

Submission to the Hong Kong Government's Inter-departmental Working Group on Gender Recognition¹

December 2017

I. Introduction

The Centre for Comparative and Public Law (CCPL) in the Faculty of Law at the University of Hong Kong welcomes the opportunity to comment on the Consultation Paper published by the Hong Kong SAR Government's Inter-departmental Working Group on Gender Recognition (IWG).

CCPL was established in 1995 as a non-profit research centre. Its goals are to (1) advance knowledge on public law and human rights issues primarily from the perspectives of international and comparative law and practice; (2) encourage and facilitate collaborative work in the fields of comparative and public law; and (3) make the law more accessible to the community and more effective as an agent of social change. The Centre's projects and events generally fall within the following themes: comparative public policy; comparative human rights; constitutional societies; and international law in the domestic order.

Over the years, scholars affiliated with the Faculty of Law at the University of Hong Kong, including current and former CCPL fellows, international advisors, and visitors, have conducted research and organized events on issues related to the questions posed in the IWG's Consultation Paper.² Recent activities include, for example, 1) a forum on gender recognition legislation with academic experts, practitioners, and members of the transgender community in Hong Kong held in September 2017; and 2) research led by CCPL scholars that indicates majority acceptance of transgender people in Hong Kong.³

This submission identifies recent interpretative materials produced by international human rights treaty monitoring bodies that shed light on the content of relevant human rights provisions that apply to Hong Kong. The Consultation Paper, while providing an impressive and thorough overview of gender recognition schemes from around the world, does not fully evaluate whether – or which of - these schemes comply with Hong Kong's international human rights obligations.⁴ Consistency with human rights should be the IWG's primary consideration when reviewing submissions and ultimately proposing a gender recognition scheme suitable to the Hong Kong context. Human rights and the rule of law are core societal values in Hong Kong and cornerstones of the SAR's constitutional framework.

¹ This submission was prepared by Kelley Loper, CCPL Director, with the assistance of Lili Ullmann, CCPL Assistant Research Officer in Human Rights. Although partly based on research supported by CCPL and the Faculty of Law, this submission does not necessarily reflect the views of all CCPL-affiliated colleagues.

² See the selected list of publications by scholars associated with the Faculty of Law and related events (Appendix B).

³ See Kelley Loper, Holning Lau, and Charles Lau, "Public Attitudes Toward Transgender People and Anti-discrimination Legislation", December 2017 (Appendix A to this submission). This research was funded, in part, by a University of Hong Kong Small Project Grant.

⁴ While the Consultation Paper mentions human rights arguments, the analysis is brief and does not take into account more recent comments made by several United Nations (UN) human rights treaty-monitoring bodies in their interpretive materials since the Paper was published.

Our responses to the issues raised in the Consultation Paper are summarized below. These are based on developments in international human rights law as reflected in the treaty body comments described in section II.

1. International human rights law applicable to Hong Kong mandates the introduction of a gender recognition scheme that enables a person to acquire a legally recognized gender other than his or her birth gender. **Response to issue 1: yes.**
2. The requirements discussed in the Consultation Paper related to medical treatment (including, but not limited to, sex reassignment surgery and hormone therapy), immigration, marital and parental status, age, etc., are inconsistent with human rights and should not be introduced. A self-determination model that does not necessitate medical intervention or other unjustifiable conditions would likely be the most compliant with Hong Kong's human rights obligations. **Responses to issues 2-12: no.**
3. The scheme should be based on legislation in order to ensure clarity and consistency. If the legislative process results in unacceptable delays, however, an administrative procedure might serve as a reasonable stopgap measure until appropriate legislation can be finalized. **Response to issue 13: the gender recognition scheme should be based on a legislative framework.**
4. The 2004 UK Gender Recognition Act does not fully comply with international human rights law. We note, however, that the UK intends to amend the 2004 Act to remove all medical preconditions. A future revised Act may be an appropriate model for Hong Kong to consider. In the meantime, however, the Act in its current state is flawed. **Response to issue 14: no.**
5. Introducing a dual-track scheme would be unnecessarily complicated and likely contain elements that are inconsistent with self-determination and international human rights obligations. **Response to issue 16: no.**

Section II of this submission notes a selection of recent, relevant interpretive comments by United Nations (UN) human rights treaty monitoring bodies that elucidate Hong Kong's human rights duties and support these responses. These comments confirm that Hong Kong is obliged under international human rights law – and domestic constitutional law - to introduce a gender recognition scheme based on self-determination without medical or other unreasonable requirements. Section III explains that any restrictions on a right to gender recognition, including medical and other requirements, must be evaluated according to a proportionality analysis. Section IV disputes claims that gender recognition is a particularly divisive issue in Hong Kong based on recent research. Section V reflects on connections between the rights to gender recognition and equality and non-discrimination and the need to proceed simultaneously with the introduction of both gender recognition legislation and an anti-discrimination ordinance on the grounds of gender identity.

II. The right to gender recognition and the duty to establish a gender recognition scheme without unreasonable requirements

In recent years, the UN human rights treaty monitoring bodies have clarified that certain fundamental rights in core human rights instruments - such as the rights to privacy, family life, equality and non-discrimination, and freedom from ill-treatment, among others - give rise to a

derivative right to gender recognition.⁵ They have also further explained that the right to gender recognition requires the introduction of a gender recognition scheme (issue 1). Such a scheme must not impose unreasonable restrictions; in this regard most of the requirements mentioned in the Consultation Paper are likely inconsistent with international and domestic human rights provisions. Medical interventions, especially sex reassignment surgery and/or sterilization, and requirements related to marital and parental status are particularly problematic (issues 2-12). The scheme should also be based on a legislative framework that ensures clarity and consistency (issues 13 and 16).

The following sets out a sample of representative interpretive comments by various human rights treaty bodies in the past few years that support these conclusions.

Human Rights Committee⁶

1. In its concluding observations on Serbia's state report, the Human Rights Committee expressed concern "that the legal consequences of adjusting or changing one's sex are not currently regulated by any legal framework and there is no right to a preferred gender in the absence of surgical intervention".⁷ Serbia should therefore "implement a procedure for legal gender recognition that is compatible with the provisions of the Covenant".⁸ (Issues 1, 5 and 13).
2. The Committee called on Honduras to ensure that "the identity of transgender persons are fully recognized".⁹ (Issue 1)
3. The Committee has praised states that have established gender recognition schemes based on legislation; for example, it welcomed the introduction of gender recognition laws in Argentina¹⁰ and Denmark.¹¹ (Issues 1, 13, and 16)
4. The Committee expressed concern about "the lack of clarity in legislation and procedure concerning the change of civil status with respect to gender identity" in Romania and recommended that the state party "ensure that legislation concerning change of civil status with respect to gender identity is clear and applied consistently with the rights guaranteed under the Covenant".¹² (Issues 1, 13, and 16)
5. In recent concluding observations on Australia's state report, the Committee expressed concern "that most [Australian] states and territories require transgender persons to undergo surgical or medical treatment and be unmarried as a prerequisite for changing the legal record

⁵ For an excellent discussion of the nature and content of this right see Holning Lau, "Gender Recognition as a Human Right", (19 October 2017) in Andreas von Arnould, Kerstin Odendahl & Mart Susi (eds.), *New Human Rights: Recognition, Novelty, Rhetoric*, UNC Legal Studies Research Paper. Available at SSRN: <https://ssrn.com/abstract=3056110>.

⁶ The expert body that monitors states' implementation of their obligations under the International Covenant on Civil and Political Rights (ICCPR). The ICCPR has been directly incorporated into Hong Kong law through Basic Law Article 39 and the Bill of Rights Ordinance and has achieved constitutional status.

⁷ Human Rights Committee, CCPR/C/SRB/CO/3, 10 April 2017, paras 18-19.

⁸ Ibid.

⁹ Human Rights Committee, CCPR/C/HND/CO/2, 22 August 2017, para 11.

¹⁰ Human Rights Committee, CCPR/C/ARG/CO/5, 10 August 2016, para 3.

¹¹ Human Rights Committee, CCPR/C/DNK/CO/6, 15 August 2016, para 3.

¹² Human Rights Committee, CCPR/C/ROU/CO/5, 9 November 2017, paras 15 and 16.

of their sex on cardinal documents”.¹³ The Committee called on Australia to “[t]ake measures necessary to remove surgery and marital status requirements for sex change on births, deaths and marriage certificates ...” The Committee referred to the prohibition against ill-treatment in Article 7, the right to privacy in Article 17, and the right to equality and non-discrimination in Article 26. (Issues 2, 4, 5, 6, and 9)

6. The case of *G v. Australia* involved an individual communication to the Committee by a married transgender woman who was unable to amend the sex on her birth certificate.¹⁴ The Committee determined that requirements based on marital status interfered arbitrarily with the right to privacy and family life, protected by Article 17 of the ICCPR. The interference was “not necessary and proportionate to a legitimate interest.” The Committee also concluded that the differential treatment based on marital status constituted discrimination in violation of the right to equality in Article 26. (Issue 9)
7. The Committee expressed concern about the “administration of invasive and humiliating medical examinations to prove transgender status” in Bangladesh.¹⁵ (Issues 2, 4, and 5)
8. In its concluding observations on Slovakia’s state report, the Committee expressed concern that “sterilization for both transgender women and men is a requirement for legal gender recognition” and that Slovakia should “develop and implement a procedure for legal gender recognition that is compatible with the provisions of the Covenant”.¹⁶ (Issues 1, 2, 5, and 6)
9. The Committee expressed concern about “restrictive requirements for legal recognition of gender reassignment” in South Korea and called on the government to “facilitate access to the legal recognition of gender reassignment.”¹⁷ (Issue 1)

The Committee against Torture¹⁸

10. In relation to Hong Kong, the Committee against Torture expressed “concern about reports that transgender persons are required to have completed sex-reassignment surgery, which includes the removal of reproductive organs, sterilization and genital reconstruction, in order to obtain legal recognition of their gender identity”.¹⁹ It called on the Hong Kong government to remove “abusive preconditions for the legal recognition of the gender identity of transgender persons, such as sterilization”. (Issue 5)

Committee on the Elimination of Discrimination against Women (CEDAW)²⁰

11. The Committee expressed concern about “the absence of legislation to change sex marker[s] in official documents” in Monaco and recommended the adoption

¹³ Human Rights Committee, CCPR/C/AUS/CO/6, 9 November 2017, para 27.

¹⁴ Human Rights Committee, Communication No. 2172/2012, *G v. Australia*.

¹⁵ Human Rights Committee, CCPR/C/BGD/CO/1, 27 April 2017, Para 11(e).

¹⁶ Human Rights Committee, CCPR/C/SVK/CO/4, 22 November 2016, paras 14 and 15.

¹⁷ Human Rights Committee, CCPR/C/KOR/CO/4, 15 December 2015, paras 14 and 15.

¹⁸ The expert committee that monitors states’ implementation of their obligations under the Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁹ Committee against Torture, CAT/C/CHN-HKG/CO/5, 3 February 2016, paras 28 and 29.

²⁰ The expert committee that monitors states’ implementation of their obligations under the Convention on the Elimination of all forms of Discrimination against Women.

of “legislation allowing for [the] change of sex marker[s] in official documentation for transgender women”.²¹ (Issues 1 and 13).

12. In relation to Montenegro’s report, the Committee expressed concern about “the legal requirement for transgender persons to undergo a surgical intervention in order to obtain legal recognition” and recommended that the state “[f]acilitate the procedure for legal recognition of a sex change, including by removing the requirement to undergo sterilization.”²² (Issue 5).
13. In its concluding comments on Germany’s report, the Committee expressed concern about “the burdensome conditions set for gender reassignment treatment for transgender women (namely, the requirement of two experts’ reports and the lengthy period of 12 to 18 months of treatment, often experienced as psychopathologization) required before gender reassignment can be granted ...”²³ It recommended revision of “the Transgender Act to harmonize it with international standards of non-discrimination and to alleviate and simplify the conditions under which gender reassignment treatment can be obtained”. (Issues 2, 4, 5, and 6).
14. The Committee called on Switzerland to “[r]eview the decisions taken by civil courts requiring transgender persons to undergo surgical and/or hormonal treatment before legal gender recognition can be granted...”²⁴ (Issues 2, 4, 5 and 6).

The Committee on Economic, Social and Cultural Rights²⁵

15. As part of the duty to ensure the right to non-discrimination, the Committee called on the Russian Federation to “[p]ut in place a quick, transparent and accessible procedure for legal gender recognition, to facilitate the enjoyment of Covenant rights by transgender persons”.²⁶ (Issues 1 and 13)

The Yogyakarta Principles

16. The Yogyakarta Principles, an authoritative guide to the application of international human rights law to issues related to sexual orientation and gender identity, reflect the treaty body interpretations described above. In particular, Principle 31 in the Yogyakarta Principles Plus 10 provides that the right to legal recognition requires states to “ensure a quick, transparent,

²¹ CEDAW/C/MCO/CO/1-317 November 2017, paras 45 and 46.

²² CEDAW/C/MNE/CO/2, July 2017, paras 46 and 47.

²³ CEDAW/C/DEU/CO/7-8, February 2017, paras 45 and 46.

²⁴ CEDAW/C/CHE/CO/4-5, 25 November 2016, para 39.

²⁵ The expert committee that monitors states’ implementation of their obligations under the International Covenant on Economic, Social and Cultural Rights.

²⁶ E/C.12/RUS/CO/6, 16 October 2017, para 23.

and accessible mechanism that legally recognizes and affirms each person’s self-defined gender identity”.²⁷ (Issues 1, 13, and 16)

17. Principle 31 also clarifies that states must ensure that “no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one’s name, legal sex or gender” and “that a person’s criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.”²⁸ (Issues 2, 3, 4, 5, 8, 10)

III. Balancing of rights and other interests

Most, and likely all, of the potential requirements for gender recognition mentioned in issues 2-12 are inconsistent with international human rights law. Human rights law does, however, allow for a careful, fair balancing of competing interests and has developed well-established legal tests that must be applied to evaluate any proposed limitations. Restrictions on rights are only acceptable if they pursue a legitimate aim and are necessary and proportionate to achieving that aim. For example, in relation to the right to equality and non-discrimination, the Human Rights Committee confirmed in *G v Australia* that “not every differentiation based on the grounds listed in article 26 amounts to discrimination, as long as it is based on reasonable and objective criteria, in pursuit of an aim that is legitimate under the Covenant”.²⁹ The Hong Kong courts have accepted, and frequently applied, this doctrine in cases involving constitutional rights.

The right to be free from torture or other forms of cruel, inhuman or degrading treatment or punishment, however, is absolute and cannot be subject to any restrictions. Based on the treaty bodies’ interpretive comments discussed above, requirements that individuals undergo sex reassignment surgery and sterilization before amending their gender on official documents, likely constitute ill-treatment in violation of absolute rights.

IV. Arguments about divisiveness and lack of consensus

We contend that issues related to gender recognition may not be as controversial or divisive in Hong Kong as some commentators have claimed. As mentioned above and in Appendix A, recent CCPL research indicates that the majority of the Hong Kong public accept and are supportive of transgender people.³⁰ These results suggest that vocal opposition to gender recognition legislation expressed by some in recent debates, reflects the views of a relatively small number of people in Hong Kong. In any event, policy decisions affecting the rights of members of a vulnerable minority, including transgender people, should not be contingent on majority public support. The IWG should move expeditiously toward recommending a gender recognition scheme and avoid any delays based on arguments about societal divisions or lack of consensus.

²⁷ The Yogyakarta Principles Plus 10, published in November 2017, update the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, a widely referenced, influential document drafted by experts in 2006.

²⁸ *Ibid.*, Principle 31.

²⁹ *G v Australia*, n 14 above, para. 7.12.

³⁰ See n 3 above (and Appendix A). For example, the results show that a majority of the Hong Kong population believe that transgender people should be free to express their identity and would support transgender friends wanting to live in their acquired gender.

V. Discrimination

The Consultation Paper explains that issues related to anti-discrimination legislation based on transgender status fall outside the scope of the current consultation exercise. We emphasize, however, that the rights to gender recognition and non-discrimination are inextricably linked and legislation to ensure protection for both should be considered simultaneously. The failure to introduce a gender recognition scheme compounds and exacerbates discrimination experienced by transgender people. The right to equality requires states to prevent such discrimination in part through the introduction of a gender recognition scheme. At the same time, the lack of an anti-discrimination law means transgender people are denied access to effective remedies for much of the discrimination they face. It is worth noting that the survey of Hong Kong public opinion mentioned above and in Appendix A indicates majority support in Hong Kong for legislation protecting people from discrimination because they are transgender.³¹

VI. Conclusions

The derivative right to gender recognition requires the adoption of a gender recognition scheme. This review of international human rights law that applies to Hong Kong supports the introduction of a gender recognition scheme based on self-determination without requirements related to medical treatment, especially sex reassignment surgery, marital status, and other restrictions incompatible with human rights. Most issues, especially issue 1, in the Consultation Paper should be relatively easily resolved and the IWG should quickly proceed to the next stage: designing procedures and drafting implementing legislation.

We note and appreciate the IWG's efforts "to maintain an open mind"; to "not have any preferred position"; and to "discuss the relevant issues as objectively as possible so as to solicit views from the community". When considering submissions received as part of this exercise and the various gender recognition options, however, the IWG should only seriously contemplate measures and arguments consistent with international human rights standards.

³¹ See n 3 above.

Appendix A: Public Attitudes Towards Transgender People and Anti-discrimination Legislation

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Introduction

Discussion about transgender issues in Hong Kong has increased in recent years. This development was spurred in part by the Hong Kong Court of Final Appeal's decision in *W v Registrar of Marriages*,³² which held that a transgender woman had a right to be recognized as a woman for the purpose of marriage. In light of these changes, we conducted a survey to gauge Hong Kong people's awareness of what the term "transgender" means. The survey also investigated Hong Kong people's attitudes towards transgender people and towards anti-discrimination legislation to protect transgender people.

This paper proceeds in three parts. First, we provide background on our survey. Second, we present our findings. Third, we conclude by commenting on the relevance of our findings to public policy debates about transgender issues.

Survey Background

As part of a project housed in the Centre for Comparative and Public Law in the Faculty of Law at the University of Hong Kong, we commissioned the Social Sciences Research Centre (SSRC) at the University of Hong Kong to conduct a public opinion telephone survey of Hong Kong residents between 12 May and 6 June 2017. SSRC called both mobile and fixed line phones to obtain a representative sample of Hong Kong residents age 18 and over. A total of 1,437 people completed the survey (719 from mobile phones and 718 from fixed line phones) in either Cantonese or English.³³

On average, respondents took 10.8 minutes to complete the survey. The survey asked 26 questions about transgender issues, gay and lesbian issues, and respondent demographics. This report is focused on the survey questions about transgender people and related anti-discrimination legislation.

Results

We present results of the public opinion survey below in three sections: Awareness; Attitudes Towards Transgender People; and Support for Anti-discrimination Legislation.

A. Awareness

As shown in Table 1 below, two thirds (66%) of Hong Kong people have heard of the term "transgender." After respondents answered the survey question about awareness, interviewers provided all respondents with a common definition of "transgender." (See Appendix for exact wording.) Respondents were asked to use this common definition when answering subsequent

³² [2013] 3 HKLRD 90.

³³ The cooperation rate (the number of people who completed the survey divided by the number of people who answered the phone) was 53% and the response rate (the number of people who completed the survey divided by the number of all phone numbers dialed) was 11%. We used standard statistical weighting techniques to adjust for non-response that is common in phone surveys.

questions about transgender people and anti-discrimination legislation. In other words, regardless of whether respondents were previously aware of the term “transgender,” they received an explanation of the term for the purposes of completing our survey.

Table 1. Awareness about Term Transgender <i>Now I'm going to ask you a few questions about transgender people. First, have you ever heard of the term "transgender?"</i> 我地而家會問你幾條有關跨性別人士嘅問題。首先，你有冇曾經聽過「跨性別」呢個詞語？	
Yes 有	66%
No 冇	34%
Total	100%

B. Attitudes Towards Transgender People

As Table 2 indicates, a large majority of Hong Kong people (81%) are very accepting, moderately accepting, or a little accepting of transgender people, and only 19% are not at all accepting.

The results in Table 3 show that 74% of the public completely or somewhat agrees that people should be able to express their gender identity, 14% are neutral, and only 12% somewhat or completely disagree. Similarly, 70% either completely or somewhat agree that they would openly accept a transgender work colleague, 15% are neutral, and 14% either completely or somewhat disagree. The majority of Hong Kong people somewhat or completely *disagree* that transgender people should be avoided (62%) and that transgender people are immoral (66%). The results of the other questions detailed in the table show similar levels of acceptance.

Table 2. Acceptance of Transgender People <i>How accepting are you of transgender people?</i> 你有幾接受跨性別人士？	
Very accepting 非常接受	21%
Moderately accepting 中等接受	38%
A little accepting 少少接受	22%
Not at all accepting 完全唔接受	19%
Total	100%

Table 3. Attitudes Towards Transgender People <i>How much do you agree or disagree with the following statements?</i> 請你以完全同意，有啲同意，中立，有啲唔同意，完全唔同意來表示你對以下句子嘅同意程度。	
<i>A. People should be free to express their gender identity</i> 所有人應該可以自由地表達對自己認同嘅性別	
Completely Agree 完全同意	52%
Somewhat Agree 有啲同意	22%
Neutral 中立	14%
Somewhat Disagree 有啲唔同意	4%
Completely Disagree 完全唔同意	8%

Table 3 (continued from previous page)	
<i>B. I would accept an openly transgender work colleague</i> 我會接受一個公開自己係跨性別嘅同事	
Completely Agree 完全同意	48%
Somewhat Agree 有啲同意	22%
Neutral 中立	15%
Somewhat Disagree 有啲唔同意	4%
Completely Disagree 完全唔同意	10%
<i>C. Transgender people should be avoided whenever possible</i> 盡可能都會避開跨性別人士	
Completely Agree 完全同意	9%
Somewhat Agree 有啲同意	10%
Neutral 中立	19%
Somewhat Disagree 有啲唔同意	19%
Completely Disagree 完全唔同意	43%
<i>D. Transgender people are immoral</i> 跨性別人士係唔道德嘅	
Completely Agree 完全同意	8%
Somewhat Agree 有啲同意	6%
Neutral 中立	21%
Somewhat Disagree 有啲唔同意	17%
Completely Disagree 完全唔同意	49%
<i>E. If a male friend wanted to live as a woman, I would support the friend</i> 如果我嘅男性朋友想要做一個女人，我會支持佢	
Completely Agree 完全同意	27%
Somewhat Agree 有啲同意	17%
Neutral 中立	30%
Somewhat Disagree 有啲唔同意	7%
Completely Disagree 完全唔同意	19%
<i>F. If a female friend wanted to live as a man, I would support the friend</i> 如果我嘅女性朋友想要做一個男人，我會支持佢	
Completely Agree 完全同意	27%
Somewhat Agree 有啲同意	17%
Neutral 中立	30%
Somewhat Disagree 有啲唔同意	7%
Completely Disagree 完全唔同意	19%
<i>G. Transgender people make me nervous</i> 跨性別人士會令我緊張	
Completely Agree 完全同意	7%
Somewhat Agree 有啲同意	14%
Neutral 中立	19%
Somewhat Disagree 有啲唔同意	15%
Completely Disagree 完全唔同意	45%

C. Support for Anti-discrimination Legislation

As shown in Table 4, 68% of Hong Kong people completely or somewhat agree that Hong Kong should have a law that protects people from being discriminated against because they are transgender, 19% are neutral, and 14% completely or somewhat disagree.

Table 4. Support for Transgender Anti-Discrimination Legislation <i>Do you agree or disagree that Hong Kong should have a law that protects people from being discriminated against because they are transgender?</i> 請問你同唔同意香港應該有法例保護因跨性別而被歧視嘅市民?	
Completely Agree 完全同意	46%
Somewhat Agree 有啲同意	22%
Neutral 中立	19%
Somewhat Disagree 有啲唔同意	4%
Completely Disagree 完全唔同意	10%
Total	100%

Conclusions

Without survey data, it is difficult to ascertain the level of public awareness of what it means to be transgender. It is also difficult to gauge public opinion without survey data; public debates about transgender issues might not accurately reflect public opinion because individuals who hold the majority viewpoint might be relatively quiet while holders of the minority viewpoint might be relatively outspoken. By providing survey data, this paper seeks to facilitate understanding of the public's awareness and opinions about transgender issues and legal protection against discrimination on the basis of being transgender.

There are currently government deliberations concerning gender recognition legislation. Such legislation would allow transgender people to modify the gender marker on identity documents so that their documents comport with their gender identity. When discussing the possibility of enacting gender recognition legislation, commentators sometimes wonder about the public's attitudes towards transgender people. This briefing paper does not directly address the normative question of whether public acceptance of transgender people is necessary before introducing legal measures to protect their rights. Arguably, legal protection for minority groups should not be contingent on majority support. To the extent, however, that the Hong Kong government insists on considering public opinion when developing policy, our research sheds light on these attitudes. It shows that only a minority of the public (19%) say they do not accept transgender people. Likewise, only a minority (26%) say they would not support a male friend who wants to live as a woman, or a female friend who wants to live as a man. Meanwhile, a majority of the public (74%) believed that people should be free to express their gender identity. A majority of the public (68%) also support legislation to protect transgender people from discrimination.

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Appendix: Definition of “Transgender” Used in Survey

Interviewers read the following definition of “transgender” to all respondents before asking questions about transgender people and related anti-discrimination legislation:

Transgender individuals are persons whose identity differs from what is typically associated with the sex they were assigned at birth.

A transgender man is a person who identifies as a man, but who was assigned female at birth.

A transgender woman is a person who identifies as a woman, but who was assigned male at birth.

跨性別人士係指是佢地認同自己嘅性別身份同出生時被定義嘅生理性別係唔同。

即係跨性別男士，出生時嘅生理性別係女性，但佢會認同自己係男性。

跨性別女士，出生時嘅生理性別係男性，但佢會認同自己係女性。

Appendix B

A selection of publications related to transgender and transsexual rights and gender recognition³⁴

By scholars affiliated with the Faculty of Law at the University of Hong Kong³⁵

Chan, C, “Deference and the Separation of Powers: An Assessment of the Court’s Constitutional and Institutional Competences” (2011) 41 Hong Kong Law Journal 7.

Emerton, R, “Time for change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong” (2004) 34 Hong Kong Law Journal 515.

Emerton, R, “Neither Here Nor There: The Current Status of Transsexual and Other Transgender Persons Under Hong Kong Law” (2004) 34 Hong Kong Law Journal 245.

Emerton, R, “Finding a voice, fighting for rights: the emergence of the transgender movement in Hong Kong” (2006) 72 Inter-Asia Cultural Studies 243.

Kapai, P, “A Principled Approach Towards Judicial Review: Lessons from *W v Registrar of Marriages*” (2011) 41 Hong Kong Law Journal 49.

Lau, H, “Gender Recognition as a Human Right”, (19 October 2017) in von Arnould, A, Odendahl, K & Susi, M (eds.), *New Human Rights: Recognition, Novelty, Rhetoric*, UNC Legal Studies Research Paper. Available at SSRN: <https://ssrn.com/abstract=3056110>

Lau, H and Loh, D, “Misapplication of ECHR Jurisprudence in *W v Registrar of Marriages*” (2011) 41 Hong Kong Law Journal 75.

Liu, A, “Exacerbating Corbett: *W v Registrar of Marriages*” (2011) 41 Hong Kong Law Journal 759.

Liu, A, “Understanding Goodwin: *W v Registrar of Marriages*” (2012) 42 Hong Kong Law Journal 403.

Liu, A, “Gender Recognition: Two Legal Implications for Marriage” (2013) 43 Hong Kong Law Journal 403.

Loper, K, “*W v Registrar of Marriages* and the Right to Equality in Hong Kong” (2011) 41 Hong Kong Law Journal 89.

Petersen, C J, “Sexual orientation and gender identity in Hong Kong: a case for the strategic use of human rights treaties and the international reporting process” (2013) 14 Asian-Pacific Law & Policy Journal 28.

Scherpe, J M, “Changing One’s Legal Gender in Europe: The ‘W’ Case in Comparative Perspective” (2011) 41 Hong Kong Law Journal 109.

³⁴ Prepared by Lili Ullmann and Kelley Loper.

³⁵ Including current and previous visiting professors, students, CCPL fellows and international advisors.

Scherpe, J M, *The Legal Status of Transsexual and Transgender Persons* (Intersentia, 2015).

Wan, M, “Doing Things with the Past: A Critique of the Use of History by Hong Kong's Court of First Instance in *W v Registrar of Marriages*” (2011) 41 Hong Kong Law Journal 125.

Wong, K Y, “Taking Transgender Rights Seriously: A Rights-Based Model of Gender Recognition in Hong Kong” (2015) 45 Hong Kong Law Journal 109.

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Selection of related events

Forum on Gender Recognition Legislation, Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong, 23 September 2017.

High Level Roundtable on Gender Identity, Rights and the Law, UNDP, Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong, and the Open Society Foundation, 2 October 2014.

The Legal Status of Transsexual and Transgender Persons, Centre for Medical Ethics and Law, Faculty of Law, The University of Hong Kong, 6-7 September 2013.

Towards Full Inclusion: Sexual Orientation, Gender Identity, and Human Rights, International Commission of Jurists and the Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong, 26 April 2008.