

**Submission to Panel on Administration of Justice and Legal Services**

On the Consultation Paper: Part 1 Gender Recognition of the  
Inter-departmental Working Group on Gender Recognition

8 November 2017

To: Clerk to Panel on Administration of Justice and Legal Services  
Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central,  
Hong Kong

Dear Honourable Members,

1. We are a group of lawyers and legal academics writing in support of the introduction of a comprehensive legal framework for gender recognition in Hong Kong, to express our views and observations and to make recommendations to the Panel on a suitable legislative framework and the consultation by the Inter-departmental Working Group (IWG). Attached to this letter is a draft bill, drafted with the assistance of Hong Kong's leading scholars and lawyers in this field. The said draft is preliminary in nature and its purpose is to demonstrate how we believe that our ideas could be incorporated into a flexible and workable statute.

**Introduction**

2. Gender is a normal and natural aspect of human society and personal identity. It is intricately enmeshed with the right to privacy, family and recognition of the person, and necessarily related to the fulfillment of other aspects of human dignity and fundamental rights. No one should be compelled to conform to any particular gender norm, neither should any person be prevented from exploring and fulfilling their own identity as a distinct person. Therefore, the undersigned strongly support the enactment of legislative provisions to recognize the right of all people to obtain legal recognition of their own gender identity.
3. Extensive scientific and sociological research suggest that trans and gender nonconforming persons in Hong Kong experience substantial restrictions, difficulties and discrimination that can have a severe impact on their lives and welfare when their gender identity is not recognized. The existence of such treatment undermines the values of equality and fairness that underpin our society and highlights shortcomings in the implementation of Hong Kong's international human rights obligations.
4. We commend the Government for undertaking this consultation to consider the implementation of a gender recognition scheme in Hong Kong. Introduction of such a scheme is a natural solution to some of the underlying issues that contribute to the

persistent inequality and discrimination encountered by trans and gender nonconforming persons in Hong Kong. Such a scheme is also necessary as it would be the basis for trans and gender nonconforming persons to be able to fully exercise all of the rights and responsibilities of citizenship.

5. Hong Kong regrettably lags behind comparable jurisdictions in not having implemented a mechanism for trans or gender nonconforming persons to change their gender identification in the legal sense so that their documentation corresponds to their identified gender. This does, however, present Hong Kong with the unique opportunity to draw on the experiences of other jurisdictions and implement a 'best in class' solution.
6. In this submission, we intend to focus on how the best practices of other jurisdictions can be adapted to Hong Kong's unique legal and legislative environment. In particular, we suggest that the scheme should be driven by our constitutional imperative to safeguard the rights of Hong Kong people under the Basic Law and the Hong Kong Bill of Rights (HKBOR). Restrictions on the recognition of gender identity should only be allowed where justified based on established principles of proportionality and lawful justification. Finally, we suggest that the legislative framework for a gender recognition scheme in Hong Kong should be flexible - allowing the scheme to adapt to advances in science and changes in society.
7. We recognize that these are socially difficult issues. However, we strongly urge the Government to adopt a legislative approach to gender recognition, whereby the general principles and scheme would be provided by statute, with the details and limits of such a scheme left to the executive and an appointed expert-led panel.

#### **Preliminary Note - Intersex issues, public understanding**

8. As a preliminary note, we are concerned that there is no discussion in the Consultation Paper of intersex related issues. Gender recognition will necessarily directly affect the intersex community. Their interests and views should also specifically be considered and accounted for in any gender recognition scheme.
9. According to the UN Office of the High Commissioner for Human Rights, intersex people are born with any of several variations in sex characteristics including chromosomes, gonads, sex hormones, or genitals that "do not fit the typical definitions for male or female bodies". Nonetheless, in Hong Kong, it has been the practice of the medical profession to assign such persons a binary gender (male or female) at birth. There was a time when such assignment would be accompanied by surgical intervention. Unfortunately, such assignments and accompanying surgical procedures do not always conform with the gender identity of such persons in their adulthood. While such persons belong to an extremely small minority, their rights and interests should nonetheless be considered in any gender recognition scheme.

10. Some, but not all, intersex persons may wish to identify as a gender that is neither male nor female. The intersex community in Hong Kong has suggested that intersex persons should have a right to be recognised as “intersex”, if an individual chooses to be recognised as such. In respect of the requests of intersex persons in relation to gender recognition, reference should be made to the submissions of the Chinese Intersex Alliance and Beyond the Boundary to the IWG.
11. In relation to the jurisprudence on gender recognition beyond the binary genders of male and female and/or in respect to a “third” gender, the Constitutional Court of Germany recently held that the birth registry must allow for a third gender option to address the rights of those who identify as neither male nor female (1 BvR 2019/16, 10 October 2017). The High Court of Australia in *Norrie* [2014] HCA 11 including Chief Justice French, who is also a Non-Permanent Justice of the Hong Kong Court of Final Appeal, similarly recognized that “not all human beings can be classified by sex as either male or female” (at [1]).
12. There is little understanding among the public of the situation of trans and gender nonconforming people, and still less about intersex persons. This ignorance has fed a ‘fear-based’ public discussion of gender identity in general and in relation to this consultation itself. This ignorance is also the source of much of the discrimination faced by trans and gender nonconforming people in the private and public spheres. The Hong Kong Government has an obligation to provide effective protection against such discrimination. Therefore, we call upon the Panel and the IWG to immediately recommend that the Government take steps to educate the public and promote understanding and acceptance of these vulnerable groups.

### **Issue 1: Whether a gender recognition scheme should be introduced in Hong Kong**

13. Sex and gender are not trivial concept and the two words cannot be used interchangeably. Every person has a gender identity and a set of sex characteristics.
14. Sex is assigned at one’s birth and refers to one’s biological status as either male or female. It is associated with sex characteristics that consist of chromosomal, hormonal, anatomic and genetic characteristics that collectively are used to classify bodies as either male or female. There are today over 40 known variations of these characteristics which include variations of any combination of the chromosomes, anatomy, genetics, or hormones of a person, with more still being discovered. Some of these variations (e.g. those that are anatomic, such as hypospadias) are noted at birth and can lead to infant intersex genital surgeries. Other variations are not discovered until puberty or until the person attempts to have children (such as Klinefelter’s syndrome, Turner syndrome, or androgen insensitivity syndrome). Still other variations are never known to the person or are only discovered during genetic testing for unrelated purposes. Some sex characteristics can be modified (hormonal and anatomic), while other sex characteristics cannot (chromosomal and genetic). The fundamental commonality for people with

intersex variations are (1) a variation on the axes of sex characteristics outside the bounds of what medicine defines as male or female and (2) that these are physical variations and have little or nothing to do with the person's gender identity.

15. Gender refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. These roles influence the way that people act, interact, and feel about themselves. While aspects of biological sex are similar across different cultures, aspects of gender may differ.
16. Gender identity is about one's identity, i.e. the concept of one's self - how a person feels about their gender, their body, and their interactions in society. Gender is a social construct that humans create; it does not have a direct basis in physical or bodily traits but instead is superimposed onto these. Most often, people identify their gender in concert with the gender typically displayed by other people with the same sex assigned at birth; transgender, transsexual, genderqueer, third gender, and non-binary people do not. Gender expression is how one manifests their gender identity in daily life. Neither gender identity nor gender expression is fixed, and for some people gender identity or expression may change over the course of life. For others, there is no change at any point.
17. It is now well recognized in the scientific community that a small but meaningful minority of children and adults do not fall clearly within the typical binary definitions of gender and sex. For some, this is a result of their visible and physical attributes, for others it results from internal attributes (such as brain, internal sexual organ or chromosomal attributes), and for others it is a result of their psychology. These are phenomena that appear across the history of human societies, including Hong Kong.
18. Without legal recognition of a person's gender identity, it can be difficult for trans and gender nonconforming persons to lead full lives with equal dignity. Lack of gender recognition can lead to social ostracization, restricted access to government services and benefits, and invasion of privacy for affected persons.
19. Ordinary activities like picking up a parcel, opening a bank account or simply using a personalized public transport ticket can become a daily source of difficulty for trans and gender nonconforming people if their gender identity does not match their legal gender, i.e. the gender recorded on official personal documents (such as HKID card or passport) or their gender as may be reflected elsewhere. These individuals may be suspected of using falsified documents, and therefore be forced to reveal their gender identity or a medical condition against their wishes. This effectively compelled revelation of personal information violates the right to privacy and regularly leads to discrimination and violence. As a consequence, many trans and gender nonconforming people are ostracized from society and the job market. This has led to a higher incidence of anxiety, depression and suicide amongst affected people. Having educational or employment

certificates which do not reflect an individual's lived gender is a common driver for unemployment amongst trans and gender nonconforming people.

20. It is a right of all people to be treated with dignity and respect for their gender identity. This right is based on the rights and values recognized under the Universal Declaration of Human Rights (UDHR), enshrined in the International Covenant on Civil and Political Rights (ICCPR), and incorporated into Hong Kong law under the HKBOR. All people are equal before the law, and are entitled to protection from discrimination on the grounds of their sex and other protected status (i.e. if they are trans or gender nonconforming). The Human Rights Committee in *G v Australia* conclusively held that gender identity is a prohibited ground of discrimination under the ICCPR. There are numerous other comparative human rights authorities in Asia<sup>1</sup>, Africa<sup>2</sup> and Latin America<sup>3</sup>, as well as in North America<sup>4</sup> and Europe<sup>5</sup>, holding that gender identity is a prohibited ground of discrimination under regional or domestic human rights law. Further, under Article 20 of the HKBOR (reflecting the United Nations Convention on the Rights of the Child), this protection is also extended to children who are entitled to protection from such discrimination from the state, society and from their families.
21. These rights have been considered in several international, regional and domestic courts around the world, including by our own Court of Final Appeal in the case of *W v Registrar of the Marriages*. The force of the human rights consideration of those courts is that the Government has a duty under domestic and international law to protect trans and gender nonconforming people's rights to recognition of their gender identity. These rights have also been highlighted by various expert-led international human rights bodies.
22. The main rights considered in the jurisprudence to date have been the equivalents of HKBOR Articles 1 (entitlement to rights without discrimination), 3 (no torture, inhuman degrading treatment), 14 (protection of privacy, family, home, correspondence, honour and reputation), 19 (right to respect of marriage and family), and 22 (equality before the law, protection from discrimination).

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<sup>1</sup> See e.g. *NALSA v Union of India*, WP (Civil) No 604 of 2013 (Supreme Court of India) and *Pant v Nepal*, NJA Law Journal 2008 (Supreme Court of Nepal)

<sup>2</sup> See e.g. *KOS and Others v Minister of Home Affairs and others* [2017] ZAWCHC 90 (Western Cape High Court in South Africa) and a decision of the High Court of Botswana on 27 September 2017 <<https://southernafricalitigationcentre.org/2017/09/29/press-release-botswana-high-court-rules-in-landmark-gender-identity-case/>>.

<sup>3</sup> See e.g. *Atala Riffo and daughters v Chile*, Judgment of February 24, 2012, Series C No. 239 (Inter-American Court of Human Rights)

<sup>4</sup> See e.g. *CF v Alberta (Vital Statistics)*, 2014 ABQB 237 (Alberta Court of Queen's Bench in Canada) and, before "gender identity" was expressly protected, *Sheridan v Sanctuary Investments* (1999) CHRR D/467 (British Columbia Human Rights Tribunal in Canada).

<sup>5</sup> See e.g. *P v S and Cornwall County Council*, Case C-13/94, [1996] IRLR 347 (European Court of Justice).

23. The general approach of the courts in dealing with the human rights of trans and gender nonconforming people has been that interference with rights based on one's sex or sexual orientation are subject to intense scrutiny, requiring 'particularly serious reasons by way of justification'. Recognition of a person's gender identity ought to be on the basis of the human rights of all those affected, with the focus on the autonomy and welfare of the applicant.
24. As was noted in the case of *W*, following the approach of the European Court of Human Rights (ECtHR) in the twin cases of *Goodwin v UK* and *I v UK*, the law may not prevent transgender persons from marrying in their new gender. The Court of Final Appeal found that there had been a serious interference with the applicant's rights through the non-recognition of her acquired gender, which reflected her gender identity.
25. The Court of Final Appeal also commented that, to prevent the denial of other rights, it would be beneficial to pass legislation that provided a means for a person to have their acquired gender legally recognized (in particular in areas such as entitlement to benefits and pensions, discrimination, succession, the position of trustees administering trusts, sport, the application of gender-specific offences, recognition of foreign gender change and marriage).
26. The Court of Final Appeal specifically rejected the use of purely biological factors as the sole basis for gender recognition in relation to the right to marry, accepting that there are other important factors – such as social and psychological factors mentioned above.
27. We note that the Court of Final Appeal's comments are directly in line with the jurisprudence of the Court of Justice of the European Union (the "CJEU"). Directive 2006/54/EC (adopted on 5 July 2006) prohibits gender discrimination with respect to employment, training, and entitlement benefits. Recital 3 in the Preamble of this Directive expressly states that scope of the directive includes discrimination arising from gender reassignment. In *P v S and Cornwall County Council*, the CJEU held that discrimination in employment and vocational training on the basis that a person has undergone gender reassignment is prohibited. Furthermore, in *KB v National Health Service Pensions Agency Case C-117/01*, the CJEU held that a person cannot be barred from receiving benefits they are entitled to simply because they had undergone gender reassignment.
28. It is now accepted by the international scientific, medical and mental health community that persons experiencing the condition of gender identity disorder should be entitled to the provision of treatment (sometimes including surgery, but not always and never mandatory) to assimilate the individual to the gender in which they perceive that they properly belong and the assumption by the person, if desired, of the real or perceived social role of the assigned gender.

29. The IWG's own research demonstrates that many jurisdictions around the world, including East and Southeast Asian jurisdictions, provide for gender recognition for trans people, although in some cases the legal regimes contain preconditions that we see as outdated and abusive<sup>6</sup>. Japan, Taiwan and Vietnam, for example, have adopted gender recognition legislation. Similarly, courts in South Korea<sup>7</sup> and Malaysia<sup>8</sup> have allowed trans people to gain gender recognition. Mainland China also provides an administrative basis for gender recognition. Reliance on Hong Kong being an "Asian" or "non-Western" society to oppose a scheme of gender recognition is untenable. The universality of gender diversity and the entitlement of trans persons to recognition of their gender is overwhelmingly evident.
30. We submit that there can no longer be any justification for the failure of the law to recognize the reality of trans and gender nonconforming people in our society as equal. Central to resolving this inequality is recognition of the gender identity of such persons as equal to the gender and sex of any other person. Without such recognition, trans and gender nonconforming people will not be able to achieve equality. Whereas we recognize that there may be narrow circumstances where different treatment may be justified (e.g. to ensure fair play in international competitive sports), such situations will necessarily be few and rare. Furthermore, such limited exceptions are not sufficient justification for denying trans and gender nonconforming people recognition of their gender identity. Therefore, to ensure the fullest entitlement to equal treatment, gender recognition must be statutory (capable of overriding administrative measures), and human rights based (allowing for only minimal, necessary and justified restrictions).
31. In view of the above, it is our collective view that Hong Kong must introduce statutory legal protection for recognition of all persons' gender identities, to enable a person to acquire a legally recognised gender other than such person's birth gender. In addition, the statute should be flexible, to allow for developments in our human rights obligations and our understanding of the medical realities.

## **Issue 2: Requirement of medical diagnosis for gender recognition**

32. The medical and scientific understanding and classification of sex, gender, gender dysphoria and gender identity disorder has been subject to dramatic and relatively rapid change.
33. The academic community now refers to the determination of sex itself as a "spectrum", involving numerous factors that change over the development of the person from foetus

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<sup>6</sup> See Annex A to the IWG Consultation Paper: Part 1.

<sup>7</sup> See the case summary of *In re Change of Name and Correction of Family Register*, Supreme Court of South Korea (22 June 2006) at <<https://www.icj.org/sogicasebook/in-re-change-of-name-and-correction-of-family-register-supreme-court-of-south-korea-22-june-2006/>>.

<sup>8</sup> See the case summary of *JG v Pengarah Jabatan Pendaftaran Negara*, High Court of Kuala Lumpur, Malaysia (25 May 2005) at <<https://www.icj.org/sogicasebook/jg-v-pengarah-jabatan-pendaftaran-negara-high-court-of-kuala-lumpur-malaysia-25-may-2005/>>.

to adulthood (see e.g. Claire Ainsworth, PhD (19 February 2015) "*Sex redefined: The idea of two sexes is simplistic. Biologists now think there is a wider spectrum than that*", *Nature*, 518 (7539): 288–291). Likewise, consistent with gender being a social construction, our understanding and classification of persons into specific genders has changed dramatically over history.

34. Reliance on the medical ‘determination’ of sex inherently relies upon the philosophical approach of the medical professionals who assigned sex on the date of birth. That approach may not always conform to the best scientific understanding of sex at that time or in the future, and still less with the understanding that gender is socially constructed. It is artificial for the legal test for ‘gender’ to be tied to a medical understanding which is neither clear, permanent or absolute.
35. Medical diagnosis as the final determinant of gender is inherently burdensome to the individual. It requires intrusive, expensive and sometimes unnecessary intervention into the private life of the subject. It may also lead to delay in recognition. Further, even though surgical or pharmaceutical intervention may not be recommended by medical professionals, the fear of such intervention or intrusion may deter those who require legal recognition of their gender identity from actually seeking it. Errors in diagnosis or failures of some professionals to continue to develop their understanding of this fast changing area of science may also lead to unnecessary disputes, appeals to second opinions, and litigation. Finally, unless properly financed by the public purse, the need for medical diagnosis may lead to unequal access to gender recognition.
36. An autonomy based scheme, by contrast, is inherently preferable because it is based upon the self-understanding of the applicant. It requires no public expenditure of precious medical resources and it would not deter suitable applicants. Further, this approach has been tested in other jurisdictions and been proven effective. Fraudulent applications for registration based on autonomy are virtually unseen in the empirical data. Simply put, there is no reason that people should not be able to register their gender identity on the basis of self-determination.
37. Serious concerns about “pathologizing and stigmatizing medical classifications relating to gender identity and expression” and the use of such classifications in “placing abusive conditions for the official recognition of the gender identity of trans people” were recently expressed in a joint statement on 12 May 2016 by human rights authorities around the world. Those authorities include the UN Committee on the Rights of the Child, seven UN Special Rapporteurs on various areas of human rights, the Inter-American Commission on Human Rights, the African Commission on Human and People’s Rights and the Commissioner of Human Rights for the Council of Europe.
38. In conclusion, we are of the view that there should not be a statutory requirement of a medical diagnosis of gender dysphoria or gender identity disorder for gender recognition.



### **Issue 3: Requirement of “real life test” for gender recognition**

39. The real life test is, in concept, a duration of time where transgender persons dedicate themselves to experience living in their preferred gender. The real life test has aimed to allow transgender persons to experiment living in their preferred gender as a “test run” before individuals commit to undergoing sex reassignment surgery (SRS). The underlying aim of the real life test has been to help ensure that individuals do not regret a decision to transition post-operation.
40. However, the current academic literature suggests that there is insufficient empirical evidence to support the notion that a real life test of any duration is a sufficient or even a necessary condition to produce positive outcomes post-operation. An extended real life test has not been demonstrated to reduce the likelihood of regret post-operation, nor has it been demonstrated that real life tests carried on for a prolonged period of time can produce regret-free results: see Lawrence; Kuiper and Cohen-Kettenis (1998).
41. Furthermore, the real life test itself is very difficult to complete without proper legal recognition of the participant’s gender identity. Without considerable support by way of gender recognition, the real life test may only exacerbate the anxiety transgender persons may already be facing. The law should support transgender persons undergoing the real life test instead of requiring them to go through the real life test first to obtain any support from the law. It is absurd to ask someone to live in their preferred gender identity without first legally recognising that identity. For example, the day to day living of individuals experiencing the real life test is likely to be unjustifiably burdened by the need to ask others to refer to the individual by the chosen gender before such gender is legally secure.
42. Without the correct documentation, there could also be restrictions on participation in education or employment where applicants are required to submit their identification documents that include a gender identity that does not match the portrayed identity. This can mean that, transgender people, without correct documentation, are in danger of having no meaningful education or employment, which may hamper lifelong prospects for employability and the ability to earn a living absent public support.
43. Aside from issues of whether there are positive results that could stem from the real life test, there are real social concerns for participants undergoing such a test. For instance, there are concerns in respect to the individual’s ability to sustain employment during the real life test which may impact the individual’s ability to fund a surgical procedure, if indeed such a procedure is desired. It may also be difficult for persons undergoing the real life test to retain their previous employment as there may be difficulty socialising with colleagues familiar with their previously portrayed gender. As a result, persons undergoing the test may need to seek new employment opportunities. This similarly applies to the situation of students who may need to change schools.

44. Another concern that persons undergoing a real life test face is the fear of being discovered to be pre-operative, and the risk of being subject to violence due to their differences. This is a particular concern in places where it is necessary to wear specialized clothing, for instance, in swimming pools, where the phallus and scrotum of a trans woman may be visibly noticeable.
45. Transgender individuals wishing to undergo SRS may in fact feel discordant solely because of their anatomy. For those falling into this category, remedy for their gender dysphoria cannot be accomplished without surgical modification (see Standards of Care v7: p54-55). Thus, living as the preferred gender without surgery may do nothing to alleviate the distress the transgender person faces, but instead, prolong their suffering.
46. The real life test unduly delays the realisation of the transgender person's wishes to transition to their preferred gender. This may result in a difficulty or inability for such persons to build and sustain romantic [sexual] relationships (Lawrence). We are concerned that the need for a real life test is an arbitrary interference of the transgender persons' privacy, which is protected by Article 14 of the Hong Kong Bill of Rights.
47. By way of example, the issue of toilet use has frequently arisen for those undergoing the real life test. In reality, trans-females using male changing facilities report being harassed by males inside, raising safety concerns. Likewise, trans-males entering male changing facilities report safety concerns for being female-bodied. The dilemmas facing participants undergoing the real life test when entering toilets and changing facilities is extremely difficult. The law should not attempt to resolve definitively this question, but allow trans people to make this decision for themselves at the appropriate time in their own transition.
48. The real life test is a medical procedure that should not be the domain of the gender recognition scheme. Rather, the scheme should recognise that those undergoing medical procedures may require legal help to properly and fully complete those procedures.
49. To conclude, it is our collective view that there should not be a statutory requirement of a "real life test" period as a pre-requisite for gender recognition. We note that the real life test is distinct from the intention of the person to permanently adopt their acquired gender.

#### **Issue 4: Requirement of hormonal treatment and psychotherapy for gender recognition**

50. This issue raises important issues of bodily integrity, personal autonomy and liberty, personal health and complex issues of science.
51. As discussed above, requiring medical treatment (of any kind) necessarily implies expenditure that may be unnecessarily burdensome for the public finances or lead to

unequal access to gender recognition. However, even assuming reasonable expense and equality of access, the science of hormonal treatments and psychotherapy is still developing. Instituting a static statutory or policy based requirement may lead to a gender recognition scheme falling behind the most up to date understanding of science and medicine.

52. In addition, from a legal perspective, these requirements may lead to breaches of fundamental human rights.
53. We recognize that hormonal treatment is a predominant feature for the care of persons suffering from gender dysphoria and related conditions. The benefits or necessity of such treatment is circumstance dependent. In some cases, hormonal treatment may not necessarily lead to better mental health of the patients undergoing such treatment as it may be dangerous. Requiring treatment that is harmful to the applicant as a precondition for recognition should be viewed as a breach of the protections under the Basic Law and Bill of Rights for security of the person, freedom from cruel, inhuman or degrading treatment, and personal liberty. Further, there does not appear to be a justification for such interference.
54. Although transgender people may opt for hormonal treatment to achieve their desired outcome, this process should not be mandatory. Transgender people should be given the freedom to choose whether or not they wish to undergo such treatment.
55. Transgender persons should have the ability to decide for themselves what kind of treatment, if any, they wish to undertake in consultation with their treating medical professionals.
56. Like hormonal treatment, there should be no requirement for applicants to undergo psychotherapy for gender recognition. Transgender persons should be given the choice as to what kind of treatment they require, if any, after consultation with their own medical and other advisers.
57. We submit that there can be no justification to deny transgender persons their rights to make informed decisions about their own medical care. Any form of medical or psychological treatment should not be a bar to gender recognition, but solely an option for transgender persons to consider.
58. In view of the above, it is our collective view that there should not be a requirement for hormonal treatment and/or other medical treatment or psychotherapy for gender recognition.

## Issue 5: Requirement of SRS and other surgical treatments for gender recognition

59. Sex reassignment surgeries are surgical procedures by which a transgender person's physical appearance and the function of their existing sexual characteristics are altered to resemble that socially associated with their identified gender. Such surgeries are a matter of developing science, but at present they cannot completely change all of the sex characteristics used to determine sex at birth.
60. Such surgeries are sometimes recommended by medical professionals as treatment for gender dysphoria in some transgender people. Similar surgeries have, in the past, been performed on intersex people, often in infancy.
61. Not all transgender persons are recommended to undergo (or choose to attempt) 'full' SRS or any form of surgical intervention. Persons may not wish to or be recommended not to undergo such interventions for a variety of reasons. In addition, requiring full SRS as a so-called bright line for legal gender recognition is likely to have an "undesirable coercive effect" (*W v Registrar of Marriages* at [136]-[137]).
62. SRS is often a painful and difficult procedure and the outcome is not always certain, especially in the case of transitioning from female to male, where it is particularly complex (*W v Registrar of Marriages* at [12]). Moreover, surgery of this type is not always available, affordable, or even medically possible. All such surgeries involve a risk of adverse outcomes (including a risk of death). SRS is also generally irreversible. Where SRS involves genital reconstruction or destruction of fertility organs, SRS (or attempted SRS) will likely result in permanent infertility.
63. It is a matter of great concern, from a legal perspective, that any requirement for surgical intervention be included in the law of Hong Kong for gender recognition or any other purpose.
64. Mandatory SRS has long been condemned by the international human rights community as a breach of fundamental human rights:
  - a. The European Court of Human Rights has recently ruled in the case of *AP, Garçon and Nicot v. France* that the requirement of sterilization for recognition of gender identity is a breach of family rights (Article 19 of the HKBOR). Similar decisions have been reached in other courts.
  - b. Courts in a number of other countries, such as Australia (*AB v Western Australia* [2011] HCA 42), New Zealand (*Michael v Registrar of Births, Deaths and Marriages* [2008] NZFC 62), Canada (*CF v Alberta (Vital Statistics)*, 2014 ABQB 237) and India (*NALSA v Union of India*, WP (Civil) No 604 of 2013) have also ruled against requirements of sterilization or sex reassignment surgeries for recognition of gender identity.

- c. In December 2015, the UN Committee Against Torture in its Concluding Observations on Hong Kong specifically recommended that the Hong Kong government repeal “abusive preconditions for the legal recognition of the gender identity of transgender persons, including sterilization”.
  - d. In a 2013 statement, the United Nations Special Rapporteur on Torture, having observed that (i) transgender people in many countries are required to undergo unwanted sterilization surgeries as a precondition to gender recognition and (ii) that the effect of such requirements undermine the ability of transgender persons to give full and free consent, and are contrary to the right to physical integrity and self-determination of such persons, called upon all states to “repeal any law allowing intrusive and irreversible treatments, including... involuntary sterilization” and to “outlaw forced or coerced sterilization in all circumstances” (Article 3 of the HKBOR).
  - e. A 2014 statement jointly issued by seven UN agencies, including the WHO, observed that sterilization requirements run counter to human rights and suggested that member states “ensure that sterilization, or procedures resulting in fertility, is not a prerequisite for legal recognition of preferred sex/gender”.
  - f. The Special Rapporteur for the Human Rights Council has recommended that states should repeal any law allowing intrusive and irreversible treatments, including the so called “reparative therapies”, such as hormone therapy and genital surgeries, without the free and informed consent of the person concerned.
  - g. Additionally, the Commissioner for Human Rights of the Council of Europe has stated that sterilization requirements for gender recognition go directly against respect for the physical integrity of the person (Article 5 of the HKBOR).
65. If transgender persons must undergo SRS or other surgical treatment as a precondition to gender recognition, it cannot be said that their consent was obtained freely.
66. In view of the above, it is our collective view that there should not be a requirement (statutory or otherwise) for full or partial sex reassignment surgery or any requirement for removal of the original genital organs and construction of some form of genital organs of the opposite sex as a precondition for gender recognition. Such surgery or medical treatment is an unconstitutional interference with the fundamental rights of trans and gender nonconforming persons seeking recognition of their acquired gender.

#### **Issue 6: Requirement of other medical treatments for gender recognition**

67. See discussion under Issues 3, 4 and 5 above.

68. In addition to those points, we are concerned that any sort of medical treatment requirement for gender recognition would inevitably lead to characterizing gender dysphoria solely as an illness that needs to be treated. The social stigma attached to being transgender should not be aggravated further by suggesting that these persons require what may be unnecessary medical treatment.

69. Therefore, it is our collective view that there should not be a requirement for any other medical requirement for gender recognition.

#### **Issue 7: Residency requirement for gender recognition**

70. In Hong Kong, it is common in various areas of the law for ‘residency’ requirements to be imposed. These requirements range from the narrowest (e.g. the *Vallejos* test, requiring ‘ordinary residence’ that is lengthy, lawful and not subject to extensive conditions of stay) to the narrow (e.g. *Re NTH* [1996] 1 HKC 93, mere habitual residence regardless of immigration status).

71. Hong Kong is “Asia’s World City” and enjoys a diverse, migrant community together with a regular and significant number of visitors from different jurisdictions (many of which have gender recognition systems of their own). It is a fact of life in Hong Kong that there is a substantial migrant community with limited (e.g. foreign domestic workers) or no immigration status (e.g. Form 8 holders).

72. It is our view that the law should cater for each of these communities. A failure to do so is likely to attract criticism before the courts as discriminatory or (for the reasons discussed above) as a breach of the fundamental rights of such persons. In respect of lawful visitors, a failure to provide for such persons may not only be a breach of human rights, but is also likely to undermine Hong Kong’s competitiveness.

73. Under Section 7(2) and 7(3) of the Immigration Service (Treatment of Detained Persons) Order, Cap 331C, the searching of detainees shall be conducted with due regard to the decency and self-respect of the detainee, and no detainee shall be searched other than by a member of the service of the same sex. If the gender recognition scheme imposes a residency requirement, transgender visitors will likely be searched by persons who are not of their self-identified gender which would invariably undermine the decency and self-respect requirements.

74. These provisions are similarly reflected in Rules 9 and 10 of the Prison Rules, Cap 234A.

75. The arbitrary imposition of a residency requirement is likely to cause confusion, possible conflicts of law and breaches of fundamental rights, and a diminution of Hong Kong’s international reputation. Further, such a requirement appears totally unnecessary. There is no reason why a person visiting Hong Kong should not be able to obtain recognition

during their stay in Hong Kong, in accordance with whatever conditions are imposed on the general population of our city.

76. In view of the above, it is our collective view that there should not be any residency requirement for any person seeking recognition under any gender recognition scheme.

### **Issue 8: Age requirement for gender recognition**

77. We submit that the gender recognition scheme in Hong Kong should not be restricted to certain ages, in particular, there should be no minimum age in which a person must be before their preferred gender can be recognised. However, we are of the view that, although there ought to be no minimum age requirement, there should be certain guidelines regarding age.
78. Gender recognition is a matter of the fundamental rights and welfare of the child. In this regard, any scheme should have regard to the rights of children under the United Nations Convention on the Rights of the Child, the welfare (or best interests) principle and the necessary considerations under the Welfare Checklist, see *PD v KWW (Child: Joint Custody)*. However, in accordance with those principles, children differ in their maturity, understanding and development and the law should allow for such difference. In this regard, there is existing guidance in the common law as to how such decisions can be taken with regard to children, i.e. the *Gillick* test, see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
79. In accordance with the *Gillick* principle, parents should be able to exercise parental responsibility over their children to ensure their best interests. This means that parents of children, generally, should be able to apply for recognition of a child's gender identity. However, when children reach a suitable age of sufficient maturity, they should be able to make such applications themselves (with parental input as appropriate).
80. Where a child seeks gender recognition, without parental permission, such decisions should be taken through judicial process - allowing the court to make a best interests decision having considered the views of the child and parents, in accordance with Hong Kong law: see section 3 of the Guardianship of Minors Ordinance, Cap 13.
81. It is our collective view that any gender recognition scheme in Hong Kong should be open to persons of all ages. The test for a child to apply for such recognition should be the same as any other similar decision taken, i.e. the test in *Gillick*. However, in addition to such test and in any event below the applicable age, any guardian of the child should be able to apply for such recognition on the child's behalf. The requirements for such application should be the same as for adults, based upon the gender identity of the child, plus a consideration of the child's best interests.

## Issue 9: Marital status requirement for gender recognition

82. All persons have a right to freedom from arbitrary interference with their family. Likewise, all persons have the right to found a family and to marry. The imposition of a 'marital status' requirement (i.e. unmarried status) is likely to result in requiring some trans and gender nonconforming persons to elect between choosing between those rights and the rights relating to the recognition of their gender identity. Such a restriction might also result in disparate treatment for trans and gender nonconforming persons in breach of Articles 1 and 22 of the HKBOR.
83. Concerns that a gender transition will result in two persons of the same legal gender remaining in a marriage is not sufficient to justify such a restriction. Any such marriage, at the time of celebration, would not have offended the definition of marriage set out in section 40 of the Marriage Ordinance, Cap 181. The German Constitutional Court<sup>9</sup> has ruled that the recognition of the gender identity of a married trans spouse is not tantamount to the legalisation of same sex marriage. The Court held that such a requirement was an unjustified breach of the basic rights of trans people and their spouses. The UN Human Rights Committee reached the same conclusion in *G v Australia* earlier this year. There is no reason to believe that a different conclusion would be reached by a Hong Kong court.
84. Considering the rights of the spouse, they should be accommodated by amending the Marriage Ordinance, Cap 181 and section 20 of the the Matrimonial Causes Ordinance, Cap 179, to provide that 'change of gender' makes a marriage voidable (rather than void). This would allow for spouses who wish to keep their family/marital relationship to do so without breaching their family rights. Conversely, if they no longer wished to remain married, they would be able to apply for a divorce. Without such an amendment, the spouses and children of persons who transition to the opposite gender may suffer by loss of the relief and rights provided for under the relevant divorce laws (e.g. maintenance).
85. In conclusion, it is our collective view that there should be no statutory requirement relating to marital status of an applicant for gender recognition. Gender recognition is a matter of fundamental human rights as are matrimonial relations between married couples. If a party to a marriage wishes to change their gender identity, this should not be prevented by the existence of the marriage. Likewise, the fundamental right of their spouse (and the applicant) to preservation of their family and interpersonal relations is protected and should only be interfered with where necessary and justified. Concerns about unfairness to spouses who are no longer willing to remain married to an applicant for a gender identity change can be resolved under existing law and/or by providing for additional grounds for divorce to include gender transition. However, we also strongly

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<sup>9</sup> See 1 BvL 10/05, Federal Constitutional Court of Germany (27 May 2008).



recommend that suitable amendments be made to the Matrimonial Causes Ordinance to prevent breaches of the family and privacy rights of applicants and their spouses.

#### **Issue 10: Parental status requirement for gender recognition**

86. Family and parent-child relations are fundamental rights protected by our constitution. Further, the right to procreate is a right protected under our constitution that should not be interfered with or limited without due justification and necessity. Likewise, such a requirement would infringe the right to privacy enjoyed by all Hong Kong people. A parental status requirement, for those reasons and the reasons discussed above, would be a prima facie breach of the family rights of applicants. There is no justification for such a breach. Therefore, there should be no requirement relating to parental status of an applicant for gender recognition.

#### **Issue 11: Recognition of foreign gender change**

87. For the reasons discussed in regards to Issue 7 above, it is our collective view that a gender change which is recognised under the law of a country or territory outside Hong Kong should be recognised in Hong Kong. Hong Kong is an international financial, business and trade hub. In order to preserve Hong Kong's international reputation for human rights, rule of law and free commerce, foreign transgender persons should be recognised while they visit Hong Kong. For ease of implementation, and to avoid confusion, local registration should not be a requirement provided that such persons are registered in accordance with the laws of another jurisdiction.

#### **Issue 12: Other possible non-medical requirements for gender recognition**

88. We submit that the main requirement for gender recognition should be the welfare of the applicant, and in that regard that person's wish to live in their self-identified gender should be the central concern. Any other requirement should be based on the general principles set out above, as determined by an independent panel of experts. In determining these requirements, the panel should recognize that each person has autonomy to choose their own gender identity. Unless there is a demonstrated need for further requirements, none should be imposed.

#### **Issue 13: Type of gender recognition scheme, if adopted**

89. Gender is a matter that cuts across multiple areas of law. Administration of the law requires a statutory scheme, capable of implementing gender recognition in disparate matters.

90. Technical matters should be decided by independent, qualified experts - free from political interference. Where children are concerned, the courts should have jurisdiction.

91. To allow for changes in circumstances and understanding of the science, the scheme should allow for subsidiary legislation prepared by a relevant government official (e.g. the Secretary for Food and Health), guided by statutory principles.
92. The general principles of the scheme should be:
- a. Welfare/best interests of the applicant.
  - b. The right to autonomy, recognition and development of gender identity.
  - c. Non-discrimination on the basis of gender identity or acquired gender.
93. In difficult and complicated areas where limitations on recognition may be justified, the relevant government official (or a panel of experts) should be empowered to promulgate subsidiary legislation, such as in relation to (1) search, detention or imprisonment or taking of intimate samples; (2) the commission or attempted commission of offences; (3) the amendment of birth and adoption registers and identity documents; (4) grounds for divorce for prior marriages; (5) application of the Human Reproductive Technology Ordinance (Cap 561) and adoption; and (6) withdrawal or revocation of gender recognition.

#### **Issue 14: Adopting a scheme similar to overseas gender recognition scheme**

94. There has been considerable diversity in approaches to gender recognition in other jurisdictions. We suggest that Hong Kong should learn from those jurisdictions that share our concern for vindicating human rights, and adopt a system that will allow for flexibility.
95. In this regard, we commend to the Panel and the IWG the examples of Malta and Ireland, which have adopted 'autonomy' based approaches. Those schemes have been highly successful, whilst vindicating the human rights of those affected.
96. We would caution the Panel and the IWG in respect of the scheme adopted in the United Kingdom. Important lessons can be learned from the jurisdiction, but it is worth noting that the UK is considering further reforms to update and improve the Gender Recognition Act 2004 in order to comply with human rights concerns. In particular, the UK is considering a more 'autonomy' based approach.

#### **Issue 15: Authority to determine applications for gender recognition**

97. We suggest that there should be a separate, independent, expert and principle-based authority for determining gender recognition applications. Independence is necessary to prevent unlawful and irrelevant considerations, or the politicization of the scheme. An independent authority should instead operate based on the most up to date understanding of science and medicine, as well as human rights. The principles and relevant considerations for determining applications should be set out in the law.

98. We suggest that the Panel and the IWG should consider a panel of independently appointed members, including medical, psychiatric and legally qualified experts. Ideally, internationally recognized experts could be included in such a panel. We suggest that the panel should be headed by a retired or serving High Court judge, and that the other members should be appointed at the recommendation of the Chair of the Equal Opportunities Commission or another independent professional body.
99. In contested children's cases, or where younger children make an application, the decision maker should be a specialist family judge in the courts.

**Issue 16: Adopting a possible dual-track gender recognition scheme**

100. It is our view that a dual-track scheme is unnecessary, confusing and likely to result in unequal treatment. It risks the creation of a group of second class citizens, who may be subjected to discrimination because of their nebulous status - a result that should be avoided. Further, there are no jurisdictions that use such a model from which Hong Kong can draw experience. The absence of such a model in other jurisdictions is also a strong indication that such a model is not desirable or at least untested.
101. We are grateful for the opportunity to present these submissions and we thank the Panel for considering this important issue for the benefit of Hong Kong.

Yours faithfully,

Azan Marwah  
Shaphan Marwah  
Geoffrey Yeung  
Darcy Davison-Roberts  
Marc Rubinstein, Co-Chair HKGALA  
Lindsay Ernst, HKU  
Leon Chan, HKU  
Wendy Kwan

## Gender Recognition Bill

Long title

To provide legal recognition for change of gender; to provide for gender recognition certificates; and to provide for related matters.

Enacted by the Legislative Council.

### PART I PRELIMINARY

#### 1 Short title

- (1) This Ordinance may be cited as the Gender Recognition Ordinance.
- (2) This Ordinance comes into operation on the day on which it is published in the Gazette.

#### 2 Interpretation

In this Ordinance, unless the context otherwise requires—

**acquired gender** ( 後天取得的性別 ) means—

- (a) in the case of an application under section 6, the gender for which the person is seeking recognition as his or her own, or
- (b) in the case of any application for recognition of a gender to which a person has changed under the law of a jurisdiction outside of Hong Kong, the gender recognized by that jurisdiction as his or her own;

**applicant** ( 申請人 ) means any person seeking a gender recognition certificate;

**application** ( 申請 ) means any application for a gender recognition certificate;

**court** ( 法院 ) means the District Court or the Court of First Instance;

**gender recognition certificate** ( 性別認同證書 ) means the certificates issued as such under section 7;

**gender identity** ( 性別認同 ) refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

**Gender Recognition Panel** (and **Panel**) ( 性別認同小組 ) is to be construed as the Gender Recognition Panel established under Part VI of this Ordinance;

**guardian** ( 監護人 ) includes—

- (a) a parent of a minor; or
- (b) any person having rights of guardianship over a minor; or
- (c) the Director of Social Welfare having the care or wardship of a child; or
- (d) the High Court acting under its inherent jurisdiction;

**Registrar** ( 登記官 ) means the Registrar of Births and Deaths;

**relevant offence** ( 有關罪行 ) means any offence involving the accused engaging in sexual activity where either or both of the following conditions are met—

- (a) that the offence may be committed only by a person of a particular gender, and
- (b) that the offence may be committed only on, or in relation to, a person of a particular gender, and the references to a particular gender include a gender identified by reference to the gender of the other person involved;

**Secretary** ( 局長 ) means the Secretary for Food and Health;

**sport** ( 體育 ) means a sport, game or other athletic activity of a competitive nature.

### 3 Delegation

The Secretary may delegate any of his powers, duties and functions under this Ordinance to any public officer save for those provided for under section 5.

### 4 General Principles

- (1) In determining any question or exercising any power in relation to this Ordinance, the court or the Secretary or the Panel must regard the welfare of the applicant or applicants as primary considerations.
- (2) In ascertaining the welfare of the applicant, the court or the Secretary or the Panel should have regard, in particular, to—
  - (a) the views of the applicant;
  - (b) the applicant's physical and emotional needs;
  - (c) any harm that the applicant has suffered or is at risk of suffering;
  - (d) the views of the applicant's treating medical practitioner, if any; and
  - (e) any other relevant fact or circumstance.
- (3) All persons shall have the right to—
  - (a) the recognition of their freely chosen gender identity;
  - (b) the free development of their person according to their gender identity;
  - (c) have their recorded sex amended, along with changes in name or names and image, in accordance with their gender identity.
- (4) No person shall be discriminated against on the basis of their gender identity or acquired gender.

### 5 Regulations

- (1) The Secretary shall within 6 months of the coming into force of this Ordinance provide by regulations for —
  - (a) the form and manner of applications to the Gender Recognition Panel;
  - (b) the amendment of birth and adoption registers and identity documents to reflect a change in gender under this Ordinance; and
  - (c) reasonable fees and costs of applications for gender recognition certificates, not exceeding \$200, and grounds for the waiver of such fees and costs.
- (2) The Secretary may by regulation provide for—

- (a) the recognition of an acquired gender in Hong Kong where the applicant has received recognition in a jurisdiction outside of Hong Kong;
  - (b) the limitation of the recognition of acquired gender in relation to the commission or attempted commission of any relevant offence;
  - (c) the rectification of errors in gender recognition certificates;
  - (d) the content and form of gender recognition certificates; and
  - (e) withdrawal of application or voluntary revocation of a gender recognition certificate by a person issued with a gender recognition certificate and any necessary amendments to the Gender Recognition Register and birth register.
- (3) The Gender Recognition Panel may by regulation provide for—
- (a) the limitation of the recognition of acquired gender in respect of adoption;
  - (b) the limitation of the recognition of acquired gender for the purposes and application of the Human Reproductive Technology Ordinance (Cap 561);
  - (c) the limitation of the recognition of acquired gender in sport if necessary for fair competition or the safety of the competitors; and
  - (d) the requirements for the search, detention or imprisonment of or taking of intimate samples from a person issued with a gender recognition certificate or any applicant.
- (4) In exercising powers under this section, the Secretary and the Panel must consider the rights of affected persons.

## **PART II APPLICATIONS FOR GENDER RECOGNITION CERTIFICATE**

### **6 Applications**

- (1) A person who is aged at least 18 may make an application for a gender recognition certificate to the Gender Recognition Panel.
- (2) A minor who is aged at least 16 may make an application for a gender recognition certificate to the Gender Recognition Panel.
- (3) A parent or guardian of any minor may make an application for a gender recognition certificate for the said minor to the court by originating summons.
- (4) The Panel shall only grant the application under subsection (2) if a certificate in writing of a medical practitioner is furnished to the court certifying that—
  - (a) he or she is the minor's treating medical practitioner;
  - (b) the minor has attained a sufficient degree of maturity to make the decision to make an application for a gender recognition certificate;
  - (c) the minor is aware of, has considered and fully understands the consequences of that decision; and
  - (d) the minor's decision is freely and independently made without duress or undue influence;
  - (e) the minor has transitioned or is transitioning to the acquired gender.
- (5) The Gender Recognition Panel may at any time during the hearing of a claim allow a witness or a party to give evidence on oath or unsworn.
- (6) The rules of evidence shall not apply to proceedings of the Gender Recognition Panel, which may receive any evidence which it considers relevant.

- (7) Applications under this section shall be determined by the Gender Recognition Panel and the court in accordance with section 4.
- (8) The Gender Recognition Panel may make rules -
  - (a) Regulating the procedure of any hearing held for the purposes of determining applications under this section;
  - (b) Prescribing any other matter that is required or permitted to be prescribed under this Ordinance.
- (9) The Gender Recognition Panel must review the rules prescribed under this section every two years.

## 7 Successful applications

If the court or the Gender Recognition Panel grants an application under section 6, the Panel must issue a gender recognition certificate to the applicant and a copy of the same to the Registrar.

## 8 Appeals etc.

- (1) An applicant may appeal to the court against any decision of the Panel to reject an application.
- (2) An appeal under subsection (1) must be heard in private and the applicant must be anonymised unless the applicant otherwise requests.
- (3) On such an appeal the court must—
  - (a) allow the appeal and issue the certificate applied for,
  - (b) allow the appeal and refer the matter to the Panel for reconsideration, or
  - (c) dismiss the appeal.
- (4) If an application to the Panel under section 6 is rejected, the applicant may not make another application before the end of the period of six months beginning with the date on which it is rejected.
- (5) If an application to the Panel under section 6 is granted but the Secretary considers that its grant was secured by fraud, the Secretary may refer the case to the court.
- (6) On a reference under subsection (5) the court—
  - (a) must either quash or confirm the decision to grant the application, and
  - (b) if it quashes it, must revoke the gender recognition certificate issued on the grant of the application and may make any order which it considers appropriate in consequence of, or otherwise in connection with, doing so.
- (7) In any proceedings under this Part, or any subsequent appeal therefrom, each party shall bear its own costs unless the court otherwise orders on the ground that—
  - (a) the proceedings were brought maliciously or frivolously; or
  - (b) there are other special circumstances which warrant an award of costs.

## **PART III CONSEQUENCES OF ISSUE OF GENDER RECOGNITION CERTIFICATE ETC.**

### 9 General

(1) Where a gender recognition certificate is issued to a person, subject to regulations made under this Ordinance, 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 and, alternatively, if non-binary gender, the person's sex becomes X).

(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of ordinances passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

(3) Subsection (1) is subject to the provisions of this Ordinance or as expressly provided in any other statute or any subsidiary legislation.

(4) The issuance of a gender recognition certificate to any person shall not affect any entitlement to pension payments related to the spouse or former spouse of that person.

#### 10 Parenthood

The fact that a person's gender has become the acquired gender under this Ordinance does not affect for any purpose whatsoever that person's existing status as the father or mother of a child.

#### 11 Succession etc.

The fact that a person's gender has become the acquired gender under this Ordinance does not affect the disposal or devolution of property under a will or other instrument made, before the appointed day.

#### 12 Trustees and personal representatives

(1) A trustee or personal representative is not under a duty, by virtue of the law relating to trusts or the administration of estates, to enquire, before conveying or distributing any property, whether a gender recognition certificate has been issued to any person or revoked (regardless of whether that fact could affect entitlement to such property).

(2) A trustee or personal representative is not liable to any person by reason of a conveyance or distribution of the property made without regard to whether a gender recognition certificate has been issued to any person or revoked if the trustee or personal representative has not received notice of the fact before the conveyance or distribution.

(3) This section does not prejudice the right of a person to follow the property, or any property representing it, into the hands of another person who has received it unless that person has purchased it for value in good faith and without notice.

#### 13 Orders where expectations defeated

(1) This section applies where the disposition or devolution of any property under a will or other instrument (made on or after the appointed day) is different from what it would be but for the fact that a person's gender has become the acquired gender under this Ordinance.



- (2) A person may apply to the court for an order on the ground of being adversely affected by the different disposition or devolution of the property.
- (3) The court may, if it is satisfied that it is just to do so, make in relation to any person benefiting from the different disposition or devolution of the property such order as it considers appropriate.
- (4) An order may, in particular, make provision for—
  - (a) the payment of a lump sum to the applicant,
  - (b) the transfer of property to the applicant,
  - (c) the settlement of property for the benefit of the applicant,
  - (d) the acquisition of property and either its transfer to the applicant or its settlement for the benefit of the applicant.
- (5) An order may contain consequential or supplementary provisions for giving effect to the order or for ensuring that it operates fairly as between the applicant and the other person or persons affected by it; and an order may, in particular, confer powers on trustees.

#### **PART IV SUPPLEMENTARY**

##### 14 Prohibition on disclosure of information

- (1) It is an offence for a person who has acquired protected information in an official capacity to disclose the information to any other person.
- (2) **Protected information** ( 受保護資料 ) means information which relates to a person who has made an application under section 6 and which—
  - (a) concerns that application or any application by the person, or
  - (b) if the application under section 6 is granted, otherwise concerns the person's gender before it becomes the acquired gender.
- (3) A person acquires protected information in an official capacity if the person acquires it—
  - (a) in connection with the person's functions as a member of the civil service, a constable or the holder of any other public office or in connection with the functions of a public authority or of a voluntary organisation,
  - (b) as an employer, or prospective employer, of the person to whom the information relates or as a person employed by such an employer or prospective employer, or
  - (c) in the course of, or otherwise in connection with, the conduct of business or the supply of professional services.
- (4) But it is not an offence under this section to disclose protected information relating to a person if—
  - (a) the information does not enable that person to be identified,
  - (b) that person has agreed to the disclosure of the information,
  - (c) the information is protected information by virtue of subsection (2)(b) and the person by whom the disclosure is made does not know or believe that a gender recognition certificate has been issued,
  - (d) the disclosure is in accordance with an order of a court or tribunal,

- (e) the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal or the Panel,
  - (f) the disclosure is for the purpose of preventing or investigating crime,
  - (g) the disclosure is made to the Registrar,
  - (h) the disclosure is made for the purposes of the social security system or a pension scheme,
  - (i) the disclosure is in accordance with a provision made by an order under subsection (5), or
  - (j) the disclosure is required in accordance with any statutory provision other than this section.
- (5) The Secretary may by order make provision prescribing circumstances in which the disclosure of protected information is not to constitute an offence under this section.
- (6) An order under subsection (5) may make provision permitting—
- (a) disclosure to specified persons or persons of a specified description,
  - (b) disclosure for specified purposes,
  - (c) disclosure of specified descriptions of information, or
  - (d) disclosure by specified persons or persons of a specified description.
- (7) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5.

## **PART V REGISTRATION OF GENDER RECOGNITION CERTIFICATES**

### **15 Gender Recognition Register**

- (1) The Registrar shall maintain at the general register office a register, to be called the Gender Recognition Register, in which shall be made such entries as may be—
- (a) successful applications for gender recognition certificates;
  - (b) voluntary revocation of a gender recognition certificate by a person issued with a gender recognition certificate;
- but no other entries.
- (3) The form in which the Gender Recognition Register is maintained is to be determined by the Registrar.
- (4) The Gender Recognition Register is not to be open to public inspection or search.
- (5) Regulations made by the Chief Executive in Council under the Births and Deaths Registration Ordinance (Cap 174) may make provision as to the duties to be performed by deputy registrars and district registrars appointed for the purposes of that Ordinance in the execution of this Part.
- (6) The Registrar shall cause an index of the Gender Recognition Register to be made and kept in the general register office; and every successful applicant shall be entitled to require a search to be made of that index and to have a certified copy of their own entry in the Gender Recognition Register and subject to the same terms, conditions and regulations as to payment of fees and otherwise as are applicable under the Births and Deaths Registration Ordinance (Cap 174), in respect of searches in other indexes

kept in the general register office and in respect of the supply from that office of certified copies of entries in the registers of births.

(7) A certified copy of an entry in the Gender Recognition Register must not disclose the fact that the entry is contained in the Gender Recognition Register.

(8) A certified copy of an entry in the Gender Recognition Register must be sealed or stamped with the seal of the General Register Office.

16 Entries in Gender Recognition Register and marking of existing birth register entries

(1) If the Registrar receives under section 7 a copy of a gender recognition certificate issued to a person, the Registrar must—

(a) make an entry in the Gender Recognition Register containing such particulars as may be prescribed in relation to the person's birth and any other prescribed matter,

(b) secure that the Hong Kong birth register entry is marked in such manner as may be prescribed, and

(c) make traceable the connection between the entry in the Gender Recognition Register and the Hong Kong birth register entry.

(2) A certified copy of any entry in the Gender Recognition Register, if purporting to be sealed or stamped with the seal of the general register office, shall, without any further or other proof of that entry, be received as evidence of the adoption to which it relates and, where the entry contains a record of the date of the birth or the country of the birth of the adopted person, shall also be received as aforesaid as evidence of that date or country in all respects as if the copy were a certified copy of an entry in the registers of births.

(3) No certified copy of the Hong Kong birth register entry and no shortened form of birth certificate compiled from that entry is to include anything marked by virtue of subsection (1) (b).

(4) Information kept by the Registrar for the purposes of subsection (1)(c) is not to be open to public inspection or search.

(5) Where a shortened form of birth certificate under section 23 of the Births and Deaths Registration Ordinance (Cap 174) is compiled from the Gender Recognition Register, the certificate must not disclose that fact.

(6) The Registrar may make regulations incidental or connected to his duties under this Part and, for the purposes of this Part, **prescribed** ( 訂明 ) means prescribed by such regulations made by the Registrar.

17 Revocation of gender recognition certificate etc.

(1) If, after an entry has been made in the Gender Recognition Register in relation to a person, the court makes an order quashing the decision to grant the person's application, the court must inform the Registrar.

(2) Subject to any appeal, the Registrar must—

(a) cancel the entry in the Gender Recognition Register, and

(b) cancel, or secure the cancellation of, any marking of an entry relating to the person made by virtue of subsection 16(1)(b).

18 Evidence

(1) After subsection (2) of section 24 of the Births and Deaths Registration Ordinance (Official seal), insert—

“(2A) A certified copy of an entry in a register or in a certified copy of a register shall be deemed to be a true copy notwithstanding that it is made on a form different from that on which the original entry was made if any differences in the column headings under which the particulars appear in the original entry and the copy respectively are differences of form only and not of substance.”

(2) This subsection 4(2A) applies in relation to the Gender Recognition Register as if it were a register under that Ordinance.

(3) A certified copy of an entry made in the Gender Recognition Register in relation to a person is to be received, without further or other proof, as evidence—

- (a) if the relevant index is the index of the Adopted Children Register, of the matters of which a certified copy of an entry in that Register is evidence,
- (b) if the relevant index is the index of the registration of a parental order made under the Parent and Child Ordinance (Cap 429), of the matters of which a certified copy of an entry in that Register is evidence, and
- (c) otherwise, of the person’s birth.

19 Application

This Ordinance binds the Government.

**PART VI GENDER RECOGNITION PANEL**

20 Establishment of Gender Recognition Panel

(1) There is hereby established a panel to be called in English ***the Gender Recognition Panel*** and in Chinese “性別認同小組”.

(2) Subject to subsection (3), the Chief Executive shall appoint to be members of the Panel—

- (a) a Chairperson, who shall be a serving or retired judge of the High Court or the Court of Final Appeal;
- (b) a deputy Chairperson, recommended by the Chairperson of the Equal Opportunities Commission;
- (c) 3 persons recommended by the Chairperson of the Equal Opportunities Commission who are engaged in the teaching or practice of—
  - (i) medicine; or
  - (ii) psychiatry; or
  - (iii) psychology;
- (d) 2 social workers recommended by the Chairperson of the Equal Opportunities Commission;
- (e) 2 barristers recommended by the Hong Kong Bar Association;
- (f) 2 solicitors recommended by the Law Society of Hong Kong;

- (g) 1 person who is engaged in the teaching of any moral philosophy or medical ethics recommended by the Chairperson of the Equal Opportunities Commission;
- (h) 1 person who is a sociologist recommended by the Chairperson of the Equal Opportunities Commission.
- (3) The Chief Executive—
  - (a) shall not appoint a public officer to be a member of the Panel under subsection;
  - (b) shall not appoint an elected member of the Legislative Council or of any District Council to be a member of the Panel.
- (4) The Secretary shall appoint—
  - (a) a secretary to the Panel; and
  - (b) a legal adviser to the Panel.
- (5) The relevant provisions of Schedule 1 shall have effect with respect to the Council and its members.
- (6) Part VII of the Interpretation and General Clauses Ordinance (Cap 1) shall apply to the Panel and appointments to the Panel except in so far as it is inconsistent with the provisions of this Ordinance.
- (7) Every appointment under subsection (2) shall be notified in the Gazette.

21 Terms of membership

- (1) Subject to this section, the Secretary shall determine the terms and conditions of appointment of a member of the Panel.
- (2) A member of the Panel shall hold and vacate his or her office in accordance with the terms of his or her appointment and shall, on ceasing to be a member, be eligible for reappointment.
- (3) A member of the Panel shall be appointed for a term not exceeding 3 years. (4) A member of the Panel may at any time by notice given to the Chief Executive resign his office.

22 Decisions of the Panel

- (1) The Chairperson or Deputy Chairperson shall preside at meetings of the Panel or, in the absence of the Chairperson or Deputy Chairperson, any other member nominated by the Chairperson.
- (2) Decisions of the Panel must be taken by majority vote (and, if its members are evenly split, the member presiding has a casting vote) with more than 5 members voting.
- (3) The Panel is to determine applications in private without undue delay.
- (4) The Panel may positively determine an application without a hearing where the Panel considers that a hearing is unnecessary.
- (5) The Chairperson may give directions about the practice and procedure of the Panel.
- (6) The Panel must give reasons for its decisions.

(7) Where the Panel has determined an application, the secretary to the Panel must communicate to the applicant the Panel's decision and its reasons for making its decision.

(8) The Secretary (or his or her representative) may make submissions before the Panel in relation to any application.

23 Staff and facilities

The Secretary may make staff and other facilities available to the Panel.

24 Money

(1) The Secretary may pay sums by way of remuneration, allowances and expenses to members and the secretary and legal adviser of the Panel.

(2) The Secretary may pay compensation to a person who ceases to be on the Panel if the Secretary thinks it appropriate to do so because of special circumstances.