieve with the assistance of medical science is only successfully completed when his newly acquired sexual identity is fully and in all respects recognised by law. This urge for full legal recognition is part of the transsexual’s plight. That explains why so many transsexuals, after having suffered the medical ordeals they have to endure, still muster the courage to start and keep up the often long and humiliating fight for a new legal identity.”*<sup>407</sup>

**Argument (2): Legal gender recognition can help eliminate discrimination against transgender persons in both social and legal contexts**

5.13 In some jurisdictions, public awareness and acceptance of LGBTI persons has significantly increased in recent years.<sup>408</sup> It has been

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403 Same as above, at paragraph 194.

404 The term is often used to denote people whose affirmed gender identity matches their assigned sex.

405 See, eg, S Monstrey, G De Cuypere and R Ettner, “Surgery: General Principles”, Chapter 5 in R Ettner, S Monstrey, and A E Eyler. (eds), *Principles of Transgender Medicine and Surgery* (New York: Haworth Press, 2007), at 89. For a review of some of the (controversial) therapies aimed at modifying children’s gender identity, see P Cohen-Kettenis and F Pfafflin, “Transgenderism and Intersexuality in Childhood and Adolescence: Making Choices” (*Thousand Oaks: Sage*, 2003). See also Gennaro Selvaggi & James Bellringer, “Gender reassignment surgery: an overview”, *Nature Reviews Urology* 8, 274-282 (May 2011), at 275.

406 (1991) 13 EHRR 622.

407 See paragraph 2.4 of the dissenting judgment. The remarks were quoted by Ma CJ and Ribeiro PJ in the CFA judgment in *W’s* case.

408 For example, the research conducted in 2013 on the acceptance of LGBT in the Netherlands revealed that this country is one of the most LGBT-friendly countries in Europe. Ninety-three per cent of the Dutch were found to remain friends with somebody who decided to undergo sexual reassignment. In the Netherlands, highly educated people, secular groups, women and people who vote for social or liberal

argued in some overseas jurisdictions that the lack of recognition of transgender persons' gender identities would be a major contributing factor to the marginalisation of those people in society.<sup>409</sup> Hence, some people contend that carefully designed and implemented gender recognition policies and laws, coupled with the anti-discrimination laws, can help prevent and/or lessen the stigma, discrimination, harassment and abuse transgender people often experience.<sup>410</sup> Gender recognition is also considered essential in order for many transgender persons to be able to live a life of dignity and respect (see also the discussion in Argument (3) below concerning human rights of transgender persons).

5.14 Dr Sam Winter has noted that:

*“Throughout much of the world, transsexual people experience daily stigma, prejudice, discrimination, harassment and abuse. In much of the world they live in fear of transphobic violence. Each of these alone or in combination often lead to poor emotional health and wellbeing, and drive transsexual people towards the margins (social, economic and legal) of their communities, and into situations (including sex work) and behaviour patterns (including unsafe sex) that put them at risk (including of sexually transmitted infections).”<sup>411</sup>*

5.15 As far as Hong Kong's situation is concerned, it has been observed that transgender persons do experience harassment and abuse, find it difficult to access rented housing, banking and other basic services.<sup>412</sup> In

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political parties are generally more positive about transgender people. Young males, people from immigrant backgrounds, lesser-educated people and strict religious groups tend to have a relatively negative view of transgender people. See Saskia Keuzenkamp & Lisette Kuyper, “Acceptance of lesbian, gay, bisexual and transgender individuals in the Netherlands 2013”, *The Netherlands Institute for Social Research*, May 2013 (available at:

[https://www.scp.nl/english/Publications/Publications\\_by\\_year/Publications\\_2013/Acceptance\\_of\\_lesbian\\_gay\\_bisexual\\_and\\_transgender\\_individuals\\_in\\_the\\_Netherlands\\_2013](https://www.scp.nl/english/Publications/Publications_by_year/Publications_2013/Acceptance_of_lesbian_gay_bisexual_and_transgender_individuals_in_the_Netherlands_2013)).

409 For example, this view can be found expressed in the course of the deliberations on the Irish Gender Recognition Act, which was passed on 15 July 2015. See Transgender Equality Network Ireland, “Legal Gender Recognition in Ireland”, available at: <http://www.teni.ie/page.aspx?contentid=586>.

410 See Amnesty International, 2014, “The State Decides Who I Am: Lack of Recognition For Transgender People”, at 20. See also Michael Kirby, “Transgender Law Reform: Ten Commandments of Hong Kong”, unpublished, *United Nations Development Programme High-Level Roundtable on Gender Identity Rights and the Law in Asia and the Pacific, Hong Kong*, 2 October 2014 (organised by the United Nations Development Programme and HKU Faculty of Law's Centre for Comparative and Public Law), at 7 to 8. See also the brief summary of the said Roundtable programme at:

<http://www.hivlawcommission.org/index.php/follow-up-stories/377-high-level-roundtable-on-gender-identity-rights-and-the-law>.

411 Sam Winter, “Identity Recognition Without The Knife: Towards A Gender Recognition Ordinance For Hong Kong's Transsexual People” (2014) 44 HKLJ 115, at 123.

412 Sam Winter, “Transgender Science: How Might It Shape The Way We Think About Transgender Rights?” (2011) 41 HKLJ 139, at 148 to 149. See also Hong Kong Christian Institute, Leslovestudy, Out and Vote and Queer Theology Academy

particular, some have noted that discrimination against transgender persons in the workplace is prevalent, especially during or after their transition.<sup>413</sup> It is also observed that many transgender persons in Hong Kong are unemployed, and the job types that are available to them are limited. Many of them may be ostracised from the labour market as a result of discrimination, and they might engage in sex-works to make ends meet, but this exposes them to the risk of harassment, abuse, and violence.<sup>414</sup> In a research study conducted in 2011 and 2012 by Community Business, a non-profit organisation in Hong Kong, it was found that the Hong Kong workplace remained intimidating and not inclusive for LGBTI employees, and the majority of LGBTI employees were not open at work, worrying about negative consequences such as discrimination and exclusion.<sup>415</sup>

5.16 Robyn Emerton has commented:

*“[Hong Kong’s] lack of legal recognition has a number of consequences. First, the fact that their birth certificate still shows their birth sex renders transgender people vulnerable to prejudice and discrimination whenever their transgender status is revealed against their wishes. Second, the sex on their birth certificate determines their status for all legal purposes, including for the purposes of ... sexual offences legislation ... Thus, a post-operative transgender woman technically cannot be raped under Hong Kong law, as the crime of rape can only be committed by a man against a woman. Despite having a vagina, a post-operative transsexual woman is still legally a man in Hong Kong. She could be indecently assaulted, but this is subject to only 10 years’ imprisonment, compared to life imprisonment for rape ... Finally, the situation gives rise to a fundamental discrepancy between the legal status and personal identity of transgender people, which the European Court of Human Rights held in 2002 was a serious interference with their private life, one of the human rights guaranteed in the European Convention on Human Rights, and also, importantly, in the Hong Kong’s Bill of Rights Ordinance.”<sup>416</sup>*

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(Collaborative), “同志及跨性別平權報告” (transliterated as “Tongzhi and Transgender Equality Report”), March 2014, available at:

<https://issuu.com/makmingyee/docs/1>, at 12.

413 Robyn Emerton contended that, although transgender persons may be legally protected from certain types of discrimination under Hong Kong law such as the Disability Discrimination Ordinance (Cap 487), bringing a claim under this Ordinance “presents somewhat of a dilemma, since it relies on the unpalatable argument that transgender people have a disability”. See Robyn Emerton, “Finding a voice, fighting for rights: the emergence of the transgender movement in Hong Kong”, *Inter-Asia Cultural Studies*, Volume 7, Number 2, 2006, at 251 and 255.

414 Sam Winter, “Lost in Transition: Transpeople, Transprejudice and Pathology in Asia”, *International Journal of Human Rights*, 13, 2/3: 365-390, 2009.

415 Community Business, “Hong Kong LGBT Climate Study 2011-12: Survey Report” (2012), at 6, 7 and 15.

416 Robyn Emerton, “Finding a voice, fighting for rights: the emergence of the transgender movement in Hong Kong”, *Inter-Asia Cultural Studies*, Volume 7, Number 2, 2006, at 254.

5.17 In another article, Robyn Emerton explained the practical difficulties facing transgender persons in their daily lives when a change of gender marker on their birth certificates is disallowed under the existing laws of Hong Kong:

*“[T]he existence of the compulsory identity card scheme minimises the occasions on which the birth certificate is relied upon for identification purposes in Hong Kong. However, a transgender person must still disclose the sex recorded on their birth certificate for various official purposes, as well as when they enter into certain types of insurance contract, which might otherwise be rendered invalid. In addition, their birth certificate remains the mechanism by which their sex is determined for the purpose of the law. This situation results in a fundamental discrepancy between their legal status and personal identity, which can be most distressing to transgender persons. ...*

*They cannot even use a public toilet or changing facility without fearing that they might be charged of an offence. They may find that even if they have a vagina, they cannot be raped under the law. They are vulnerable to discrimination whenever their transgender history is disclosed, added to the general prejudice in a society which labels them as ‘evil’ or ‘abnormal’ and even suggests that they might be committing an offence by wearing the clothes they wish to wear, as everyone else is free to do. ...”<sup>417</sup>*

**Argument (3): Legal gender recognition is a human right of transgender persons**

5.18 It has been argued that countries that do not allow legal gender recognition or have highly restrictive laws or regulations for changing name and sex violate fundamental human rights obligations.<sup>418</sup> The absence of any system to recognise transgender persons’ gender identity may have implications in the context of their enjoyment of the right to privacy and their right to recognition as a person before the law.

*Right to privacy*

5.19 The right to privacy is protected by Article 14 of the HKBOR which is identical to Article 17 of the International Covenant on Civil and Political Rights (“*ICCPR*”) and is similar to Article 8 of the ECHR which protects a person’s right to respect for private life.

5.20 Prior to *Goodwin*, the ECtHR did not find any breach of Article 8 of the ECHR when dealing with cases relating to transsexual persons. The ECtHR considered that it was within each country’s margin of appreciation to

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417 Robyn Emerton, “Neither Here Nor There: The Current Status Of Transsexual And Other Transgender Persons Under Hong Kong Law” (2004) 34 HKLJ 245.

418 The Open Society Foundations, “License To Be Yourself: Laws and Advocacy for Legal Gender Recognition of Trans People”, May 2014, at 8.

retain congruent biological factors as the determining criteria for “sex” in the context of both birth and marriage.<sup>419</sup>

5.21 In *Goodwin*, the ECtHR recognised the evidence of a continuing international trend towards increased social acceptance of transsexuals and towards legal recognition of the new sexual identity of post-operative transsexuals. Since it was considered there were no significant factors of public interest to weigh against the interest of the individual applicant in obtaining legal recognition of her gender reassignment, the Court concluded unanimously that the balance tilted decisively in favour of the applicant, and accordingly, there had been a failure to respect her right to private life in breach of Article 8 of the ECHR.

5.22 Subsequently, the ECtHR in *Grant v The United Kingdom*<sup>420</sup> and *L v Lithuania*<sup>421</sup> referred to *Goodwin* and held that States were required, by their positive obligation under Article 8 of the ECHR, to implement the recognition of gender change in post-operative transsexuals through, *inter alia*, amendments to their civil-status data, with its ensuing consequences. Nevertheless, the ECtHR has so far only addressed the rights of transsexual persons who either have undergone gender reassignment surgery, or are in the process of doing so. The Court has not yet addressed the right to gender identity as a broader category than to the specific rights of post-operative transsexual individuals.

5.23 Notably, in 2006, a panel of human rights experts from diverse regions and backgrounds adopted the Yogyakarta Principles.<sup>422</sup> With regard to transgender persons’ enjoyment of privacy, Principle 6 of the Yogyakarta Principles provides that:

*“Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference ... The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity, as well as decisions and choices regarding both one’s own body and consensual sexual and other relations with others.”*

5.24 In 2011, the United Nations High Commissioner for Human Rights expressed concern regarding the lack of arrangements in Member States for granting legal recognition of transgender people’s identities. The High Commissioner has recommended that Member States should “*facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.*”<sup>423</sup>

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419 The only exception was *B v France* [1992] ECHR 40, 25 March 1992.

420 [2006] ECHR 548, (2007) 44 EHRR 1.

421 Application No. 27527/03 (11 September 2007), ECHR 2007-IV.

422 For a brief introduction to the Principles, see paragraph 4.162 of this Consultation Paper.

423 Report of the United Nations High Commissioner for Human Rights, “Discriminatory

Then in 2015, he recommended that in order to address discrimination based on gender identity, and protect individuals from human rights violations, Member States should issue legal identity documents, upon request, that reflect preferred gender.<sup>424</sup>

5.25 The United Nations Human Rights Committee has also urged States parties to the ICCPR to recognise the right of transgender persons to change their gender by permitting the issuance of new birth certificates.<sup>425</sup> It has noted with approval legislation facilitating legal recognition of a change of gender in the UK.<sup>426</sup>

5.26 There is also case-law in some countries, such as, Argentina,<sup>427</sup> Ireland,<sup>428</sup> Lithuania,<sup>429</sup> Serbia<sup>430</sup> and India,<sup>431</sup> which has decided that lack of arrangements for recognising the acquired gender of transgender or transsexual persons may have implications on the right to respect for private life which encompasses notions such as personal identity, personal autonomy,

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laws and practices and acts of violence against individuals based on their sexual orientation and gender identity”, A/HRC/19/41, 17 November 2011, paragraph 84(h).

424 Report of the United Nations High Commissioner for Human Rights, “Discrimination and violence against individuals based on their sexual orientation and gender identity”, A/HRC/29/23, 4 May 2015, paragraph 79(i).

425 See CCPR/C/IRL/CO/3, 7-25 July 2008, at paragraph 8.

426 See CCPR/C/GBR/CO/6, 7-25 July 2008, at paragraph 5.

427 Family Tribunal No 1 of Quilmes, Argentina (30 April 2001). In this case, the Family Tribunal held that since a transgender person’s personal identity included his/her acquired sex, the transgender person had the right to be issued new identification documents reflecting the changed sex.

428 *Foy v An t-Ard Chláraitheoir* [2007] IEHC 470. In this Irish case, the High Court declared that certain provisions of the Civil Registration Act 2004 were incompatible with the plaintiff’s right to gender recognition flowing from Article 8 of the ECHR, in that there were no provisions that would enable the acquired gender identity of transsexual persons to be legally recognised by the State. The Court noted that for those who had undergone gender reassignment surgery, there seems to be a burning desire to have their new sexual identity recognised, not only socially but also legally. This urge to have that identity fully and in all respects accepted by the law is at the core of the transsexuals’ plight.

429 No A858-1452/2010, decided on 29 November 2010. In this case decided by the Supreme Administrative Court of Lithuania, the applicant had to undergo gender reassignment surgery in Thailand because Lithuania had no laws governing the conditions and procedure on gender reassignment. Although the applicant might apply for recognition of gender reassignment by invoking judicial procedure, the Court considered that such procedure caused additional inconvenience and was incompatible with the principle of equal rights.

430 In Serbia, the Constitutional Court held in 2012 that the Government had wrongly decided that it could not rule on the application to legally change name and sex, and had therefore denied the applicant’s right to dignity and free development of personality. See Uz-3238/2011, Constitutional Court of Serbia (21 March 2012).

431 *National Legal Services Authority v Union of India* [2014] 4 LRC 629. In this case, the Supreme Court of India (Civil Original Jurisdiction) held that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Indian Constitution, which states that all citizens shall have the right to freedom of speech and expression, which includes one’s right to expression of his self-identified gender, and the State is bound to protect those rights. As self-determination of gender is an integral part of personal autonomy and self-expression, it also falls within the realm of personal liberty guaranteed under Article 21 of the Constitution.

personal development, and physical and moral integrity.

*Right to recognition as a person before the law*

5.27 The impossibility of obtaining official documents that reflect gender identity may also raise an issue in relation to a transgender person's right to recognition as a person before the law, which is protected by Article 13 of the HKBOR (identical to Article 16 of the ICCPR). The expression "*person before the law*" is meant to ensure recognition of the legal status of every individual and of his or her capacity to exercise rights and enter into contractual obligations.<sup>432</sup> The United Nations Human Rights Committee has found in several instances that any State's failure to issue birth certificates or to keep civil registries reflecting transgender individuals' gender identity amounted to a violation of Article 16 of the ICCPR and led to the violation of other rights, including access to social services or education.<sup>433</sup>

***Argument (4): International trend of legal gender recognition***

5.28 In 2004, Robyn Emerton commented that Hong Kong was "[s]ignificantly ... out of sync with the international trend to legally recognise transgender persons ... in their chosen gender" and "[t]he vast majority of countries in Europe, including...the United Kingdom, together with many states/ provinces in the United States and Canada now grant legal recognition to transgender persons."<sup>434</sup>

5.29 Similarly, Dr Jens Scherpe has observed that Hong Kong is becoming "*increasingly isolated in its legal position concerning the change of legal gender, and not only with regard to Europe but also the rest of the world.*"<sup>435</sup> He has commented:

*"One might argue that the legal position and social development in Europe and beyond is not necessarily determinative for Hong Kong. However, it is highly doubtful whether the societal developments in Hong Kong really are so different that they justify refusing a change of legal gender for that reason alone, particularly when considering the enormous negative impact on the individuals concerned, evidenced by international medical and psychological research and even accepted by the Court in W v Registrar of Marriages. In the end, allowing a transsexual person to change his or her legal gender is not merely a legal question, not merely a human rights question (although that it*

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432 United Nations document A/2929, Chapter VI, section 97.

433 See Amnesty International, 2014, "The State Decides Who I Am: Lack of Recognition For Transgender People", Chapter 1 (legal gender recognition and human rights), at 21.

434 Robyn Emerton, "Time for Change: A Call For The Legal Recognition Of Transsexual And Other Transgender Persons In Hong Kong" (2004) 34 HKLJ 515, at 517.

435 Jens M Scherpe, "Changing One's Legal Gender In Europe – The 'W' Case In Comparative Perspective" (2011) 41 HKLJ 109, at 123.



*certainly is) but most of all a question of a society's humanity.*<sup>436</sup>

5.30 As can be seen from Chapter 4 of this paper, legal gender recognition of transgender persons has now been granted in many overseas jurisdictions under their new or amended legislation, administrative measures or judicial decisions, and this development has not been confined to the “western world”, as similar developments have also been noted in the Asia-Pacific region.

***Argument (5): A gender recognition scheme can provide legal certainty***

5.31 Robyn Emerton has argued that the absence of a gender recognition scheme providing for transgender persons' legal rights and obligations would result in the Hong Kong authorities' policies with respect to such rights and obligations being “*driven by their own interpretation of the relevant legislation*”.<sup>437</sup> She has further stated that: “[p]roviding a transgender person is willing to front a test case, and brave the time, costs and inevitable publicity involved, then the authorities' implementation of these policies in his or her particular case is capable of challenge by way of judicial review”.<sup>438</sup> Emerton observed that, if the authorities' own interpretation of the law and consequent policies can be demonstrated as being incompatible with the Hong Kong Bill of Rights Ordinance and/or the Basic Law, then the courts would be obliged to declare them invalid, as well as to grant remedies in the applicant's particular case.<sup>439</sup>

5.32 Emerton made the following observation about the need for a gender recognition scheme in Hong Kong:

*“Clearly, legislation offers the only certain and comprehensive road to reform. It is likely to be the only way in which to achieve the wholesale legal recognition of the chosen gender of transgender persons – not just for marriage purposes. In addition, it is probably the only way in which the rights of transgender persons other than post-operative transsexual persons are likely to be addressed, as the international and comparative law relied upon to advance the position of transgender persons in the above analysis is so far limited to the situation of post-operative transsexual persons. ...*

*[T]he prompt introduction of legislation in this area ... would hopefully lead to more comprehensive coverage of the issues than can realistically be achieved in the courts, and to more inclusiveness in terms of the range of transgender persons who would benefit from the legislation. The task is greatly aided by the availability of legislative models from around the world and in*

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436 Same as above.

437 Robyn Emerton, “Time for Change: A Call For The Legal Recognition Of Transsexual And Other Transgender Persons In Hong Kong” (2004) 34 HKLJ 515, at 534.

438 Same as above.

439 Same as above.

particular the UK Gender Recognition Act, which will take effect in the same legislative and administrative framework as Hong Kong.”<sup>440</sup>

## Arguments against having a gender recognition scheme

### **Argument (1): The sex of a person is determined at birth and recognising a person’s non-birth gender opposes the law of nature**

5.33 As observed by the Court of First Instance in *W*’s case:<sup>441</sup>

*“Surgery of either form [i.e. male-to-female transsexual surgery or female-to-male transsexual surgery], however, cannot change the chromosomes of the person or establish fertility. Surgery can change the sex phenotype to suit the patient’s gender identity so that his or her distress can be relieved. Surgery can also enable the individual to feel better accepted as a member of the desired gender. Surgery, however, cannot change the genetic sex.”*<sup>442</sup>

5.34 Some people regard this binary division of humanity as immutable – ordained by God or nature and thus not to be denied or challenged by conduct, advocacy or law. It was noted that within Christianity, there are some pastors such as Robert A J Gagnon (an ordained elder in the Presbyterian Church of the US) who regard transsexuality as a purely medical problem with a medical solution, as well as those who may even regard transsexuality as essentially blasphemous – a “*decisive complaint or rebellion against God.*”<sup>443</sup> Such views were articulated by the Evangelical Anglican ethicist, Oliver O’Donovan:

*“Human beings come into existence with a dimorphically differentiated sexuality, clearly ordered at the biological level towards heterosexual union as the human mode of procreation. It is not possible to negotiate this fact about our common humanity; it can only be either welcomed or resented.”*<sup>444</sup>

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440 Same as above, at 544 and 555.

441 *W v Registrar of Marriages*, HCAL 120/2009 (CFI), judgment of 5 October 2010, at paragraph 32.

442 The UK Home Office made similar remarks in its *Report of the Interdepartmental Working Group on Transsexual People* (April 2000), at paragraph 1.5, that: “Gender reassignment is commonly termed a sex change, but in reality it is an alteration only in a person’s physical characteristics. The biological sex of an individual is determined by their chromosomes, which cannot be changed. What can be achieved through the transsexual person’s own efforts, and with counselling, drugs and surgery is social, hormonal and surgical reassignment.”

443 RAJ Gagnon, “Transsexuality and Ordination”, August 2007 (quoted in Duncan Dormor, “Transgenderism and the Christian Church: An Overview”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 31).

444 O O’Donovan, “Transsexualism and Christian Marriage” (1983) 11(1), *Journal of Religious Ethics* 141, quoted in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 36. Nevertheless, it has been

5.35 It has been observed by Reverend Duncan Dormor, Dean of Chapel at St John's College, the University of Cambridge, that the overwhelming majority of Christians belong to churches that articulate a conservative or neo-conservative theological anthropology which place a great emphasis on the differences between men and women, male and female.<sup>445</sup> It has been contended by some organisations like the General Presbytery of the Assemblies of God that a transsexual person's demand to change sex stems from his or her "*disordered desire*", which likely attributes to same-sex erotic attractions and the aspiration to certain roles belonging properly to one sex.<sup>446</sup> Transgenderism is therefore perceived as a moral problem and as akin to homosexuality, and the advocacy of rights for transgender persons is perceived as a manifestation of a secular "*gender agenda*".<sup>447</sup> Reverend Dormor set out a detailed demonstration of this approach and the ideas and influence of the Roman Catholic Church on the "*order of creation*" argument in a research project.<sup>448</sup>

5.36 Such views echo the ruling in an Australian case *R v Harris & McGuiness*<sup>449</sup> that "[t]he law could not countenance a definition of male or female which depends on how a particular person views his or her own gender" because "[t]he consequence of such an approach would be that a person could change sex from year to year despite the fact that the person's chromosomes are immutable."

5.37 In the medical sector, the American College of Pediatricians recently published a research article<sup>450</sup> in which they contended, amongst

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observed that a small number of Christian communities have listened to the experience of transgender people, accepted that transgenderism is a 'real' phenomenon rather than a delusion, ordained and conducted wedding for post-operative transsexual persons and developed resources of advocacy and support. See Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 61.

445 See Duncan Dormor, "Transgenderism And The Christian Church: An Overview", in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 52.

446 Same as above, at 37.

447 MA Case, "After Gender: The Destruction of Man? The Vatican's Nightmare Vision of the 'Gender Agenda' for Law" (2012) 31(3) *Pace Law Review* 802-817; J Samson, W Jansen and C Notermans, "The Gender Agenda: New Strategies in Catholic Fundamentalist Framing of Non-Heterosexuality in Europe" (2011) 4 *Journal of Religion in Europe* 273-299.

448 See Duncan Dormor, "Transgenderism And The Christian Church: An Overview", in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 36 to 51.

449 [1988] 17 NSWLR 158. In this case, the issue before the New South Wales Court of Criminal Appeal was whether the accused persons were male within the meaning of a particular statute that made certain conduct, if performed by a male person, an offence. One of those accused was a transsexual person who had undergone full SRS from male to female, and the other was a pre-operative transsexual person. The Court decided by a majority that the transsexual accused person who had undergone SRS was a female but the other accused person remained a male.

450 American College of Pediatricians (a US organisation of pediatricians and other healthcare professionals), Aug 2016, "Gender Dysphoria in Children" (available at: <https://www.acpeds.org/the-college-speaks/position-statements/gender-dysphoria-in-children>).

other things, that it was false that brain differences observed in some studies between transgender adults and non-transgender adults proved that gender dysphoria is innate, and if differences do exist in brain structures of transgender adults, these differences are more likely to be the “*result*” of transgender identification and behaviour, not the “*cause*” of transgender identification and behaviour. In their view, no one is born with an awareness of being male or female, and this awareness develops over time which may be derailed by a child’s subjective perceptions, relationships and adverse experiences from infancy forward. Further, there were psychiatrists and epidemiologists who took the views that the hypothesis that gender identity is innate and that a person might be “*a man trapped in a woman’s body*” or “*a woman trapped in a man’s body*” is not supported by scientific evidence.<sup>451</sup>

***Argument (2): There is no evidence that the social acceptance of transsexualism in Hong Kong has been changed***

5.38 It was the view of the dissenting judge in *W*’s case, Chan PJ, that the present position in Hong Kong is quite different from that in Europe and the UK when *Goodwin* was decided. Chan PJ considered that not only is it the case that there is no evidence showing that for the purpose of marriage, the ordinary meanings of man and woman in Hong Kong have changed to accommodate a transsexual man and woman, but also, nor is there evidence on the degree of social acceptance of transsexualism.<sup>452</sup>

5.39 Further, some people in Hong Kong argue that gender recognition is too controversial to be accepted by the society as a whole. They consider that the concept of gender recognition will change the original laws and policies that determine one’s sex based on the biological sex and chromosomes, and arguably such a change will lead to great confusion among the community and social costs. This view is based on the concept that in order to maintain a fair and just society, the laws and policies should not only seek public consensus, but also be built upon facts and clear definitions rather than ideas that could vary with different individuals at different times. In this regard, it has also been argued that human rights should not be a sword used to fight for gender recognition, as every country or territory has its own culture and history and there should not be a single interpretation or understanding of the “*human rights*” of individuals. Some also take the view that changing one’s gender identity is not just an individual matter, as it inevitably relates to recognition by the society as a whole.<sup>453</sup>

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451 See, eg, Mayer, LS, & McHugh, PR (2016), “Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences”, *The New Atlantis*, No. 50 (available at: <http://www.thenewatlantis.com/publications/number-50-fall-2016>). For a different view: see, eg, Warren Throckmorton, “The Editor of The New Atlantis Responds to My Critique of the Mayer and McHugh Article”, 27 August 2016, *Patheos* (available at: <http://www.patheos.com/blogs/warrenthrockmorton/2016/08/27/editor-of-the-new-atlantis-responds-to-my-critique-of-the-mayer-and-mchugh-article/>).

452 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraph 188.

453 See Kwan Kai-man, *同性與變性 – 評價同性戀運動和變性人婚姻* (in Chinese, transliterated as “Homosexuality and Transsexualism – Commenting on Homosexual

**Argument (3): The issues of gender recognition are unnecessary to be addressed by a new law in view of Hong Kong's situation**

5.40 One view is that some transgender people may be more concerned about matters of well-being (such as achieving the acceptance of their gender identity by their family members and the community as a whole), rather than in getting their desired gender recognised by the law. Those transgender people might not have to seek medical treatment or surgery for the purpose of getting their preferred gender identity recognised in the domestic law. They might rather be content with their status or situation in the society and the protection afforded to them under the existing law. A further observation is that female-to-male transgender persons are generally less resolute in deciding to undergo surgical process than male-to-female transgender persons, probably because female-to-male transgender persons' masculine or tomboyish appearance seems to be relatively more readily accepted by the society, and accordingly they might be able to express their gender identity without surgical procedures even though the society may misunderstand them to be homosexual.

5.41 In Hong Kong, it appears that there is a similar trend of increasing awareness and acceptance towards LGBTI individuals, but a level of ambivalence was noted in that the level of non-acceptance is still high.<sup>454</sup> Many transgender persons pointed out that the real practical problem facing them in their daily lives was usually the difficulty in securing and/or maintaining gainful employment as and when their employers become aware that their gender identity or physical appearance does not match the gender marker on their identification document.<sup>455</sup> On the one hand, some consider that the definition of a “*disability*” under the Disability Discrimination Ordinance (Cap 487)<sup>456</sup>, which regulates activities conducted in the public sphere including employment, education, provision of goods and services, disposal and management of premises, etc, should be wide enough to encompass gender identity disorder or gender dysphoria. Separately, there are a number of core United Nations treaties that include non-discrimination provisions (such as Article 26 of the ICCPR and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (“*ICESCR*”). Further, the Basic Law and the Hong Kong Bill of Rights contain a number of provisions protecting people's human rights which are legally binding on Government, public authorities, and those acting on their behalf.<sup>457</sup> It is therefore arguable that the rights and interests of people having gender identity disorder or gender dysphoria should be protected already to a certain extent in Hong Kong.<sup>458</sup>

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Movement and Transsexual Marriage”), June 2015, at 7.

454 See Community Business, “Hong Kong LGBT Climate Study 2011-12: Survey Report” (2012), at 5, 10, 14 and 15.

455 Same as above, at 5 and 6.

456 See the definition of “*disability*” under section 2 of Disability Discrimination Ordinance (Cap 487).

457 See Articles 25 and 39 of the Basic Law and Articles 1(1) and 22 of the Hong Kong Bill of Rights.

458 Gender identity is increasingly being recognised as a ground on which discrimination is prohibited. See United Nations Committee on Economic, Social and Cultural Rights, “General Comment 20”, E/C.12/GC/20, paragraph 32. See also Human

5.42 On the other hand, there are transgender people who observe that there is currently no legislation against discrimination on the grounds of gender identity in Hong Kong, and to date there has been no definitive determination by any court in Hong Kong that gender identity disorder or gender dysphoria is considered as a disability under the Disability Discrimination Ordinance (Cap 487).<sup>459</sup> Some transgender groups are lobbying for an anti-discrimination law to expressly protect them from discrimination on grounds of gender identity, arguing that such legislation is the best tool for protecting the basic human rights of transgender persons<sup>460</sup> and could largely alleviate transgender persons' plight in employment, education, provision of services and goods, etc. Some of them also lobby for additional measures to eliminate discrimination such as educational and promotion programmes to raise public awareness and understanding of transgender persons' issues, as well as guidelines for social institutions and business sectors in the provision of an LGBTI-friendly environment, setting up of gender-neutral toilets in the workplace, on campus and in public facilities.<sup>461</sup> To create an environment free from discrimination on grounds of gender identity is arguably more pressing than a gender recognition scheme in the eyes of some transgender people.

5.43 In 2013, the Advisory Group on Eliminating Discrimination against Sexual Minorities was established to advise the Secretary for Constitutional and Mainland Affairs on matters relating to concerns about discrimination faced by sexual minorities in Hong Kong. In particular, its role was to advise on the aspects and extent of discrimination faced by sexual minorities in Hong Kong, and the strategies and measures to tackle the problems identified with a view to eliminating discrimination and nurturing a culture of diversity, tolerance and mutual respect in the community.<sup>462</sup> In late 2015, the Advisory Group published its report which contains recommendations to the Government, mainly to enhance public education and publicity to raise the community's, and some professional groups' and sectors', sensitivities towards sexual minorities, and to conduct further study on the proposal of enacting legislation to prohibit discrimination on the grounds of sexual orientation and gender identity.<sup>463</sup> The Government is following up on the recommendations in consultation with stakeholders.

5.44 Moreover, some may consider that a fully-fledged gender recognition scheme would be unnecessary and expensive for Hong Kong.

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Rights Council, seventeenth session, 14 July 2011, A/HRC/RES/17/19 (adoption of a resolution on gender identity).

459 See Suen, Y.T., Wong, A.W.C., Barrow, A., Wong, M.Y., Mak, W.S., Choi, P.K., Lam, C.M., Lau, T.F., *Report on Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status*, Equal Opportunities Commission and Gender Research Centre of the Chinese University of Hong Kong, January 2016, at paragraph 1.5.3.

460 Same as above, at paragraph 4.5.3.

461 Same as above, at paragraph 4.4.3.

462 More information about the Advisory Group can be found in:  
[http://www.cmab.gov.hk/en/issues/equal\\_advisory\\_group.htm](http://www.cmab.gov.hk/en/issues/equal_advisory_group.htm).

463 The report of the Advisory Group is at:  
[http://www.cmab.gov.hk/doc/issues/full\\_report\\_e.pdf](http://www.cmab.gov.hk/doc/issues/full_report_e.pdf).

Most countries need to enact specific gender recognition law possibly because they do not have a document comparable to the Hong Kong identity card and thus their gender recognition scheme would involve the issuance of a separate document such as a gender recognition certificate. Some transgender persons in Hong Kong may therefore consider that instead of introducing a gender recognition scheme in Hong Kong, it would be more convenient and probably a quicker solution to review the existing administrative practice so as to consider whether to allow pre-operative transgender persons to change the sex entry on their identity cards to reflect their preferred gender.

**Argument (4): Gender recognition may have unintended consequences**

5.45 As stressed by Walt Heyer, a biological man who had a sex change to become a woman at the age of 42, and then reverted back to being a man:

*“Allowing the original birth record gender to be altered has unintended consequences. It can be misused, perhaps by a terrorist to hide his identity. Or, some would say it will legitimize same sex marriage. With an amended birth record in hand (changed from male to female), the new female would be free to enter into a legal marriage with a man.”*<sup>464</sup>

5.46 Further, Dr Kwan Kai Man, Professor, Department of Religion and Philosophy, Hong Kong Baptist University, has argued that the experience of European and US jurisdictions has demonstrated that gender recognition legislation would bring about more complicated issues such as “gender subjectivity”, “gender deconstruction”, a rising number of younger children seeking sex-changing treatments, constant demands for expanding transgender rights on the grounds of anti-discrimination, etc.<sup>465</sup>

**Argument (5): The “slippery slope” argument**

5.47 It has been argued in some quarters that activists for the transsexual movement had, at the time of *W*'s case, emphasised that Ms *W* is a post-operative transsexual person who had undergone surgical procedures, but after Ms *W* won the lawsuit, they argued that legislating to permit those who have undergone full SRS to marry in their acquired gender would have the effect of coercing transsexual persons to complete full SRS before they are granted the right to marry in their preferred gender. It was contended that this would constitute a form of torture or cruel, inhuman or degrading treatment.<sup>466</sup>

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464 See Walt Heyer, *Paper Genders: Pulling the Mask Off the Transgender Phenomenon*, Make Waves Publishing, 2nd printing, June 2011, at 10.

465 See Kwan Kai-man, *同性與變性 – 評價同性戀運動和變性人婚姻* (in Chinese, transliterated as “Homosexuality and Transsexualism – Commenting on Homosexual Movement and Transsexual Marriage”), June 2015, at 281 to 283.

466 See, eg, the Legislative Council’s Report of the Bills Committee on Marriage (Amendment) Bill 2014 (LC Paper No. CB(2)1962/13-14, 3 July 2014), at paragraph 11; Pink Alliance’s Submission to the Legislative Council on the said Bill (LC Paper No. CB(2)1309/13-14(12)).

Some have suggested that since *W*'s case, activists have been seeking for an expansion of rights so that pre-operative transsexual persons could also have the right to marry in their preferred gender, and further, that they are asking for transgender persons' preferred gender to be legally recognised. Some may query that activists would lobby for more and more rights in favour of the transgender persons, and the strength and frequency of their lobbying may increase with time.<sup>467</sup>

5.48 It has also been argued that the transsexual movement has been associated with the homosexual movement to become an influential and political LGBTI movement, which may aggressively press its demands, and bring about enormous impact on the social culture of Hong Kong and other individuals' interests.<sup>468</sup>

5.49 It has also been suggested that nowadays some people regard those more liberal gender recognition schemes in various western countries as the golden rule, and blindly advocate them even though those policies usually assume some extreme liberalism and the ideology of sexual liberation or sex deconstruction. Some people have expressed concern that the ultimate pursuit by the LGBTI groups would be the Argentina-style scheme that recognises self-determined gender identity, which could lead to severe social and family problems arising out of the excessive and undue freedom given under the law.<sup>469</sup>

## **Issue for consultation on whether a gender recognition scheme should be introduced in Hong Kong**

**Issue for Consultation 1: 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.**

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467 See Kwan Kai-man, *同性與變性 – 評價同性戀運動和變性人婚姻* (in Chinese, transliterated as "Homosexuality and Transsexualism – Commenting on Homosexual Movement and Transsexual Marriage"), June 2015, at 243 to 244.

468 See Hong Kong Sex Culture Society Limited, "回顧逾二百文獻 – 重量級報告歸納指性傾向及性別認同非天生不可改變", 26 September 2016, in Chinese.

469 See Kwan Kai-man, *同性與變性 – 評價同性戀運動和變性人婚姻* (in Chinese, transliterated as "Homosexuality and Transsexualism – Commenting on Homosexual Movement and Transsexual Marriage"), June 2015, at 282 to 283.



## CHAPTER 6

# MEDICAL REQUIREMENTS FOR GENDER RECOGNITION

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### Introduction

6.1 This chapter examines the possible arguments both in support of and against various medical requirements for gender recognition, including the requirement for sex or gender reassignment surgery (SRS/GRS), medical diagnosis, hormonal treatment and real life test, from a wide scope of perspectives that include, but are not limited to, legal, medical, political, religious and sociological aspects.

6.2 As a matter of clarification, the possible arguments discussed in this chapter are solely for the purposes of consultation and do not necessarily represent the IWG's stance on any of the issues. No conclusion as to the IWG's stance should therefore be drawn from the wording and mode of presentation of this chapter, nor from the citing or referring to the comments, observations or arguments made by individuals or organisations mentioned in this chapter. It should also be stressed that pending the result of the consultation, the IWG has not reached any conclusion on any of the issues. Further, it should be borne in mind that the list of possible arguments discussed below is by no means exhaustive, and that the IWG is prepared to consider such other arguments as may be appropriate.

### Requirement of medical diagnosis

#### ***Arguments in support of having a requirement of medical diagnosis***

*Argument (1): Gender dysphoria, gender identity disorder or transsexualism is a recognised medical condition*

6.3 As observed by the CFA in *W's* case, it was well-established that transsexualism was a condition requiring medical treatment.<sup>470</sup> In many jurisdictions including Hong Kong, the medical diagnosis of gender dysphoria, gender identity disorder or transsexualism remains a pre-condition for accessing the medical interventions or treatments by transgender persons. As stated in Chapter 2 of this paper (see paragraph 2.38), the management of persons with the relevant symptoms usually begins with a psychiatric assessment. It could be argued that, if it is decided that a gender recognition

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470 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), at paragraph 5.

scheme is intended to address the problems facing people having gender dysphoria, gender identity disorder or transsexualism, as opposed to other minority groups such as homosexual people, cross-dressers (ie, people who wear clothing and adopt a gender role presentation that, in a given culture, is more typical of the other sex),<sup>471</sup> then a medical diagnosis of the condition would be a practical means to distinguish the former from the latter.

6.4 To require a medical diagnosis as a pre-condition for gender recognition might seem to suggest, to a certain extent, that the persons seeking recognition of gender identities different from their sexes assigned at birth are pathologised, and a medical diagnosis performs a therapeutic function. As Lisa Fishbayn observed (upon her review of the UK GRA):

*“The need to characterize transsexuality as pathology rather than as a chosen mode of existence may also reflect the needs of the medical profession itself... The acceptance of gender dysphoria as a therapeutic diagnosis is key to this conception of legitimacy. An alternative conception of gender transition as an autonomous act of self-creation does not fit easily within this paradigm.”<sup>472</sup>*

6.5 WPATH considers that some people experience gender dysphoria at such a level that the distress meets criteria for a formal diagnosis that might be classified as a mental disorder. Such a diagnosis is not a license for stigmatisation, or for the deprivation of civil and human rights. Existing classification systems such as the DSM and ICD<sup>473</sup> attempt to classify clusters of symptoms and conditions, not the individuals themselves.<sup>474</sup> Thus, transsexual and transgender individuals are not inherently disordered. Rather, the distress of gender dysphoria, when present, is the concern that might be diagnosable and for which various treatment options are available. The existence of a diagnosis for such dysphoria often facilitates access to health care and can guide further research into effective treatments.<sup>475</sup>

#### *Argument (2): Diagnosis being the “gatekeeper”*

6.6 It was noted by some scholars that medical practitioners have

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471 See the definition of “cross-dressing” by the WPATH in its *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 95.

472 Lisa Fishbayn, “Not Quite One Gender or the Other: Marriage Law and the Containment of Gender Trouble in the United Kingdom”, *American University Journal of Gender, Social Policy & the Law*, 15, no. 3 (2007): 413-441, at 440. Yet, Fishbayn deemed that to pathologise transsexuals like what the UK GRA did was to perform “the neat trick of recognizing the reality of transsexual embodiment but strictly confirming the significance of this recognition.”

473 ICD-10 provides the diagnostic guidelines for gender identity disorder. Separately, under DSM-5, the diagnostic criteria for gender dysphoria in children are different from that in adolescents and adults. The details of those diagnostic criteria are set out in paragraphs 2.39 to 2.42 of this Consultation Paper.

474 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 5.

475 Same as above, at 6.

long been the “gatekeepers” to legal recognition, as medicine has played a role in interpreting the bodies of transsexual people and has offered shifting accounts of their meaning.<sup>476</sup> The role of doctors in this context is, presumably, to decipher “*the true sex that was hidden beneath ambiguous appearance.*”<sup>477</sup> Further, securing a diagnosis of gender dysphoria might, in the views of some medical experts and scholars, be a necessary step in expressing a transgender person’s autonomy to redefine his or her gender.<sup>478</sup> Arguably, since medical diagnosis is usually the very first step in determining whether a person belongs to a gender other than his or her sex assigned at birth, it makes sense to require such a diagnosis as one of the key “gatekeepers” for allowing gender recognition, unless, as some may argue, SRS, being a stronger indicator of gender transition, should be made a mandatory requirement for gender recognition. Moreover, this would arguably be a relatively objective approach as opposed to a subjective self-determination approach (as that adopted in Denmark, Argentina and Malta etc), to decide whether a person with gender dysphoria or gender identity disorder would require treatments and what those treatments would be.

6.7 It is further argued that if medical diagnosis is required for an application for gender recognition, it would likely prevent the gender recognition scheme from being abused by people not entitled to the protection under it. Presumably psychiatrists would be able to rule out phenomena other than gender dysphoria or gender identity disorder, such as homosexuality and transvestism. The use of international classification standards, such as ICD and DSM standards which provide series of diagnostic guidelines, could help enhance the accuracy and reliability of medical diagnosis by psychiatrists.<sup>479</sup> It is arguable that medical diagnosis is a

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476 Lisa Fishbayn, “Not Quite One Gender or the Other: Marriage Law and the Containment of Gender Trouble in the United Kingdom,” *American University Journal of Gender, Social Policy & the Law*. 15, no 3 (2007): 413-441, at 437.

477 Herculine Barbin and Michel Foucault, *Herculine Barbin: Being The Recently Discovered Memoirs of a Nineteenth Century French Hermaphrodite* (1980), at paragraph viii.

478 See, eg, Judith Butler, *Gender Trouble: Feminism and The Subversion of Identity* (1990) (describing the tension between conceding gender transition as an expression of personal autonomy and needing to shape the narrative of transition in ways acceptable to medical experts).

479 The WHO stated in the ICD-10 guidelines that: “*The ICD-10 proposals ... were produced in the hope that they will serve as a strong support to the work of the many who are concerned with caring for the mentally ill and their families, worldwide. No classification is ever perfect: further improvements and simplifications should become possible with increases in our knowledge and as experience with the classification accumulates. The task of collecting and digesting comments and results of tests of the classification will remain largely on the shoulders of the centres that collaborated with WHO in the development of the classification.*” Regarding the DSM-5, the American Psychiatric Association claimed that it: “*is the authoritative guide to the diagnosis of mental disorders for health care professionals around the world. In the United States alone, it influences the care that millions of people of all ages receive for mental health issues. Clinicians use DSM to accurately and consistently diagnose disorders affecting mood, personality, identity, cognition, and more. The manual does not address treatment or medications.*” See the Fact Sheet published by the American Psychiatric Association, available at:

[https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA\\_DSM-Dev](https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-Dev)

reliable determinant of one's gender identity for the purpose of legal gender recognition, and that the risks of fraud or misuse would be reduced.

*Argument (3): Prevalence of jurisdictions requiring medical diagnosis in their gender recognition schemes*

6.8 As illustrated in Annex B of this paper, a requirement that an applicant for gender recognition has to prove that he or she has or has had gender dysphoria, gender identity disorder or transsexualism has been expressly adopted in many jurisdictions such as the UK, Japan, Mainland China, Austria, Estonia, Spain, Portugal, Minnesota (US), New York State (US). In some jurisdictions where it is unclear as to what kinds of diagnosis are mandatory, the regime requires affirmation or report by psychiatrists and/or psychologists as regards the applicant's sex identity or an irreversible conviction of belonging to another gender (eg, Bulgaria, Republic of Cyprus, Finland, British Columbia (Canada), Ontario (Canada)). It is also pertinent to note that the ECtHR has recently held in the case of *A.P., Garçon and Nicot v France* (2017)<sup>480</sup> that the requirements for medical diagnosis of gender identity disorder and medical examination in order to change the sex entry on birth certificates (under the French law at that time) did not constitute a violation of Article 8 of ECHR (right to respect for private life). With regard to the condition imposed on a person requesting to change the sex entry on the birth certificate to prove that he or she suffered from gender identity disorder, the ECtHR observed that a broad consensus existed among the member States in this area and that this criterion did not directly call into question an individual's physical integrity. The Court therefore concluded that the member States retained considerable room for manoeuvre in deciding whether to impose such a condition.

***Arguments against having a requirement of medical diagnosis***

*Argument (1): Possibility of misdiagnosis*

6.9 A recent article referring to observations made by Dr James Barrett, a consultant psychiatrist at the Charing Cross clinic, asserts that a fair proportion (at least 80%) of the children originally diagnosed as having gender dysphoria will grow up to be cisgender and gay or bisexual.<sup>481</sup> Although a reason for this was not found, it appeared that in some children, nascent homosexuality or bisexuality manifests itself as gender dysphoria. The article suggested that, in the case of other children, gender dysphoria can arise as a

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[elopment-of-DSM-5.pdf](#).

480 Application nos. 79885/12, 52471/13 and 52596/13, 6 April 2017. The concerned requirements for medical diagnosis of gender identity disorder and medical examination have been abolished since the amendment of the French law on 1 January 2017: see Article 61 of the French Civil Code as summarised in Annex B of this Consultation Paper.

481 See Jesse Singal (a New-York-based journalist, referring to observations made by Dr James Barrett) (25 July 2016), "What's Missing From the Conversation About Transgender Kids", published on the website of *Science of Us* (available at: <http://nymag.com/scienceofus/2016/07/whats-missing-from-the-conversation-about-transgender-kids.html>).

result of some sort of trauma or other unresolved psychological issue, and may go away either with time or counselling. The article also cited two research papers (2012 and 2013) by specialists in the area of gender dysphoria and gender identity disorder which appeared to support these observations.<sup>482</sup> Research by Dr James Cantor, a Canadian clinical psychologist and sexologist, noted that since 1972, there have been three large-scale studies and eight smaller ones on “*trans-kids*”.<sup>483</sup> These studies apparently demonstrated that despite the differences in country, culture, decade, and follow-up length and method, a similar conclusion was reached: only very few trans-kids still wanted to transition by the time they were adults, and many turned out, instead, to be gay or lesbian persons. The exact numbers varied by study, but according to this research by Dr Cantor, roughly 60–90% of trans-kids were no longer trans by adulthood. The American College of Pediatricians expressed a similar view in their recent research paper.<sup>484</sup> On the basis of such research, it might be argued by some that given such complexity in identifying “*real*” gender dysphoria, at least in children, misdiagnosis might result and the proportion of misdiagnosis could be considerable.<sup>485</sup>

6.10 Regarding the possible causes of misdiagnosis, the WPATH observed, “[*i*]nexperienced clinicians may mistake indications of gender dysphoria for delusions.”<sup>486</sup> The requirement of medical diagnosis for determination of an application for gender recognition generally relies heavily on the decisions of psychiatrists. However, psychological or psychiatric misdiagnosis may occur for various reasons and one of them may be the complexity of “*neuroplasticity*” (ie, changes of the brain across the lifespan in response to behaviours) that might facilitate confusion of cognisance of gender.<sup>487</sup> A study conducted by Heyer<sup>488</sup> used a Dutch study in 2003 and a

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482 Thomas Steensma, “Factors Associated With Desistance and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study”, 2013, *Journal of the American Academy of Child and Adolescent Psychiatry*; Devita Singh, “A Follow-up Study of Boys With Gender Identity Disorder”, 2012, available at: <http://images.nymag.com/images/2/daily/2016/01/SINGH-DISSERTATION.pdf>.

483 Dr James Cantor, 11 January 2016, “Do trans- kids stay trans- when they grow up?”, published on *Dr Cantor’s blog called Sexology Today* (available at: [http://www.sexologytoday.org/2016/01/do-trans-kids-stay-trans-when-they-grow\\_99.html](http://www.sexologytoday.org/2016/01/do-trans-kids-stay-trans-when-they-grow_99.html)).

484 American College of Pediatricians (Aug 2016), “Gender Dysphoria in Children” (available at: <https://www.acped.org/the-college-speaks/position-statements/gender-dysphoria-in-children>).

485 Jesse Singal’s article was cited by Dr Kwan Kai Man in his article where he argued against a non-SRS type gender recognition scheme: see Kwan Kai Man, “向政治凌駕科學說不一探討跨性別兒童的科學研究” (in Chinese), 22 September 2016, available at: <https://hkscsblog.wordpress.com/2016/09/22/%E5%90%91%E6%94%BF%E6%B2%BB%E5%87%8C%E9%A7%95%E7%A7%91%E5%AD%B8%E8%AA%AA%E4%B8%8D-%E6%8E%A2%E8%A8%8E%E8%B7%A8%E6%80%A7%E5%88%A5%E5%85%92%E7%AB%A5%E7%9A%84%E7%A7%91%E5%AD%B8%E7%A0%94%E7%A9%B6/>.

486 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 13.

487 See Zucker K, Wood H, e.al (2012), “A Developmental, Biopsychosocial Model for the Treatment of Children with Gender, Identity Disorder”, *Journal of Homosexuality*, 59:3,

US model of treatment on patients with “*I’m in the wrong body*” symptoms as examples to illustrate the misdiagnosis of gender identity disorder. Heyer concluded that misdiagnosis and mistreatment could result because “*the many other psychological, hormonal and childhood potential causes for the patient’s distress are rarely, if ever, explored first in an effort to prevent the surgery.*”<sup>489</sup> Other causes might include inadequate diagnosis of major pathology (eg, psychosis, personality disorder, alcohol dependency), absence of or a disappointing real-life experience, and poor family support.<sup>490</sup> Some other psychologists and sexologists found that some people diagnosed as having gender dysphoria may have other psychological conditions beyond gender identity disorder or the misunderstanding of one’s gender, stemming from parental reinforcement of cross-gender behaviour during the sensitive period of gender identity formation, family dynamics, parental psychopathology, peer relationships, social situations and the multiple meanings that might underlie the child’s fantasy of becoming a member of the opposite sex.<sup>491</sup>

6.11 Given the possibility of misdiagnosis, some people argue that relying on a medical diagnosis for an application for gender recognition may lead to applications being mistakenly allowed or disallowed. In either case, the gender recognition scheme may become flawed or discredited, and the legislative intent to protect transgender persons undermined. The availability, willingness and, more importantly, competence of psychiatrists who are going to take up the responsibility of making the decisions related to gender recognition may be highly relevant in considering whether there should be a requirement of medical diagnosis for legal gender recognition.

*Argument (2): Self-determination of one’s gender is a human right*

6.12 In countries like Argentina, Belgium, Denmark and Malta, legal gender recognition does not require any proof of medical intervention, thus moving away from the pathologisation of transgender identities (ie, seeing them as medical conditions) (see Chapter 4 of this paper). It has been argued that the Argentina-type model is a good example of a gender recognition scheme, as showing respect for an individual’s autonomy, self-determination and human dignity, as enshrined under Principle 3 of the

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369-397.

488 See a brief introduction to Walt Heyer in paragraph 5.45 of this Consultation Paper.

489 See Walt Heyer, *Paper Genders: Pulling the Mask Off the Transgender Phenomenon*, Make Waves Publishing, 2nd printing, June 2011, at 31-37.

490 It has been observed that, given the magnitude of the social changes associated with gender transition, strong family support and good emotional health are associated with positive adjustment to many life changes. See Byne, W, Bradley, SJ, Coleman, E, Eyster, A, Green, R, Menvielle, EJ, Meyer-Bahlburg, HFL, Pleak, R & Tompkins, D (2012), “Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder”, *Archives Of Sexual Behavior*, 41(4), 759-796, at 782.

491 Kenneth J Zucker, “Children with gender identity disorder: Is there a best practice?”, *Neuropsychiatrie de l’Enfance et de l’Adolescence* 56, no. 6 (2008): 363, available at: <http://dx.doi.org/10.1016/j.neurenf.2008.06.003>. See also American College of Pediatricians (Aug 2016), “Gender Dysphoria in Children” (available at: <https://www.acpeds.org/the-college-speaks/position-statements/gender-dysphoria-in-children>).

Yogyakarta Principles:<sup>492</sup>

*“Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.”*

6.13 In the UK, some advocates support a claim for a self-declaration scheme (without any requirement of medical diagnosis and intervention) by reference to recent reforms in the Netherlands, Denmark and Malta.<sup>493</sup> Although these recent developments cannot yet be considered to establish a wider right to self-declaration in human rights law, it has been contended that de-psychopathologisation of gender recognition envisaged in the Danish and Maltese models represents emerging “*best practice*” for reform in other jurisdictions.<sup>494</sup>

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

6.14 It has been argued that medical diagnoses in this area, and their underlying rationale, have become increasingly controversial<sup>495</sup> with, as alluded to above, a growing number of people advocating for “*de-psychopathologisation*” of transsexuality and transgenderism in order to remove the stigma attached to transgender persons being diagnosed as having a mental disorder.

6.15 Dr Hines of the University of Leeds has argued that the evidence-based criteria of the UK GRA, through demanding that a person be diagnosed with gender dysphoria before being deemed eligible for a Gender Recognition Certificate, “*instrumentally countered gender difference*” because this “*leaves transsexualism (rather than gender diversity per se) as the only*

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492 For a brief introduction to the Yogyakarta Principles, see paragraph 4.162 of this Consultation Paper.

493 See Peter Dunne, “Ten years of gender recognition in the United Kingdom: still a ‘model for reform?’” (2015) Public Law 530.

494 Amnesty International, 2014, “The State Decides Who I Am: Lack of Recognition For Transgender People”, at 90 and 91.

495 See, eg, Darryl B Hill *et al*, “Gender Identity Disorders in Childhood and Adolescence a Critical Inquiry,” *Journal of Psychology & Human Sexuality*, Vol.17 (2006), at 7; Paul L Vasey and Nancy H Bartlett, “What can the Samoan ‘Fa’afafine’ Teach us about the Western Concept of Gender Identity Disorder in Childhood?” *Perspectives in Biology and Medicine*, Vol 50 No 4 (2007); Sam Winter, “Transphobia: A Price Worth Paying for ‘Gender Identity Disorder?’”, paper presented at *First Biennial Symposium of the WPATH, Chicago, United States*, 5–8 September 2007.

permissible route to gender recognition and, as such, reproduces much critiqued medical understandings of transsexualism as pathological.”<sup>496</sup> She observed that this criterion “leads many gender diverse people to reproduce a transsexual narrative strategically, for rights and benefits.”<sup>497</sup> It has been argued that requiring a healthy person with a transgender identity to be labelled as mentally ill within legal gender recognition proceedings impacts the person’s lives and violates his/her right to private life, and the right to non-discrimination.<sup>498</sup>

6.16 Dr Winter has commented:

*“Criticisms have been laid on the technical aspects of the diagnostic process, including diagnostic criteria, information upon which clinicians make a diagnosis, and the absence of an ‘exit clause’ by which transpeople (once transitioned) may be free of a diagnosis. More fundamental criticisms have focused on the nature and consequences of pathologisation, including that pathologisation is a tool of social control, stemming from restrictive ideologies of sex, gender and sexuality; encourages an essentialism that sees the transwoman as a man, and the transman as a woman, undermining a person’s gender self-identification; encourages ethically questionable ‘reparative’ treatments whilst undermining the legitimacy of effective medical procedures that enhance transpeople’s lives; and contributes to unfavourable court decisions for transpeople. It has also been argued that gender identity variance in itself involves no pathology, with any mental disturbance experienced by transpeople the result of intolerance and stigma, and that pathologisation merely exacerbates intolerance and stigma and does so more than many other psychiatric diagnoses because it involves pathologisation of one’s identity. These last criticisms suggest that, in a gender identity variant person, pathologisation may bring about pathology.”<sup>499</sup>*

6.17 A German study found that 63% of trans respondents felt that the mental-health diagnosis “*Gender Identity Disorder*” required for gender recognition is a source of significant distress for them.<sup>500</sup> It has also been

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496 Hines, S, *Gender Diversity, Recognition and Citizenship: Towards a Politics of Difference* (2013), at 95 and 96.

497 Same as above.

498 See Jamison Green, Sharon McGowan, Jennifer Levi, Rachael Wallbank & Stephen Whittle (2011), “Recommendations from the WPATH Consensus Process for Revision of the DSM Diagnosis of Gender Identity Disorders: Implications for Human Rights”, *International Journal of Transgenderism*, 13:1, 1-4. See also Richard Kohler, Alecs Recher and Julia Ehrt, *Legal Gender Recognition in Europe: Toolkit Transgender Europe*, December 2013, at 18; Richard Kohler and Julia Ehrt, *Legal Gender Recognition in Europe - Toolkit, 2nd Revised Edition*, November 2016, at 24.

499 Sam Winter, “Lost in Transition: Transpeople, Transprejudice and Pathology in Asia,” *International Journal of Human Rights*, 13, 2/3: 365-390, 2009.

500 Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 653.



argued that diagnosis requirements have a heavily stigmatising effect on the transgender community, which has a negative impact on the social and political status of transgender persons.<sup>501</sup>

6.18 Arguments have also been made that medical and legal transitions are conceptually distinct and need to be treated separately, and thus it would be perfectly consistent for medical professionals to require a diagnosis for medical treatments even though legal gender recognition may not require a medical diagnosis.<sup>502</sup>

## **Issue for consultation related to medical diagnosis**

**Issue for Consultation 2: 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.**

## **Requirement of “real life test”**

### ***Arguments in support of having a requirement of “real life test”***

6.19 Arguments set out earlier have indicated that a purely psychiatric or psychological assessment might not always be accurate (or even appropriate, some have asserted) for determining issues of gender recognition. There is also a possibility that some patients may be unable or choose not to tell the truth about their inner feelings, or may even mislead their treating psychiatrists into diagnosing them as having gender dysphoria or gender identity disorder. With regard to medical procedure requirements, there is a possibility that transgender persons may not wish to or may not be able to undergo these, or may change their mind and decide not to proceed with gender reassignment procedures even though they might have originally indicated a desire to do so. A reasonable period of real life experience of living in the preferred gender (the so-called “*real life test*”) may therefore serve as strong evidence to show that an applicant for gender recognition is unlikely

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501 Same as above, at 653-654.

502 Same as above, at 652-653.

to change his or her decision to live in the preferred gender.

6.20 In the course of the real life test, a person would have to live as the opposite gender and may face many life difficulties and challenges when outwardly exposing himself or herself and expressing his or her gender identity to their family, friends and colleagues. This could create an opportunity for the person concerned to 'prove' his or her capacity and desire to live in the preferred gender and to understand the consequences of transitioning without crossing a legal threshold. If they are unable to cope with these difficulties and challenges, they may re-consider they should continue with the gender reassignment process. Whether reasonable period of real life test also may help individuals to identify whether they are really experiencing gender dysphoria or whether they may experience other psychiatric disorders, or be gay or lesbian rather than trans.

6.21 A two-year real life test is currently one of the pre-conditions to assess whether an individual is able to undergo SRS in Hong Kong. It is also a pre-condition for gender recognition in the UK under section 2(1) of the GRA. Some have commented that the two years' duration for a real life test should be the minimum threshold from both the medical and legal perspectives, as some transgender persons may not be ready for SRS without having lived in the opposite gender for a significant period of time. On the other hand, in some cases, the person may, for various reasons, choose not to maintain their life mode in another gender all the time, and may only live that way during holidays, for example. Some people consider that a reasonable period of real life test is necessary for gender recognition, so as to avoid legally recognising someone who is actually uncertain about his or her determination to live in the opposite gender for the rest of their life.

### ***Arguments against having a requirement of "real life test"***

6.22 The real life test may have its limitations as a means of assessment, as psychiatrists would have difficulties in observing the behaviour of the concerned individual outside the clinic. Preferably, the individual may be monitored by an occupational therapist during the period of real life test, but hospitals may not have sufficient resources for this purpose. Further, it has been contended that the test could be inaccurate and/or biased, as it might suggest that there is only one identifiable way of living in a particular gender. Dr Scherpe argues that there is nothing to precisely indicate how, for example, a transgender woman could prove that she can function socially and professionally as a female, or how, for example, a 'normal man' lives his life. Dr Scherpe notes that, "*[t]here is a real fear that, in requiring applicants for recognition to prove their capacity to live a 'real life', policy makers will merely reinforce biased and stereotyped presumptions about male and female conduct which do not conform with the lived reality of the vast majority of the population,*" and that such requirements may, "*hold transgender persons to a false standard of maleness and femaleness which is not expected of any other person*", since they will, prior to obtaining official recognition, "*feel obliged to express an accentuated version of their preferred gender which they have no*

*intention of subsequently maintaining.*<sup>503</sup>

6.23 Some people may also argue that the duration of two years for the real life test prescribed under the UK GRA is too long, especially for teenage applicants who lack support from their parents and their schools. If the period set is too long, this might discourage individuals concerned from constantly adopting the life style of the opposite gender during that period. Some jurisdictions (eg, Ireland<sup>504</sup> and Denmark<sup>505</sup>) have recently reformed or implemented their gender recognition laws to, *inter alia*, omit the “*real life test*” as a precondition for gender recognition.

6.24 Further, some transgender persons may not wish to readily change their appearance into the opposite gender at the beginning of their transition as this may affect their employment and other aspects of their daily lives. As illustrated in the case of *YY v Turkey*,<sup>506</sup> personal reflection on gender identity is often a lifelong process. A gender recognition law requiring applicants to go through the “*real life test*” might put some of them into a dilemma of choosing gender recognition or maintaining the status quo at work and/or daily connection with the people around them. It would appear that the real life test requirement under the UK GRA, for example, was often accused of undermining one’s freedom of choice.<sup>507</sup> Further, as illustrated in paragraph 3.93 in Chapter 3 of this Consultation Paper, it may be difficult for a transgender person to get his or her name or gender changed on their day-to-day documentation (eg, workplace record or student card) during the period of real life test and this would place barriers for living the “*real life*” in his or her acquired gender.

6.25 In addition, some might contend that imposing a real life test requirement (which is sometimes used, as we have seen, as one of the pre-conditions for surgery and other medical treatment decisions in this context) presupposes the validity and necessity of medical intervention requirements when it has been argued by some that medical preconditions for legal transition should be rejected as a violation of the fundamental rights of the persons concerned. Thus, some argue, the issue of whether a real life test can be justified on a medical basis cannot form a legitimate precondition for legal gender recognition.<sup>508</sup>

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503 Same as above, at 656.

504 The Irish Gender Recognition Act 2015.

505 In Denmark, the application for gender recognition needs to include a statement that the application is based on an experience of belonging to the other gender, but nothing further is required.

506 [2015] ECHR 257 (10 March 2015).

507 See, eg, Hines, S and Davy, Z, “Gender Diversity, Recognition and Citizenship: Exploring the Significance and Experiences of the UK Gender Recognition Act” (*University of Leeds and Economic & Social Research Council*, undated paper), at 8 and 16.

508 See Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 656.

## Issue for consultation related to “*real life test*”

**Issue for Consultation 3: 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 in the acquired gender, and why.**
- (4) If the answer to sub-paragraph (3) is “yes”, what kind of evidence should be required.**

## Requirement for hormonal treatment

### ***Arguments in support of having a requirement for hormonal treatment***

6.26 Arguably, transgender persons may wish to receive hormonal treatment with a view to making their bodies as congruent as possible with their preferred gender. In Hong Kong, a recent study at a local gender clinic showed that around seven out of eight individuals who were diagnosed with gender dysphoria or gender identity disorder expressed a need for hormonal treatment.<sup>509</sup> It is stated in the WPATH’s *Standards of Care* that medical treatment options for many transsexual and transgender individuals with

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509 CCC Chan, “Prevalence of Psychiatric Morbidity in Chinese Subjects with Gender Identity Disorder in Hong Kong” (Unpublished thesis, fellowship examination, Hong Kong College of Psychiatrists, 2013).

gender dysphoria include, for example, feminisation or masculinisation of the body through hormone therapy, which is effective, and even necessary, in alleviating gender dysphoria and is medically necessary for many people as it can assist them with achieving comfort with self and identity.<sup>510</sup> Hormonal therapy is an especially recommended option for those who do not wish to make a social gender role transition or undergo surgery, or who are unable to do so.<sup>511</sup> As hormonal treatment is usually part of the normal procedures for treating persons with gender identity disorder or gender dysphoria, to include this as a requirement for gender recognition might be considered natural and reasonable.

6.27 In cases where SRS is required under a gender recognition scheme, it may be less contentious as to whether hormonal treatment or some other medical procedures should be required also. Many jurisdictions that impose SRS for recognition do not specify in the law whether hormonal treatment is a compulsory criterion (typical examples are Latvia, Turkey, Vietnam, New Jersey (US), New Brunswick (Canada)). On the other hand, some people might argue that to have hormonal treatment as one of the requirements for gender recognition could provide an additional ‘safeguard’ to prevent an applicant from reverting back from the gender identity once changed. In its new *Standards of Care*, the WPATH recommends that persons seeking access to specific surgical procedures for sex re-assignment, including a hysterectomy or orchiectomy, should complete at least “12 continuous months of hormone therapy as appropriate to the patient’s gender goals.”<sup>512</sup> It is argued by some commentators that where legal gender recognition is contingent upon medical treatment, it is correct that applicants should access healthcare procedures in accordance with international practice such as the WPATH’s recommendations.

6.28 If SRS is not mandatory in a gender recognition scheme, the requirement of hormonal treatment might be advocated for the reason that it could lead to physical changes that are more congruent with a person’s preferred gender identity, so that the general public’s possible confusion or fears about interacting with transgender persons might be reduced. As noted by the WPATH, the physical changes expected to occur following feminising/masculinising hormone therapy (depending in part on the dose, route of administration, and medications used, etc) include: in female-to-male persons, deepened voice, clitoral enlargement (variable), growth in facial and body hair, cessation of menses, atrophy of breast tissue, and decreased percentage of body fat compared to muscle mass; in male-to-female persons, breast growth (variable), decreased erectile function, decreased testicular size, and increased percentage of body fat compared to muscle mass.<sup>513</sup> Some

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510 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 5, 9 and 33. Surgery is stated to be another effective option in this regard.

511 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 34.

512 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 60.

513 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and*

people might find requiring hormonal treatment as a minimum to be a halfway house to full SRS, and thus consider it as a necessary requirement for a gender recognition scheme, in between a self-determination scheme and a scheme based upon full SRS.

### ***Arguments against having a requirement for hormonal treatment***

6.29 There is an argument that not all transgender persons need or wish to receive hormonal treatment. The WPATH made the following comments in its *Standards of Care*:

*“As the field matured, health professionals recognized that while many individuals need both hormone therapy and surgery to alleviate their gender dysphoria, others need only one of these treatment options and some need neither (Bockting & Goldberg, 2006; Bockting, 2008; Lev, 2004). Often with the help of psychotherapy, some individuals integrate their trans- or cross-gender feelings into the gender role they were assigned at birth and do not feel the need to feminize or masculinize their body. For others, changes in gender role and expression are sufficient to alleviate gender dysphoria. Some patients may need hormones, a possible change in gender role, but not surgery; others may need a change in gender role along with surgery, but not hormones. In other words, treatment for gender dysphoria has become more individualized.”<sup>514</sup>*

6.30 Dr Winter has stated that, “*hormone therapy also often involves side effects, some potentially serious*” and, where there are pre-existing health conditions, “*hormone therapy may aggravate the transsexual person’s health problems.*”<sup>515</sup> He also notes that “[*s]pecific health histories may rule out the use of certain hormones altogether.*” The Hospital Authority in Hong Kong advises that it is important for psychiatrists to communicate to patients that supraphysiologic doses of sex steroids are potentially harmful. For example, giving male hormone treatment may increase overall cardiovascular risk like dyslipidemia and increase in red cell count; while receiving female hormone may increase the risk of deep vein thrombosis.

6.31 Some of these side effects, aggravating effects and contraindications are summarised in the WPATH’s *Standards of Care*.<sup>516</sup> In their view, the likelihood of a serious adverse event is dependent on numerous factors: the medication itself, dose, route of administration, and a patient’s clinical characteristics (age, comorbidities, family history, health habits). It is impossible to predict whether a given adverse effect will happen in an

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*Gender-Nonconforming People*, 7th version (2012), at 36 to 38.

514 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 8 and 9.

515 Sam Winter, “Identity Recognition Without The Knife: Towards A Gender Recognition Ordinance For Hong Kong’s Transsexual People” (2014) 44 HKLJ 115, at 122.

516 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 39 and 40.

individual patient. Dr Winter has observed that patients should be very careful in considering whether or not to undergo hormonal treatment, taking into account all the side effects.<sup>517</sup>

6.32 In light of the above observations, some might contend that making hormonal treatment a mandatory requirement for gender recognition is impracticable and unnecessary. Dr Scherpe argues 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.<sup>518</sup>

### **Issue for consultation on requirement(s) of hormonal treatment and psychotherapy**

6.33 In view of the discussion in paragraphs 6.26 to 6.32 above, we invite views from the public on having a requirement of hormonal treatment for gender recognition and related issues.

6.34 We understand also that psychotherapy is considered as a mainstay of care for adult patients diagnosed with gender dysphoria or gender identity disorder (see discussion at paragraph 5.11 above). 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 invite views on this also.

**Issue for Consultation 4:**

**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 what effect should the treatment(s) achieve; and**
  - (b) what kind of evidence should an applicant for gender recognition provide on this.**

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517 Sam Winter, “Identity Recognition Without The Knife: Towards A Gender Recognition Ordinance For Hong Kong’s Transsexual People” (2014) 44 HKLJ 115, at 122.

518 Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 650.

## Requirement of SRS

6.35 SRS (ie, sex reassignment surgery, sometimes also referred to as “GRS” (gender reassignment surgery)) 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. The extent of SRS may vary for different individuals, and the procedures differ for male-to-female and female-to-male persons. For the details of these procedures, please see the discussion at paragraph 2.52 above. Further, as can be seen from Chapter 4 of this Consultation Paper, those jurisdictions requiring surgical interventions for gender recognition usually have their own interpretation, through legislation or case law or otherwise, of what procedures are required to fulfil those criteria. Under the current practice in Hong Kong (in order for the Immigration Department to change a person’s sex entry on his or her HKID card) the SRS requirement includes: (i) for sex change from female to male: removal of the uterus and ovaries, and construction of a penis or some form of a penis; (ii) for sex change from male to female: removal of the penis and testes, and construction of a vagina.<sup>519</sup>

### ***Arguments in support of having a requirement for the applicant to have undergone SRS***

#### *Argument (1): Impact on the traditional values of parenthood and family*

6.36 For many, it is an instinctual assumption that one’s gender recognised by law should have social implications.<sup>520</sup> Those who favour surgical requirements 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 accordingly, a balance should be struck between individual rights and the public interest when considering appropriate criteria for a gender recognition scheme. Those of this view will likely sway towards a SRS requirement being mandatory and inevitable for such a scheme. In this regard, it has been argued that a scheme that does not impose SRS as a prerequisite for gender recognition and is based instead on an individual’s psychological distress or desired gender identity would confuse the borderline for gender identity, which in turn, may cause chaos in the community and a bring about multifarious social problems.<sup>521</sup>

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519 See Question 22, “What procedures should be followed and what supporting documents should be submitted if I want to change the sex entry on my identity card?” on the website of the Hong Kong Immigration Department, available at: [http://www.immd.gov.hk/eng/faq/faq\\_hkic.html](http://www.immd.gov.hk/eng/faq/faq_hkic.html).

520 See Beverly L Miller, “Gender Identity: Disorders, Developmental Perspectives and Social Implications”, Nova Science Publishers, Incorporated, 1 Jan 2014, which examines, *inter alia*, gender identity along with developmental perspectives and social implications.

521 See Kwan Kai-man, *同性與變性 – 評價同性戀運動和變性人婚姻* (in Chinese, transliterated as “Homosexuality and Transsexualism – Commenting on Homosexual Movement and Transsexual Marriage”), June 2015, at 281.



6.37 For instance, if a female-to-male transgender person not required to undergo SRS were to marry a woman and become the “*father*” of a child, it is argued that this will result in confusion to traditional family roles. A typical example, which has been frequently cited by those in favour of the SRS requirement for gender recognition, was the case of Thomas Beatie, an American female-to-male transgender person, who had removed his breasts and was given testosterone to make him look and sound like a man, but he still kept his female reproductive organs and became pregnant (by way of testosterone cessation and sperm donation) and subsequently gave birth to three children between 2008 and 2010.<sup>522</sup> Beatie had been on hormone therapy but had stopped taking testosterone in anticipation of getting pregnant. His being known to be the first “*pregnant man*”, which was previously only in the realm of the imagination, caused a media storm across the US and even internationally. Newspaper headlines, like “*When daddy is also the mommy*” and “*Pregnant, yes – but not a man*”, seem to demonstrate the difficult dissociation between gender and the parental function.<sup>523</sup>

6.38 A similar concern was addressed by the UK Interdepartmental Working Group on Transsexual People during the deliberations on the UK GRA:

*“[T]he great concern which would be felt by the general public [was] someone who was legally a man gave birth to a child or someone who was legally a woman became the father of one. Those countries which impose a sterility requirement before allowing a change of sex to be legally recognised clearly believe such a requirement is justified.”*<sup>524</sup>

6.39 Some family concern groups have cited another example of social chaos theoretically caused by a non-surgical scheme. This relates to a news report in 2013 about 54 Australian transsexual men getting pregnant and giving birth.<sup>525</sup> It has been argued by some people that this atypical

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522 See news report of *Daily Mail Online*, 24 May 2008, “How will the pregnant man’s daughter thank him for this breathtakingly cynical – and profitable – foray into gay rights”, available at:

<http://www.dailymail.co.uk/femail/article-1021557/How-pregnant-mans-daughter-thank-breathtakingly-cynical-profitable-foray-gay-rights.html>. It was reported that psychoanalysts had expressed concern that the child could be deeply confused over the question: “*Where am I from?*” Nevertheless, Thomas Beatie expressed that child-bearing is no longer the domain of women, it is now a man’s entitlement, too.

523 Related media articles appearing in July 2008: “When daddy is also the mommy”, *The Boston Globe*; “Man Is Six Months Pregnant”, *CBS News*; “The Pregnant Man Speaks Out,” *People Magazine*; “Pregnant Man Is Feeling Swell,” *New York Post*; “‘It’s My Right to Have Kid,’ Pregnant Man Tells Oprah” *ABC News*; “She’s Pregnant, but She’s a Man,” *Sydney Morning Herald*; “Pregnant, yes—but not a man”, *International Herald Tribune*.

524 See the UK Home Office, *Report of the Interdepartmental Working Group on Transsexual People* (April 2000), at paragraph 4.14 (available at: <http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf>).

525 See news report of *International Business Times*, “More Than 50 Australian Men Got Pregnant, Gave Birth to Babies in 2013, Advocate Predicts Trend to Last”, 19 November 2014.

phenomenon could greatly impact on the next generation, causing gender confusion, which is not something that a conservative society in Hong Kong could tolerate.

6.40 It has also been argued that the confusion of gender identity will adversely affect the development of children. Dr Kwan Kai Man has argued that, for example, if a genetic man, A, who has not undergone full SRS is legally recognised as a woman and could then marry a man, A could not have normal heterosexual sexual intercourse with her husband, but would have anal intercourse with him. A could also have sex with other women who give birth to children, as well as be a sperm donor. When A, her husband and their adopted children take a shower or change clothes together, the children may be very confused to find that both their “mother” and father have the same sex organs, while their “mother” may also have breasts.<sup>526</sup>

*Argument (2): Concerns about sex-specific facilities and situations*

6.41 A number of facilities in the community are sex-segregated, ranging from those needed on a daily basis (such as bathrooms and toilets) to those in otherwise non-segregated spaces (such as locker rooms in gyms). There are also gender-segregated residential or quasi-residential facilities, programmes or services, such as homeless shelters, foster care homes and domestic violence shelters. In these places, transgender people might be subjected to special treatment or placed into the section according to their sex assigned at birth, or they may have to seek shelters specifically catering for them. If a pre-operative transgender person’s acquired gender is recognised in law, some may express concerns about their use of sex-specific public facilities, claiming that there is a need to ensure privacy of other people using the facilities and to prevent possible sexual abuses and assaults.<sup>527</sup> Further, some may assert that for sex-specific jobs or job duties, such as those that might exist in a nursing or medical facility, bodily privacy of clients would be violated if, for example, a staff member of one anatomical structure observes or treats an unclothed client of another anatomical structure.<sup>528</sup>

6.42 In this respect, the case of Colleen Francis has frequently been mentioned in narratives opposing gender recognition based on non-surgical requirements, and is taken as a cautionary tale that allegedly proves that any

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526 See Kwan Kai-man, *同性與變性 – 評價同性戀運動和變性人婚姻* (in Chinese, transliterated as “Homosexuality and Transsexualism – Commenting on Homosexual Movement and Transsexual Marriage”), June 2015, at 281 to 282.

527 See, eg, the views expressed by Mr Choi Chi-sum of the Society for Truth and Light, available at: <https://gltnewsarchives.wordpress.com/tag/choi-chi-sum-%E8%94%A1%E5%BF%97%E6%A3%AE/>. See also Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, 19 *Mich J Gender & L* 373 (2013), at 417.

528 Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, 19 *Mich J Gender & L* 373 (2013), at 417.

trans-equality laws could go too far.<sup>529</sup> Colleen Francis was at the material time a US male-to-female transgender person with male genitalia who dressed as a woman. In late 2011, she was found to have exposed her body and male genitalia in a college women's locker rooms which girls aged from 6 to 18 years would use. This upset parents and the girls' swim coaches.<sup>530</sup> The local district attorney refused to press charges against Francis under Washington State's indecent exposure statute<sup>531</sup> on the grounds that she had an affirmative right to be in the women's locker room on the basis of her acquired gender identity,<sup>532</sup> thus her behaviour was consistent with normal usage of the sex-segregated facility. The college subsequently put up privacy curtains for women who might feel uncomfortable changing in the locker rooms. Nevertheless, the Alliance Defending Freedom<sup>533</sup> warned the college to readdress granting their permission to a transgender person like Francis to use women's locker rooms, as "*allowing a person who is biologically a man to undress and expose himself to young girls places those girls at risk for emotional distress and harm... Any reasonable person would view this as dangerous to the young girls involved. The fact that this individual was sitting in plain view of young girls changing into their swimsuits puts you and [the college] on notice of possible future harm.*"<sup>534</sup> It has also been argued that the embarrassment and emotional distress that would be caused to women by allowing a male-to-female transgender person who has retained male genitalia to expose herself in public changing rooms and toilets are disproportionate to the alleged plight of transgender people in using sex-segregated facilities.<sup>535</sup>

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529 One example is Dr Hong Kwai-wah's submissions to the Bills Committee on Marriage (Amendment) Bill 2014, LC Paper No. CB(2)1309/13-14(20), available at: <http://www.legco.gov.hk/yr13-14/chinese/bc/bc52/papers/bc520423cb2-1309-20-c.pdf>

530 See news report of *Daily Mail Online*, "Parents' outrage as transgendered woman is permitted to use the women's locker room 'exposing himself to little girls'", 4 November 2012.

531 Wash. Rev. Code § 9A.88.010. It is provided that a conviction for indecent exposure would require proving that the person concerned subjectively and "*intentionally ma[de] any open and obscene exposure of his or her person ... knowing that such conduct [wa]s likely to cause reasonable affront or alarm.*"

532 Washington's administrative policy for changing a person's gender designation on a birth certificate does not impose a surgical requirement on the applicants. It requires a signed original statement from the applicant's licensed healthcare provider stating that the applicant has undergone surgical, hormonal or other treatment appropriate for him/her for the purpose of gender transition. For more information about the related administrative measure, please refer to Annex A and Annex B of this Consultation Paper.

533 An American Christian non-profit organisation founded in 1994 that endeavours to preserve and defend religious freedom by way of, *inter alia*, training and litigation: official website available at: [www.adflegal.org](http://www.adflegal.org).

534 See news report of *Daily Mail Online*, "Parents' outrage as transgendered woman is permitted to use the women's locker room 'exposing himself to little girls'", 4 November 2012.

535 See Kwan Kai-man, *同性與變性 – 評價同性戀運動和變性人婚姻* (in Chinese, transliterated as "Homosexuality and Transsexualism – Commenting on Homosexual Movement and Transsexual Marriage"), June 2015, at 281-282. During deliberations on the Marriage (Amendment) Bill 2014 in Hong Kong, deputations made submissions to the Bills Committee invoking the Colleen Francis's case as an example to argue that it is reasonable, for avoidance of confusing the definitions of male and female, to require full SRS to be completed before a transgender person is entitled to marry in his

6.43 It is evident that, even in the West, where more liberal attitudes might be expected, there is often a tension on issues of sex-specific public facilities between the LGBTI groups and other more conservative people. For example, in Texas, a proposed Bill that added “*gender identity*” and “*sexual orientation*” to protection for places of “*public accommodation*”, which includes bathrooms, locker rooms and shower rooms, was voted down in late 2015 by a significant margin as many people believed this Bill went too far to allow men to use women’s public accommodation facilities.<sup>536</sup> If appears that during the discussion of this bill among the public, national, state and local groups, activists and political figures all weighed in on the related issues, amongst whom the Texas Governor Greg Abbott, Texas Attorney General Ken Paxton, Houston megachurch pastor Dr Ed Young and a coalition of local black, Hispanic and Asian pastors and churches opposed the Bill. One main reason for the opposition was that many cases of crimes in Texas had been reportedly committed against women and children in public bathrooms. Texas Values Action<sup>537</sup> described the rejection of the Bill as “*a massive victory for common sense, safety, and religious freedom*”, since “[m]illions of dollars pouring in from national LGBT extremists, an out-of-control Mayor, and a sustained media onslaught could not overcome the tireless efforts of Houston pastors and people of faith standing for common sense, safety, and liberty.”<sup>538</sup> Elsewhere in the US, the dispute has continued and similar debates over “Bathroom Bills” (restricting access to sex-segregated facilities on the basis of a definition of sex assigned at birth) have come to the fore in other states, and some of them are pondering the enactment of similar Bills.<sup>539</sup>

6.44 There have been court cases holding that denying equal access to transgender people in sex-segregated facilities does not constitute unlawful discrimination. For example, in *Goins v West Group*,<sup>540</sup> the court in Minnesota held that an employer, which designated restrooms and restroom use on the basis of biological gender, did not violate Minnesota’s law prohibiting discrimination based on sexual orientation which was defined to

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or her acquired gender. See Life Transformers’ submissions dated 10 April 2014 (LC Paper No. CB(2)1309/13-14(23)) (in Chinese), available at: <http://www.legco.gov.hk/yr13-14/chinese/bc/bc52/papers/bc520423cb2-1309-23-c.pdf>

536 See news report of *Texas Values Action*, “Historic Victory In Houston As Proposition 1 Bathroom Ordinance Is Defeated”, 4 November 2015.

537 A non-profit lobbying and advocacy organisation based in Texas that “*advocates for faith, family, and freedom in the political arena*”: see official website at: <http://txvaluesaction.org>.

538 See news report of *Texas Values Action*, “Historic Victory In Houston As Proposition 1 Bathroom Ordinance Is Defeated”, 4 November 2015.

539 See Joellen Kralik, “‘Bathroom Bill’ Legislative Tracking”, 30 August 2016, available at: <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>. It is further noted that on 22 February 2017, the Trump administration rescinded Obama-era guidance directing schools to allow transgender students to use the bathroom that matches their gender identity. The developments regarding the “*Bathroom Bills*” in the US remain to be seen. See ABC news, “Trump administration reverses transgender bathroom guidance”, 22 February 2017, available at: <http://abcnews.go.com/Politics/trump-administration-issue-guidance-transgender-bathrooms/story?id=45663275>.

540 635 N.W.2d 717, 720 (Minn. 2011).

include gender identity. The court ruled that the legislature could not have intended to upset what it termed “*the cultural preference for restroom designation based on biological gender.*”<sup>541</sup> In another US lawsuit, in Massachusetts, the District Court ruled on 17 September 2015 to deny the US Eastern District Court’s injunction that would have required Gloucester County Public Schools to allow a 16 year-old female-to-male transgender student to use male restrooms. The student, Gavin Grimm, was diagnosed to have gender dysphoria and had been living as a boy with medical and therapeutic treatment, but no SRS had been performed. The Judge, in denying that injunction, wrote in the issued opinion that “*society demands that male and female restrooms be separate because of privacy concerns... Not only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the state educational system. The students are almost all minors, and public school education is a protective environment. Furthermore, the School Board is tasked with providing safe and appropriate facilities for these students.*”<sup>542</sup> Grimm’s appeal was allowed by the Court of Appeals for the Fourth Circuit in April 2016, but the school board appealed to the Supreme Court.<sup>543</sup> In February 2017, the Department of Justice and Department of Education under the Trump administration withdrew the guidance on gender identity issued by the Obama administration (requiring transgender students to have unfettered access to bathrooms and locker rooms matching their gender identity).<sup>544</sup> A letter issued by the departments cited a need to “more completely consider the legal issues involved”, and stated that “there must be due regard for the primary role of the States and local school districts in establishing education policy.” In March 2017, the Supreme Court announced that it was sending Grimm’s case back to the Fourth Circuit Court of Appeals to be reconsidered in light of the new guidance from the Trump administration.<sup>545</sup> The legal position of cases alike is yet to be determined in not only Massachusetts but the whole US.

6.45 Some people may therefore argue that women and girls should, at a minimum, have the right to be free from potential male nudity in all public spaces and this right should be backed by strong legal protections. In the larger context, the argument is that women and girls should not have to bear the burden of determining the difference between sexual fetishists, sexual predators, and males who believe they are expressing an alternative gender identity desired or acquired.

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541 *Goins v West Group* 635 N.W.2d 717, 720 (Minn. 2011), at 723. This ruling was followed in *Hispanic Aids Forum v Estate of Joseph Bruno*, 729 N.Y.S.2d 43, 46-48 (NY App Div 2005).

542 See news report of *Daily Press*, “Federal judge issues opinion in Gloucester transgender lawsuit”, 18 September 2015.

543 See news report of *The Advocate*, “Supreme Court to Hear Gavin Grimm Case; Huge Implications for Trans Students”, 28 October 2016.

544 See news report of *The Guardian*, “Trump administration rescinds Obama-era protections for transgender students”, 23 February 2017.

545 See news report of *The New York Times*, “Supreme Court Won’t Hear Major Case on Transgender Rights”, 6 March 2017.

*Argument (3): SRS is a medical necessity and does not constitute torture or cruel, inhuman or degrading treatment*

6.46 Some people contend that transgender people having gender dysphoria or gender identity disorder find the sexual characteristics they were born with to be unbearable, and they would have a strong desire to receive hormonal therapy and SRS. Therefore, it has been argued 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 they are not forced by anyone to do so. Such arguments are backed by the assertion that SRS has been found to improve the quality of life and mental health outcomes of transgender people,<sup>546</sup> and identified by the WPATH as playing “an undisputed role in contributing towards favorable outcomes” for many transgender and transsexual persons to treat their gender dysphoria or gender identity disorder.<sup>547</sup>

6.47 The issue of whether a SRS requirement would constitute torture or cruel, inhuman or degrading treatment was hotly debated at the time that the Marriage (Amendment) Bill 2014 was deliberated on in Hong Kong, where the SRS requirement under the Bill had attracted criticisms from various interested parties. Dr Albert Yuen, former Consultant Surgeon of the Ruttonjee and Tang Shiu Kin Hospitals, who had been specialising in SRS, delivered a speech pertinent to SRS performed by him in Hong Kong over the past 30 years in one of the meetings of the Bills Committee on the Bill. In response to the query that the full SRS requirement proposed in the Bill was a form of torture or cruel and inhuman treatment, Dr Yuen stated that SRS was carried out at the request of patients with gender identity disorder so as to relieve them from their psychiatric distress, and therefore such a requirement should not be deemed as any form of torture.<sup>548</sup>

6.48 These views are shared by some traditional value concern groups who are in support of the SRS requirement.<sup>549</sup> For example, some

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546 See, eg, Ainsworth TA, Spiegel JH, “Quality of life of individuals with and without facial feminization surgery or gender reassignment surgery” (Qual Life Res) September 2010; 19(7):1019–24.

547 World Professional Association for Transgender Health, “Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.”, 21 December 2016. Though see also: WPATH, “2015 Statement on Identity Recognition,” 19 January 2015, where the WPATH encourages individualised evaluation and treatment for those with gender dysphoria.

548 See Minutes of the fourth meeting of the Bills Committee on 20 May 2014, LC Paper No. CB(2)2164/13-14, available at: <http://www.legco.gov.hk/yr13-14/english/bc/bc52/minutes/bc5220140520.pdf>. See also news report of *Apple Daily*, “醫生指變性手術非酷刑” (in Chinese, transliterated as “Doctors Noted Transsexual Surgeries Are Not Torture”), 21 May 2014.

549 Some opposition views to the Bill were based on the perception that the proposed amendment may result in *de facto* same sex marriage, and that it would create confusion and anxiety in the absence of common consensus of the public, thus jeopardising the common good and the well-being of the society. See, eg, the submissions made by the Catholic Diocese of Hong Kong Chancery Office, LC Paper No. CB(2)1384/13-14(05), available at: <http://www.legco.gov.hk/yr13-14/english/bc/bc52/papers/bc520429cb2-1384-5-e.pdf>

took the view that the criticism that the Bill was meant to compel transgender persons to complete full SRS was misconceived, as it was ultimately their free choice to undergo or not undergo any surgical procedures. The concern groups questioned why, if surgical intervention to treat transgender persons is itself a torture or cruel or degrading treatment, so many transgender persons undertook it.

*Argument (4): Permanence of the transition*

6.49 An argument in support of the SRS requirement is that such a requirement may ensure permanence or irreversibility of the transition, so that the applicant would not “switch back” after legally changing their gender identity under the gender recognition scheme. This would arguably avoid multiple corrections of gender on a person’s identification documents or records, which may cause in others confusion and anxiety about privacy and safety when dealing with persons who manifest different legal genders at different times. In this regard, it has been argued that there has been data showing that a return to previous gender happens extremely rarely and is generally a result of discrimination and rejection from family, friends, and colleagues, and a person is no less likely to transition back to the originally assigned gender after surgery as opposed to before surgery.<sup>550</sup>

6.50 Dr Anne Lawrence, an American psychologist and sexologist, examined factors associated with satisfaction or regret following SRS in 232 male-to-female transsexuals operated on between 1994 and 2000 by one surgeon using a consistent technique. She reported<sup>551</sup> that participants in the study reported overwhelmingly that they were happy with their SRS results and that SRS had greatly improved the quality of their lives. None reported outright regret and only a few (1 to 2%) expressed occasional regret. Dissatisfaction was most strongly associated with unsatisfactory physical and functional results of surgery. It was reported that most indicators of transsexual typology, such as age at surgery, previous marriage or parenthood, and sexual orientation, were not significantly associated with subjective outcomes.

*Argument (5): Concerns about possible fraud or security*

6.51 Another argument for an SRS requirement is that a gender recognition scheme without an SRS requirement may give rise to possible fraudulent or dishonest changes of identity. By effectively becoming different persons, people might assume new identities in order to escape family or other

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and submissions made by Hong Kong Baptist Church, written by Dr Walter Chen, LC Paper No. CB(2)1339/13-14(10), available at:

<http://www.legco.gov.hk/yr13-14/english/bc/bc52/papers/bc520423cb2-1339-10-e.pdf>.

550 Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, 19 *Mich J Gender & L* 373 (2013), at 416.

551 See Lawrence AA (2003), “Factors associated with satisfaction or regret following male-to-female sex reassignment surgery”, *Archives of Sexual Behavior*, 32, 299-315.

legal obligations, and consequently the risk of fraud in the use of the transfer of gender identity might become a public security concern. Some worry that people might disguise their gender in order to marry another person of the same biological sex.<sup>552</sup> There has also been the suggestion that terrorists could take advantage of the ability to alter gender markers on birth certificates.<sup>553</sup>

6.52 Kenji Yoshino, the Chief Justice Earl Warren Professor of Constitutional Law at New York University School of Law, has noted a potential objection in this regard: “[l]owering the barriers to sex reassignment increases the incentive for individuals who have no sincere desire to change their sex to do so for opportunistic reasons.”<sup>554</sup> Even for Denmark, which recognises a person’s self-determined gender identity, there is a “reflection period” of 6 months between the time of the application and the registration of the changed gender, ostensibly for the purpose of ensuring that the application is not based on impulse and to protect against potential abuse or fraud.<sup>555</sup>

*Argument (6): The international trend is not overwhelming and some Asian jurisdictions’ approaches should be of higher reference value for Hong Kong*

6.53 In recent years, there seems to have been an international trend in the judicial and political sectors to eliminate irreversible surgery and sterilisation as preconditions for the recognition of a transgender person’s desired or acquired gender (see a more detailed analysis in paragraphs 6.55 to 6.57 of this chapter). In spite of this, requirements of surgery and sterilisation for gender recognition remain commonplace in many countries. For example, the pan-European advocacy group, Transgender Europe, reported in April 2017 that at least 20 countries in Europe still mandate sterilisation for gender recognition.<sup>556</sup> On the other hand, the latest developments are not always “*avant-garde*”. For instance, the newly adopted Civil Code 2014 in the Czech Republic has expressly introduced into national law for the first time a “*sex change*” requirement which includes both surgery and sterilisation.<sup>557</sup>

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552 Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, 19 *Mich. J. Gender & L.* 373 (2013), at 414.

553 Kenji Yoshino, “Sex and the City: New York City Bungles Transgender Equality”, *SLATE*, 11 December 2006. See also Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, 19 *Mich J Gender & L* 373 (2013), at 414.

554 Kenji Yoshino, “Sex and the City: New York City Bungles Transgender Equality”, *SLATE*, 11 December 2006.

555 See The Open Society Foundations, “License To Be Yourself: Laws and Advocacy for Legal Gender Recognition of Trans People”, May 2014, at 17.

556 Transgender Europe (TGEU), “Trans Rights Europe Map, 2017”. As can be seen from Chapter 4 and Annex A of this Consultation Paper, of the 36 countries in Europe studied, 10 require SRS and/or sterilisation as preconditions for a gender recognition procedure.

557 Act on Specific Health Services No.373/2011 Coll; Czech Civil Code s.29(1).



6.54 Asian countries such as Singapore, Japan and South Korea are frequently cited by people advocating the maintaining of SRS-based requirements for gender recognition, as the argument is made that these jurisdictions' approaches concerning gender recognition have more reference value than those of European countries when considering a gender recognition scheme in Hong Kong. For example, it has been argued that the society in Singapore or Mainland China is relatively similar to that of Hong Kong, and their gender recognition laws and policies, that require a person to complete SRS before he or she can change the sex entry on his or her household register or identification document, should be followed in Hong Kong.<sup>558</sup> Notably, Vietnam has, in late 2015, passed new legislation to allow transgender persons who have undergone gender reassignment surgery to register their civil status under their new gender. The Vietnamese parliament commented that the new law is an attempt to “*meet the demands of a part of society ... in accordance with international practice, without countering the nation's traditions.*”<sup>559</sup>

### **Arguments against having a requirement for the applicant to have undergone SRS**

*Argument (1): The apparent international trend towards surgery-free gender recognition*

6.55 It is observed that in the past decade, there has been an emerging global trend towards not requiring SRS or similar medical treatments for legal recognition of a person's acquired or preferred gender.<sup>560</sup> According to our study on gender recognition schemes in other jurisdictions (see Annex A and Annex B of this Consultation Paper), since 2004 when the UK GRA was exacted,<sup>561</sup> there has been legislative reform or changes in administrative policies in a number of jurisdictions to, *inter alia*, eliminate the SRS requirement for gender recognition, including in: the Australian Capital Territory (2014), South Australia (2016), Belgium (2017), Denmark (2014), France (2017), Hungary (2009), Iceland (2012), Ireland (2015), Malta (2015), the Netherlands (2014), Norway (2016), Spain (2007), Sweden (2013), British Columbia (Canada) (2014), Manitoba (Canada) (2014), Newfoundland and Labrador (Canada) (2016), Nova Scotia (Canada) (2015), Prince Edward Island (Canada) (2016), Quebec (Canada) (2016), Saskatchewan (Canada) (2016), California (US) (2013), Connecticut (US) (2015), Hawaii (US) (2015), Maryland (US) (2015), Oregon (US) (2013), New York State (US) (2014),

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558 See Kwan Kai-man, *同性與變性 – 評價同性戀運動和變性人婚姻* (in Chinese, transliterated as “Homosexuality and Transsexualism – Commenting on Homosexual Movement and Transsexual Marriage”), June 2015, at 282.

559 See news report of *The Guardian*, “Vietnam law change introduces transgender rights”, 24 November 2015.

560 See Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, 19 *Mich J Gender & L* 373 (2013), at 410.

561 Some would say that the breakthrough of legal development begun since the landmark ECtHR decision in *Goodwin v United Kingdom* (2002) 35 EHRR 18, 11 July 2002.

Pennsylvania (US) (2016), District of Columbia (US) (2013), Vermont (US) (2011), Washington (US) (2008), Argentina (2012), Bolivia (2016), Colombia (2015), Ecuador (2016), Uruguay (2009), Mexico Federal District (2014).

6.56 In a number of jurisdictions having surgical and sterilisation requirements for gender recognition, it seems that the courts have increasingly subjected medical intervention conditions to strict scrutiny, and there are overseas cases in which the courts have overturned the mandatory SRS requirements for legal gender recognition. Recent judgments having this effect were handed down in the courts in India (April 2014), South Korea (March 2013), Italy (July 2015), Ontario (Canada) (April 2012), Turkey (March 2015) and Germany (Jan 2011). Most of these decisions were reached on the grounds that SRS and sterilisation are incompatible with the concept of physical integrity enshrined in the relevant national constitution or international human rights standards. The related court rulings will be examined in Argument (2) below (concerning the arguments from the human rights perspective for removing SRS requirements,) and are illustrated in Annex C of this Consultation Paper.

6.57 The removal of SRS and sterilisation requirements has been supported by transgender advocacy groups and international human rights bodies on the grounds of reflecting the realities of the gender transition process and conforming to medical best practices. The Danish government, upon passing the self-determination gender recognition law in 2014, commented that the move was part of an international trend towards “*easing the conditions for legal sex change(s)*.”<sup>562</sup> Arja Voipio, Transgender Europe Co-Chair, remarked, at the time of the passage of the Maltese Act on gender recognition in April 2015,<sup>563</sup> that “[d]emanding sterility, divorce, a mental health diagnosis in legal gender recognition or completely lacking procedures are more and more an unacceptable thing of the past. Lawmakers in the rest of Europe should take inspiration from this trail-blazer for swift action.”<sup>564</sup>

#### *Argument (2): Human rights implications of an SRS requirement*

6.58 Some have argued that the requirement of SRS as a precondition for legal gender recognition constitutes torture or cruel, inhuman or degrading treatment. The right to be free from torture or cruel, inhuman or degrading treatment is protected by Article 3 of the HKBOR which is identical to Article 7 of the ICCPR. Also relevant are Articles 2(1) and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 1(1) of that Convention provides for a definition of “*torture*”. Other forms of ill-treatment which fall short of torture must attain “*a minimum level of severity*” which usually involves actual bodily injury or intense physical or mental suffering if they are to fall within the scope of “*cruel,*

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562 See news report of *Autostraddle*, “Denmark’s New Law Makes Legal Gender Recognition A Lot Easier”, 4 September 2014.

563 The Gender Identity, Gender Expression and Sex Characteristics Act.

564 See news report of *TGEU*, “Malta Adopts Ground-breaking Trans and Intersex Law”, 1 April 2015.

*inhuman or degrading treatment.*"<sup>565</sup>

6.59 The freedom from torture and cruel, inhuman or degrading treatment includes freedom from any forced or coerced medical or psychological treatments or procedures. After noting that transgender persons in many countries were required to undergo sterilisation surgeries, such as gender-confirming surgery or gender reassignment surgery, as a prerequisite to enjoy legal recognition of their preferred gender, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment recommended in 2013, in relation to LGBTI persons, that all States "*repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, 'reparative therapies' or 'conversion therapies', when enforced or administered without the free and informed consent of the person concerned.*"<sup>566</sup> It has been suggested that the recommendation is significant because no court or human rights body has argued before that the practice against transgender people amounts to torture or cruel, inhuman or degrading treatment.<sup>567</sup>

6.60 In 2014, an interagency statement on elimination of forced, coercive and otherwise involuntary sterilisation was issued by seven international bodies.<sup>568</sup> The interagency statement includes a list of specific suggestions after reviewing the available information on involuntary, coerced and forced sterilisation and the human rights implications. One of the suggestions is to "[e]nsure that sterilization, or procedures resulting in infertility, is not a prerequisite for legal recognition of preferred sex/gender."<sup>569</sup> As regards health services, it was suggested that:

*"In obtaining informed consent, take measures to ensure that an individual's decision to undergo sterilization is not subject to inappropriate incentives, misinformation, threats or pressure. Ensure that consent to sterilization is not made a condition for*

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565 *Ubamaka Edward Wilson v Secretary for Security* [2013] 2 H.K.C. 75 (CFA), paragraphs 172-173.

566 See Juan E Méndez, United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (1 February 2013, A/HRC/22/53), at paragraph 88.

567 Micah Grzywnowicz, "Consent Signed with Invisible Ink: Sterilization of Trans\* People and Legal Gender Recognition", in *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report*, American University Washington College of Law, Center for Human Rights & Humanitarian Law: *Anti-Torture Initiative* (2014), pp 73-81, at 80.

568 Namely, Office of the High Commissioner for Human Rights, United Nations Entity for Gender Equality and the Empowerment of Women, Joint United Nations Programme on HIV and AIDS, United Nations Development Programme, United Nations Population Fund, United Nations Children's Fund and the World Health Organisation. The statement deals with forced, coercive and otherwise involuntary sterilisation of women, women living with HIV, ethnic minorities girls and women, persons with disabilities, transgender persons and intersex persons.

569 OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO, "Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement" (2014), at 13.

*access to medical care (such as HIV or AIDS treatment, vaginal or caesarean delivery, abortion or gender-affirming treatment) or for any other benefit (such as recognition of identity, medical insurance, social assistance, employment or release from an institution).<sup>570</sup>*

6.61 In a report published in May 2015, the United Nations High Commissioner for Human Rights stated that Member States have an obligation to protect LGBTI persons from torture and other ill-treatment in all settings,<sup>571</sup> adding that “*medical procedures that can, when forced or otherwise involuntary, breach the prohibition on torture and ill-treatment include ‘conversion’ therapy, sterilization, gender reassignment ...*”<sup>572</sup>

6.62 On 13 May 2015, a group of United Nations and international human rights experts<sup>573</sup> called for an end to discrimination and violence against LGBTI young people and children, urging governments worldwide to protect these young people and children from violence and discrimination, and to integrate their views on policies and laws that affect their rights. In particular, the experts noted that:

*“In some countries, young LGBT persons are subjected to harmful so-called ‘therapies’ intended to ‘modify’ their orientation or identity. Such therapies are unethical, unscientific and ineffective and may be tantamount to torture. Young transgender people also lack access to recognition of their gender identity, and are subjected to abusive procedures, such as sterilization or forced treatment.”<sup>574</sup>*

6.63 Moreover, the Yogyakarta Principles<sup>575</sup> and the WPATH’s

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570 Same as above, at 14.

571 Report of the United Nations High Commissioner for Human Rights, “Discrimination and violence against individuals based on their sexual orientation and gender identity”, A/HRC/29/23, 4 May 2015, paragraphs 13 and 14.

572 Same as above, paragraph 38.

573 The experts include: United Nations Committee on the Rights of the Child (CRC); Mr Philip Alston, Special Rapporteur on extreme poverty and human rights; Mr Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association; Mr David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Mr Dainius Pūras, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Mr Michel Forst, Special Rapporteur on the situation of human rights defenders; Mr Juan Méndez, Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment; Special Representative of the United Nations Secretary-General on Violence against Children, Ms Marta Santos Pais; Inter-American Commission on Human Rights (IACHR); African Commission on Human and Peoples’ Rights (ACHPR); Ms Reine Alapini-Gansou; Special Rapporteur on Human Rights Defenders in Africa; Council of Europe Commissioner for Human Rights; Mr Nils Muižnieks.

574 OHCHR’s Press Release of 13 May 2015, “Discriminated and made vulnerable: Young LGBT and intersex people need recognition and protection of their rights – International Day against Homophobia, Biphobia and Transphobia - Sunday 17 May 2015”.

575 See discussion at paragraph 4.162, above. Principle 3 of the Yogyakarta Principles

statements on medical necessity<sup>576</sup> and identity recognition<sup>577</sup> have also called for the removal of requirements of surgery or sterilisation as conditions of identity recognition.

6.64 In Europe, the Council of Europe Commissioner for Human Rights was critical of the requirement that a transgender person must follow a medically supervised process of gender reassignment and/or be rendered surgically irreversibly infertile before the person may have his/her sex and first name in identity documents changed.<sup>578</sup> In a recommendation on measures to combat discrimination on the grounds of sexual orientation or gender identity adopted in 2010, the Committee of Ministers of the Council of Europe recommended that prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove “*abusive*” and disproportionate requirements.<sup>579</sup>

6.65 Further, in a resolution on forced sterilisations and castrations adopted in 2013, the Parliamentary Assembly of the Council of Europe declared that “*coerced, non-reversible sterilisations and castrations constitute grave violations of human rights and human dignity*”, and cannot be accepted in Council of Europe Member States.<sup>580</sup> Subsequently, in a resolution on discrimination against transgender people in Europe adopted in April 2015, the Parliamentary Assembly stated that it is concerned about the violations of fundamental rights, “*notably the right to private life and to physical integrity, faced by transgender people when applying for legal gender recognition; relevant procedures often require sterilisation, divorce, a diagnosis of mental illness, surgical interventions and other medical treatments as preconditions*.”<sup>581</sup> It called on Member States to “*abolish sterilisation and other compulsory medical treatment, including a mental health diagnosis, as a necessary legal requirement to recognise a person’s gender identity in laws*

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provides that: “*No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.*”

576 World Professional Association for Transgender Health, “Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.”, 21 December 2016.

577 WPATH, press release of 16 June 2010 on Identity Recognition Statement; WPATH, 2015 Statement on Identity Recognition, dated 19 January 2015.

578 Thomas Hammarberg, “Human Rights and Gender Identity”, CommDH/IssuePaper (2009) 2, at 18.

579 Recommendation CM/Rec(2010)5, Appendix, paragraph 20, and Explanatory Memorandum, Section IV, paragraphs 20 to 21.

580 Resolution 1945 (2013), “Putting an end to coerced sterilisations and castrations”; text adopted by the Parliamentary Assembly on 26 June 2013 (24th Sitting), paragraph 1. The Parliamentary Assembly considered that although there had been rare cases of sterilisations in Member States in the most recent past, there was “*a small but significant number of both sterilisations and castrations*” which would fall under the definition of “*coerced*” and these are mainly directed against transgender persons (paragraph 4). The Parliamentary Assembly urged the Member States to revise their laws and policies as necessary to ensure that no one could be coerced into sterilisation in any way for any reason (paragraph 7.1).

581 Resolution 2048 (2015), “Discrimination against transgender people in Europe”; text adopted by the Parliamentary Assembly on 22 April 2015 (15th Sitting), paragraph 3.

*regulating the procedure for changing a name and registered gender.*<sup>582</sup>

6.66 The SRS requirement has been challenged before the courts and tribunals in various jurisdictions. In most cases, the grounds of challenge are mainly based on the right to personal or physical integrity of transgender persons, the right to private and family life, and/or the right to non-discrimination. The right to recognition as a person before the law<sup>583</sup> and the right to the enjoyment of the highest attainable standard of physical and mental health<sup>584</sup> are also implicated. A summary of some recent overseas case-law on the requirements for transgender persons to undergo SRS and/or sterilisation is set out in Annex C of this Consultation Paper. The IWG stresses that the summary at Annex C is provided solely for reference. The IWG does not express any view on the decisions or their reasoning.

6.67 In Hong Kong, the CFA in *W's* case observed that SRS involves “*very extensive and irreversible changes to a person’s physical state*”.<sup>585</sup> The CFA left open the question of whether transsexual persons who have undergone less extensive treatment might also qualify for marriage in their assigned gender but Ma CJ and Ribeiro PJ said (Lord Hoffmann NPJ concurring):

*“... a bright line test applied universally is inevitably likely to produce hard cases in certain circumstances unless special provision is made. Moreover, as Lord Nicholls points out [in *Bellinger v Bellinger*<sup>586</sup>], drawing the line at the point where full SRS has been undertaken may have an undesirable coercive effect on persons who would not otherwise be inclined to undergo the surgery.*

*It is with such disadvantages in mind that we have refrained, at least at this stage, from attempting any judicial line-drawing of our own, contenting ourselves with declaring that a person in *W's* post-operative situation does qualify and leaving it open whether and to what extent others who have undergone less extensive surgical or medical intervention may also qualify.”<sup>587</sup>*

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582 Resolution 2048 (2015), paragraph 6.2.2.

583 Article 13 of the HKBOR.

584 Article 12 of the International Covenant on Economic, Social and Cultural Rights.

585 The evidence given by Dr Ho Pui-tat was that not all transsexual patients choose to undertake SRS. The level of psychological discomfort in people with gender identity disorder differs, ranging from mild gender dysphoria to severe transsexualism. Those less severely afflicted may decline surgery. There may also be social constraints, for instance, a desire not to put good careers at risk by undergoing SRS, or the patient may not be willing to face “*the painful process of surgery with what may be an uncertain outcome, especially in the case of female to male transsexuals where the surgery is more complex and difficult*” (See paragraph 12 of the Court of Final Appeal judgment in the *W* case).

586 A summary of this case can be found at paragraph 3.38 of this Consultation Paper.

587 *W v Registrar of Marriages* [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013), paras 136 and 137.

6.68 In its concluding observations on the fifth periodic report of China with respect to the HKSAR adopted on 3 December 2015, the Committee Against Torture expressed concerns about: (i) transgender persons being required to have completed SRS, which includes the removal of reproductive organs, sterilisation and genital reconstruction, in order to obtain legal recognition of their gender identity; and (ii) intersex children<sup>588</sup> being subjected to unnecessary and irreversible surgery to determine their sex at an early stage. The Committee recommended that:

*“Hong Kong, China should:*

- (a) Take the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex persons, including by removing abusive preconditions for the legal recognition of the gender identity of transgender persons, such as sterilisation;*
- (b) Guarantee impartial counselling services for all intersex children and their parents, so as to inform them of the consequences of unnecessary and non-urgent surgery and other medical treatment to decide on the sex of the child and the possibility of postponing any decision on such treatment or surgery until the persons concerned can decide by themselves;*
- (c) Guarantee that full, free and informed consent is ensured in connection with medical and surgical treatments for intersex persons and that non-urgent, irreversible medical interventions are postponed until a child is sufficiently mature to participate in decision-making and give full, free and informed consent;*
- (d) Provide adequate redress for the physical and psychological suffering caused by such practices to some intersex persons.”<sup>589</sup>*

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

6.69 It has been discussed earlier in this Consultation Paper (see paragraphs 6.9 to 6.11), that it is possible that, for various reasons, psychological or psychiatric misdiagnosis of gender identity disorder or gender dysphoria may occur. The misdiagnosis may lead to possible mistreatment or

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588 In the context of its extensive international review of gender recognition schemes, the IWG is aware that there have been developments in some overseas jurisdictions relating to the recognition of intersex persons. The extent to which this is an issue to be addressed by the IWG, if at all, has yet to be determined.

589 Committee against Torture, “Concluding observations on the fifth periodic report of China with respect to Hong Kong, China”, adopted at the 1392 and 1393 meetings held on 3 December 2015 (CAT/C/SR. 1392 and 1393), at paragraphs 28 and 29.

wrongful decisions on SRS. If, subsequent to gender recognition, some people regret having undergone SRS and wish to change back to their biological sex, there might not be any flexibility for them to do so, as SRS already performed is, in most cases, irreversible.

6.70 There are statistics (although limited) concerning sex transition regrets by people having undergone SRS. It was observed in a US study that 1 to 2% of those who have undergone SRS regret it.<sup>590</sup> Another report published in 2011 by the American Psychological Association<sup>591</sup> revealed that in a review of over 1,400 individuals being studied in the period between 1961 and 1991, big regrets such as reversion to the original gender role, rather than some lesser degree of regret or ambivalence, were estimated to have occurred in 1 to 1.5% of patients.<sup>592</sup> In earlier literature, the German registry recorded in 1996 only one person out of 733 who had applied for legal change of sex between 1981 and 1990 subsequently applying for reversal (suggesting profound regret), and 57 out of 1,422 adults who had obtained gendered changes of their first name requesting a second legal name change (suggesting some degree of regret).<sup>593</sup> In 1997, one Swedish study found a 6% regret rate.<sup>594</sup> These statistics could not be said to provide robust evidence on regret rates, and interpretation of these findings should be limited by the analysis of non-random samples based on their recruitment and/or response rate. Furthermore, it seems that some post-surgical regrets are attributed to the unsatisfactory quality of the surgical results, such as function and appearance. However, the information might suggest that SRS could have resulted from misdiagnosis and, more importantly, misconception by the person concerned regarding his or her actual gender identity, which might then develop into a desire for gender reassignment.<sup>595</sup>

6.71 Walt Heyer provided some sample cases of sex change regret.<sup>596</sup>

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590 See Lawrence AA. (2003), "Factors associated with satisfaction or regret following male-to-female sex reassignment surgery", *Archives of Sexual Behavior*, 32, at 299-315.

591 The American Psychological Association is a scientific organisation in the United States. Its official website is at: <http://www.apa.org/about/index.aspx>.

592 See Byne, W, Bradley, S J, Coleman, E, Eyler, A, Green, R, Menvielle, E J, Meyer-Bahlburg, HFL, Pleak, R & Tompkins, D (2012), "Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder", *Archives Of Sexual Behavior*, 41(4), 759 to 796, at 781.

593 See Weitze C, Osburg S, "Transsexualism in Germany: empirical data on epidemiology and application of the German Transsexuals' Act during its first ten years", *Arch Sex Behav* 1996; 25:409-425.

594 Eldh J, Berg A, Gustafsson M, "Long-term follow up after sex reassignment surgery", *Scand J Plast Reconstr Surg Hand Surg* 1997; 31:39-45. A long-term follow up of 136 persons operated on for sex reassignment was done to evaluate the surgical outcome. Social and psychological adjustments were also investigated by a questionnaire in 90 of these 136 persons.

595 Nevertheless, it is revealed that review of the available literature also documents a downward trend in rates of post-surgical regrets over the last three decades. See Byne, W, Bradley, S J, Coleman, E, Eyler, A, Green, R, Menvielle, E J, Meyer-Bahlburg, HFL, Pleak, R & Tompkins, D (2012), "Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder", *Archives Of Sexual Behavior*, 41(4), 759 to 796, at 782.

596 See Walt Heyer, *Paper Genders: Pulling the Mask Off the Transgender Phenomenon*,



Alan Finch, an Australian person who was born a male, decided to become a woman at the age of 19, with the support of health-care professionals as well as his mother. However, it was later found that the diagnosis of gender identity disorder may have been wrong, and what he needed was psychotherapy instead of sex change surgery. It was observed that he had attempted to take refuge in womanhood because he grew up without a father which caused him to be unable to “*learn from his father how to be anything that he wanted to be.*” Heyer revealed that at the age of 30, Alan returned to living in his birth gender, with a mutilated body. According to Heyer, during the period of undergoing pre-surgery psychiatric testing, Finch would try to skew his answers for the purpose of qualifying for the surgery because of his wrong belief that he would like to become a woman and this could solve his identity crisis. Heyer stated that:

*“Many transsexuals are psychologically in need. They push their way into getting approved for surgery, buying into the lie that life will be sunny on the other side. They do not have a clue about the rightness or the wrongness of surgery and do not understand the depth of their psychological disorders.”*

6.72 It has been argued that psychiatric misdiagnosis leading to sex change regret might be attributed to a lack of reliability of the current diagnosis practice and standards for diagnosis. Dr Lai Hak-kan, Research Assistant Professor of the School of Public Health of the University of Hong Kong, commented in his submissions to the Bills Committee on the Marriage (Amendment) Bill 2014,<sup>597</sup>

*“When regrets occur, they may reflect difficulties in making the transition to a different lifestyle because of appearance or limited social skills. These problems appear to be more common in patients with late-onset transsexuality, who have lived in their natal sex for a long-time.*

*The most critical concern for legislation for this group of patients who suffers from gender identity disorder is the uncertainty of the effectiveness of the treatment since none have conclusively demonstrated that medical interventions can resolve gender dysphoria [Cohen-Kettenis and Gooren 1999<sup>598</sup>; Smith et al 2005<sup>599</sup>; Murad et al 2010<sup>600</sup>]. Current practices are only based on expert opinion without support of large-scale population*

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*Make Waves Publishing*, 2nd printing, June 2011, at 86 to 87.

597 LC Paper No. CB(2)1359/13-14(07), available at:  
<http://www.legco.gov.hk/yr13-14/english/bc/bc52/papers/bc520429cb2-1359-7-e.pdf>.

598 See Cohen-Kettenis, PT, & Gooren, L J G (1999), “Transsexualism: a review of etiology, diagnosis and treatment”, *Journal of Psychosomatic Research*.

599 See Smith, Y L, Van Goozen, S H, Kuiper, A J, & Cohen-Kettenis, PT (2005), “Sex Outcomes and predictors of treatment for adolescent and adult transsexuals”.

600 See Murad, M, Elamin, M, Garcia, M, Mullan, R, Murad, A, Erwin, P, et al. (2010), “Hormone therapy and sex reassignment: A systematic review and meta-analysis of quality of life and psychosocial outcomes”, *Clinical Endocrinology*.

studies [Hembree et al 2009<sup>601</sup>]. Unresolved questions are whether there is an age at which cross-sex hormonal treatment should be discontinued [Gooren et al 2008<sup>602</sup>] and whether hormone replacement should be avoided in older subjects.”

6.73 Similar views have been expressed by Dr Madeline Deutsch, Associate Professor of Clinical Family & Community Medicine, University of California San Francisco:

*“Transgender individuals seeking gender-affirming surgery must fulfil certain criteria for the particular procedure sought, as described in the WPATH Standards for the Care of Transgender, Transsexual, and Gender Nonconforming People, Seventh Version (SOCv7). These criteria focus on issues of diagnosis and capacity to provide informed consent. For example, the SOCv7 criteria for genital reconstruction procedures include the presence of persistent and well documented gender dysphoria, capacity to make an informed decision and consent to treatment, age of majority, and reasonably good control of any coexisting significant medical or mental health conditions. ... While these recommendations have face validity and have formed the basis of gender-affirming preoperative evaluations for decades, it is important to note that they are not based on evidence. No studies have been conducted to test the current criteria’s impact on postoperative satisfaction, outcomes, or complications. No citations were provided to support the initial 1979 recommendations, which contain the same core recommendations as are found in SOCv7.<sup>603</sup> ... In reality these recommendations were assembled based on the anecdotal experiences of pioneers in the field, who developed their practices based on their empiric experience and clinical judgment. Lost in this mental health model is a holistic assessment of an individual’s overall state of psychosocial functioning, capacity, and support system.”<sup>604</sup>*

*Argument (4): SRS is not a medical necessity for many transgender persons*

6.74 Though some transgender people do wish to have SRS, there is

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601 Hembree WC, Cohen-Kettenis P, Delemarre-van de Waal HA, Gooren LJ, Meyer WJ, Spack NP, Tangpricha V, Montori VM, “Endocrine treatment of transsexual persons: An endocrine society clinical practice guideline”, *Journal of Clinical Endocrinology & Metabolism* 2009; 94(9): 3132 to 3154.

602 Cohen-Kettenis PT, Delemarre-van de Waal HA, Gooren LJG, “The treatment of adolescent transsexuals: Changing insights”, *The Journal of Sexual Medicine* 2008; 5(8): 1892 to 1897.

603 See State of California Department of Managed Health Care, Letter No. 12-K, “Gender Nondiscrimination Requirements”, 9 April 2013.

604 Madeline B Deutsch, MD MPH, “Gender-affirming Surgeries in the Era of Insurance Coverage: Developing a Framework for Psychosocial Support and Care Navigation in the Perioperative Period”, *Journal of Health Care for the Poor and Underserved* 27 2016; 27(2):386-91.

an argument that for many it is not necessary or desirable, or even possible. This is why medical practices such as those advocated by the WPATH and the American Psychological Association presently do not mandate SRS, but instead regard it as one treatment option among many, to be considered within each patient's individual context, and have disavowed conditioning legal gender identity recognition upon SRS.<sup>605</sup>

6.75 It has been argued that transgender persons may have a variety of medical, personal and practical reasons for not seeking or being able to undergo SRS. As observed by Lisa Mottet, the following are some common barriers and considerations:

- “(1) Some individuals cannot afford the surgery they desire, especially given that a large majority of private and public health insurance plans do not currently cover sex reassignment surgeries.*
- (2) Many people have medical conditions that make surgery risky or contraindicated.*
- (3) Many people who want and can afford surgery do not pursue it because they fear complications.*
- (4) Many individuals are unsure whether the surgery will provide the desired physical or aesthetic result, especially given individual variation and the chance of achieving an optimal result.*
- (5) Some are prevented by practical considerations involved in undergoing major surgery, including having difficulty in taking several weeks off from work or school, having care-giving responsibilities for family members, or lacking caregivers for themselves following surgery.*
- (6) Some hold sincere religious beliefs, or personal beliefs, against surgical body modification.*
- (7) Some have family members or other loved ones who would be upset if they had the surgery, and thus forgo surgeries to maintain these relationships.*
- (8) For some, maintaining reproductive capacity is important and many surgeries eliminate this possibility.*
- (9) Some are denied access to needed approval or diagnosis ‘letters’ from psychologists when their life experiences do not neatly fit the ‘transsexual’ pattern, when they do not match closely enough the stereotypes of man or woman, or when they are not sufficiently ‘clinically distressed’.*
- (10) A significant percentage of transgender people have determined that surgery is not necessary for them to be comfortable living in their new gender. Many transgender*

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605 See WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 5, 165, 171 (2011). See also WPATH, “Identity Recognition Statement”, 16 June 2010. See also American Psychological Association, “Transgender, Gender Identity & Gender Expression Non-Discrimination”, August 2008, available at: <http://www.apa.org/about/policy/transgender.aspx>.

*people determine that the alternations they make to their gendered appearance, names, and pronouns give them the well-being they need without further medical treatment.”<sup>606</sup>*

6.76 In its commentary on the then Draft Gender Recognition Bill 2003 (UK), the Joint Committee on Human Rights noted that forced medical intervention inevitably discriminates because – for medical or financial reasons – some applicants will never be able to access the required procedures.<sup>607</sup> In rejecting surgery and sterilisation within the UK GRA, Parliament affirmed that gender recognition should be subject only to the applicant taking “*decisive steps to live fully and permanently in their acquired gender*”, and it should not be reserved to those who “*look the part*.”<sup>608</sup>

6.77 Notably, in the opinion of Hon Michael Kirby, former Justice of the High Court of Australia:

*“The possibility, from at least the 1990s, of radical hormone therapy and gender reassignment surgery (GRS) has presented options which a [transgender person] might desire. However, such options are not, on any account, to be embarked upon lightly:*

*The surgery is highly invasive;  
The surgery results in sterilisation, destroying the possibility of subsequent genetically related children;  
The surgery requires lifelong treatment, care and maintenance;  
A significant 1% risk of failure in the surgery is recorded; and  
Hormonal and non-invasive therapy has its own side effects and adverse consequences.”<sup>609</sup>*

6.78 Given the above views, it has been argued that pre-conditioning legal gender recognition on SRS may cause transgender people to be subject to harassment, due to their gender markers on their identification documents not matching their external appearance. It may also be argued that a gender recognition policy imposing a SRS prerequisite would interfere with medical autonomy rights by requiring transgender individuals who would prefer not to undergo SRS to decide between honouring that personal preference and

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606 Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, 19 *Mich J Gender & L* 373 (2013), at 408-409.

607 Joint Committee on Human Rights, *Nineteenth Report of Session 2002–03 (Draft Gender Recognition Bill) (2002–03)*, HL Paper No.188-I, HC Paper No.1276-1, p. 13.

608 David Lammy, “Parliamentary Under-Secretary of State for Constitutional Affairs”, 418 *PARE. DEB., H.C.* (6th ser.) (2004), p. 53.

609 Michael Kirby, “Transgender Law Reform: Ten Commandments of Hong Kong”, unpublished, *United Nations Development Programme High-Level Roundtable on Gender Identity Rights and the Law in Asia and the Pacific, Hong Kong*, 2 October 2014 (organised by the United Nations Development Programme and HKU Faculty of Law’s Centre for Comparative and Public Law).

undergoing unwanted surgery simply to achieve legal recognition of their gender status.<sup>610</sup> Some transgender activists may dismiss as nonsensical the contention that the procedure is what is wanted by the persons involved and they have, in any event, the right to object to such procedures. Those opposing this view might hold that the desire to maintain the existing family law structures cannot justify the deep and profound interference with – and indeed violation of – the physical integrity of those immediately concerned.<sup>611</sup>

6.79 In the view of Micah Grzywnowicz, a transgender activist,<sup>612</sup> a system requiring transgender persons to undergo SRS is “*unjust*” because they are unable to make decisions about their own bodies. He says:

*“When cisgender men suffer from a condition called gynecomastia, which results in breast tissue growing in ‘abnormal amounts,’ they are provided, without any additional tests or diagnosis, with chest reconstruction operations in order to create a masculine, flat chest. Moreover, reconstruction surgeries, for cisgender individuals, of breasts, penises, or testicles lost (due to illness or accident) are also performed without any further diagnosis. At the same time, no one questions those people’s gender identity or gender markers in their legal documents, in case they choose not to go through those procedures. In that case, one could question: is a man who lost his testicles in an accident still a man? Or is a woman who lost her breasts due to cancer still a woman? The only difference between trans\* and cisgender individuals is that trans\* people seem to be challenging accepted gender norms, whereas cisgender persons seem to try to ‘fix’ their bodies to fit those gender norms.”*<sup>613</sup>

6.80 The Interdepartmental Working Group on Transsexual People set up by the Home Office in the UK had considered in 2000 whether sterility should be a pre-condition to gender recognition. They stated:

*“Several countries which recognise a change of gender require a*

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610 See Harvard Law Review: Volume 127, 6 Number 2013 - April 2014, at 1869. See also Thomas Hammarberg, “Human Rights and Gender Identity”, (CommDH/ Issue Paper (2009)), at 19 (*sterilisation would undermine transgender families and forces individuals to choose between recognition and their right to reproduce*).

611 See Centre for Medical Ethics and Law, Faculty of Law of the University of Hong Kong, “Submission to the Legislative Council and the Security Bureau of the Hong Kong SAR on the Legal Status of Transsexual and Transgender Persons in Hong Kong” [in Relation to the Marriage (Amendment) Bill 2014] (Occasional Paper No 1, March 2014; LC Paper No. CB(2)1052/13-14(01)), at 4 and 5.

612 Micah Grzywnowicz is a transgender activist involved in LGBTIQ movements since 2005, and is one of the Executive Board members of the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), which is a European NGO.

613 Micah Grzywnowicz, “Consent Signed with Invisible Ink: Sterilization of Trans\* People and Legal Gender Recognition”, in *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture’s 2013 Thematic Report* (2014), Washington College of Law, Center for Human Rights & Humanitarian Law, at 78.

*transsexual person to be sterile before recognition can be given (see, for example, Sweden and the Netherlands). The transsexual community however is opposed to such a provision. Their view is that it is unnecessary because, after a few years, the hormone treatment undertaken by transsexual people will have rendered them infertile. They also suggest that the requirement is discriminatory as some transsexual people, for health reasons, cannot take the high hormone levels normally prescribed, nor can they necessarily undergo extensive surgery.*

*It is certainly the case that not all transsexual women are medically in a position to undergo sufficient treatment (whether surgery or high doses of hormones) for fertility to cease. And surgical options for transsexual men will not irretrievably remove the option of fertility at some later date - the substantial medical risks involved in hysterectomy, phalloplasty and the surgical closing of the vaginal opening are such that many or most transsexual men choose to forgo these surgical procedures.”<sup>614</sup>*

6.81 Some people have asserted that there is a spectrum of severity for gender identity disorder or gender dysphoria, and persons having the most severe symptoms would have a stronger desire to undergo transition to the opposite gender typically through hormones and surgery. Therefore, it is arguable that current medical thinking has rejected the one-size-fits-all mentality that was common in early treatment of transgender people.<sup>615</sup> Further, the WPATH has increasingly encouraged and required individualised evaluation and individualised treatment. Its latest statement on identity recognition in 2015 has called for the removal of surgery or sterilisation as requirements to change legal gender.<sup>616</sup> In addition to the WPATH, the American Medical Association released a statement in 2014 stating that it “*adopted new policy supporting the elimination of any government requirement that an individual must have undergone surgery in order to change the sex indicated on a birth certificate.*”<sup>617</sup>

6.82 Some have suggested that, for transgender persons who are unable to undergo surgery owing to health problems, exemptions could be provided for these applicants for gender recognition. However, practical problems may arise from this suggestion; for example, the list of exemptions would be non-exhaustive as many disabilities and diseases might need to be included and there might be challenges in court that some justifiable exemptions were not included.

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614 See the UK Home Office, *Report of the Interdepartmental Working Group on Transsexual People* (April 2000), at paragraphs 4.12 to 4.13 (available at: <http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf>).

615 Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, *19 Mich J Gender & L* 373 (2013), at 405.

616 WPATH, “2015 Statement on Identity Recognition,” 19 January 2015.

617 American Medical Association, “AMA Calls for Modernizing Birth Certificate Policies”, dated 9 June 2014.

*Argument (5): Concerns about possible fraud or security is not evidentially supported and security can be enhanced by not imposing SRS for recognition*

6.83 Many in the community may express anxiety that some individuals could disguise their gender in order to enter sex-segregated public accommodation to exploit the vulnerability of other bathroom users, especially women and girls. There are counter-arguments against such allegations, however. Professor Kenji Yoshino noted a potential objection against this fraud concern:<sup>618</sup>

*“There is little evidence that transgender individuals present a security risk to women, while there is a great deal of evidence that transgender individuals themselves are at immense risk if they are not given accommodations. To the extent that privacy concerns rest on a fear of sexual objectification, they rely on a specious assumption of universal heterosexuality. Fraud seems unlikely when a perpetrator would have to live two years in another gender to effectuate his ends. National security would not be undermined if the original records were sealed to all but those in charge of enforcement.”*

6.84 Another counterargument is that in jurisdictions where gender recognition laws are in place, nothing in such laws would make it legal to commit sexual assault or other sex related crimes in public facilities. In the US, some people claim that municipalities which already have legislation on non-discrimination on the grounds of gender identity, which allows transgender persons to go into the public bathrooms of their acquired gender, have not seen any increase in reports of bathroom assaults.<sup>619</sup>

6.85 It has also 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.<sup>620</sup> In response to the concern of some people that pre-operative transgender women may enter women’s bathrooms and changing rooms to sexually assault non-transgender women who are using those facilities, Lisa Mottet observed that:

*“As a general rule, transgender people who have not had genital surgery are very likely to go to great lengths to avoid having other*

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618 See Kenji Yoshino, “Sex and the City: New York City Bungles Transgender Equality”, *SLATE*, 11 December 2006.

619 See Sarah Morice-Brubaker (assistant professor of theology at Phillips Theological Seminary in Tulsa), “What The Conservative Christian “Fake-Trans Bathroom Creeper” Has To Do With Suburban Anxiety”, 30 June 2015, available at: <http://religiondispatches.org/what-the-conservative-christian-fake-trans-bathroom-creeper-has-to-do-with-suburban-anxiety/>.

620 Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, *19 Mich J Gender & L* 373 (2013), at 418.

*people observe their unclothed bodies. If they are able to do so, their bodily characteristics should not be considered relevant. If one is not able to keep their body private, the facility will learn of the person's bodily anatomy as a practical matter, typically through voluntary verbal disclosure. [FN: It is difficult to imagine an instance where a transgender woman, who still has male genitalia and who has struggled all her life to be seen as a woman by others, would walk into an open women's shower without attempting to conceal that area of her body.]*

*Individuals who believe that transgender people should complete surgery before being allowed to change their birth certificates often cite the protection of women as their main goal. More specifically, these individuals feel that transgender women who have not undergone surgery will enter women's bathrooms and locker rooms to sexually assault non-transgender women who also frequent those facilities. However, this concern is based on several incorrect assumptions, including that access to these facilities is currently based on the gender marker listed on a person's birth certificate.*

*In fact, the large majority of sex-segregated facilities do not maintain written policies with regard to restroom access. Although this is changing, the default rule is essentially a social one: if you look like a man, you can use the men's room and if you look like a woman, you can use the women's room.”<sup>621</sup>*

6.86 Another counterargument is that security and law enforcement agencies' ability to protect the public could be enhanced by having gender marker policies that are not based on surgeries, but are instead based on the gender to which a person has transitioned which accords with his or her external gender expression. As Lisa Mottet observed.<sup>622</sup>

*“Transgender people often report being delayed, detained, or otherwise harassed by law enforcement officers because the gender marker on their ID does not match their external gender expression. Sometimes officers are concerned the ID is fraudulent and take various steps to determine the legitimacy of the document. This extra scrutiny consumes law enforcement resources that are better spent identifying truly counterfeit identity documents or dealing with other law enforcement duties.*

*A second advantage for law enforcement of accurate, up-to-date gender markers involves situations in which police officers respond to crimes, identify witnesses, or attempt to locate persons of interest. The officer attempting to locate someone is better served by knowing the gender that the person is known as*

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621 Same as above, at 418 to 419.

622 Same as above, at 415.



*by friends and acquaintances, who may be confused or unhelpful when the officer asks about the “woman” or “man” who lives next door. Similarly, when the officers interact with a victim or a witness, they are more likely to alienate a transgender man, with a female designation on his license, by using the terms “ma’am” and “Ms.,” or by using “sir” or “Mr.” for a transgender woman. This alienation could make the transgender person, or others aware of the disrespect shown, less likely to trust, inform, and work with police in the instant case or in future situations.*

*In conclusion, there are no realistic fraud or security concerns that are addressed by maintaining a surgery requirement.”*

6.87 There is a considerable body of literature and campaigning activism lobbying for gender-neutral public toilets.<sup>623</sup> However, to some transgender persons this idea might not be a solution as they might feel uncomfortable, belittled or even discriminated against by not being allowed to use as of right the toilets matching their acquired gender identity. It has been suggested that their insistence on being able to use such toilets and public accommodations may stem from their anxiety and desperate need for acceptance as a man or woman, as the case may be.<sup>624</sup> On the other hand, some people might contend that toilet provision should remain sex-segregated or take the form of individual cubicles that offer privacy and safety to all (especially female) users.<sup>625</sup> Conversely, there are voices from LGBTI community in favour of gender neutral bathrooms for avoidance of misunderstanding, harassment or hatred by other sex-segregated public facility users and/or security.<sup>626</sup> Also, some might argue that setting up gender neutral bathrooms would serve an educational purpose in reminding the public that the current binary gender categories are inadequate and unsatisfactory. Indeed, gender-neutral bathrooms are becoming increasingly common as a way of addressing the bathroom tension. In the US, for example, legislation was passed in May 2013 in Philadelphia that brought a number of protections, including the addition of gender-neutral restrooms in new or renovated city-owned buildings.<sup>627</sup> In the District of Columbia, all

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623 Case, Mary Anne (2010), “Why not abolish laws of urinary segregation?”, in Harvey Molotch, & Laura Noren (Eds.), “Toilet: Public restrooms and the politics of sharing” (pp. 211 to 225), *New York University Press*. See also Cavanagh, Sheila (2010), “Queering bathrooms: Gender, sexuality and the hygienic imagination”, *Toronto University Press*.

624 See, eg, Rebecca Stinson (a male-to-female transgender person), “I’m a Trans woman and I don’t want gender neutral toilets”, 24 March 2015, available at: <http://thetab.com/uk/northumbria/2015/03/24/im-a-trans-woman-and-i-dont-want-gender-neutral-toilets-7359>.

625 See Sheila Jeffreys, “The politics of the toilet: A feminist response to the campaign to ‘degender’ a women’s space,” *University of Melbourne*, VIC 3010, Australia, 7 June 2014, available at: <http://www.sheilajeffreys.com/wp-content/uploads/2014/08/toilet-article.pdfpublished-veersion.pdf>.

626 See, eg, a gender neutral bathroom survey conducted by San Francisco Human Rights Commission in 2001, available at: <http://www.makezine.enoughenough.org/bathroomsurvey.htm>.

627 See news report of *NBC10.com*, “Gender-Neutral Restrooms Become the Law”, 10

covered entities with single-occupancy restroom facilities are required to use gender-neutral signage for those facilities.<sup>628</sup>

6.88 Dr Scherpe notes that all legal processes in principle are at risk of being abused (eg, sham marriages for immigration purposes), but this has not led to calls for abolishing or restricting these processes. He therefore takes the view that potential abuse of legal gender recognition “*simply needs to be monitored like all other potential abuses.*”<sup>629</sup>

### ***Arguments in support of and against recognising SRS performed overseas***

6.89 If SRS were to be adopted as a pre-condition for gender recognition in Hong Kong, a question arises as to whether SRS performed overseas should be recognised. It should be noted that this issue differs from the issue of recognising a gender change which has been recognised in a foreign jurisdiction, which is a matter to be canvassed later in Chapter 7 of this paper.

6.90 As can be seen in Chapter 4 and Annex B, out of those jurisdictions we have examined which set SRS as a pre-condition for gender recognition, most do not specify whether SRS performed overseas would be recognised. A relatively small number of jurisdictions, including Western Australia, Ireland, Slovenia, and New Brunswick (Canada), have indicated that SRS performed overseas can be recognised.

6.91 Arguably, the acceptance of evidence of SRS undertaken overseas can provide more flexibility to transgender applicants who would like to go through the surgical procedures during gender transition and obtain gender recognition at a later date. They could seek SRS anywhere or in the jurisdictions authorised under the gender recognition scheme in consideration of their individual financial resources, and the quality of facilities and healthcare services of the jurisdiction(s) where they choose to undergo the SRS etc. A medical certificate confirming that the reassignment procedures have been done could be submitted as evidence for assessing the legal gender recognition.

6.92 However, some people might argue that the authenticity of a certification of SRS performed in some places could be in doubt. To give transgender persons the autonomy to choose wherever they want to undergo SRS could lead to difficulty in the local authority ascertaining the completion of transition. It might be possible to eliminate this doubt by requiring the applicant for gender recognition to be reassessed by a local medical

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May 2013, available at:  
<http://www.nbcphiladelphia.com/news/local/LGBT-Gender-Neutral-Restrooms-206932591.html>.

628 D.C. Mun. Regs. tit. 4. § 802.2 (2006).

629 Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 655.

practitioner. Yet, the applicant might be reluctant to have such a reassessment, deeming it unnecessary and an intrusion into personal privacy.

## **Issues for consultation on SRS and other medical requirements**

6.93 In view of the discussion in paragraphs 6.35 to 6.92 above, we invite views from the public on having a surgical requirement for gender recognition and related issues.

**Issue for Consultation 5: 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.

6.94 Separately, we also invite views from the public on further medical requirements or evidence for gender recognition.

**Issue for Consultation 6: 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 requirement or further evidence 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.

## CHAPTER 7

# NON-MEDICAL REQUIREMENTS FOR GENDER RECOGNITION

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### Introduction

7.1 This chapter examines the considerations which may be relevant to non-medical requirements for gender recognition, including requirements of: nationality, citizenship, residency or domicile; minimum age; marital status; and parental status.

7.2 As a matter of clarification, the possible arguments discussed in this chapter are solely for the purposes of consultation and do not necessarily represent the IWG's stance on any of the issues. No conclusion as to the IWG's stance should therefore be drawn from the wording and mode of presentation of this chapter, nor from the citing or referring to the comments, observations or arguments made by individuals or organisations mentioned in this chapter. It should also be stressed that pending the result of the consultation, the IWG has not reached any conclusion on any of the issues. Further, it should be borne in mind that the list of possible arguments discussed below is by no means exhaustive, and that the IWG is prepared to consider such other arguments as may be appropriate.

### Requirements related to nationality, citizenship, residency or domicile

7.3 The gender recognition schemes in many, although not all, jurisdictions impose requirements on the applicants with regard to their legal position or civil status such as nationality, citizenship, residency, domicile, etc. Such requirements are, however, not necessarily imposed, and a typical example is the UK GRA (examined in Chapter 3 of this Consultation Paper) under which no requirements of residency or citizenship are stipulated. This would indicate that any transgender person who lives in the UK and who fulfils the prescribed prerequisites under the UK GRA could become for all purposes recognised in the acquired gender (although a non-citizen will not receive a replacement birth certificate since he or she does not possess one in the UK registry). In considering questions as to whether such types of requirements should be imposed under a potential gender recognition scheme for Hong Kong (eg, as to whether foreigners should also be entitled to apply, and which civil status should be chosen), a global review is first presented below, followed by discussion of considerations from the legal perspective, including relevant conflict of laws implications.

## Global review

7.4 Different jurisdictions have different requirements for applicants for gender recognition with regard to their nationality, citizenship, residency or domicile. For example, Québec in Canada permits only a Canadian who has been domiciled in the province for at least one year to make an application for change of the designation of sex on the applicant's act of birth.<sup>630</sup> Germany allows applications by German nationals and stateless persons who have their main residence in Germany<sup>631</sup> and persons with a right of asylum or refugees domiciled in Germany. Taiwan,<sup>632</sup> Japan<sup>633</sup> and Slovenia<sup>634</sup> make citizenship a mandatory criterion for gender recognition. Finland,<sup>635</sup> New South Wales (Australia)<sup>636</sup> and New Zealand require applicants for gender recognition to be local citizens or residents.<sup>637</sup> In Manitoba, Canadian citizens residing in the province for at least one year are eligible to apply.<sup>638</sup> Sweden<sup>639</sup> and Switzerland<sup>640</sup> require applicants to be residents. Some jurisdictions, such as Poland,<sup>641</sup> Portugal<sup>642</sup> and Spain,<sup>643</sup> make nationality a mandatory requirement for applications for gender recognition.

7.5 For those jurisdictions where gender recognition effects a gender change on the applicants' birth certificates, being born in that jurisdiction or having their birth registered there is an indispensable prerequisite.<sup>644</sup> However, some countries expressly allow certain foreigners to apply for gender recognition under their domestic laws. For example, Germany allows applications by foreigners who have an indefinite right of residence in Germany, or foreigners who have a renewable residence permit and live lawfully in Germany on a permanent basis, whose home state has no equivalent law.<sup>645</sup> By a court decision in July 2006, foreigners who are present in Germany lawfully and not merely temporarily, where their home state does not contain comparable provisions, are entitled to make the application.<sup>646</sup>

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630 The Civil Code of Québec, section 71.

631 *Transsexuellengesetz*, the Law on Transsexuals of 10 September 1980 that entered into force on 1 January 1981.

632 Under the executive rules published by the Ministry of the Interior in 2008.

633 *Law 111* of July 2003, which took effect on 16 July 2004, called the "Act on Special Cases in Handling Gender for People with Gender Identity Disorder" (revised in June 2008).

634 Article 4 of the Register of Civil Status Act.

635 The Act on the Recognition of the Sex of Transsexual Individuals (*laki transseksuaalin sukupuolen vahvistamisesta*) (563/2002).

636 Births, Deaths and Marriages Registration Act 1995, section 32DA.

637 Part 5 (sections 27A to 33) and section 64 of the Births, Deaths, Marriages and Relationship Registration Act 1995.

638 The Vital Statistics Amendment Act, which received royal assent on 12 June 2014.

639 The Gender Recognition Act (reformed in 2012), section 3.

640 Article 42 of the Civil Code.

641 Polish Civil Code.

642 The Gender Identity Law (Law No 7/2011 of 15 March 2010).

643 *Ley 3/2007 Rectificacion registral de la sexo de las persona*.

644 Examples of these jurisdictions are all the Australian territories, Luxembourg, Malta and all the US States.

645 *Transsexuellengesetz*, the Law on Transsexuals of 10 September 1980 that entered into force on 1 January 1981.

646 *Bundesverfassungsgericht* 18.7.2006 (1 BvL 1/04 –1 BvL 12/04), FamRZ 2006, 1818.

7.6 Some jurisdictions do not stipulate in their gender recognition schemes *any* requirement as to the citizenship, residency, domicile or nationality of the person applying for legal recognition of gender change. The UK is one amongst them, as examined earlier in Chapter 3. Italy is another, where the court in a leading case<sup>647</sup> held that, as the related Italian Act<sup>648</sup> did not stipulate any requirement as to nationality, the general conflict of laws rules were applicable so that the law of the nationality of the applicant would principally determine the applicable rules.<sup>649</sup> However, the court went on to find that if the law of nationality did not allow a change of gender, then this constituted a breach of the Italian *ordre public*, and hence the Italian law was applicable. This effectively means that people of foreign nationality could successfully apply for a legal change of gender in Italy.<sup>650</sup> A successful applicant, for example, was the one in the case of *Guerrero-Castillo v Italy* (2007),<sup>651</sup> a Peruvian residing in Italy, who underwent female to male gender reassignment in Italy and subsequently received an Italian identity card and a “*code fiscal*” (tax code card) in the male gender.<sup>652</sup>

7.7 It remains unclear whether an approach along the lines of the Italian court’s decision would be applied in other jurisdictions where no specification as to citizenship, residency, domicile or nationality is provided in their gender recognition schemes.

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647 See also Jens M Scherpe, “The Nordic Countries in the Vanguard of European Family Law”, *Stockholm Institute for Scandinavian Law 1957-2010*, section 3.2.1, at 282. *Tribunale di Milano Sez. IX*, 17 July 2000, *Famiglia e Diritto* (2000), 608 ff. See also *Tribunale di Milano*, 14 July 1997, “*Rivista di diritto internazionale privato e processuale 1998*”, 508.

648 *Norme in materia di rettificazione di attribuzione di sesso* (Act concerning the correction of gender assignment), Legge 14 aprile 1982, n. 164, *Gazzetta Ufficiale* n. 106, del 19 aprile 1982, p. 2879.

649 See Basedow, Jürgen/ Jens M Scherpe (eds.), “Transsexualität, Staatsangehörigkeit und internationales Privatrecht”, *Mohr Siebeck*, 2004, at 42.

650 See Jens M Scherpe, “Focus: What’s So ‘Unusual’ about W? - Changing One’s Legal Gender in Europe -- The ‘W’ Case in Comparative Perspective” (2011) 41 *HKLJ* 109, at 118.

651 Application no. 39432/06, 12 June 2007.

652 In that case, the applicant was denied a renewal of residence permit in Italy because of the inconsistency of his name and gender between his Italy identity card and passport issued by Peru, a jurisdiction not recognising gender reassignment surgeries. The applicant contended that his Article 8 right to a private and family life and Article 3 right against inhuman and degrading treatment had been violated because of the failure to obtain a new residence permit under Italian law. The ECtHR noted that neither the ECHR nor its Protocols conferred a right to a residence permit or a right to nationality. In particular, the Court remarked that the Italian authorities had officially recognised the applicant’s gender reassignment surgery and his change of name, and had also issued the applicant a new identity card and a tax code card. These were sufficient for the Italian authorities to discharge its obligations under Article 8. The Court also found that the difficulties in which the applicant found himself were insufficient to reach the minimum level of gravity necessary to engage Article 3.

## **Legal considerations: relevant ‘conflict of laws’ implications**

### *Concept of the conflict of laws and how it operates*

7.8 As illustrated in preceding paragraphs of this chapter, if a particular gender recognition legislation does not stipulate any requirement as to nationality, citizenship, residence or domicile, the general conflict of laws rules (ie, an area of the law which deals with cases having a foreign element<sup>653</sup>) will be deployed. It follows that in order to determine which requirement(s) (nationality, citizenship, residence or domicile) should apply under the law, the conflict of laws rules should be taken into account.

7.9 Normally the law of a country has rules dealing with questions in the conflict of laws context (in contrast to its domestic or internal law).<sup>654</sup> In Hong Kong, the common law will have the force of law in the context of conflict of laws concerning, *inter alia*, a person’s domicile.<sup>655</sup>

7.10 Conflict of laws rules arise because there are conflicts in the domestic laws of different countries which may relate to a particular case or issue. Resolving conflict of laws cases<sup>656</sup> involves examining issues of the court’s jurisdiction and the choice of applicable law (ie, once it has been determined that a court has jurisdiction to hear a dispute involving foreign elements, the court is in a position to apply the relevant choice of law rules to determine the law to be applied, which may be the domestic law or a foreign law).<sup>657</sup>

7.11 In the choice of law process, the factual situation or the relevant

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653 Cases having a “foreign element” are those concerning a contact by Hong Kong law with some system of law other than Hong Kong law, and “[s]uch a contact may exist, for example, because a contract was made or to be performed in a foreign country, or because a tort was committed there, or because property was situated there, or because the parties are not [from Hong Kong].” See Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell), Vol 1, at paragraph 1-001.

654 Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell), Vol 1, at paragraph 1-003.

655 Section 7 of the Hong Kong Reunification Ordinance (Cap 2601) provides, *inter alia*, that the common law and rules of equity will continue to have the force of law in Hong Kong. Such laws and rules include in the context of conflict of laws matters concerning domicile, contract and tort. In other areas, such as family law and the enforcement of foreign judgments, local legislation has evolved to precede the common law.

656 Conflict of laws deals with cases in areas such as: jurisdiction and foreign judgments; family law; domicile and residence; law of property; corporation and insolvency law; and contractual and non-contractual obligations.

657 The questions that arise in ‘conflict of laws’ cases usually involve three main preliminary matters: (1) whether the local court has the jurisdiction to hear and determine a dispute involving foreign elements; (2) if so, what is the law, either the domestic one or the foreign one, that should apply (ie, what the ‘choice of law’ is); (3) separately, whether the local court can recognise or enforce a foreign judgment purporting to determine the issue of a particular case that does not necessarily involve foreign elements. See Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell), Vol 1, at paragraph 1-003.



legal rule is categorised into a precise legal category.<sup>658</sup> In Hong Kong, issues of procedure in a court are decided according to Hong Kong law, referred to in this context as the “*law of the forum*” (*lex fori*), whereas issues of substance are decided according to the law governing that substance (not necessarily Hong Kong law) as determined by choice of law rules (*lex causae*).<sup>659</sup> Therefore, in a case which potentially involves the application of a foreign law to an issue, “[t]he parties’ rights and obligations should be applied by a Hong Kong court as meaningfully as possible according to the *lex causae*, with the *lex fori* being restricted, in the absence of some overriding public policy concern, to providing the machinery by which these rights and obligations are determined and given effect in practice.”<sup>660</sup>

***Conflict of laws principles relating to gender recognition and, in particular, requirements of nationality, citizenship, residency or domicile***

7.12 There appears to be little reference to the subject of gender recognition in the conflict of laws literature. Whilst the rules on conflict of laws that were applicable in Hong Kong were radically affected by the Conventions negotiated under the auspices of the Hague Conference on Private International Law<sup>661</sup> (currently there are eight Conventions in force for Hong Kong<sup>662</sup>), none of these Conventions appears to be directly related to the issues of gender recognition, although possibly some may have application in

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658 CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th ed, 2011, Oxford University Press), at 20.

659 Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd ed, 2012, Sweet & Maxwell), at paragraph 2.008.

660 Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd ed, 2012, Sweet & Maxwell), at paragraph 2.012.

661 The Hague Conference on Private International law is a global inter-governmental organisation currently with 82 members (81 States and the European Union) representing all continents. It develops and services multilateral legal instruments which address the global needs on private international law rules. The work of the Hague Conference involves “*finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.*” See the website of The Hague Conference on Private International Law, available at: <https://www.hcch.net/en/about>.

662 Between 1951 and 2008, the Conference adopted 38 international Conventions which deal with various issues. The most widely ratified include the Conventions on: the abolition of legalisation (Apostille); service of process; taking of evidence abroad; access to justice; international child abduction; inter-country adoption; conflicts of laws relating to the form of testamentary dispositions; maintenance obligations; and recognition of divorces. At present, there are eight Conventions in force for Hong Kong, including: Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions; Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents; Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations; Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition; and Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

cases coming before the court where one of the parties is a transgender person, either in seeking gender recognition or if involved in another type of legal process to which a Hague Convention may relate.<sup>663</sup>

7.13 As far as the requirements of nationality, citizenship, residency and domicile for gender recognition are concerned, these items of personal status are examples of “*connecting factors*”, a technical term frequently used in the conflict of laws context denoting the circumstances that make linkage, *inter alia*, between person and country.<sup>664</sup> It has been an accepted norm amongst legalists that the connecting factor for a particular category of legal area (such as the formal validity of a marriage, succession to immovable property, etc) should be determined by the domestic law (*lexi fori*)<sup>665</sup> and it is considered appropriate that a person’s legal position in the field of personal status should be wholly or partly determined by the courts of their own country in accordance with the law of that country.<sup>666</sup> It is therefore arguable that Hong Kong law could adopt this prevailing opinion, and is entitled to determine the connecting factor applicable in its gender recognition scheme (if it is deemed necessary).

7.14 With regard to choice of law in the field of personal status (as well as marriage and succession), the prevailing view under the common law is that the applicable law should be the law of the country with which the person has a “*substantial connection, on the basis that [person] should be subject to the law of the country to which [he or she] primarily belongs*”.<sup>667</sup> There is little international agreement as to the appropriate test of “*belonging*” in relation to applicable laws for personal status.<sup>668</sup> In England and most common law countries, the traditional personal connecting factor appears to be *domicile*, which loosely translates as a person’s permanent home. (In the US, domicile is given a significantly different meaning from that ascribed by English law.) On the other hand, most of continental Europe and other civil law countries use *nationality* as the basic connecting factor. In India and Cyprus the personal law is based on *adherence to a particular religion*. In some countries, including England, another connecting factor, *habitual residence*, has emerged to tackle the conflict of laws conundrum.<sup>669</sup>

7.15 The test of appropriateness underlying choice of law may vary depending on different purposes to which the connecting factor is being

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663 An international convention that directly correlates to gender recognition is the one issued in 2002 by another international organisation, the International Commission on Civil Status (ICCS), which allows a contracting state to recognise “*the final court or administrative decisions recording a person’s sex reassignment which have been taken by the competent authorities*” in another contracting state. The ICCS Convention will be expounded in paragraph 7.78 below when the issues on recognising foreign gender recognition are discussed.

664 For more descriptions and examples of connecting factors, see Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell), Vol 1, at paragraphs 1-079 and 1-080.

665 Same as above, at paragraphs 1-082 and 1-083.

666 CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th ed, 2011, Oxford University Press), at 303.

667 Same as above, at 304.

668 Same as above, at 303.

669 Same as above.

employed, and it has been noted that different degrees of connection might be appropriate for different areas of personal law.<sup>670</sup> For example, in relation to the formal validity of wills, policy considerations in favour of upholding the validity of wills might work against insisting on compliance with the law of the country to which a person most closely belongs.<sup>671</sup>

7.16 As noted earlier, common connecting factors adopted in the jurisdictions' gender recognition schemes examined in this study (see Annex A and Annex B of this Consultation Paper) include nationality, citizenship, residency and domicile. In Hong Kong, the concepts of "*permanent residents*" and "*non-permanent residents*" are also important connecting factors. The following paragraphs set out the general principles relating to these connecting factors and their applicability under various Hong Kong laws, with a view to help determine which connecting factor(s) may be the most suitable for a gender recognition scheme in Hong Kong.

### *Domicile*

7.17 In English law, "*domicile*" generally means "*the place or country which is considered by law to be a person's permanent home.*"<sup>672</sup> This remains of considerable significance in Hong Kong conflict of laws.<sup>673</sup> In contrast, "*residence*" has a limited relevance in the conflict of laws, as it merely requires more than a fleeting presence.<sup>674</sup> A person's nationality or foreign connection may be irrelevant to the determination of "*domicile*". It is also recognised that domicile is largely defined by statute in Hong Kong.<sup>675</sup>

7.18 The relevant Hong Kong legislation encapsulates the common law rule on domicile that every person must have only one domicile at a given time for a given purpose and the determination of domicile by the Hong Kong courts is a matter of Hong Kong law only.<sup>676</sup>

7.19 It is usual under the common law that the domicile of choice (ie, a

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670 Same as above.

671 Same as above.

672 *Mason v Mason* (1885) EDC 330, at 337. In *Whicker v Hume*, 7 H L Cas 124, at 160, 11 E R 50, at 64 (1858), Lord Carnworth observed: "*By domicile, we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it.*"

673 See Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd ed, 2012, Sweet & Maxwell), at paragraph 7.003.

674 In *de Lasala v de Lasala* (unrep, CACV 6/1976, 17 Dec 1976), the Court of Appeal held that temporarily staying in a hotel was sufficient to amount to being a "*resident*" in Hong Kong for the purposes of the Matrimonial Proceedings and Property Ordinance (Cap 192).

675 See Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd ed, 2012, Sweet & Maxwell), at paragraph 7.003.

676 Domicile Ordinance (Cap 596), section 3. For the position at common law, see *Mark v Mark* [2006] 1 AC 98. See also CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th ed, 2011, Oxford University Press), at 306, and Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell) Vol 1, at paragraphs 6-014 to 6-016.

self-acquired domicile by a person who chooses to replace his/her former domicile) in a jurisdiction could be acquired by residing there with the intention of settling there permanently or indefinitely, and the residence factor will be satisfied as soon as the person arrives.<sup>677</sup> Hong Kong's situation differs in that section 5(2) of Domicile Ordinance (Cap 596) requires, in order to qualify as the "*domicile*" of an adult, presence in Hong Kong and an intention "*to make a home [in Hong Kong] for an indefinite period*", where the apparent difference is that the statutory requirement of "*presence*" may be marginally easier to show than the common law requirement of "*actual residence*".<sup>678</sup> Yet the requisite intention to remain permanently or indefinitely is likely to lead to disputes because, from the legal point of view, it is imprecise and may be difficult to prove on the facts.<sup>679</sup> The onus of proving any change of domicile may be difficult to discharge as there is a very wide range of facts that could be relevant: eg, quality of residence, change of nationality, purchase of a flat or tented accommodation, family ties, etc.<sup>680</sup>

7.20 Domicile of children under 18 years old has different requirements than that of adults in Hong Kong. The domicile of a child in question must be the country or territory with which he or she is "*for the time being most closely connected*".<sup>681</sup>

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677 *Bell v Kennedy* [1868] LR 1 Sc & Div 307, cited in Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, *Sweet & Maxwell*) Vol 1, at paragraph 6-036.

678 In less clear-cut common law cases, it has been held that "*residence*" for the purpose of acquiring a domicile means physical presence "*as an inhabitant*", and this would effectively exclude presence merely as a visitor, see: *IRC v Duchess of Portland* [1982] Ch 314, at 319, cited in Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, *Sweet & Maxwell*) Vol 1, at paragraphs 6.034 and 6.036.

Further, under common law, in a case where a person has two homes, he might be deemed an inhabitant of the country in which he has his "*chief residence*", see *Henwood v Barlow Clowes International Ltd* [2008] EWCA Civ 577, at paragraph 104. See also, *Plummer v IRC* [1988] 1 WLR 292, where a party had a home in England where she finished school, did a secretarial course and went to university, and a home in Guernsey where her family lived and where she spent many weekends and some holidays. It was concluded that Guernsey was not her place of chief residence and that a domicile had not been acquired there. See also Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, *Sweet & Maxwell*) Vol 1, at paragraph 6.035.

679 See CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th ed, 2011, *Oxford University Press*), at 318 to 321.

680 As Kindersley VC said in *Drevon v Drevon* [1864] 34 LJ Ch 129 at 133, "[T]here is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime", cited in Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, *Sweet & Maxwell*) Vol 1, at paragraph 6.048.

681 Domicile Ordinance (Cap 596), section 4(1). Two presumptions apply for "*closely connected*":

1. Where the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it is presumed that the child is most closely connected with that country or territory.
2. Where the parents are not domiciled in the same country or territory and the child has his home with one of them, but not with the other, it is presumed that the child is most closely connected with the country or territory in which the parent with whom he or she lives is domiciled.

7.21 In the UK, it was noted that the nature of the subject matter before the court would likely influence the court's interpretation of the rules on domicile. For example, in *Ramsay v Liverpool Royal Infirmary*,<sup>682</sup> the deceased had been domiciled in Scotland before moving to Liverpool where he lived for the last 36 years of his life. In determining the validity of his will (valid under Scottish law and invalid under English law), the House of Lords held that he was domiciled in Scotland, as the domicile of origin should not be lost unless a change of domicile has been proved beyond a mere balance of probabilities.<sup>683</sup> Arguably, if the issue had been the capacity of the person to marry or an issue of taxation, the court would have concluded that he was domiciled in England in light of the modern approaches to allowing a domicile of origin to be replaced by a domicile of choice.<sup>684</sup> With regard to gender recognition, policy considerations could vary in different jurisdictions or vary in the same jurisdiction over different periods of time.

### *Nationality*

7.22 Nationality can be distinguished from domicile in that, while the former connects an individual to a state, the latter relates to a legal jurisdiction. Further, a person can be stateless or have more than one nationality at the same time, he cannot be without a domicile and can only have a single domicile at any one time.<sup>685</sup>

7.23 In most civil law systems, the test of “*belonging*” to a country for conflict of laws purposes is “*nationality*”, which is of extremely limited use in England as a connecting factor. It has been observed that nationality also has in general no direct relevance in conflict of laws in Hong Kong.<sup>686</sup>

### *Ordinary residence and permanent residence*

7.24 “*Ordinary residence*” is connected to various issues in the Hong Kong conflict of laws,<sup>687</sup> including but not limited to, being a factor in determining the application of Hong Kong anti-discrimination statutes<sup>688</sup> and

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682 [1930] AC 588.

683 See also *R v R (Divorce: Jurisdiction: Domicile)* [2006] 1 FLR 389.

684 For example, the House of Lords decision of *Mark v Mark* [2006] 1 AC 98 and *Holiday v Musa* [2010] 2 FLR 702. See also, CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th ed, 2011, Oxford University Press), at 307 and 310.

685 Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell), Vol 1, at paragraphs 6-166 to 6-170.

686 See Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd ed, 2012, Sweet & Maxwell), at paragraph 7.006. Johnston states that the advantages of nationality over domicile are that it can easily be ascertained and is, therefore, more certain, however the concept does not work efficiently where some people are stateless or have dual nationality, or when dealing with composite states such as the United States or the United Kingdom. It can lead to highly unrealistic results when a person has long since left a country, but has failed to become naturalised elsewhere and has had to continue to be subject to the law of his former country.

687 See Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd ed, 2012, Sweet & Maxwell), at paragraph 7.018.

688 Sex Discrimination Ordinance Cap 480, sections 14(2), 41(3)(b), Family Status Discrimination Ordinance Cap 527, sections 10(2), 29(3)(b), Disability Discrimination

as a basis of bankruptcy jurisdiction.<sup>689</sup> Lying at the heart of the interpretation is the passage in Lord Scarman's speech in the *Shah* case where he said: "*ordinarily resident*" refers to a person's abode in a particular place which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."<sup>690</sup> This rule was applied by the Court of Appeal and Court of Final Appeal of Hong Kong to construe the term "*ordinarily resident*" for the purposes of Immigration Ordinance (Cap 115).<sup>691</sup>

7.25 Some indication of the approach for construing "*ordinarily resident*" for the purpose of the Immigration Ordinance can be found in section 2(6), which provides that:

*"For the purposes of this Ordinance, a person does not cease to be ordinarily resident in Hong Kong if he is temporarily absent from Hong Kong. The circumstances of the person and the absence are relevant in determining whether a person has ceased to be ordinarily resident in Hong Kong. The circumstances may include-*

- (a) the reason, duration and frequency of any absence from Hong Kong;*
- (b) whether he has habitual residence in Hong Kong;*
- (c) employment by a Hong Kong based company; and*
- (d) the whereabouts of the principal members of his family (spouse and minor children)."*

7.26 An important factor distinguishing ordinary residence from domicile is that a person could be, for certain purposes, ordinarily resident in two countries at the same time.<sup>692</sup> The requirement of "*settled purposes*" is loose whilst an intention to be settled for a limited period suffices, and all that is necessary is that "*the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.*"<sup>693</sup>

7.27 In the Hong Kong context, another concept of importance is

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Ordinance Cap 487, sections 14(2), 40(3)(b).  
689 Bankruptcy Ordinance Cap 6, section 4(1)(c).  
690 *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309, per Lord Scarman, at 340-344. For application of the ordinary rule, see Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd ed, 2012, Sweet & Maxwell), at paragraph 7.019, footnote 64.  
691 *Prem Singh v Director of Immigration* [2003] 1 HKLRD 550 (Court of Final Appeal) and *ZC v CN* [2014] 5 HKLRD 43 (CACV 225/2013).  
692 Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell), Vol 1, at paragraph 6-163. See also *ZC v CN* [2014] 5 HKLRD 43 (CACV 225/2013), at paragraph 8.3, in which the Hong Kong Court of Appeal ruled that "*Unlike domicile, one may have habitual or ordinary (the terms are the same) residence in two places at the same time.*"  
693 *Reg v Barnet London Borough Council, ex parte Shah* [1983] 2 AC 309 (followed in *Director of Immigration v Ng Shun-Loi* [1987] HKLR 798 and *Prem Singh v Director of Immigration* [2003] 1 HKLRD 550).

*“Hong Kong permanent resident”*.<sup>694</sup> This is defined in Article 24 of the Basic Law as the following six categories of residents who shall have the right of abode in Hong Kong and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.<sup>695</sup>

- (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
- (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
- (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);
- (4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;
- (5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and
- (6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

7.28 Notably, *“ordinary residence”* is a factor for determining *“permanent resident”* under category (2) above. In this context, the Court of Final Appeal regarded the natural and ordinary meaning approach of Lord Scarman as a starting point but not decisive, as *“[i]t is always necessary to examine the factual position of the person claiming to be ordinarily resident to see whether there are any special features affecting the nature and quality of his or her residence.”*<sup>696</sup>

7.29 Non-permanent residents in Hong Kong are persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of Hong Kong but have no right of abode. A person who is permitted by the

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694 See Johannes Chan SC (Hon) and CL Lim (eds), *Law of The Hong Kong Constitution* (2nd ed, Thomson Reuters Hong Kong Limited trading as Sweet & Maxwell, 2015), at paragraphs 5.030 to 5.031.

695 Section 1A of the Registration of Persons Ordinance (Cap 177) defines a *“permanent identity card”* to be *“an identity card which contains a statement that the holder has the right of abode in Hong Kong”*.

696 *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, at paragraphs 80 to 81.

relevant authorities to remain in Hong Kong for more than 180 days will have to be registered as a non-permanent resident.<sup>697</sup>

### *Habitual residence*

7.30 The connecting factor of “*habitual residence*” has been widely employed in the Hague Conventions and English statutes<sup>698</sup> and used in the context of divorce,<sup>699</sup> separation,<sup>700</sup> nullity of marriage,<sup>701</sup> recognition of foreign divorces,<sup>702</sup> formal validity of wills,<sup>703</sup> child custody,<sup>704</sup> international adoptions<sup>705</sup> and child abduction.<sup>706</sup> It is also encountered in the Hong Kong conflict of laws in the context of: child abduction;<sup>707</sup> certain parentage, legitimacy and matrimonial issues;<sup>708</sup> certain statutory restrictions upon contractual choice of law clauses;<sup>709</sup> formal validity of wills;<sup>710</sup> and certain jurisdictional issues in shipping collision cases.<sup>711</sup>

7.31 However, it is likely that the meaning of habitual residence varies according to the circumstances in which the issues arose.<sup>712</sup> This view was endorsed by the House of Lords in *Mark v Mark*<sup>713</sup> where it was held that the concept could have a “*different meaning in different statutes according to [the] context and purpose*” of the statute.<sup>714</sup> The English law has generally accepted that this connecting factor and another one, “*ordinary residence*”, are interchangeable, ie, in order to prove habitual residence it is necessary to establish a concurrence of both the physical element of residence and a mental state of having a settled purpose of remaining there.<sup>715</sup>

7.32 In Hong Kong, the Court of Appeal has summarised the meaning of habitual residence in the child abduction context.<sup>716</sup> It was held, *inter alia*,

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697 See section 3(1) of the Registration of Persons Ordinance (Cap 177) and section 25 of the Registration of Persons Regulations (Cap 177A).

698 See CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th ed, 2011, Oxford University Press), at 329; see also Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell), Vol 1, at paragraph 6-123.

699 Domicile and Matrimonial Proceedings Act 1973, section 5(2).

700 Same as above.

701 Domicile and Matrimonial Proceedings Act 1973, section 5(3)(b).

702 Family Law Act 1986, section 46(1)(b).

703 Wills Act 1963, section 1.

704 Family Law Act 1986, section 3.

705 Adoption and Children Act 2002, section 47(3).

706 Child Abduction and Custody Act 1985, schedule 1, article 4.

707 Eg, Child Abduction and Custody Ordinance Cap 512, section 2 and schedule 1.

708 Eg, Parent and Child Ordinance Cap 429, sections 6 and 12.

709 Eg, Unconscionable Contracts Ordinance Cap 458, section 7.

710 Wills Ordinance Cap 30, section 24.

711 High Court Ordinance Cap 4, sections 12B and 12C; RHC Order 75 rule 4.

712 Rogerson, “Habitual Residence: The New Domicile?” (2000) 49 ICLQ 86 at 87.

713 [2006] 1 AC 98.

714 At paragraphs 15 and 37. See also CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th ed, 2011, Oxford University Press), at 330.

715 Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell), Vol 1, at paragraphs 6-125 to 6-134.

716 *BLW v BWL* [2007] 2 HKLRD 193. The issue in the this appeal was whether one of the parents, namely the mother has wrongfully retained the children of the family in



that the interpretation is a question of fact, and as far as a child's habitual residence is concerned, it refers to his/her abode in a particular place which he/she has adopted voluntarily and for settled purposes as part of the regular order of his/her life for the time being, whether of short or of long duration.<sup>717</sup> It remains to be seen how this is interpreted in other contexts.

7.33 It has been argued that the concept of habitual residence is one suited to modern conditions where people move around the world with greater ease than in the past, and is ideally suited for purposes such as divorce jurisdiction or child abduction where the aim is not to establish a "real home" but rather to identify a jurisdiction with which a person has a legitimate connection.<sup>718</sup> Habitual residence can be utilised in many areas of law, particularly in the context of jurisdiction and the recognition of foreign judgments.<sup>719</sup>

7.34 However, it has also been observed that this concept is unsuitable for general choice of law purposes as it generates a link with a country that may be tenuous. Such an approach would be inappropriate and could encourage people to engage in deliberate evasion of the law that would normally be applicable to them.<sup>720</sup> For example, an English domiciliary working on a short term contract can become habitually resident in Saudi Arabia, and he should not marry more than one wife, which is permitted under the Saudi Arabian law. Therefore, arguably the concept of domicile is more appropriate for most family choice of law purposes.<sup>721</sup>

## Issue for consultation related to residency requirement

**Issue for Consultation 7: 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.**

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Hong Kong. The Court of Appeal ruled that when the children in question moved to Hong Kong they acquired a habitual residence there because the parents had expressly agreed that for 21 months the boys would live with the mother, which was a substantial time of the children's lives.

717 Same as above, at paragraph 31(5).

718 See CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th ed, 2011, Oxford University Press), at 341.

719 Same as above.

720 UK Law Com No 168, paragraph 3.6.

721 See CMV Clarkson & Jonathan Hill, *The Conflict of Laws* (4th ed, 2011, Oxford University Press), at 341.

## Minimum age requirement

### *Arguments in support of having a minimum age requirement*

7.35 It has been argued that setting the age requirement for gender recognition at the age of majority is reasonable, as a change of legal gender involves substantial changes in lifestyle and, if legal gender recognition requires surgery, a person has to be mature enough to make an informed decision about undergoing gender reassignment surgery.<sup>722</sup> There has been media commentary in this area illustrating the general belief shared by many judges and policy makers in Europe that minors must be protected from actions that they may regret in later life.<sup>723</sup> It was recognised that the age limit set down in the UK GRA reflects the practice in an overwhelming majority of European states;<sup>724</sup> and even the Danish landmark gender recognition scheme, which is based solely on the principle of self-determination, is restricted to individuals who have reached the age of majority. The legislature in Japan prescribed the reaching of majority age for a number of reasons: first, the requirement accords with the principle of civil law which provides adults with full capacity to enter into transactions independently; secondly, surgery is mandatory for gender recognition in that jurisdiction and thus the decision ought to be carefully taken by an adult who has attained biological maturity and mental stability; thirdly, this requirement is in line with the guidelines promulgated by the Japanese Society of Psychiatry and Neurology which only allow applicants over 20 years of age to access gender confirmation surgery.<sup>725</sup>

7.36 From the medical perspective, it is stated in the WPATH *Standards of Care* that follow up studies show that for the majority of children who had been diagnosed as having gender dysphoria before puberty, this did not persist into adulthood, while patients with onset in adolescence (during and after puberty) and adulthood had a higher chance of the condition persisting. The WPATH noted that some epidemiologic studies lent support to the proposition that “[g]ender dysphoria during childhood does not inevitably continue into adulthood” and “the persistence of gender dysphoria into adulthood appears to be much higher for adolescents.”<sup>726</sup> As discussed

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722 Patrick Jiang, “Legislating for Transgender People: a Comparative Study of the Change of Legal Gender in Hong Kong, Singapore, Japan and the United Kingdom” (2013) 7 HKJLS 31, at 66.

723 Carol Malone, “Why is NHS money wasted on treating transgender kids who aren’t old enough to understand?”, *Mirror*, 8 April 2014.

724 See Peter Dunne, “Ten years of gender recognition in the United Kingdom: still a ‘model for reform’ ?” (2015) Public Law 530, at 4.

725 C Nono (ed), *Kaisetsu: Sei Dôitsusei Shôgaisha Seibetsu Toriatsukai Tokureihô* [Commentary: Law Concerning Special Rules Regarding Sex Status of a Person with Gender Identity Disorder], Nihon Kajo Shuppan, Tokyo 2004, at pp. 87-88; S. Ondera, *Sei Dôitsusei Shôgaisha no Seibetsu no Toriatsukai no Tokurei ni kansuru Hôritsu* [Law Concerning Special Rules Regarding Sex Status of a Person with Gender Identity Disorder] [2003] 1252 Jurist 67. For more discussion in this respect, see Yuko Nishitani, The Legal Status of Transsexual and Transgender Persons in Japan, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 351 and 374.

726 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and*

earlier in Chapter 6 (under paragraph 6.9), it appears that a number of studies conducted by psychologists and sexologists in different jurisdictions have made similar observations. By citing those studies, Dr Kwan Kai Man argued that “allowing children to undergo social gender identity transition or apply adolescent inhibitors before puberty will very likely strengthen their transgender inclination and increase the chance of persisting their gender identity disorder into adulthood which would lead to irreversible surgery and a route to the gender change bearing the risk of being affected by the side effects of drugs in the rest of their lives. Accordingly, should the best interests of children be the paramount consideration, and based on the current unambiguous empirical scientific conclusion, the society must refuse any policies and ideologies that normalise transgender.”<sup>727</sup>

7.37 It was noted that treatment for gender dysphoria would usually concentrate more on counseling before puberty, while more reversible treatment may be considered in adolescents on or after puberty.<sup>728</sup> The hormonal treatment for teenage patients would aim to afford them a chance to “revert” back to their anatomical sex and the hormones prescribed would delay puberty in adolescence and block normal hormones that would cause children to develop secondary sex characteristics.<sup>729</sup> According to the Hospital Authority, after the diagnosis of gender dysphoria, the treatment varies with age and the desire of patient. For children and adolescents, the mainstay of treatment is psychological counselling. For exceptional cases in adolescence, hormones of the opposite sex may be prescribed. For adults, the mainstays of treatment are hormones and surgery. Psychotherapy is also a mainstay of care for adult patients.

7.38 Medical interventions for legal gender recognition procedures are usually age-sensitive. For example, they might be restricted to persons at or above a certain age, such as 16 or 18. The WPATH’s *Standards of Care* suggest that adolescents may be eligible to begin feminising/masculinising hormone therapy, preferably with parental consent, while genital surgery should not be carried out until (a) patients reach the legal age of majority to give consent for medical procedures in a given country and (b) patients have lived continuously for at least 12 months in the gender role that is congruent

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*Gender-Nonconforming People*, 7th version (2012), at 11 and 12.

727 Kwan Kai Man, “向政治凌駕科學說不一探討跨性別兒童的科學研究” (in Chinese) 22 September 2016, available at:

<https://hkscsblog.wordpress.com/2016/09/22/%E5%90%91%E6%94%BF%E6%B2%BB%E5%87%8C%E9%A7%95%E7%A7%91%E5%AD%B8%E8%AA%AA%E4%B8%8D-%E6%8E%A2%E8%A8%8E%E8%B7%A8%E6%80%A7%E5%88%A5%E5%85%92%E7%AB%A5%E7%9A%84%E7%A7%91%E5%AD%B8%E7%A0%94%E7%A9%B6/>.

728 See WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 10 to 13.

729 A recent Dutch study (2014) revealed that transgender youth who begin hormone treatment to delay puberty in adolescence are more likely to become happy. See news article of *BuzzFeed*, “New Study Shows Suppressing Puberty Helps Transgender Teens Become Happier Young Adults” (2 September 2014), available at: [https://www.buzzfeed.com/tonymerevick/new-study-shows-suppressing-puberty-helps-transgender-teens?utm\\_term=.ofL4mP8Lv#.wqNN6ZwPg](https://www.buzzfeed.com/tonymerevick/new-study-shows-suppressing-puberty-helps-transgender-teens?utm_term=.ofL4mP8Lv#.wqNN6ZwPg).

with their gender identity.<sup>730</sup>

### **Arguments against having a minimum age requirement**

7.39 It is noted that there has been a trend in many countries to remove the minimum age requirement for gender recognition. Dr Scherpe has observed:

*“The earlier statutes/legal provision of the 1970/80s (for example those of Sweden and Germany) often stipulated a certain minimum age for an applicant (e.g. 18 years or even 25 years). More recent legislation, having the benefit of being able to rely on modern medical and psychological research, have moved away from a minimum age requirement. In the case of Germany such a requirement was even found to be a violation of Germany’s Basic Law.”*<sup>731</sup>

7.40 Dr Scherpe also stated that:

*“Any age limit essentially is an arbitrary one, and each applicant therefore deserves to be considered as an individual and the particular circumstances of the individual need to be taken into account.”*<sup>732</sup>

7.41 One observation is that explicit or implicit age restrictions affecting transgender persons’ access to legal gender recognition may (though not necessarily will) have implications on their right to non-discrimination on the grounds of age under the Hong Kong Bill of Rights. Also relevant are the non-discrimination provisions in the Convention on the Rights of the Child (“CRC”),<sup>733</sup> the ECHR<sup>734</sup> and the Yogyakarta Principles.<sup>735</sup> There have been arguments that the omission of minors from the UK GRA has created significant practical obstacles, as transgender youth who are unable to access gender-appropriate identity documents would run a continual risk of public ‘outings’ which in turn could expose them to higher levels of bullying and, in extreme cases, the threat of transphobic violence.<sup>736</sup>

7.42 In the case of a child below 18, the CRC requires States parties to respect the right of the child to preserve his or her identity as recognised by

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730 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th version (2012), at 12 to 14.

731 See Centre for Medical Ethics and Law, Faculty of Law of the University of Hong Kong, “Submission to the Legislative Council and the Security Bureau of the Hong Kong SAR on the Legal Status of Transsexual and Transgender Persons in Hong Kong” [in Relation to the Marriage (Amendment) Bill 2014] (Occasional Paper No 1, March 2014; LC Paper No. CB(2)1052/13-14(01)), at 2.

732 Same as above.

733 See Article 2.1 of the CRC.

734 See Article 14 of the ECHR and Article 1 of Protocol No. 12 to the ECHR.

735 See Recommendation (C) under Principle 24 of the Yogyakarta Principles.

736 See Peter Dunne, “Ten years of gender recognition in the United Kingdom: still a ‘model for reform’ ?” (2015) Public Law 530, at 4.

law without unlawful interference.<sup>737</sup> It also requires States parties to respect children’s right to be heard, and to duly take their views into account.<sup>738</sup> In all actions concerning children, “*the best interests of the child shall be a primary consideration*”.<sup>739</sup> Further, it has been argued that the maturity of a person cannot in reality be pinned to a specific date or age, and thus the age of legal majority is only a legal fiction in the contexts of gender recognition. Recent studies suggest that young transgender individuals are just as capable of expressing a consistent gender identity as other children.<sup>740</sup>

7.43 There are signs that national policy makers are increasingly aware of the difficulties faced by transgender youth. In 2013, the Netherlands adopted new gender recognition rules which expressly include 16 and 17 year old individuals,<sup>741</sup> apparently acknowledging that persons under 18 years can express a stable and coherent gender identity. Argentina and Malta allow transgender children and minors, irrespective of age, to make an application for gender recognition through their parents or guardians.<sup>742</sup> In 2013, Argentine media reported the case of “Lulu”, a six-year-old transgender child who, after protracted negotiations with national registry officials, obtained legal recognition of her preferred female gender.<sup>743</sup> Dr Scherpe observed:<sup>744</sup>

*“The reality is that, irrespective of whether the law recognises the existence of transgender young people, such children and adolescents are present in society. A significant minority of transgender young people now self-identity as gender non-conforming. While many of these young people are satisfied with their current identity documentation, others struggle on a daily basis with the inability to access services according to their true gender ... [T]his situation creates circumstances of potential danger for young transgender individuals. Where a child or adolescent lives and presents in their preferred gender, but must bear the burden of incongruent identity documents, the individual will be subjected to continuous ‘outings’, where their transgender history is involuntarily revealed to others and where they may be exposed to peer bullying, social discrimination and,*

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737 Article 8.1 of the CRC. Gender identity is arguably within the scope of this right alongside with nationality, name and family relations which have been listed by way of example.

738 Article 12.1 of the CRC.

739 Article 3.1 of the CRC.

740 KR Olson, AC Key and NR Eaton, “Gender Cognition in Transgender Children” (2015) 26(4) *Psychological Science* 467.

741 Dutch Civil Code art. 28 paragraph 1.

742 For Argentina, see the Gender Identity Act 2012 (Act No. 26.743) art.5; For Malta, see the Gender Identity, Gender Expression and Sex Characteristics Act (Act No.XI of 2015) s.7.

743 See news report of *Huffington Post*, “Argentina Grants Lulu, Six-year-old Transgender Child, Female ID Card”, 10 October 2013, available at: [http://www.huffingtonpost.com/2013/10/10/argentina-child-transgender\\_n\\_4077466.html](http://www.huffingtonpost.com/2013/10/10/argentina-child-transgender_n_4077466.html).

744 See Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 626 to 627.

*in extreme cases, transphobic violence. If the primary concern of legal gender recognition is truly the 'best interests of the child', it makes little sense to force a person who has, from an early age, expressed a clear and consistent gender identity to live in a way which does not reflect his or her lived experience of gender, and which may create significant emotional harm."*

7.44 In the UK, the minimum age limit for GRC applications under the GRA (ie, 18 years old) has been challenged. The Women and Equalities Committee<sup>745</sup> released a report on *Transgender Equality* in January 2016 recommending, *inter alia*, that the gender recognition process should be opened up to applicants aged 16 and 17.<sup>746</sup> The reason for the proposal was based on the findings in recent research that many adolescents in the UK transition at younger ages nowadays and hold a stable gender identity. They can consent to medical treatment from the age of 16 years; they are accessing appropriate and supervised healthcare pathways; they also engage in earlier social transitions and develop important networks of peer-support and enjoy formative experiences in their preferred gender. The Committee was of the view that subject to a caveat that clear safeguards are in place to ensure that long-term decisions about gender recognition are made at an appropriate time, a persuasive case has been made in favour of reducing the minimum age at which an application can be made for gender recognition to 16 years old.<sup>747</sup> Similar recommendations were made in Scotland.<sup>748</sup>

7.45 In his recent text, Dr Scherpe made a recommendation on the age limit for gender recognition as follows:<sup>749</sup>

*"There should be no absolute age limit for obtaining legal recognition of preferred gender. Where legislatures restrict access for minors, exceptions must be available and should not be excessively onerous to achieve. Decisions regarding the legal recognition of preferred gender of children should solely be based on the best interest of the child and should take account of the opinion of the minor concerned."*

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745 A parliamentary committee in the UK appointed by the House of Commons in June 2015 to oversee equality issues.

746 See Women and Equalities Committee, *Transgender Equality* (First Report of Session 2015-16), published on 14 January 2016 by *authority of the House of Commons*, at paragraph 70.

747 *Same as above*, at paragraph 64 to 71.

748 See The Scottish Parliament, "SPICe Briefing - Key Issues for the Parliament in Session 5", 6 May 2016, at 31.

749 See Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 629.

## Issue for consultation related to age requirements

**Issue for Consultation 8: 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) 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.**

## Requirement related to marital status

### ***Arguments in support of having a requirement that an applicant should be unmarried or divorced***

7.46 In jurisdictions where same-sex marriage is not legalised, there is often a legal requirement in their gender recognition scheme (if it exists) that an applicant is single, or, if married, that the applicant must divorce his/her opposite-sex partner before his/her new gender can be recognised. Including such prerequisites to gender recognition could arguably avoid any assumption of legalisation of same-sex unions.

7.47 As an illustration, the Japanese legislature has provided the requirement of being unmarried for gender recognition, because it believed

that authorising the legal recognition of gender for a married person would result in same-sex marriages, which are not legally recognised in Japan. Despite occasional academic opinions calling for the requirement to be abolished, the majority of commentary, however, considers that the Japanese family law system is grounded on the heterosexual marital family unit, as is reflected in the family register, and marriage is conceived to be a stable community of a man and a woman who give birth to and take care of children, and the status of children is clearly distinguished in Japan according to whether they are born in or out of wedlock.<sup>750</sup>

7.48 Under the UK GRA, an applicant who is married to his/her opposite-sex partner is no longer required to divorce since the passage of the Marriage Equality Act 2013 (see Chapter 3, at paragraph 3.45 for more information). Arguably, the introduction of same-gender marriage there has significantly reduced concerns regarding the relationship status of transgender individuals. Schedule 5 to the English and Welsh Marriage (Same-Sex Couples) Act 2013 permits applicants for gender recognition to remain in their existing marriage where the non-transitioning spouse consents to conversion from a heterosexual union into a same-gender marriage. However, similar provisions are not at this moment applicable to Hong Kong as there is no law that recognises civil partnership or same-sex marriage in Hong Kong.

7.49 The official justification for the divorce requirement in the UK GRA was the then existing prohibition on equal marriage rights.<sup>751</sup> During the period between 2004 (when the UK GRA was passed) and 2013 (when the Marriage Equality Act 2013 was passed), there was a perception that allowing spouses to remain married after they had legally transitioned would create a loophole in the UK's marriage laws and undermine the state's commitment to traditional marriage.<sup>752</sup> It would appear that in Hong Kong, similar concerns regarding the relationship status of transgender individuals and the divorce requirement for gender recognition would be raised by some groups of advocates. It is noted that even some transgender advocates recognise the difficulties of not adopting the divorce requirement in a gender recognition scheme for policy reasons, and in view of the fact that most jurisdictions enacting gender recognition reforms without an obligation to divorce have already permitted same gender couples to marry whereas the situation in Hong Kong is not the same. As Peter Dunne observed:<sup>753</sup>

*“Over the past 10 years, no clear international and European consensus has emerged regarding the Divorce Requirement. Soft law actors, such as the UN Committee on Human Rights and the Commissioner for Human Rights of the Council of Europe, have recommended that states ‘remove any restrictions on the right of*

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750 See Yuko Nishitani, “The Legal Status of Transsexual and Transgender Persons in Japan”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 375.

751 See Peter Dunne, “Ten years of gender recognition in the United Kingdom: still a “model for reform”?” (2015) Public Law 530, at 3.

752 Same as above.

753 Same as above.



*transgender persons to remain in an existing marriage’. Since 2004, Spain, Portugal, the Netherlands, Sweden and Denmark have all enacted gender recognition reforms without an obligation to divorce. Yet, each of these jurisdictions—at the time they introduced their new rules—already permitted same gender couples to marry. It is questionable therefore whether these countries can properly be understood as representing an emerging trend away from Divorce Requirements. The example of Malta, which is a jurisdiction without marriage equality but which nonetheless allows transitioning individuals to remain married, is noticeably rare and does not reflect wider practice in this area. Indeed, even in Germany and Italy, where the Constitutional Courts have ruled that married applicants for gender recognition cannot be stripped of all their existing marital rights, the judges have affirmed that the specific nomenclature of ‘marriage’ can be reserved for opposite gender couples.*

*It appears, therefore, that, by retaining the Divorce Requirement since 2005, the UK has not violated any established obligation under international human rights law. Without doubt, there are compelling policy reasons why Parliament should never have adopted the requirement, not least the hardship which an inability to access gender recognition has created for married transgender persons. In addition, ... the status and validity of a marriage under English common law is usually assessed at the point of entry so that it is questionable whether, as a matter of law, one spouse’s transition could have converted a validly contracted heterosexual marriage into a same gender union. However, by requiring divorce as a pre-condition for gender recognition, the UK has, at worst, chosen a course which other European jurisdictions have not followed and, at best, aligned its national laws with the prevailing European consensus.”*

7.50 Although there have been movements away from the “forced divorce” requirement for gender recognition, particularly in Europe (as can be noted from the overview of overseas gender recognition schemes in Chapter 4 and Annex B of this Consultation Paper), this trend was somewhat halted by the recent judgment of the ECtHR in *Hämäläinen v Finland* (2014),<sup>754</sup> which concerned a complaint made by a post-operative male-to-female transsexual about the requirement that she had to transform her marriage to her female spouse into a civil partnership in order to gain full legal gender recognition in Finland.<sup>755</sup> The ECtHR held that Contracting States might require the dissolution of an existing marriage before extending the right to legal gender recognition. It stressed that the ECHR does not impose an obligation on the Contracting States to allow same-sex marriage. The regulation of the effects of a change of gender in the context of marriage fell to a large extent, though

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754 Application no. 37359/09, 16 July 2014.

755 It is worth noting that Finland has legalised same-sex marriage since 1 March 2017 and the divorce requirement for gender recognition would become obsolete in Finland.

not entirely, within the margin of appreciation of the Contracting States. The ECtHR therefore found that there was no disproportionate interference with the applicant's Convention rights, as the vast majority of rights enjoyed by married couples were also afforded to registered partners in Finland.

***Arguments against having a requirement that an applicant should be unmarried or divorced***

*Argument (1): SRS is now available to married persons in Hong Kong*

7.51 Formerly in Hong Kong, SRS was not available to married persons owing to legal complications which could ensue, but this is no longer the case since late 1990s.<sup>756</sup> Therefore, some may argue that it would be illogical that, on the one hand, married persons can undergo SRS whilst they are still married, but on the other hand, they have to divorce in order to obtain legal recognition.

*Argument (2): Marital status requirement might constitute an infringement of an applicant's right to marry*

7.52 Dr Sam Winter noted in his article regarding Asian transgender experiences that transgender persons' right to marry is crucial for their daily lives. He said:

*"[A] common condition, in the absence of provisions allowing for same-sex marriage, is that the person concerned should not already be married. Notwithstanding the conditions imposed, the impact of the opportunity to change legal status can be substantial for individual transpeople: it means that they will be able to enter mixed-gender marriages (i.e., heterosexually; a transwoman to a man, and a transman to a woman). The numbers of transpeople potentially affected are substantial. Research across the region confirms that most transpeople are heterosexual. Legal status as spouse, inter alia, enables mutual inheritance and insurance rights and, where one partner is hospitalised and unable to consent to medical procedures, the right to do so on his or her behalf. Where agencies regulating child adoption require the adopting couple to fit the hetero-normative mould, marriage makes it possible for a gender identity variant partner to be an adopting parent (and legally recognised as such)."*<sup>757</sup>

7.53 It is then argued that the requirement on marital status for gender recognition would discriminate against transgender persons who are married and wish to remain so, as such a requirement would force them to choose between their rights to marry and to found a family as well as to respect for

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756 Helen Luk, "Professor in Sex Switch", SCMP, 30 May 1999, at 1, referring to the first married person to go through the Gender Reassignment Programme.

757 Sam Winter, "Lost in Transition: Transpeople, Transprejudice and Pathology in Asia", *International Journal of Human Rights*, 13, 2/3: at 365 to 390, 2009.

private and family life, and their right to recognition before the law.<sup>758</sup>

7.54 Further, Dr Scherpe noted that:

*“In jurisdictions where [civil partnership or civil union] is not possible because there are no equivalent legal regimes available (such as in Hong Kong) the requirement of dissolution appears to be the inevitable consequence. However, a decision by the German Constitutional Court was particularly instructive. In Germany, where marriage is restricted to two persons of the opposite sex/gender, the institution of marriage is protected under the German Basic Law. So is the right to being recognised in one’s gender identity. The German Constitutional Court held that a requirement to dissolve a valid, constitutionally protected marriage in order to be allowed to change one’s legal sex/gender – also a constitutionally guaranteed right – amounted to a violation of the German Basic Law.<sup>759</sup> Such a requirement would force the applicant to give up one constitutionally protected right for another for which there was no justification.”<sup>760</sup>*

7.55 In Japan, as noted earlier, the gender recognition law requires an applicant to be unmarried (see the discussion in Chapter 4 at paragraph 4.23). This criterion for gender recognition has been criticised by some protestors. For example, Dr Hiroyuki Taniguchi made the following comments:<sup>761</sup>

*“[Requiring an applicant for gender recognition to be unmarried] could force couples to divorce when they want to stay married by forcing them to choose between preserving their marriage or fulfilling the needs of one spouse to legally change his or her gender. This fails to demonstrate respect for the dignity of the*

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758 See Amnesty International, 2014, “The State Decides Who I Am: Lack of Recognition For Transgender People”, Chapter 1 (legal gender recognition and human rights), at 26; see also Athena Liu, “The Legal Status Of Transgender And Transsexual Persons In Hong Kong”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 351.

759 1 BvL 10/05, Federal Constitutional Court of Germany (27 May 2008). The Federal Constitutional Court found this created a conflict between a person’s right to marry and their privacy, which included their self-determined gender identity. Subsequent to the judgment, an amendment to the law was passed on 17 July 2009, removing a previous requirement to be unmarried from the legislation: see Bundesgesetzblatt Jahrgang 2009, Teil 1, Nr. 43, on 22 July 2009, p. 1978, Gesetz zur Aenderung des Transsexuellengesetzes (*Transsexuellengesetz-Änderungsgesetz – TAG-ÄndG*) 17 July 2009.

760 See Centre for Medical Ethics and Law, Faculty of Law of the University of Hong Kong, “Submission to the Legislative Council and the Security Bureau of the Hong Kong SAR on the Legal Status of Transsexual and Transgender Persons in Hong Kong” [in Relation to the Marriage (Amendment) Bill 2014] (Occasional Paper No 1, March 2014; LC Paper No. CB(2)1052/13-14(01)), at 3.

761 See Hiroyuki Taniguchi, PhD, “Japan’s 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan”, *Asian-Pacific Law & Policy Journal*, Volume 14, Issue 2, at 113, available at: [http://blog.hawaii.edu/aplpj/files/2013/02/APLPJ\\_14.2\\_Taniguchi.pdf](http://blog.hawaii.edu/aplpj/files/2013/02/APLPJ_14.2_Taniguchi.pdf).

*couple or for the individual spouse. In addition, this puts individuals with GID in the position of having to choose to either file a false (in their minds) notification for wanting a divorce and then divorce, or to give up his or her wish for social recognition through legally changing to his or her new gender. This requirement also limits an individual's right to marry after they have changed their legal gender because that individual can only marry another individual of the opposite legal gender. Finally when a person with GID wishes to have a legally recognized relationship with a person of different gender (ex: a man who presents as a woman and wants to be legally married to a man), the individual comes under pressure to 'choose' surgical intervention even if the operation is medically unnecessary and/or the individual does not wish to undergo it.*

*The requirement prohibiting individuals from being married at the time they seek to legally change their gender preserves heterosexual assumptions that marriage is between a man and a woman, regardless of the physical appearance of the couple and regardless of whether the couple wishes to divorce. The Act fails to make space for diversity in terms of composition of possible relationships and of the needs of the individuals concerned. Ultimately, this Act uses an outdated model of both gender and marriage that is not applicable in today's diverse Japan."*

7.56 At the time of deliberation on the UK Gender Recognition Bill, Lord Goodhart expressed concern about the effect of a gender recognition certificate on an existing marriage:<sup>762</sup>

*"The Government say that the law must not recognise a marriage between a couple who are seen in law as being of the same sex. It may well be justifiable to say that marriage can be entered into only between a couple of the opposite sex, but it does not follow logically that a marriage validly entered into must be annulled before the gender change can be recognised by law. If the couple were legally married originally and wished to continue their marriage, I believe that it would be wrong to present them with the dilemma either of having to terminate the marriage, which both wish to keep, or of depriving one of them of the right to legal recognition of gender change."*

7.57 After the UK GRA was enacted in 2004, the divorce requirements were subject to significant criticisms.<sup>763</sup> For a number of transgender persons, who, because of faith or principle, were unwilling to dissolve their marriage, they contended that the divorce requirement had prevented effective

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762 HL Deb 13 January 2004 c 44GC.

763 Peter Dunne, "Divorce in the Gender Recognition Bill 2013" (2014) 32(1) *Irish Law Times* 70.

enjoyment of their right to gender recognition. In *MB v Secretary of State for Work and Pensions* (2016),<sup>764</sup> a 60-year-old post-operative transgender woman, who remained married, was unable to access a gender-appropriate state pension under the national law in force at the time.<sup>765</sup> She challenged, amongst other matters, that the law at the time directly discriminated against her on grounds of sex. The case has been referred to the European Court of Justice for a preliminary ruling.

7.58 The Lord Bishop of Winchester also considered that:<sup>766</sup>

*“If people have committed themselves to a marriage, whether or not out of a religious understanding, of any faith, it is part of the Government’s responsibility to sustain that marriage if they wish to sustain it; ... To force them to be broken apart and then to suggest that they be placed in some other legal relationship which—quite apart from the fact that it does not yet exist—if it were to exist, they do not want, is not a sustainable way of behaving on the part of the Government.”*

7.59 It appears that the advent of same-sex marriage in many jurisdictions in the international sphere has meant that requirements to dissolve marriages for the purposes of gender recognition have become obsolete in those jurisdictions.<sup>767</sup> Where legislation concerning gender recognition was introduced after the passage of marriage equality laws (eg, in Argentina), dissolution requirements do not form part of the law. Further, the marital status requirement as a prerequisite to obtaining legal gender recognition was abolished in Austria, Germany and Italy after their constitutional courts ruled against it. In 2006, the Austrian Constitutional Court granted a transsexual woman the right to change her sex to female even though she remained married to her wife. The German Constitutional Court also ruled in 2008 that legislation could not force divorce on a person who, but for his or her marriage, fulfilled all the other criteria for recognition. These two rulings call on the State to accept that protecting all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriages.<sup>768</sup> In a similar vein, the Italian Constitutional Court held in 2014 that a married couple would be denied their “*inviolable rights of man*” as set out in Article 2 of the Italian Constitution if the couple was stripped of all their legal rights because one spouse obtained legal gender recognition.<sup>769</sup>

7.60 With regard to the ECtHR’s ruling in *Hämäläinen v Finland* (2014)

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764 [2016] UKSC 53; [2017] 1 C.M.L.R. 13.

765 The law concerning marriage subsequently changed to allow transsexuals to obtain a full gender recognition certificate without having to have their marriage annulled, but without retrospective effect.

766 HL Deb 29 January 2004 c395.

767 Examples are Austria, the Netherlands, Spain, Manitoba (Canada).

768 Thomas Hammarberg, “Human Rights and Gender Identity”, CommDH/IssuePaper (2009) 2, at 23.

769 No 170 [2014], 11 June 2014.

(see paragraph 7.50 above) that Finland might require the dissolution of an existing marriage before extending the right to legal gender recognition, Dr Scherpe argued that:<sup>770</sup>

*“Hämäläinen v Finland...merely says that currently the Finnish law is within the margin of appreciation afforded to Contracting States. But as the development leading up the Goodwin decision has shown, this may change over time. In addition, in Finland there are (almost) equivalent rights available for registered partners, so the decision may well have been different had that not been the case.”*

7.61 In August 2014, the United Nations Human Rights Committee expressed concern about the new Gender Recognition Bill of Ireland approved by the Cabinet in June 2014, which retained the requirement for married transgender persons to dissolve the existing marriage or civil partnership in order to have their preferred gender formally recognised. The Committee recommended that Ireland should ensure that *“transgender persons and representatives of transgender organizations are effectively consulted in the finalization of the Gender Recognition Bill so as to ensure that their rights are fully guaranteed, including the right to legal recognition of gender without the requirement of dissolution of marriage or civil partnership.”*<sup>771</sup> The said dissolution requirement was then abolished after the passage of the Marriage Act 2015.

7.62 The above view of the Human Rights Committee is in line with that of the Council of Europe Commissioner for Human Rights. The Commissioner noted that since same-sex marriage is not legalised in many member States of the Council of Europe, married transgender persons may find themselves forced to divorce prior to their new gender being officially recognised. In numerous cases, it is argued that forced divorce is against the explicit will of the married couple, who wish to remain a legally recognised family unit, especially if they have children in their care. The Commissioner also observed that forced divorce can lead to hardship as in the case where both spouses wished to remain married so that the non-transsexual male partner would not lose custody of the child and could continue to receive state benefits in addition to his part-time work, in order to support his disabled, and now transsexual, spouse in providing care for the joint child.<sup>772</sup> In the Commissioner’s view, divorce should not be a necessary condition for gender recognition as it can have a disproportionate effect on the right to family life.<sup>773</sup>

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770 See Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 636. A number of criticisms were raised against the reasoning in *Hämäläinen v Finland* in the same literature, at 636 to 637.

771 Human Rights Committee, “Concluding observations on the fourth periodic report of Ireland”, CCPR/C/IRL/CO/4, paragraph 7.

772 Thomas Hammarberg, “Human Rights and Gender Identity”, CommDH/IssuePaper (2009) 2, paragraph 3.2.2, at 22.

773 Letter from Nils Muižnieks, Council of Europe Commissioner for Human Rights, to Joan Burton, Minister for Social Protection of Ireland, CommDH (2012)37, dated 6 December 2012.

7.63 With regard to the argument that a married individual's gender recognition would result in same-sex marriage, Dr Athena Liu commented:<sup>774</sup>

*“Although a married individual's gender recognition results in the parties (in a marital relationship) being the same gender, arguably this is different from permitting same-sex marriage. This is so because the debate concerning same-sex marriage has always been about whether persons of the same-sex at the time of marriage should be permitted to enter into marriage. Further, there may not be a strong enough case for refusing gender recognition to those who are married when such a refusal may be challenged on the basis that it creates a conflict between a person's right to family life and the right to establish one's sexual identity. ...*

*Hong Kong currently relies on the law in the [Registration of Persons Ordinance] to recognise a person's acquired gender. There is no reason why it should not continue to do so. It is unnecessary to impose 'being unmarried' as a precondition to obtaining a replacement identity card. A de facto same-sex marriage (small in number as they are) need not be a serious concern to law reform towards gender recognition.”*

## **Issue for consultation related to marital status**

**Issue for Consultation 9: 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;**

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774 See Athena Liu, “The Legal Status Of Transgender And Transsexual Persons In Hong Kong”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 351 and 361.

- (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.**

## Requirement related to parental status

### *Arguments in support of and against requiring an applicant to be childless*

7.64 A requirement of relating to parental status for gender recognition is not common around the globe, and a stricter requirement, that an applicant must be childless, is rarer. Turkey and South Korea are known to be the only countries under our study that stipulate such a prerequisite for gender recognition. In Turkey, the requirement of sterilisation before submitting to surgical intervention (as a prerequisite for gender recognition) has been increasingly criticised for having constituted an unnecessary physical and mental burden for the transgender community in Turkey.<sup>775</sup>

7.65 Japan once required applicants for gender recognition to be childless, and this has been amended to “*absence of minor children*”. (In relation to the previous “*childless*” requirement, the legislators had sought to avoid disturbing the family order and contravening the best interests of the child, because it was considered that having a father or mother who has obtained recognition of their preferred gender may, arguably, cause a psychological burden or anxiety for the child and could harm his or her relationship with the parents.<sup>776</sup> The legislators considered that Japan was a society with unique customs, traditions, family models and other specificities which could justify the imposition of childlessness in the national law.<sup>777</sup>)

7.66 The “*childless*” requirement had been subject to certain criticisms. As stated by Dr Taniguchi:

*“The no child requirement has been subject to specific criticisms, which revolve around two points. First, an individual with children cannot change the fact that they have children by will or*

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775 See, eg, G Turan Basara, *Türk Medenî Kanunu'nun 40'inci Maddesi Kapsamında Cinsiyet Değişikliği ve Hukuki Sonuçları* [Legal Consequences of Gender Change According to Article 40 of Turkish Civil Code] (2012) TBBD, at 245, 255 to 256.

776 See Yuko Nishitani, “The Legal Status of Transsexual and Transgender Persons in Japan”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 376.

777 C Nono (ed), *Kaisetsu: Sei Dôitsusei Shôgaisha Seibetsu Toriatsukai Tokureihô* (in Japanese, transliterated as “Commentary: Law Concerning Special Rules Regarding Sex Status of a Person with Gender Identity Disorder”), Nihon Kajo Shuppan, Tokyo 2004, at 90 to 91; S Ondera, *Sei Dôitsusei Shôgaisha no Seibetsu no Toriatsukai no Tokurei ni kansuru Hôritsu* (in Japanese, transliterated as “Law Concerning Special Rules Regarding Sex Status of a Person with Gender Identity Disorder”) [2003] 1252 Jurist 68.



*choice...an individual with GID faces the option of having to wish their child's death — something many parents would have a difficult time doing — or wait until their children are no longer minors. In this case, a child who is aware of her or his parent's gender struggle may themselves suffer from the guilt of knowing that their existence prevents their parent from changing their legal gender. The irony of this latter situation is that it is caused by a law that is intended to protect and promote child welfare.*

*Second, critics have criticized the uniform approach to this no child restriction... The welfare of the child in these cases should be approached on a case-by-case basis. Some children cannot accept a parent's gender change or may become confused as their parent transitions from one gender to the other. On the other hand, some children are able to easily accept their parent's gender transformation and will be comfortable with the gender transformation. The degree of acceptance differs in every parent-child relationship and may vary even within a single family.*

*Moreover, the no child requirement seems to be based on the assumption that having transgender parents is, in and of itself, a negative factor for children. This assumption represents a kind of revulsion, or transphobia, of transgendered individuals. It additionally seems to reinforce the idea that children should be raised in households in which parents conform to their biological genders, or at least, children should live apart from transgender individuals. If a child faces bullying at school due to having a transgender parent, the cause should not be seen to be the transgender parent, but rather that society itself is intolerant to gender transition. In addition, the no child requirement seems to be based on the assumption that a child has two parents, one taking on a female role and the other taking on a male role, and that, that is conducive to child welfare.*

*Ultimately, the no child requirement ignores the reality of families with transgender members. Although the law was ostensibly written to recognize the transgendered condition, the no child requirement is based on negative and stereotypical attitudes toward transgender people. As a result, it does not ease the process of those who wish to legally change their gender, and in some cases, has the same effect on those around them, including the very children this section of the Act is intended to protect.<sup>778</sup>*

7.67 A requirement of parental status may also have implications on a person's right to respect for private life. In *PV v Spain* (2010),<sup>779</sup> the

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778 Hiroyuki Taniguchi, PhD, "Japan's 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan", *Asian-Pacific Law & Policy Journal*, Volume 14, Issue 2, at 114

779 Application no. 35159/09, 30 November 2010.

applicant, a transsexual woman, complained about the restrictions ordered by a judge on the arrangements for contact with her son on the ground that her lack of emotional stability following her gender reassignment was liable to upset the child. The ECtHR considered that barring a legal relationship or guardian or visiting rights because of a parent's gender identity could amount to discrimination.<sup>780</sup> However, the overriding factor for the restrictions had been the child's best interests and not the parent's transsexualism, with the aim of getting the child gradually accustomed to his father's gender reassignment. Therefore, it held that the restrictions of the contact arrangements had not resulted from discrimination on the ground of the applicant's transsexualism and there had been no violation of Article 8 of the ECHR taken in conjunction with Article 14 (right to non-discrimination).

7.68 Under the ECHR, States have a discretion to decide whether a transsexual parent would qualify as a legal parent. In *X, Y and Z v United Kingdom* (1997),<sup>781</sup> the issue was whether a post-operative female-to-male transsexual person should be allowed to register as the father of a child, born to his female partner by means of artificial insemination by donor.<sup>782</sup> The ECtHR emphasised that this case was distinguishable from previous legal gender recognition cases since it mainly concerned the recognition of a family tie with a child. It was held that, given the lack of consensus in Europe on the granting of parental rights to transsexual persons and filiation to a child conceived by artificial insemination by donor, States should be afforded a wide margin of appreciation and Article 8 of the ECHR<sup>783</sup> could not, in this context, be taken to imply an obligation for the States to formally recognise as the father of a child a person who was not the biological father. In the circumstances, it was held that there was no violation of Article 8.

7.69 In *R (on the application of JK) v Registrar General for England and Wales* (2015),<sup>784</sup> the claimant challenged the requirement in the UK's birth registration scheme that men who had changed gender from male to female should be listed as the "father" on the birth certificates of their biological children.<sup>785</sup> The English High Court decided that Article 8 of the ECHR was

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780 See Richard Kohler and Julia Ehrt, *Legal Gender Recognition in Europe - Toolkit, Transgender Europe*, 2nd Revised Edition, November 2016, at 33.

781 Application no. 21830/93, 22 April 1997.

782 In this case, British authorities had denied the applicant the right to register as father on the child's birth certificate. The transsexual applicant complained that the refusal to legally recognise the relationship between him and the child was in breach of Articles 8 and 14 of the ECHR.

783 Article 8 of ECHR provides that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

784 [2015] EWHC 990 (Admin).

785 The claimant was born male and was married to a woman. The couple had two naturally conceived children. The claimant was diagnosed with gender identity

engaged, as gender identity is an integral part of an individual's private life and it is a key part of a Member State's obligation to ensure that documentation and certification is reissued to transgender people in their acquired gender. However, the interference with the Article 8 rights was justified since the birth registration scheme pursued the legitimate aims of having an administratively coherent system for the registration of births, and respecting the rights and interests of other people, notably those of the partner and children of the person living in an acquired gender, including a child's right to know, and have properly recognised, the identity of his or her biological father. The Court held that the scheme was well within the margin of appreciation of the State, and the State was entitled to conclude that the interference with the Article 8 rights inherent in the scheme was outweighed by the interference with the rights and interests of other individuals and the public interest that would be caused by not having such a restriction.

***Arguments in support of and against requiring an applicant not to be a father or mother of a child below a certain age limit***

7.70 Only one jurisdiction under our study, ie, Japan is currently known to have the requirement that an applicant for gender recognition must not have a child below a certain age limit.<sup>786</sup> In Japan, applicants for gender recognition must not have a child aged 19 years or younger (see paragraph 4.24 of Chapter 4 of this paper). The previous requirement, that *"the person has no child at present"*, was relaxed in Japan, and this reform was viewed as commendable by some scholars. As two Japanese scholars stated:<sup>787</sup>

*"The clause of "no children"...was established considering an argument that admitting gender change to people with GID having children at present might disturb the family order or have an adverse impact on child welfare; it was held constitutional in Supreme Court. On the other hand, people with gender identity disorder having children at present ... [feared] that they could not ask for gender change so long as they had children..."*

*Based on these opinions, the extent of the clause of "no children" was limited to "no minor children" in the revised clause in respect for child welfare; People with gender identity disorder whose children are all adults are permitted to ask for gender change. This reform is extremely proper from the standpoint of balancing*

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disorder after the birth of the first child. Before the claimant started hormone therapy, her wife fell pregnant a second time. Both children's birth certificates recorded the claimant as the *"father"*. The claimant submitted that the requirement to identify her as the *"father"* breached her and her children's rights under Articles 8 and 14 of the ECHR.

786 It is pertinent to note that Ukraine used to require applicants for gender recognition to have no children under the age of 18. This requirement was abolished by the Ministry of Health of Ukraine in 30 December 2016.

787 See Tanamura, Masayuki and Kitada, Mari, "Family Law" (2010) *Waseda Bulletin of Comparative Law*, Vol 28, 64 to 67, at 67 (available at: <http://www.waseda.jp/hiken/jp/public/bulletin/pdf/28/ronbun/A02859211-00-000280064.pdf>).

*between child welfare and the self-determination of people with gender identity disorder.”*

7.71 Dr Taniguchi also made a similar comment:<sup>788</sup>

*“The Article 3(iii) no child requirement is intended to avoid disturbances in parent-child relationships and to protect the welfare of the child, which is that a child should live in a stable and economically-sound environment. ... Even after this requirement was revised to allow those who have no minor children to legally change their gender, the underlying purpose of the requirement is still to protect the welfare of minor children.”*

7.72 Nonetheless, the requirement of the absence of minor children is considered as excessively strict by some transgender persons. In a Tokyo High Court decree of 30 March 2009,<sup>789</sup> X was a male-to-female transgender person who had a daughter, Y, from a relationship with her former spouse. After undergoing SRS, X sought to obtain legal recognition of her preferred gender. In June 2008, Y, then aged 16, married Z (Y was deemed to have attained majority for marriage). In late 2008, X applied for legal recognition at the Tokyo Family Court. The judge, however, held that X had authorised Y to marry Z with a view to manipulating her daughter’s legal status so as to circumvent the requirement of the absence of minor children for the purpose of getting gender recognition. There has been commentary that although the outcome of this case may be respectable from the legal point of view, the question remains whether the family order or the best interests of the child would have effectively been infringed had X successfully obtained legal recognition of her preferred female gender. Arguably, Y was already 16 years old and capable of understanding X’s situation, desire and need in accessing legal recognition, and indeed was accustomed to X’s female appearance and willing to support X. It has been argued that the Japanese gender recognition law unconscionably restricts the right to self-determination and does not respect the individual dignity of transgender persons, where the best interests of the child would not be harmed or may even be enhanced by the self-realisation of the parent.<sup>790</sup> Some scholars suggested that it would be desirable either to abolish the requirement of the absence of minor children or at least introduce an option to exempt it, depending on circumstances of the case, family relations and the age and maturity of the child.<sup>791</sup>

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788 See Hiroyuki Taniguchi, Ph.D., “Japan’s 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan”, *Asian-Pacific Law & Policy Journal*, Volume 14, Issue 2, at 113 and 114.

789 Tokyo Family Court, 30 March 2009, KSG 61-10, 75.

790 For example, see Patrick Jiang, “Legislating for Transgender People: a Comparative Study of the Change of Legal Gender in Hong Kong, Singapore, Japan and the United Kingdom” (2013) 7 HKJLS 31, at 68, where it was argued that no actual harm would be done to a child if a parent changed their gender out of necessity, and the child’s interests would be better served if the parent can live a more normal life that is in conformity with their self-perceived gender.

791 M Tanaka (2010), 6 *Sokuhô Hanrei Kaisetsu* 115-116 (Comment on Tokyo Family Court, 30 March 2009); see also Tanamura, *Sei Dôitsusei Shôgai wo meguru*

7.73 There were also commentaries that the requirement not to have any minor children is incompatible with human rights law, and that the arguments in support of the requirement are unconvincing. Dr Scherpe has commented:<sup>792</sup>

*“It is unclear how barring the recognition of the preferred gender for an extended period could possibly maintain the ‘family order’ or prevent any ‘harm for children’ (described as ‘psychological burden’ and causing ‘anxiety’) if the persons concerned can and indeed will transition socially even without legal recognition. Surely the ‘disturbance of the family order’ and the potential ‘harm for children’ do not arise from the legal recognition as such but, if at all (and there are more than serious doubts about this in any event), rather from the social transition of the parent. Moreover, the inability to achieve the legal recognition of the preferred gender will in all likelihood have a profound negative impact on the person concerned, which in turn will have an impact on any existing family relationships, including parent-child relationships. Thus nothing is really gained by such a requirement, except unnecessary suffering of the persons concerned. It appears that the requirement is rooted in an overly medicalised and outdated view... It should be abolished.”*

## Issue for consultation related to parental status requirement

**Issue for Consultation 10: 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 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;**

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*Hôteki-jōkyō to Kadai* [2008] 1364 Jurist 6-7.

792 See Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 638.

**(c) if the answer to sub-paragraph (b) is “yes”,  
what the age limit should be, and why.**

## **Recognition of foreign gender change**

7.74 If a gender recognition scheme is to recognise a person’s foreign gender change, this does not mean in the narrow sense of accepting that person’s sex entry shown on his or her foreign travel document for immigration clearance at the time he or she arrives or transits through Hong Kong.<sup>793</sup> The scope of recognising foreign gender change concerns recognising the gender marker shown on the travel documents of the applicants, and, if they submit an application for residency, issuing to them identification documents recording their gender as recognised in a foreign country.<sup>794</sup>

7.75 From the legal perspective, domestic recognition of a change of gender which has been legally recognised in a foreign jurisdiction is an issue that falls within the context of conflict of laws (the general concept of conflict of laws can be referred to paragraphs 7.8 to 7.11 above). It is observed that gender recognition by foreign jurisdictions could be granted by the courts (such as the Family Court of New Zealand, the Tribunal de Grand Instance of France and the Civil Court of Poland) or a competent administrative authority designated by the related law or rule (such as the local registry office of Czech Republic, the Ministry of Health of Hungary and the Expert Committee on gender identity disorder in Iceland) (see Annex A and Annex B of this Consultation Paper for related information).

7.76 A range of possible sub-issues could arise, including, but not limited to:

- (1) whether or not a gender change recognised under the law of a country or territory outside Hong Kong should be recognised in Hong Kong;
- (2) if the answer to sub-question (1) above is yes, whether or not such foreign countries and territories should be limited to those

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793 The current general practice of the Immigration Department in Hong Kong is to, for a visitor coming to Hong Kong presenting a travel document for immigration clearance, take the gender marker on that document as it is unless there is reasonable cause for suspicion of its authenticity.

794 At present, when a foreigner is granted approval to reside in Hong Kong and applies to be registered and for an identity card in accordance with the Registration of Persons Ordinance (Cap 177) and Regulations (Cap 177A), a registration officer may require the applicant to provide, depending on the circumstances, his or her birth certificate, travel document, or identity card previously issued to him or her (if any) as identity proof. Generally speaking, the registration officer will handle the application for registration and identity card based on the personal particulars furnished by the applicant, which should be consistent with those as reflected in the identity proof supplied.

certain requirements for gender recognition (such as requirements as to SRS); and

- (3) whether or not a 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 in order for his/her foreign gender recognition to be recognised in Hong Kong.

### **Global review**

7.77 As shown in Chapter 4 of this Consultation Paper, different jurisdictions across the world have different measures for recognising a change of gender legalised in a foreign country or territory (see also Annex A and Annex B of this Consultation Paper). However, it appears that most jurisdictions do not specify whether or not, and how, foreign gender recognition will be recognised under their schemes. In contrast, the following jurisdictions appear to have the option of recognising change of gender which has been legalised by certain other jurisdictions:

- (1) The UK GRA provides, under sections 1(1)(b) and 3(5), that a person's gender change recognised in an approved country or territory might be recognised in the UK. For example, Italy is one of the countries approved by the Secretary of State for the purpose of the UK GRA.<sup>795</sup>
- (2) Sweden may recognise a verdict or a decision about a person's changed gender, as determined by a foreign court or authority, if the person was a citizen in the foreign country or had residency there when the verdict or the decision was determined.<sup>796</sup>
- (3) Manitoba (Canada) empowers the Director of Vital Statistics to change the sex designation of an applicant's birth registration upon receipt of documentation effecting a change of sex designation from the foreign jurisdiction in which he or she is domiciled or habitually resides, provided, *inter alia*, that the legal requirements of the jurisdiction for such changes are comparable to the requirements under the Vital Statistics Act of Manitoba.<sup>797</sup>
- (4) Ontario (Canada) allows applicants to submit a document or certificate issued by a jurisdiction in which the applicant was domiciled or ordinarily resident that, in the opinion of the Registrar General, confirms that the applicant's gender identity does not accord with the sex designation on the applicant's birth

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795 Pursuant to the Gender Recognition (Approved Countries and Territories) Order 2011, available at:

[http://www.legislation.gov.uk/ukxi/2011/1630/pdfs/ukxi\\_20111630\\_en.pdf](http://www.legislation.gov.uk/ukxi/2011/1630/pdfs/ukxi_20111630_en.pdf).

796 Sweden Gender Recognition Act (1972: 119) as reformed in 2012, section 3.

797 Available at <http://web2.gov.mb.ca/laws/statutes/ccsm/pdf.php?cap=v60>.

registration and it is appropriate that the sex designation be changed.

- (5) Utah (US) accepts evidence of sex change approved by a court of competent jurisdiction of another state in the US or a province of Canada.<sup>798</sup>

*Relevant international convention: ICCS Convention No. 29*

7.78 Different jurisdictions might mutually agree to recognise gender changes legally granted in respective states. One relevant agreement found in Europe is the “*Convention no. 29 on the recognition of decisions recording a sex reassignment*”,<sup>799</sup> dated 12 September 2002, issued by the International Commission on Civil Status (ICCS).<sup>800</sup> The Convention is “*limited to laying down the conditions governing the recognition in one State of a sex reassignment decision taken in another State*”.<sup>801</sup> The Convention provides that the Contracting States should mutually recognise each other’s “*final court or administrative decisions recording a person’s sex reassignment that have been taken by the competent authorities*”.<sup>802</sup> The Convention has been signed by five countries (Germany, Austria, Spain, Greece and the Netherlands), but only Spain and the Netherlands have ratified this Convention (this took effect on 1 March 2011).<sup>803</sup>

*Sub-question (1): whether to recognise foreign gender recognition*

7.79 Some people argue that gender recognition granted in a foreign country should be recognised in Hong Kong, and Hong Kong should not ask the transgender persons who have had their preferred gender recognised overseas to go through the local recognition process, because they have already successfully passed the threshold for gender recognition in an overseas jurisdiction where they were domiciled or resided. Arguably, it would be onerous for them to re-submit an application and go through another

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798 Utah Code Ann. § 26-2-11, available at:

<http://law.justia.com/codes/utah/2012/title-26/article-2/section-11/>.

799 The Convention can be found under the list of convention at ICCS’s website at:

<http://ciec1.org/>.

800 It is an international intergovernmental organisation which was founded in Amsterdam in September 1948 and recognised in December 1949 by an exchange of letters between Belgium, France, Luxembourg, the Netherlands and Switzerland.

801 See the Explanatory Report of the Convention which stated the purpose of drawing up the Convention, in page 3 of the Convention.

802 See Article 1 of the Convention. Three exceptions to this mutual recognition are set out in Article 2 of the Convention, namely:

(a) the physical adaptation of the person concerned has not been carried out and has not been recorded in the decision in question;

(b) recognition is contrary to public policy in the required State; or

(c) the decision has been obtained by fraudulent means.

Nonetheless, the Contracting State in which recognition of the foreign decision is sought is not obliged to refuse recognition in the above three cases. See also Explanatory Note to the Convention, at paragraph 2 under the sub-heading of “Article 2”.

803 See the General Information in ICCS’s website at: <http://ciec1.org/>.



round of procedures for the purpose of acquiring the rights that they should otherwise be entitled to enjoy.

7.80 Not providing for recognition of foreign gender changes in a gender recognition scheme may potentially cause numerous problems. It appears from the experience of jurisdictions where recognition of foreign gender change is prohibited, or where the law this is ambiguous, that transgender people may encounter compounded difficulties in everyday life due to different gender identities stated on their identity documents issued by different jurisdictions, which could lead to administrative confusion and chaos. The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), a European NGO, gave two actual examples to illustrate the plight facing transgender persons under these circumstances.<sup>804</sup> In the first, a Danish trans man residing in Germany changed his first name into a male name in accordance with German transsexual law, but when he booked a flight to Canada, the airline company insisted his title be indicated as “Mrs”, which caused confusion and forced him to constantly have to explain the contradictory information on the ticket, exposing him to discrimination. In another example, a French trans man residing in Germany had a civil status document identifying him as female, whereby he was insulted and discriminated against by German authorities and border control officers when travelling from France to Germany, and was unable to have a bank account in Germany.

7.81 The problem could be complicated by the lack of nationality or residency requirements in some jurisdictions’ gender recognition schemes, such as Italy’s, which might result in the civil status documents of a foreign transsexual person being changed under the Italian law (as illustrated in paragraph 7.6 above). In such circumstances, a question arises as to whether this person’s gender recognition granted in Italy should be recognised in the country where he/she resides or where his/her birth is registered.

7.82 From the perspectives of conflict of laws, enforcing a personal right or capacity arising under the law of a foreign jurisdiction (and gender change recognised by a foreign jurisdiction is arguably one kind of such personal right or capacity) is allowed only when the enforcement is not inconsistent with the fundamental public policy of the domestic law,<sup>805</sup> and

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804 See European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), “ILGA-Europe’s contribution to the Green Paper” COM(2010) 747 final, April 2011, at 24.

805 See Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, *Sweet & Maxwell*), Vol 1, at paragraph 5-001. This common law principle has been followed by Hong Kong courts, and one writer asserts that this principle will become more relevant in future Hong Kong civil litigation with cross-border elements, due to the growth over recent decades in regulation, by way of public international law, of topics such as expropriation, aggression, torture and, in due course, other breaches of human rights and peremptory norms of international law. See Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd ed, 2012, *Sweet & Maxwell*), at paragraphs 4.034 and 4.036. Further, the doctrine of public policy has been principally invoked in cases involving a foreign status. In this respect, an incapacity imposed for reasons which it would be contrary to public policy to enforce is disregarded as a “penal incapacity”. The

does not represent a serious infringement of human rights.<sup>806</sup> However, the concept of public policy “does not admit of definition and is not easily explained”.<sup>807</sup> For avoidance of undue confusion, it is arguably preferable to make explicit legislative provision for the recognition of foreign gender recognition in legislation to implement a gender recognition scheme.

*Sub-question (2): restricting recognition to certain foreign jurisdictions*

7.83 In the light of the established conflict of laws principle that a personal capacity existing under a foreign law might or might not be disregarded by domestic courts, depending on the circumstances of the individual case,<sup>808</sup> it is arguable that Hong Kong is capable of determining whether a gender change recognised by a particular jurisdiction, in view of the nature and prerequisites of that gender recognition scheme, should be recognised in Hong Kong.

7.84 In the UK, the GRA promulgates a list of countries where gender recognition under their systems is eligible to be recognised locally (as stated in paragraph 3.60 above). If a similar approach were to be adopted in Hong Kong, it is likely that the question of which jurisdictions should be included in the list would hinge upon how the gender recognition scheme in Hong Kong is formulated and what pre-conditions for gender recognition are provided (the considerations of the common pre-conditions are discussed in Chapter 6 and Chapter 7 of this Consultation Paper). If a foreign country adopts a more restrictive approach for gender recognition than that employed in Hong Kong, there may not be much contention amongst the community if Hong Kong accepts and recognises a gender change recognised under that foreign regime. In contrast, sectors of the community might object if Hong Kong were to recognise a gender change recognised under a foreign jurisdiction’s more

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English courts have thus held that the penal incapacities imposed on account of slavery, religion or religious vocation, alien nationality, race, divorce and physical incompetence and prodigality, will be disregarded (see Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell) Vol. 1, at 5-010). A person’s reassigned gender having been legally recognised in a foreign country is arguably a kind of foreign status, but it is unlikely that the recognition would lead to any “penal incapacities” so as to justify a non-recognition in domestic courts (because even in a jurisdiction mandating full SRS as a requirement for gender recognition, the gender change would result in recognition of some civil rights of the applicant).

806 For example, in *Oppenheimer v Cattermole* [1976] AC 249, a majority in the House of Lords expressed the view, *obiter*, that Nazi nationality decrees depriving absent German Jews of their nationality and confiscating their property were not recognised in the UK, as “a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.” See Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell) Vol 1, at paragraph 5-005.

807 As per Kekewich J in *Davies v Davies* (1887) 36 Ch D 359 at 364, quoted in *Chen Li Hung v Ting Lei Miao* [2000] 1 HKLR 252.

808 For example, the English courts recognise the validity of marriages within the prohibited degrees of relationship under English law, but they might refuse to recognise a marriage with a child below the age of puberty or a marriage with a man suffering from autism and severe impairment of intellectual functioning. See Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012, Sweet & Maxwell) Vol 1, at 5-011.

liberal scheme, as this might be perceived to create a loophole in the law. (For example, a transgender person might consider the gender recognition law in Hong Kong too restrictive for him/her or the procedures too cumbersome, and choose to obtain gender change and recognition in another jurisdiction with less stringent requirements. If he/she subsequently seeks recognition in Hong Kong of the foreign gender change that might be seen as having bypassed the Hong Kong gender recognition law.)

7.85 Another factor to be considered in this is the possible difficulty in classifying a particular jurisdiction's scheme as "*more restrictive*" or "*more liberal*" than that implemented in Hong Kong. The yardstick for measuring the liberalism of a scheme may sometimes be hard to determine because of the risk of comparing 'apples with oranges' while different legal systems approach gender recognition issues in diverse ways.<sup>809</sup>

*Sub-question (3): connection between the applicant and the foreign jurisdiction*

7.86 This issue would arise if it were necessary to consider whether Hong Kong should recognise a gender change recognised in a foreign jurisdiction where no requirements as to residency, nationality or domicile were imposed. This matter is interrelated with sub-question (2) above.

## **Issues for consultation regarding foreign gender change and other possible non-medical requirements**

7.87 In view of the discussion in paragraphs 7.74 to 7.86 above, we invite views from the public on recognition of foreign gender change and relating issues.

**Issue for Consultation 11: 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**

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809 Such a difficulty has been previously noticed in the context of recognition of foreign judgments, with the Hong Kong courts on several occasions concluding that the foreign court was in fact deciding a somewhat different issue. See Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd ed, 2012, Sweet & Maxwell), at paragraphs 9.005, 9.013 and 9.091.

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.

7.88 Separately, we also invite views from the public on further non-medical requirements or evidence for gender recognition.

**Issue for Consultation 12: 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 or further evidence 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.

## CHAPTER 8

# WHAT ARE THE OPTIONS FOR A GENDER RECOGNITION SCHEME

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### Introduction

8.1 As can be seen from the discussion in Chapters 3 and 4 of this paper, different jurisdictions adopt a wide range of different approaches to processing applications for gender recognition. One of the approaches is to set up a panel like the Gender Recognition Panel (GRP) under the Gender Recognition Act 2004 (GRA) in the UK. The role of the GRP is to adjudicate, on a case by case basis, on whether recognition of an acquired gender is to be granted upon application by a transsexual person. The GRP is a constituent tribunal of HM Courts and Tribunal Service and comprises a judicial panel (made up of legal and medical members responsible for assessing applications) supported by an administrative team. The system requires an applicant for gender recognition to submit specified evidence to the GRP which then reaches its decision based on the documentary evidence submitted.

8.2 Other types of authorities to process applications for legal recognition of gender change, such as bodies exercising an administrative function to change details on the personal identification documents, are discussed in Chapter 4 of this paper.

8.3 In this chapter, we will examine the arguments in support of and against adopting various options for a gender recognition scheme in Hong Kong, including a legislative scheme, an administrative scheme, a scheme with a panel set up to perform quasi-judicial or judicial functions to determine applications for gender recognition (similar to the UK's GRP), a scheme involving overseas experts in the assessment of gender recognition applications, and a hypothetical dual-track gender recognition scheme for Hong Kong with different requirements for each track.

8.4 As a matter of clarification, the possible arguments discussed in this chapter are solely for the purposes of consultation and do not necessarily represent the IWG's stance on any of the issues. No conclusion as to the IWG's stance should therefore be drawn from the wording and mode of presentation of this chapter, nor from the citing or referring to the comments, observations or arguments made by individuals or organisations mentioned in this chapter. It should also be stressed that pending the result of the consultation, the IWG has not reached any conclusion on any of the issues. Further, it should be borne in mind that the list of possible arguments discussed below is by no means exhaustive, and that the IWG is prepared to consider such other arguments as may be appropriate.

## A legislative scheme vs an administrative scheme

8.5 This section discusses the arguments for and against two options for a gender recognition scheme, namely a legislative scheme or an administrative scheme. It is presumed that the two options would have different formalities (eg, a fully-fledged statute *versus* administrative guidelines underpinning the scheme), but each would aim to achieve the purpose of “legal gender recognition” as defined in paragraph 1.9 in Chapter 1 of this paper.

### *Arguments in support of a legislative scheme*

8.6 Dr Scherpe took the view that specific legislation underpinning a gender recognition scheme is essential for Hong Kong, stating that:

*“There is absolutely no doubt that the issues concerning the legal status of transsexual and transgender persons are complex. That is why there is a clear trend towards specific legislation amongst the jurisdictions looked at. Where there were major court (or constitutional court) decisions, all these decisions have emphasised (e.g. in the U.K. and in Hong Kong) that the issues ought to be dealt with by the legislature and are not amenable to a ‘quick fix’. As for Hong Kong, the mandate by the Court of Final Appeal is clear: legislation needs to be implemented. A simple amendment (for example to allow only post-operative transsexual/transgender persons to fully change their legal sex/gender and thus marry accordingly) of the existing legislation*

- 1. would be inappropriate to deal with the matters concerned;*
- 2. would be contrary to what the W v Registrar of Marriages-decision requires,*
- 3. would aggravate the situation of those concerned who could not and or would not fulfil such narrow requirements; and*
- 4. would merely attract new litigation which eventually would lead to the new provisions being struck down as well as a violation of the Basic Law...*

*There is broad consensus amongst experts that what is required for Hong Kong is a fully-fledged Gender Recognition Ordinance. Most experts agree with the Court of Final Appeal that that the UK’s Gender Recognition Act 2004 might serve as a useful starting point/comparator for any Hong Kong legislation, given the similarity of the legal systems. However, there are some concerns about some parts/provisions of the Gender Recognition Act 2004; as is inevitable with new legislation, some of the provisions in practice turned out to be problematic, and so careful analysis of the UK Act would enable the Hong Kong legislature to avoid these problems,*

*and also to draft an Ordinance suitable for the Hong Kong legal system.”*<sup>810</sup>

8.7 Another argument in support of a legislative scheme is that it could dispense with the need to amend all legislative provisions which are affected by gender recognition (eg, new definitions of “male” and “female” might have to be added to the relevant legislation). Such a gender recognition statute would have to deal with legal issues consequent upon gender recognition (a list of the legal issues potentially affected can be found in paragraph 18 of the Preface of this Consultation Paper, as the UK GRA does (see sections 12 to 20 of the UK GRA). It may also involve the setting up of a statutory body (a panel or a board for gender recognition) to determine applications for gender recognition (similar to the UK model) or empower the court to make the determination (similar to the model in New Zealand).

#### *Arguments against a legislative scheme and in support of an administrative scheme*

8.8 However, it might be argued that it would be costly to set up and maintain a gender recognition board or panel, or, if a statutory scheme via judicial proceedings is to be implemented, to involve judicial manpower and training in the field of transsexualism.<sup>811</sup> Training of qualified clinical psychologists and psychiatrists fully cognizant with the provision of counselling services to transsexual persons would also be necessary in order to keep the statutory scheme in place.

8.9 Another counter-argument against introducing a new legislative scheme for gender recognition in Hong Kong is that it would be unnecessary for Hong Kong whilst the existing administrative measures, or an improved system which utilises the existing HKIC system and builds on the current administrative practice in this area, would be more suitable for Hong Kong. Most countries enacting specific gender recognition law do not have a document comparable to the HKIC, and issue a separate document, such as a gender recognition certificate, to the applicant so as to enable a subsequent application for change of gender marker on other identification documents. Since a HKIC is the major identification document that is applicable in routine life in Hong Kong, to issue a new HKIC reflecting the successful applicant’s new gender identity would arguably be a more straightforward approach that could facilitate the person concerned to legally express his/her new gender identity. In such a new administrative scheme, the authority that determines whether an application is granted will be given a set of guidelines and criteria for gender recognition so as to prevent abuse of the system. The procedures

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810 See Centre for Medical Ethics and Law, Faculty of Law of the University of Hong Kong, “Submission to the Legislative Council and the Security Bureau of the Hong Kong SAR on the Legal Status of Transsexual and Transgender Persons in Hong Kong” [in Relation to the Marriage (Amendment) Bill 2014] (Occasional Paper No 1, March 2014; LC Paper No. CB(2)1052/13-14(01)).

811 The UK GRP considered that there was no definitive answer as to what constitutes “*practising in the field*”. The Panel gave it a liberal interpretation. See the minutes of GRP User Group Meeting on 4 April 2006.

involved for implementing such an administrative scheme would arguably be simpler and the cost would be lower, and the time to implement faster, than legislation.

### *Arguments against an administrative scheme*

8.10 One view is that an administrative scheme similar to the current system adopted in Hong Kong may not have the desired effect of recognising the concerned individuals' acquired gender for all legal purposes. After obtaining a new HKIC, the transgender person concerned would have different gender identities displayed on different identification documents, which may lead to public confusion and even judicial disputes, as in *W's* case. Other difficult issues could arise in relation to, for example, gender-specific offences, the small house policy, property and succession matters, etc, and legal challenges might follow if those issues are not tackled clearly in law. Arguably, these types of post-recognition issues (which will be addressed as noted earlier, in the second stage of the IWG's study) will require legal intervention. A question arises as to how an administrative scheme would effectively regulate those matters in contrast to fully-fledged legislation on gender recognition, which is capable of addressing all these types of post-recognition issues, and for which the UK GRA is a good example. As Dr Athena Liu has stated:

*"The Court of Final Appeal's decision represents the dawn of a paradigm shift away from entrenched gender binaries. We live in a world where sexual minority rights need to be taken seriously, and ad hoc law reform is unlikely to be the appropriate response. Hong Kong now has a valuable opportunity to review and update its law. In so doing, it will find that protecting the rights of sexual minorities liberates society and helps to realise a more tolerant and inclusive community. This opportunity for reform should not be missed."*<sup>812</sup>

### **Issue for consultation on type of gender recognition scheme, if adopted**

**Issue for Consultation 13: 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**

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812 Athena Liu, "The Legal Status Of Transgender And Transsexual Persons In Hong Kong", in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 361.



**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.**

## **Considerations for adopting a scheme that is similar to the UK gender recognition scheme**

8.11 As noted in Chapter 3 of this paper (at paragraph 3.1), the CFA in *W's* case described the UK gender recognition scheme as a “*compelling model*” for consideration of the legislation in Hong Kong. It has been argued, however, that when considering whether a gender recognition law should be styled on the UK GRA, one should pay heed to the differences between the laws in the UK and Hong Kong. For example, the UK law legalises civil unions and same-sex marriage whereas no similar law has been passed in Hong Kong.

8.12 Another problem of the UK GRA is arguably the low utilisation rate. A possible explanation for this phenomenon is that many transgender persons in the UK may not have an imperative need to acquire the gender recognition certificate until they wish to marry (and this motive may be less relevant since the enactment of the Marriage (Same Sex Couples) Act 2013) or to qualify for the related social security benefits and entitlement to pensions enjoyed by people of the opposite sex. Many transgender persons may live comfortably without gender recognition, largely attributed to the protection afforded under the equal protection and employment protection laws applicable in the UK. Chapter 3 of this paper also illustrates other reasons for the low level of applications under the UK GRA.<sup>813</sup>

8.13 There have been calls in recent years for reform of the UK GRA. As commented by the Women and Equalities Committee<sup>814</sup> in its report published in January 2016, the UK GRA is now “*dated*” as “*its medicalised approach pathologises trans identities and runs contrary to the dignity and personal autonomy of applicants.*”<sup>815</sup> The Committee urged the UK

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813 In addition, in late 2015 when the UK Parliament’s Women and Equalities Committee heard evidence surrounding the UK GRA, trans people and some other attendees contended that the Act did not work well for various reasons, including that getting legal recognition was a long and difficult process, the whole process for assessment can be humiliating, self-declaration is becoming the model for most trans activists, etc. See news report of *Pink News*, “6 reasons why the UK’s gender laws are failing transgender people”, 15 October 2015.

814 For more information about the Women and Equalities Committee, please see: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/role/>.

815 See Women and Equalities Committee, *Transgender Equality (First Report of Session*

Government to update the Act, in line with the principle of gender self-declaration that has developed in other jurisdictions, and noting that “*an administrative process must be developed, centred on the wishes of the individual applicant, rather than on intensive analysis by doctors and lawyers.*”<sup>816</sup>

8.14 Nevertheless, it has been argued that the UK model provides a comprehensive system for gender recognition, applying clear and transparent procedures and catering for post-recognition issues as well.<sup>817</sup> As noted by Dr Sam Winter, the UK GRA has the following features: (a) the voluntary aspect: with those choosing not to have a gender recognition certificate free not to have one; (b) the broad scope: extending into a range of legal areas in which one’s status as male or female has legal importance; and (c) the inclusiveness: with all those trans people covered who identify in a gender other than that assigned to them at birth.<sup>818</sup>

8.15 Some people also consider that the line to be drawn for gender recognition should be set at the applicant’s desire to live in the opposite gender permanently, and the evidential requirements under the UK GRA are sufficient. They also argue that the UK model is a realistic approach for Hong Kong as it would be too far-fetched for the community to accept a self-determination model at this stage. Yet, it has also been observed by some that the UK GRA is no longer the global leading model in protecting gender identity rights in light of the more recent developments elsewhere in this area.<sup>819</sup>

8.16 Even if a scheme along the lines of the UK model were to be introduced in Hong Kong, certain modifications would need to be made, in particular, regarding the provisions relating to marital status of the applicants. Also, it remains to be determined, given the specific circumstances of Hong Kong, whether or not a gender recognition certificate or a replacement identity card or a new birth certificate or any other identification documentation would be issued to a successful applicant.

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2015-16), published on 14 January 2016, House of Commons, at 3.

816 Same as above, at paragraphs 44 and 45.

817 See Peter Dunne, “Ten years of gender recognition in the United Kingdom: still a “model for reform”?” (2015) Public Law 530.

818 The Professional Commons, “Task Force on Transgender Law Reform: Background Paper”, including Sam Winter, “It’s really time for change: Towards a Gender Recognition Ordinance for Hong Kong” (updated on 3 October 2013), at 14.

819 Same as above. There have been calls for the current UK law on gender recognition to be reformed; a significant factor being the legal reforms which have taken place in Argentina, Denmark and Malta in recent years.

## **Issue for consultation on adopting a scheme similar to the UK or another jurisdiction's gender recognition scheme**

**Issue for Consultation 14: 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.**

### **Considerations for setting up a panel to perform quasi-judicial or judicial functions (similar to the UK's GRP) to determine applications for gender recognition**

8.17 The UK GRP could be said to be performing quasi-judicial or judicial functions because it is empowered to make a final decision on recognising an applicant's acquired gender under the GRA. It has been argued that such a specific authority for gender recognition, which would make an assessment on the evidence submitted by the applicants, could serve as a "*gate-keeper*" to safeguard against premature or frivolous applications, especially in jurisdictions where the criteria for gender recognition are more flexible (for example, where SRS is not required).

8.18 Assuming a gender recognition scheme is to be introduced in Hong Kong and it includes medical pre-conditions, the involvement of medical members in such a statutory authority would be significant, not for making a diagnosis (this would be provided by the person practising in the field of gender dysphoria) but ensuring that the medical evidence could be properly understood by the authority. This view was made by Lord Filkin in the House of Lords second reading debate upon the UK Gender Recognition Bill in early

2004.<sup>820</sup> In the UK, the size of the GRP could be as small as comprising only one legal member (eg, lawyer or judge) and one medical member (eg, doctor or psychiatrist), provided that they had long-term experience of sitting on the Panel for the assessment, and the applications concerned were relatively straightforward (eg, where the applicant had undergone full SRS). For more complex cases, the GPR would usually consist of at least a lawyer, a doctor and a psychiatrist with expertise in the subject area.

8.19 However, a potential stumbling block of establishing a similar authority as the UK's GRP in Hong Kong is the foreseeable difficulty of engaging sufficient medical experts with expertise in the field of transgenderism to sit on such an authority. Many medical experts with such expertise are active medical practitioners, who they might be placed in a conflict of interest situation when sitting on the panel for determination of an application for gender recognition by a patient whom they have treated or are treating.

8.20 It might be possible to engage overseas experts, but it is uncertain whether they would have sufficient knowledge of all the relevant circumstances including the daily life of the transgender community in Hong Kong, which may affect their assessment of whether the applicants could live in their acquired gender in the future. As commented by Dr York Chow, former Secretary for Food and Health of Hong Kong<sup>821</sup>:

*“The process of gender identification and designation must be discussed beyond the medical aspect to include psychological, social and family considerations. This must include how a transgender person interacts with society and their family, and how such interactions are influenced by socially constructed gender roles.”*

## **Issue for consultation on authority to determine applications for gender recognition**

**Issue for Consultation 15: 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.**

820 HL Deb 29 January 2004 c377.

821 Dr York Y.N. Chow, “Hong Kong must do right by its transgender minority”, published in the *South China Morning Post* on 12 July 2013.

- (2) If an authority other than the courts in 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.

## **Considerations for establishing a dual-track gender recognition scheme for Hong Kong with different requirements for each track**

8.21 Chapters 6 and 7 as well as the preceding paragraphs in chapter 8 illustrate the diversity of views inherent in the discussion of the various possible requirements and options for gender recognition. It is anticipated that no matter where the line is drawn, there would be some criticisms of the scheme, either because of its perceived restrictiveness or its overly liberal approach.

8.22 One alternative measure to deal with gender recognition is to implement a dual track system, providing two different sets of procedures with different criteria for gender recognition (eg, SRS being a compulsory requirement or allowing less stringent qualification) and/or different legal consequences (eg, for all or partial legal purposes, or with changes of gender marker on different identification documents). Such a system may be able to provide flexibility to applicants with different personal conditions and needs, and form a halfway house between liberal and restrictive approaches to gender recognition.

8.23 In terms of counter-arguments, there may be doubts on its practicality; there may be a risk of the relatively easier track being overwhelmingly utilised while another more strict track may become redundant; the creation of more gender confusion in society; and the consequential legal issues and implications that could arise on a number of matters, including those listed at paragraph 18 of the Preface of this Consultation Paper (eg, which recognition track would affect a person's existing parenthood status or right of succession to property; whether or not gender-specific offences could be committed by a man whose changed gender identity has been recognised by either recognition track). All those matters necessitate careful and

comprehensive scrutiny and consultation.

8.24 Theoretically, there could be multifarious models of a dual-track system. The fundamental concept for devising a hypothetical model is to make different pathways available to cater for different groups of applicants with their specific needs. It is noted that so far, no jurisdiction has been identified as having adopted a dual-track model for gender recognition, but there has been discussion about a dual-track model in some quarters. As an illustration, a dual-track model was recently proposed by Rachael Wallbank, a qualified Mediator and Collaborative Law Practitioner in New South Wales of Australia,<sup>822</sup> where she commented on the legal framework in Australia concerning gender recognition proposals.<sup>823</sup> According to Wallbank, “[a] practical and fair system for the reassignment of Legal Sex<sup>824</sup> does not create legal hierarchies and provides the same rules for all people who seek to have their Legal Sex reassigned.” Her proposed model for the Australian government is as follows:

“(1) A primary pathway for those applicants who are able to provide the reports of two suitably qualified doctors certifying that they had undergone a ‘sex affirmation procedure’ defined as:

‘A surgical or medical procedure involving the person’s reproductive organs carried out for the purpose of assisting a person to be considered to be a member of their affirmed sex.’

(2) A secondary pathway for applicants who are unable to satisfy the requirement of the primary pathway, due to age, health or financial reasons, but who are able to satisfy an expert medico-legal board that a recognition or reassignment of their Legal Sex should nevertheless be made based upon the principle that it is the fundamental task of the board, in a legal and social context that assigns all human beings in the community into either the Male or the Female Legal Sex, to assign applicants to one Legal Sex or the other, including individuals whose characteristics are not uniformly those of one or other biological sex, based upon

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822 Wallbank represented and appeared on behalf of the post-operative female to male transsexual applicant at trial in an Australian case concerning his right to marry according to his new gender namely *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158, and on appeal in *Attorney-General for the Commonwealth v Kevin and Others* [2003] FamCA 94. She is a member of the Legal Issues Committee of the WPATH and a founding member of the Australian and New Zealand Professional Association for Transgender Health.

823 See Rachael Wallbank, “The Legal Status Of People Who Experience Difference In Sexual Formation And Gender Expression In Australia”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 523 to 524.

824 Wallbank defines “Legal Sex” as “the legal categorisation of a person’s sex, usually assigned at or near the birth event, being a part of the legal identity of a person.” See Rachael Wallbank, “The Legal Status Of People Who Experience Difference In Sexual Formation And Gender Expression In Australia”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 466.

a *Re Kevin* style holistic objective assessment of which Legal Sex is a best fit for both the applicant and the community.” (emphasis added)

8.25 To clarify, a “*Re Kevin* style” assessment mentioned above is, according to Wallbank, an “*inclusive approach to Legal Sex*” that “*presumes or recognises the natural diversity that exists in human sexual formation and gender expression and then seeks to assimilate and assign that diversity into either of the culturally understood and accepted ‘Male’ or ‘Female’ categories of Legal Sex.*”<sup>825</sup> The case of *Re Kevin*<sup>826</sup> concerned an application for a declaration of the validity of a marriage between a woman, Jennifer, and Kevin, who was born with female characteristics but then affirmed the male sex and underwent hormonal treatment, chest reconstruction surgery and a total hysterectomy with bilateral oophorectomy (no phalloplasty procedure was undertaken). It was held, *inter alia*, that the marriage concerned was valid having regard to all the circumstances, and in particular that Kevin: (a) had always perceived himself to be a male; (b) was perceived by those who knew him to have had male characteristics since he was a young child; (c) went through the treatments prior to the marriage which were regarded as a full process of transsexual re-assignment; and (d) appeared and behaved and was perceived as a man at the time of the marriage.<sup>827</sup>

8.26 It can be seen that Wallbank’s suggested dual-track model was based on her hypothesis that every citizen should only be assigned a male or a female legal sex, despite the fact that Australia recognised third gender in its gender recognition law. Save for this, Wallbank considered that “*freedom of gender expression is a fundamental human right and that such right should have legal protection.*” Wallbank observed that this dual pathway model “*provides a reasonable balance between the needs of the individual and community concerning Legal Sex as an aspect of legal identity and provides the law with a compassionate discretionary capacity.*”<sup>828</sup>

8.27 The Wallbank model may provide an insight for the formulation of a dual-track scheme in Hong Kong. The following are two variant forms resembling the Wallbank model as examples to illustrate how a dual-track model may work:

Model A:

Applications under both tracks for recognition would be assessed by a gender recognition board or panel or an independent

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825 See Rachael Wallbank, “The Legal Status Of People Who Experience Difference In Sexual Formation And Gender Expression In Australia”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 505.

826 *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158. The decision and the reasoning were upheld unanimously on appeal: *Attorney-General for the Commonwealth v Kevin and Others* [2003] FamCA 94.

827 *Re Kevin*, at paragraph 330.

828 Same as above, at 524.

decision-making authority, relying upon a particular set of guidelines which would provide the criteria or yardsticks for either recognition track.

The primary pathway imposes on applicants strict medical requirements (eg, full SRS or sterilisation due to hormonal and other surgical treatment) supported by medical certificates issued by qualified doctors.

The secondary pathway provides for applicants who are unable to satisfy the requirements of the primary pathway due to specific reasons (eg, age or health reasons certified by qualified doctors), but who are able to produce evidence to the satisfaction of a gender recognition board or panel that he or she is a person of the gender other than his or her biological sex (eg, having been diagnosed of gender identity disorder or gender dysphoria and/or having completed real life experience for a specific period and/or having adapted his or her physical appearance to the opposite gender, etc). In addition, there could be flexibility regarding the evidence required for the secondary pathway (eg, only psychiatric assessment is compulsory but other related proof is optional) as long as the age or health reasons are substantiated.

A successful applicant under either track would be granted full gender recognition for all legal purposes, which would entail change of gender marker on his or her birth certificate and/or other identification documents.

#### Model B:

The first pathway imposes strict medical requirements (eg, full SRS or sterilisation due to hormonal and other surgical treatment) supported by medical certificates issued by qualified doctors. The application will be approved once the requisite medical certificates are submitted to the relevant authority with the application, and there is no need to go through any gender recognition board or panel. The decision-making authority will determine the application based on a particular set of guidelines.

Another pathway requires less stringent medical requirements (eg, merely diagnosis of gender identity disorder or gender dysphoria and/or proof of real life experience for a specific period and/or having adapted his or her physical appearance to the opposite gender, etc). An application under this track would be assessed by a gender recognition board or panel or an independent decision-making authority. Hence, the procedure for the application would be more complex (eg, interview with the board members is mandatory) and the evidence required would be substantial (eg, records of psychiatric assessment, witness statements relating to real life experience, etc). In this regard, the way in which the UK GRP processes an application



could be followed, with certain modifications adapted to Hong Kong's situation.

A successful applicant under either track would be granted full gender recognition for all legal purposes, which would entail change of gender marker on his or her birth certificate and/or other identification documents.

8.28 As can be seen, Model A appears to rely heavily on medical assessment, which is the determinative factor for each pathway for recognition to be taken into account by the independent decision-making authority. Similar to the current practice in Hong Kong, full SRS would remain the corner for approving a legal gender change. On the other hand, the secondary pathway provides flexibility so that the compulsory requirement for full SRS might be relaxed so long as it is medically evident that the applicant is unfit for full SRS. A similar relaxation for mandatory medical requirements is provided in Spain (see Annex B regarding the gender recognition situation in Spain).

8.29 Conversely, Model B does not require an applicant to be assessed as to whether or not he or she is medically fit to undergo full SRS, and it would be up to the applicant to choose not to undergo SRS (provided that he or she fulfils the other requirements) if he or she elects to apply under the second pathway. If SRS is opted for, the application would be processed simply on the papers. If an applicant opts not to undergo SRS his or her application has to be assessed by an independent board, panel or authority.

8.30 The Wallbank model and the two above-mentioned models would lead to the same end, ie, full gender recognition in law. One advantage of this is that legal certainty would be guaranteed, because as long as the applicant is granted legal recognition, he could enjoy full legal rights and obligations of the recognised gender no matter which recognition track he or she has gone through.

8.31 An alternative possibility for a dual-track scheme is to grant full legal gender recognition for one recognition track, and grant recognition for limited legal purposes for another track. The latter track might be based on changes to the sex entry on HKICs because a HKIC is a unique official document for Hong Kong residents and is used as the primary means of identification.<sup>829</sup> In light of transgender advocates' opinions, as illustrated in the preceding chapters, it would arguably be highly beneficial for transgender people to be issued with new HKICs reflecting their preferred gender identity so as to provide the person concerned with ease and convenience in his/her routine activities and daily living.

8.32 However, changing HKIC does not itself establish a person's sex or gender for all legal purposes. Rather, the legal gender of a person in Hong

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829 A HKIC is required for most real life situations in Hong Kong, such as entering into a phone contract; travelling across borders; starting a new job; being called into a doctor's waiting room; opening bank or library accounts; or being inspected by police beat officers on street patrol.

Kong for some legal purposes (eg, marriage) is determined, prima facie, by reference to his or her birth certificate, as envisaged by the CFA in *W's* case. Changes made on an HKIC without changes on the birth certificate might create ambiguity regarding the person's legal gender, and undesirable consequences might result, eg, rendering transgender people vulnerable to prejudice and discrimination.<sup>830</sup> Some people might have difficulty establishing a coherent personal history and therefore risk being suspected of identity fraud. Moreover, the changing of a HKIC might still give rise to controversy in some daily life situations, such as the use of toilets or changing rooms by transgender or transsexual people. Obviously, there will be a number of legal implications that have to be addressed if such a dual track scheme is introduced in Hong Kong.

8.33 In light of the above discussion, a dual-track gender recognition scheme might take the following form, which is distinguishable with Model A and Model B in terms of the legal consequences:

Model C:

Under one track for recognition, a person seeking full gender recognition for all legal purposes (which would entail change of gender marker on the birth certificate) would have to satisfy stricter medical requirements (eg, SRS and/or sterilisation is required).

Under another track, a person wishing to have only the sex entry changed on his or her HKIC would be required to satisfy less stringent requirements (eg, diagnosis of gender identity disorder or gender dysphoria and/or proof of real life experience for a specific period and/or adaptation of physical appearance of the opposite gender etc).

The former application track would have to be assessed by a gender recognition board or panel or an independent decision-making authority, and the latter track would require the applicant to apply to a relevant authority under the procedures similar to the existing one. Each decision-making body would determine an application based on a particular set of guidelines.

The legal consequences of recognition under each track including but not limited to marriage and sexual offences will need to be articulated in the law and/or administrative guidelines to avoid confusion or ambiguity that might be caused (discussion on post-recognition issues will be deferred to the next stage of the IWG's consultation).

8.34 A model like the above that could be said to be built on the existing administrative measures operating in Hong Kong, with modifications

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830 See the statement made by Robyn Emerton, as quoted in paragraph 5.16 of this Paper.

that relax the existing requirements for changing one's sex entry on his/her HKIC and, arguably, plug the loophole for lack of a scheme granting full gender recognition. However, a big question mark hangs over the gender confusion that might be caused by having two official documents showing different genders (in case an applicant goes for the latter track in Model C). With a view to reconciling the possible "gender confusion" issue, it would be necessary to articulate in the relevant law the legal purposes or implications of changing the different documents under the two tracks. Public education on the legal consequences of both recognition tracks would also be essential to increase the community's awareness. Besides, given that one of the tracks requires that a person seeking full gender recognition for all legal purposes would have to satisfy the medical requirements, including SRS and/or sterilisation, there may be other legal considerations, including potential human rights implications of the SRS and/or sterilisation requirement, that need to be addressed.

8.35 In the interests of clarity, the above hypothetical models of a dual-track gender recognition scheme are for illustration only and do not represent the IWG's stance or preference on any of them. The IWG invites comments or views from the public on the above models and any other forms of proposed gender recognition models.

### **Issue for consultation regarding a possible dual-track gender recognition scheme**

**Issue for Consultation 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 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 this is so.**

## CHAPTER 9

### OTHER RELATED MATTERS

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#### Introduction

9.1 In Chapters 6 to 8 we have examined different requirements that may be imposed on an applicant for gender recognition and the possible models of a gender recognition scheme. The issues arising from those matters are the subject of the consultation in this paper, and a summary of those issues is set out in Chapter 10 for consultation purposes.

9.2 In addition to those topics, there are other matters related to legal gender recognition that may have to be considered during the deliberation on introducing a gender recognition scheme in Hong Kong. Likely matters in this regard are listed in paragraph 18 of the Preface of this Consultation Paper and are reiterated below as follows:

- (a) official documentation;
- (b) privacy and related matters (such as the need for legal protection of data about a person's gender history);
- (c) family and parenthood matters (such as the status of a subsisting marriage to which the applicant is a party and the applicant's parental rights and responsibilities);
- (d) criminal law, procedure and evidence matters (such as gender specific offences);
- (e) property and succession matters (such as the right of succession to property and the small house policy);
- (f) compensation and benefits matters (such as the right to receive social welfare benefits and pensions); and
- (g) tax related matters (such as entitlement to a married person's allowance).

9.3 The above matters are considered "*post-recognition*" issues, as they pertain to the effect of a recognised change of legal gender on existing laws and practice, and touch on a wide range of legal areas with many possible legal consequences to be addressed. These will be covered in the second part of the IWG's study in the event that it is to be recommended that a gender recognition scheme should be established in Hong Kong (see

paragraph 11 of the Preface). Nonetheless, it is considered that some of these matters, in particular items (a) and (b) above, would have a bearing on the question of “*recognition*” as well. For example, whether or not to allow a successful applicant for gender recognition to have his/her gender marker on their birth certificate altered may be a matter taken into account by some people in forming their opinions on what requirements should be imposed on the applicants for gender recognition.

9.4 With a view to presenting a more complete picture on the issues relevant to “*recognition*” to help the public in providing their views, this chapter will provide some general information and discussion on two topics: (1) alteration of birth certificate following gender recognition; and (2) protection of gender history. Since these matters will be covered in the second part of the IWG’s study on Post-Recognition Issues,<sup>831</sup> we will not in this Consultation Paper pose specific questions on these topics for consultation. We nonetheless invite views from the public on any issues arising therefrom.

9.5 As a matter of clarification, the information and discussion presented in this chapter do not necessarily represent the IWG’s stance on any of the issues. No conclusion as to the IWG’s stance should therefore be drawn from the wording and mode of presentation of this chapter, nor from the citing or referring to the comments, observations or arguments made by individuals or organisations mentioned in this chapter. It should also be stressed that pending the result of the consultation, the IWG has not reached any conclusion on any of the issues. Further, it should be borne in mind that the list of possible arguments discussed below is by no means exhaustive, and that the IWG is prepared to consider such other arguments as may be appropriate.

## **Allowing alteration of birth certificate following gender recognition**

### *Background information*

9.6 In many of the jurisdictions studied, the law permits the alteration of entries in birth certificates as part of, or as a result, of legal gender recognition (see Annex A and Annex B for detailed information).

9.7 In Hong Kong, registration of births is governed by the Births and Deaths Registration Ordinance (Cap 174). The criteria for determining the sex of a child at birth is not set out in the Ordinance, but it is noted that the

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831 Post-Recognition Issues generally concern the impact of gender recognition on existing laws which may touch on a wide range of legal areas with many possible legal consequences to be addressed. In some overseas jurisdictions, individuals who have obtained legal gender recognition in principle will be recognised in their preferred gender for all legal purposes. However, exceptions to this general rule may apply in certain areas of law, such as criminal law, family law, or in the law regarding healthcare, sport, etc.

practice of the Registrar of Births and Deaths is to rely on the birth return furnished by the relevant hospital.<sup>832</sup> Section 27(1)(b) of the Ordinance provides that clerical errors on the birth registers may be corrected. Section 27(1)(c) allows for the correction of errors of fact and substance on the production of evidence including a declaration setting forth the nature of the error and the true facts of the case. There are no other circumstances under which a birth certificate can be legally amended. It follows that a birth certificate cannot be amended unless it can be shown there was a clerical error or an error of fact or substance when the birth was recorded. There is no mechanism by which a person's birth certificate can be amended to reflect his or her chosen or preferred gender, even after full SRS.

9.8 Ms W, of *W's* case, once applied to alter the sex entry on her birth certificate, but the application was refused and the refusal was not challenged in the relevant proceedings.<sup>833</sup> Nevertheless, it is relevant to consider whether such refusal could withstand future legal challenge. In the *Goodwin* case (see paragraph 3.36 of this Consultation Paper for a summary of the judgment), the ECtHR held that the UK Government's failure to allow post-operative transsexual persons to change their birth certificates and to recognise their chosen gender for marriage and other legal purposes constituted a violation of their right to respect for private life and their right to marry under the ECHR. It is unclear whether the Hong Kong courts would follow the decision of *Goodwin* in case a challenge similar to Ms W's is brought. Even if *Goodwin* is followed, it may offer little reference regarding the position of *pre-operative* transgender persons in this respect.

9.9 If a gender recognition scheme is implemented in Hong Kong, it would be necessary to decide whether a successful applicant is entitled to or must have his or her gender marker on the birth certificate altered to reflect the legally recognised gender. Set out below are possible arguments in support of and against allowing the change of gender marker on a person's birth certificate following gender recognition.

#### *Arguments in support*

9.10 Arguments in support of allowing the alternation of birth certificates following gender recognition would usually be that the inability of transgender persons to change their birth certificates would cause their biological sex and transgender status be revealed against their wishes whenever they are required to produce their birth certificate. This would arguably make them vulnerable to prejudice and discrimination.<sup>834</sup> Although

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832 This is completed by reference to biological criteria - primarily the genitals (penis in males; vagina in females), but also gonads (testes in males; ovaries in females) and chromosomes (XY in males; XX in females) in less straightforward cases. See Robyn Emerton, "Neither Here Nor There: The Current Status Of Transsexual And Other Transgender Persons Under Hong Kong Law" (2004) 34 HKLJ 245, at 257.

833 *W v Registrar of Marriages*, HCAL 120/2009 (CFI), judgment of 5 October 2010, at paragraph 45.

834 See Robyn Emerton, "Neither Here Nor There: The Current Status Of Transsexual And Other Transgender Persons Under Hong Kong Law" (2004) 34 HKLJ 245, at 257.

there is currently little information as to how often a person may be required, both in a legal or non-legal setting, to present his or her birth certificate, it is a fact that a person's birth certificate remains the mechanism by which his or her sex is determined for the purpose of Hong Kong law. This would lead to the argument that legal gender recognition must entail a change of the gender marker on birth certificate, failing which successful applicants for gender recognition would be "*permanently stranded as their designated birth sex for all legal purposes.*"<sup>835</sup>

9.11 Further, there may be insufficient information on how often the discrepancy between a transgender person's appearance and the gender marker on their birth certificate is source of humiliation and embarrassment. However, *Goodwin* held that the right to respect for one's private life is interfered with irrespective of the frequency of humiliation and embarrassment caused by the discordance of reality and entry in the birth certificate.<sup>836</sup> Some people might therefore argue that, when the birth certificate contains an entry incompatible with that person's appearance and acquired gender, to show that birth certificate would expose the person's gender history which may result in the person being excluded from certain employment and other activities due to existing discrimination towards transsexual persons.

9.12 The argument that allowing alteration would undermine the function and integrity of the birth record system might be challenged on the basis that there are existing exceptions. For example, in the case of adoptions, section 19 of the Adoption Ordinance (Cap 290) provides that a child adopted under an adoption order will be given a new birth certificate with the original birth entry marked with the word "*Adopted*". Separately, amendments to a birth certificate are possible in cases of re-registration of the father of an illegitimate child, re-registration after declaration of parentage or legitimacy, and re-registration after parental order in favour of gamete donors.<sup>837</sup> Arguably, these exceptions have not undermined the historical nature of the record nor the integrity of the birth record system. Some might also argue that in view of the relatively small number of transgender persons, any exception created for them is unlikely to be unduly burdensome.

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835 Same as above, at 256.

836 See *Goodwin v The United Kingdom* (2002) 35 EHRR 18, at paragraph 77, which states:

*"It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity ... . The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety."*

See also Athena Liu, "Understanding Goodwin: *W v Registrar of Marriages*" 42 HKLJ 403, at 4.

837 Births and Deaths Registration Ordinance (Cap 174), sections 12A, 12B and 12C.

## Arguments against

9.13 Some may argue that a person's birth certificate is the historical evidence of that person's genetic gender. It also represents an accurate entry at the time when it was created. Allowing alteration of the birth certificate for reasons other than a clerical error or an error of fact or substance would arguably undermine the function and integrity of the birth record system.

9.14 A further argument is that the birth record enables other people and organisations to verify a transgender person's original sex and this could prevent forgery cases. In jurisdictions where transsexuals are not required to disclose their transsexual identity to marriage partners, there were cases where their spouses felt being deceived and distressed after discovering the biological sex of them.<sup>838</sup>

9.15 Medically speaking, some diseases are peculiar to one gender eg, only men might have prostate cancer. It has been argued that keeping the birth gender marker intact can prevent misconception of this factor in the course of body-checking or medical treatment.

## Disclosing history of gender change

9.16 Regardless of whether gender recognition would result in the issuing of a new birth certificate or new HKIC, it would need to be determined whether the concerned person's history of gender change should be allowed to be searched or disclosed in certain circumstances.

9.17 In the UK, the Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No 2) Order<sup>839</sup> prescribes circumstances where disclosure of protected information does not constitute an offence under section 22 of the GRA (which makes it an offence for a

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838 See Kwan Kai-man, *同性與變性 – 評價同性戀運動和變性人婚姻* (in Chinese, transliterated as "Homosexuality and Transsexualism – Commenting on Homosexual Movement and Transsexual Marriage"), June 2015, at 268 to 269, where the author offered two examples to illustrate this point. In 2008, an American male-to-female transgender person was beaten to death by her husband who learned that she had changed her sex: see news report of *CNN*, 23 April 2009, "Transgender murder, hate crime conviction a first", available at: <http://edition.cnn.com/2009/CRIME/04/22/transgender.slaying.trial/>. Further, it was reported in 2012 that a Belgian husband discovered after 19 years of marriage that his Indonesian wife was born a boy, and after that he had been undergoing psychiatric treatment: see news report of *Daily Mail Online*, 26 November 2012, available at: <http://www.dailymail.co.uk/news/article-2238663/Belgian-husband-leaves-wife-19-years-discovering-man-says-knows-good-ironing.html>. See also *Fox News*, 27 November 2012, "Belgian man finds out his wife of 19 years was born a man", available at: <http://www.foxnews.com/world/2012/11/27/belgian-man-finds-out-his-wife-1-years-was-born-man/>.

839 This Order came into force on 4 April 2005 (available at : <http://www.legislation.gov.uk/ukxi/2005/916/made/data.pdf>).



person to disclose information, acquired in an official capacity, concerning a gender recognition application or a person's previous gender). The Order allows disclosure for the purposes of: obtaining legal advice (Art 3); for religious purposes (Art 4); for medical purposes (Art 5); by or on behalf of a credit reference agency (Art 6) and disclosure for purposes in relation to insolvency or bankruptcy (Art 7). It is arguable that the UK's approach protects the privacy of people when their desired gender has been legally recognised.

9.18 It has been argued that in circumstances where it is necessary to prove legal gender, it is inappropriate to request production of a GRC, as it is the new birth certificate issued after the granting of a GRC that provides evidence of a person's legally recognised gender. The Statutory Code of Practice in respect of the Equality Act 2010 issued by the Equality and Human Rights Commission states:

*“Transsexual people should not be routinely asked to produce their Gender Recognition Certificate as evidence of their legal gender. Such a request would compromise a transsexual person's right to privacy. If a service provider requires proof of a person's legal gender, then their (new) birth certificate should be sufficient confirmation.”*<sup>840</sup>

9.19 The right to privacy for Hong Kong people is guaranteed under Article 14 of the HKBOR. As noted by Lisa Mottet, policymakers, in considering a policy related to privacy of transgender persons, should “consider the impact of government disclosure on transgender people as well as constitutional privacy rights that may be implicated” and a state may be “violating an individual's right to privacy if it reveals information regarding a person's gender assigned at birth, gender transition, or transgender status.”<sup>841</sup>

9.20 Given the risk of violence and discrimination that comes with being known as transgender, Lisa Mottet observed that some people desire to keep information about their transgender status limited to only those whom they choose to tell and “[e]ven if the risk of violence is not present, being able to decide with whom and when to have a ‘coming out’ conversation should be a matter of individual choice.”<sup>842</sup>

9.21 However, there might be situations where a transgender person's gender history is important and its revelation 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. For instance, non-disclosure of a person's transgender status to his or her spouse before

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840 Equality and Human Rights Commission, “Equality Act 2010 Statutory Code of Practice: Services, Public Functions and Associations”, 2011, paragraph 2.27.

841 Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People”, 19 *Mich J Gender & L* 373 (2013), at 437.

842 Same as above, at 444.

their marriage might impair validity of consent. The information on gender history might be required for the prevention or investigation of a crime. Such information might also be needed by medical professionals at a time when the transgender person is too ill to be able to provide consent. A person's gender history would be needed to claim an inheritance where he/she is named in a will in his/her former identity.

9.22 The list above of these matters is not exhaustive. Giving exemptions for disclosure of people's transgender status should be balanced against other policy rationales and the potential abuse of keeping such information confidential. It appears to be necessary to conduct a thorough study on the existing law under which disclosure of a transgender person's gender history might be relevant.

## **Concluding remarks**

9.23 Birth registration is part of a complex system of the existing registers maintained by the government. Privacy of personal data is another sensitive matter that warrants careful scrutiny before a policy decision is made to change the existing law. As such, with regard to the issues of amending birth certificates following gender recognition and disclosure of gender history, the rationale and coherency of birth records and the privacy law should be reviewed before any actual solutions are proposed. These matters are to be covered in the second part of the IWG's study on Post-Recognition Issues. We nevertheless invite views from the public on whether to allow the gender marker on a transgender person's birth certificate to be altered following gender recognition, and whether a successful applicant's gender history could be allowed to be searched or disclosed on certain circumstances.

## CHAPTER 10

### SUMMARY OF ISSUES FOR CONSULTATION

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10.1 This chapter summarises the issues for consultation set out in Chapters 5 to 8 of this Consultation Paper. To assist us with our further deliberations, we now invite views from the public on those issues.

10.2 In view of the complexity and importance of the issues surrounding gender recognition, in both the legal and social contexts, and in view of the wide-ranging approaches adopted by different jurisdictions around the world, the IWG has not yet arrived at any views on how these issues are to be dealt with, and maintains an open mind at this stage. No conclusions as to the IWG's stance should therefore be drawn from wording adopted, and mode of presentation, in the issues set out below.

#### **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)<sup>843</sup> 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;

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

- (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:

- (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.