



**Submission to Bills Committee on Marriage (Amendment) Bill 2014 – Part 1**

**12 April 2014**

**IDENTITY RECOGNITION WITHOUT THE KNIFE: TOWARDS A GENDER  
RECOGNITION ORDINANCE FOR HONG KONG'S TRANSSEXUAL PEOPLE<sup>1</sup>**

**Sam Winter<sup>2 3</sup>**

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**Introduction**

In 2004 this journal published an article (entitled “Time for change”) calling for Hong Kong Government to enact legislation that would offer opportunities for “transsexual and other transgender persons” to have their gender identity (their personally experienced sense of their gender) recognised in law.<sup>4</sup> Some years later “W”, a transsexual woman who had undergone “sex reassignment surgery” involving gonadal and genital excision and reconstruction, challenged the refusal of the Registrar of Marriages to allow her intended marriage to her boyfriend; a refusal based on the Registrar’s position that, for the purposes of marriage, “W” was legally male.<sup>5</sup> In May 2013 Hong Kong’s Court of Final Appeal (CFA) ruled in favour of “W”, thereby providing legal gender recognition, albeit to one subgroup of transsexual people (so called “post-ops”), and in one area of their lives (marriage).<sup>6</sup> The ruling has been suspended for 12 months to allow the Government to make legislative changes in response to the judgment.

The CFA noted that there may be a case for the same marriage rights to be extended to individuals who have not undergone such invasive medical procedures. The judges noted:

We would not seek to lay down a rule that *only* those who have had full gender

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<sup>1</sup> This article has been accepted for publication in the Hong Kong Law Journal in an issue in or around May 2014. It is a reworked version of a paper originally written for Professional Commons of Hong Kong, which the group subsequently submitted to various individuals and groups. Notable among these was the drafting section of the Department of Justice. At time of current writing, we have not received an acknowledgement of receipt.

<sup>2</sup> B.Sc., P.G.D.E., M.Ed., Ph.D. Associate Professor, Faculty of Education, University of Hong. Member of the Board of Directors of the World Professional Association of Transgender Health (WPATH).

<sup>3</sup> Acknowledgement to Joanne Leung for some of the analysis in Appendix Two; to Sheena Winter, solicitor of the HKSAR, for legal research; and to Jamison Green, President-Elect of the World Professional Association for Transgender Health, for editorial advice.

<sup>4</sup> R. Emerton (2004) “Time for Change: A Call for the Legal Recognition of Transsexual and other Transgender Persons under Hong Kong Law”. *Hong Kong Law Journal*, 34, 3, pp515-555. Following common usage in the media, Emerton referred to transgender persons as those experiencing “gender dysphoria”, and transsexual persons (or indeed “post-operative transsexual persons”) as those who had undergone “sex reassignment surgery” to alter their sexual anatomy. More on the use of these terms later in this paper.

<sup>5</sup> The Registrar was not asked, and did not offer an opinion, on what the Government’s view would have been in the event that “W” was lesbian and intended to marry a girlfriend. One may assume there would have been no problem.

<sup>6</sup> Hong Kong Court of Final Appeal (2013) *Judgment in the case of W and the Registrar of Marriages*. 13<sup>th</sup> May 2013. FACV #4 of 2012.

reassignment surgery involving both excising and reconstructive genital surgery, qualify. We leave open the question whether transsexual persons who have undergone less extensive treatment might also qualify.<sup>7</sup>

The CFA was aware too that there were areas of the law other than marriage in which legislative reform might be valuable,<sup>8</sup> noting that it was “entirely a matter for the legislature to decide whether such legislation should be enacted”.<sup>9</sup>

On 30 October 2013 the Hong Kong Legislative Council (LegCo) debated a motion proposed by Chan Chi Chuen, which, among other matters, urged the Government to “expeditiously enact a gender recognition ordinance to address the various legal problems arising from sex reassignment”.<sup>10</sup> The motion was defeated, albeit that three amendments, two of which had the effect of watering down the motion, were defeated too. Shortly before the motion the Government published its legislative schedule for 2013-2014. In it was an item with the title “Marriage (Amendment) Bill” (hereafter the “Bill”), introduced with the purpose of following up on the CFA decision.<sup>11</sup> LegCo’s Security Panel discussed the Government proposals on 7 Jan 2014, and shortly afterwards, on 26 February, Government briefed LegCo on the provisions of its intended Bill.<sup>12</sup> The Bill received its first reading in LegCo on March 19, A Bills Committee was formed that same month to examine the Bill’s provisions.

It would be difficult to call the Bill comprehensive or inclusive. It complies minimally with the CFA judgment by providing for gender recognition in matters of marriage, and only in those cases in which the person concerned has undergone “full sex re-assignment surgery”. It bears noting that the Bill defines exactly what full sex re-assignment surgery involves, noting that in the case of what the Government calls a “male-to-female” person (a person who in this paper is described as a transsexual woman) it involves removing the person’s penis and testes and constructing a vagina, and in the case of a “female-to-male” person (in this paper, a transsexual man) it involves removing the uterus and ovaries, and constructing a penis or some form of a penis.<sup>13</sup> These requirements (surgery to the genitals and to the gonads, with the latter involving permanent sterilisation) are the same as Security Bureau have in recent years imposed on transsexual persons applying for new ID cards. The difference of course, is that the ID card requirements are administrative in nature, whereas those proposed in the Bill would, if enacted, have the force of legislation in the matter of marriage.

To its credit, in addition to presenting the Bill, and perhaps in recognition of the fact that there are broader recognition issues that merit fuller discussion going forward, the Government has announced the formation of an Interdepartmental Working Group, chaired by the Secretary for Justice, to undertake a detailed study of gender recognition issues.

The LegCo debate, and subsequent discussion at LegCo Security Panel, was notable for confusion often evident in matters relating to transsexualism concerning what it is and is not. Views expressed were also notably devoid of any reference to what Hong Kong’s international rights obligations might be in the matter of legal gender recognition for transsexual people. This paper aims to resolve some of the confusion about transsexual

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<sup>7</sup> *Ibid.* para 124.

<sup>8</sup> *Ibid.* section H5 (paras 141-146).

<sup>9</sup> *Ibid.* para 146.

<sup>10</sup> Hong Kong Government. Legislative Council. *Official Record of Proceedings*, 30<sup>th</sup> Oct 2013. Pages 1551-1552.

<sup>11</sup> Hong Kong Government, Chief Secretary’s Office. *Legislative Programme 2013-14*. 7 Oct 2013. Annex of LC Paper No. CB(2)15/13-14(01).

<sup>12</sup> Hong Kong Government (2014). *Legislative Council Brief. Marriage Ordinance (Chapter 181). Marriage (Amendment) Bill 2014*. 26 Feb 2014. Accessed 2 Apr 2014 at [http://www.legco.gov.hk/yr13-14/english/bills/brief/b201402282\\_brf.pdf](http://www.legco.gov.hk/yr13-14/english/bills/brief/b201402282_brf.pdf).

<sup>13</sup> *Ibid.*

people, to shed light on some of the challenges they face, and to outline what international human rights conventions, as well as authoritative voices in rights and health, have to say about the subject. Particular attention is placed upon medical preconditions for legal gender recognition; preconditions that may undermine bodily integrity and free consent to medical care, represent a form of coercive medicine, and constitute cruel, inhuman and degrading treatment.

The paper presents a health and rights case for gender recognition legislation in Hong Kong that is both **comprehensive** and **inclusive**; ( a ) comprehensive in providing recognition to transsexual people in all relevant areas of life, and ( b ) inclusive in applying to a broad range of transsexual people, and without imposing unreasonable medical barriers.

Taking its lead from the CFA judgment (which devoted eight paragraphs<sup>14</sup> to a discussion of the “compelling model”<sup>15</sup> provided by the 2004 UK Gender Recognition Act (GRA),<sup>16</sup> this paper proposes a Gender Recognition Ordinance (GRO) based on the UK legislation. The reader should note that the UK GRA is written so as to extend the possibility of gender recognition opportunities in areas beyond marriage, and to a broad range of transsexual people, regardless of hormonal or surgical status.

### **Transsexual persons: resolving some confusion.**

Persons who identify as members of genders other than that society assigns to them have a range of identity labels to choose from. “Transsexual” is one. Other labels used include “transgender”, “gender variant”, “gender queer” and “trans”, though many identify simply as a man or as a woman. There is even nowadays a term “trans\*”, the asterisk highlighting the fact that there are a wide range of different identity labels out there for communities to use.<sup>17</sup> I emphasise that in this paper the case presented for a GRO only concerns transsexual people, with the term used in the way described for diagnostic purposes in ICD-10 (the tenth revision of the International Statistical Classification of Diseases and Related Health Problems) published by the World Health Organisation.<sup>18</sup> ICD-10 limits the transsexualism diagnosis to persons who display *“a desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one’s anatomic sex and a wish to have hormonal treatment and surgery to make one’s body as congruent as possible with one’s preferred sex”*.<sup>19</sup>

ICD-10’s description of the transsexualism diagnosis spotlights the clinically core characteristic; an incongruence between, on one hand, an individual’s experienced (or affirmed) gender) and, on the other hand, the gender assigned, along with the individual’s sex, at birth (sometimes called assigned gender).<sup>20</sup> It is this fact (not hormones or surgery of

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<sup>14</sup> See Court of Final Appeal judgment in case of “W”. Paras 138-145.

<sup>15</sup> *Ibid.* para 138.

<sup>16</sup> United Kingdom Government (2004). Gender Recognition Act, available at <http://www.legislation.gov.uk/ukpga/2004/7>.

<sup>17</sup> See web site of Global Action for Trans\* Equality (GATE). Accessed 2 Apr 2014 at <http://transactivists.org/trans/>.

<sup>18</sup> World Health Organisation (1990). *International Classification of Diseases and Related Health Problems* (Tenth ed.). Geneva: World Health Organisation.

<sup>19</sup> *Ibid.* Vol 1, p350.

<sup>20</sup> The central importance, in the lives of transsexual people, of the incongruence between experienced and assigned gender, is highlighted in other WHO documents, including those developed by its regional office for the Western Pacific (in which area Hong Kong is located). For example, World Health Organisation. (2012). *Report of the consultation on HIV, STI and other health needs of transgender people in Asia and the Pacific*. Manila: WHO Western Pacific Regional Office; and World Health Organisation. (2013); also *Joint Technical Brief: HIV, sexually transmitted infections and other*

any sort) that sets transsexual people (regardless of what labels they informally use to identify themselves) apart from other sexual and gender minorities; for example, individuals who for whatever reasons enjoy crossdressing (transvestites, drag queens etc), and gays and lesbians (whose distinguishing features concern patterns of sexual attraction). It is worth noting that Hong Kong statistics confirm this. A recent study at a local gender clinic revealed that around one in ten individuals diagnosed as having gender issues did not express a need for surgery, while two in ten did not express a need for hormonal treatment.<sup>21</sup> It is worth bearing in mind that Hong Kong Government's Security Bureau requires transsexual people to undergo genital and gonadal surgery as preconditions for being issued gender affirmative ID cards. In the view of the current author the number *not* expressing a need for surgery would likely be higher were it not for this policy. For more information on the gender clinic study see Appendix 2.

ICD-10's focus on the incongruence between experienced and assigned gender highlights the fact that, while many transsexual people may wish to undergo medical procedures aimed at bringing their bodies into line with their personal gender identity (indeed some may experience a need so deeply felt that for them such medical procedures constitute medical necessity), *others do not*. In the recent LegCo debate some of the speakers appeared entirely unaware of this fact, instead viewing genital and gonadal surgery ("sex reassignment surgery") as a defining feature of transsexualism, with all those who do not undergo such surgery being consigned to another group called "transgender people" (who, it appeared, did not merit legal gender recognition).<sup>22</sup> To define transsexualism in terms of surgical history (or surgical intention) is to make an error. "Transsexual" does *not* equal sex reassignment surgery. Nor does it equal hormonal treatment, or any other type of medical procedure. This point is of fundamental importance for the GRO case being made in this paper.

### **Gender dysphoria and gender transition: the social and the physical.**

Where an individual's desire to live and be accepted in his / her experienced gender is frustrated or denied, and he / she feels compelled to live in his / her assigned gender, the inevitable result is great and continuing discomfort and distress. These feelings are often called gender dysphoria. These feelings often appear in early childhood, and in many cases do not abate with increasing age. After the age of around 12, and quite possibly earlier in childhood too, there are no psychological treatments that have been shown to rid a person of these feelings. Indeed attempts at such treatment have been ruled unethical. The scientific consensus is that one does not choose to be gender dysphoric; it is not a lifestyle choice.

There are two elements to gender dysphoria. The first element is social, stemming from the refusal or failure by significant individuals, and broader society (and in some jurisdictions the law) to recognise or accept a transsexual person's experienced gender. This withholding of recognition and acceptance is an expression of (and further reinforces) stigma, prejudice, harassment, abuse and (in some countries) alarming levels of violence. For many transsexual people the result is denial of many of the rights and opportunities enjoyed by the general population, and a process of marginalisation (social, economic and legal).

The second possible element of gender dysphoria is physical. For many transsexual people (but I stress again, not all) there may be a physical component (a discomfort or distress

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*health needs among transgender people in Asia and the Pacific: joint regional technical brief*. Manila: WHO Western Pacific Regional Office.

<sup>21</sup> C.C.C.Chan. (2013). "Prevalence of Psychiatric Morbidity in Chinese Subjects with Gender Identity Disorder in Hong Kong". Unpublished thesis, fellowship examination, HK College of Psychiatrists.

<sup>22</sup> The reader may have noticed that Emerton made the same mistake in her "Time for Change" paper, mentioned earlier.

about one's physical sexual characteristics; primary and / or secondary). This is often called physical dysphoria (otherwise called bodily or anatomic dysphoria).

The process of beginning to live in one's experienced gender is often called gender transition. For transition, as for dysphoria, there is a social and physical element. For most transsexual people the social element comprises a gender affirmative name, mode of dress, hairstyle and, if possible, new identity documentation and legal recognition of their experienced gender. The physical element of transition, if any, typically involves accessing gender affirming healthcare involving hormones and / or surgery. The surgery may include, but not be restricted to, breast surgery (removal or augmentation, as appropriate), and surgery involving the gonads and genitals. The term sex reassignment surgery usually denotes the latter; that is, surgery to remove gonads (having the effect of sterilisation), and genital reconstructive surgery. Gender affirming healthcare is a medical necessity for some transsexual people.<sup>23</sup> As will by now be clear, for others it is not.

Current Hong Kong Government policy is to issue, on request, gender affirmative ID cards only to those transsexuals who have undergone full "sex reassignment surgery". The surgical preconditions are particularly stringent, focusing very precisely, to the exclusion of all other aspects of sexual anatomy, upon a requirement for permanent sterilization, and construction of some form of genitals consistent with experienced gender.<sup>24</sup> These requirements leave transsexual people who have not undergone such surgery (and who therefore do not hold gender appropriate ID cards) in a limbo; a situation immensely damaging to psychological health and wellbeing. Their transgender status is exposed whenever they are required to show an ID card, putting them at risk of humiliating and discriminatory treatment. They may be denied services, are at risk of prosecution when they use gender appropriate toilet facilities, and are placed in gender inappropriate accommodation (with consequences for personal safety) when hospitalized or detained. See Appendix One for four Hong Kong case studies illustrating some of the challenges faced by transsexual persons in Hong Kong who have not undergone "sex reassignment surgery".

It will be no surprise then that for many transsexual individuals, the two elements of dysphoria and transition (social and physical) may be linked. As a clinician I have worked with transsexual persons in Hong Kong whose physical dysphoria (and desire for genital and gonadal surgery) arises solely out of the fact that they are not able, with the body they now have, to get a gender affirmative ID card that will open up the opportunities for them that "post-op" transsexual persons, and the bulk of Hong Kong's population, enjoy.

Important though a gender affirmative ID card may be for a transsexual person, the legal gender status of the individual carrying it remains uncertain in today's Hong Kong. This was clearly evident in the case of "W", which stemmed from the Government's refusal to recognize, for the purposes of marriage, the gender of the holder of a card which it itself had issued. With the CFA judgment in the "W" case, the legal status of the ID card in relation to marriage may now be settled. But it remains untested in many of the other areas in which legal gender status is important: for example parenthood, discrimination law, inheritance,

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<sup>23</sup> World Professional Association for Transgender Health (WPATH) (2008). *Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage for Transgender and Transsexual People Worldwide*. Accessed 15 Dec 2013 at [http://www.wpath.org/site\\_page.cfm?pk\\_association\\_webpage\\_menu=1352&pk\\_association\\_webpage=3947](http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1352&pk_association_webpage=3947).

<sup>24</sup> The requirements are listed at [www.gov.hk/en/residents/immigration/idcard/hkic/faq\\_hkic.htm](http://www.gov.hk/en/residents/immigration/idcard/hkic/faq_hkic.htm). The requirement for "construction of some form of penis" appears relatively recent, with trans men previously able to get a new ID card without undergoing these highly complex surgeries, whose effects are, from the point of view of urinary function, sexual function and appearance, widely accepted to be deficient.

and gender specific (including sexual) offences.

In view of the emphasis placed by Hong Kong Government on “sex reassignment surgery”, it bears noting that such surgery is major and invasive, and that the gonadal element involves permanent sterilization. Complications are common and well documented. Like other major surgical procedures, it presents risks, and these risks are greater for certain types of individual. Some of these issues are now well researched, with some summarized in the Standards of Care compiled by the World Professional Association for Transgender Health (WPATH).<sup>25</sup> It should also be noted (though Hong Kong Government does not currently impose requirements involving hormones) that hormone therapy also often involves side effects, some potentially serious. Where there are preexisting health conditions hormone therapy may aggravate the transsexual person’s health problems. Specific health histories may rule out the use of certain hormones altogether. Again, some of these side effects, aggravating effects and contraindications are very well documented, and are now summarized in the most recent version of the WPATH Standards of Care.<sup>26</sup> The upshot is that some transsexual patients may be best advised to think very carefully before availing themselves of gender affirmative healthcare.

In the light of all the above, it is significant that the UK GRA, in setting out the conditions to be satisfied by persons applying for a change of legal gender status, refers to “gender dysphoria”. The Act does not specify whether this should include physical dysphoria. Further, while the Act is very clear on the need for social transition (specifying that applicants should have lived in their “acquired” gender<sup>27</sup> for at least two years), it is entirely silent on the need for physical transition.<sup>28</sup>

### **The significance of legal gender recognition for transsexual people.**

Throughout much of the world transsexual people experience daily stigma, prejudice, discrimination, harassment and abuse. In much of the world they live in fear of transphobic violence. Each of these alone or in combination often lead to poor emotional health and wellbeing, and drive transsexual people towards the margins (social, economic and legal) of their communities, and into situations (including sex work) and behaviour patterns (including unsafe sex) that put them at risk (including of sexually transmitted infections). Two sets of figures (one on murders and the other on HIV) illustrate the scale of the problem. Recently updated figures, worldwide and over six year period, record nearly 1400 documented murders of “trans people” (the vast majority of which likely fit ICD-10 criteria for being diagnosed transsexual).<sup>29</sup> A recent review of HIV research reveals that, worldwide, HIV prevalence figures for transsexual people are around 49 times greater than the background rate.<sup>30</sup> A recent report on transsexual people’s rights and health highlights the situation faced by transsexual people in the Asia-Pacific region, and speaks of a “stigma-sickness

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<sup>25</sup> See WPATH (2011). *Standards of Care*. <http://www.wpath.org/documents/IJT%20SOC,%20V7.pdf>.

<sup>26</sup> *Ibid*.

<sup>27</sup> Acquired gender is a term used throughout the UK GRA to denote the gender in which a person is now living (as opposed to his or her assigned gender). For obvious reasons, acquired gender will match experienced gender.

<sup>28</sup> UK Gender Recognition Act. Section 2.

<sup>29</sup> The most recent figures (covering Jan 2008 to Nov 2013) are available at the Trans Murder Monitoring Project, at [http://www.transrespect-transphobia.org/en\\_US/tvt-project/tmm-results/tdor-2013.htm](http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/tdor-2013.htm). The researchers involved in the project point out that many murders likely go unreported, or, if reported, fail to highlight the victim’s status as a trans person.

<sup>30</sup> S. Baral, T. Poteat, S. Strömdahl, A. Wirtz, T. Guadamuz, & C. Beyrer (2012). “Worldwide burden of HIV in transgender women: a systematic review and meta-analysis”. *Lancet Infectious Diseases*, published online.

slope”.<sup>31</sup> Many of the challenges faced by transsexual people elsewhere also confront transsexual people in Hong Kong. Appendix Two summarises findings from two recent local research studies, which together highlight some of the challenges which transsexual people in Hong Kong face.

Stigma, and all that flows from it, is sustained and aggravated where Governments fail to offer legal gender recognition (as, pace the CFA judgment in the case of “W”, in Hong Kong), or make gender recognition (be it legal recognition or not) conditional upon medical procedures involving hormones and surgery). Such policies undermine transsexual people’s experienced genders, communicating to all that the trans woman is in fact a man, and the trans man is in fact a woman,<sup>32</sup> and that transsexual people are therefore deceivers, pretenders and / or mentally disordered. The consequences for transsexual people go far beyond whispers and stares. These policies prompt or support patterns of discrimination, harassment and abuse, providing justification for landlords to refuse transsexual people as tenants, and employers to refuse transsexual people as employees. They prompt in transsexual people a fear of being exposed and humiliated when engaged in common place activities; fear of being refused a bank account, fear of being detained for questioning at an airport, or fear of being prosecuted for simply using a public toilet. In many parts of the world these policies may provide a justification for physical and sexual violence. Some of this is evident in the cases presented in Appendix One.

### **The case against refusing transsexual people opportunities for gender recognition.**

There are numerous arguments, based in human rights law, for extending legal gender recognition to transsexual people. For example, the failure to do so may represent a breach of several ICCPR<sup>33</sup> Articles: including Article 17 (re: privacy); Article 16 (re: right to recognition before the law); Article 23 (re: marriage and family); and, for those transsexual people deprived of liberty, Article 10 (re: treatment with humanity). The failure to offer gender recognition (coupled with a failure to enact effective and enforced anti-discrimination law) arguably represents a breach of ICESCR<sup>34</sup> Article 6 (re: access to employment).

The human rights implications arising out of governmental failure to offer legal gender recognition are further highlighted in many of the “Yogyakarta Principles” developed at a 2006 meeting sponsored by the International Commission of Jurists and the International Service for Human Rights, and involving 29 international human rights experts. The principles examine existing international human rights law in relation to sexual orientation and gender identity.<sup>35</sup>

Where States fail to provide transsexual people with opportunities for recognition of experienced gender, they inevitably force transsexual people into disclosing their transsexual status whenever they are in the course of their daily business obliged to show documentation showing their assigned gender. Such failure arguably undermines Principle #6 (the right to privacy), which asserts that

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<sup>31</sup> S. Winter (2012). *Lost in transition: transgender people, rights and HIV vulnerability in the Asia-Pacific region*. Bangkok: United Nations Development Programme.

<sup>32</sup> To remind the reader, the term “transsexual woman” here means a person assigned male at birth who grows up identifying as female. A “transsexual man” is a person assigned female at birth who identifies as male.

<sup>33</sup> International Convention on Civil and Political Rights. Available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>34</sup> International Convention on Economic, Social and Cultural Rights. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

<sup>35</sup> *The Yogyakarta Principles: the application of international human rights law in relation to sexual orientation and gender identity*. Available at: <http://www.yogyakartaprinciples.org>.

“(t)he right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity”<sup>36</sup>

and calls on States to

“(e)nsure the right of all persons to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and to protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others”.<sup>37</sup>

Arguably, where there is no effective anti-discrimination legislation such failure, through its impact on access to equal opportunities, also undermines States’ compliance in regard to Principles #12 (right to work), #14 (right to an adequate standard of living), #15 (the right to adequate housing), and #19 (the right to freedom of opinion and expression).

The case for gender recognition also has a health dimension. Two WPATH documents recognise the important health consequences stemming out of opportunities to change names and gender markers on ID documents. In the recently updated WPATH Standards of Care such changes are listed as key options for alleviating gender dysphoria.<sup>38</sup> In the WPATH Statement on Medical Necessity they are listed among the elements of successful sex reassignment, contributing to favourable outcomes.<sup>39</sup> In view of the above, the refusal of opportunities for gender recognition arguably constitutes a violation of the right to the highest attainable standard of health (Yogyakarta Principle #17, itself drawing on Article 12 of the ICESCR).<sup>40</sup>

### **The case against preconditions for gender recognition that involve medical procedures.**

As is by now evident, the transsexualism diagnosis is defined as a desire to live and be accepted in one’s experienced gender, rather than in terms of medical procedures undergone or requested. Medical procedures used as preconditions for legal gender recognition therefore introduce a division of transsexuals into two subgroups, with one enjoying opportunities and rights equal to those in the general population, and the other denied those rights, not on the basis of degree of suffering or need for gender recognition, but rather on the basis of the type of medical treatment received (or intended).

An arbitrary division of transsexual people in this way arguably puts undue pressure upon all transsexual individuals to undergo whatever medical procedures are set as requirements for recognition. In Hong Kong these specifically involve gonadal and genital surgery, with the Government showing no apparent interest at all in any other medical procedures undergone (or not, as the case may be) by the individual concerned. The pressure is also felt by individuals who do not wish to (or are best advised on medical grounds not to) undergo these procedures. Preconditions such as these arguably constitute coercive medicine, and an assault on bodily integrity (the self-determination of human beings over their own bodies), leaving the individuals concerned in a position in which they are unable to give entirely free consent. Arguably then, preconditions of this sort are in breach of ICCPR Article 7 (re: cruel, inhuman or degrading treatment). Indeed, insofar as such treatments may be not be medically advised for some transsexual people preconditions of this sort may put such governments in breach of anti-discrimination provisions in international (and in some cases

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<sup>36</sup> *Ibid.* p14.

<sup>37</sup> *Ibid.* p14.

<sup>38</sup> See WPATH (2011) *Standards of Care*.

<sup>39</sup> See WPATH (2008) *Medical Necessity Statement*.

<sup>40</sup> See ICESCR.



domestic) law. For obvious reasons the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment may be relevant here.<sup>41</sup>

Again, the Yogyakarta Principles spotlight some of the principles, already developed in international human rights law, that may be relevant here. Preconditions involving medical procedures undermine compliance with Principle #3 (dealing with right of recognition before the law). Principle #3 asserts that

“No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization on hormonal therapy, as a requirement for legal recognition of their gender identity”.<sup>42</sup>

and calls on all States to

“(t)ake all necessary legislative, administrative and other measures to ensure that procedures exist whereby all state-issued identity papers which indicate a person’s gender / sex - including birth certificates, passports, electoral records and other documents - reflect the person’s profound self-defined gender identity”.<sup>43</sup>

In the light of the above, requirements for specific medical procedures may also undermine compliance with Principle #10 (covering the right to freedom from torture and cruel, inhuman or degrading treatment or punishment); #18 (dealing with protection from medical abuses); and also (in the case of sterilization, and in the absence of access to adoption or assisted procreation procedures) #24 (the right to found a family).

It is not only in the Yogyakarta Principles that human rights law has been invoked in this area. Onerous preconditions for legal gender recognition, including medical preconditions, have not passed unnoticed in international human rights commentaries. In a 2011 report to the UN Human Rights Council the UN High Commissioner for Human Rights affirmed that:

All people, including lesbian, gay, bisexual and transgender (LGBT) persons, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression and association and peaceful assembly. ....The right to be free from torture and other cruel, inhuman or degrading treatment is absolute. Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. According to the Committee against Torture, States are obligated to protect from torture and ill-treatment all persons, regardless of sexual orientation or transgender identity, and to prohibit, prevent and provide redress for torture and ill-treatment in all contexts of State custody or control.<sup>44</sup>

The relevance of all this to transsexual people becomes apparent later in the report, when the UN High Commissioner notes:

in many countries, transgender persons are unable to obtain legal recognition of their

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<sup>41</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

<sup>42</sup> *Yogyakarta Principles*. Page 11-12.

<sup>43</sup> *Ibid.* Page 11-12.

<sup>44</sup> Report of Navi Pillay to the UN Human Rights Council “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity”. The UN High Commissioner for Human Rights. 17 Nov 2011. paras 5,11,12.

preferred gender, including a change in recorded sex and first name on State-issued identity documents. As a result, they encounter many practical difficulties, including when applying for employment, housing, bank credit or State benefits, or when travelling abroad. Regulations in countries that recognize changes in gender often require, implicitly or explicitly, that applicants undergo sterilization surgery as a condition of recognition. Some States also require that those seeking legal recognition of the change in gender be unmarried, implying mandatory divorce in cases where the individual is married. The Human Rights Committee has expressed concern regarding lack of arrangements for granting legal recognition of transgender people's identities. It has urged States to recognize the right of transgender persons to change their gender by permitting the issuance of new birth certificates and has noted with approval legislation facilitating legal recognition of a change of gender.<sup>45</sup>

In recommendations at the end of her report, the High Commissioner recommends that UN member States:

facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.<sup>46</sup>

Even more recently, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (affirming and citing other rapporteurs, including the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health) noted in a report to the UN Human Rights Council that:

...informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision. Guaranteeing informed consent is a fundamental feature of respecting an individual's autonomy, self-determination and human dignity in an appropriate continuum of voluntary healthcare services. ....(W)hile informed consent is commonly enshrined in the legal framework at the national level, it is frequently compromised in the healthcare setting. Structural inequalities, such as the power imbalance between doctors and patients, exacerbated by stigma and discrimination, result in individuals from certain groups being disproportionately vulnerable to having informed consent compromised.....(M)edical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned.<sup>47</sup>

In view of the fact that the effect (or, one suspects, intention) of requirements for genital reconstruction is to sterilise the individual concerned, it is worth noting that that the Special Rapporteur continues (again affirming previous positions):

Many policies and practices that lead to abuse in health-care settings are due to discrimination targeted at persons who are marginalized. Discrimination plays a prominent role in an analysis of reproductive rights violations as forms of torture or ill-treatment because sex and gender bias commonly underlie such violations. The mandate has stated, with regard to a gender- sensitive definition of torture, that the

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<sup>45</sup> *Ibid.* pp71-73.

<sup>46</sup> *Ibid.* para 84, recommendation (h).

<sup>47</sup> Report of Juan Mendez, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Report to Human Rights Council, 22<sup>nd</sup> Session. Agenda Item 3: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. 1 Feb 2013, paras 28-32.

purpose element is always fulfilled when it comes to gender-specific violence against women, in that such violence is inherently discriminatory and one of the possible purposes enumerated in the Convention is discrimination.<sup>48</sup>

In a section specifically focusing on medical abuse against transsexual people the Special Rapporteur writes:

In many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender. .... Some domestic courts have found that not only does enforced surgery result in permanent sterility and irreversible changes to the body, and interfere in family and reproductive life, it also amounts to a severe and irreversible intrusion into a person's physical integrity. In 2012 the Swedish Administrative Court of Appeals ruled that a forced sterilization requirement to intrude into someone's physical integrity could not be seen as voluntary. In 2011, the Constitutional Court in Germany ruled that the requirement of gender reassignment surgery violated the right to physical integrity and self-determination. In 2009, the Austrian Administrative High Court also held that mandatory gender reassignment, as a condition for legal recognition of gender identity, was unlawful. In 2009, the former Commissioner for Human Rights of the Council of Europe observed that "[the voluntary sterilization] requirements clearly run counter to the respect for the physical integrity of the person"<sup>49</sup>

In closing his report to the Human Rights Council, the Special Rapporteur included a recommendation specifically focused upon lesbian, gay, transgender and intersex persons. He wrote:

The Special Rapporteur calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital normalizing surgery, involuntary sterilization, unethical experimentation, medical display, "reparative therapies" or "conversion therapies", when enforced or administered without the free and informed consent of the person concerned. He also calls upon them to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.<sup>50</sup>

The above commentaries are a small selection from extensive UN documentation focusing on rights violations arising where sterilisation is performed under conditions in which freely given consent may be absent. For example, see statements by the UN High Commissioner for Human Rights<sup>51</sup> and by the Committee on the Elimination of Discrimination against Women,<sup>52</sup> in regard to forced sterilization performed upon women.

As is evident in one of the earlier quotes, the UN is not the only forum in which preconditions for legal recognition that involve sterilization have caused concern. Senior courts in (for example) Sweden, Germany and Austria have ruled such sterilisation unlawful. It is worth quoting a section from the 2011 German Federal Constitutional Court decision in this matter. The Court notes:

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<sup>48</sup> *Ibid.* para 37.

<sup>49</sup> *Ibid.* para 78.

<sup>50</sup> *Ibid.* para 88.

<sup>51</sup> Office of the High Commissioner for Human Rights. CCPR General Comment No. 28: Article 3 (the Equality of Rights between Men and Women) 29 Mar 2000.

<sup>52</sup> Committee on the Elimination of Discrimination Against Women . General Recommendation No. 19 (11<sup>th</sup> Session, 1992), paras 22 and 24m; No.21 (13<sup>th</sup> Session, 1994), para 22; No. 24 (20<sup>th</sup> session, 1999), para 22.

Gender reassignment surgery constitutes a massive impairment of physical integrity, which is protected by Article 2.2 GG<sup>53</sup> and it involves considerable health risks and side effects for the person concerned. However, according to the current state of scientific knowledge, it is not always indicated even in the case of a diagnosis of transsexuality that is certain to a large extent. The permanent nature and irreversibility of transsexual persons' perceived gender cannot be assessed against the degree of the surgical adaptation of their external genitals but rather against the consistency with which they live in their perceived gender. The unconditional prerequisite of a surgical gender reassignment according to § 8.1 no. 4 TSG<sup>54</sup> constituted an excessive requirement because it requires of transsexual persons to undergo surgery and to tolerate health detriments even if this is not indicated in the respective case and if it is not necessary for ascertaining the permanent nature of the transsexuality.<sup>55</sup>

Again in Europe, the Council of Europe Commissioner for Human Rights also highly critical of the practice. In the same vein, the Council of the European Union (Foreign Affairs Council), surveying practices around the world, recently noted that:

Appropriate identity documents are a prerequisite to effective enjoyment of many human rights. Transgender persons who do not have identity documentation in their preferred gender may as a result be exposed to arbitrary treatment and discrimination at the hands of individuals and institutions. No provision is made in some countries for legal recognition of preferred gender. In other countries, the requirements for legal gender recognition may be excessive, such as requiring proof of stability or infertility, gender reassignment surgery, hormonal treatment, a mental health diagnosis and / or having lived in the preferred gender for a specified time period (the so-called "real-life experience"). Such excessive provisions or practices are contrary to the right of equality and nondiscrimination as stated in Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>56</sup>

A very recent voice, yet again coming from Europe, is in the form of a report published by Amnesty International, and looking at gender recognition policies across that continent. Compellingly titled "The State decides who I am", it speaks out against gender recognition policies that impose unreasonable preconditions upon the individuals concerned.<sup>57</sup> It is worth noting that Amnesty's report goes beyond surgical and hormonal preconditions, and touches on matters related to diagnostic, marital and age statuses. It recommends to all Governments that they:

Abolish requirements to undergo psychiatric assessment and receive a diagnosis for obtaining legal gender recognition;

Abolish any medical requirement, including surgeries and sterilization, in relation to legal gender recognition;

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<sup>53</sup> Note: "Article 2.2 GG" here is a reference to an article in the German Constitution.

<sup>54</sup> Note: "§ 8.1 no. 4 TSG" here is a reference to a section of the Transsexuellengesetz (Transsexuals Law), also known as the TSG.

<sup>55</sup> Federal Constitutional Court of Germany. Press Office. Press release no. 7/2011 of 28 Jan 2011 regarding Order of 11<sup>th</sup> Jan 2011 – 1 BvR 3295/07. Section 2d. Accessed 2 Apr 2014 at <http://www.bundesverfassungsgericht.de/en/press/bvg11-007en.html>.

<sup>56</sup> Council of the European Union. *Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*. Foreign Affairs Council Meeting, 24 Jun 2013.

<sup>57</sup> Amnesty International (2014). *The State decides who I am: lack of legal recognition for transgender people in Europe*. London: Amnesty International

Abolish any requirement of single status as a prerequisite to obtain legal gender recognition;

Abolish blanket age restrictions to legal gender recognition procedures and ensure that legal recognition is accessible to minors, taking into account the child's freely expressed views regarding their own best interests, in light of their evolving capacities(;) <sup>58</sup>

Turning now to authoritative voices in the world of health, a wide range of organisations have argued, on health rights grounds, in favour of the integrity of the body, and for the right of all persons to make decisions freely concerning their own bodies. The Declaration of Sexual Rights compiled in 1999 by the World Association for Sexual Health (WAS) (by coincidence issued from Hong Kong where its World Congress was taking place that year) includes the following:

Right #2. the right to sexual autonomy, sexual integrity, and safety of the sexual body, This right involves the ability to make autonomous decisions about one's sexual life within a context of one's own personal and social ethics. It also encompasses control and enjoyment of our own bodies free from torture, mutilation and violence of any sort;

Right #8. The right to make free and responsible reproductive choices. This encompasses the right to decide whether or not to have children, the number and spacing of children, and the right to full access to the means of fertility regulation. <sup>59</sup>

Along similar lines, Article 3 of the Declaration of Sexual Rights issued by the International Planned Parenthood Federation (IPPF) in 2008 refers to the rights to life, liberty, security of the person and bodily integrity. <sup>60</sup>

And again on similar lines, though with a focus on women, the Declaration of the 4<sup>th</sup> World Conference on Women (Beijing) in 1995 proclaimed that:

We are convinced that the explicit recognition and reaffirmation on the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment. <sup>61</sup>

Turning now to transsexual health more specifically, WPATH clarified its position on removal of unreasonable medical barriers to gender recognition in two documents.

The "Statement on Medical Necessity" notes that: *Genital reconstruction is not required for social gender recognition, and such surgery should not be a prerequisite for document or record changes..... Changes to documentation are important aids to social functioning, and are a necessary component of the pre-surgical process; delay of document changes may have a deleterious impact on a patient's social integration and personal safety.* <sup>62</sup>

An Identity Recognition Statement states: "No person should have to undergo

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<sup>58</sup> *Ibid.* Pages 90-91.

<sup>59</sup> World Association for Sexual Health (1999). *Declaration of Sexual Rights*. Accessed 2 Apr 2014 at <http://www.worldsexology.org/resources/declaration-of-sexual-rights/>.

<sup>60</sup> International Planned Parenthood Federation (2008). *Sexual Rights: an IPPF declaration*. Accessed 2 Apr 2014 at [http://www.ippf.org/sites/default/files/sexualrightsippfdeclaration\\_1.pdf](http://www.ippf.org/sites/default/files/sexualrightsippfdeclaration_1.pdf).

<sup>61</sup> Fourth World Conference on Women (1995). *Beijing Declaration*. Para 17. Accessed 2 Apr 2014 at <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>.

<sup>62</sup> See WPATH *Medical Necessity Statement*.

*surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person's lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.”*<sup>63</sup>

Key UN health documents take essentially the same position as WPATH on this. For example, the Global Commission on HIV and the Law<sup>64</sup> recently issued the following strongly worded recommendation (here using the term “transgender people”):

To ensure an effective sustainable response to HIV that is consistent with human rights obligations ... countries must ... ensure transgender people are able to have their affirmed gender recognised in identification documents, without the need for prior medical procedures such as sterilisation, sex reassignment surgery or hormonal therapy.<sup>65</sup>

Authoritative health documents developed in this region adopt the same line. For example the recent report of a consultation meeting convened by the WHO's office for the Western Pacific region (in which region Hong Kong is located).<sup>66</sup>

Transgender people should be legally recognized as having equal rights and dignity, which are and should be protected under the law, with passage of protective legislation to contribute to a climate of acceptance and equality. Transgender people should have the right to legal recognition of their gender identity, and the recognition of gender status should not depend on medical treatment or surgical procedures.<sup>67</sup>

The reader will observe that this report too uses the term “transgender people.” The term, defined in the report as “*Persons who identify themselves in a different gender rather than that assigned to them at birth*”<sup>68</sup> is synonymous with “transsexual” as used in the current paper.

### **Towards comprehensive and inclusive gender recognition legislation.**

The legally uncertain and restrictive policies of Hong Kong Government in regard to gender recognition for transsexual people leave it out of step with many jurisdictions elsewhere. Worldwide an increasing number offer transsexual people a form of legal gender recognition without imposing gonadal / genital surgery as a precondition. In Europe, for example, these countries include the United Kingdom, Netherlands, Sweden, Iceland, Portugal, Spain, Germany, Austria, Hungary, Poland and Belarus. In some countries, for example the United Kingdom, Portugal and the Netherlands preconditions specifying hormone therapy have also been dropped. Similar developments (removing the requirement for surgeries, and sometimes going further in removing requirements for hormones) have recently taken place in the Canadian provinces of Ontario and Quebec, parts of Australia and the United States, and parts of the South Asian sub-continent. Proposals for legislative reforms are under way in Malta, Ireland, Albania and Taiwan. The most liberal legislation is currently found in

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<sup>63</sup> WPATH (2010). *Identity Recognition Statement*, Accessed 15 Dec 2013 at: [www.wpath.org/documents/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf](http://www.wpath.org/documents/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf).

<sup>64</sup> Global Commission on HIV and the Law. (2012). *Risks, rights and health*. New York: UNDP (HIV/AIDS Group).

<sup>65</sup> *Ibid.* recommendation 3.4.5, p54.

<sup>66</sup> See *Report of the consultation on HIV, STI and other health needs of transgender people in Asia and the Pacific*.

<sup>67</sup> *Ibid.* recommendation 3, p23.

<sup>68</sup> *Ibid.* p22.

Argentina, where it is possible to change one's legal gender status by way of a purely administrative procedure, without undergoing any medical assessment or treatment.<sup>69</sup> It bears noting that the Government of Denmark has proposed a rather similar law for enactment by the Danish legislature.<sup>70</sup>

The CFA in the case of "W", aware of developments elsewhere, remarked favourably on legislation in jurisdictions beyond Hong Kong. In one section of the judgment the CFA examines different approaches to determining who qualifies as "a woman" or "a man" for marriage and other purposes.<sup>71</sup> Two approaches are highlighted. The first is to have judges determine a specific point in the sex reassignment process at which gender is recognized. The second is for establishing by way of legislation a process by which individual cases can be examined on an individual basis.<sup>72</sup> The judges write:

*The second approach, involving legislative intervention, would in our view be distinctly preferable. The legislature could set up machinery for an expert panel to vet gender recognition claims on a case-by-case basis.....A compelling model may be readily found in the United Kingdom's Gender Recognition Act of 2004. (para 138).<sup>73</sup>*

The GRA provides a mechanism by which a transsexual person can apply to a Gender Recognition Panel (GRP) for a Gender Recognition Certificate (GRC). The GRP examines the portfolio of documentation provided by the applicant. The applicant is not in attendance when the case is considered. If the GRP issues a GRC the result is that a new birth certificate is issued, carrying an appropriate gender marker. The law provides for high levels of confidentiality in matters relating to the person's previously assigned gender, and in all matters surrounding the application.

The GRA is both comprehensive and inclusive. It is comprehensive in extending recognition not only in the area of marriage but also in areas such as registration, parenthood, social welfare benefits, pensions, discrimination, succession, and gender specific offences. It is inclusive in extending gender recognition to applicants based on gender identity and lived experience, regardless of medical treatment such as hormones or surgery. Applicants must simply demonstrate to the GRP that they (i) have or have at some point in the past had gender dysphoria (discomfort or distress in regard to gender assignment), (ii) have lived in the acquired gender throughout the period of two years prior to the application, and (iii) intend to continue to live in the acquired gender until death.

The reader may wonder if, in the absence of requirements for invasive surgery, the bar is set too low, with the GRA enabling legal gender change even for persons who are not truly transsexual. In the view of the current writer, the bar is in fact set high. The application form extends to 14 pages.<sup>74</sup> The guidance on how to complete it extends to 25 pages.<sup>75</sup> The

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<sup>69</sup> See English Translation of Argentina's Gender Identity Law as approved by the Senate of Argentina on 8 May 2012. Accessed on 2 Apr 2014 at <http://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf>.

<sup>70</sup> International Lesbian, Gay, Transgender and Intersex Association (ILGA). Accessed 2 Apr 2014 at [http://www.ilga-europe.org/home/guide\\_europe/country\\_by\\_country/denmark/danish\\_government\\_proposes\\_free\\_access\\_to\\_change\\_of\\_legal\\_gender](http://www.ilga-europe.org/home/guide_europe/country_by_country/denmark/danish_government_proposes_free_access_to_change_of_legal_gender).

<sup>71</sup> See Court of Final Appeal judgment in the case of "W". Section H4 (para 129 onwards).

<sup>72</sup> *Ibid.* para 130.

<sup>73</sup> *Ibid.* para 138.

<sup>74</sup> HM Courts and Tribunals Service. *Application for a Gender Recognition Certificate*. Form T450. Available at:

<http://hmctsformfinder.justice.gov.uk/courtfinder/forms/t450-eng.pdf>.

<sup>75</sup> HM Courts and Tribunals Service. *Guidance on completing the application Form for a Gender Recognition Certificate*. Updated Sep 2007. Available at:

completed application form must be accompanied by a portfolio of documents. The documents must include two reports regarding, one of which must be by a medical practitioner or chartered psychologist working in the field of gender dysphoria, with the second one submitted by a medical practitioner. Detailed guidelines, and a proforma, are provided for practitioners writing these reports.<sup>76</sup> The reports must detail the gender dysphoria diagnosis, the principal evidence that led to the diagnosis, and information on any treatment so far undergone or planned.<sup>77</sup> Beyond the two reports, the portfolio must also include a statutory declaration, a copy of all documents relating to a change in name, and any documentary evidence of living full-time in the “acquired gender” for least two years prior to the date of application. For this last item applicants are encouraged to include any or all of the following: letters from official, professional or business organisations or from friends or family; utility bills; official documents (e.g. driving license, passport); a statutory declaration or deed poll registering a change of name; academic documentation (if a student during the relevant period); an official letter from an employer or from an individual in a professional role (e.g. a solicitor, doctor, dentist, MP, etc ...) who knows the applicant on a personal basis. Each of these documents must include the applicant’s name (in the acquired gender) and relevant dates. If they don’t include the applicant’s name in his / her acquired gender, the applicant will need to prove that the person named is actually him / her.<sup>78</sup>

All in all then, the evidential requirements are quite strict.

It should be noted that the UK GRA, as passed in 2004, required that those transsexual people already married and applying for a GRC should dissolve their marriage and (if they wish) enter a Civil Union instead.<sup>79</sup> It is anticipated that a GRO based on the GRA would have to be amended so as to take account of the absence of same-sex civil union in Hong Kong. Notwithstanding that this and other amendments might be needed, the current writer agrees with the CFA that the UK GRA does indeed provide a “compelling model” for legislative reform in Hong Kong.

Research is now available suggesting that the impact of the GRA upon the lives of transsexual people in the UK has been broadly positive.<sup>80</sup> That said, the GRA is not perfect. The same would be true of any Hong Kong GRO based on it. Much is to be said for a law along the lines of the 2012 Gender Recognition Law in Argentina, mentioned earlier. As noted earlier, this law makes gender recognition an entirely administrative procedure, simply requiring of the applicant a self-affirmation of gender status, with no involvement by health providers at all (even for diagnosis of gender dysphoria). However, in Hong Kong, where there is no provision for same-sex union or marriage, such a law might raise fears of “gender

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<http://www.justice.gov.uk/downloads/forms/tribunals/ts-grp/guidance-completing-applic-gender-recognition-certificate.pdf>.

<sup>76</sup> UK Government. HM Courts and Tribunals Service (2012). *Guidelines for registered medical practitioners and registered psychologists to facilitate completion of the Medical Report Proforma for Gender Recognition*. Available at:

<http://hmctsformfinder.justice.gov.uk/courtfinder/forms/t452-eng.pdf>.

<sup>77</sup> President’s Guidance No. 1. *Evidential requirements for application under section 1(1)(a) of the Gender Recognition Act*. Dec 2005. Available at:

<http://www.justice.gov.uk/downloads/tribunals/gender-recognition-panel/other-guidance-and-information/grp-guidance-no1.pdf>.

<sup>78</sup> See *Guidance on completing the application Form for a Gender Recognition Certificate*.

<sup>79</sup> This provision was included in the Act because of a perceived need to avoid creating de facto same sex marriage. With the enactment of the UK Equal Marriage Act (2013) this need presumably no longer exists.

<sup>80</sup> S. Hines and Z. Davy (undated paper). *Gender diversity, recognition and citizenship: exploring the significance and experiences of the UK Gender Recognition Act (GRA, 2004)*. <http://www.gender-studies.leeds.ac.uk/assets/files/staff/hines/ESRC%20Research%20Report%20Gender%20Diversity,%20Recognition%20and%20Citizenship.pdf>.



chaos” resulting from gay and lesbian people changing their gender status in order to enter civil union with marry their partners. Unreasonable though many would argue them to be, these fears might have the effect of sabotaging any attempt to enact an Argentinian-style law in Hong Kong. Consequently, less radical legislation of a type equivalent to the UK GRA seems more appropriate for contemporary Hong Kong.

Several local groups (transgender and transsexual and LGBT, as well as broader social groups) support this proposal. They include transsexual advocacy groups such as Transgender Resource Center (TGR),<sup>81</sup> and Transgender Equality and Acceptance Movement (TEAM);<sup>82</sup> LGBT groups such as Pink Alliance (PA),<sup>83</sup> Queer Sisters(QS),<sup>84</sup> Samma Kammanta,<sup>85</sup> Hong Kong Scholars Alliance for Sexual and Gender Diversity,<sup>86</sup> and Queer Straight Alliance (QSA);<sup>87</sup> and a broader civil society group (Professional Commons).<sup>88</sup>

## Conclusion

To summarise, transsexual people are characterised by a desire to live and be accepted as members of another gender; an incongruence between their personally experienced gender and the gender to which, along with their sex at birth, they have been assigned. While hormonal and surgical treatments are for some transsexual people matters of medical necessity, for other transsexual people they are not. In contrast, gender recognition, including by way of documentation and in law, is a key factor in enabling *all* transsexual people, regardless of hormonal or surgical status, to live their lives in dignity, enjoying the rights and opportunities taken for granted by the general population. Where transsexual people are denied legal gender recognition, or such recognition is made conditional upon hormonal or surgical procedures, their rights enshrined in international human rights law may be violated. The imposition of hormonal and surgical preconditions have the effect of arbitrarily dividing the transsexual patient population into two subgroups, one of which is

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<sup>81</sup> Transgender Resource Center is a non-profit organization in Hong Kong that focus solely in providing services to Transgender people. It aims to raise gender awareness in public as well as in colleges, and to provide supporting services within the community.

<sup>82</sup> Transgender Equality and Acceptance Movement was the first local group to bring together both Chinese and non-Chinese Transgender activists and Transgender people. It has taken a back seat as more local organisations have flourished.

<sup>83</sup> The Pink Alliance (aka Tongzhi Community Joint Meeting or TCJM) aims to link tongzhi organizations operating in Hong Kong, to assist them in their work and to provide a network for information in both Chinese and English within the tongzhi community. The TCJM will also research and campaign on issues of key importance.

<sup>84</sup> Queer Sisters. works for women’s rights, sexual and otherwise, in Hong Kong.

<sup>85</sup> Samma-Kammanta is a non sectarian group providing a safe and supportive space for LGBTIQ people in Hong Kong.

<sup>86</sup> Hong Kong Scholars Alliance for Sexual and Gender Diversity is founded by a group of teachers and scholars who are concerned with sexual and gender issues in Hong Kong. It includes those who teach or research sexuality and gender as well as those who self-identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ). The alliance provides and facilitates education, research, training, and support for sexual and gender diversity in order to work towards a more open and progressive society.

<sup>87</sup> Queer Straight Alliance is a student organisation which promotes and celebrate sexual diversity. The Alliance aims to provide a safe social platform for the Lesbian, Gay, Bisexual and Transgender (LGBT) members both on and off campus.

<sup>88</sup> The Professional Commons is committed to improving the quality of public governance in Hong Kong and empowering the community in the policy-making process. It aims to accomplish this by harnessing the soft power of responsible professionalism. Its mission statement includes engaging with the community in developing public policies, and expressing professional views in the pursuit of public interest.

denied the rights and opportunities enjoyed by the other subgroup (and indeed by the general population). These practices put pressure on transsexual people to undergo the required procedures, and present threats to bodily integrity and free consent, raising issues of coercive medicine, cruel, inhuman and degrading treatment, and presenting barriers to the highest attainable standard of health, and other human rights. Not surprisingly, a number of authoritative voices in the world of rights and health have urged that Governments refrain from imposing medical preconditions upon transsexual people seeking legal gender recognition.

One thing is for sure. If the Hong Kong Government puts into place arrangements that limit legal gender recognition to matters of marriage, or that limit it to those who have undergone hormonal or surgical treatments, it will find itself in the Courts again in the near future fighting transsexual people determined to secure rights already enshrined in international human rights law to which Hong Kong is a party. With the CFA judgment in the case of “W” offering guidance, the Government now has an opportunity to move forward on an issue of fundamental importance to this small sector of the Hong Kong community. It is time for transsexual people in Hong Kong to enjoy lives of dignity. That means gender recognition without the knife. It really is time for change.

## **Appendix One: Four transsexual people in Hong Kong who have experienced the impact of absence of legal gender on their lives.**

**Case 1:** *Sally is a young Hong Kong Chinese woman. She is bright, attractive, likeable - and transsexual. Born with a male anatomy, she has identified as female for as long as she can remember. She is gender dysphoric - deeply unhappy about being regarded by others as male, and about having a male body. Puberty was a really difficult time for her. She remembers trying to pray away the changes she daily saw in the mirror.*

*Sally has taken hormones for some years. She looks no different from other attractive young Chinese women. You would not know she is transsexual. Poor in general health, she has not undergone the invasive genital and gonadal surgery that W famously underwent. She is, to use colloquial language, “pre-op”.*

*Rejected for years by family and friends on the grounds of her transsexualism, unable to get a job because of a male ID card that leaves her open to prejudice, she recently slipped into a deep depression about her situation, attempting suicide twice in one week.*

*First hospitalized for emergency treatment, Sally was later committed into a local mental health institution; to a male ward, on the grounds that she had a male ID card. She spent several weeks there, surrounded by male inmates and male staff, until her discharge. She was deeply distressed. Though she was eventually discharged, the experience has scarred her further. The bright light in Sally’s life is her loving boyfriend. She would like to marry him. But that male ID card means she won’t be able to.*

**Case 2:** *When Ina was born her mother was proud to have a son. But Ina grew up identifying as a girl. As a child she would play with girls’ toys, play girls’ games, and dress in whatever female clothes she could get hold of. She hated being treated as a boy. Today a young transsexual woman, Ina would very much like to have surgery (breasts, gonads and genitals), but she has not so far had the chance.*

*Ina’s documentation shows her to be male. She can’t get a job, and has no one to turn to. She does street sex work to survive. Recently, she was arrested for soliciting (a police officer approached her to ask her how much; she made the mistake of answering). She was prosecuted and sentenced to a period of imprisonment. Correctional Services Department policy is that she is a male. So there she is, a timid and anxious individual, female-identified and surrounded by male convicts. Despite a compassionate magistrate’s recommendation, hormone treatment is being withheld, which is a known contributor to depression and suicidality.*

**Case 3:** *Julie is a 41-year-old transsexual woman, born in China and coming to Hong Kong around her first birthday. Experiencing gender dysphoria even in early childhood, and bullied in school on account of her feminine behaviour, she tried to repress her feelings for many years, and vainly hoping that they would go away. Depressed, she finally decided to begin living as a woman. She has been taking hormones for several years, has had laser facial hair treatment, and one day may have genital and gonadal surgery. Desperate to be treated as a woman now rather than later, she recently made amateurish amendments to her ID card, getting caught when she tried to open a bank account in her female name. I saw Julie after her arrest. In one of the saddest confession I have heard in 15 years working with transsexual people, she said, tears in eyes, “I just wanted to be able to go into the bank and have the counter staff address me as ‘Miss’. That’s all I wanted”. She faces serious charges.*

**Case 4:** *A young Hong Kong Chinese trans woman had spent six years in another country, during which time, according to her own account, she “transitioned” successfully, living in her experienced gender with little difficulty, and feeling no need to undergo genital and gonadal*

*surgery. Upon returning to Hong Kong she encountered many daily difficulties arising out of the fact that she had an ID Card that marked her as male. She began to feel the pressure to undergo SRS, simply in order to get an ID Card that would enable her to retain some privacy in regard to her transgender status, and assure her of equal opportunities in employment. Indeed her own mother (out of love) put her under pressure to get SRS, arguing that without an appropriate ID Card she would not have a normal life.*

## **Appendix Two: Two recent studies examining health and well-being for transgender people.**

### **A. The Community Business “Climate Survey”.<sup>89</sup>**

A recent Community Business survey examined attitudes towards LGBT individuals in Hong Kong among members of Hong Kong’s working population. With the help of the authors of the survey, who responded to a request to share the data files, it has been possible to analyse the data on attitudes towards transgender people. It should be noted that the word “transgender” in this study can be regarded as broadly synonymous with the word “transsexual” in this study. The analysis reveals that, among 1002 randomly selected members of the Hong Kong working population:

- a. 25% of the participants explicitly described themselves as unaccepting towards transgender persons,<sup>90</sup>
- b. 20% said that they would be shocked, disgusted and / or uncomfortable, and would not want to be friends with any person introduced to them as transgender, with 81% of persons in the 56+ age group reporting these feelings,<sup>91</sup>
- c. 59% believed that transsexual people in Hong Kong are subjected to discrimination or prejudice, with 45% saying they suffer verbal assault or mockery, 42% saying they face social stigma or exclusion, 42% saying they are ignored or disregarded, and 13% saying they face violence and bullying.
- d. 45% believed transgender people face negative treatment in the community, with 22% saying they face it in the workplace.

As well as this general population survey, the Community Business Survey also involved an online survey of 606 LGBT individuals either in the workforce or seeking work. Thanks to the authors, it has been possible to analyse the results for the 78 individuals involved in the study who identified as “transgender”. The findings revealed that:

- a. Of those transgender identified persons who were employed (72% of those 78 persons identifying as transgender) and who were prepared to share information on income (71% of the 78 persons) 45% had an income below HK\$10,000 (indeed 9% had an income lower than HK\$6000). Another 49% had an income in the HK\$10000 to HK\$30000 band. Only 5% had incomes that were higher.
- b. When asked if they were “out” to key people in their lives, only 22% of the 78 participants reported being fully “out” to parents, 22% fully out to other family members, and only 32% fully out to friends.
- c. Among those who had chosen not to be fully open with family about their trans status, reasons given included a fear that their family might not show acceptance (60% of the 78 participants) or understanding (50%), that they might be ashamed of them (24), might reject or abandon them (31%), or might be worried about how others would treat the transsexual person (32%). A few participants (6%) were worried that family members might threaten their personal safety.

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<sup>89</sup> Community Business (2012). Hong Kong LGBT Climate Survey 2011-21012. Hong Kong: Community Business. Available for download at [www.communitybusiness.org](http://www.communitybusiness.org).

<sup>90</sup> Lowest levels of acceptance were among participants who were less educated, older, belonging to protestant christian faith, and working for local employers.

<sup>91</sup> These negative reactions were most common, not only among older participants, but also among protestant Christians, and those who reported having no LGBT acquaintances.

- d. When those who were employed (56 (72%) of the 78 participants) were asked if they were open about their transgender status in the workplace, few appeared to be fully out, either with human resources department (16% of the 56 employed participants), boss / supervisor (20%), colleagues in general (18%), subordinates (18%), or even close workplace friends (32%). They were even less likely to be open with clients (5%) and other external parties (7%).
- e. There were a wide range of reasons for not being fully open in the workplace. Common were fears about: what other people would think (54% of the 56 employed participants); being stereotyped as mentally ill, HIV positive or promiscuous etc (48%); losing connections or relationships with co-workers (54%); making people feel uncomfortable (46%); not being able to advance one's career (41%); being fired (38%); or being excluded from meetings and discussions (32%). Some (24%) reported that they already knew of someone who was humiliated at work on account of being transgender. Alarming, a small number (7%) feared for their personal safety.
- f. Only 23% of the 78 participants reported ever experiencing any positive treatment at the workplace on account of their gender identity. Occasional examples included: being encouraged and supported to be open about one's gender identity; support from colleagues when encountering negative treatment because of gender identity; and being supported by other LGBT colleagues.
- g. Another 28% of the 78 participants reported explicitly negative treatment in the workplace, with the most common examples including: being treated with less respect (22% of the participants); verbal insult or mockery (15%); being deliberately put in difficult situations (10%); being overlooked or mistreated in work projects (9%); and being denied a promotion for which one was qualified (9%). Six per cent reported being fired on account of their gender identity. Other examples of negative treatment included: being excluded from meetings, workplace and social activities; being given less favourable training and development opportunities; being denied a job offer; and sexual harassment, bullying and physical violence.
- h. Among those who were not fully open in the workplace, participants commonly reported that it had an impact in terms of having to lie about their personal life, and in their ability to build authentic relationships with colleagues. Other consequences reported were: an inability to commit fully to work or to one's employer; being unable to act as a team player; an unwillingness to express one's views openly; energy wasted on anxiety, exhaustion, depression and stress; avoiding certain situations, workplace opportunities or colleagues; unhappiness or distraction at work; absence from work; and / or leaving one's job

### **Mental health issues for transsexual people.**

A recently completed research study examined 91 trans men and trans women attending a local gender clinic as patients.<sup>92</sup> All had been diagnosed to have Gender Identity Disorder (the American Psychiatric Association equivalent of the transsexualism diagnosis). While the majority expressed a desire for surgery (77%) and for hormonal treatment (88%) a sizable minority did not.

The study showed that many respondents had, over their lifetimes, experienced some sort of mental disorder (51%), with the most common being depression (46% of the sample, with a

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<sup>92</sup> C.C.C. Chan (2013). Prevalence of Psychiatric Morbidity in Chinese Subjects with Gender Identity Disorder in Hong Kong. Unpublished thesis, fellowship examination, HK College of Psychiatrists.

major depressive episode in the vast majority of these cases). These levels were over double that for the general population.<sup>93</sup> Those who reported having less social support available to them reported the highest levels of lifetime mental disorder,

Current prevalence (i.e. prevalence of a mental disorder at the time of the study) was lower (14%), but this was still comparable to the prevalence for the general population over an entire lifetime.

Unemployment levels were high (nearly 15% (students not included in the analysis), over four times the 3.4% rate in the general population over the period the study was done). There was a strong and highly significant relationship between current unemployment and current disorder, with 42% of those not working currently experiencing a disorder, as against 9% of those working. Depression was the most common disorder experienced (33.% for those unemployed, and 4% for those in work). There were indications that it was the experience of being unemployed that led to depression, rather than a history of disorder leading to unemployment.

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<sup>93</sup> Chan, the author of the study, cites figures from the 1993 Shatin Community Mental Health Study which reported lifetime prevalence rates for psychiatric disorder around 20% for males and 18% for females.

## **Submission to Bills Committee on Marriage (Amendment) Bill 2014 – Part 2**

**12 April 2014**

### **Correspondence with Board of Directors of the World Professional Association of Transgender Health (WPATH).**

#### **a) Letter addressed to Dr Fraser,**

We write on behalf of the Professional Commons Task Force on Transgender Law Reform, the Transgender Equality and Acceptance Movement (TEAM), and Transgender Resource Centre, all based in Hong Kong, to ask if WPATH Board would consider forming a view (and making that view known) in relation to some legislative reform the executive branch of Hong Kong Government will soon be putting to LegCo (the Legislative Council of Hong Kong). The proposed reform has been prompted by a recent decision of Hong Kong's Court of Final Appeal (CFA) regarding a transsexual person's right to marry, and touches on the issue of legal gender recognition for trans people. The transsexual woman (Miss 'W') won the case. The Government lost. There is reason to believe that what Government will soon propose (as a way of responding to the recent case) will fall far short of what is required to address the gender recognition rights of trans people.

We present below the background to the proposed reform, referring to the following four attached documents.

Attachment 1. The Court of Final Appeal judgement in the case of 'W'

Attachment 2. Our background paper 'It's Time for Change' which puts the health and rights case for a comprehensive and inclusive GRO.

Attachment 3. The schedule for the 2013-2014 session of the HK LegCo (Legislative Council) j (the relevant item is Item 26)

Attachment 4. The current HK Government policy on issuing gender affirmative ID cards to transsexuals. (from the Immigration Department website).

#### **The case of Miss 'W'.**

The story begins in late 2008. Miss 'W', a 'post-op' trans woman wanted to marry her boyfriend. She asked the Registrar of Marriages if she could legally do so. (See Attachment 1, para20 on p10). The Registrar replied that she could not, since for the purposes of the relevant ordinances (and despite the fact that she had undergone 'sex reassignment surgery ('SRS') and had been issued a female ID card) she was for marriage purposes legally male. [1]

Miss 'W' sought judicial review, lost her case, appealed to the Court of Appeal, lost her case again, and then appealed to the Court of Final Appeal (CFA).

The CFA took a view of the case that was more favourable to 'W' than in the lower courts, noting that the Government's failure to recognise her as a woman in regard to the laws on marriage



violated her rights as enshrined in Hong Kong's Basic Law (its mini constitution) and Bill of Rights (modelled on ICCPR). (See Attachment 1, para124 on p51). The CFA ruled in May this year that two relevant Ordinances (the Marriage Ordinance and Matrimonial Causes Ordinance (the latter dealing with dissolution of marriages)) should be read and given effect so that Miss 'W' could be recognised as a woman, and gave the Government a year to make any necessary legislative reform (See Attachment 1, para150 on p60).

The CFA cited the UK Gender Recognition Act (GRA) of 2004 as a 'compelling model' for legislative reform in Hong Kong (Attachment 1, para138 on p56). The UK GRA provides for legal gender recognition in all areas, regardless of gender transition health care undergone. Applicants for gender recognition must demonstrate to a panel, by way of documentation, that they suffer from gender dysphoria (or have done in the past), have lived in their experienced gender for at least two years, and intend to do so permanently.

### Ongoing developments in Hong Kong

During this window of opportunity for legislative reform, a coalition of trans, LGBT, and broader civil society groups are campaigning for a Gender Recognition Ordinance (GRO) that, like the UK GRA, offers gender recognition that is comprehensive (applies to all areas, not just marriage) and inclusive (applies to all trans people, not just post-ops). The rights and health arguments for a GRO of this sort are detailed in a paper entitled 'It's Time for Change', promulgated by Professional Commons, one of the endorsing organisations (see Attachment 2). The paper makes a rights and health case for gender recognition legislation, noting that the imposition of medical procedures as preconditions for gender recognition undermines free consent and bodily integrity, and constitutes a form of coercive medicine.

The GRO proposal (see Attachment 2) is already endorsed by a number of transgender, LGBT and civil society groups (listed in the attachment). We are pleased to know that the Equal Opportunity Commission of Hong Kong also intends to support our case for a UK style GRO.

We are/will be approaching many more groups in Hong Kong (Human Rights Monitor, Amnesty International, Women's Commission, Women's Foundation, Association for Advancement of Feminism, Hong Kong Medical Association, Hong Kong College of Psychiatrists, etc etc etc) and overseas (WPATH being one of them). We may also approach the International Commission of Jurists, who were involved earlier in the 'W' case.

The Professional Commons has sent the 'Time for Change' paper to the drafting department in the Department of Justice, but there has been neither a response nor acknowledgement. It now appears the HK Government is intending to respond to the CFA judgement in a minimalist way, tweaking the two ordinances on marriage to allow a post-op trans person to marry heterosexually. The amendments are to be brought before LegCo in the first half of 2014. (See Attachment 3, Item 26).

From the information so far provided it appears that the Government intends to limit gender recognition to matters of marriage, with no other areas of life covered. Furthermore, we believe that, in view of the fact that the Government fought for over four years to deny Miss 'W', who had undergone full 'SRS', the right to marry, the proposed amendments will likely limit marriage rights to those who have undergone similar surgery. Under current arrangements eligibility for a new ID card rests entirely on having surgery that both sterilizes and creates new genitals (there is no mention at all of hormones or 'top' surgery). It is likely that the proposed amendments to the ordinances on marriage will be similarly focused – on genitals and sterilisation.

We do hope WPATH Board is able to offer support in this matter. Its voice would be very important to us in this matter.

Please contact us for further information if you need it. We hope to hear from you soon.

With best wishes.

Dr Robin Bradbeer, Chair of Transgender Equality and Acceptance Movement (TEAM) and of the Professional Commons Task Force on Transgender Law Reform.

Ms Joanne Leung, Chair of Transgender Resource Centre.

[1] The Immigration Department (whose Director is also the Registrar of Marriages) currently issues gender affirmative ID cards (on request) only on condition that trans person concerned has undergone full 'sex reassignment surgery' to remove gonads (ie for sterilization) and to create new genitals. No other conditions are imposed; either medical (e.g. hormones, 'top' surgery, lived experience) or social (e.g. age, marital status etc. etc.). Miss 'W' had undergone the surgery specified, and thus had been issued a female ID card. Immigration Department (whose director is also the Registrar of Births) does not issue new birth certificates.

Attachment 1 can be downloaded from

[http://legalref.judiciary.gov.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=80598&QS=%2B&TP=JU&ILAN=en](http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=80598&QS=%2B&TP=JU&ILAN=en)

Attachment 2 can be downloaded from

<http://www.procommons.org.hk/wp-content/uploads/2013/11/PC-GRO-Background-Paper-Oct03SW.pdf>

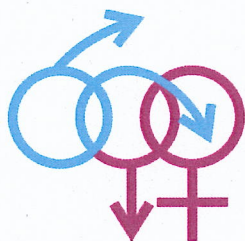
Attachment 3 can be downloaded from [www.legco.gov.hk/yr13-14/english/hc/papers/hccb2-15-1-e.pdf](http://www.legco.gov.hk/yr13-14/english/hc/papers/hccb2-15-1-e.pdf)

Attachment 4 can be downloaded from

[http://www.gov.hk/en/residents/immigration/idcard/hkic/faq\\_hkic.htm#arp](http://www.gov.hk/en/residents/immigration/idcard/hkic/faq_hkic.htm#arp)

**b) Reply from Dr Fraser**

(attached)



**Bean Robinson, PhD**  
Executive Director

**Jeffrey Whitman, BS**  
Business Manager/Event  
Manager

**Andrea Martin**  
Executive Administrator

**Lauren Husting, MM**  
Office Assistant

1300 South 2nd Street, Suite  
180  
Minneapolis, MN 55454 USA  
Phone: 1+ (612) 624-9397  
Fax: 1 + (612) 624-9541  
Email: [wpath@wpath.org](mailto:wpath@wpath.org)  
Web Page: [www.wpath.org](http://www.wpath.org)

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# The World Professional Association for Transgender Health, Inc.

*A Non-Profit Corporation*

17 March 2014

Dr. Robin Bradbeer, Chair of Transgender Equality and Acceptance  
Movement (TEAM) and of the Professional Commons Task Force on  
Transgender Law Reform

[\[REDACTED\]@gmail.com](mailto:[REDACTED]@gmail.com)

Ms. Joanne Leung, Chair of Transgender Resource Center

[\[REDACTED\]@tgr.org.hk](mailto:[REDACTED]@tgr.org.hk)

We are writing in response to your request that we offer our relevant  
policy position, derived collectively from combined expertise over  
many decades of practice in the field of transgender and transsexual  
medicine, health, and law, in response to pending legislative reforms  
soon to be discussed in the Legislative Council of Hong Kong.

The World Professional Association for Transgender Health (WPATH) is  
an international educational association of professionals devoted to  
the understanding and treatment of individuals with gender dysphoria.  
Founded in 1979, and currently with over 700 physician, mental  
health, social science, and legal professional members, all of whom are  
engaged in clinical practice and/or research that affects the lives of  
transgender and transsexual people, WPATH is the oldest  
interdisciplinary professional association in the world that is  
concerned with this specialty, and our expertise is recognized by the  
World Health Organization, the American Medical Association,  
numerous national Health Ministries, and in courts of law throughout  
the world.

As background, we respectfully refer you to the Standards of Care for  
the Health of Transsexual, Transgender and Gender-Nonconforming  
People, Version 7, available at

[http://www.wpath.org/site\\_page.cfm?pk\\_association\\_webpage\\_menu=1351&pk\\_association\\_webpage=3926](http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=3926)

These internationally accepted guidelines describe the current mental  
health and medical best practices in the treatment of transsexual  
individuals who are undergoing sex reassignment.

Gender variance, or the experience of one's self as having a gender that is different from prevailing cultural norms, or even different from the gender assigned to one at birth, exists in every known culture. In some cultures, for some people, the pressure to conform to assigned gender roles may be intolerable; conversely, for some transgender-identified people, try as they might to conform to roles expected for them, people around them always perceive them as differently-gendered: they may be perceived as homosexual, or as members of another sex category than that to which they were assigned, no matter how hard they try to meet the expectations of others based on assigned birth sex. These conflicts, though relatively rare, can be extremely painful for those who experience them. Because these experiences occur regardless of race, class, or culture, it is reasonable to think of the phenomenon as basic to human existence. Because of this universality, WPATH has urged the avoidance of pathologizing gender variance, that is, we urge authorities to resist viewing gender variance as something wrong, to be treated or corrected, because of historical beliefs or assumptions about gender or sex. For those transgender people who come to realize that their best hope of survival is to live as a member of the sex to which they were not assigned at birth, the decision to transition is not taken lightly; the sacrifices and the risks are many.

Full surgical sex reassignment (SRS) that includes removal of gonads and construction of external genitalia is not medically necessary or economically feasible for all transgender people. Because of the wide diversity in the circumstances of transgender people worldwide, the WPATH Board of Directors, in the interest of the health and well-being of transgender and transsexual people globally, issued the following identity recognition statement 16 June 2010:

No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person's lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.

Identity recognition documents are crucial for all people: the ability to have a birth certificate, passport or other official documents of recognition from one's country of citizenship can facilitate basic processes necessary to daily life. These may be lifesaving documents, as, in some cases, they validate the individual's existence and deflect hostile behaviours toward transgender people. Changes to documentation are important aids to social functioning, and are a necessary component of the pre-surgical process, if surgery is anticipated. Regardless which medical treatments, if any, are to be applied in any individual case, delay of document changes may have a deleterious impact on a patient's social integration and personal safety.

While we view that sex reassignment surgery (SRS) is a medical necessity, we recognize that SRS is not desired by all transgender people. The nature and duration of a transition from male-to-female or female-to-male is variable and individualized. Transgender people may undergo a social transition by living outwardly in their preferred gender role and using their preferred name and pronoun (as linguistically appropriate); or they may undergo a medical transition, which includes feminization or masculinization of the body (as appropriate)

through the use of hormones and other medical procedures including surgery, vocal training, epilation (hair removal), etc. Both the social and medical avenues should be recognized as valid for application for gender marker change in identity documents and public records. Governments of an increasing number of countries, including the United Kingdom, Argentina, South Korea, and the United States of America have issued policies and administrative regulations that permit the issuance of identity documents that recognize the gender in which individuals live without a requirement for surgical intervention. Social gender recognition is not dependent upon an individual's genital configuration, and forced surgery to modify, reconstruct, or otherwise alter intimate body parts should not be a prerequisite for document or record changes.

Likewise, a diagnosis as a prerequisite to gender validation can also serve to marginalize and/or stigmatize transgender people unnecessarily. The WPATH Standards of Care recognize that living with gender variance is not a pathological state, and that many transgender people are perfectly capable of knowing who they are and living full, rewarding lives without having a diagnostic label applied to them. We have asserted that identity recognition should not be withheld from such individuals. It is not reasonable to require that the person has lived in conformance with any gender role for any period of time, or that they have had any specific medical treatment or a particular diagnosis in order to declare their gender identity, or to obtain state recognition of the identity that will facilitate their social integration. As stated earlier, the majority of transgender people worldwide may be precluded from accessing medical transition due to lack of funding or the unavailability of experienced medical providers. Individuals in this position should not be denied identity recognition because the resources necessary for medical transition are not available to them.

Nevertheless, acute gender dysphoria often requires medical intervention, which may include hormone replacement (cross-sex hormone treatment), and various surgical procedures, most typically breast augmentation for transgender women (male-to-female transsexual people), and male chest reconstruction for transgender men (female-to-male transsexual people). In fact, for transgender men, chest reconstruction is typically far more important to social functioning than genital reconstruction. Pinning social validation on a particular medical procedure as a policy matter does not take into account the differing medical needs of the affected population.

Sex reassignment, when properly indicated and performed as provided by the WPATH Standards of Care, has proven to be beneficial and effective in the treatment of individuals with transsexualism and/or gender dysphoria. Since the goal of medical sex reassignment is to assist individuals in achieving lasting personal comfort with their gendered selves in order to maximize their overall health, psychological well-being, and self-fulfillment, it is also important to emphasize that human rights should not be precluded by medical status as a transsexual person. Transsexual and transgender people must be afforded the same human rights as any other person. Identity recognition and the rights of citizenship associated with one's gender identity are crucial to psychological well-being for every human being, including those who may be transsexual, who may have gender dysphoria, or who may be unable constitutionally to conform to social expectations prescribed for persons of

their assigned sex. Every individual's gender identity is an important component of their psychological make-up, whether or not it corresponds with the individual's assigned sex at birth.

In May of 2012, legislators in Argentina passed a law permitting transgender people to change their identity documents without requiring surgery or any medical treatment and without certification from physicians or approval from judges. The law also mandated that sex reassignment surgery be available from either public or private providers through the "Obligatory Medical Plan" at no extra cost to patients. This law immediately became the most progressive law on this topic anywhere in the world.

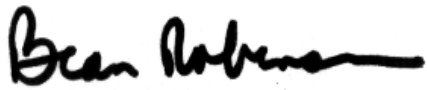
The evolutionary trend in policy is to recognize the lived gender identity of persons regardless of the form of their body. WPATH urges the Hong Kong Government to eliminate barriers to full participation in society for transgender and transsexual citizens, in accordance with their lived gender identity.

We hope you will be able to make use of these recommendations in your dialogue with the Hong Kong Government. If we can be of any assistance to your contacts in the Hong Kong Government in their work with transsexual, transgender, or gender-nonconforming individuals, please invite them to contact our office.

Respectfully,

A handwritten signature in black ink, appearing to read 'Jamison Green', with a long, sweeping horizontal line extending to the right.

Jamison Green, PhD  
WPATH President

A handwritten signature in black ink, appearing to read 'Bean Robinson', with a long, sweeping horizontal line extending to the right.

Bean Robinson, PhD  
Executive Director