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

Submission of the Hong Kong Bar Association

1. The Inter-Departmental Working Group on Gender Recognition ("IWG") was established by the HKSAR Government in January 2014 following the Court of Final Appeal's judgment in *W v Registrar of Marriages* [2013] 3 HKLRD 90 (May 2013). Its terms of reference are:

   "1. To consider legislation and incidental administrative measures that may be required to protect the rights of transsexualpersons in all legal contexts, and to make such recommendations for reform as may be appropriate.

   2. For the aforesaid purpose, to conduct consultations and to engage the assistance of such experts or professionals as may be appropriate."

2. The IWG issued a consultation paper in June 2017 (the "Consultation Paper") seeking the views of the public on "recognition issues", particularly as to whether a gender recognition scheme should be introduced in Hong Kong. The IWG plans to study thereafter "post-recognition issues" in the event that it takes the view that a formal gender recognition scheme should be established in Hong Kong.

3. At present, there is no legislation in the HKSAR that allows recognition of the reassigned, acquired or preferred gender for legal purposes. Administratively, a person who has undergone sex re-assignment surgery ("SRS") may apply with the relevant medical certification for an amendment or correction of the particular of "sex" on the person's Hong Kong Identity Card. This administrative provision, based on a set of administrative guidelines, concerns only the identification of the person on his/her Hong Kong Identity Card.

4. The Court of Final Appeal held in *W v Registrar of Marriages* that it impairs the essence of the constitutionally guaranteed freedom of marriage of a post-operative male to female transgender woman for the Registrar to refuse to marry her with a man, and adopted a remedial interpretation of the provisions of the Marriage Ordinance (Cap 181) s 40

and the Matrimonial Causes Ordinance (Cap 179) s 20(1)(d) to enlarge the definitions of "marriage" to accommodate her case.

5. However, proposed legislation introduced to implement *W v Registrar of Marriages*, which included provisions to cater for the case of a post-operative female to male transgender man, was negatived by the Legislative Council in October 2014. The report of the Bills Committee for this Marriage (Amendment) Bill 2014 indicates that there had been sharply divided discussion among Members of the Legislative Council on whether the proposed full SRS requirement proposed in the Bill was too high a threshold and whether such a legislative requirement would violate the Basic Law of the HKSAR's prohibition of torture and other forms of cruel, inhuman, degrading treatment or punishment, and on whether a requirement that is less than full SRS requirement would have undesirable or unacceptable implications on the existing institutions of marriage and family. Another issue that had raised concern was whether a marriage would become void if one of the parties to the marriage has subsequent to the celebration of the marriage undergone full SRS.[1] Other issues such as the prima facie evidence of the sex of a person for the purpose of marriage registration, and whether a religious organization may refuse to celebrate marriages of post-operative transsexuals were considered by the Bills Committee.[2]

6. The HKBA ("HKBA") makes this Submission on the Issues for Consultation set out in the Annex to the Executive Summary of the Consultation Paper.

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

7. The HKBA is of the view that a gender recognition scheme should be introduced in Hong Kong to enable a person to acquire a legally recognised gender other than his or her birth gender.

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[1] The Hong Kong Bar Association had expressed the view that a marriage could become void if a party to the marriage has undergone full SRS (since the marriage thereafter ceases to be one between a man and a woman) unless the Marriage Ordinance were suitably amended to avert this automatic operation of the law.

[2] LC Paper No. CB(2)1962/13-14 (3 July 2014) available at: http://www.legco.gov.hk/yr13-14/english/bc/bc52/reports/bc520709cb2-1962-e.pdf.

Issue 2: Requirement of medical diagnosis for gender recognition

8. The HKBA is of the view that gender recognition scheme to be introduced in Hong Kong should stipulate as a requirement for gender recognition a medical diagnosis. This is consistent with the approach taken by the Court of Final Appeal in *W v Registrar of Marriages*. Although the alternative requirement of a statutory declaration of "self-identification" as a member of the opposite sex and of intention to live in the acquired gender until death recognizes the broad range of possible permutations of transsexualism[3] and allows a transsexual person to be recognized in the acquired gender while maintaining the anatomy of the birth gender, which is an approach consistent with Principle 3 of the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and transgender identity (2006) (underlining that '[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),[4] the HKBA notes that the European Court of Human Rights has recently held in *Garcon and Nicot v France* (App Nos 79885/12, 52471/13 and 52596/13, 6 April 2017) that it is within a State Party's margin of appreciation to require an applicant for gender recognition to provide evidence, including medical expert evidence, of her condition of transsexuality.

Issues 3 to 6: Requirement of "real life test" and medical and other treatments (including SRS) for gender recognition

9. The HKBA first considers the issue of consultation of "real life test" as a requirement for gender recognition. "Real life test" is generally understood to be like a transitional period, during which the person concerned has the opportunity to test the reality by living out in the person's "desired" or "identified" gender before formal recognition or otherwise irreversible detrimental change is done to her. The IWG

[3] For example, the New York City Government has listed 31 gender classifications that city dwellers can choose to identify themselves (see: https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_Card2015.pdf).

[4] Ie the Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Transgender Identity (March 2006) (at: http://data.unaids.org/pub/manual/.../070517_yogyakarta_principles_en.pdf).

suggests in the Consultation Paper that the UK model of a two-year period of "real life test" be adopted for Hong Kong. The IWG also suggests that a longer period of transition before full recognition would be afford better protection and minimize abuse of the gender recognition process.

10. The HKBA notes that "real life test" is a precondition for SRS in Hong Kong. However, different considerations would be relevant if it is proposed that the "real life test" should be a compulsory requirement for gender recognition. These considerations require that "real life test" for the purpose of a gender recognition scheme must be legally certain, that is, defined with precision and enables an applicant to foresee what he/she has to meet, and comply with relevant constitutionally guaranteed fundamental rights, including equality before the law and non-discrimination, personal liberty and security of the person, and protection of private life or privacy. The HKBA considers that, given that only broad parameters can be set of the "real life test", it may be necessary for compliance with the "real life test" to be assessed by a dedicated statutory board of experts from multiple related streams of knowledge, so that each individual case can be considered according to the individual circumstances of the applicant. The HKBA notes that one of the difficulties of precise definition involves framing what is gender "male" or "female" living, since this can perpetrate stereotyping and lead to inappropriately insisting or coercing an applicant to live in a particular way to "prove" that he/she is living as the preferred gender.

11. The HKBA considers that in the event that a gender recognition scheme is introduced in Hong Kong, there should be a requirement of intention on the part of the applicant to live permanently in the acquired gender and this intention should be put into writing in a statutory declaration.

12. Turning to the requirements of medical or other treatment for gender recognition, the HKBA considers that where such requirements operate as quid pro quo for gender recognition, constitutionally guaranteed fundamental rights, including personal liberty and security of the person, and protection of private life or privacy, are engaged. The European Court of Human Rights case of *Garcon and Nicot v France* (above) has made it clear that a requirement of medical treatment that involves sterilization (such as "full" SRS) for recognition does involve conditioning the exercise of an individual's right to private life (namely

that of self-identification of one's sexual identity) on the renunciation of the individual's right to personal integrity and this sort of conditioning does not strike a fair balance between these rights and amounts to a violation of the individual's right to private life. The HKBA also notes that the UN Committee Against Torture has expressed concern over the requirement of SRS for change of sex on the Hong Kong Identity Card. The HKBA considers that the above ECHR jurisprudence to be applicable to Hong Kong and recognizes that the HKSAR Government has the positive obligation to take heed of the views and recommendations of the UN Committee Against Torture.

13. Given that the HKBA has replied to Issue 2 above that a medical diagnosis is an appropriate requirement in a gender recognition scheme for Hong Kong, the HKBA necessarily favours the stipulation of medical treatment(s) as a requirement for gender recognition, save that medical treatments that involves sterilsation as a necessary consequence shall not be stipulated as a compulsory requirement in a gender recognition scheme in Hong Kong.

Issue 7: Residency requirement for gender recognition

14. The HKBA considers that a gender recognition scheme for Hong Kong should cater for HKSAR permanent residents and lawfully resident dependants of HKSAR permanent residents only, since these groups of individuals do have substantial or more than substantial connection with Hong Kong.

Issue 8: Age requirement for gender recognition

15. The HKBA considers that a minimum age requirement for applying for gender recognition should be introduced in a gender recognition scheme for Hong Kong.

16. On the other hand, the HKBA notes that notwithstanding the general provision in the laws of the HKSAR of the age of majority of 18, other laws of the HKSAR have specifically provided for different ages of individual consent from 16 to 21. For example, a person does not require the written consent of a parent or guardian for marriage only if he/she is above 21, but a person can consent to sexual intercourse when he/she is above 16 and can donate gametes when he/she is above 18. Having taken

into account of the arrangement in Ireland, where a person who has attained 16 but not 18 years of age can apply for gender recognition through a next friend, the HKBA suggests that an individual at or over 18 years of age can make an application for gender recognition on his/her own and that an individual between 16 and 18 can make an application with the written consent of his/her parents and/or legal guardian and/or pursuant to an order of the Family Court.

Issue 9: Marital status requirement for gender recognition

17. The HKBA understands that a requirement that an applicant for gender recognition should be unmarried or divorced is considered necessary to be consistent with the current legal position that the HKSAR does not recognize same-sex marriages.

18. On the other hand, the HKBA notes that the UN Human Rights Committee recently considered an individual's complaint against the Australian laws that together require a transgender applicant for change of sex on the birth certificate to divorce from her spouse (*G v Australia* (Comm No 2172/2012, 15 June 2017, CCPR/C/119/D/2172/2012)) and reached the conclusions that: (1) Such a requirement interferes with her rights to privacy and family/private life, guaranteed under Art 17 of the ICCPR. Such a requirement is not necessary and proportionate to a legitimate interest and is therefore arbitrary within the meaning of Art 17. Therefore, such a requirement violates Art 17; and (2) Such a requirement is differential treatment between married and unmarried persons who have undergone SRS and request to amend their sex on their birth certificate. Such differential treatment is not based on reasonable and objective criteria, and therefore constitutes discrimination on the basis of marital and transgender status under Art 26 of the ICCPR. Bearing in mind that Australia has not allowed domestic same sex marriages, the HKBA finds this jurisprudence of the UN Human Rights Committee to be relevant to Issue 9.

19. The HKBA also refers to *Hämäläinen v Finland* (2014) 37 BHRC 55, where the Grand Chamber of the European Court of Human Rights considered the requirement in Finland, which did not allow domestic same sex marriages at the material time,[5] that a transgender person may

[5] Finland has since 2017 legalized same sex marriages.

only be able to have her identity number changed from a male to a female one if she converts her existing marriage with a female into a registered partnership. Although the Grand Chamber voted 14 to 3 that there has been no violation of Art 8 of the European Convention guaranteeing an individual's private life and her family life, the Grand Chamber's reasoning followed the earlier and well known cases of *Goodwin v United Kingdom* (2002) 35 EHRR 18 and *Grant v United Kingdom* (2007) 44 EHRR 1, which established that if a person had undergone SRS, that person's change of gender should be recognized through, inter alia, the possibility to amend the data relating her civil status; and that the regulation of the effects of a change of gender in the context of marriage falls to a large extent, though not entirely, within the margin of appreciation of the Contracting State. The Grand Chamber also referred to *Parry v United Kingdom* (App No 42971/05, 28 November 2006), where the Court held that civil partnership was an adequate option in terms of legal rights and obligations for parties to carry on their relationship after one of them had had her change in gender after SRS recognized. The Grand Chamber then examined the legal options available in Finland, which included (a) maintaining the status quo of her legal situation by remaining married (as the marriage was not annulled or dissolved under Finnish law on account of the fact that one of the spouses had undergone SRS) and tolerating the inconvenience caused by the male identity number; (b) obtaining legal recognition of her new gender and converting the marriage into a registered partnership with the consent of the applicant's wife (whereby the relationship would continue to be legally protected); and (c) obtaining a divorce. The Grand Chamber focused on the compatibility of option (b), which was the applicant's complaint, and found that the Finnish system "currently" struck a fair balance between the competing interests and satisfied the proportionality test. The Grand Chamber explained its reasoning by reference to the Finnish system:

'If the consent of the spouse is received, the system provides both for legal recognition of the new gender and legal protection of the relationship. The system works both ways, thus providing not only for a marriage to be converted into a registered partnership but also for a registered partnership to be converted into a marriage, depending on whether the gender reassignment surgery has the effect of turning the existing relationship into a same-sex or a heterosexual partnership. … In devising this legal framework, the Finnish legislature has opted for

reserving marriage to heterosexual couples, this rule being capable of no exceptions. … One of the applicant's concerns relates to the requirement of the spouse's consent, which she sees as a "forced" divorce. However, the Court considers that as the conversion is automatic under the Finnish system, the spouse's consent to the registration of a change of gender is an elementary requirement designed to protect each spouse from the effects of unilateral decisions taken by the other. The requirement of consent is thus clearly an important safeguard which protects the spouse who is not seeking gender recognition. In this context, it is worth noting that consent is also needed when a registered partnership is to be converted into a marriage. This requirement thus applies also for the benefit of the institution of marriage.'

The Grand Chamber also considered that the differences between a marriage and a registered partnership were not such as to involve an essential change in the applicant's legal situation.

20. The HKBA further notes that the constitutional courts of the major civil law jurisdictions of Austria, Germany and Italy have all held against the "forced divorce" requirement for official or legal gender recognition.

21. The review of the jurisprudence above shows that a marital status requirement for gender recognition is very likely to be incompatible with the constitutionally guaranteed fundamental rights of privacy, family and non-discrimination in the circumstances of Hong Kong, because there is currently no legal protection of the existing status quo between the applicant for gender recognition and his/her spouse, and no legal provision for the maintenance of the existing relationship and family through conversion to a legally recognized and protected form of civil or registered partnership or relationship. Accordingly, the HKBA is of the view that if it is considered that a marital status requirement should be included in the gender recognition scheme to be introduced in Hong Kong, there should be introduced at the same time amendments to the family legislation in Hong Kong to establish at least option (a) in the Finnish system examined above, if not both options (a) and (b) in the Finnish system.

22. Other issues relating to marital status will arise if a gender recognition scheme is introduced into Hong Kong. They will be outlined below.

Issue 10: Parental status requirement for gender recognition

23. The HKBA considers that none of the parental status requirements suggested (including that the applicant be "childless" or that the applicant may not have parental responsibility for a child under a specified age) is justified. Such purported requirements would tend to perpetrate the unjustified viewpoint that a transgender person should not have or nurture children.

24. In the light of the HKBA's position in the preceding paragraph, consideration should be given to the question of whether, in an application for gender recognition by a person having responsibility with respect to a child, there shall be a process whereby child's views would be ascertained and taken into account by the relevant authorities.

25. Other issues relating to parental status will arise if a gender recognition scheme is introduced in Hong Kong. They will be outlined below.

Issue 11: Recognition of foreign gender change

26. The HKBA notes that the Consultation Paper has listed the different models for gender recognition adopted in different countries overseas. Given this situation, the HKBA suggests that the principle of reciprocity can be explored, whereby the HKSAR authorities enter into arrangements of mutual recognition of gender recognitions with overseas jurisdictions on a jurisdiction-by-jurisdiction basis following mutual examination of the processes involved in gender recognition.

27. The HKBA recognizes that the above process of mutual recognition takes time. Therefore, the gender recognition scheme for Hong Kong should make provision for discretionary exemption for applicants who have received gender recognition overseas from all or some of the requirements of the scheme for Hong Kong.

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

28. The HKBA is not in favour of introducing any other non-medical requirements for gender recognition.

Issue 13: Type of gender recognition scheme, if adopted

29. The HKBA considers that legislation is necessary to introduce the gender recognition scheme adopted for Hong Kong. The proposed legislation should also deal with consequential amendments to family law legislation in Hong Kong.

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

30. The HKBA notes that in *W v Registrar of Marriages*, the Court of Final Appeal had examined the United Kingdom's Gender Recognition Act 2004 and suggested that this Act could be of useful reference. The HKBA also notes that the United Kingdom is considering developing its gender recognition scheme from a pathological model to a self-determination model. The HKBA considers that both the experience of the operation of the Act and the ongoing developments (including proposed legislative changes to the Act) should be studied with a view to adoption, after suitable modifications to dovetail to Hong Kong's particular circumstances, including the continuing non-legalization and non-recognition of same sex marriage.

Issue 15: Authority to determine applications for gender recognition

31. The HKBA considers that an independent statutory authority should be established to assess and determine applications for gender recognition. Given the views expressed above in favour of medical diagnosis and "real life test" as requirements, there should be established under this independent statutory authority a dedicated board of experts to monitor and verify the satisfaction of these two requirements. An application verified by the dedicated board of experts will then be checked and verified by the independent statutory authority itself.

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

32. The HKBA does not recommend the adoption of a dual-track gender recognition scheme. On the other hand, as submitted above, the HKBA considers that either the dedicated board of experts or the independent statutory authority should be vested with the discretion of exempting satisfaction of some of the requirements, such as the "real life test", for applicants who have undergone medical or other treatment overseas and are able to demonstrate with credible evidence of such treatment.

Issues at post-recognition stage

33. The HKBA reads from the jurisprudence discussed above, including *G v Australia* and *Hämäläinen v Finland*, that there is a substantial case for consideration of enacting provisions to allow a transgender person to apply for change of sex on the birth certificate for the purpose of ensuring protection of the person's gender identity. On the other hand, there is a substantial case for maintaining the birth certificate as a document of fact of the life history of the individual, particularly in the light of the extensive (if not universal) use of the Hong Kong Identity Card as the unique personal identifier of individuals in Hong Kong. This issue therefore should be thoroughly studied.

34. The HKBA is aware of the many cases of a party to a marriage in Hong Kong realizing himself/herself to be transgender and wishing at the same time to maintain the marital relationship with his/her spouse and to continue the family status with his/her biological children after gender recognition. Several post-recognition issues have to be considered: Firstly, s 20(1)(b) of the Matrimonial Causes Ordinance (Cap 179) provides at present that a marriage shall be void on the ground that "the marriage is otherwise invalid by the law of Hong Kong". If a gender recognition scheme is introduced, a consequential or "for the avoidance of doubt" amendment must be introduced to ensure that the existing marriage of an applicant for gender recognition does not automatically become void after he/she has received gender recognition. Secondly, s 20(1)(d) of the Matrimonial Causes Ordinance provides at present that a marriage shall be void on the ground that "the parties are not respectively male and female". If a gender recognition scheme is introduced, a consequential or "for the avoidance of doubt" amendment must be introduced to ensure that the existing marriage of an applicant for gender recognition does not automatically become void after he/she has received gender recognition. Alternatively, consideration should be given to the introduction of "civil partnership", in respect of which the family law provisions of the HKSAR would apply as if it were a marriage. Thirdly, the person who has received gender recognition should be in a position to retain the capacity to apply for custody, care, control and access, or parental responsibility of the children of the marriage.

35. The HKBA considers that another group of post-recognition issues requiring thorough study concern a post-recognition transgender person wishing to marry a person of the opposite sex, bearing in mind that gender and sexual orientation are different concepts and the laws of the HKSAR at present has not legalized or recognized same sex marriages. The first issue is whether this person should be obliged by law to disclose to the future spouse that he/she is a transgender person. This issue is related to the question of valid consent to the marriage (where such consent can be said to have been vitiated in consequence of mistake or otherwise, pursuant to the ground of annulment (or for rendering a marriage voidable) under s 20(2)(c) of the Matrimonial Causes Ordinance). The second issue concerns whether the ground of annulment (or for rendering a marriage voidable) under s 20(2)(a) of the Matrimonial Causes Ordinance should apply to a person after gender recognition, especially where he has undergone medical treatment of gender reassignment that does not enable him to consummate the marriage by natural penetration.

36. The HKBA considers that a third group of post-recognition issues involve the Parent and Child Ordinance (Cap 429). They involve clarification, in the light of the capacity of a person who has received gender recognition to remain married, to enter into a new marriage and to be in a relationship that is child-bearing, of s 5's presumption of a man to be the father of a child, s 9's provision that the woman who carries the child and "no other woman" is the mother of the child, and s 10's provision that "the other party to the marriage" shall be regarded as the father of the child.

37. The HKBA has submitted previously that the definition of "parent" in the Children Proceedings (Parental Responsibility) Bill, which is phrased in terms of "father" and "mother", is too narrow and fails to take account of the Court of Final Appeal's judgment in *W v Registrar of Marriages*, as well as the observation of the House of Lords in *Re G (Children) (Residence Same Sex Partner)* [2006] 1 WLR 2305 that there are at least three ways in which a person may be or become a natural parent of a child, namely genetic parenthood, gestational parenthood, and social and psychological parenthood.[6] The HKBA repeats this submission in

[6] See Committee on Family Law, Hong Kong Bar Association, *Response on the Children Proceedings (Parental Responsibility) Bill* (26 April 2016) (at: http://www.hkba.org/sites/default/files/Children%20Proceedings%20%28Parental%20Responsibility%29%20%20Bill%20-%2024%204%2016%20%28final%29.pdf).

relation to gender recognition, since it is reasonably foreseeable that a person who has received gender recognition may marry and thereby or thereafter assume parental responsibility of children (be they natural children or step-children).

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HONG KONG BAR ASSOCIATION