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Panel on Administration of Justice and Legal Services

Special meeting on 20 November 2017

**Background brief on the Consultation Paper issued by the
Inter-departmental Working Group on Gender Recognition in June 2017**

Purpose

This paper provides background information on the Consultation Paper issued by the Inter-departmental Working Group on Gender Recognition ("IWG") in June 2017. It also summarizes the major views and concerns of Legislative Council ("LegCo") Members on this and related matters.

Background

2. In May 2013, the Court of Final Appeal ("CFA") ruled in *W v Registrar of Marriages* ("*W's case*")¹ 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. CFA also commented on the problems facing transsexual persons in other areas of law, as well as the treatment of persons who had not undertaken any SRS or had not fully completed SRS. CFA observed that the Administration 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 2004.²

3. Following the observations made by CFA, the Administration established IWG in January 2014 to consider legislation and incidental administrative

¹ [2013] 3 HKLRD 90; FACV 4/2012 (13 May 2013).

² In March 2014, the Administration introduced Marriage (Amendment) Bill 2014 into LegCo to implement CFA's order in *W's case* while the motion for the Bill to be read for the second time did not pass LegCo in October 2014.

measures that may be required to protect the rights of transsexual persons in Hong Kong in all legal contexts and to make such recommendations for reform as may be appropriate.³

4. The study of IWG is divided into two parts. For the first part of its study, 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 IWG's study will focus on post-recognition issues which will become relevant in the event that IWG takes the view that a gender recognition scheme is eventually established in Hong Kong.

5. On 23 June 2017, IWG issued its Consultation Paper: Part 1: Gender Recognition ("the Consultation Paper") to seek the views of the public on issues concerning legal gender recognition,^{4,5} including whether a gender recognition scheme should be established in Hong Kong and, if so, the contents of the scheme. The major issues on which IWG is now consulting the public include:

- (a) whether a gender recognition scheme should be established in Hong Kong;
- (b) the criteria for determining whether a person is eligible for gender recognition (which may include residential requirements, minimum age, marital status and the number of years the person has lived in the reassigned, acquired or preferred gender); and
- (c) the procedure for gender recognition (including 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 recognized);

and are seeking public views on the 16 issues in **Appendix I**.

³ IWG is chaired by the Secretary for Justice, with representatives from relevant policy bureaux including the Constitutional and Mainland Affairs Bureau, the Security Bureau and the Food and Health Bureau, as well as two non-official members from the legal sector.

⁴ Hyperlink of the Consultation Paper: <http://www.iwggr.gov.hk/eng/publications.html> [Accessed November 2017].

⁵ 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.

6. The consultation period originally runs until 31 October 2017. Nevertheless, having considered requests made by different groups interested in this matter, the Administration has decided to extend the consultation period for two more months (i.e. until 31 December 2017).

7. After studying the results of the public consultation, IWG will proceed to the second part of the study concerning the impact of gender recognition on existing laws and practice in the event that a gender recognition scheme is to be established in Hong Kong. As part of this study, IWG will review all existing legislative and administrative measures in Hong Kong which may be affected by legal gender recognition, so that any required legislative or procedural reform may be followed up by the Administration.

Major views and concerns of Members

8. Since IWG was established in 2013, Members have expressed views and concerns about its work through questions raised at special Finance Committee meetings as well as Council meetings. The Panel on Administration of Justice and Legal Services ("the Panel") was also briefed on the progress of the work of IWG at its meeting on 18 July 2017. The major views and concerns of Members are summarized in the ensuing paragraphs.

Work progress of the Inter-departmental Working Group on Gender Recognition

9. At the Panel meeting on 18 July 2017, some members expressed dissatisfaction at the Administration's delay in undertaking the consultation exercise as the judgment of *W's case* had been delivered by CFA in 2013. They considered that the existence of vacuum period in legislation concerning gender recognition upon the delivery of CFA's judgment was against the principle of justice. Questions were raised about the specific timetable for the completion of the study and the subsequent legislative amendments. IWG advised that the consultation exercise was still in progress and it would need time to analyse the responses received and then consider the way forward.

Recognition issues

10. Some members enquired about whether the adoption of an administrative scheme for gender recognition, such as maintaining the existing administrative measures for amending the sex entry on the Hong Kong Identity Card, would be enough to address issues concerning legal gender recognition problems facing transsexual person in all areas of law.

11. Some members noted that there was no single uniform approach to gender recognition in overseas jurisdictions and expressed concern whether IWG had studied various social issues arising from these different requirements for gender recognition, such as the use of sex-specific facilities (e.g. changing rooms and toilets) by pre-operative transgender persons according to their preferred gender.

12. IWG responded that apparently, some jurisdictions had adopted a self-declaration model whereas others had imposed stricter requirements in matters relating to gender recognition. IWG reiterated that it had no confirmed views on any of the issues presented in the Consultation Paper and its analysis mainly focused on the legal positions of gender recognition schemes in other jurisdictions at this stage. The approach adopted in the Consultation Paper was to provide to the public information that was as comprehensive as possible so that the public could have an informed view on relevant issues from the perspectives of both transgender/transsexual persons and other members of the public.

Requirement of sex reassignment surgery for gender recognition

13. Some members opined that with regard to Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights, the scope of CFA's Order applied not only to transsexual persons who had gone through full SRS, but also those not suitable, not necessary and not willing to undergo SRS. In response, IWG explained that the Consultation Paper had covered both transsexual and transgender persons generally, and so included persons who for one reason or another did not undergo SRS.

14. Some members voiced out their worries that a gender recognition scheme without SRS requirement might give rise to much controversy in the community over the issue. If SRS was not required for the gender recognition scheme or a transgender person could switch back to their original sex after legally changing their gender identity through the gender recognition scheme, this might give rise to confusion in the community.

15. Members of the Panel noted that that according to the expert advice given to IWG, gender dysphoria patients could be categorized into those feeling that they were born into the wrong body and hence had a strong desire to undergo SRS, and those who had the belief that they belonged to another gender but SRS was not necessary for them. In the light of this, SRS was not a precondition for gender recognition in some overseas jurisdictions. On the other hand, there were cases in which persons switched back to their original sex after legally changing their gender identity through the gender recognition schemes and, owing to the reversibility of transition, the SRS requirement was made mandatory in certain jurisdictions to ensure permanence of the transition.

16. In response to some members' enquiry about the administrative measures in place to assist transgender persons having gender identity disorder or gender dysphoria who could not afford undergoing SRS, IWG advised that as the SRS service was provided by public hospitals under the Hospital Authority, expenses on SRS should not be an issue.

17. As regards members' enquiry about the administrative measures in place to assist transgender persons who preferred not to undergo SRS or whose physical conditions were not suitable for undergoing SRS, IWG advised that it was examining administrative measures and potential legislation to protect the rights of transgender persons.

Post-recognition issues

18. In response to members' enquiry, IWG stated that it had been examining the possible social issues arising from different requirements for gender recognition in the course of its study and the matter could also be looked at in the context of the post-recognition part of the study.

19. IWG also said that it was envisaged that a number of post-recognition issues concerning the legal status of transgender and transsexual persons would be raised in the event that a gender recognition scheme was to be introduced in Hong Kong. In this connection, whether administrative measures could cover the purpose of the study would need to be explored at a later stage.

Interim measures to protect the rights of transgender and transsexual persons

20. Some members urged the Administration to implement short- to medium-term measures in areas such as search, detention and imprisonment arrangements, with a view to facilitating the transgender and transsexual persons to live with dignity. IWG was of the view that the Administration would further examine the various issues raised in the Consultation Paper and it might not be necessary to wait for IWG's recommendations before proceeding with possible interim measures.

Other concerns

21. Some members considered that the problems faced by transgender and transsexual persons could not be completely addressed even though a gender recognition scheme was established in Hong Kong. They urged for legislation against discrimination on the grounds of sexual orientation and gender identity. In response, IWG explained that this matter was outside the scope of its study. The Consultation Paper has also clarified that "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".

Latest position

22. The Panel plans to conduct a public hearing at the special meeting to be held on 20 November 2017 to listen to stakeholders' views on the Consultation Paper.

Relevant papers

23. A list of the relevant papers is in **Appendix II**.

Council Business Division 4
Legislative Council Secretariat
14 November 2017

Major issues for consultation

- Issue 1 : Whether a gender recognition scheme should be introduced in Hong Kong
- Issue 2 : Requirement of medical diagnosis for gender recognition
- Issue 3 : Requirement of "real life test" for gender recognition
- Issue 4 : Requirement of hormonal treatment and psychotherapy for gender recognition
- Issue 5 : Requirement of sex reassignment surgery and other surgical treatments for gender recognition
- Issue 6 : Requirement of other medical treatments for gender recognition
- Issue 7 : Residency requirement for gender recognition
- Issue 8 : Age requirement for gender recognition
- Issue 9 : Marital status requirement for gender recognition
- Issue 10 : Parental status requirement for gender recognition
- Issue 11 : Recognition of foreign gender change
- Issue 12 : Other possible non-medical requirements for gender recognition
- Issue 13 : Type of gender recognition scheme, if adopted
- Issue 14 : Adopting a scheme similar to overseas gender recognition scheme
- Issue 15 : Authority to determine applications for gender recognition
- Issue 16 : Adopting a possible dual-track gender recognition scheme

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List of relevant papers

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
9.10.2013	Council meeting	Hon CHAN Chi-chuen raised a question on medical services provided for gender identity disorders patients	http://www.info.gov.hk/gia/general/201310/09/P201310090465.htm
31.3.2014	Finance Committee (Special meeting)	Replies to initial written questions raised by Finance Committee Members in examining the Estimates of Expenditure 2014-2015 (Session No.: 2) (Questions Serial Nos. 0272 and 0303)	http://www.legco.gov.hk/yr13-14/english/fc/fc/w_q/sj-e.pdf
27.3.2015	Finance Committee (Special meeting)	Replies to initial written questions raised by Finance Committee Members in examining the Estimates of Expenditure 2015-2016 (Session No.: 2) (Question Serial No. 4882)	http://www.legco.gov.hk/yr14-15/english/fc/fc/w_q/sj-e.pdf
9.12.2015	Council meeting	Hon CHAN Chi-chuen raised a question on gender identity disorder-related services provided by public hospitals	http://www.info.gov.hk/gia/general/201512/09/P201512090358.htm
1.4.2016	Finance Committee (Special meeting)	Replies to initial written questions raised by Finance Committee Members in examining the Estimates of Expenditure 2016-2017 (Session No.: 2) (Questions Serial Nos. 1858 and 2205)	http://www.legco.gov.hk/yr15-16/english/fc/fc/w_q/sj-e.pdf

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
6.7.2016	Council meeting	Hon Alvin YEUNG raised a question on protecting rights of transsexuals	http://www.info.gov.hk/gia/general/201607/06/P201607060776.htm
3.4.2017	Finance Committee (Special meeting)	Replies to initial written questions raised by Finance Committee Members in examining the Estimates of Expenditure 2017-2018 (Session No.: 5) (Question Serial No. 2775)	http://www.legco.gov.hk/yr16-17/english/fc/fc/w_q/sj-e.pdf
18.7.2017	Panel on Administration of Justice and Legal Services	Administration's paper on progress of the work of Inter-departmental Working Group on Gender Recognition	CB(4)1386/16-17(02) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170718cb4-1386-2-e.pdf
		Consultation paper on gender recognition by Inter-departmental Working Group on Gender Recognition	http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170718-cp-pr20170626-e.pdf