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20 December 2017.

The Secretary,  
Inter-Departmental Working Group on Gender Recognition,  
5th Floor, East Wing, Justice Place,  
18 Lower Albert Road,  
Central,  
Hong Kong.  
PER EMAIL.

Dear Michelle Ainsworth,

We write in response to the recent Hong Kong Inter-Departmental Working Group on Gender Recognition (IWG) Consultation Paper (July 2017). We are academics researching in the field of comparative family law (please see brief biographical information in Annex I below). Through our extensive academic and professional experience, we work on various projects relating to transgender ('trans')<sup>1</sup> and gender non-conforming identities. This is our joint consultation response to the IWG's report.

In 2013, at the University of Hong Kong, Dr Jens Scherpe organised and hosted an international conference on 'The Legal Status of Transsexual and Transgender Persons' under the auspices of the Centre for Medical Ethics and Law.<sup>2</sup> This conference resulted in an international and comparative law publication under the same title.<sup>3</sup> In its consultation (to which we here respond), the IWG made extensive reference to the various contributions in that

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<sup>1</sup> In this response, we understand transgender (trans) as an umbrella term which embraces all persons who do not identify with the legal gender that was assigned to them at birth.

<sup>2</sup> See: <http://www.cmel.hku.hk/events/the-legal-status-of-transsexual-and-transgender-persons>.

<sup>3</sup> See: <http://intersentia.com/en/shop/academisch/the-legal-status-of-transsexual-and-transgender-persons.html>

that publication, and to additional journal articles authored by Peter Dunne. This consultation response draws upon work carried out as part of various projects, including Peter Dunne's research as an Usher Fellow at Trinity College Dublin and the comparative analysis chapter from Jens Scherpe's publication (co-authored by Peter Dunne and Jens Scherpe), which we provide for further reference.

The purpose of our consultation response is to assist the IWG with its ongoing consultation for a gender recognition law in the Hong Kong Special Administrative Region (HK SAR). In our response, we explore the majority (but not all) of the 'Issues for Consultation' which the IWG raises in its report. Our focus is on those questions where there is scope to provide meaningful, clear and thorough international and comparative law advice. We have endeavoured to follow (as far as practicable) the order in which the IWG addresses the relevant issues (but have deviated from that order where necessary for clarity and precision). Should the IWG require any further information, we may be contacted according to the relevant details provided below (Annex I).

I. **Issue for Consultation 1: Should the HK SAR introduce a scheme for legal gender recognition?**

**Issue for Consultation 13: What type of gender recognition framework should the HK SAR adopt?**

Recommendation I

*We recommend that the HK SAR **should** introduce a **legislative** scheme for the legal recognition of preferred/affirmed gender.*

We welcome the decision of the Court of Final Appeal of the Hong Kong Special Administrative Region (*W v Registrar of Marriages*<sup>4</sup>) to allow trans persons in the HK SAR to be recognised in their preferred gender for the purposes of marriage law. This judgment brings the HK SAR law into line with both existing human rights standards and international best practice.<sup>5</sup>

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<sup>4</sup> *W v Registrar of Marriages* [2013] HKCFA 39 (Court of Final Appeal of the Special Administrative Region).

<sup>5</sup> See generally: Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015); Zhan Chiam, Sandra Duffy and Matilda González Gil, *Trans Legal Mapping Report* (2nd edn, ILGA 2017); United Nations High Commissioner for Human Rights (UN HCHR), 'Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity' (4 May 2015) UN Doc No. A/HRC/29/23, [79(i)]; 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (19 April 2017) UN Doc No. A/HRC/35/361, [57].

Within the United Nations (UN) human rights structures<sup>6</sup>, as well as regional human rights frameworks (e.g. European Convention on Human Rights<sup>7</sup>, American Convention on Human Rights<sup>8</sup>, etc.), there is growing consensus that trans populations should have access to formal gender recognition procedures. Through landmark decisions, such as *G v Australia*<sup>9</sup> (UN Human Rights Committee) and *Goodwin v United Kingdom*<sup>10</sup>, various human rights tribunals have placed gender recognition within the protected sphere of private life. In *G*, the UN Human Rights Committee held that:

“...‘privacy’ under article 17 [of the International Covenant on Civil and Political Rights (ICCPR)] ‘refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.’ It is the established jurisprudence of the Committee, and undisputed by the parties, that this includes protection of a person’s identity, such as their gender identity.”<sup>11</sup>

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<sup>6</sup> See e.g. United Nations Human Rights Committee, ‘Concluding observations on the third periodic report of Ireland’ (30 July 2008) UN Doc No. CCPR/C/IRL/CO/3, [8]; United Nations Human Rights Committee, ‘Concluding observations on the seventh periodic report of Ukraine’ (22 August 2013) UN Doc No. CCPR/C/UKR/CO/7, [10]; United Nations Human Rights Committee, ‘Concluding observations on the fourth periodic report of the Republic of Korea’ (3 December 2015) UN Doc No. CCPR/C/KOR/CO/4, [14] – [15]; United Nations Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the fifth periodic report of Costa Rica’ (21 October 2016) UN Doc No. E/C.12/CRI/CO/5, [20] – [21]; United Nations Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the seventh periodic report of Finland’ (10 March 2014) UN Doc No. CEDAW/C/FIN/CO/7, [29(b)]; United Nations Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the fourth periodic report of Kyrgyzstan’ (11 March 2015) UN Doc No. CEDAW/C/KGZ/CO/4, [33] – [34]; United Nations Committee on the Rights of the Child, ‘Concluding observations on the combined fourth and fifth periodic reports of Chile’ (30 October 2015) UN Doc No. CRC/C/CHL/CO/4-5, [34] – [35]; United Nations Committee against Torture, ‘Concluding observations on the fifth periodic report of Hong Kong, China’ (3 February 2016) UN Doc No. CAT/C/CHN-HKG/CO/5, [28] – [29]. In some cases, the Treaty Bodies have expressly praised State Parties for introducing (or improving) domestic procedures for obtaining gender recognition, see e.g. United Nations Human Rights Committee, ‘Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’ (30 July 2008) UN Doc No. CCPR/C/GBR/CO/6, [5]; United Nations Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the seventh periodic report of Argentina’ (25 November 2016) UN Doc No. CEDAW/C/ARG/CO/7, [4(g)].

<sup>7</sup> *Goodwin v United Kingdom* [2002] 35 EHRR 18; *L v Lithuania* [2008] 46 EHRR 22; *B v France* [1993] 16 EHRR 1; *AP, Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017).

<sup>8</sup> *Tamara Mariana Adrian Hernandez*, Report on Admissibility, Inter-American Commission on Human Rights, Report No. 66/16 Petition 824-12 (6 December 2016); Inter-American Commission on Human Rights, *Violence against LGBTI Persons* (12 November 2015) OAS/Ser.L/V/II.rev.1, [419]. For recent activities and statements, see: ‘IACHR Expresses Concern over Setbacks in Federal Protections for Trans and Gender-Nonconforming Students in the United States’, (*OAS Website*, 15 March 2017) [http://www.oas.org/en/iachr/media\\_center/preleases/2017/033.asp](http://www.oas.org/en/iachr/media_center/preleases/2017/033.asp) accessed 24 August 2017; ‘IACHR Hails Regional Progress on Human Rights of LGBTI People in the Americas’ (*OAS Website*, 10 March 2017) [http://www.oas.org/en/iachr/media\\_center/preleases/2017/028.asp](http://www.oas.org/en/iachr/media_center/preleases/2017/028.asp) accessed 24 August 2017; ‘IACHR Congratulates Mexico and Colombia for Measures Recognising Identity of Trans Persons’ (*OAS Website*, 1 July 2017) [http://www.oas.org/en/iachr/media\\_center/preleases/2015/075.asp](http://www.oas.org/en/iachr/media_center/preleases/2015/075.asp) accessed 24 August 2017.

<sup>9</sup> Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017), [7.2].

<sup>10</sup> *Goodwin v United Kingdom* [2002] 35 EHRR 18, [93].

<sup>11</sup> Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017), [7.2].

Depriving trans individuals of gender recognition has numerous practical consequences. It inhibits one's capacity to access basic services – such as social security benefits, healthcare and, even, transportation. As the *W* litigation illustrates, withholding acknowledgement also restricts access to important legal and social institutions, including marriage. Finally, refusing to affirm trans populations encourages wider social discrimination, and limits the life opportunities of trans individuals.

Against that background, we welcome the outcome in *W v Registrar of Marriages*, and we commend the IWG for seeking to enact a practical, workable structure for acknowledging trans identities (**Issue for Consultation 1**). We note that existing human rights standards do not merely apply to trans guarantees for the purposes of marriage (although in *Goodwin*, the European Court of Human Rights (ECtHR) did also find a violation of art. 12 ECHR<sup>12</sup> where, by withholding an amended birth certificate, the UK prevented Ms Goodwin from entering an opposite-gender marriage). Rather, the shifting norms of international and regional law suggest that individuals should be affirmed in their preferred gender for all purposes, including education, social security and employment (although, we note that a number of jurisdictions, such as the United Kingdom and Ireland, have limited the application of gender recognition in areas, such as family law and gender-specific criminal offences<sup>13</sup>).

As part of **Issue for Consultation 13**, the IWG seeks views on the type of gender recognition scheme that the HK SAR should adopt. It is our recommendation that the HK SAR should enact a legislative framework, without an obligation to seek court approval. We believe that, for reasons of certainty and accessibility, a formal, statutory system is preferable to *ad hoc* court-based requirements. Establishing a centralised, legislative regime creates clarity in terms of the conditions which applicants must satisfy to obtain gender recognition. It encourages certainty for public officials, who will be able to easily identify whether applicants have completed the necessary steps. On the other hand, a system based upon court orders creates risks of arbitrariness (where a person's access to gender recognition is dependent upon the views of individual judges) and inaccessibility (many trans people may lack the financial and professional resources to enter the court system). It is likely to hinder (rather than facilitate) trans populations' ability to obtain formal legal acknowledgment. It is instructive to note that,

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<sup>12</sup> *Goodwin v United Kingdom* [2002] 35 EHRR 18, [104].

<sup>13</sup> See Gender Recognition Act 2004, ss. 12 and 20 (United Kingdom); Gender Recognition Act 2015, ss. 19 and 23.

since the United Kingdom’s landmark *Gender Recognition Act 2004*, a majority of countries (which have introduced or reformed their gender recognition laws) have preferred a statutory scheme, including Argentina, Ireland, Malta, and Belgium.

**II. Issue for Consultation 3: Should applicants for legal gender recognition have to complete a period of ‘real life experience’ prior to seeking affirmation?**

Recommendation II

*We recommend that applicants for legal gender recognition in the HK SAR should not have to complete a period of ‘real life experience’ before they are entitled to legal affirmation.*

Around the world, a number of jurisdictions require that an applicant for recognition observe a period of what has been called a ‘real life experience’ (RLE), often a minimum of two years, before the preferred legal gender is formally acknowledged. In some countries, RLE is a requirement for access to gender confirmation surgery (which then in turn is a requirement for gender recognition – see below).<sup>14</sup> RLE conditions are considered as a trial-run for gender recognition, allowing trans persons to ‘prove’ their capacity and desire to live in their preferred gender, and creating an opportunity to understand the consequences of transitioning without crossing a legal threshold.

In one sense, it is not surprising that trans individuals should have to observe a waiting period before accessing legal gender recognition. In the seventh edition of its Standards of Care, the World Professional Association for Transgender Health (WPATH) recommends that persons seeking access to specific surgical procedures, including a hysterectomy or

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<sup>14</sup> For example in Turkey: two years before access to medical procedure (see: Yesim Atamer, ‘The Legal Status of Transsexual and Transgender Persons in Turkey’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 318 f); Czech Republic: ‘real life test’ lasting at least 12 months before access to gender confirmation surgery (see Barbara Havelková, ‘The Legal Status of Transgender and Transsexual Persons in the Czech Republic’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 137). That there internationally often seems to be a two year RLE requirement was also noted by the Hong Kong Court of Final Appeal in its seminal *W. v. Registrar of Marriages* decision: ‘If the diagnosis of gender identity disorder is confirmed, the patient is usually required to go through a “real life experience”, living in the preferred gender for about two years while having hormones of the opposite sex administered to produce reversible physical changes in the body and to ease the patient’s psychological discomfort.’ (*W v Registrar of Marriages* [2013] HKEC 716, para [11]).

orchiectomy, should complete at least “12 continuous months of hormone therapy as appropriate to the patient’s gender goals.”<sup>15</sup> Where legal gender recognition is contingent upon medical treatment, it is correct that applicants should access healthcare procedures in accordance with international best practice. However, this line of reasoning pre-supposes the validity and necessity of medical intervention requirements (see Recommendation III below). In reality, the main objection to RLE is not that trans persons must observe a waiting period before surgery. Rather, the problem lies in the fact that medical intervention is a pre-requisite for gender recognition. For the reasons discussed below, physical (and psychological) medical preconditions for legal transitions are to be rejected as a violation of fundamental rights. Therefore, irrespective of whether RLE conditions can be medically justified for accessing surgery, they are not a legitimate pre-condition for legal gender recognition.

In jurisdictions, such as the United Kingdom, which have already repealed medical requirements for gender recognition,<sup>16</sup> RLE appears to have even less justification. The idea of a trial-run living as a man or woman is highly problematic in a number of key respects. It suggests that there is only one, identifiable way of living in a particular gender. What exactly does it mean for a trans woman to prove that she can function socially and professionally as a female? How do ‘normal men’ live their lives? There is a real fear that, in requiring applicants for recognition to prove their capacity to live a ‘real life’, the HK SAR may reinforce biased and stereotyped presumptions about male and female conduct which do not conform with the lived-reality of the vast majority of the population. RLE requirements hold trans persons to a false standard of maleness and femaleness which is not expected of any other person. Nowhere in the law are men and women denied recognition of their gender simply because they do not conform to gendered assumptions. RLE conditions may result in a bizarre situation where, prior to obtaining official recognition, applicants will feel obliged to express an accentuated version of their preferred gender which they have no intention of subsequently maintaining.

RLE conditions also misunderstand the complex ways in which people experience their gender. Trans individuals do not begin to self-identify and express their preferred gender on

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<sup>15</sup> World Professional Association for Transgender Health, Standards of Care for the Health of Transgender, Transsexual and Gender Nonconforming People (Version VII) (WPATH 2012) 60 and 106 [https://s3.amazonaws.com/amo\\_hub\\_content/Association140/files/Standards%20of%20Care%20V7%20%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20%202011%20WPATH%20(2)(1).pdf) accessed 24 May 2017.

<sup>16</sup> Stephen Gilmore, ‘The Legal Status of Transsexual and Transgender Persons in England and Wales’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 183 ff.

the day that they first apply for recognition or think about making such an application. As the recent litigation in *YY v Turkey* (the ECtHR held that sterilisation is a disproportionate access requirement for gender confirmation surgery) illustrates, personal reflection on gender identity is often a lifelong process.<sup>17</sup> In many instances, a trans person will have self-identified with his or her preferred gender for numerous years before applying for recognition. Trans individuals do not need a trial period to know what it is like to live their preferred gender, because they experience that gender on a daily basis.

That the jurisdictions which have recently reformed or implemented their gender recognition laws, have omitted, and thus actively rejected, RLE conditions illustrates that such requirements are not a necessary (and probably not even an effective)<sup>18</sup> safeguard against potential abuse and should not be adopted as part of the HK SAR's new gender recognition model.<sup>19</sup>

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<sup>17</sup> *YY v Turkey* App No. 14793/08 (ECtHR, 10 March 2015); see: Yesim Atamer, 'The Legal Status of Transsexual and Transgender Persons in Turkey' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 321.

<sup>18</sup> Anecdotal evidence suggests that there is sufficient information available on internet websites and other media so that a RLE can be faked; apparently, that information even is 'tailored' towards specific jurisdictions, panels and even the individuals who judge the RLE.

<sup>19</sup> See Gender Recognition Act 2015 (Ireland). In Denmark, the application needs to include a statement that the application for legal gender recognition is based 'on an experience of belonging to the other gender', but nothing further (and particularly no proof) is required, see: Natalie Videbaek Munkholm, 'The Legal Status of Transsexual and Transgender Persons in Denmark' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 166.



**III. Issue for Consultation 4: Should applicants for legal gender recognition have to submit to hormonal treatments prior to being affirmed?**

**Issue for Consultation 5: Should applicants for legal gender recognition have to submit to gender confirmation surgery and other medical interventions prior to being affirmed?**

**Issue for Consultation 6: Should applicants for legal gender recognition have to satisfy any additional medical requirements?**

**Issue for Consultation 10: What is the relevance of existing parental status in terms of access to legal gender recognition?**

**Recommendation III**

*We recommend that the HK SAR adopt a model of legal gender recognition whereby applicants are **not required to submit to any physical medical interventions** (including, surgery, sterilisation or hormone treatment) as a pre-condition for obtaining affirmation.*

*We recommend that the HK SAR should **not bar individuals who currently have children** (either **above or below the age of majority**) from obtaining legal gender recognition.*

The IWG must consider whether legal gender recognition should be subject to undergoing physical medical interventions – gender confirming surgery, sterilisation or hormone treatments. Around the world, a significant number of jurisdictions still condition access to formal acknowledgement on proof of medical treatment (and, this is also the assumption under which the Court of Final Appeal seemed to be operating in *W*).

It is our clear and firm recommendation that the HK SAR should not impose medical requirements as a pre-condition for gender recognition (N.B: it is important to note that we *do* advocate the right of trans persons to access voluntary medical treatments which assist their desired processes of medical transition. On the other hand, we recommend against enforcing unwanted healthcare interventions as a requirement for *legal* gender recognition). Enforced

(involuntary) medicalisation is incompatible with guarantees of bodily integrity, and is an important infringement on the dignity of trans populations (It is important to clarify that, in addition to surgery, sterilisation and hormone treatments, which are our main focus in this section, our recommendation also extends to all additional non-desired medical interventions – **Issue for Consultation 6**).

In its recent judgment, *AP, Garçon and Nicot v France*, the ECtHR – considering the validity of sterilisation pre-requisites in France – concluded that forcing applicants to forgo their reproductive capacities infringed physical and moral integrity rights (art. 8 ECHR).<sup>20</sup> In reasoning that can be generally applied to all enforced medical interventions, the Strasbourg judges found that sterilisation requirements confront trans communities with an “insoluble dilemma” – either they forfeit their procreative ability or they must suffer the consequences of living with incongruent identity documents.<sup>21</sup>

While the ECHR obviously does not apply in the context of HK SAR law, the judgment is instructive as to whether any medical requirements (for gender recognition) would be inconsistent with physical integrity obligations to which the HK SAR *is* subject (indeed, a similar approach has been adopted by national courts in the context of their domestic bodily integrity frameworks<sup>22</sup>). Numerous UN human rights actors<sup>23</sup> (including the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>24</sup>) have condemned medical conditions as incompatible with existing human rights norms.

Since 2004, a significant number of jurisdictions – which have enacted gender recognition rules or reformed existing laws – have engaged in processes of de-medicalisation. This is evident from current rules in, *inter alia*: Sweden, Norway, Spain, Argentina, Colombia, Mexico City, New York City, California (2018), Ontario, Quebec, South Australia, Ireland, Belgium, France, Malta, Taiwan, and the Australian Capital Territory. Around the world, domestic policy-makers have cited numerous justifications for de-coupling gender recognition

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<sup>20</sup> *AP, Garçon and Nicot v France* App Nos. [79885/12](#), [52471/13](#) and [52596/13](#) (ECtHR, 6 April 2017), [135].

<sup>21</sup> *Ibid*, [132].

<sup>22</sup> See e.g. Stockholm Court of Administrative Appeal, *Socialstyrelsen v. NN* Mål nr 1968-12 (19 December 2012).

<sup>23</sup> United Nations High Commissioner for Human Rights, ‘Discrimination and violence against individuals based on their sexual orientation and gender identity’ (4 May 2015) UN Doc No. A/HRC/29/23, [79(i)]; United Nations Human Rights Committee, ‘Concluding observations on the seventh periodic report of Ukraine’ (22 August 2013) UN Doc No. CCPR/C/UKR/CO/7, [10].

<sup>24</sup> ‘Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment’ (5 January 2016) UN Doc No. A/HRC/31/57, [49].

and medicalisation – including possible inability to undergo treatment due to healthcare complications, insufficient financial resources to obtain treatment, rejection of treatment on religious grounds, and personal contentment with existing bodily characteristics. At its base, the legislative move away from medicalisation is a recognition that a person’s legal status should not be based upon their sexed body.

In addition to legislative intervention, national judiciaries have also taken an active role in detaching gender recognition processes from medicine. In Germany (Constitutional Court), Italy (Supreme Court) and Sweden (Stockholm Administrative Court of Appeal), domestic judges have issued landmark decisions, striking down parliament-approved physical intervention requirements.<sup>25</sup> These decisions stand alongside similar rulings in jurisdictions, such as Canada and Argentina.<sup>26</sup> Throughout this case law, there is consistent evidence of judges being troubled by apparent disregard for bodily integrity. To the extent that an applicant would only ‘consent’ to physical intervention as a pre-requisite for gender recognition, there is real doubt about whether such consent can (and should) be considered as an autonomous act.

As a final point, we note that, in addition to preserving the reproductive/physical integrity of trans individuals who seek legal gender recognition (i.e. omitting a sterilisation requirement), the HK SAR should also respect the gender recognition rights of applicants who are the legal parent of (or enjoy parental responsibility for) any child (whether that child is above or below the age of majority – **Issue for Consultation 10**). We recommend that the HK SAR should not prohibit applications from individuals who currently have any child (N.B. we do *not* recommend that the HK SAR adopt different rules for persons who have minor children). If the HK SAR is concerned about the potential impact of gender recognition on young people, a workable solution can be found in s. 12 of the *Gender Recognition Act 2004* (UK) and s. 19 of the *Gender Recognition Act 2015* (Ireland), which maintains existing parenthood relationships even after an applicant has obtained the Gender Recognition Certificate.

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<sup>25</sup> Stockholm Court of Administrative Appeal, *Socialstyrelsen v. NN* Mål nr 1968-12 (19 December 2012); Federal Constitutional Court of Germany, 1 BvR 3295/07 (11 January 2011); Supreme Court of Italy (20 July 2015).

<sup>26</sup> *XY v R* [2012] HRTO 726 (Human Rights Tribunal of Ontario); *PRL*, Criminal and Correction Court No. 4 of Mar del Plata (10 April 2008).

**IV. Issues for Consultation 7 and 11: To whom should the gender recognition scheme be open? Should decisions on gender recognition from outside the HK SAR be recognised?**

**Recommendation IV**

*We recommend that **only habitual residence/domicile** should be a legal requirement to apply for gender recognition.*

*We recommend that **foreign decisions on gender recognition should be recognised in the HK SAR without any further requirements.***

As noted, the right to gender identity/gender recognition has been affirmed as a fundamental human right by a large number of jurisdictions, highest and constitutional courts (including the Hong Kong Court of Final Appeal), as well as international organisations.<sup>27</sup> Therefore, the recognition scheme cannot legally be limited to require specific nationalities etc., as this would be a violation of the Basic Law, as well as the HK SAR's international obligations<sup>28</sup>

It is a fact that foreign identity documents and birth certificates cannot be changed by courts or other institutions in the HK SAR. However, given that absolutely refusing gender recognition to foreign nationals is not an option, the only possibility is to recognise the gender of the persons concerned within the HK SAR. While this may create a 'limping' legal gender status (i.e. legally being of one gender in the HK SAR and all jurisdictions that recognise such decisions, and potentially of another legal gender in jurisdictions that do not, which may

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<sup>27</sup> For details see the references in other parts of this submission, as well as the contributions in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

<sup>28</sup> On this particular point, see: German Constitutional Court BVerfG 18 July 2006, BVerfGE 116,243, as well as the comment/explanation by Anatol Dutta, *The Legal Status of Transsexual and Transgender Persons*, in: Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015), 215-216. For a full exposition of this and connected conflict of laws issues, see: Jurgen Basedow/Jens M. Scherpe (ed.), *Transsexualität, Staatsangehörigkeit und internationales Privatrecht – Entwicklungen in Europa, Amerika und Australien* (Transsexuality, Nationality and Private International Law – Developments in Europe, America and Australia) (Mohr Siebeck 2004), which was submitted as an amicus brief in the aforementioned proceedings and followed. For a short comparison. See: the conclusions by Jens M. Scherpe/Peter Dunne, *The Legal Status of Transsexual and Transgender Persons – Comparative Analysis and Recommendations*, in: Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015), 629-631.

include the home jurisdiction of the person concerned), there is a clear emerging consensus that this is preferable, and indeed mandated by constitutional law, to non-recognition of gender.

The arguments for this were set forth very clearly and meticulously in a decision by the German Constitutional Court,<sup>29</sup> but can be summarised as follows: not only would the ‘burden’ of this limping status be borne by the individuals who applied for gender recognition and therefore have indicated their clear desire to have such a recognition in the HK SAR, but there actually are (and have always been) many such examples for ‘limping’ statuses of persons. For example, divorces often are recognised in some jurisdictions but not others, and the same applies to parentage decisions, etc. The dominant legal consideration, therefore, is the protection of the individual, as expressed in their application for gender recognition, as would be the case where a divorce was pronounced, or parentage determined, in the HK SAR in the case of nationals in whose home jurisdictions, such decisions would not be recognised.

The application of foreign law (as a result of private international law rules on applicable law) in family law is alien to many common law jurisdictions, including the HK SAR, and thus the *lex fori* is applied if the court/administrative body finds it has jurisdiction. Hence, the HK SAR law will have to apply to gender recognition in proceedings in the HK SAR, even for foreign nationals. This then leads to the question, which, if any, residency requirements should be stipulated. While there currently is no international consensus on this, recent law reforms, which addressed this point in many jurisdictions, clearly have moved towards either short residency requirements (e.g. one-year in Ireland or the Netherlands)<sup>30</sup> or merely stipulated that habitual residence/domicile should be sufficient.<sup>31</sup> It is the latter approach that we recommend. While this would prevent mere visitors from applying for gender recognition, it enables individuals who have made HK SAR their home to apply and be recognised in the environment and the society in which they live.

The final questions in the context of international gender recognition is whether foreign decisions on gender recognition ought to be recognised. Given what was set out above, the

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<sup>29</sup> See references in previous in footnote 28.

<sup>30</sup> Gender Recognition Act 2015, ss. 2, 9 and 10 (Ireland); Walter Pintens, ‘The Legal Status of Transsexual and Transgender Persons in Belgium and the Netherlands’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 117-118.

<sup>31</sup> See Jens M. Scherpe/Peter Dunne, *The Legal Status of Transsexual and Transgender Persons – Comparative Analysis and Recommendations*, in: Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015), 631 with further references.

answer to this appears obvious to us: foreign decisions must be recognised. There should not be a limitation or “list” of countries that “qualify” for recognition of their decisions; not only is such a list bound to be out-of-date almost as soon as it is created (and thus continuously vulnerable to legal challenge), but it would also be out of line with the general policy of recognition of foreign decisions in the HK SAR and its international obligations. Again, the comparison with recognition of foreign divorces is helpful. Even where the foreign divorce decree would not have been issued had the case been heard in the HK SAR<sup>32</sup>, there is no doubt that such decisions would be recognised. The same must apply to foreign decisions regarding gender recognition. Hence, the evidence required would merely be that such a decision has been taken by a body authorised by the law of the jurisdiction in question, as this would also offer proof that the legal requirements to take such a decision had been met. As explained above, nationality requirements have been deemed to be a violation of constitutional law and thus equally cannot be a requirement (or an element of the requirements) for recognition of foreign decisions.

As with all recognition of foreign decisions, not least for reasons of comity and human rights reasons, non-recognition of foreign decisions for public policy reasons must be restricted to rather extreme cases; that the same decision would not have been reached in the HK SAR (had the case been heard there) cannot be sufficient in itself.

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<sup>32</sup> See e.g. Swedish or Spanish divorces, which in principle require nothing but an application for divorce, unlike Hong Kong’s Matrimonial Causes Ordinance, ss. 11, 11A.

**V. Issue for Consultation 8: Should applicants for legal gender recognition have to have reached the age of majority?**

Recommendation V

*We recommend that, while stricter controls may have to be placed upon child applicants, the HK SAR should not adopt a gender recognition framework which absolutely excludes trans minors.*

In a majority of jurisdictions around the world, children (and those below the age of legal majority) are either: (a) wholly excluded from gender recognition processes; or (b) subject to stricter access pre-requisites than their adult counterparts. The justification for child-exclusionary rules typically focuses on questions of welfare and capacity. There is a general belief that: (a) children are incapable of expressing a stable trans identity, and (b) that premature recognition procedures would materially harm the physical and mental well-being of young people.

At the outset, it is important to acknowledge that the case law (and legal commentary) on trans youth remains in a nascent phase. While there is growing social science and medical research which indicates the benefits which trans children derive from being affirmed in their preferred gender<sup>33</sup> (and which indicates that trans children *can* in fact express a stable identity<sup>34</sup>), it remains unclear what impact human rights law has on the relationship between trans youth and the law. There is evidence that, in recent years, a significant number of states, which have either enacted or reformed gender recognition rules, have made specific provision for persons under the age of majority (in all cases, different requirements exist for children and adolescents). Jurisdictions where this is the case include: Ireland, Argentina, Malta and

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<sup>33</sup> Françoise Susset, 'Between a Rock and a Hard Place: The Experience of Parents of Gender-Nonconforming Boys' in Elizabeth J Meyer and Annie Pullen Sansfaçon (eds), *Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014) 117; Sarah Gray, Alice Carter and Heidi Levitt, 'A Critical Review of Assumptions about Gender Variant Children in Psychological Research' (2012) 16(1) *Journal of Gay and Lesbian Mental Health* 4, 21-22; Stanley Vance Jr, Diane Ehrensaft and Stephen Rosenthal, 'Psychological and Medical Care of Gender Nonconforming Youth' (2014) 134(6) *Paediatrics* 1184, 1187; Christine Aramburu Alegria, 'Gender nonconforming and transgender children/youth: Family, community, and implications for practice' (2016) 28(10) *Journal of the American Association of Nurse Practitioners* 521, 524.

<sup>34</sup> Marco Hidalgo and others, 'The Gender Affirmative Model: What We Know and What We Aim to Learn' (2013) 56(5) *Human Development* 285, 286; Kristina R Olson, Aidan C Key and Nicholas R Eaton, 'Gender Cognition in Transgender Children' (2015) 26(4) *Psychological Science* 467, 472-473.

Belgium. Similarly, the United Nations Committee on the Rights of the Child has also begun to encourage state parties to more actively respect the lived-gender of children within their territory.<sup>35</sup>

It is our recommendation that, while stricter controls may have to be placed upon child applicants, the HK SAR should not adopt a gender recognition framework which absolutely excludes trans youth. We believe that there are a number of safeguards which the HK SAR authorities may put in place to ensure that, on the one hand, valid concerns about safety and welfare are being addressed, while, on the other hand, trans children are not being required to experience an identity which causes distress and which, in many cases, leads to higher rates of youth anxiety and poor mental health.

In developing the proposed gender recognition scheme, it is key for the HK SAR to foreground both the ‘voice’ and the ‘best interests’ of the child. We acknowledge that – for a multiplicity of reasons – gender recognition (before the age of majority) should not be the response for every young person who expresses a trans or gender non-conforming identity. However, we believe that – in order to be truly human rights compliant – the HK SAR should adopt a gender recognition structure which, in appropriate cases, is capable of accommodating applicants under the age of majority. We also recommend that, following recent reforms in Malta, the Netherlands, Norway and Sweden, persons above the age of 16 years in the HK SAR should be able to obtain gender recognition according to the same application procedures as their adult peers.

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<sup>35</sup> United Nations Committee on the Rights of the Child, ‘Concluding observations on the combined fourth and fifth periodic reports of Chile’ (30 October 2015) UN Doc No. CRC/C/CHL/CO/4-5, [34] – [35]; United Nations Committee on the Rights of the Child, ‘Concluding observations on the combined third to fifth periodic reports of Cameroon’ (6 July 2017) UN Doc No. CRC/C/CMR/CO/3-5, [14] – [15].



**VI. Issue for Consultation 9: What impact should applying for legal gender recognition have upon marital status?**

Recommendation VI

*We recommend that the HK SAR adopt a legal gender recognition model which **does not require applicants to divorce** before being affirmed in their preferred gender.*

Among the most controversial and sensitive questions for the IWG to consider is whether applicants should be required to divorce before obtaining gender recognition. The rationale for ‘divorce requirements’ is that, if an individual in a (legally) opposite-gender marriage accesses gender recognition, there will be two, same-gender spouses. For a jurisdiction, such as the HK SAR, which does not currently permit same-gender marriages, this gives rise to the suggestion that gender recognition will become an instrument of circumventing the general law.

It is our recommendation that the HK SAR should not impose a divorce requirement as part of any new gender recognition law. We appreciate the politically contentious nature of this debate and, therefore, we set out the exact reasoning for our recommendation below. At the outset, it is important to clarify that, while we think that there are significant policy justifications for omitting divorce requirements from the proposed law – not least the detrimental effects which divorce requirements would have upon existing family structures in the HK SAR – our arguments on this question are based solely on considerations of law. We acknowledge that policy determinations are best undertaken by elected (and accountable) officials. Our aim is simply to assist the IWG in understanding the legal context in which any new law will operate.

In July 2017, the United Nations Human Rights Committee handed down an important communication decision, *G v Australia*.<sup>36</sup> In *G*, the author complained that a requirement, under the current law of New South Wales (NSW, Australia), that trans persons divorce before obtaining gender recognition is inconsistent with Australia’s obligations under the ICCPR. In previous Concluding Observations, the Committee had encouraged State Parties to remove

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<sup>36</sup> Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017).

divorce requirements from their laws.<sup>37</sup> However, this was the first opportunity for the Committee to consider a specific communication.

In its published views, the UN Human Rights Committee agreed with the author. It concluded that the New South Wales framework violated art. 17 ICCPR (private life). The current law constituted disproportionate and unnecessary discrimination on the basis of marital status and transgender status.

The *G* communication has significant relevance for the HK SAR. First, post-1997, the ICCPR continues to apply to the HK SAR. How the UN Human Rights Committee interprets the Covenant is, therefore, relevant to the operation of legislative processes in the region. Second, like the HK SAR, New South Wales was (at the time) a jurisdiction, which prohibited same-gender marriage. The Australian government sought to justify the divorce requirement by reference to ensuring consistency with existing marriage laws. Yet, in spite of this argument (and the fact that the Committee has previously indicated that the ICCPR does not protect a right to same-gender marriage<sup>38</sup>), the Committee still found that there was a violation of the Covenant.

*G v Australia* stands as a strong human rights statement against the legitimacy of divorce requirements in gender recognition laws. It is not, however, the only (or first) time that a supra-national jurisdiction has addressed the marital rights of applicants for gender recognition. In *Hämäläinen v Finland*<sup>39</sup>, the applicant claimed that Finnish rules forcing her to convert (before gender recognition) her marriage into a registered partnership were incompatible with arts. 8 (read in conjunction with art. 14) and 12 ECHR. In reasoning, which differs substantially from the approach adopted in *G*, the Grand Chamber of the European Court of Human Rights concluded that Finland's conversion procedures did not disproportionately infringe the applicant's Convention rights.

On its face, the *Hämäläinen* judgment is difficult to reconcile with the later, more critical, outlook of the UN Human Rights Committee in *G*. Taking both cases, one might argue

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<sup>37</sup> United Nations Human Rights Committee, 'Concluding observations on the fourth periodic report of Ireland' (19 August 2014) UN Doc No. CCPR/C/IRL/CO/4.

<sup>38</sup> *Joslin v New Zealand* Communication No. 902/1999 (UN Doc. A/57/40 at 214 (2002)) (UN HRC, 17 July 2002).

<sup>39</sup> *Hamalainen v Finland* [2015] 1 FCR 379.

that international law – as it applies to the question of divorce requirements – remains uncertain, with few clear rules to which the HK SAR can consider itself bound. Yet, in reading and understanding the judgments, it is difficult not to conclude that the arguments set out by the Committee in *G* have greater weight (and more relevance) for the existing legal and social context in the HK SAR.

The decision of the ECtHR in *Hämäläinen* is highly fact-specific. The Court was satisfied that there was no *disproportionate* interference with private or family life because: (a) Ms Hämäläinen and her wife had the option of entering another legal relationship structure; (b) most importantly, the alternative relationship structure (registered partnership) mirrored their existing marriage (i.e. they would lose almost no rights); and (c) conversion to registered partnership was automatic (the parties did not have to divorce or break their legal ties – it was simply the nature of the ties that changed). In those circumstances, the Court was satisfied that the Finnish authorities had struck a proper balance between, on the one hand, the individual rights of Ms. Hämäläinen, and, on the other hand, the existing public policy against same-gender marriage.

It is clear, however, that the same reasoning currently cannot apply to the HK SAR. Applicants subjected to any divorce requirement in the HK SAR would not have an identical partnership structure into which they could convert their marriage and through which they would continue to enjoy their existing marital rights. On the contrary, where applicants in the HK SAR are required to divorce prior to obtaining gender recognition, they (and their former spouse) will effectively become legal strangers. That scenario is appreciably removed from the facts of *Hämäläinen*, which can therefore have only limited relevance for the HK SAR.

It is furthermore crucial to note that the Constitutional Courts of Germany and Italy have held divorce requirements to be unconstitutional. In both jurisdictions, same-gender marriage was not permitted at the time of the decision, and in both jurisdictions the institution of marriage (because of its societal importance) enjoys special constitutional protection. Indeed, it was precisely because of this protection that the courts decided against a divorce requirement (for further information, please see: pages 631 ff. of our chapter in Jens Scherpe's edited collection, and Peter Dunne's article *(Trans) Marriage Equality? Challenging Europe's Marital 'Dissolution Requirements'* (2016) 28(4) *Child and Family Law Quarterly* 325-346).

At pages 202-203 of its consultation paper, the IWG refers to the earlier scholarship of one of the authors of this response (Peter Dunne) who, writing in 2015, suggested that there was not, at that point, a definitive international law consensus around the legitimacy of divorce requirements. While that may have been the case in early 2015, there is, in early 2018 – having regard to recent UN and regional human rights jurisprudence on this question – a much firmer, clearer and more deliberate movement away from involuntary divorce.<sup>40</sup>

**VII. Issue for Consultation 2: Should applicants for legal gender recognition have to prove a diagnosis of gender dysphoria?**

**Issue for Consultation 14: Should the HK SAR adopt the UK framework for gender recognition or another jurisdiction’s framework?**

**Issue for Consultation 15: What authority should be entitled to determine applications for legal gender recognition in the HK SAR?**

Recommendation VII

*We recommend that applicants for legal gender recognition **should not have to prove a diagnosis of gender dysphoria.***

*We recommend that applicants in the HK SAR should be entitled to access gender recognition through a process of **self-determination.***

The final, and perhaps most controversial, issue that the IWG must consider is whether applicants for legal gender recognition should have to prove a diagnosis of gender dysphoria (or another mental health diagnosis relating to the experience of a trans identity). While acknowledging the particular sensitivities which surround this question (and that the ECtHR has recently upheld a diagnosis requirement in France<sup>41</sup>), we recommend that the HK SAR should not impose diagnosis pre-conditions on applicants for legal gender recognition.

<sup>40</sup> See e.g. the recent opinion of Advocate General Bobek in *MB* (Case C-451/16, 5 December 2017) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=197431&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=438128> (accessed 20 December 2017).

<sup>41</sup> *AP, Garçon and Nicot v France* App Nos. [79885/12](#), [52471/13](#) and [52596/13](#) (ECtHR, 6 April 2017).

Many jurisdictions require a medical diagnosis for recognition of preferred gender. Diagnoses are explained as ensuring that applicants are ‘true transsexuals’. In jurisdictions, in which invasive surgery is still a requirement, such as the Czech Republic,<sup>42</sup> Turkey,<sup>43</sup> Singapore<sup>44</sup> and Japan<sup>45</sup>, this is hardly surprising. But even in jurisdictions which have moved away from surgical intervention requirements (or indeed any mandatory treatment), medical diagnoses are still used. Examples include Germany (two separate diagnoses required)<sup>46</sup> and Spain.<sup>47</sup> In England and Wales, two medical experts must confirm that an individual has, or has had, gender dysphoria<sup>48</sup> (N.B. in its recent, landmark report to the British Government, the House of Commons Select Committee on Women and Equalities recommended that the diagnosis requirement in the *Gender Recognition Act 2004* should be abolished<sup>49</sup>).

At the other end of the spectrum, there are jurisdictions like Argentina, Malta, and Ireland (for individuals above 18 years) where there are no medical requirements whatsoever. In these countries, a simple self-declaration suffices. The same is true for Denmark<sup>50</sup> and Taiwan;<sup>51</sup> however, in both these latter jurisdictions a waiting period and affirmation of the application after six months is required (to prevent spontaneous and/or spurious applications leading to immediate legal consequences).

It is important to note that, under a model of self-determination, it is *primarily* the applicant – rather than a third-party official or institution (e.g. Gender Recognition Panel in the

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<sup>42</sup> Barbara Havelková, ‘The Legal Status of Transgender and Transsexual Persons in the Czech Republic’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 135.

<sup>43</sup> Yesim Atamer, ‘The Legal Status of Transsexual and Transgender Persons in Turkey’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 317 ff.

<sup>44</sup> Terry Sheung-Hung Kaan, ‘The Legal Status of Transgender and Transsexual Persons in Singapore’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 410 ff.

<sup>45</sup> Yuko Nishitani, ‘The Legal Status of Transsexual and Transgender Persons in Japan’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 380.

<sup>46</sup> Anatol Dutta, ‘The Legal Status of Transgender and Transsexual Persons in Germany’ in Jens M Scherpe, *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 215 f; Yuko Nishitani, ‘The Legal Status of Transsexual and Transgender Persons in Japan’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 380.

<sup>47</sup> Josep Ferrer Riba and Albert Lamarca Marqués, ‘The Legal Status of Transsexual and Transgender Persons in Spain’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 270.

<sup>48</sup> Stephen Gilmore, ‘The Legal Status of Transsexual and Transgender Persons in England and Wales’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 193 ff.

<sup>49</sup> House of Commons Select Committee on Women and Equalities, *Transgender Equality* (The Stationary Office Limited 2016) 14.

<sup>50</sup> Natalie Videbaek Munkholm, ‘The Legal Status of Transsexual and Transgender Persons in Denmark’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 165 ff.

<sup>51</sup> Chih-hsing Ho, ‘The Legal Status of Transsexual and Transgender Persons in Taiwan’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 425 ff.

United Kingdom, etc.) – who determines access to gender recognition (**Issue for Consultation 15**). Although, under a self-determination framework, a third party may verify that the relevant statutory declarations have been provided (e.g. in Ireland, this verification process is undertaken by the Minister for Social Protection), the role of the third party is essentially administrative (processing application documentation) and does not entitle the third party to adjudicate upon the sufficiency of identification with the preferred gender.

A ‘middle ground’ position is taken by the Netherlands. Under the current Dutch rules, applicants must present a report from an expert (or expert team) to confirm that they hold the conviction that they are their preferred gender. The expert must also confirm that the application is not due to mental disorder or ‘caprice’.<sup>52</sup> In principle, the gender team do not have to provide a diagnosis and there is no requirement for treatment. However, in practice, it remains unclear the extent to which the Dutch model has actually de-medicalised legal recognition. It is apparent that, unlike the Maltese and Argentine regimes, the Netherlands’ current law has not fully broken the link between legal gender recognition and medicine.

Diagnosis requirements have a heavily stigmatising effect on trans communities. They reinforce stereotypes of trans individuals as confused and unstable. In a number of jurisdictions ( canvassed in Jens Scherpe’s edited collection), linking trans identity to mental illness has subsequently been used to validate institutional discrimination, in areas such as employment and parental rights. The requirement to obtain a diagnosis has a direct and extremely negative impact on the social and political status of trans persons.

Conscious of the strong objections raised against the diagnosis requirement, a number of jurisdictions (as outlined above) have recently acted to remove mental health considerations from their legal gender recognition regimes or introduced new schemes without such requirements. If the IWG hopes to enact gender recognition rules which will reinforce and advance the position of trans populations, it should consider existing laws in countries, such as Ireland, Malta and Argentina (**Issue for Consultation 14**). From an international human rights law perspective, these jurisdictions are now widely considered to have achieved the ‘gold standard’ in terms of separating legal gender recognition from medicine.

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<sup>52</sup> Walter Pintens, ‘The Legal Status of Transsexual and Transgender Persons in Belgium and the Netherlands’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 119.

Of course, objections can be, and are, raised in opposition to self-determination. Some observers complain that an unsupervised system is open to abuse. A typical objection is that a person may misuse gender recognition in order to obtain legal or social benefits (such as pension rights, etc.). While there is no reported evidence of such abuse, it might be thought that insufficient data has been analysed to determine the true risk of self-declaration. For example, the fact that there is no abuse of legal gender recognition in France and Germany – where individuals have to submit to medical diagnosis – cannot be proof that misuse would not arise where such safeguard is removed. Even in jurisdictions, such as Denmark and Taiwan, which have embraced a model of self-determination, lingering fears have led policy-makers to implement a six-month waiting period. Such a ‘waiting time’ does not infringe on the principle that individuals can self-define their own gender but it may reduce the likelihood of improper applications.

For the purposes of this response, we have reflected hard on all the legal arguments surrounding the ‘*medical supervision v self-determination*’ debate’. We acknowledge that concerns about possible fraud are legitimate. While they are unlikely to arise with great frequency, the risk of abuse should give lawmakers reason to pause. However, balancing the existing rights arguments, this response recommends that the HK SAR introduces a model of self-determination as the most appropriate, desirable and human rights conscious regime (we therefore ***do not recommend*** that the HK SAR adopt the UK’s current regime, see **Issue for Consultation 14**).

The (abstract) risk of abuse is insufficient to justify the interference with the right to legal gender recognition. All legal processes in principle are at risk of being abused (one only needs to think of sham marriages for immigration purposes) but this has not led to calls for abolishing or restricting these processes. Potential abuse of legal gender recognition simply needs to be monitored like all other potential abuses. Medical supervision of the legal transition pathway can, and does, cause individuals significant harm and/or distress. We believe that a properly maintained and administered self-determination system is capable of avoiding widespread fraud. It is therefore the most appropriate system for acknowledging an individual’s preferred legal gender in the HK SAR.

## **Conclusion**

We appreciate the opportunity to feed into the IWG's ongoing consultations on gender recognition. Should the Working Group require further information or clarifications, we can be contacted according to the details set out below.

Yours sincerely,

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## Annex I – Biographies

### **Dr Jens M. Scherpe**

Dr Jens M. Scherpe is Reader in Comparative Law at the University of Cambridge, Cheng Yu Tung Visiting Professor at the University of Hong Kong. He also is a Fellow of Gonville and Caius College, Cambridge and. Honorary Fellow of St. John's College/Hong Kong as well as an Academic Door Tenant at Queen Elizabeth Building, London, and Director of Cambridge Family Law ([www.family.law.cam.ac.uk](http://www.family.law.cam.ac.uk)). Dr Scherpe is an internationally renowned family law expert and has held visiting positions in many institutions, including the University of Sydney, the University of Auckland, Queen Mary University of London, the University of Vienna, the Catholic University of Leuven, the University of Padua, Universitat Pompeu Fabra Barcelona and the Catholic University of Louvain-la-Neuve. In 2013 he organized and hosted an international conference on “The Legal Status of Transsexual and Transgender Persons” at the University of Hong Kong under the auspices of the Centre for Medical Ethics and Law (<http://www.cmel.hku.hk/events/the-legal-status-of-transsexual-and-transgender-persons>). This resulted in a comparative publication under the same title (<http://intersentia.com/en/shop/academisch/the-legal-status-of-transsexual-and-transgender-persons.html>) which was referred to extensively in the consultation by the Hong Kong Inter-departmental Working Group (IWG) on Gender Recognition. He also is co-editor of the forthcoming book “The Legal Status of Intersex Persons” (<http://intersentia.com/en/the-legal-status-of-intersex-persons.html>) which analyses the status of persons born with variations in sex characteristics from a legal, medical, psychological and theological perspective.

### **Peter Dunne**

Peter Dunne is a lecturer in law at the School of Law, University of Bristol. He teaches in the areas of family law, European Union law and medical law. Peter holds postgraduate degrees from Harvard Law School and the University of Cambridge. From 2014-2017, Peter completed his doctoral studies as an Ussher Fellow at Trinity College Dublin, Ireland. He has previously held visiting researcher/scholar positions at NYU School of Law and the Max Planck Institute for International and Comparative Private Law, Hamburg. Peter’s scholarship focuses broadly on human rights, family law and comparative law. He has a particular interest in gender, sexuality and law. Peter’s doctoral research considered the relationship between human rights and conditions for obtaining legal gender recognition. He regularly publishes in leading peer-reviewed journals, including the Medical Law Review, Socio-Legal Studies and the Child and Family Law Quarterly. With Dr Lynsey Black (University College Dublin), he is co-editor of *Law and Gender in Ireland: Critique and Reform* (Hart, 2018). Peter has authored or co-authored a number of policy reports and issue papers, relating to the legal regulation of identity (e.g. [here](#)). Peter has presented evidence before the United Nations Committee on the Rights of the Child, and his work has been referenced by numerous public bodies, including the Equality Authority of Ireland (now the Irish Human Rights and Equality Commission) and the Hong Kong Inter-Departmental Working Group on Gender Recognition. In 2015, Peter was invited to provide evidence to the UK Parliamentary Inquiry on Transgender Equality (conducted by the House of Commons Select Committee on Women and Equalities). His research was extensively referenced by the Committee in its 2016 Report, Transgender Equality. With Dr Marjolein van den Brink, Peter is currently undertaking EU-funded research into the status of trans and intersex persons in Europe.