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Dear Sir / Madam

**Consultation Paper (Part 1) on Gender Recognition -
Submissions by Amnesty International Hong Kong**

A. BACKGROUND

The Inter-departmental Working Group on Gender Recognition (“IWG”) published the first part of the consultation paper on gender recognition on 23 June 2017 (the “Consultation Paper”) inviting public views on various aspects concerning legal gender recognition in Hong Kong. Amnesty International Hong Kong (“AIHK”) sets out in this paper its position and recommendations for the IWG to consider and report to the Government of Hong Kong for immediate further actions.

AIHK is the Hong Kong branch of Amnesty International, the latter of which has been working and advocating on human right issues since 1961 and is now the world’s largest human rights organisation. There are more than 7 million members and supporters in over 150 countries and territories. Although they come from many different backgrounds and have widely differing political and religious beliefs, they are united by a determination to work for the world in which everyone enjoys human rights.

Sexual orientation and gender identity rights have been one of AIHK’s focuses. It works closely with the LGBTI (lesbian, gay, bisexual, transgender and intersex persons) Group to campaign on, amongst others, local anti-discrimination legislation relating to sexual orientation and gender identity. It also supports Amnesty International’s global actions concerning human rights abuses relating to gender, sexual orientation or gender identity.

B. GUIDING PRINCIPLES AND OVERALL COMMENTS

The Consultation Paper has spelled out 16 issues for the public to consider and comment on. Before diving into these 16 specific issues, we would first state the important underlying principles and considerations that our recommendations are based on. AIHK calls on governments to prevent and end grave abuses of the human rights of transgender people, in accordance with state obligations under international human rights standards.

International conventions concerning LGBTI people

The utmost important principle setting the basis of LGBTI rights is that all human beings are born free and equal in dignity and rights, and are entitled to all human rights

and freedoms without distinction of any kind.¹ Internationally protected human rights are applicable to gender identity as acknowledged by the Yogyakarta Principles, which crystallize the current status of human rights law in relation to gender identity and sexual orientation. Developed in 2006 by lawyers, scholars, NGO activists and other experts, these Principles have been referred to by several international and regional organizations, governments and other authorities in the context of human rights treaties' monitoring activities or when developing policies on equality and non- discrimination.² In addition, human rights of transgender persons are well recognised and protected by multiple international conventions and treaties and include:

(a) The right to life, bodily integrity and health

Everyone enjoys the non-derogable right to life³ and freedom from torture or cruel, inhuman and degrading treatment or punishment.⁴ Everyone has the right to a standard of living adequate for the health and well-being of oneself and of one's family, including medical care.⁵ Everyone shall enjoy the highest attainable standard of physical and mental health.⁶

(b) The right of self-determination

Everyone has the right of choice and right to determine one's own destiny.⁷

(c) The right to found a family and reproductive rights

Everyone enjoys the right to found family.⁸ As such, there shall be a right to marry and right to freedom from forced sterilisation.

(d) The right to privacy

No one shall be subjected to arbitrary or unlawful interference with the person's

¹ Articles 1 and 2 of the Universal Declaration of Human Rights ("UDHR").

² Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity. http://www.yogyakartaprinciples.org/principles_en.htm (accessed 15 January 2014). For examples of the impact of the Principles and the references made to them by international organizations and governments, see: Ettelbrick, P.L., Trabucco Zerán, A., The impact of the Yogyakarta Principles on International Human Rights Law Developments, 2010, http://www.ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf, accessed 15 January 2014

³ Article 3 of the UDHR and Article 6-1 of the International Covenant on Civil and Political Rights ("ICCPR").

⁴ Article 5 of the UDHR and Article 7 of the ICCPR.

⁵ Article 25 of the UDHR.

⁶ Article 12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR").

⁷ Article 1 of the ICCPR and Article 1 of the ICESCR.

⁸ Article 16 of the UDHR, Article 23 of the ICCPR and Article 10 of the ICESCR.

privacy.⁹

(e) The right to freedom from discrimination

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. All states should prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground or status, including gender identity.¹⁰

(f) The right to freedom from gender stereotyping

The United Nations Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”) requires states to ensure that state policies and practices are not based on, or have the effect of reinforcing, gender stereotypes. According to Article 5a of the Convention, states should take measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

Fundamental human rights are protected in Hong Kong under the Basic Law.¹¹ The International Covenant on Civil and Political Rights (“ICCPR”) is also put into effect in Hong Kong through the Bill of Rights Ordinance (Cap. 383). The ICCPR and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) are also given constitutional status under Article 39 of the Basic Law.

Furthermore, the UN Committee Against Torture has made the following observation and recommendation in 2015 on Hong Kong’s obligations under the Convention Against Torture regarding the need to remove “abusive” preconditions for the legal gender recognition:

28. While welcoming the set-up of an interdepartmental working group on gender recognition (see para. 5 (e) above), the Committee is concerned about reports that transgender persons are required to have completed sex-reassignment surgery, which includes the removal of reproductive organs, sterilization and genital reconstruction, in order to obtain legal recognition of their gender identity... (arts. 10, 12, 14 and 16).

29. Hong Kong, China should:

(a) Take the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex persons, including by removing abusive preconditions for the legal

⁹ Article 12 of the UDHR and Article 17 of the ICCPR.

¹⁰ Article 7 of the UDHR and Article 26 of the ICCPR; Views adopted by the Human Rights Committee under Article 5(4) of the Optional Protocol to the ICCPR concerning communication No. 2172/2012, 17 March 2017, UN Doc CCPR/C/119/D/2172/2012.

¹¹ Such rights include equality before the law (Article 25) and the freedom of marriage and the right to raise a family freely (Article 37).

recognition of the gender identity of transgender persons, such as sterilization...”

Gender identities

Amnesty International uses the term transgender to describe individuals whose gender identity and/or gender expression differs from conventional expectations based on the physical sex they were assigned at birth. Commonly, a transgender woman is a person who was assigned ‘male’ at birth but has a female gender identity; a transgender man is a person who was assigned ‘female’ at birth but has a male gender identity. However, not all transgender individuals identify as male or female; transgender is a term that can include members of third genders, as well as individuals who identify as more than one gender or no gender at all. It includes those people who feel they have to - or who prefer or choose to - present themselves in a way that conflicts with the social expectations of the gender role assigned to them at birth, whether they express this difference through language, clothing, accessories, cosmetics or body modification. This definition includes, among many others, transsexual and transgender people, transvestites, cross dressers, no gender, liminal gender, multigender, and genderqueer people, as well as intersex and gender variant people who relate to or identify as any of the above. Due to the diversity of cultural concepts and subcultural self-definitions, and especially due to the lack of another globally valid umbrella term, this definition also includes those who identify with local, indigenous or subculture-specific terms and simultaneously self-identify as trans people or as any of the above. Transgender individuals may or may not choose to undergo some or all possible forms of gender reassignment treatment. This can, but does not necessarily, include surgery and/or hormonal therapy.

It appears that what the IWG has considered so far is restricted to a binary of sex/gender, and there has not yet been discussion on the rights of people who identify as a third gender/ sex,¹² who identify as more than one gender or no gender at all. The Consultation Paper also does not consider the possibility of allowing a third gender which caters to the needs and rights of people outside the conventional sex or gender binary system, which has been accepted in some countries. For example, people of Australia may choose the gender-neutral option “X” on their passports.¹³ Other countries that allow this option include Canada, New Zealand, Germany, Malta and Pakistan. In addition, the specific issues of intersex persons¹⁴ are not discussed at all in the Consultation Paper.

¹² Third gender/sex refers to any of many socially or culturally acknowledged genders or gender identities that are neither male nor female; examples include mahu and fa’afafine in Polynesia, muxe in Mexico, xanith in Oman, and hijra in India and Pakistan. Some countries, including Nepal and Pakistan, have recognised the existence of gender identities that are neither male nor female and issue official documents which reflect this fact.

¹³ Surgery is not a prerequisite, yet confirmation is required from a registered medical practitioner or psychologist that the person is of indeterminate sex or is intersex. See: <https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changeofsexdoborpob.aspx>.

¹⁴ Intersex individuals possess genital, chromosomal or hormonal characteristics that do not correspond to the given standard for the “male” or “female” categories of the sexual or reproductive anatomy. Intersexuality may take different forms and cover a wide range of conditions.

The rights of these people are no less important and must also be protected on equal basis. We recommend the IWG and the Government to allow individuals who identify as a gender that is neither male nor female to obtain official papers which reflect their gender identity.

Other considerations

The IWG indicated in the Consultation Paper that “other issues” such as same-sex marriage, civil partnership and homophobic discrimination are outside the scope of its study. This is however impractical as these issues are naturally intertwined with the issues that this Consultation Paper is looking at. For example, one argument for imposing a marital status requirement is that a heterosexual marriage might become a same-sex marriage if one of the spouse obtained gender recognition, and some of the possible solutions to that issue would be to open up same-sex marriage or civil partnerships. Also, when the type of gender recognition scheme is discussed, the essential consideration is its discriminatory effect that it entails. This is where anti-discrimination comes into place. In Canada, for example, gender recognition issues are sometimes dealt with through gender identity discrimination legislation. As this is a comprehensive exercise of reviewing legislation relating to sex and gender, it would be useful to also look into the core concerns of transgender people and other sexual or gender minorities which include the discrimination problems and their right to form or maintain a family, etc. We recommend the IWC and the government to also study and give proper suggestions to these issues together with the issues raised in the Consultation Paper.

In addition, in the view of the discrimination against transgender persons within the criminal justice system, we call on the Government to ensure that transgender individuals are placed in facilities appropriate for their gender identity, and that they are not further marginalised while in detention, for example by being detained in solitary confinement, or placed with detainees where violence is a high probability.

C. AIHK’S RESPONSES TO THE ISSUES RAISED IN THE CONSULTATION PAPER

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

A gender recognition scheme should be introduced in Hong Kong as soon as possible.

AIHK believes that legal gender recognition is a crucial component for the enjoyment of human rights by transgender people.

As the consultation paper points out, although there is no legal requirement, currently in Hong Kong an individual must in practice undergo full sex reassignment surgery¹⁵ (and before that, a ‘real-life experience’ period) before one may be issued a medical certificate which may be used for a change of the sex entry on the person’s Hong Kong Identity Card. This system opens leeway for the following human rights violations:

¹⁵ Defined in the Consultation Paper as ‘removal of the original genital organs and construction of some form of genital organs of the opposite sex’

First, the requirement of surgery erodes the rights of the persons who wish to have their preferred gender recognised but are unable to or do not wish to go under the knife given the health risks and the negative effects to their bodies, sometimes including permanent loss of reproduction ability. Requiring transgender people to undergo unnecessary medical treatments to obtain legal gender recognition violates their right to the highest attainable standard of health.

Second, there is no legal or administrative obligation for the government, quasi-bodies and private institutions to recognise their change of gender, except the sex entry on the identity card. It causes not only inconvenience but also more and prolonged psychiatric pressure on the persons who still have to carry other documents that do not reflect their gender identity or expression, who are left at risk of questions, suspicion, discrimination or even harassment or violence.

A human rights-oriented gender recognition scheme would set out the basic principles and framework that different actors including medical professionals, government officials, education institutions and service providers could refer to and follow when making policies. This would ensure that transgender people's rights are respected in all contexts.

AIHK calls for the Hong Kong government to allow individuals to change their legal name and gender markers, through a quick, transparent and accessible process, on all official documents issued by the government bodies, as well as documents provided by other institutions, such as certificates of education, and employment-related documents.

Issue 2: Requirement of medical diagnosis for gender recognition

Requiring transgender individuals to submit to mandatory medical or psychological treatments in order to obtain official documentation reflecting this change violates their rights to protection from medical abuses. Prescribing certain treatment routines, including forced psychological treatment, in a one-size-fits-all manner violates the individual's right to self-determination and to the highest attainable standard of health.

In practice, a psychiatric diagnosis requirement results in medical professionals making decisions on identity features that are personal and do not manifest themselves in a uniform and consolidated pattern. Where these decisions are based on gender stereotyping, individuals who do not conform to the medical professionals' gender norms and expectations may be denied a diagnosis and consequently legal recognition of their gender.

Therefore, instead of having a medical diagnosis as a condition for gender recognition, we recommend the Hong Kong government to develop quick, accessible and transparent legal gender recognition procedures in accordance with the individual's sense of gender identity.

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

The Hong Kong government has the obligation to protect transgender individuals from forced medical treatment and unwanted psychiatric monitoring. Overly lengthy

procedures on legal gender recognition may violate the rights to privacy and to recognition before the law. Amnesty International recommends that a new legal gender recognition procedure be quick, accessible and transparent.

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

States have an obligation to protect transgender individuals from forced medical treatment and unwanted psychiatric monitoring. While some transgender people would like to have access to certain health treatments with the aim of modifying their bodies, many others do not. For those who do, their choices in terms of the treatments they would like to access – whether hormone therapy, surgeries, genital reassignment surgeries, voice therapy, depilation and so on – greatly vary and depend on the personal feelings and perceptions shaping their gender identity.

Requiring transgender people to undergo unnecessary medical treatments in order to obtain legal gender recognition violates their right to the highest attainable standard of health. Hormonal treatment, therefore, should not be a condition for transgender individuals being able to have their desired gender legally recognised.

Hormonal treatment and psychotherapy are not currently requirements for changing the sex entry on the Hong Kong Identity Card. New requirements should not be introduced to any gender recognition scheme.

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

Not all transgender individuals wish to – or are able to, for reasons of health, age or other factors – undergo sex reassignment surgery. As mentioned above, requiring transgender people to undergo unnecessary medical treatments to obtain legal gender recognition violates their right to the highest attainable standard of health.

Amnesty International recommends that SRS and other surgical treatments not be included as preconditions for legal gender recognition.

Issue 6: Requirement of other medical treatments for gender recognition

As mentioned above, requiring transgender people to undergo unnecessary medical treatments to obtain legal gender recognition violates their right to the highest attainable standard of health. This includes, as mentioned above, psychiatric diagnosis or monitoring, hormonal treatment, and surgeries, as well as any other medical treatment including sterilisation.

Amnesty International recommends that a new legal gender recognition procedure not include any requirements for medical treatments of any kind as a precondition for legal gender recognition.

Issue 7: Residency requirement for gender recognition

The crucial point to consider is the underlying purpose of establishing a gender recognition scheme – it recognises and protects the fundamental human rights of the transgender persons. It would therefore not be sensible to draw a line between permanent residents and non-permanent residents who live in Hong Kong for work, study or other legitimate reasons and who face similar problems and difficulties.

Apart from those who hold Hong Kong identity cards, the gender recognition scheme should also be equally applicable to asylum seekers and those who are granted refugee status and awaiting resettlement. Due to their special circumstances, this group of people are unable to be recognised as residents of Hong Kong, yet they stay and live in Hong Kong for years or even over a decade for their status recognition or resettlement progress to complete. Amongst this group of people, there are actual cases of individuals who fled their countries because of the persecution they face in their countries due to their transgender status. Their fundamental rights must not be derogated during their stay in Hong Kong.

Issue 8: Age requirement for gender recognition

We recommend that the government shall abolish blanket age restrictions to legal gender recognition procedures and ensure that legal recognition is accessible to minors, taking into account the child's freely expressed views regarding their own best interests, in light of their evolving capacities. In addition, the government should abolish any inclusion of third parties for gatekeeping purpose in gender marker changes, including parents.

Issue 9: Marital status requirement for gender recognition

A single status requirement discriminates against transgender individuals who are married and wish to remain so, as they are bound to choose between their rights to marry and to found a family and to respect for private and family life, and their right to recognition before the law. Reference should also be made to the views of the UN Human Rights Committee adopted on 17 March 2017 in *G v Australia*, UN Doc CCPR/C/119/D/2172/2012, that a marital status requirement for gender recognition constitutes unjustifiable discrimination.

AIHK recommends that a new legal gender recognition scheme be accessible to all transgender people, regardless of their marital status.

Issue 10: Parental status requirement for gender recognition

The change of legal gender should not take away any custodial and parental rights of the transgender person, nor should it be a requirement for the transgender person applying for gender recognition not to be a parent. The change of legal gender also should not affect the assessment of a transgender person as a suitable adoptive parent.

Issue 11: Recognition of foreign gender change

Whether a person's preferred gender has been recognised in another country should have no effect to one's eligibility for applying for a legal gender change in Hong Kong which should be a quick, accessible and transparent process.

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

AIHK opposes any non-medical requirement which discriminates against any group of persons of their eligibility for the gender recognition scheme.

Issue 13: Type of gender recognition scheme, if adopted

AIHK recommends the government to develop quick, accessible and transparent legal gender recognition procedures on the basis of the individual's self-declaration. In other words, the gender recognition scheme should impose no medical and psychological condition over the applicant. Any inclusion of third parties in gender marker changes for gatekeeping purpose shall also be abolished.

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

The Consultation Paper has referred to the gender recognition scheme in the United Kingdom in details and the public is specifically asked to consider whether to adopt a scheme similar to that of the United Kingdom.

We point out that the scheme in the United Kingdom is not without criticisms, and in fact the UK government is proposing to reform its current scheme to make the process of changing legal gender simpler and more in line with human rights standards.

Therefore, AIHK emphasises that any reference made to overseas experience shall take into consideration of human rights standards, and that abusive practices shall not be applied in Hong Kong under any circumstances.

Issue 15: Authority to determine applications for gender recognition

As said in Issue 13, any inclusion of third parties in gender marker changes shall be abolished. It is the government's responsibility to ensure that transgender individuals have access to gender reassignment treatment if they wish to undergo such treatment, without undue bureaucratic, financial, medical, social or political interference or delays.

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

Transgender individuals whose official documents – including but not limited to their ID card - do not reflect their gender identity, name or gender expression must disclose they are transgender every time they produce these documents, leaving them open to discrimination, harassment or violence.

AIHK opposes any model of legal gender recognition that is not quick, transparent and accessible to any person who seeks it. Adopting a twin track approach may risk denying legal gender recognition to transgender individuals who do not wish to or cannot meet

the preconditions.