



CONSULTATION PAPER: PART 1

GENDER RECOGNITION

SUBMISSION

INTRODUCTION

1. The Law Society of Hong Kong provides these submissions in response to the release of a Consultation Paper on Gender Recognition ("Consultation Paper") in June 2017 by the Inter-departmental Working Group on Gender Recognition ("IWG") which is said to be Part 1 of the IWG's Study; another round of consultation on post-recognition issues will be carried out by the IWG.
2. The Law Society of Hong Kong has reviewed the Consultation Paper and submits the following observations and responses as set out below for consideration. The Law Society welcomes the opportunity to provide submissions in respect of Part II of the consultation in due course.
3. References to the paragraph numbering below, unless otherwise specified, are to the Consultation Paper.

INITIAL OBSERVATIONS

(i) Delay

4. The Court of Final Appeal, in *W v Registrar of Marriages (FACV 4/2012)* (*W's case*), took the extraordinary step in 2013¹ of suspending its order in respect of the constitutional rights of a successful litigant. The Court suspended W's rights for 12 months to afford the government a proper opportunity to put in place comprehensive and constitutionally compliant gender recognition legislation (subsequent attempts to legislate, as envisaged by the Court of Final Appeal, for some reasons failed).

¹ Para 7, Order and Costs in FACV 4/2012 dated 16 July 2013

5. We note the IWG was established in 2014 to conduct consultation. Public consultation only commenced however in June 2017, four years after the Court of Final Appeal’s judgment. We further note that this is only Part 1 of the consultation.
 6. We are concerned about the delay in the consultation process and consequent delay in the enactment of comprehensive and constitutionally compliant gender recognition legislation envisaged by the court despite the importance and urgency of the issue accorded by the court.
- (ii) The importance of due deference to and compliance with human rights principles and obligations
7. We consider that human rights principles and standards should be given first and paramount consideration in the consultation exercise and not simply taken to be one factor to be taken into account and accorded the same weight as for instance societal consensus.
 - (a) Due and paramount deference must be accorded human rights obligations enshrined in our Basic Law, the Bill of Rights (incorporating into Hong Kong law the rights enshrined in the ICCPR), our treaty obligations under the Convention against Torture and Other Cruel Inhumane or Degrading Treatment of Punishment as well as international human rights standards.
 - (b) The United Nations Office of the High Commissioner for Human Rights recently re-affirmed in 2015 the international human rights position in regards to rights enjoyed by transgender people:

“Application of international human rights law is guided by the fundamental principles of universality, equality and non-discrimination. **All human beings, irrespective of their sexual orientation and gender identity, are entitled to enjoy the protection of international human rights law with respect to the rights to life, security of person and privacy, to freedom from torture and ill-treatment, discrimination** and arbitrary arrest and detention, and to freedom of expression, association and peaceful assembly, and all other civil, political, economic, social and cultural rights.” (emphasis added)²
 - (c) These comments echo the applicability of international human rights obligations concerning the rights of transgendered persons as set out in the Yogyakarta Principles developed in 2007³.

² Discrimination and Violence against individuals based on their sexual orientation and gender identity, Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015, Paragraph 9

³ The Yogyakarta Principles 2007, <http://www.yogyakartaprinciples.org/principles-en/>

- (d) There is therefore an overarching need for the gender identity issues considered in this consultation, to be viewed, through the lens of rights to dignity, self-determination and bodily integrity enjoyed by transgendered person.

(iii) Terminology

8. For the purposes of these submissions we shall address the issues as applying to transgender persons rather than the narrower category of transgender persons identified as transsexuals.
9. We adopt the definition of transgender persons as defined by WPATH⁴ as being ‘individuals whose gender identity and/or expression of their gender differs from social norms related to their gender of birth’.
10. We accept that transgender persons include all who personally identify with a gender different to that accorded to them at birth. We further accept that transgender persons cover a wide spectrum including those who may be comfortable with their bodies (and therefore feel no need for body modification, surgery or hormone treatment) as well as those who seek to modify their bodies.
11. For the purpose of these submissions, we accept that transsexuals are those transgender persons who personally identify with a gender different to that accorded to them at birth and who seek to modify their bodies.
12. We consider it important that terminological distinctions are observed in order to avoid misunderstanding.

RESPONSES TO THE CONSULTATION QUESTIONS

13. Our responses to the consultation questions are as follows.

Issue 1: Whether a gender recognition scheme should be introduced in Hong Kong (see near paragraph 5.49 [of the Consultation Paper])

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

⁴ World Professional Association for Transgendered Health (2011) Standards of Care for the health of transsexual, Transgender, and Gender Nonconforming People (seventh ed)
http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=3926

Law Society's Response:

14. We say “YES”.
15. By way of preliminary observation we consider that in taking the extraordinary step of suspending W's constitutional rights (for 12 month) to allow the Government to enact comprehensive gender recognition legislation, the court adopted the view that such legislation would be highly beneficial⁵. As such we consider that the more appropriate question posed by the consultation paper should be what type of scheme for gender recognition should be introduced into Hong Kong rather than whether a gender recognition scheme should be introduced.
16. In any event, we have studied those arguments “FOR” (paragraphs 5.5 – 5.32 in the Consultation Paper) and “AGAINST” (paragraphs 5.33 – 5.49) the setting up of a gender recognition scheme in Hong Kong. For those “AGAINST” arguments which are based on purported scientific (Argument (1)) or sociological (Argument (2)) analysis we have no comments. For the other opposing arguments, we consider that
 - (a) the issues of gender recognition should be addressed by a clear scheme backed by legislation with certainty and clarity. At present, protection in Hong Kong for transgender people is not adequate. Discrimination against transgender people generally, in their work place, social circles, is well documented⁶ and extends even to detention. A well-conceived gender recognition scheme would help promote a discrimination-free environment;
 - (b) the so-called unintended consequences (e.g. abuses of the scheme by a terrorist to hide his/her identity) are fanciful and the ‘slippery slope’ arguments (on same sex marriage) should not displace the fundamental human rights principles.

Issue 2: Requirement of medical diagnosis for gender recognition (see near paragraph 6.18 [of the Consultation Paper])

[The IWG] invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement of a medical diagnosis of, for example,*

⁵ W v. the Registrar of Marriages [2013] HKCFA 39 (CFA) 129

⁶ Report on Study on legislation against discrimination on the grounds of sexual orientation, gender identity and intersex status. Commissioned by the Equal Opportunities Commission and conducted by Gender Research Centre of the Hong Kong Institute of Asia-Pacific Studies of The Chinese University of Hong Kong, January 2016, <http://www.eoc.org.hk/eoc/upload/ResearchReport/20161251750293418312.pdf>

gender dysphoria or gender identity disorder, for gender recognition, and why.

(2) If the answer to sub-paragraph (1) is “yes”, what kind of evidence should be provided by an applicant for gender recognition.

Law Society’s Response:

17. Paragraph 4.2 of the Consultation Paper sets out different approaches taken in other jurisdictions regarding gender recognition. These are recapped in the following
- (a) a self-declaration model, which allows change of gender identity by means of the applicant submitting a specific declaration self-identifying in a particular gender without any medical intervention requirements, personal status restrictions or any procedural complexity (examples of jurisdictions adopting this model are Argentina, Denmark, Malta and Ireland).*
 - (b) a surgery-free but otherwise detailed model requiring medical evidence, such as proof of diagnosis of gender dysphoria or transsexualism and proof of real life test (examples of jurisdictions adopting this model are the, Iceland, Germany, Spain and New York State in the US. In this regard, we note that currently the UK also adopts this model in the Gender Recognition Act 2004 although adoption of the self declaration model is currently under review.)*
 - (c) a surgery-requiring model, but with fewer other medical evidence requirements (examples of jurisdictions adopting this model are New South Wales (Australia), Queensland (Australia), Liechtenstein and New Brunswick (Canada)).*
 - (d) a model which includes a wide range of requirements like surgery, medical diagnosis of gender dysphoria, marital status exclusion, etc (examples of jurisdictions adopting this model are Japan, Mainland China and Finland).*
18. We **firmly oppose** a surgery-requirement model (i.e. models 17(c) and 17(d) in the above). This is because a prerequisite for a surgery for the purpose of gender recognition would have an undesirable coercive effect on persons who would not otherwise be inclined to undergo that surgery. That would be a blatant violation of various basic human rights. In addition, there could also be violation of those other rights against cruel, inhuman or degrading treatment which are protected by international conventions, such as the Convention Against Torture and Inhuman, Cruel or Degrading Treatment or Punishment 1984 (CAT) (Articles 2, 16) the European Convention on Human Rights

(Article 3) and ICCPR Art 7. We would refer to our submissions on Marriage Amendment Bill dated 13 May 2014 (annexed).

19. The following basic human rights must be protected, i.e. the rights to
 - Privacy
 - Self-determination
 - Bodily integrity
 - Family Life
 - Freedom from torture, cruel and inhuman treatment
 - Equality on the ground of gender identity.

20. Among the other models of choice, we are receptive to both "*a surgery-free but otherwise detailed model requiring medical evidence*" as well as a "*self-declaration model*". We tend not to "pick and choose" either one of these two models, as we acknowledge the strength and the relevancy of these two models.

21. In devising a model for gender recognition for Hong Kong, we ask the IWG to take the following into account.
 - (a) Rights of the minority are never a matter dependent upon headcounts. As the Court of Final Appeals in the judgment in *W's case* (FACV 4/2012) has highlighted, reliance on the absence of a majority consensus as a reason for rejecting a minority's claim is inimical in principle to fundamental rights (§ 116 of the Judgment).

 - (b) The self-declaration model is (at the time of this submission) being considered by the UK Government in its review of 2004 Gender Recognition Act ("2004 GRA")⁷. The review aims to inter alia remove the requirements for medical evidence and interview panel, to allow the transgender people to have their gender legally recognized through a simple administrative process⁸.

 - (c) The above represents a recognition by the UK government of an international advancements in schemes for recognition of transgender persons, the increasing difficulty in justifying the need for transgender persons to have to provide medical evidence to confirm their own identity, and an acknowledgment of the drawbacks of their current 2004 GRA as identified by the transgender community who have found the 2004 GRA scheme to be daunting and discriminatory. The Hong Kong Government should take heed of the increasing emphasis being placed on the rights of transgender people to self-determination, privacy and dignity including the process by which they may obtain legal gender

⁷ The Scottish Government in November 2017 launches a similar consultation to review the Gender Recognition Act 2004. The deadline for that consultation is 1 March 2018. See <https://beta.gov.scot/publications/review-gender-recognition-act-2004/pages/25/>

⁸ See <http://www.independent.co.uk/news/uk/politics/transgender-rules-reform-gender-dysphoria-changes-2004-gender-recognition-self-identify-a7855381.html>

recognition.

- (d) Of equal importance is the readiness of the Hong Kong society towards a gender recognition scheme, in terms of her civic freedom, degree of social openness and the extent of religious tolerance. It is worth noting that, according to our own researches, for those jurisdictions which adopt a self-declaration model, they tend to be more open and liberal towards sexual minority.
22. In the course of the deliberations by our expert committees, we received a suggestion on the possible way forward and that is for Hong Kong to first have "*a surgery-free but otherwise detailed model requiring medical evidence*", upon a firm policy commitment to review the scheme periodically, with the ultimate goal to implement a "*self-declaration model*". It was said that this gradual or transition approach should help different sectors of the Hong Kong society to better understand how the scheme is to be implemented. It would also give Hong Kong the opportunity to evaluate the experience in her neighboring countries on issues relating to sexual minority rights. The Hong Kong Courts could in the meantime build up its own jurisprudence in these areas. All the above would boost confidence and fortify consensus which in turn should improve the gender recognition scheme for the benefit of the transgender community. We feel obliged to pass this suggestion, by way of an observation, to the IWG for further consideration.
23. After all, the four models should not be the only options Hong Kong has to pigeonhole herself. The IWG might be more flexible or creative in formulating a model suitable for Hong Kong, taking into account her unique cultural and core values. In this regard, we note the following "variation models" from a consultation paper released last month (Nov 2017) by the Scottish Government on a review of her gender recognition scheme. In these variation models, a medical diagnosis is not required but the applications need to be substantiated and supported by relevant information.
24. In the Canadian province of British Columbia: from 2014, British Columbia allowed a person whose birth was registered there to submit an application to the Vital Statistics Agency. The applicant can request a change in their birth certificate from female to male or male to female. The applicant must submit:
- an application form containing a personal statement that they have assumed, identify with and intend to maintain the gender identity corresponding with their requested change; and
 - a statement from a doctor or psychologist confirming the applicant's gender identity.

Another example of a variation model is the legal gender recognition process adopted in France in 2017. This is court based. The applicant must provide supporting evidence such as evidence that they appear publicly to belong to the

sex in which they want to be legally recognised.

These assessment models may not require applicants to demonstrate a medical diagnosis, but access to legal recognition in British Columbia and France does require applicants to demonstrate that their gender identity conforms to the sex in which they wish to appear in their birth records⁹.

Issue 3: Requirement of “real life test” for gender recognition (see near paragraph 6.25 [of the Consultation Paper])

[The IWG] invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement of “real life test” for gender recognition, and why.*
- (2) If the answer to sub-paragraph (1) is “yes”,*
 - (a) what should an applicant for gender recognition have undertaken in order to satisfy a requirement that he or she has undergone a “real life test”;*
 - (b) what should be the duration of a “real life test”; and*
 - (c) what kind of evidence should be provided by an applicant for gender recognition to show that he or she has undergone a “real life test” for the specified duration.*
- (3) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a requirement of intention on the part of the applicant to live permanently the acquired gender, and why.*
- (4) If the answer to sub-paragraph (3) is “yes”, what kind of evidence should be required.*

Law Society’s Response:

25. The answer to this question depends on the model of gender recognition scheme Hong Kong is to have. For that purpose, we refer to our Responses to issue 2 above.

⁹ See the researches set out in the Scottish Consultation Paper on the Review of Gender Recognition Act 2004 (paragraphs 3.17 – 3.19 therein): <https://beta.gov.scot/publications/review-gender-recognition-act-2004/pages/25/>

26. Thus, *IF* Hong Kong is to have “self-declaration model” we agree that there is no need for the applicant to undergo a “real-life test”. On the other hand, *IF* Hong Kong is to have “a *surgery-free but otherwise detailed model requiring medical evidence*” model, we consider some assessments prior to the gender change are relevant and are needed. In that case, we agree that
- (a) a duration of two years for the assessment is appropriate and reasonable; and
 - (b) medical evidence (in terms of psychiatric or psychological evidence) should be provided by an applicant for gender recognition to show that he or she has committed to the change.
27. We put forth the above propositions for the “a surgery-free but otherwise detailed model” (*IF* that is adopted), as we acknowledge that a change of gender of an individual is an important decision to be fully respected. A regret on the change is not desirable. The inclusion of some assessments is therefore proportionate to the gravity of the decision to be made. The assessment which would last for a period of time could also serve as a “cooling-off” period for the applicant to reflect upon his/her preferred gender in the social circle and in the workplace. That is important not only to the applicants but also to their family, friends and colleagues at work.
28. The above assessment should be performed by qualified and recognized medical professionals. At the time of this consultation we are not advised on the manpower currently available from the Hospital Authority that could take up this kind of assessments. There are legitimate questions such as: should overseas medical professionals be allowed to conduct these assessments and could their medical evidence be admitted? Would the assessment results be subject to review or appeal?
29. We appreciate the Consultation Paper is silent on the assessment itself, as we understand that the Paper at this stage is only preliminary. We would however red-flag the above when the IWG is to further consider the subject matter. We would also invite the IWG to try to take into account circumstances relevant to and unique to Asian culture, when it is to consider the contents of the assessment.
30. By way of remark, in the above responses, we have intentionally not adopted the term “*real-life test*” in the Consultation Paper. This is because we consider the assessment should not be a “test” which is capable of being passed or failed (as in a school examination). That should be an assessment which could be on a continual basis. That assessment by itself should not impose a hurdle, psychological or otherwise, upon the applicants.
31. It thus may not be relevant to limit the number of attempts for the assessment, or even the number of times an applicant is to change his/her gender, although

there may be concerns that applications for gender change might be submitted frivolously if there is no limit on the number of times that a person may apply for recognition of his acquired gender. The question of the number of “reverses” an applicant wishes to have on his acquired gender may be further explored in subsequent consultations by the IWG.

Issue 4: Requirement of hormonal treatment and psychotherapy for gender recognition (near paragraph 6.34 [of the Consultation Paper])

[The IWG] invite views from the public on the following matters:

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

Law Society’s Response:

32. We consider that there should **not** be a mandatory requirement for hormonal treatment and/or other medical treatment(s) for gender recognition. The applicant should have autonomy in the freedom to choose medical treatment he or she wishes to receive for the purpose of gender change, having been fully advised by a medical practitioner with specialization in psychosexual medicine or by other relevant gender specialist. He or she should be given the choice to receive hormonal or other medical treatment. In this regard, we agree with the statement quoted in the Consultation Paper, i.e. ‘*any requirement of unwanted medical intervention in order to obtain recognition of preferred gender is a violation of the fundamental human rights of the persons concerned, particularly their right to physical integrity and private autonomy*’¹⁰.
33. Insofar as the suggestion that a mandatory hormonal or medical treatment could provide an additional “safeguard” to prevent an applicant from reverting back (paragraph 6.27), we repeat our comments in the above paragraphs.

¹⁰ (§6.32, from Jens M Shcerpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015) at 650)

Issue 5: Requirement of SRS and other surgical treatments for gender recognition (near paragraph 6.93 [of the Consultation Paper])

We invite views from the public on the following matters:

- (1) Insofar as the practice in Hong Kong is concerned, full sex reassignment surgery requires removal of the original genital organs and construction of some form of genital organs of the opposite sex. In the event that a gender recognition scheme is to be introduced in Hong Kong, should there be a requirement for the applicant to have undergone partial/full sex reassignment surgery, and if so, why?*
- (2) If the answer to sub-paragraph (1) is “yes”,*
 - (a) regarding the extent of the surgery required, whether there should be a requirement of full sex reassignment surgery as currently adopted in Hong Kong, and why;*
 - (b) if the answer to sub-paragraph (a) is “no”, what type of partial sex reassignment surgery (i.e. the extent of the partial surgery) would be sufficient, and why;*
 - (c) other than a partial/full sex reassignment surgery, what kind of surgery should be required (including non-genital surgery such as plastic surgery, reconstruction of chest, etc), and why;*
 - (d) what kind of evidence in this respect should be provided by an applicant for gender recognition;*
 - (e) whether sex reassignment surgery carried out in a country or territory outside Hong Kong should be recognised in Hong Kong for the purposes of gender recognition, and why; and*
 - (f) if the answer to sub-paragraph (e) is “yes”, what kind of evidence should be provided by the applicant.*

Law Society’s Response:

34. We are of the strong view that partial or full sex reassignment surgery should **not** be a mandatory requirement for a gender recognition scheme in Hong Kong. We repeat our reasoning set out in Responses to Issues 2 and 4 above.
35. We would also draw the attention of the IWG to the relevant Yogyakarta Principles which, we notice, are similar to some of the articles in the HKBOR

and the ICCPR.

36. For the full reference of the IWG, it is worth reciting these principles in the following (with emphasis supplied).

(a) *The Right to recognition before the law*

Yogyakarta Principles - Principle 3

“Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. **No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.** No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall...

b) Take all necessary legislative, administrative and other measures to fully respect and legally recognize each person’s self-defined gender identity;

c) Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person’s profound self-defined gender identity”

[Similar provisions: Article 13 of the HKBOR, Article 16 of the ICCPR]

(b) *The Right to Privacy*

Yogyakarta Principles - Principle 6

“Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity, as well as decisions and choices regarding both one’s own body and consensual sexual and other relations with others.

States shall...

d) Repeal any law that prohibits or criminalizes the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity”

[Similar provisions: Article 14 of the HKBOR, Article 17 of the ICCPR, Article 8 of the ECHR]

(c) *The Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment*
Yogyakarta Principles - Principle 10

“Everyone has the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender identity.

States shall...

a) Take all necessary legislative, administrative and other measures to prevent and provide protection from torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to the sexual orientation or gender identity of the victim, as well as the incitement of such acts”

[Similar provisions: Article 3 of the HKBOR, Article 7 of the ICCPR, Articles 2(1) and 16 of the CAT]

37. The Yogyakarta Principles have had significant traction within the United Nations. The Principles have been highly regarded by Office of the High Commissioner for Human Rights and States at UN as a guide for monitoring state performance in relation to the rights of sexual and gender minorities. During a Human Rights Council panel on “Human Rights Voluntary Goals” in 2008, Slovenia, on behalf of the EU, affirmed that “[these] Principles reflect existing international human rights law and invites States to duly consider and reflect them in national policy and practice.”¹¹
38. In respect of the Guidance Note on Refugee Claims in 2008¹², the UN High Commissioner for Refugees drew from the Principles multiple times in providing guidance on how sexual orientation or gender identity can be the basis of a well-founded fear of persecution. The document adds that while sexual orientation is not explicitly delineated in any human rights treaty, “The

¹¹ UN Human Rights Council (5 March 2008). Available at http://www.ypinaction.org/wp/wp-content/uploads/2016/10/Slovenia_UN_Human_Rights_Council_2008.pdf. “UN General Assembly Joint Statement on Sexual Orientation and Gender Identity: Building on the Past, looking to the future.”

¹² Available at <http://www.refworld.org/pdfid/48abd5660.pdf>

Yogyakarta Principles reflect binding international legal standards with regard to sexual orientation which are derived from key human rights instruments.”

39. We consider that the Yogyakarta Principles, though not binding on Hong Kong, are persuasive. They provide transgender people equality policy with a clear set of overall guiding principles which are in keeping with international best practice. As such, they should be considered by the IWG carefully.

Issue 6: Requirement of other medical treatments for gender recognition (near paragraph 6.94 [of the Consultation Paper])

[The IWG] invite views from the public on the following matters:

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

Law Society’s Response:

40. We do **not** consider there should be a requirement for any medical treatment other than consultation with a medical practitioner with specialization in psychosexual medicine or by other relevant gender specialist who can confirm that medical advice has been given. We repeat our observations in our Response to Issue 5 above.

Issue 7: Residency requirement for gender recognition (near paragraph 7.34 [of the Consultation Paper])

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

Law Society’s Response:

41. We note that the Consultation Paper has made reference to a number of conflict of law principles relating to gender recognition (paragraphs 7.12 – 7.34). We do

not consider it necessary to have residency requirement for gender recognition. Specifically we note that there are a number of non-resident transgender persons detained in custody in Hong Kong. In the interest of proper administration of policies in regard to their conditions of detention, and for the protection of such persons from discrimination and/or inhuman and degrading treatment, it is important for such persons have access to the scheme.

Issue 8: Age requirement for gender recognition (near paragraph 7.45 [of the Consultation Paper])

[The IWG] invite views from the public on the following matters:

- (1) In the event that a gender recognition scheme is to be introduced in Hong Kong, whether there should be a minimum age requirement for applying for gender recognition.*
- (2) If the answer to sub-paragraph (1) is “yes”, what should be the minimum age for the application: 12 years of age, 18 years of age, 21 years of age or another age; and the basis for choosing that age as the minimum age for the application.*
- (3) If the answer to sub-paragraph (1) is “no”,*
 - (a) whether a minor (under the age of 18 years) should not be allowed to make an application unless with the consent of his or her parents and/or legal guardians, and why;*
 - (b) whether there should be additional requirements for a minor applicant which would not be required for an adult applicant, and why; and*
 - (c) if the answer to sub-paragraph (b) is “yes”, what kind of requirement(s) and evidence should be required.*

Law Society’s Response:

42. We consider that
 - (a) there should be a minimum age requirement for applying for gender recognition;
 - (b) the minimum age for application should be 18 years of age.
43. The above is subject to exceptions for special circumstances for those under 18, and the exceptions should be premised upon the "best interests of the child" principle. Parental consent could be one of the factors for consideration but should not be the dictating or determining factor. Counseling and psychological

evaluation will certainly be required in these cases.

44. Our above position is premised upon, among other things, a prime consideration of the vulnerabilities of young children, particularly given the lack of public education in this regard. A minimum age requirement provides a clear safeguard to ensure that long term decisions about gender recognition are made at an appropriate time.
45. We emphasize that our proposed minimum age of 18 is not an absolute bar below which no application can be entertained. If there are exceptional circumstances, applications for gender changes could still be made, but in those circumstances, the “best interests of the child” **must be** the guiding principle.
46. By way of passing remarks, some of our expert committees have in the course of discussion alluded to the mental capacity of the applicants for gender change. This issue is outside the scope of the current consultation, but we red-flag this for the Government’s consideration in the future.

Issue 9: Marital status requirement for gender recognition (near paragraph 7.63 [of the Consultation Paper])

[The IWG] invite views from the public on the following matters:

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

Law Society’s Response:

47. We do **not** agree that the married couples should be forced to divorce before either one party is entitled to make an application. Making it a mandatory

requirement that an applicant should be unmarried or divorced is by itself

- (a) against the Government's policy to support family;
- (b) against “the explicit will of the married couple who wish to remain in a legally recognized family unit, especially when they have children in their care” (paragraph 7.62);

48. We also repeat the comments of Dr Athena Liu in this regard, as cited in the paragraph 7.63 of the Consultation Paper¹³

“Although a married individual’s gender recognition results in the parties (in a marital relationship) being the same gender, arguably this is different from permitting same-sex marriage. This is so because the debate concerning same-sex marriage has always been about whether persons of the same-sex at the time of marriage should be permitted to enter into marriage. Further, there may not be a strong enough case for refusing gender recognition to those who are married when such a refusal may be challenged on the basis that it creates a conflict between a person’s right to family life and the right to establish one’s sexual identity. ...

Hong Kong currently relies on the law in the [Registration of Persons Ordinance] to recognise a person’s acquired gender. There is no reason why it should not continue to do so. It is unnecessary to impose ‘being unmarried’ as a precondition to obtaining a replacement identity card. A de facto same-sex marriage (small in number as they are) need not be a serious concern to law reform towards gender recognition.”

Issue 10: Parental status requirement for gender recognition (near paragraph 7.73 [of the Consultation Paper])

[The IWG] invite views from the public on the following matters:

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

¹³ See Athena Liu, “The Legal Status Of Transgender And Transsexual Persons In Hong Kong”, in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (1st ed, December 2015), at 351 and 361.

- (b) whether an applicant for gender recognition should not be a father or mother of any child below a certain age limit, and why;*
- (c) if the answer to sub-paragraph (b) is “yes”, what the age limit should be, and why.*

Law Society’s Response:

49. We consider it is **not** necessary to have requirements relating to parental status of the applicant, thus
- (a) an applicant for gender recognition need not be childless; and
 - (b) an applicant need not be a father or mother of any child below a certain age limit.

Issue II: Recognition of foreign gender change (near paragraph 7.87 [of the Consultation Paper])

[The IWG] invite views from the public on the following matters:

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

Law Society's Response:

50. **YES** - a gender change which is recognised under the law of a country or territory outside Hong Kong should be recognised in Hong Kong.
51. When the IWG is to consider the recognition of gender change outside Hong Kong, we suggest it to draw reference to the UK, where "there are two types of application for gender recognition under the GRA, one of which is for "overseas application" i.e. for those who have changed gender under the law of a country or territory outside the UK (paragraph 3.60). There is in the UK an approved list of countries for those countries which legally recognize the applicants in their acquired genders.

Issue 12: Other possible non-medical requirements for gender recognition (near paragraph 7.88 [of the Consultation Paper])

[The IWG] invite views from the public on the following matters:

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

Law Society's Response:

52. There should **not** be any other non-medical requirement for gender recognition.

Issue 13: Type of gender recognition scheme, if adopted (near paragraph 8.10 [of the Consultation Paper])

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

Law Society's Response:

53. In our Response to Issue 1 above, we have already stated that the recognition scheme should be backed up by a legislative scheme, based on a (new) specific ordinance.
54. In *W v Registrar of Marriages* (FACV 4/2012), the Court of Final Appeal was unanimous in finding favour with legislative intervention.
- (a) Ma CJ and Ribeiro PJ discussed areas where “legislative intervention would be desirable” (para. 141-146 of the Judgement)
 - (b) Chan PJ held there is a strong case for a comprehensive review of the relevant legislation with a view to propose changes in the law concerning the problems facing transsexuals as soon as practicable (para 197)
 - (c) Bokhary NPJ suggested “much room for legislative reform still remains” (para. 226).
55. The following paragraphs from the *W's case* are note-worthy :

"138. The second approach, involving legislative intervention, would in our view, be distinctly preferable. The legislature could set up machinery for an expert panel to vet gender recognition claims on a case-by-case basis and also to deal with some of the other legal issues mentioned below. A compelling model may readily be found in the United Kingdom's Gender Recognition Act 2004 ("GRA 2004") which, it will be recalled, was being prepared when Bellinger was decided in the House of Lords. The approach of the Act was then described by Lord Nicholls as "primary legislation which will allow transsexual people who can demonstrate they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender". "

...

"143. Perusal of the GRA 2004 indicates that legislative intervention would also be beneficial in areas which include (apart from marriage and parenting) entitlement to benefits and pensions, discrimination, succession, the position of trustees administering trusts, sport, the application of gender-specific offences and recognition of foreign gender change and marriage. In respect of all these areas, the Act provides a practical model for possible approaches to dealing with legal issues which could arise."

Issue 14: Adopting a scheme similar to overseas gender recognition scheme (near paragraph 8.16 [of the Consultation Paper])

[The IWG] invite views from the public on the following matters:

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

Law Society's Response:

56. We consider the experience with and the evolution of the Gender Recognition Scheme in the UK are relevant to Hong Kong in her consideration for a gender recognition scheme.
57. An issue which merits detailed consideration here is what official document(s) should be recognized to show the gender of an individual. In UK, individuals who have been granted recognition in the acquired gender will have new entries created in the UK birth register entry to reflect the acquired gender, and a new birth certificate will be issued recognizing the new legal gender, provided that he or she was born in the UK (paragraph 3.58).

We acknowledge that the issuance, if considered desirable, of a new birth certificate to individuals who have acquired a new gender, is one of the "post-recognition" issues to be covered in the second part of the IWG's study (paragraph 9.3). We would supply views in this regard in due course.

Issue 15: Authority to determine applications for gender recognition (near paragraph 8.20 [of the Consultation Paper])

We invite views from the public on the following matters:

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

Law Society's Response:

58. The answer to this question depends on the gender recognition model Hong Kong is to have. We repeat our Responses to Issue 2 in the above.
59. Where self-declaratory model is to be adopted, only an administrative body is needed to be set up to handle the paperwork relating to the application. On the other hand, if a surgery free model is to be implemented, we agree there should be a statutory body performing quasi-judicial or judicial functions (such as the UK's Gender Recognition Panel) to determine applications for gender recognition. A set of guidelines and criteria for gender recognition should be put in place.

Issue 16: Adopting a possible dual-track gender recognition scheme (near paragraph 8.35 [of the Consultation Paper])

We invite views from the public on the following matters:

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

Law Society’s Response:

60. We do not consider a dual-track gender recognition scheme to be appropriate.

Concluding Remarks

61. International developments on gender recognition apparently are rapid. For instance, the UK (and lately Scotland) are already reviewing their gender recognition schemes. The scheme envisaged in the latest review in the UK could be a more up to date and human rights compliant scheme. In other jurisdictions, there could be recognition for non-binary gender people who are able to record their gender as “X”.
62. When compared to the UK, the progress of implementing the *W’s case* in Hong Kong is not satisfactory. After a lapse of 5 years, there is still no legislation in Hong Kong that provides for gender recognition.
63. We commend the IWG to our views, particularly as regards the need for consultation to proceed on the basis of human rights principles and obligations being given foremost weight and consideration. We are concerned by the delay in the adoption of a human rights compliant gender recognition scheme and relevant legislation
64. Hong Kong is a pluralistic and inclusive society with core values, as reflected in our Basic Law, that do not tolerate marginalization, harassment or

discrimination of any members of our society. In regards to transgender members of our community, a set of clear legislation that give effect to the universal human rights, the rights to dignity, self-determination and bodily integrity should be enacted, without further delays.

65. We shall keenly await the engagement in the consultation of the Part II of the IWG study.

The Law Society of Hong Kong
28 December 2017



Marriage (Amendment) Bill 2014

Submissions

Background

1. In *W v. the Registrar of Marriages* (FACV 4/2012) (the *W* case), the appellant *W* underwent full sex reassignment surgery (SRS) and intended to get married. The Registrar of Marriages refused to celebrate their marriage, deciding that *W* did not qualify as a woman under the Marriage Ordinance (Cap 181) (MO). The Director of Immigration (as the Registrar of Marriages) took the view that, for the purpose of marriage, the sex of a person referred to biological sex by birth. *W* brought judicial review proceedings to challenge the decision. Finding in favour of *W*, the Court of Final Appeal (CFA) held that biological factors were the only appropriate criteria for assessing the sex of an individual for the purposes of marriage, but such restrictive construction is inconsistent with the constitutional rights to marry protected by Art 37 of Basic Law and Art 19(2) of the Hong Kong Bill of Rights.
2. The CFA made it clear at the start of its judgment of *W* that the issue before the court was not same-sex marriage, but the marriages of the transgender persons who have undergone full SRS¹.
3. In a subsequent Orders and Costs dated 16 July 2013, the CFA agreed to a 12-months' suspension of its order to afford the Government and the Legislature a proper opportunity to put in place a constitutionally compliant scheme capable of addressing the position of broader classes of persons potentially affected².

¹ Para 2, Judgment in FACV 4/2012 dated 13 May 2013

² Para 7, Order and Costs in FACV 4/2012 dated 16 July 2013

The Marriage (Amendment) Bill 2014

4. In consequence, the Government introduced the Marriage (Amendment) Bill 2014 (the Bill) to implement the above CFA judgment. The Bill provides that for determining the sex of a party to a marriage under the MO, a person who has received a full SRS will be treated as being of the sex to which the person is re-assigned after the surgery³.
5. Full SRS is defined in the Bill in respect of certain surgical procedures (Clause 40A (2)).

Scope of the proposed legislative amendments

6. The Law Society notes that the scope of the Bill, as provided for, is quite narrow -
 - (a) the Bill only addresses how the gender in MO are being construed for the purposes of MO; in other words, it provides for matters connected only with marriage registration;
 - (b) Matters which take place after a marriage is registered fall outside the scope of the Bill.
7. The Law Society was given the understanding that, as explained in the Explanatory Memorandum of the Bill, the Administration's paper for discussion at the Security Panel on 7 January 2014, the Legislative Council Brief issued on 28 February 2014, as well as the Secretary for Security's speech moving the Second Reading of the Bill on 19 March 2014, the only purpose of the Bill is to implement the order of the CFA in W.
8. As such, the Bill could be considered as an "interim measure" taken by the Administration, as its response to the CFA judgment. In respect of other issues relating to, e.g. gender recognition, which has been left open by the CFA, the Law Society was advised that the Administration has set up an inter-departmental working group (IWG) on gender recognition⁴ to consider.

³ See Preamble to the Bill and its Explanatory Memorandum.

⁴ Letter from the Security Bureau to the LegCo (Legal Services Division) dated 13 March 2014

At the time of this submission the IWG has not yet produced any report or made any recommendations to the Administration.

9. The Law Society shall keenly wait for consultation (if any) and/or the reports from the IWG and urges the Administration to thoroughly and carefully consider all those relevant matters arising from the *W* case and the Bill, including the issues which the Law Society identifies in the following paragraph.

Legal Issues arising from the Bill

10. The Law Society notes that the Legislative Council Secretariat has on 5 March 2014 and 25 March 2014 written to the Security Bureau to raise a number of valid and important questions on implications of the Bill upon various existing legislation concerning marriages, guardianship and inheritance law. The Law Society agrees that all these issues are pertinent, but they have not been canvassed at his stage. These should be addressed by the Administration, when the Administration is to proceed with the legislative process, either by this Bill or other legislative proposals.

Constitutional Issues arising from the Bill

11. The Law Society understands that SRS involves major and almost irreversible surgical procedures in that certain organs are to be removed and/or other organs are to be constructed. It necessarily carries with it a significant extent of pain and suffering, and an obligatory intensive rehabilitation programme, both physical and psychological⁵.
12. It is also the understanding of the Law Society that, medically speaking, after SRS has been completed, the transgender person would normally become sterile for the rest of his/her life.
13. Yet, under the Bill, in order to avail themselves to proper marriage recognition, transsexual persons need to undergo full SRS, as defined. There is no other means open to the transsexual people for marriage recognition.

⁵ For the purpose of this submission, the SRS as averred to refer to those surgical procedures intimated for the purpose of the Bill and is not for, for example, life-saving purposes.

14. This prerequisite for full SRS would therefore have an undesirable coercive effect on persons who would not otherwise be inclined to undergo this type of surgery⁶:
- (a) people in the transgender community may choose to undergo only some of the surgical procedures defined in the Bill; others may decide not to undergo any SRS at all. The reasons for not undergoing full SRS, or completing all the stages for full SRS could include a lack of financial resources, appreciation of the risks involved in the surgery, medically or psychologically unable to cope with these surgeries, and/or preference for other less invasive medical treatment (e.g. hormonal treatment). The singularly narrow requirement of the Bill does not address these widely different needs of the transgender community;
 - (b) by insisting upon and enshrining the surgery requirement to become a legal prerequisite, the Government is in effect compelling the transgender community to undergo the surgery to have their sex re-assigned in order they can satisfy the new requirements for the purpose of the MO.
15. The above are a prima facie violation of the following human rights:
- (a) rights to marry;
 - (b) rights to reproduction;
 - (c) rights to privacy and family life.

These rights are protected by

- Article 37 of the Basic Law;
- Article 3 and 19(2) of section 8 of the HK Bill of Rights Ordinance, Cap 383
- Article 16, 17 and 23 of the International Covenant on Civil and Political Rights, 1966 (ICCPR); and
- Article 15, Convention on the Elimination of All forms of Discrimination against Women, 1981.

⁶ See the remarks of Lord Nicholls in *Bellinger v. Bellinger* [2003] 2 AC 467 at para 41

16. Apparently the SRS itself could also amount to violation of those other rights against cruel, inhuman or degrading treatment which are protected by international conventions, such as the Convention Against Torture and Inhuman, Cruel or Degrading Treatment or Punishment 1984 (CAT) (Articles 2, 16) the European Convention on Human Rights (Article 3) and ICCPR Art 7.
17. Additionally, there could be potential discrimination arising from the Bill. The views of the Chairperson of the Equal Opportunities Commission on the above are noted by the Law Society⁷.

Approaches in the UK

18. The Law Society notes that in the majority judgment, Ma CJ and Ribeiro PJ stated in clear terms that the Court preferred to establish a gender recognition procedure (to be achieved by legislation) whereby each case is examined with a view to certification by an expert panel. The Court suggested reference could be drawn to the United Kingdom's Gender Recognition Act 2004 (GRA 2004) which was described by Lord Nicholls as "primary legislation which will allow transsexual people who can demonstrate they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender".
19. The following passage extracted from *Bellinger v. Bellinger* [2003] 2 AC 467 on GRA 2004 is note-worthy:

"True to that description, the GRA 2004 does not lay down a bright line test for when a transsexual person does or does not qualify for recognition in his or her acquired gender. Instead, the Act sets up a panel with legal and medical members which hears applications for gender recognition and requires the panel to grant a gender recognition certificate:

... if satisfied that the applicant –

- (a) has or has had gender dysphoria,*
- (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,*
- (c) intends to continue to live in the acquired gender until death, and*

⁷ See SCMP articles on 28 March 2014 and on 2 April 2014 both by York Chow.

(d) *complies with the requirements imposed by and under s.3 [which lays down the requirements regarding medical evidence and certain other supporting documents].*⁸

20. Under the UK system, the completion of the full SRS seemingly is not the single criterion relied on by the expert Panel. Instead, the Panel examines broader issues such as the applicant's history and intention of living in the acquired gender.
21. In point of fact, SRS is a medical procedure which technically speaking is outside the ambit of knowledge of the legal profession. Relying on and drawing reference to SRS as the criterion for recognizing the marriages of transgender people give rise to complication the CFA acknowledges in *W*, i.e. asking the judges for "a formulation of a line at some point in the sex reassignment process for marking the stage at which a gender change is recognized". This is described to be disadvantageous and should not be preferred.

Conclusion

22. The Law Society is of the view that, in the light of the matters identified in the above, the Administration should seriously consider either amending the Bill or to prepare a separate set of comprehensive legislation to deal with all those related issues. In the process of legislation, the Administration should consider the experience in other jurisdiction, including those in the UK, as set out in the preceding paragraphs.
23. The Law Society notes the 12-month "deadline" but suggests that in case the related legislative amendments have not yet been effected, a party, if so required, should not have major difficulties to obtain a declaration for the purpose of marriages, as envisaged in the case of *W*.

The Law Society of Hong Kong
13 May 2014

⁸ para. 139