

## Views on Consultation on Gender Recognition

1. I have the following views, according to the Issues as listed in the Consultation Paper.
2. Issues 1: Whether a gender recognition scheme should be introduced in Hong Kong
  - (i) It **should not** be introduced because it would have profound and wide implications on the welfare of humanity. While the difficulties faced by people who are suffering from gender identity disorder/gender dysphoria of transsexualism have to be addressed specifically (by professional treatment and assistance, public policy change/accommodation etc.), a gender recognition scheme expected to be backed up by legislation and incidental administrative measures (thus establishing rights of transsexual persons in all legal and public policy contexts) would cause structural changes in the binary division of humanity under which since human history people have been living (“the Present System”), and consequently would affect human interests and human well-being in wide aspects – interests and rights of spouses, children, families, employers, working/business partners, friends and acquaintance; marriage, government/public services, military services, immigration, public security, insurance, education, sports, criminal sanctions etc..
  - (ii) The Present System is not only natural, it has a long human history worldwide to prove its significance and value of existence/maintenance. Social order, marriage and family system are based on the Present System backed up by law. In connection with this, Article 19(1) of the Hong Kong Bill of Rights provides that “The family is the natural and fundamental group of unit of society and is entitled to protection by society and the State.”
  - (iii) I agree with the arguments against gender recognition in paragraphs 5.33 to 5.49 of the Consultation Paper, in particular paragraph 5.37 showing that it is still doubtful and unsettled about the hypothesis that gender dysphoria is innate. Further, even if a full SRS has been done, a person with the many complicated sets of chromosomes for a certain sex cannot be changed to the opposite

sex having different sets of chromosomes. There cannot possibly be change in genetic sex. After a full SRS, the concerned person in essence remains to be of the same sex as born. There is therefore no real basis for a recognition of a change of gender.

- (iv) I also notice from paragraph 5.13 onward, there are suggestions, by way of "...it is observed.." or "..it is noted..", of stigma, prejudice, discrimination, harassment and abuse suggested to have been suffered by transsexual persons. However, to be fair, I think comprehensive researches or surveys to prove such discrimination etc. are necessary, before a generalization or conclusion is made.

There may have been reports on isolated events of unfair treatment or sorrowful experience of transsexual persons, they deserve our attention and sympathy. An appropriate solution and as a social obligation, is to help those suffering. Hong Kong is resourceful and viable to do so.

On the other hand, observations can be had from daily living and as facts personally experienced, that Hong Kong people generally do not pay much attention to the life of transsexual people, they, like people in general, have the freedom to live out their way of life in a society of high tolerance level such as Hong Kong.

- (v) Paragraphs 5.18 – 5.27 of the Consultation Paper discuss about legal gender recognition as a human right of transgender persons, quoting the Yogyakarta Principles (para. 5.23), the urging views of the United Nations Human Rights Committee (para.5.25), the case-law in some countries (para.5.26) , and the ECtHR's rulings in Goodwin, Grant v The United Kingdom and L v Lithuania ( paras. 5.21 & 5.22). To my understanding, these are views or legal authorities outside Hong Kong jurisdiction, they may be relevant when an individual court case has come up for decision in Hong Kong subject to the facts and law and other considerations applicable to the case. I observe that the court's ruling in favor of the applicant for a gender recognition in Goodwin (to which the other two ECtHR cases referred) was based on the consideration that there was a continuing international trend towards increased social acceptance of transsexual and towards legal recognition of the new sexual identity of post-operative transsexuals , and that there were no significant factors of public interest to weigh against the interest of the individual applicant in

obtaining legal recognition of her gender reassignment. I am of the view that the same considerations may not apply here in Hong Kong being a society with different culture , tradition , social and family value , notwithstanding that it is considered an international financial/economic city. It is noteworthy that Hong Kong family system and functions on the whole are still governed by Chinese tradition, the family structure and relationship for family members and relatives are based on the binary division of humanity, any gender recognition upsetting or confusing such system and tradition would be highly controversial and subject to serious challenges and objection.

(vi) Given that sex by birth or genetic sex cannot be changed, gender recognition has no true basis for any law to be established in that regard, and if legal gender recognition is established, it would be artificial or just to give effect to a personal preference . Further, a legal gender recognition would give rise to de-facto same-sex marriage in respect of which there is still no social consensus, the subject is highly controversial in Hong Kong.

(vii) In the premises, introduction of a gender recognition scheme is not justified, a gender recognition scheme therefore should not be introduced in Hong Kong.

### 3. Issue 2: Requirement of medical diagnosis for gender recognition

(i) Without agreeing that a gender recognition scheme should be introduced, if it is to be introduced, there should be a requirement of medical diagnosis for such recognition because a confirmation based on cogent evidence and expert advice is necessary for the benefit of the person seeking the recognition and the society affected by the recognition, and in view of the great impact on that person and the society resulting from the change after the recognition. This is a reasonable requirement even if it is considered that transgender persons have a right to a gender recognition.

(ii) Further, a law, the legal gender recognition, should be established on reasonable, objective, verifiable and reliable basis, in particular when the establishment will widely and profoundly affect the society. Requirement of medical diagnosis (e.g. DSM-5, ICD-10, as recognized under the Disabilities Discrimination Ordinance)

provides such basis.

(iii) As observed by the CFA in W's case, it was well-established that transsexualism was a condition requiring medical treatment. Medical diagnosis is confirmatory and healing, it is also facilitative to an application for gender recognition. If any applicant for a gender recognition is not satisfied with the diagnosis or otherwise hesitant about any diagnosis and treatment, he/she can seek further medical consultations or wait and see and defer making decision or ultimately withdraw the application. There is no question of infringement of "self-determination". Further, the standard of the medical profession is high and medical technologies are advanced here in Hong Kong according to international standards. Wrong diagnosis is not a real concern. Anyway, it is within a State Party's margin of appreciation to require an applicant for gender recognition to provide evidence, including medical evidence, of his/her condition of transsexuality ( Garcon and Nicot v France, the European Court of Human Rights decisions).

4. Issue 3: Requirement of " real life test " for gender recognition

Without agreeing that a gender recognition scheme should be introduced, if it is to be introduced, there should be a requirement of " real life test " for the benefit of the applicant for a gender recognition. Further, "real life test" forms reasonable and reliable basis for seeking the legal gender recognition. The duration can be 2 years. The evidence required and assessment can be undertaken by psychologists or social workers.

5. Issue 4: Requirement of hormonal treatment and psychotherapy for gender recognition

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

(i) These issues are controversial. On the basis that there cannot possibly be change in genetic sex, and that hormonal treatment and SRS and other surgical treatment can only achieve changes in some aspects of the person such as appearance, characteristics, behavior and some bodily functions, hormonal treatment and SRS in principle should not be administered. However, as expediency and in order to lessen confusions ( in the eyes of the public and in

other areas of social life) , and without agreeing that a gender recognition scheme should be introduced, if it is to be introduced , the above two requirements should be part of the conditions for approving an application for a gender recognition. It is possible to have case where it is firmly established that the applicant is seriously not suitable for such treatment or surgery, then the case can be considered on its own merits as an exception to the requirements. Such case should be dealt with by a board comprising experts ( doctors, psychologists, psychiatrist, lawyers and social workers) and community representatives ( educators, councilors etc. ) in a comprehensive and strict manner/process, to safeguard correct judgment and against abuses.

(ii) Given that the hormonal treatment or SRS is to be done with the consent of the applicant, there is no question of torture or infringement of personal liberty/security or protection of private life/privacy. The purpose of the requirements is consistent with the concerned applicant's desire to change to the preferred sex . Further, the requirements are quid pro quo for gender recognition. There is also the provision of an exception to the requirements as mentioned above.

#### 6. Issue 7: Residency requirement for gender recognition

Without agreeing that a gender recognition scheme should be introduced, if it is to be introduced, there should be permanent residency requirement, for simple and clear public administration.

#### 7. Issue 8: Age requirement for gender recognition

Without agreeing that a gender recognition scheme should be introduced, if it is to be introduced, the age requirement of an applicant for a gender recognition should be 18-year old or above, to tally with the capacity of a person to give consent and make contract, bearing in mind the complexities of gender identity disorder or gender dysphoria of transsexualism, the requirements to be met, and the great impact on the applicant.

#### 8. Issue 9: Marital status requirement for gender recognition

Without agreeing that a gender recognition scheme should be

introduced, if it is to be introduced, the applicant for a gender recognition should be unmarried or divorced in order to avoid the effect on spouses and children, the marital and family system, and related social policy/administration. More importantly, Hong Kong does not recognize same-sex marriage.

9. Issue 10: Parental status requirement for gender recognition

Without agreeing that a gender recognition scheme should be introduced, if it is to be introduced, the applicant for a gender recognition should not be a parent so that no children of young age and family with such children will be affected, except for those who are having children of age 18 or above.

10. Issue 11: Recognition of foreign gender change

Without agreeing that a gender recognition should be introduced, if it is to be introduced, foreign gender change can be recognized only if the recognition system and requirements are the same as those for Hong Kong and pursuant to agreement made between the party countries case by case taking into account the standards of processing and approving applications for gender recognition and other matters such as medical diagnosis, SRS etc..

**Chau Hon Yum**