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Litigating transgender issues in the absence of a legislative scheme for gender recognition

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Introduction

1. The legal recognition of a person's change of gender from that assigned at birth to a different, experienced, gender is controversial and complex. Many jurisdictions have legislative schemes prescribing the conditions under which a change of gender to an experienced gender may be recognised. Hong Kong is not such a jurisdiction. Instead, its courts have had to deal with transgender issues on a piecemeal basis. This paper[1] describes the experience of the Hong Kong courts so far and considers schemes for gender recognition in other jurisdictions. It seeks to identify what difficulties arise from the lack of a gender recognition scheme, and what questions remain or arise even in jurisdictions with legislative schemes. It invites discussion of what a jurisdiction without such a scheme might learn from the experiences of those jurisdictions with legislative gender recognition schemes. Finally, in view of changes in societal attitudes towards transgenderism, it also invites consideration of what future issues might arise in this area.

Transgenderism

2. It is helpful to begin with a definition of "transgenderism" and a description of the treatment objectives and methodology. The following section of this paper reflects evidence placed before the Hong Kong Court of Final Appeal (CFA) in the recent case of *Q & Henry Tse v Commissioner of Registration* (*Q*),[2] which will be addressed in more detail below.

3. Transgenderism is not a term of art. The American Psychological Association broadly defines transgenderism as "an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to that

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1 This paper was written with the assistance of Ivan Sin, Thomas Leung and Christopher K H To, Judicial Assistants (2022-2023) in the Court of Final Appeal. I am grateful to them for their helpful research and contributions to the preparation of this paper.

2 [2023] HKCFA 4.

typically associated with the sex to which they were assigned at birth".[3] The World Health Organization (WHO) uses the term "gender incongruence" to describe the medical condition where there is a "marked and persistent incongruence between an individual's experienced gender and the assigned sex".[4] Gender dysphoria refers to "the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender".[5] There are two aspects to gender dysphoria, being social and physical. Social dysphoria refers to the distress or discomfort arising out of the mismatch between one's gender identity and the gender to which one is assigned and recognised by others. Physical dysphoria refers to that arising out of the mismatch between one's gender identity and one's sex characteristics.[6] A person experiencing gender dysphoria may suffer social or physical dysphoria, each to a varying extent, or both.

4. Unsurprisingly, it is not possible to state definitively the size of the world's population that suffers from gender dysphoria. One estimate, in 2016, suggests a figure of around 25 million transgender people worldwide.[7] Regardless of the exact number, it is obvious that the transgender population is a sizeable minority group within the global population. It is also clear from the diverse number of countries that have introduced legislative gender recognition schemes that transgenderism exists around the world and this suggests that it is neither unique nor even predominant amongst particular demographics or ethnicities. Like other parts of the world, Hong Kong has a transgender population and the Hospital Authority in Hong Kong has, since about 1980, been providing health care in Hong Kong for persons with gender identity issues.[8] In the period from 2006 to 2016, the Immigration Department in Hong Kong received 136 applications from transgender persons who had undergone sex reassignment surgery to amend the sex entry on their identity cards.[9]

5. The medical treatment objective for a person with gender dysphoria is to enable that person to live, and be accepted, in their experienced gender in which they identify. Given that individuals will experience gender dysphoria differently, the appropriate treatment depends on that individual's unique needs

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3 American Psychological Association, "Answers to Your Question: About Transgender People, Gender Identity, and Gender Expression" at https://www.apa.org/topics/lgbtq/transgender.pdf.

4 WHO, *International Statistical Classification of Disease and Related Health Problems* (11th edition) (ICD-11), replacing the reference to transsexualism in ICD-10.

5 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edition, 2013), p.451.

6 *Q* (note 2) at [9]-[11].

7 Sam Winter, Milton Diamond, Jamison Green, Dan Karasic, Terry Reed, Stephen Whittle, Kevan Wylie, "Transgender people: health at the margins of society" [2016] Lancet 392.

8 *Q* (note 2) at [12].

9 Inter-departmental Working Group on Gender Recognition (IWG), *Consultation Paper: Part 1 Gender Recognition* (June 2017) at [2.10].

and preferences. As described in the following paragraph, there is a range of treatments for gender dysphoria. For persons experiencing only social dysphoria, gender-affirming counselling coupled with cosmetic surgery may be sufficient. For many persons experiencing physical dysphoria, hormone treatment and/or breast surgery may be effective to alter their bodies to alleviate their feelings of gender incongruity. More intrusive surgical options such as sterilisation and reconstructive surgery are only recommended by doctors if the physical dysphoria cannot be resolved by less intrusive means.[10]

6. Treatments for gender dysphoria encompass a range of multi-disciplinary treatments including:[11]

(1) Psychological counselling and therapy, which can help individuals cope with distress, explore gender identity, address social and familial relationships, and make a fully-informed decision about further medical treatments. Before engaging in medical interventions, some transgender individuals may undergo "real-life experience", where they experience living as a member of the experienced gender for a period of time.[12]

(2) Hormone treatment, which involves reducing the individuals' endogenous hormone levels and/or replacing the hormones with those of the experienced sex. This can help suppress the sexual characteristics of the biological sex and promote that of the experienced sex.[13]

(3) Cosmetic surgery such as facial plastic surgery, breast augmentation or removal, and hair removal further aligns a person's external appearance with that of their gender identity.

(4) Sterilisation, which involves the removal or impairment of the reproductive organs.

(5) Genital reconstructive surgery, which involves modifying an individual's sexual organs to those of the experienced sex. As a generalisation, female-to-male (FtM) surgery is more complex and difficult than that for male-to-female (MtF) reconstruction.[14]

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10 *Q* (note 2) at [17].
11 *Ibid*. at [12].
12 *Ibid*. at [13].
13 *Ibid*. at [14].
14 *Ibid*. at [15]-[18].

7. It should be noted that gender dysphoria can also be reduced by non-medical approaches, such as offline and online support, voice and communication theory, hair removal, breast binding or padding, and a change of name and gender marker on identity documents.[15]

8. Sterilisation and genital reconstructive surgery together are commonly referred to as sex reassignment surgery (SRS) and, as can be seen, are only two of the various options available to transgender persons to treat their gender dysphoria. While SRS may be essential for some persons experiencing physical dysphoria, without which they may be at risk of self-harm or suicide, a significant number of transgender persons find hormone treatment coupled with breast augmentation or reduction sufficiently efficacious to reduce their bodily discomfort.[16] Indeed, SRS simply may not be clinically necessary to treat gender dysphoria.

9. The diagnosis and treatment of gender dysphoria can be seen, on the one hand, as measurable by reference to completion of "change of sex", when a patient's dysphoria is "attenuated enough for their social integration and psychological well-being" or, on the other hand, when the dysphoria is "reduced to such an extent that enables them to live and be accepted as a member of their experienced gender".[17]

Legal issues arising

10. A person's gender is self-evidently material to their rights and obligations in a wide range of legal contexts, both civil and criminal. The following examples in Hong Kong law illustrate the diverse range of common circumstances in which differentiation between persons on the basis of gender is relevant. In Hong Kong, they arise in a jurisdiction with well-developed rights and freedoms, constitutionally guaranteed under its Basic Law[18] and the Hong Kong Bill of Rights[19]. Some of these rights and freedoms are necessarily engaged in the ordinary course of life for transgender persons.

11. Perhaps the area of law in Hong Kong in which the difference between genders is most obviously material is that of marriage and parentage. Under Hong

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15 World Professional Association for Transgender Health (WPATH), *WPATH Standards of Care for the Health of Transgender and Gender Diverse People* (8th edition, 2022), pp.518 and 554.

16 In a survey conducted in 2019-2020 of 234 transgender people in Hong Kong, nearly half of the respondents were unsure about or did not want surgical procedures: Y.T. Suen, R.C.H. Chan and E.M.Y. Wong, "Heterogeneity in the Desire to Undergo Various Gender-Affirming Medical Interventions Among Transgender People in Hong Kong: Findings from a Community-Drive Survey and Implications for the Legal Gender Recognition Debate" (2022) 51 Arch Sex Behav 3613.

17 *Q* (note 2) at [20].

18 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

19 Hong Kong Bill of Rights Ordinance (Cap.383).

Kong legislation, marriage is defined as the voluntary union for life of one man and one woman to the exclusion of all others.[20] Hong Kong law has yet to recognise same-sex marriage and a challenge on the constitutionality of not recognising same-sex marriage has been dismissed by the Court of Appeal.[21] Depending on how flexible the law is in recognising a person's experienced gender, allowing a person to marry in a gender other than their assigned gender may be perceived as a means of recognising same-sex marriage by the back-door. This would also be controversial for other reasons, including, for example, the fact that hormone treatment is reversible. Where SRS is not a pre-requisite for a transgender person marrying in their acquired gender, a transgender person might terminate hormone treatment and reassume the biological and reproductive characteristics of their original assigned gender. Furthermore, there is an obvious question as to the effect of a gender transition on an existing marriage. There are conflicting views on this issue.[22]

12. In addition to the institution of marriage itself, various rights and obligations defined by law depend on a person's marital status. If transgender persons are unable to marry in their experienced gender, they will in effect be deprived of various benefits ancillary to matrimony. Recognition of same-sex civil partnerships or marriage would address this inability. In the meantime, in the context of same-sex couples married in overseas jurisdictions in which same-sex marriage is legal, Hong Kong courts have had to deal, case-by-case, with issues relating to inheritance,[23] dependency visas,[24] public housing[25] and tax assessment[26] on the basis of anti-discrimination law. Whether this approach would assist in resolving issues relating to the rights of transgender persons is debatable. The Sex Discrimination Ordinance (SDO)[27] makes it unlawful to discriminate against a person on the ground of sex in various spheres of activity, including employment and education. However, it does not outlaw discrimination against transgender persons because of their transgender status. Moreover, certain provisions and exceptions in the SDO are applicable to certain genders only. It is unclear whether a transgender person, for the purpose of the SDO, should be considered according to their experienced gender or not.

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20 Marriage Ordinance (Cap.181), s.40, Marriage Reform Ordinance (Cap.178), s.4 and Matrimonial Causes Ordinance (Cap.179), s.20(1)(d). This is also the position under the common law in Hong Kong: *W v Registrar of Marriages* (FACV 4/2012, 13 May 2013), (2013) 16 HKCFAR 112 at [39] and [63].

21 *Sham Tsz Kit v Secretary for Justice* [2022] HKCA 1247, [2022] 4 HKLRD 368, although the applicant has been granted leave to appeal to the CFA in [2022] HKCA 1690 and that appeal will be heard later this year.

22 Report of the Hong Kong Legislative Council Bills Committee on the Marriage (Amendment) Bill 2014 (LC Paper No. CB(2)1914/13/14), at [30]-[34].

23 *Ng Hon Lam Edgar v Secretary for Justice* [2020] HKCFI 2412, [2020] 4 HKLRD 908.

24 *QT v Director of Immigration* [2018] HKCFA 28, (2018) 21 HKCFAR 324.

25 *Infinger Nick v Hong Kong Housing Authority* [2020] HKCFI 329, [2020] 1 HKLRD 1188.

26 *Leung Chun Kwong v Secretary for the Civil Service* [2019] HKCFA 19, (2019) 22 HKCFAR 127.

27 Sex Discrimination Ordinance (Cap.480).

13. Parentage, in Hong Kong law, is gender based and defined in various ordinances in terms of a child's father and mother.[28] Apart from issues relating to terminology for transgender parents of existing children post-transition to an experienced gender, difficult questions arise from the possibility of a transgender parent being a biological father or mother to a child prior to transitioning into a different experienced gender. This has not yet occurred in Hong Kong but, as will be seen below, has in other jurisdictions.

14. In the criminal context, under Hong Kong law, rape can only be committed by a man against a woman.[29] A differentiation is drawn between homosexual buggery by or with a male under 16[30] and buggery with a female under the age of 21.[31] Of less serious criminality, but a criminal offence nonetheless, entry to a public convenience in Hong Kong is segregated by reference to the male and female gender.[32]

15. A discrete and specific Hong Kong issue where transgenderism is potentially relevant is that of property rights constitutionally guaranteed to indigenous New Territories villagers. Under a long-standing government policy in Hong Kong (called the Small House Policy), only male indigenous villagers are entitled to apply for a small house grant. A judicial review against the Small House Policy on the basis of sexual discrimination was dismissed by the CFA.[33] If the experienced gender of a transgender person were to be recognised for legal purposes, it would be necessary to consider the question of whether a transgender FtM indigenous villager is also entitled to apply for such a grant, in particular since the right is derived from the Basic Law.

16. In addition to the above examples, there are many administrative contexts and regulations in which segregation of the sexes is gender based. The accommodation of prisoners is one context in which transgenderism presents potentially difficult practical questions.[34] A recent case in Scotland concerning a MtF transgender woman, who was convicted of two offences of rape as a man, caused considerable controversy when she was remanded to a women's prison to await sentence.[35]

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28 Guardianship of Minors Ordinance (Cap.13), s.2; Parent and Child Ordinance (Cap.429), *passim*; Adoption Ordinance (Cap.290), s.2.

29 Crimes Ordinance (Cap.200), s.118.

30 *Ibid*., s.118C.

31 *Ibid.*, s.118D.

32 Public Conveniences (Conduct and Behaviour) Regulation (Cap.132BL), ss.7 and 10 (save for a child under the age of 5).

33 *Kwok Cheuk Kin v Director of Lands & Ors* [2021] HKCFA 38, (2021) 24 HKCFAR 349.

34 Prison Rules (Cap.234A), s.6; *Navarro Luigi Recasa v Commissioner of Correctional Services* [2018] HKCFI 1815, [2018] 4 HKLRD 38.

35 BBC, "Isla Bryson: What is the transgender prisoners row all about?" at https://www.bbc.com/news/uk-scotland-63823420.

Hong Kong's experience litigating transgender issues

17. Despite the range of legal issues arising from transgenderism that might require resolution, the Hong Kong courts' engagement with them has to date been limited. The CFA has, so far, addressed transgender issues in two decisions and there have been two other cases argued at first instance. In 2013, in *W v Registrar of Marriages* (*W*),[36] the CFA considered the scope of the right to marry stipulated in the Basic Law in relation to a transgender person. In February this year, in *Q*, the CFA decided two appeals heard together in a case challenging a government policy requiring full SRS before recognising a change of gender marker on an identity document.

W v Registrar of Marriages

18. In *W*, the appellant W was a MtF transgender person who had undergone full SRS and whose gender marker on her Hong Kong Identity Card (HKID) (which was the focus of the *Q* appeals, discussed below) had been changed to female. She wished to marry her male partner but the Registrar of Marriages decided that she could not do so on the ground that she did not qualify as a woman for the purposes of the Marriage Ordinance (MO) or the Matrimonial Causes Ordinance (MCO). Her challenge by way of judicial review to the Registrar's decision failed at first instance and in the Court of Appeal and she appealed to the CFA.

19. There were two principal issues to be decided. First, whether the references to "woman" and "female" in s.40 of the MO and s.21(1)(d) of the MCO extended to a post-operative MtF transgender person. This was purely a question of statutory interpretation. Secondly, if not, whether the provisions were unconstitutional having regard to the appellant's right to marry under article 37 of the Basic Law and/or article 19(2) of the Hong Kong Bill of Rights. This issue engaged the more fundamental question of the scope of a transgender person's constitutional right to marry.

20. On the first issue, the CFA was unanimous as to the construction of the relevant provisions of the two ordinances in question. The CFA traced the legislative history of s.20(1)(d) of the MCO and held that it was enacted to reproduce the English legislation which endorsed the view expressed in *Corbett v Corbett (otherwise Ashley)*[37] that the criteria for determining who was a woman

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36 (FACV 4/2012, 13 May 2013), (2013) 16 HKCFAR 112.
37 [1970] 2 WLR 1306.

for the purposes of marriage must be biological (i.e. chromosomal, gonadal and genital) and that the statutory provisions must be construed accordingly.

21. However, the CFA was divided on the second issue. By a majority (of 4 to 1), the CFA held that the relevant provisions in the two ordinances were unconstitutional, being inconsistent with the right to marry guaranteed by the Basic Law and the Hong Kong Bill of Rights. The leading judgment of the majority[38] held that the relevant provisions were unconstitutional principally for the following reasons. First, in present-day Hong Kong, there had been significant changes such that procreation was no longer (if it ever was) regarded as essential to marriage. Secondly, the *Corbett* criteria, which ignored the psychological and social elements of a person's sexual identity and any reassignment treatment, could not be justified in light of the significant medical advances and changes in social attitudes concerning transgender persons. Thirdly, the provisions impaired the very essence of the right to marry because, given W's irreversible surgery and implacable rejection of her male sexual identity, the provisions fundamentally deprived W of the right to marry as there was no question of her enjoying that right in any meaningful sense by being able to marry a woman.

22. In his minority dissenting judgment, Chan NPJ, held that a firm line had to be drawn between, on the one hand, giving a constitutional provision an updated interpretation to meet the needs of changing circumstances and, on the other, making a new social policy.

23. A few points relevant to subsequent developments after *W* may be noted. First, although the relevant provisions in the MO and MCO were declared to be unconstitutional, the CFA suspended the operation of the declarations for 12 months to give the Government the opportunity to consider enacting legislation to deal with the issue of who qualifies as a woman or a man for marriage and other purposes. It commended the UK's Gender Recognition Act 2004 (GRA)[39] as a "compelling model".[40] Secondly, it is important to note what *W* did not decide. While the CFA declared that a transgender person who, like W, had received full SRS should qualify as a person of the post-operative re-assigned gender for the purposes of marriage, it necessarily left open the question whether and to what extent others who had undergone less extensive surgical or medical intervention might also qualify. The CFA also indicated other areas where legislative intervention would be desirable, such as the impact of a legally

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38 A joint judgment of Ma CJ and Ribeiro PJ, with which Bokhary NPJ and Lord Hoffmann NPJ agreed.
39 GRA.
40 *W* (note 36) at [138].

recognised gender change on an existing marriage. Thirdly, the CFA was at pains to point out that the case did not address the issue of same-sex marriage.[41]

Developments post-W

24. There were two notable developments after the decision in *W*. First, the Government attempted to introduce an amendment bill to introduce two new sections into the MO in order to align the legislation with the CFA's judgment in *W*.[42] One of the proposals related to the references to "man" and "woman" and to "male" and "female" in the relevant provisions of the ordinance[43] and would have provided that a person who had undergone full SRS should be treated as being of the sex to which the person was re-assigned post-surgery.[44] The proposed amendment defined full SRS as a surgical procedure that has the effect of re-assigning the sex of a MtF transgender person by: (1) the removal of the person's penis and testes and (2) the construction of a vagina. In the context of a FtM transgender person, full SRS would require: (1) the removal of a person's uterus and ovaries and (2) the construction of a penis or some form of a penis.[45]

25. The bill did not pass its second reading, with 40 members of the Legislative Council voting against it, 11 voting in favour of it and 11 abstaining. Legislators opposed it either because it was thought to have gone too far or because it had not gone far enough.[46]

26. For the latter, the full SRS requirement proposed in the bill was regarded as too high a threshold. There was concern on the part of some that the requirement of full SRS to marry in an experienced gender, even if full SRS was not medically necessary or desired, might constitute a form of torture, or cruel or inhumane treatment. Others took issue with the definition of full SRS in the proposed amendment as requiring both the removal of a person's original genital organs and the construction of genital organs of the opposite sex, considering this to be unduly harsh or onerous. On the other side of the debate, there were those, reflecting the views of conservative religious and family groups, who thought that the bill had gone too far and who opposed the bill in principle, pointing out the importance of taking into account the degree of social acceptance of transgender persons and the need for a balance to be struck between the rights of transgender persons and the rights of other affected persons in dealing with gender recognition issues.

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41 *Ibid.* at [2].
42 Marriage (Amendment) Bill 2014, ss.40A and 40B.
43 MO (note 20), ss.40(2) and 20(1)(d) respectively.
44 Marriage (Amendment) Bill 2014 (note 42), s.40A(1).
45 *Ibid*., s.40A(2).
46 Legislative Council Brief of the Marriage (Amendment) Bill 2014 (File Ref.: SB CR 1/3231/13).

27. The second major initiative after the CFA's judgment in *W* was the Government's establishment in January 2014 of an Inter-Departmental Working Group on Gender Recognition (IWG) "to consider legislation and incidental administrative measures that might be required to protect the rights of transsexual persons in Hong Kong in all legal contexts and to make such recommendations for reform as may be appropriate".[47] The IWG is chaired by the Secretary for Justice and consists of representatives of the legal community and relevant Government bureaux.

28. After its establishment, the IWG conducted a study which was divided into two parts. The first part focused on recognition issues, examining overseas experiences and the legal issues that might arise from the enactment and operation of a formal gender recognition scheme in Hong Kong. The second part addressed post-recognition issues that might arise if the IWG were to recommend the establishment of a gender recognition scheme in Hong Kong. This involved a comprehensive overview of existing legislative provisions and administrative measures in Hong Kong which might be affected by a gender recognition scheme, in order to identify reforms that would be required.

29. In June 2017, the IWG published a consultation paper to invite opinions from the public on issues concerning gender recognition.[48]

Q and Henry Tse

30. Despite the publication of the IWG's consultation paper, no further steps have been taken by the Government to determine how to address transgenderism in Hong Kong. This was the situation when a second case arose for decision in the CFA earlier this year.

31. Q and Henry Tse are FtM transgender persons who have each identified as male since their youth. Having been diagnosed with gender dysphoria, they each underwent a lengthy course of medical and surgical treatments, including psychiatric treatment, hormonal treatment, mastectomy and real life experience. As a result, they had acquired masculine bodily features, and the gender dysphoria of each had been medically certified to have been sufficiently attenuated to enable their social integration and psychological well-being without the need for additional surgical procedures.

32. In these circumstances, Q and Henry Tse applied to the Commissioner of Registration to amend the gender markers on their HKIDs to reflect their

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47 IWG's website at https://www.iwggr.gov.hk/eng/index.html.

48 IWG, *Consultation Paper: Part 1 Gender Recognition* (note 9).

experienced gender. Every resident of Hong Kong over the age of 11 is required to register for a HKID and its production and inspection is ubiquitous as a means of verifying that person's identity. The Commissioner's policy, which permitted a change of gender marker on a HKID, was to require transgender persons to have undergone full SRS, unless medically exempted from doing so, before a change of gender marker would be registered. Q and Henry Tse's applications were refused by the Commissioner because they had not undergone full SRS as required by that policy.

33. Q and Henry Tse therefore brought judicial review proceedings to challenge the refusals to register their change of gender marker contending that the policy unlawfully interfered with their rights to privacy[49] and subjected them to humiliation, distress and loss of dignity in the routine day-to-day activities involving inspection of their identity cards.

34. Applying the established four-step proportionality assessment in Hong Kong, the CFA considered the question of whether the encroachment constituted by the policy passed the test of being "no more than reasonably necessary" in achieving the legitimate aim of establishing "a fair, clear, consistent, certain and objective administrative guideline to decide when a change of the sex entry on the identity card is to be accepted". The CFA concluded that it did not and rejected all three reasons put forward by the Commissioner as to why the policy was justified.

(1) First, it held that full SRS was not the only workable, objective and verifiable criterion for amending a gender marker on a HKID, since the availability of a medical exemption under the existing policy as well as examples of different polices in other jurisdictions showed that other criteria were plainly workable without causing administrative difficulty.[50]

(2) Secondly, full SRS was not justified by a need to avoid administrative problems that would allegedly arise, resulting in incongruence between a transgender person's physical appearance and the gender marker on their HKIDs, if other criteria were adopted. The CFA observed that the kind of incongruence which most commonly caused problems was the discordance between the gender marker and a transgender person's outward appearance rather than the appearance of their genital area. The CFA accepted there were areas where genuine and difficult issues arose concerning

[49] Hong Kong Bill of Rights (note 19), Art.14.
[50] *Q* (note 2) at [68]-[78].

the appropriate treatment of transgender persons, but the resolution of such difficulties did not normally bear on the gender marker on a HKID, and leaving the gender maker unchanged because an applicant had not undergone full SRS in the majority of cases in fact produced greater confusion or embarrassment and rendered the gender marker's identification function deficient.[51]

(3) Thirdly, in the great majority of cases, a FtM transgender person's commitment to achieving a permanent transition to the male gender is plain and obvious, some elements of the FtM hormonal treatment are irreversible, and it would be wholly disproportionate to regard the risk of a rare and exceptional post-transition FtM pregnancy as a justification of the policy.[52]

35. The Commissioner having failed to demonstrate that the policy on which his refusals of Q and Henry Tse's applications were based was no more than reasonably necessary to accommodate the legitimate concerns and justify the interference with the applicants' privacy rights, the policy failed the test of reasonable necessity and was therefore disproportionate. The CFA held that it was unnecessary to go on to consider the fourth step of the proportionality analysis, as to whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual. Nonetheless, the CFA noted that, had it been necessary to consider the question, the pursuit of the societal interest did result in an unacceptably harsh burden on Q and Henry Tse.[53]

36. Q and Henry Tse's appeals were therefore allowed and each was granted an order quashing the Commissioner's refusal decision and a declaration that the Commissioner's policy was unconstitutional. However, the CFA left it to the Commissioner to reconsider his policy anew and decide if, under such a revised policy, Q and Henry Tse should be permitted to change their gender markers on their HKIDs. It is difficult to see why such a change of gender marker should not be accommodated within any new policy to be devised by the Commissioner. In this context, it is critical to note that the gender marker on a HKID does not signify recognition of the holder's sex as a matter of law. The case was limited to a challenge to the policy concerning correction of a gender marker on an identification document not affecting the legal status of that person. The appeal did not give rise to complications about the relationship of inter-linked legislation

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51 *Ibid*. at [79]-[96].
52 *Ibid*. at [97]-[102].
53 *Ibid*. at [104]-[107].

across different contexts as would arguably be the case if it had concerned the question of gender recognition generally.[54]

Two other cases

37. Apart from *W* and *Q*, two other cases concerning transgender person's rights have reached the courts in Hong Kong.

38. In *Navarro Luigi Recasa v The Commissioner of Correctional Services and Anor* (*Recasa*),[55] the Court of First Instance heard a judicial review of various decisions relating to the detention in prison, and body searches of, a pre-operative MtF transgender person. Recasa was born biologically male but suffered from gender dysphoria and identified as female. As a MtF transgender person, she had been receiving hormone replacement treatment since the age of 12 and had breast argumentation surgery at 19. Despite having an outwardly female appearance and feminine physique, Recasa had not undergone any SRS and retained male genitalia intact.

39. She entered Hong Kong as a visitor and was subsequently convicted of various drug offences and breach of condition of stay, and sentenced to 20 months' imprisonment. Both before and after the conviction, she was detained by the Commissioner of Correctional Services (CCS) in male custodial facilities and subject to detention conditions which kept her effectively in a single cell and unable to mix with or participate in activities with other female inmates. She was also subjected to strip and body cavity searches by male officers following the respective decisions of the Commissioner of Police and the CCS.

40. Recasa brought judicial review proceedings to challenge the decisions alleging that they were discriminatory and in breach of the SDO and the Disability Discrimination Ordinance (DDO)[56] and infringed various fundamental rights protected under the Hong Kong Bill of Rights and the Basic Law. She also challenged the CCS's delay in providing her with hormone replacement therapy she had requested, alleging that the delay amounted to direct disability discrimination under the DDO. She was only partially successful in her judicial review.

41. The Court of First Instance dismissed Recasa's complaints of discrimination regarding her detention in male custodial facilities and confinement in a single cell. The court found that the relevant comparator in the same or not materially different circumstance (i.e. a FtM pre-operative

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54 *Ibid.* at [3], esp. footnote 3, and [61].
55 [2018] HKCFI 1815, [2018] 4 HKLRD 38.
56 Disability Discrimination Ordinance (Cap.487).

transgender person who retains all the genitalia of a biological female) would have been put in a female correctional institution rather than a male one, and would equally be subject to the same or similar detention conditions applied to Recasa. The court also found that Recasa was not assigned to a female prison because she had all her male genitalia intact, but was instead assigned to a male wing with protective measures because of the presence of feminine features that might make her vulnerable to abuse and harassment from other male prisoners. As such, Recasa was not subject to cruel, inhuman or degrading treatment, and her right to privacy was not unjustifiably infringed.

42. Her challenge to strip and body cavity searches by male officers failed on the facts. However, it was held that the objective intention of the provisions of the applicable regulations was that police and prison officers were to be placed in a position to identify, by reference to some objective means with clarity and certainty and within a short time, whether a person to be searched was a man or a woman in order to ensure strict compliance with the regulations so that such searches should be conducted by an officer of the same sex as the person in custody. Since those provisions were only intended to be a general rule, a discretion was to be exercised by police and prison officers as to how a custody search was to be properly and lawfully conducted in light of all the relevant circumstances and having regard to the individual circumstances of the detained person. The court therefore held that consideration should be given to the provision of a guideline by the authorities on the issue of searches of pre-operative transgender persons in custody.

43. Recasa succeeded in her challenge to the delay in provision of hormone replacement therapy on the ground that she should have been referred to a visiting consultant psychiatrist earlier and that it was *Wednesbury* unreasonable in the circumstances for the CCS to have referred Recasa to the visiting consultant psychiatrist only at a very late stage.

44. The *Recasa* decision is one which turned largely on its special facts. As will be seen below, however, where to detain transgender persons in custody, in particular MtF transgender persons who might be a threat to other female prisoners, is a vexed question even in jurisdictions with comprehensive legislative gender recognition schemes.

45. One further case concerning the rights of a transgender person that has been argued before the courts of Hong Kong is *K v Secretary for Environment and Ecology & Secretary for Justice* (*K*).[57] K is a FtM transgender person who is currently undergoing real life experience as a male. However, since he has not

[57] HCAL 646/2022; the hearing took place on 12 January 2023 and judgment has been reserved.

undergone full SRS, the gender marker on his HKID remains female. K previously asked the Secretary for Environment and Ecology to grant him access to male public toilets based on his medical certificate which certifies that he has gender dysphoria and that he needs to use male toilets as part of his real life experience treatment. K's request was refused, on the basis that his HKID still shows him to be female.

46. The relevant regulation provides that "no female person, other than a child under the age of 5 years who is accompanied by a male relative or male nurse, shall, in any public convenience, enter any part thereof which is allocated for the use of male persons".[58] K brought judicial review proceedings to challenge that regulation, contending that it should be construed to include a FtM transgender person who has not undergone full SRS. It was argued that the regulation violated his right to equality and privacy under the Hong Kong Bill of Rights and that the encroachment was disproportionate. It is not known how the argument on proportionality was put and judgment is still pending. The comments in the CFA's judgment in *Q* concerning alleged external incongruence between a person's anatomy and the gender marker on their HKIDs may have some relevance.[59]

The IWG comparative study

47. As part of its study for its consultation document, the IWG reviewed the legislation, schemes and case law in over 100 overseas jurisdictions, as well as standards set by international bodies. It carried out a detailed comparative study as part of its consultation paper and noted "an accelerating trend towards establishing formal mechanisms to recognise a transgender or transsexual person's acquired gender".[60]

48. The IWG noted there were different approaches in overseas jurisdictions regarding gender recognition, including differences as to the form of the scheme (statutory, administrative or judicial), the pre-conditions for granting recognition and the legal implications post-recognition. In summary, the IWG broadly distilled four different approaches:[61]

(1) A self-declaration model, under which a person would be able to change their gender identity by submitting a statutory declaration self-identifying in a particular gender, without any medical

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58 Public Conveniences (Conduct and Behaviour) Regulation (note 32), s.7(2).
59 *Q* (note 2) at [89]-[90].
60 IWG, *Executive Summray of Consultation Paper: Part 1 Gender Recognition* (June 2017) at [21].
61 *Ibid.*at [24].

intervention (whether surgical or hormonal), personal status restrictions (such as minimum age) or any procedural complexity.

(2) A surgery-free but otherwise detailed model requiring a medical diagnosis of gender dysphoria or transsexualism and proof of real life test. The UK's GRA was cited as an example of this model.

(3) A surgery-requiring model, but fewer other medical evidential requirements, though including certain other restrictions such as exclusion on the basis of marital status.

(4) A model including a wide range of requirements such as surgery, medical diagnosis of gender dysphoria, and exclusions such as marital status.

49. There have been considerable developments in the context of gender recognition in many of the jurisdictions studied by the IWG in the six years since the publication of its consultation document. In the jurisdictions of Australia, Canada and New Zealand, for example, which have gender recognition schemes, there would appear to have been a trend towards greater flexibility in the requirements and conditions for recognition in an experienced gender. In particular, there is less emphasis on physical conformity of genitalia through surgery as a condition of recognition of the acquisition of an experienced gender.

50. In broad summary, of the six states of Australia and the Australian Capital Territory (ACT) and Northern Territory, it would appear that two adopt a self-declaration model (Tasmania and Victoria), four adopt a surgery-free but otherwise detailed model (ACT, Northern Territory, South Australia and Western Australia) and two adopt a surgery-requiring model (New South Wales and Queensland). A change of gender registered under the relevant legislative scheme generally has effect for all legal purposes.[62] The legislative schemes of five states and territories (ACT, Northern Territory, South Australia, Tasmania and Victoria) permit a change of sex other than male or female to be registered. In New South Wales, it is open to the Registrar to register a person's change of sex to "non-specific".[63] The schemes in the other two jurisdictions (Queensland and Western Australia) do not appear currently to provide for registration of change of sex other than male or female. However, legislative reform is currently underway in Queensland to replace its surgery-requiring model with a self-

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62 E.g. Births, Deaths and Marriages Registration Act 1995 (NSW), s.32I(1): "A person the record of whose sex is altered under this Part is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as so altered."

63 *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11, (2014) 306 ALR 585.

declaration model, which will also allow a person to nominate a sex descriptor of their choice.[64]

51. It would appear that the majority of provinces and territories of Canada have adopted a self-declaration model of gender recognition (Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Quebec and the Yukon Territory). Of the others, most are surgery-free models requiring supporting statements from medical professionals (Manitoba, New Brunswick, Ontario, Prince Edward Island and Saskatchewan). It would appear that the change of gender pursuant to the respective legislative schemes is recognised for all legal purposes.[65] There is also the option to choose the gender marker "X" for those persons who do not wish to adopt a binary gender definition of male or female.[66]

52. In New Zealand, the Births, Deaths, Marriages and Relationships Registration Act 2021 (NZ Act 2021) is understood to be due to come into effect on 15 June 2023.[67] It introduces a self-declaration model of gender recognition for the amendment of the sex recorded on birth certificates. However, s.79(2) of the NZ Act 2021 provides that the sex record on a person's birth certificate is not conclusive of a person's sex or gender at law and that "[a]ny individual, private sector agency, or public sector agency" required to ascertain a person's sex or gender can refer to other information than that contained in the birth certificate. It is also noteworthy that, although s.24 of the NZ Act 2021 refers to changing a person's nominated sex to "any other sex or gender specified in regulations", it appears to remain an open question whether, under the NZ Act 2021 or relevant regulations, it will be open to a person to record a gender other than male or female, such as intersex.[68]

53. As one might expect, in those jurisdictions which have legislative gender recognition schemes, different legislative models have been adopted for the circumstances and conditions required to be fulfilled in order for a change of gender to be recognised. These conditions have, from time to time, addressed matters such as the degree of medical treatment and intervention necessary, restrictions on marriage, and age related conditions such as a requirement for consent of a parent or guardian to treatment. Of significance, also, is the legal

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64 Births, Deaths and Marriages Registration Bill 2022, cl.39.

65 E.g. Vital Statistics Act, RSBC 1996, C479, s.27(5): "A birth certificate issued after the making of an amendment under this section must be prepared as if the person's original birth registration had been made containing the sex designation as amended."; see also Government of Ontario, "Changing your sex designation on your birth registration and birth certificate" at https://www.ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate.

66 E.g. Civil Code of Quebec, Art.70.1; Government of Quebec, "Change of sex designation" at https://www.etatcivil.gouv.qc.ca/en/change-sexe.html#effets; Vital Statistics Act, PEI, s.12(1).

67 Births, Deaths, Marriages and Relationships Registration Act 2021 s.2(1)(c); *Registrar-General of Births, Deaths and Marriages v Nelson* [2022] NZFC 3065 at [41].

68 *Ibid*. at [89].

effect of such recognition and the question of whether anything other than a binary gender classification is permitted in the legislation of the relevant jurisdiction. In addition, it is relevant to consider whether the laws of a particular jurisdiction permit same-sex marriage, as a consequence of which one of the issues presented by a change of gender by a person in a subsisting marriage does not have the same significance, since the option exists of the marriage continuing if the parties to it consent.

54. Like Hong Kong, Singapore does not have gender recognition legislation. Following a recent Court of Appeal decision,[69] the Singapore Parliament repealed the law criminalizing consensual sexual conduct between males.[70] At the same time, a constitutional amendment was passed to protect the legal definition of marriage as between a man and a woman from legal challenge.[71] Pursuant to an administrative policy, it is possible for a transgender person to change the gender recorded on their National Registration Identity Card (NRIC) if they have undergone a sex reassignment procedure.[72] Under the applicable law determining the gender of a person for the purposes of marriage, the gender shown on a NRIC is determinative and a person who has undergone a sex re-assignment procedure is identified as being of the sex to the which the person has been re-assigned.[73] A person in the position of W in Singapore would appear, therefore, to be able to marry in their acquired, experienced, gender. Moreover, in Singapore, an amendment to the Penal Code in 2007 introduced a new provision legally recognising, for sexual offences, the reassigned sex of transgender persons who have undergone "a sex reassignment procedure"[74] and stipulating that references to a part of the body for such offences include references to a part which is surgically constructed, in particular through a sex reassignment procedure.[75]

Litigating in the absence of a legislative gender recognition scheme

55. The courts in Hong Kong will continue to have to deal with legal issues arising from transgenderism regardless of whether there is a legislative gender recognition scheme or not. The extra-judicial comments of Lord Reed, quoted in *W*,[76] are apposite:

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69 *Tan Seng Kee v Attorney General* [2022] SGCA 16.

70 Penal Code (Cap.224, 2008 Rev Ed), s.377C: for sexual offences, references to a part of the body stated in the provisions relating to sexual offences include references to a part which is surgically constructed, in particular, through a sex reassignment procedure; further, a person who has undergone a sex reassignment procedure shall be identified as being of the sex of which that person has been reassigned.

71 Constitution of the Republic of Singapore, Art.156.

72 National Registration Regulations, r.10 provides that a person registered under the National Registration Act (Cap.201) in possession of an NRIC containing particulars which are known to be incorrect (other than his address) should report this within 28 days and apply for a replacement.

73 The Women's Charter 1961, s.12(3).

74 Penal Code (Amendment) Act 2007, s.71, introducing Penal Code (Cap.224), s.377C(c)(ii).

75 Penal Code (note 74), s.377C(b).

76 *W* (note 36) at [128].

> "… for the law to ignore transsexualism, either on the basis that it is an aberration which should be disregarded, or on the basis that sex roles should be regarded as legally irrelevant, is not an option. The law needs to respond to society as it is. Transsexuals exist in our society, and that society is divided on the basis of sex. If a society accepts that transsexualism is a serious and distressing medical problem, and allows those who suffer from it to undergo drastic treatment in order to adopt a new gender and thereby improve their quality of life, then reason and common humanity alike suggest that it should allow such persons to function as fully as possible in their new gender. The key words are 'as fully as possible': what is possible has to be decided having regard to the interests of others (so far as they are affected) and of society as a whole (so far as that is engaged), and considering whether there are compelling reasons, in the particular context in question, for setting limits to the legal recognition of the new gender."[77]

56. *W* was an important development in the law in Hong Kong, being the first case in which a transgender person was recognised in a different, experienced, gender to that assigned at birth. Although the decision did not address her status for all legal purposes, her designation as female for the purposes of marriage was a substantial recognition of her experienced gender in place of her assigned gender. She had already been issued with a HKID which showed her gender as female, so the practical issues which affected Q and Henry Tse did not affect her.

57. In the light of the CFA's earlier decision *W*, the decision this year in *Q* was relatively more straight forward. That decision only related to a gender marker on an identity document which did not affect the legal status of the holder. *Recasa* was a decision on its special facts but it concerned an area in which transgenderism has given rise to considerable controversy, namely the security of female only spaces and intrusive body searches by a member of the opposite sex. The question of gender-specific only spaces also arises in the context of the public toilet case.

58. As can be seen, therefore, so far the experience of Hong Kong courts has been to deal with transgender issues on a case-by-case basis as they arise. This is inevitable and was alluded to in *W* when noting the desirability of legislative intervention and that:

> "If such legislation did not eventuate, it would fall to the courts, applying constitutional principles, statutory provisions and the rules of common law, to decide questions regarding the implications of recognizing an individual's acquired gender for marriage

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[77] Robert Reed, "Splitting the Difference: Transsexuals and European Human Rights Law" (lecture given to Anglo-German Family Law Judicial Conference in Edinburgh, September 2000), at p.50, cited in *Bellinger v Bellinger* [2001] EWCA Civ 1140, [2002] 2 WLR 411 at [159]. The paper was subsequently published as: Robert Reed, "Transsexuals and European Human Rights Law" (2005) 48(3-4) Journal of Homosexuality 49, p.81.

> purposes as and when any disputed questions arise. That would not, in our view, pose insuperable difficulties."[78]

59. Whilst it is true that this does not pose insuperable difficulties (as Lady Hale and Lord Reed have said, in a different context, "our law is used to rising to such challenges and supplies us with the legal tools to enable us to reason to a solution"[79]) it is clearly not ideal, as the CFA acknowledged when discussing the test of who qualifies as a woman for marriage purposes. It was observed that:

> "Two main approaches to deciding that question in the context of marriage have emerged. The first involves the formulation by judges of some test – usually involving the drawing of a line at some point in the sex reassignment process – for marking the stage at which a gender change is recognized. The second approach involves establishing a gender recognition procedure whereby each case is examined with a view to certification by an expert panel without necessarily adopting any bright line test. The latter approach can obviously only be achieved by legislation."[80]

60. It was pointed out that "[s]ome form of judicial line-drawing is probably the only feasible approach if it is left to judges to determine what the test should be" but it was acknowledged to be:

> "… an approach which has evident disadvantages. It would be highly undesirable to formulate different tests for different purposes (as suggested in the *Otahuhu* case) so that a person would only sometimes be recognized as an individual of his or her acquired gender. That is, indeed, to some extent the unsatisfactory position we have in Hong Kong at present. On the other hand, a bright line test applied universally is inevitably likely to produce hard cases in certain circumstances unless special provision is made. Moreover, as Lord Nicholls points out, drawing the line at the point where full SRS has been undertaken may have an undesirable coercive effect on persons who would not otherwise be inclined to undergo the surgery."[81]

61. The reference in the above passage to *Otahuhu* is to a decision of the High Court of New Zealand, before the enactment of a legislative gender recognition scheme, concerning the question of whether a transgender person could marry in their post-operative experienced gender.[82] The court declared that if a person had undergone surgical and medical procedures that had effectively given them the physical conformation of a person of a specified sex, there was no bar to them marrying in that specified sex. Ellis J emphasised, however, that the declaration sought was to resolve the capacity to marry only and was not intended to resolve questions arising in other branches of the law such as the criminal law and law of

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78 *W* (note 36) at [147].

79 *R (Miller) v Prime Minister (Lord Advocate intervening)* [2019] UKSC 41, [2020] AC 373 at [1].

80 *W* (note 36) at [130].

81 *Ibid.* at [136]; the reference is to Lord Nicholls speech in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 1 AC 467 at [41].

82 *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603.

succession.[83] This underlines the limited value of the case-by-case judicial line-drawing approach but it also shows there is clearly a risk of unsatisfactory fragmentation in the law by piecemeal judicial decisions as to where to draw the line in transgender cases in different contexts. This was alluded to in counsel's submissions that were adopted by Ellis J:

> "… there may need to be different criteria in respect of different circumstances, involving the sex reassignment of any one individual. ... A pre-operative transsexual who nevertheless dresses and behaves in the assigned sex may be accepted in that sex for employment and social purposes, and for documents such as driving licences. It may not be appropriate for such a person whose genitals do not correspond with the sex of assignment to be able to marry in that sex."[84]

62. In other jurisdictions which now have legislative gender recognition schemes, the courts were previously also faced with the same need to draw lines as to when a transgender person should be regarded as having completed the process of transition into their experienced gender for a particular purpose and in particular to consider the question of whether the completion of SRS was necessary. *Otahuhu*, discussed above, is an example of such a decision in New Zealand in the context of marriage. In Australia, in *R v Harris & McGuiness*,[85] the New South Wales Criminal Court of Appeal had to decide this question, in respect of two transgender persons accused of certain conduct which, if performed by a male person, was an offence. The court decided that one of the transgender accused, who had undergone full SRS from MtF, was to be regarded as female, whereas the other accused, who was a pre-operative MtF transgender person, remained male. A similar conclusion was reached in the context of social security law, in *Secretary, Department of Social Security v SRA*,[86] where the Federal Court of Australia considered the question of whether a pre-operative MtF transgender person could qualify for a pension under the relevant social security legislation as the wife of an invalid pensioner.

63. In the context of marriage, in *Attorney-General for the Commonwealth v Kevin and Jennifer*,[87] the Full Court of the Federal Family Court of Australia had to decide whether a post-operative FtM transgender person should be able to marry as a man under the relevant Commonwealth marriage statute. An earlier decision, *In the Marriage of N and H*,[88] concerned the rights of a MtF transgender parent who sought access to the child of his former marriage.

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83 *Ibid*. at p.607.
84 *Ibid*. at pp.604, 616-617.
85 (1988) 17 NSWLR 158.
86 (1993) 118 ALR 467, (1993) 31 ALD 1.
87 [2003] FamCA 94, (2003) 172 FLR 300.
88 (1982) 45 ALR 419.

64. These selective examples demonstrate that courts are accustomed to making decisions in relation to transgender rights in the absence of a legislative gender recognition scheme. Indeed, in jurisdictions where there is still no legislative scheme, courts will necessarily have to continue to do so. However, judicial line-drawing is far from perfect and in his speech in *Bellinger v Bellinger*, Lord Nicholls observed:

> "Your Lordships' House is not in a position to decide where the demarcation line could sensibly or reasonably be drawn. Where this line should be drawn is far from self-evident. The antipodean decisions of *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 and *Re Kevin (validity of marriage of transsexual)* [2001] Fam CA 1074 and App. EA 97/2001 have not identified any clear, persuasive principle in this regard. Nor has the dissenting judgment of Thorpe LJ in the present case. Nor has the decision of the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 EHRR 18. Nor is there uniformity among the thirteen member states of the European Union which afford legal recognition to a transsexual person's acquired gender. The pre-conditions for recognition vary considerably.
>
> Further, the House is not in a position to give guidance on what other pre-conditions should be satisfied before legal recognition is given to a transsexual person's acquired gender. Some member states of the European Union insist on the applicant being single or on existing marriages being dissolved. Some insist on the applicant being sterile. Questions arise about the practical mechanisms and procedures for obtaining recognition of acquired gender, and about the problem of people who 'revert' to their original gender after a period in their new gender role." [89]

65. Lord Nicholls referred to the difficulty of maintaining coherence and consistency across different areas of law in adopting the case-by-case approach, noting that:

> "… the recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender. These areas include education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulations, sport, the needs of decency, and birth certificates. Birth certificates, indeed, are one of the matters of most concern to transsexual people, because birth certificates are frequently required as proof of identity or age or place of birth. When, and in what circumstances, should these certificates be capable of being reissued in a revised form which does not disclose that the person has undergone gender reassignment?"[90]

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89 *Bellinger v Bellinger* [2003] UKHL 21 (note 81) at [43]-[44].

90 *Ibid*. at [45].

Issues arising despite the enactment of a gender recognition scheme

66. In its consultation paper, the IWG raised fundamental questions: should Hong Kong have a gender recognition scheme at all? If so, what should be the medical requirements for gender recognition including any necessity for surgery or the permanence or irreversibility of any transition and the recognition of SRS performed overseas? What non-medical requirements for gender recognition might be incorporated such as a minimum age requirement or condition as to marital or parental status? Should any gender recognition scheme adopted be administrative or legislative and who should be the decision-making authority? Should it be permissible to alter a birth certificate and how might gender history be protected? Since no follow up to the IWG consultation paper has yet been published, the views of any respondents to those questions have not been made public.

67. In jurisdictions which have adopted gender recognition schemes, these questions have been addressed and answered in different ways. There is no uniform approach in jurisdictions around the world and this is a natural consequence of the complexity of the issues raised. But notwithstanding the existence of gender recognition schemes in many jurisdictions, it remains the case that courts in those jurisdictions continue to have to deal with transgender issues, albeit in the context of their applicable legislative schemes. Unsurprisingly, the adoption of a gender recognition scheme is not a panacea for all the difficult questions that arise in the context of gender and the law. Indeed, as discussed below, the issues in this context extend to matters beyond gender dysphoria and transgenderism.

Statutory interpretation

68. An obvious source of litigation in jurisdictions with statutory gender recognition schemes concerns the interpretation of the applicable legislative provisions. Examples of this include, in Australia, the decision of the High Court in *AB & AH v Western Australia*,[91] which concerned FtM transgender persons who had undergone sex-reassignment procedures but who each retained a female reproductive system. The issue to be decided was whether, for the purposes of the relevant statutory provisions,[92] each had the "gender characteristics" by which a person is "identified" as male. The High Court decided this on the basis that, for the purposes of the relevant act, the physical characteristics by virtue of which a person was identified as male or female were confined to external physical

91 [2011] HCA 42, (2011) 281 ALR 694.
92 Gender Reassignment Act 2000 (WA), ss.3 and 15(b)(ii).

characteristics, so that the applicants should have been issued with recognition certificates.

69. In New Zealand, a similar issue of statutory construction of a provision of its gender recognition scheme arose in *Michael v Registrar-General of Births, Deaths and Marriages* (*Michael*).[93] The Family Court had to decide the degree of medical and surgical intervention required to be undertaken by a transgender person for registration of sex on a birth certificate pursuant to the applicable legislation.[94] It was decided that the statutory requirement of "physical conformation" required "some degree of permanent physical change as a result of the treatment".[95] Subsequent decisions, *Re C-DCT*[96] and *Howe v Registrar-General of Births, Deaths and Marriages*,[97] may have further extended the circumstances in which a transgender person who has yet to undertake surgical treatment may be able to change gender.

70. Another example is the decision of the High Court of Australia in *NSW Registrar for Births, Deaths and Marriages v Norrie* (*Norrie*).[98] In that case, the High Court had to consider whether the Births, Deaths and Marriages Registration Act 1995 (NSW) (NSW Act)[99] permitted, in respect of a transgender person who had undergone a sex affirmation procedure, the registration of that person as "non-specific".

71. A very recent decision of the New South Wales Court of Appeal, *Attorney General for New South Wales v FJG* (*FJG*),[100] provides a further example of statutory construction in a "complex" case concerning the interplay between the NSW Act and the Marriage Act 1961 (Cth)[101] in respect of the correction of particulars relating to the registration of a marriage of a person who was recorded as male at the time of the marriage but who subsequently transitioned to the female gender. It was held that the NSW Act could not be construed so as to require the correction of the registration of the marriage under the NSW Act where that would lead to inconsistency with the registration of the marriage under the Marriage Act 1961. It was acknowledged that this outcome might appear anomalous or harsh but it was the unavoidable result of the process of statutory interpretation and could only be corrected by legislation.[102]

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93 [2008] NZFC 62.
94 Births, Deaths and Marriages Registration Act 1995 (New Zealand), s.28.
95 *Michael* (note 93) at [50].
96 [2012] NZFC 10036 at [14].
97 [2021] NZFC 1745.
98 [2014] HCA 11, (2014) 306 ALR 585.
99 Births, Deaths and Marriages Registration Act 1995 (NSW).
100 [2023] NSWCA 34.
101 Marriage Act 1961 (Cth).
102 *Ibid.* at [1], [2], [74] and [78].

Human rights considerations

72. Courts may also have to decide challenges to aspects of statutory gender recognition schemes on human rights grounds. An example of this is the decision of the Ontario Human Rights Tribunal in *XY v Ontario (Minister of Government and Consumer Services)*,[103] in which a ministerial decision imposing certain requirements, including "transsexual surgery", on the transgender applicant as a condition of recognising a change of gender was challenged as being discriminatory and contrary to the Ontario Human Rights Code. That decision was followed by the Court of Queen's Bench of Alberta in *CF v Alberta (Vital Statistics)*,[104] where the court held that a requirement in the applicable legislation[105] infringed the right of a MtF transgender person to equal protection and benefit of the law under the Canadian Charter of Rights and Freedoms in that it did not permit the issuance to her of a birth certificate recording her sex as female unless her anatomical sex structure was surgically changed.

Identity of decision maker

73. Legislative gender recognition schemes vary in terms not only of the legal requirements for recognition but also as to the decision maker responsible for making the relevant assessment for such recognition. In Australia, in broad terms, the primary decision maker in most states and territories is the Registrar of Births, Deaths and Marriages or the Registrar-General. Western Australia provides an exception to that general rule in that application for a gender recognition certificate is determined by a Gender Reassignment Board which must consist of its President (who must be a judge) and not more than five members, who must include (1) a medical practitioner, (2) a person who has undergone a reassignment procedure and (3) a person with experience in equal opportunities matters.[106] There remains a residual role for the courts in four states (Queensland, Tasmania, Victoria and South Australia) in relation to applications by parents or guardians for the change of a child's sex or gender identity.

74. Again, in broad terms, the jurisdictions of Canada require applications for gender recognition to be made to the Registrar or Director of Vital Statistics in the province concerned. In New Zealand, when the new self-declaration regime comes into effect, an application to amend sex records on a birth certificate will

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103 [2012] OHRTD No.715, 2012 HRTO 726, 74 CHRR D/331, Fil No 2009-01326-1 (11 April 2012).
104 (2014) ABQB 237.
105 Vital Statistics Act 2000, s.22 and Vital Statistics Act 2007, s.30.
106 Gender Reassignment Act 2000 (WA), ss.6 and 7.

be made by the applicant making the required declaration to the Registrar-General.[107]

75. Under the UK's GRA, certification is by the Gender Recognition Panel, which consists of at least one member from the legal and medical fields respectively. A recent amendment to the GRA for Scotland, the Gender Recognition Reform (Scotland) Bill, was passed by the Scottish Parliament in order to introduce a self-declaration model of gender recognition with applications being made to the Registrar-General for Scotland and to lower the age for applications. It remains to be seen if that amendment will be effective.[108]

76. Where a decision is that of a registrar or panel, a legal challenge by way of judicial review may lie. Depending on the grounds of review raised, the court's supervisory role may be more limited than where a decision on registration of a change of gender falls within the jurisdiction of the court itself.

Marriage and parentage

77. The effect of sexual reassignment on subsisting marriages may be addressed in legislative gender recognition schemes and so that question may not be problematic. But this may not be the case for the controversial question of childbirth by transitioning transgender persons who stop hormone therapy and conceive a child in their assigned, biological, gender and then complete their change of gender. Some of the processes of gender transition are reversible and the case of *R (McConnell) v Registrar General for England and Wales (AIRE Centre intervening)* (*McConnell*) provides a striking example.[109]

78. In that case, a FtM transgender person transitioned to live as a male without undergoing sterilisation and was recognised as male under the UK's GRA. He then suspended hormone treatment, became pregnant, and gave birth to a child. He challenged the government's decision to register him as the child's mother rather than its father. While the English Court of Appeal decided against the applicant, it recognised that the case involved "difficult and sensitive social, ethical and political questions".[110] The Queensland Civil and Administrative Tribunal came to a similar conclusion as in *McConnell* in the case of *Coonan v Registrar of Births, Deaths and Marriages* (*Coonan*), construing the Births,

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107 NZ Act 2021 (note 67), s.24.

108 The UK Government has exercised its powers under s.35 of the Scotland Act 1998 to prevent the bill from being proposed for Royal Assent: see House of Commons Library, "Section 35 of the Scotland Act and vetoing devolved legislation" at https://commonslibrary.parliament.uk/section-35-of-the-scotland-act-and-vetoing-devolved-legislation/.

109 [2020] EWCA Civ 559, [2021] Fam 77.

110 *Ibid*. at [62].

Deaths and Marriages Registration Act 2003 (Qld)[111] as requiring the FtM transgender applicant to be registered as mother of the child to which he gave birth.[112] More recently, a similar case in India concerning a transgender couple who have conceived a child has attracted media attention.[113]

79. How courts in the jurisdictions participating in this Colloquium would deal with this issue is a matter of some interest. The question requires the rights of a person who has undergone sexual reassignment to be weighed against the right of a child to know its biological mother.[114] It is likely that the phenomenon is rare or at least relatively unusual but the recent occurrence of that situation in India is some indication that it is far from unique.

Female safe spaces

80. A commonly encountered subject of real practical concern is that of the use by MtF transgender persons of female only spaces. Two such spaces may be considered as examples, namely toilets and prisons.

81. Toilets are pre-eminently places of privacy where gender segregation is the norm. The entry into such places of transgender persons may cause alarm and distress on the part of other users. As a (possibly risky) generalisation, that alarm and distress is more likely to be experienced by a woman when encountering a MtF transgender person in a female toilet than in the converse situation, although the case of *K*, referred to above, in fact raises that converse issue.

82. Of more serious concern is the question of where to accommodate MtF transgender persons who are in custody, especially where such persons have been charged with or convicted of serious crimes of violence or are otherwise a threat to other women. There is clearly a balance to be struck between the right of a transgender woman to be recognised in her experienced gender and the privacy or safety of other biological women. The case of Isla Bryson has been referred to above. Following that case, a review of transgender cases was conducted by the Scottish Prison Service and it was decided that transgender prisoners would be initially accommodated according to their birth sex pending an assessment of whether it was more appropriate to accommodate them in a male or female prison.

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111 Births, Deaths and Marriages Registration Act 2003 (Qld).

112 [2020] QCAT 434.

113 Paval is a MtF transgender woman and Zahad a FtM transgender man; after both stopped hormone therapy mid-transition, Zahad conceived and gave birth to a child in Feburary this year. See BBC, "Kerala: The transgender couple whose pregnancy photos went viral" at https://www.bbc.com/news/world-asia-india-64495574.

114 *Coonan* (note 112) at [79].

83. In England and Wales, in light of the Isla Bryson controversy, the government's policies of allocating transgender women with a history of sexual or violent offences against women into a women's prison have been revised. The previous policies had been challenged but were held not to be disproportionate interferences with the rights of a biological woman prisoner.[115] In February 2023, regulations in England and Wales came into force to restrict transgender women with male genitalia, or who are sex offenders, from being remanded in a women's prison.[116] The number of transgender prisoners these regulations may affect might be thought to be relatively small.[117]

84. In this context, there is also a decision of the Federal Court of Canada concerning an application for interim injunctive relief arising in the context of a MtF transgender prisoner's request to be transferred from a man's prison to a women's prison.[118] It was held that the refusal to transfer her constituted *prima facie* discrimination based on gender identity or expression and that this was not justified by the government. The court concluded that, even though the prison service would have to take special measures to manage the risk posed by the transgender prisoner, the evidence did not show this would result in undue hardship. On the contrary, being either exposed to threats or placed in administrative segregation constituted irreparable harm for the transgender prisoner and that harm overcame the inconvenience that could result from her transfer to a women's institution.[119] A subsequent policy document issued by Correctional Service Canada updates certain procedural changes addressing the needs of the gender diverse offender population in Canada, covering intake, transfer, and other gender-informed measures such as showers and toilets, accommodation and clothing, and the privacy of gender information.[120]

85. The contrast between the way this sensitive issue has been addressed in Scotland, England and Wales and Canada, shows the potential for diverging approaches.

Confidentiality of gender history

86. Given the nature of transgenderism, the gender history of a transgender person is a matter of confidential medical record. But there will also be other

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115 *R (FDJ) v Secretary of State for Justice* [2021] EWHC 1746 (Admin), [2021] 1 WLR 5265.

116 GOV.UK, "Update on changes to transgender prisoner policy framework" at https://www.gov.uk/government/news/update-on-changes-to-transgender-prisoner-policy-framework.

117 As of the year ended March 2022, there were approximately 80,000 prisoners in England and Wales of whom 43 were transgender women and 187 transgender men: see BBC, "Ban on trans women in female prisons extended - Raab" at https://www.bbc.com/news/uk-64781360.

118 *Jamie Boulachanis v The Attorney General of Canada* [2019] FC 456.

119 *Ibid.* at [3].

120 Correctional Service Canada, "Commissioner's Directive 100 Gender Diverse Offenders" at https://www.csc-scc.gc.ca/politiques-et-lois/005006-100-cd-en.shtml.

records which include gender-specific information concerning a transgender person. The confidentiality of such information is generally protected under privacy laws. That will be the case whether there is a legislative gender recognition scheme or not.[121] In Hong Kong, for example, the right to privacy under article 14 of the Hong Kong Bill of Rights or the protection of personal data under the Personal Data Privacy Ordinance would offer a measure of protection to a transgender person in respect of records disclosing their sexual identity.[122] However, are there circumstances in which there might be a need to require disclosure of a change of gender or in which an infringement of the right to privacy in this respect might be justified? In Hong Kong, such questions might be answered by the application of the proportionality analysis. How this issue has been or might be addressed in those jurisdictions with statutory gender recognition schemes is a matter of some interest. In the UK, for example, the Gender Recognition Disclosure of Information (England, Wales and Northern Ireland) (No 2) Order[123] prescribes certain circumstances in which disclosure of gender history will not be an offence under s.22 of the GRA (which prohibits the disclosure of the fact a person has made an application for a gender recognition certificate).

87. As well as keeping gender history confidential, there is a related issue of when circumstances might exist that impose a duty on a person or organisation to correct gender-specific information about a transgender person after their acquisition of a different gender. The recent case of *FJG* in New South Wales could be seen as an attempt to impose such a duty on the Registrar by requiring a correction of the gender history of the applicant MtF transgender woman by altering the entry in the marriage registry recording her former name and describing her as "bridegroom". But other examples can be postulated, such as academic transcripts and employment records.

Intersex and non-binary gender markers

88. Although not strictly a transgender issue, how to categorise persons who are intersex, meaning that they have indistinct or conflicting biological, genital or chromosomal characteristics, is a related and difficult question. So, too, is the issue of whether non-binary gender markers should be permitted to be chosen by those who do not identify as either male or female.

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121 In New Zealand, an application for information about a named person may be made under the NZ Act 2021 (note 67), but there are provisions limiting the disclosure of certain restricted information including name-change and sex information: see ss.106-109.

122 Personal Data (Privacy) Ordinance (Cap.486).

123 The Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No. 2) Order 2005.

89. In *R (Elan-Cane) v Secretary of State for the Home Department* (*Elan-Cane*),[124] the UK Supreme Court considered the issue of whether the UK Passport Office was under an obligation to issue a passport bearing a gender marker "X" to the applicant, who was born with female physical sexual characteristics but identified as having no gender. The Passport Office's policy was only to issue passports with the gender indicators of male or female. The claim for breach of the applicant's privacy rights and discrimination failed.[125]

90. The question raised in the appeal was not one relating to transgenderism. As Lord Reed explained in his judgment for the Supreme Court:

> "The term 'transgender' can be used in a wider sense, as it is by the intervener, Human Rights Watch, so as to include persons in the position of the appellant. The term is used in this judgment in the narrower sense in which it has been used in the European case law and in most of the documentation to which I shall refer. So used, it describes those individuals who have acquired a gender, either male or female, which is different from the one recorded at birth. Such persons are not non-gendered. In the United Kingdom, they can obtain a passport which conforms to their acquired gender on the production of a gender recognition certificate, a re-registered birth certificate showing their acquired gender, or a doctor's letter confirming that their orientation to their acquired gender is likely to be permanent."[126]

91. The Supreme Court concluded that the Passport Office's policy did not breach the applicant's privacy rights or constitute unjustified discrimination. In his judgment, Lord Reed said:

> "As was explained in evidence, there is no legislation in the United Kingdom which recognises a non-gendered category of individuals. On the contrary, legislation across the statute book assumes that all individuals can be categorised as belonging to one of two sexes or genders (terms which have been used interchangeably). Some rights differ according to whether a person is a man or a woman: for example, rights of succession to hereditary titles. There are criminal offences that can only be committed against persons of a particular gender: for example, female genital mutilation. There is a raft of legislation which assumes that only a woman can give birth to, or be the mother of, a child, including legislation relating to maternity rights and benefits, health provision and fertility treatment, and nationality. The legislation governing the registration of births requires the sex of children to be recorded. Legislation relating to marriage and civil partnership (including legislation permitting same sex marriages) assumes that everyone is either a man or a woman. The Gender Recognition Act 2004, enacted following the judgment of the European court in *Goodwin v United Kingdom*, likewise assumes that all individuals belong to one of two genders, albeit not necessarily the gender recorded at birth. Equality legislation protects people from discrimination if it arises from their being a man or a woman.

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124 [2021] UKSC 56, [2022] 2 WLR 133.

125 Under Article 8 (Right to respect for private and family life) and Article 14 (Prohibition of discrimination) of the European Convention on Human Rights as implemented in the UK under the Human Rights Act 1998.

126 *Elan-Cane* (note 124) at [7].

> A binary approach to gender also forms the basis of the provision of a wide variety of public services. The prison estate, for example, is divided into male and female prisons. Hospitals have wards where patients can only be of a single sex. Local authorities may fund rape crisis centres or domestic abuse refuges which offer their services only to women. Many schools only admit pupils of a particular sex. Much of this is underpinned by, or permitted by, legislation."[127]

92. The decision in *Elan-Cane* turned at least in part on the view taken by the Supreme Court as to the limited need in the UK to use a passport as an identity document and the common use of other documents, such as a birth certificate or driving licence, for that purpose. Other considerations, including national security, costs and coherence of the administrative and legal practices within the domestic system ultimately led to the conclusion that considerations relating to the applicant's interests in being issued with an "X" passport were outweighed by the public interest. However, Lord Reed observed that:

> "… the question in this case raises sensitive moral and ethical issues, especially in so far as it impinges on the broader question of gender determination on the basis of an individual's feelings or choice, regardless of biological sex and physiology, and unconfined by the categories of male and female."[128]

93. It is a fact, though, that there are non-gendered people in the world and international practice shows that a number of jurisdictions (including, of the jurisdictions participating in this Colloquium, Australia, Canada and New Zealand) permit passports to bear an indicator other than male or female.[129] Thus, "the questions whether other gendered categories should be recognised beyond male and female, including a non-gendered category, and if so, on what basis such recognition should be given, raise complex issues with wide implications."[130]

94. In Australia, the registration of a change of a person's sex to the category of "non-specific" was raised in *Norrie*, referred to above. The High Court of Australia decided, as a matter of statutory interpretation, that the relevant New South Wales provision admitted of a possibility that a person might be registered as something other than male or female. It held, in particular, that:

> "The Act does not require that people who, having undergone a sex affirmation procedure, remain of indeterminate sex – that is, neither male nor female – must be registered, inaccurately, as one or the other. The Act itself recognises that a person may

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127 *Ibid*. at [52]-[53].
128 *Ibid.* at [61].
129 *Ibid*. at [16]-[19].
130 *Ibid*. at [54].

> be other than male or female and therefore may be taken to permit the registration sought, as 'non-specific'."[131]

95. This conclusion was driven by two principal factors, namely (1) the definition of "sex affirmation procedure" in the legislation, which acknowledged the possibility of "ambiguities" in a person's sex, and (2) the context of the introduction of the legislative provisions in issue, which showed an expressed legislative recognition of the existence of persons of indeterminate sex. It was not regarded as a sufficient objection that confusion would be caused by construing the act as recognising more than two categories of sex:

> "The difficulty foreshadowed by this argument could only arise in cases where other legislation requires that a person is classified as male or female for the purpose of legal relations. For the most part, the sex of the individuals concerned is irrelevant to legal relations. In this regard, s 8(a) of the Interpretation Act 1987 (NSW) provides that '[i]n any Act or instrument ... a word or expression that indicates one or more particular genders shall be taken to indicate every other gender'. The chief, perhaps the only, case where the sex of the parties to the relationship is legally significant is marriage, as defined in the fashion found in s 5(1) of the Marriage Act 1961 (Cth)."[132]

Concluding thoughts

96. It is unsatisfactory that issues relating to transgenderism are left to be dealt with by the courts on a case-by-case basis. Some of the issues raised are complex and involve difficult social, moral and ethical questions more suitably addressed by legislation. Decisions made by courts are, for the most part, limited to the facts of the cases before them and the precedential value and ambit of any judgment will be similarly limited. There is inevitable delay and significant costs implications in litigating issues, especially to final appellate court level. There can be little doubt that legislative intervention is preferable to piecemeal decision-making. The number of jurisdictions that have legislative gender recognition schemes would seem to point strongly to this conclusion.

97. However, it is apparent that, even with the enactment of gender recognition schemes, there remain issues for court decision. Questions of statutory construction and constitutional review are obvious categories of potential litigation. It would be instructive to learn of any distinct themes or common problems that have arisen in jurisdictions with legislative schemes. The extent of surgical intervention required for the recognition of a change of gender – in particular, the trend towards no longer insisting on such surgery for recognition of a change of gender – seems to be a theme common across jurisdictions whether

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131 *Norrie* (note 98) at [46].
132 *Ibid.* at [42].

with or without legislative schemes (compare *AB & AH v Western Australia*, for example, with *Q*).

98. Continued fertility post-transition and the potential reversibility of medical procedures present other practical issues of considerable complexity. These may ultimately be resolved as questions of statutory construction: in *McConnell*, for example, the English Court of Appeal held that the provision of the GRA governing parenthood (s.12) created an exception to the rule in the provision governing the effect of a full gender recognition certificate (s.9), so that a FtM transgender person who gave birth to a child remained its mother. How is this issue addressed in the legislation of the jurisdictions represented at this Colloquium?

99. Separately, are there any respects in which legislative schemes have been deficient or less than efficient in providing solutions to the difficult questions that transgenderism raises? What is the most appropriate age limit for self-declaration schemes? Should the age limit be different depending on whether a medical diagnosis of gender dysphoria is a condition of a change of gender? Do self-declaration gender recognition schemes pose too great a risk to any gender-specific only spaces? Apart from prisons and toilets, what other areas might require special protection?

100. Finally, what particular future issues might arise in the context of gender and the law? Just as courts cannot avoid dealing with issues arising from transgenderism, what other aspects of gender might give rise to legal issues? Is there a need to provide recognition for non-specific gender categorisation? What consequential problems might arise from such recognition?

101. It would be illuminating to hear the views of those participating in this Colloquium on these and related questions.

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