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Task Force on Transgender Law Reform[A]

Background Paper

It's Time for Change:[B] Towards a Gender Recognition Ordinance for Hong Kong.

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This paper provides an introduction to trans people and various health and rights issues confronting them - worldwide and in Hong Kong. It discusses the role played by legal gender recognition in the lives of trans people and argues for the introduction of gender recognition legislation in Hong Kong that is both *extensive* and *inclusive*; (a) extensive in providing recognition in all relevant areas of life, and (b) inclusive in applying to a broad range of trans people, and without imposing unreasonable medical barriers. It proposes a Gender Recognition Ordinance for Hong Kong, using the UK Gender Recognition Act of 2004 as a model.[D]

Section 1: Trans people: some terms defined

Trans people here is an abbreviation covering persons identifying as transgender, transsexual or equivalent. **Transgender people** are *'individuals whose gender identity and/or expression of their gender differs from social norms related to their*

[A] 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.

[B] The title of this paper echoes that of a 2004 paper written by Robyn Emerton, research assistant professor, and later assistant professor, specializing in human rights law at the Faculty of Law in the University of Hong Kong. The nature of the paper was evident from the full title: '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, 515-555.

[C]Acknowledgement and thanks to Joanne Leung for some of the analysis in Appendix One; 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.

[D] At various points in this paper reference is made to WPATH. WPATH is the World Professional Association for Transgender Health, a global multidisciplinary association consisting of mental health professionals, endocrinologists, surgeons, lawyers and others working with trans people worldwide. It works to promote evidence based care, education, research, advocacy, public policy and respect in transgender health. It publishes the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ('The WPATH Standards of Care'), now in its seventh edition, freely available on its website, and used worldwide (including in Hong Kong) to guide healthcare providers. WPATH advises internationally, including in response to requests from Government departments, on matters relating to health and public policy. It has advised on matters relating to legal gender recognition. WPATH maintains an extensive public website at *www.wpath.org.*

gender of birth' (from the World Professional Association of Transgender Health (WPATH), Standards of Care, Edition 7).[1] Like other widely available definitions the WPATH definition includes a wide range of people who personally identify as male, as female, as genders beyond these two, or indeed in ways that transcend gender.The term embraces those who are comfortable with their bodies and therefore feel no need for hormones, surgeries or other body modifications, as well as those who seek to modify their bodies.

Transsexualism has a special meaning in medicine. It is the name of a specific diagnosis currently employed in the WHO diagnostic manual (International Classification of Diseases, Revision 10 (ICD-10) for 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 the preferred sex'* (ICD-10, available on the WHO website). It should be noted that current WHO proposals for the next edition of ICD, due for publication in 2015, are that the transsexualism diagnosis will be removed, and replaced by one called *gender incongruence.*[2]

It is usual to talk of **trans women** (assigned males who grow up identifying as female) and **trans men** (assigned females who grow up identifying as male). The terms 'MtF' and 'FtM' are some times used.[E]

Trans people are a **gender minority**, not a sexual minority. Gender identity is unrelated to sexual orientation. The former is about one's sense of one's gender, the latter about who one happens to be attracted to. Some trans people are heterosexual. Some are homosexual. A trans woman who is attracted to men (as in the recent case of W) may be described as heterosexual. If she is attracted to other women she may be described as homosexual.

The incongruence between one's personal gender identity (sometimes called **experienced** or **affirmed gender**) and the one that in which one is expected to live (sometimes called **assigned gender**) *can* cause great discomfort and distress. These feelings are often called **gender dysphoria.** Gender dysphoria almost always has a social component; a sense of discomfort or distress associated with identifying as a gender other than the one that society recognises one to be (the **social dysphoria**). It may also have a physical component; discomfort or distress about one's physical sexual characteristics, primary and/or secondary (the **physical dysphoria,** sometimes called bodily or anatomic dysphoria). Clearly these two can be related; a trans person who feels that his/her body undermines his/her ability to be recognised in his/her experienced gender will inevitably also experience physical dysphoria. Note that a trans person may experience social dysphoria without experiencing physical dysphoria. Such persons may *not* seek hormonal or surgical treatment, except insofar as they may help the person become better recognized in the experienced gender.

[E] Trans women are sometimes called 'male transsexuals' and trans men are called 'female transsexuals'. This practice denies trans people their experienced genders, and is seen as offensive by many. It was once a common practice, particularly in the medical literature, but is now dying out.

Many trans people, especially those who are dysphoric of course, experience a deeply felt need to live in their experienced gender. The process of beginning to live in one's experienced gender is often called **gender transition.** Gender transition inevitably comprises a social element (name, clothes, hair and, where possible, new identity documentation etc). It may also comprise a physical element (gender-affirming hormones and/or surgery etc). Surgery may include, but not be restricted to, breast surgery (removal or augmentation, as appropriate) and/or genital reconstruction. When people use the term **sex reassignment surgery** they usually mean genital reconstructive surgery. In fact **gender affirmation surgery** may well be a better name for this, and all other, transition-related surgery. A trans person who has undergone the surgery required to alleviate their gender dysphoria is often described as post-operative (or **post-op**). One intending to undergo such surgery is described as **pre-op**. Many trans people do not undergo such surgery. They are sometimes described, or describe themselves, as **non-op.**

One does not choose to be gender dysphoric. One either has these feelings or not. These feelings often appear in childhood. After the age of around 12, and quite possibly earlier in childhood too, there are no psychological treatments that can rid a person of these feelings. Indeed attempts at such treatment have been ruled unethical (for example see WPATH Standards of Care, Edition 7). The most effective treatment for a gender dysphoric person (specifically someone who experiences physical dysphoria) is broadly gender affirmative treatment involving hormones (for those who need them) and surgery (again those who need it). For those whose health and well-being depend on such healthcare it is a medical necessity; enhancing health and wellbeing, changing lives, and occasionally having the effect of saving lives. WPATH has issued a statement affirming the medical necessity of these procedures, underlining that they are neither experimental nor (for many trans people) elective in nature.[3]

Aside from transition-related healthcare there are other gender affirmative actions which can be important for the health and well-being of trans people; one of the most important is to have gender affirming ID. Like gender affirmative healthcare, documentation changes can for many trans people be life-enhancing, life-changing and life-saving.

That said, there are good reasons why some trans people choose not to undergo gender-affirming hormonal therapy or surgery. Hormone therapy often involves side effects, some potentially serious. Where there are preexisting health conditions hormone therapy may aggravate the trans person's health problems. Specific health histories may rule out the use of certain hormones altogether. 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.[4]

As for gender affirming surgeries, they are often major and invasive, with some genital reconstruction procedures involving sterilization. Complications are common and well documented, particularly in the case of genital reconstruction. Like other major surgeries, it involves risks, and these risks are greater for certain types of individual. Some of these issues are now well researched, with some summarized in the WPATH Standards of Care.[5]

For all these medical reasons (and others) even those trans people who are anatomically dysphoric may often decide (or indeed be advised) not to undergo hormonal or surgical treatment. All this is relevant to the issue of legal recognition for experienced gender, especially where governments impose hormones and surgery as preconditions for gender recognition.

Section 2: Issues relating to trans rights and health.

In many countries openly transgender and transsexual people (i.e. trans people) experience on a daily basis social stigma, as well as prejudice (**transprejudice**) associated discriminatory, harassing and abusive practices, so consistent and marked as to nudge many towards the social, economic and legal margins of society, and damage their psychological health and well-being. In many cases the forces marginalising trans people intersect with those that marginalize ethnic minorities, foreign and rural migrants, the poor, the poorly educated and women, so that trans people belonging to one or more of these other groups encounter even greater challenges leading a life of respect, equality and dignity. Some, despite all the hurdles, lead fulfilled lives. Many others however are tilted towards situations and behaviour patterns (including sexual) that leave them open to many risks, including to HIV infection. Worse, on the way along that slope they often encounter poor healthcare (for transition-related, sexual or general health). Depending on where they live, the HIV positive trans person may encounter few care and treatment services, or may be marginalized by and excluded from those that exist. Poverty, involvement in sex work and HIV infection can all add to the stigma they face. When trans people engage in sex work they often do so under conditions placing them at a high risk of acquiring HIV. A recent review in Lancet put the prevalence figure for trans people worldwide at around 49 times the background rate.[6]

Recent reports focus in some depth on many of these issues, spanning much of the world, including North America,[7] [8] Central and South America,[9] [10] [11] Europe,[12] [13] [14] [15] Africa,[16] [17] [18] the Middle East,[19] [20] the ex-Soviet Republics,[21] [22] [23] and the Asia- Pacific region [24] [25] [26] (including South Asia,[27] [28] [29] [30] [31] [32] [33], South East Asia,[34] [35] [36] [37] [38] [39] East Asia,[40] [41] [42] [43] [44] [45] Australasia, [46] [47] [48] and Oceania, [49] [50] [51] [52]).

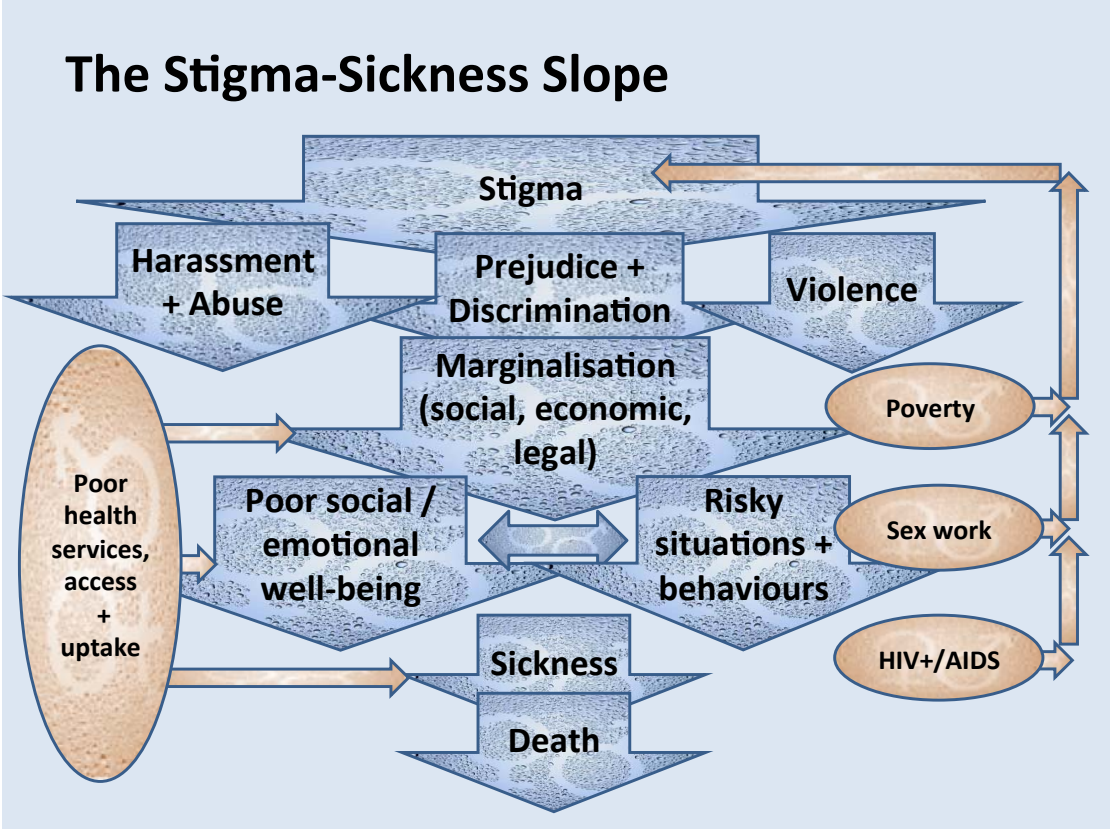
A recent global survey focusing on trans people's life circumstances spotlights the impact of stigma on transgender health and wellbeing.[53] The impact of stigma is especially evident in levels of violence against transgender people worldwide, with a documented total of 1123 transgender people killed between January 2008 and March 2013.[F] It is likely that many killings go unreported, or else misreported (for example as murders of gay and lesbian persons).

All these reports (regional and global) touch variously on the effects of stigma on health and wellbeing. A recent report published by the Asia-Pacific office of the United Nations Development Programme (UNDP) writes of a 'stigma-sickness slope' upon which many trans people in this region live.[54] See diagram

Section 3: Legal recognition for experienced gender.

[F] www.transrespect-transphobia.org/en/tvt-project/tmm-results/march-2013.htm

The absence of legal gender recognition for trans people (or restrictions upon such recognition by way of preconditions involving surgery and hormones) acts as a key pillar supporting and sustaining stigma. Such policies undermine trans people's experienced gender identities, signaling that the trans woman is in fact a man, and the trans man is in fact a woman, and that trans people are therefore deceivers, pretenders and/or are mentally disordered. The consequences for trans people go far beyond whispers and stares in public places. These policies prompt or support patterns of discrimination, harassment and abuse, providing justification for landlords to refuse trans people as tenants, and employers to refuse trans people as employees. They prompt a fear of being exposed and humiliated when engaged in common place activities; of being refused a bank account, being detained for questioning at an airport, or being prosecuted for simply using a public toilet. In many parts of the world they provide a justification for physical and sexual violence.



From Winter, S (2012) 'Lost in Transition: Transgender people, rights and HIV vulnerability in the Asia-Pacific region' UNDP.

There are numerous arguments, based in human rights law, for extending legal gender recognition to trans people. For example, the failure to do so may represent a breach of several ICCPR[55] Articles: including Article 17 (re: privacy); Article 16 (re: right to recognition before the law); Article 23 (re: marriage and family); and, for those trans 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[56] Article 6 (re: access to employment).

Where governments demand that persons submit themselves to medical procedures

as preconditions for gender recognition, they arguably put undue pressure on individuals to undergo those procedures, including on those who otherwise might not wish to undergo them. Such preconditions arguably involve coercive medicine, with the individuals concerned not being in a position to give entirely free consent.

Such preconditions are arguably in breach of ICCPR Article 7 (re: cruel, inhuman or degrading treatment). Indeed, since such treatments may be not be medically advised for some trans people (see earlier section) such preconditions may put such governments in breach of anti-discrimination provisions in international (and in some cases domestic) law. For obvious reasons the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment may also be relevant here.

The human rights implications arising out of governmental failure to offer legal gender recognition (or out of onerous requirements imposed as preconditions for such recognition) are further highlighted in the Yogyakarta Principles (a highly influential set of principles compiled at an international meeting of experts in human rights).[G]

Where States fail to provide trans people with opportunities for recognition of experienced gender they force trans people into disclosing their status as trans people 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

> '(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' (p14),

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' (p14).

Where there is no effective anti-discrimination legislation such failure, through its impact on equal opportunity issues, arguably 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).

Where States provide legal gender recognition, but impose preconditions involving specific medical procedures, such requirements clearly undermine compliance with

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[G] The Yogyakarta meeting was sponsored by the International Commission of Jurists and the International Service for Human Rights. The 29 principles examine existing international human rights law in relation to sexual orientation and gender identity. See http://www.yogyakartaprinciples.org

Principle #3 (dealing with right of recognition before the law). Principle #3 asserts that

> '(n)o 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' (p11-12)

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' (p12).

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 absence of access to adoption or assisted procreation procedures) #24 (the right to found a family).

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.[H]

The relevance of all this to trans 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 preferred gender, including a change in recorded sex and first name on State-issued identity documents. As a result, they encounter

[H] 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 November 2011. Paras 5, 11, 12,

> 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.[I]

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.[J]

Even more recently, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, noted in a report to the UN Human Rights Council (in doing so 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) 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.[K]

In view of the fact that the effect (or indeed—in some cases--purpose) of requirements for genital reconstruction is to sterilise the individual concerned, we note that the Special Rapporteur continues (again affirming previous positions):

[I] ibid. 71-73.

[J] Ibid. para 84, recommendation (h)

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

> 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 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.[L]

In a section specifically focusing on medical abuse against trans 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" [M]

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. [N]

The above commentaries are a small selection from extensive UN documentation focusing on rights issues posed by sterilization performed under conditions in which freely given consent may be absent. For example, see statements by the UN High

[L] ibid. para 37.
[M] Ibid. para78.
[N] Ibid, para 88

Commissioner for Human Rights[O] and by the Committee on the Elimination of Discrimination against Women,[P] in regard to forced sterilization performed upon women.

As we have already seen in one of the earlier quotes, the UN is not the only forum in which sterilisation preconditions for legal recognition have caused concern, with courts in Sweden, Germany and Austria ruling such sterilisation unlawful, and 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).[Q]

The arguments for legal recognition for trans people's experienced gender are not just legal ones. They are also based in concerns for trans people's health and wellbeing. The importance of opportunities to change names and gender markers on ID documents is recognised by WPATH in two documents:

> In the WPATH Standards of Care (seventh edition, 2011) such changes are listed as key options for alleviating gender dysphoria.[R]
>
> In the WPATH Statement on Medical Necessity (June 17th 2008) it is listed as one of the elements of successful sex reassignment, contributing to favourable outcomes.[S]

WPATH has also recognised the importance of removing unreasonable medical barriers standing in the way of such recognition. WPATH's position on this matter is

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[O] Office of the High Commissioner for Human Rights. CCPR General Comment No. 28: Article 3 (the Equality of Rights between Men and Women) 29 March 2000.

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

[Q] 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, 24th June 2013.

[R] http://www.wpath.org/publications_ijt.cfm

[S] http://www.wpath.org/medical_necessity_statement.cfm

evident in two documents.

> The 'Statement on Medical Necessity' (June 17th 2008) 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.*[T]
>
> An Identity Recognition Statement (June 16th 2010) states: *'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.'* [U]

Section 4: Trans people, trans health and trans rights in Hong Kong

There are no hard figures on how many trans people there are in Hong Kong. Research in the United States has suggested that a conservative figure of 0.3% (around 1 in 300) of the adult population may identify as transgender (or related terms).[57] This figure finds broad support in other research, leading one researcher to estimate that there may be, among individuals aged 15 and above, 9 to 9.5 million trans people across the Asia-Pacific region.[58] A 0.3% figure applied to the 6.25 million Hong Kong residents aged 15 and above[V] yields an estimate of 18750 individuals who identity privately as a gender other than that which they have been assigned at birth. Clearly, many of them are unlikely to live in their identified gender. That said, the number of trans people in Hong Kong inevitably exceeds (probably by many multiples) the number who approach the regional government gender clinics (or any other clinics for that matter).

While Hong Kong trans people appear not to experience some elements of the stigma-sickness slope (for example violence), anecdotal and clinical experience indicates that daily experiences of stigma, prejudice and discrimination have the effect of marginalizing Hong Kong trans people (socially, economically and legally), and impact on their quality of life, and mental health and well-being. Two recent local research studies confirm this. A recent Community Business 'Climate Survey' examined the attitudes of Hong Kong's working population towards **LGBT** individuals in Hong Kong. With the help of the authors of the survey, who responded to a request to share the data files, we have been able to analyse the data on attitudes towards transgender people. The analysis reveals that, among 1002 randomly selected members of the Hong Kong working population, there were disturbingly

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[T] http://www.wpath.org/medical_necessity_statement.cfm

[U] www.wpath.org/documents/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf

[V] Based on 2011 figures available on the HK Census Bureau website at http://www.census2011.gov.hk/flash/dashboards/population-pyramid-db-102-en/population-pyramid-db-102-en.html

stigmatizing and prejudicial patterns of thinking about trans people. The Community Business Survey also involved an online survey of 606 LGBT individuals either in the workforce or seeking work. Thanks to the authors, we have been able to analyse the results for the 78 trans individuals. The findings confirm this impression, indicating fear of being exposed as trans, as well as, for many, comparative poverty. These challenges may have a broader impact on trans people's health and wellbeing.

A recently completed research study examined 91 trans men and trans women attending local gender clinic as patients. [59] The study showed that over their lifetimes many had experienced some sort of mental disorder (46%), with the most common being depression (41% of the sample). These levels were over double that for the general population.[W] Current prevalence (i.e. prevalence of disorder at the time of the study) were lower (14%), but this was still comparable to the prevalence for the general population over entire lifetimes. Unemployment levels were high (nearly 15%, 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 and other disorders, rather than a history of disorder leading to unemployment.[X]

For more detail of the findings from these two studies see Appendix One.

It is clear that stigma, prejudice and discrimination, and the constant risk trans people face that they may be exposed by their identity documentation, contributes to the social and economic marginalization suffered by Hong Kong trans people, and aggravates their risks of depression, anxiety and other forms of emotional pain. The absence of gender affirming documentation, and the uncertain legal status of such documentation as is offered, aggravates the challenges with which they are faced. It is to this matter that we now turn.

Section 5: Legal recognition of experienced gender in Hong Kong

Hong Kong Government issues, on request by a trans person, an ID card that recognises experienced gender. However, at the risk of putting itself on the wrong side of international law, and contrary to WPATH recommendations reviewed earlier, Hong Kong Immigration Department issues gender affirming ID cards only to those trans people who have undergone full 'sex reassignment surgery' (i.e. full

[W] The author of the study, Dr Chario Chan, 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.

[X] The relationship between lifetime prevalence and unemployment , though apparent, was weaker and not significant, indicating that for many it was the experience of being unemployed that led to depression and other disorders, rather than a history of disorder leading to unemployment.

gender affirming surgery). Indeed, the surgical preconditions are particularly rigorous.[Y] These requirements leave trans 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 (see cases presented in this paper). 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 liable to be prosecuted when they use gender appropriate toilet facilities, and are placed in gender inappropriate accommodation (with consequences for personal safety) when hospitalized (see Appendix Two, Box 1) or detained (see Appendix Two, Box 2).

Moreover, even where new ID cards are issued to those who have undergone surgery, the legal force of these ID cards remains uncertain. This was clearly evident in the case of 'W', which stemmed from the decision of the Registrar of Births, Marriages and Deaths refusing to recognize, for the purposes of marriage, the gender of the holder of a card which his own Department had issued.[Z] The legal status of the ID card remains untested in many of the other areas in which legal gender status is important: for example parenthood, discrimination law, inheritance, and gender specific offences (for example sexual offences) etc

The restrictive and uncertain policies of Hong Kong Government in regard to legal gender recognition for trans people leaves it out of step with an increasing number of jurisdictions elsewhere.[AA]

Importantly, in its recent decision in the case of 'W' the Hong Kong Court of Final Appeal remarked favourably on legislation in jurisdictions beyond Hong Kong. One particular piece of legislation appeared to catch their attention; the UK Gender Recognition Act of 2004. In Section H4 of the judgment (para 129 onwards) the judges examine different approaches to determining who qualifies as "a woman' or "a man" for marriage and other purposes,. They highlight two approaches. 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 (para 130). The judges write:

> *The second approach, involving legislative intervention, would in our view be*

[Y] The requirements are listed at www.gov.hk/en/residents/immigration/idcard/hkic/faq_hkic.htm. The requirement for 'construction of some form of penis is apparently new, 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.

[Z] The Court of Final Appeal has of course recently ruled this policy unconstitutional. At the time of writing this the Government has made public no response.

[AA] A number of jurisdictions worldwide now offer trans people some form of legal recognition without imposing genital surgery as a precondition. In Europe, for example, these countries include the United Kingdom, Sweden, Iceland, Portugal, Spain, Germany, Austria, Hungary, Poland and Belarus. In some countries, for example the United Kingdom and Portugal, preconditions specifying hormone therapy have also been dropped.

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). [60]

Notable features of the UK GRA are that:

a. the Act provides recognition through issuance of a gender recognition certificate (GRC).
b. the GRC provides legal gender recognition in a wide range of areas, not only in the area of marriage but also in areas such as registration, parenthood, social welfare benefits, pensions, discrimination, succession, gender specific offences etc.
c. the GRC provides legal gender recognition to applicants based on gender identity and lived experience, regardless of medical treatment such as hormones or surgery. One simply needs to demonstrate to a Gender Recognition Panel hearing one's case that one (i) has or has at some point in the past had gender dysphoria (discomfort or distress in regard to one's gender assignment), (ii) has lived in the acquired gender throughout the period of two years previous to the application, and (iii) one intends to continue to live in the acquired gender until death.

Section 6: Proposal for a Gender Recognition Ordinance

It is proposed that the Hong Kong Government enacts a Gender Recognition Ordinance in Hong Kong along the lines of the UK Gender Recognition Act (GRA) of 2004.

Three features of the UK GRA are worthy of particular commendation

a. the voluntary aspect; with those choosing not to have a gender recognition certificate free not to have one (thereby allowing those who are already in marriages to remain married).
b. the broad scope; extending into a range of legal areas in which one's status as male or female has legal importance.
c. the inclusiveness; with all those trans people covered who identify in a gender other than that assigned to them at birth.

It should be noted that the UK GRA, as passed in 2004, required that those trans people already married and applying for a GRC should dissolve their marriage and (if they wish) enter a Civil Union instead. 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.

The UK GRA is not perfect. The same would be true of any Hong Kong Gender Recognition Ordinance based on it. Some trans people, as well as many experts in law and health, would ideally prefer a law along the lines of the 2012 Gender Recognition Law in Argentina. 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 (not even diagnosis of gender dysphoria!). However, it is important to note that in Hong Kong, where there is no provision for same-sex marriage, such a law would raise fears of 'gender chaos' stemming from gay and lesbian people changing their gender status in order to marry their partners. Unreasonable though these fears might be, they might sabotage any attempt to enact an Argentinian-style law in Hong Kong. Consequently, less radical legislation of a type equivalent to the UK GRA is proposed.

Notably, the Court of Final Appeal, as indicated earlier, made extensive favourable references to the UK GRA, referring to it as a 'compelling model' for legislative change in Hong Kong.[BB] This fact, and the continuing Hong Kong tendency to look to the UK for legislative models, arguably makes a Gender Recognition Ordinance styled on the UK GRA worthy of serious consideration.

Research is now available suggesting that the impact of the GRA upon the lives of transgender and transsexual people in the UK has been broadly positive.[61]

It should be noted that the proposal for a GRO of the type outlined above is already supported by a several local groups (transgender and transsexual and LGBT, as well as broader social groups). They are:

Professional Commons

Pink Alliance (PA)[CC]

Transgender Resource Center (TGR)[DD]

Transgender Equality and Acceptance Movement (TEAM)[AB]

Queer Sisters(QS)[EE]

Samma Kammanta[FF],

Hong Kong Scholars Alliance for Sexual and Gender Diversity[GG]

[BB] Para 138 of CFA Judgment in *W v Registrar of Marriages.*

[CC] 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.

[DD] 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.

[AB] 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.

[EE] Queer Sisters. works for women's rights, sexual and otherwise, in Hong Kong.

[FF] Samma-Kammanta is a non sectarian group providing a safe and supportive space for LGBTIQpeople in Hong Kong.

[GG] 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

For updates on the call for a GRO see the 'GRO NOW' page on Facebook.

Sam Winter,[HH] August 10th 2013. September 17th 2013 update.

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.

[HH] Dr. Winter works in trans health and rights, sits on the Editorial Board of the *International Journal of Transgenderism*, and is commissioned author for a forthcoming paper in the medical journal *Lancet*. He has provided expert evidence in a number of legal cases, including that of 'W'. He is one of the Directors of the *World Professional Association for Transgender Health (WPATH)*, and was member of a team which recently revised the WPATH *Standards of Care (SOC)* for health care providers worldwide working with trans people. He has done consultancy work for UNDP, and for the UNAIDS and WHO HQ offices in Geneva.

Appendix One: Two recent studies examining health and well-being for trans people.

A. The Community Business 'Climate Survey'. [62]

A recent Community Business survey examined attitudes towards LGBT individuals in Hong Kong. With the help of the authors of the survey, who responded to a request to share the data files, we have been able to analyse the data on attitudes towards transgender people. The analysis reveals that, among 1002 randomly selected members of the Hong Kong working population:

a. 25% explicitly described themselves as unaccepting towards transgender persons,[II]
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,[JJ]
c. 59% believed that trans 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.

The Community Business Survey also involved an online survey of 606 LGBT individuals either in the workforce or seeking work. Thanks to the authors, we have been able to analyse the results for the 78 trans individuals. The findings reveal that:

a. Of those who were employed and who were prepared to share information on income (55 of the remaining 56) 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% 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 (47 participants) or understanding (39), that they might be ashamed of them (24), might reject or abandon them (26), or might be worried about how others would treat the

[II] Lowest levels of acceptance were among participants who were less educated, older, belonging to protestant christian faith, and working for local employers.
[JJ] These negative reactions were most common, not only among older participants, but also among protestant Christians, and those who reported having no LGBT acquaintances.

trans person (25). A few (5) participants were worried that family members might threaten their personal safety.

d. When those who were employed (56 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%), 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 (30 participants); being stereotyped as mentally ill, HIV positive or promiscuous etc (27); losing connections or relationships with co-workers (30); making people feel uncomfortable (26); not being able to advance one's career (23); being fired (21); or being excluded from meetings and discussions (18). Some (14) reported that they already knew of someone who was humiliated at work on account of being transgender. Alarmingly, a small number (4) feared for their personal safety.

f. Only 23% 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. 28% reported explicitly negative treatment in the workplace, with the most common examples including: being treated with less respect (17 participants); verbal insult or mockery (12); being deliberately put in difficult situations (8); being overlooked or mistreated in work projects (7); and being denied a promotion for which one was qualified (7). Five 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 (23%), and in their ability to build authentic relationships with colleagues (14%). 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.

(with thanks to Joanne Leung for the analysis)

B. Mental health issues for trans people.

A recently completed research study examined the mental health and wellbeing of 91 trans men and trans women attending local gender clinic as patients. [63] Among other findings it was evident that:

a. There was a 15% unemployment rate (N.B. students not included in analysis).
b. An alarming 51% had a history of mental disorder, with the most common being some sort of depressive disorder (lifetime prevalence 46% of the sample), and with many of them (41% of the sample) experiencing at least one major depressive episode. Six per cent had experienced an anxiety disorder at some point in their life; in most cases a social phobia. Three per cent had experienced a substance-related disorder.
c. The lifetime prevalence figures were far higher than for the general population, as indicated by the 1993 Shatin Community Mental Health Study which reported lifetime prevalence rates for psychiatric disorder around 20% for males and 18% for females.
d. Those with a history of mental disorder were more likely (than those without such a history) to have *inter alia* a lower level of perceived social support, and a higher likelihood of having engaged in deliberate self-harm. The links between, on one hand, a history of mental disorder and, on the other hand, poor social support and deliberate self-harm, remained even when other possibly confounding factors were taken into account.
e. For some the psychiatric problems were very much part of their current lives. Around 14% were experiencing a mental disorder at the time the research was being conducted, the commonest being depressive and/or anxiety disorders.
f. 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). The relationship between lifetime prevalence and employment , though apparent, was weaker and not significant, indicating that for many it was the experience of being unemployed that led to depression and other disorders, rather than a history of disorder leading to unemployment.
g. Six participants had a history of multiple disorders.
h. Beyond these so-called Axis I disorders, 21% of the participants displayed ‘Axis II’ personality disorders; most commonly in regard to avoidance.

Appendix Two: Three cases illustrating the impact of absence of legal gender on trans people's 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 surgery that W famously underwent. She is, as we say, '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 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 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 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*.

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