



SUBMISSION

for the list of issues before reporting

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against Torture on the implementation of
Convention against Torture in Hong Kong



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About Pink Alliance

Founded in 2008, the Pink Alliance (formerly known as the Tongzhi Community Joint Meeting or TCJM) is an umbrella network representing 16 GLBTI and GLBTI-friendly advocacy and cultural organizations in Hong Kong. The Pink Alliance carries out research and campaigns on issues of key importance concerning the GLBTI community via a number of channels, including political lobbying, engaging with parliamentarians, government officials, the United Nations and other NGOs. Whether through advocacy work or cultural activities, we aim to advance social recognition of GLBTI as valuable members of society.

This report is submitted to the 56th Session of the Committee against Torture for the List of Issues prior to reporting on China (Hong Kong) to facilitate and assist Committee members to formulate questions on the implementation of CAT concerning gay, lesbian, bisexual, transgender and intersex community in Hong Kong, China. The Pink Alliance will be pleased to provide additional information and further assistance required by the Committee. This report was prepared by:

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Introduction - CAT and GLBTI people

Article 1(1) of the Convention against Torture (CAT) absolutely prohibits torture within territories under the jurisdiction of state parties, including "for any reason relating to discrimination", and Article 16(1) requires State Parties to prevent any cruel, inhuman or degrading treatment or punishment which are "committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". General Comment No. 2 of the Committee against Torture (the Committee) highlighted the importance of the application of CAT to groups made vulnerable by discrimination and marginalization, including all persons regardless of "gender, sexual orientation, transgender identity".¹ The intersection of various characteristics or statuses, including gender and sexual orientation, and "actual or perceived non-conformity with socially determined gender roles", often lead to vulnerability to torture or cruel, inhuman or degrading treatment. Moreover, as understanding of GLBTI people has evolved in recent years, certain practices, particularly those involving unwanted or involuntary surgeries and treatments, have come to be identified as torture or ill-treatment that are worthy of the Committee's attention.

This report covers various issues of torture or ill-treatment under CAT that GLBTI people in Hong Kong face. With rampant discrimination against and ignorance of GLBTI people as the pretext, it will be seen that healthcare and detention settings expose GLBTI people to ongoing ill-treatment or possibly even torture in the Hong Kong context.

¹ CAT/C/GC/2/CRP. 1/Rev.4 (2007) ¶ 20-23

Key Terms

Gender expression	Characteristics in personality, appearance, and behavior that in a given culture and historical period are designated as masculine or feminine. ² Expressions of gender may take the form of dress, speech and mannerisms.
Gender identity	Each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. ³
GLBTI	Abbreviation for gay, lesbian, bisexual, transgender and intersex.
Intersex persons	refers to people born with (or who develop naturally in puberty) chromosomes, genitals, hormones and/or gonads that do not fit typical definitions of male or female. ⁴
Gender reassignment surgery (GRS)	also known as "gender confirmation surgery" or "sex reassignment surgery", refers to thea collection of procedures (including hormone treatments and surgeries) by which a person's physical appearance and function of their existing sexual characteristics are altered to affirm that of the preferred gender. Unless otherwise stated, GRS in this report refers to the series of surgeries involving of the removal of biological genitalia and reconstruction of the genital organs in the reassigned gender. GRS is referred to by the Government of Hong Kong as "sex reassignment surgery" (SRS).
Sexual orientation	Each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. ⁵
Transgender persons*	Individuals whose gender identity and/or gender expression differs from social norms related to their gender of birth. ⁶ This is a diverse group of individuals who cross or transcend culturally defined categories of gender, ⁷ including genderqueer, transsexual persons and some cross-dressers.
Transsexual persons*	Individuals who identify as, and desire to live and be accepted as, a member of another sex. ⁸ The permanent nature of their identity with another sex defines this subset of transgender people . They may or may not have a sense of discomfort with their anatomic sex or a wish to undergo surgery or hormone treatment to make their body as congruent as possible with their preferred sex.
Trans men	People who were assigned female sex at birth but identify and live as men.
Trans women	People who were assigned male sex at birth but identify and live as women.

* Clarification: In this report, we use the term "transsexual" while discussing issues concerning legal gender recognition; and we use "transgender" while discussing all other issues. This is to reflect that only some transgender persons who desire to live permanently in a different sex are affected by issues relating to legal gender recognition, while other issues such as discrimination and ill-treatment in detention affect all transgender persons.

² Weber-Main, A. (2011). *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*. World Professional Association for Transgender Health (WPATH).

³ *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. (2007). Firth Preamble.

⁴ Organisation Intersex International United States of America (OII United States)

⁵ Ibid; Fourth Preamble.

⁶ Weber-Main, A. (2011). *Standards of Care*. WPATH. See note 2 above.

⁷ Ibid.

⁸ *I.C.D. - 10: 1990 draft of chapter V. Categories F00-F99, , Mental and behavioural disorders (including disorders of psychological development): Clinical descriptions and diagnostic guidelines*. (1990). World Health Organization, F64.0

Discrimination faced by GLBTI people

Implicated articles: 1, 2 and 16, CAT General Comment #2

1. The importance of eliminating discrimination against GLBTI people to the implementation of CAT has long been recognized, including by successive UN Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment. In 2001, Sir Nigel Rodley's report to the Human Rights Council as UN Special Rapporteur on torture stated that "discrimination on the grounds of sexual orientation and gender identity may often contribute to the dehumanization of the victim, which is often the necessary condition for torture and ill-treatment to take place".⁹ According to General Comment No. 2 of the Committee Against Torture, eliminating employment discrimination both in state institutions and in the private sector, as well as conducting on-going sensitization training in contexts where torture or ill-treatment is likely to be committed, are thus key to preventing such ill-treatment and building a culture of respect.¹⁰
2. However, the lack of an anti-discrimination law on the basis of sexual orientation, gender identity and intersex variations in Hong Kong allows rampant discrimination against GLBTI people to continue without sanctions. Other UN treaty bodies have recognized this issue in Hong Kong but successive governments have avoided their calls to enact legislation to prohibit discrimination against GLBTI people.¹¹
3. **Rampant discrimination,¹² and even ignorance, of gay, lesbian, bisexual, transgender and intersex people set the context for torture and other forms of ill-treatment to occur.** The Committee has recognized the impact of such discrimination and issued relevant recommendations in respect of other state parties in the past.¹³

RECOMMENDED QUESTION:

- Given that discrimination sets the context for CAT violations, is the Government of Hong Kong going to enact legislation to prohibit discrimination on the grounds of sexual orientation, gender identity and intersex status?

Mandatory surgeries for gender identity recognition of transsexual individuals

Implicated articles: 16 (and potentially 1 and 2)

4. Transsexual persons are individuals who identify as, and desire to live and be accepted as, a member of another sex.¹⁴ The permanent nature of their self-identification with another sex defines this subset of transgender people. Many transsexual persons have a sense of discomfort with, or inappropriateness of, their own anatomic sex, and wish to have surgery and hormone treatment to make their body as congruent as possible with their preferred sex. However, not all transsexual persons experience such discomfort or wish to undergo such medical treatments. The side effects of hormone treatment and the potential complications of gender reassignment surgeries (GRS)

⁹ Rodley, N. (2001), *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*. United Nations, A/56/156. ¶ 19

¹⁰ CAT General Comment 2. (2007), CAT/C/GC/2/CRP. 1/Rev.4 ¶ 24.

¹¹ Concluding Observations of CCPR 1997, CCPR/C/79/Add.117 ¶ 15; Concluding Observations of CCPR 2013, CCPR-C-CHN-HKG-CO-3 ¶ 23; Concluding Observations of CESCR 2001, E/C.12/1/Add.58 ¶ 15 & 31; Concluding Observations of CESCR 2005, E/C.12/1/Add.107 ¶ 78; Concluding Observations of CRC, CRC/C/CHN/CO/2 ¶ 33.

¹² For example, see Vernon, K. and Yik, A. (2010), *Hong Kong LGBT Climate Study*. Community Business. Pg. 5.

¹³ Concluding Observations of CAT 2011 on Paraguay, CAT/C/PRY/CO/4-6 ¶ 19(d); Concluding Observations of CAT 2011 on Guatemala, CAT/C/GTM/CO/5-6 ¶ 22.

¹⁴ I.C.D. - 10. World Health Organization, F64.0. See note 8 above.

are also well-documented.¹⁵

5. **Transsexual persons are currently unable to obtain legal recognition of their preferred gender**, including a change of their gender marker on government-issued identification documents, such as the Hong Kong Identity Card (HKIC), **unless they undergo highly invasive gender reassignment surgeries (GRS),¹⁶ which include genital removal and reconstruction surgeries and result in permanent sterilization.**
6. All Hong Kong residents are required by law to register and carry a HKIC. The law provides that a police or immigration officer can require anyone to produce the proof of identity anytime. It is also used widely in healthcare, employment, accessing goods or services, and in many other daily government-related and private settings. The widespread use of the HKIC means that transsexual persons who have not had GRS often experience embarrassment and rejection when faced with situations where they have to explain the inconsistencies with their gender marker in their identification.
7. The Immigration Department of the Security Bureau is responsible for the registration of persons, including the registration and amendment of gender marker in official documents. In order to be eligible to make such change, the current regulation requires that an applicant to
 - ... produce a medical proof which should indicate that the following criteria for the completion of SRS are met:
 - A. for sex change from female to male:
removal of the uterus and ovaries; and construction of a penis or some form of a penis;
 - B. for sex change from male to female:
removal of the penis and testes; and construction of a vagina.¹⁷
8. Even though GRS have been included as part of the basic healthcare subsidized by public funds since 1980s and transsexual persons must give their formal consent before GRS can take place, **the imposition of surgical preconditions to the legal recognition of transsexual persons' gender undermines free consent and constitutes coercive medicine, if not an implicit form of coercive sterilization.**
9. International human rights bodies, legal and health authorities have called for the removal of medical preconditions, including GRS, sterilization or hormonal therapy, to transsexual persons' legal gender recognition.
10. In February 2013, the **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez**, in his report to the Human Rights Council, observed that:

In many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender.¹⁸
11. After noting a number of court decisions and observations to the effect that these unwanted surgeries run counter to transsexual persons' ability to give full voluntary consent, right to physical integrity and self-determination, **the Special Rapporteur, Mr. Méndez**, called upon all states to:

... repeal any law allowing intrusive and irreversible treatments, including... involuntary sterilization...

¹⁵ Weber-Main, A. (2011). *Standards of Care*. WPATH. See note 2 above.

¹⁶ As explained in the "Key Terms" section, the Government of Hong Kong refers to GRS as "sex reassignment surgeries" (SRS).

¹⁷ GovHK: Frequently Asked Questions – Hong Kong Identity Card. (n.d.). Retrieved January 15, 2015, from http://www.gov.hk/en/residents/immigration/identitycard/hkic/faq_hkic.htm, Question 22

¹⁸ Méndez, J. E. (2013), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Report*. Print. United Nations. A/HRC/22/53, ¶ 78

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.¹⁹

12. The **High Commissioner for Human Rights'** report to the Human Rights Council in 2011 also called on states to:

... 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.²⁰

13. An **interagency statement jointly issued by seven UN agencies** in 2014 also observed that sterilization surgery requirements run counter to human rights and suggested states to:

Ensure that sterilization, or procedures resulting in infertility, is not a prerequisite for legal recognition of preferred sex/gender.²¹

14. These calls are further echoed by the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, in particular Principle #3, as well as the World Professional Association for Transgender Health (WPATH), which has also recognized the positive health effects of legal recognition for transsexual persons,²² and called for removal of medical barriers in gender recognition.²³

15. In July 2013, the Court of Final Appeal (CFA) in Hong Kong ruled, in the landmark case of *W v Registrar of Marriages* (the *W Case*),²⁴ that it was unconstitutional to deny a transsexual woman who had undergone full GRS her right to marry a man. In its judgment, the CFA refused to draw a bright line test for transsexual persons' gender recognition on the point of completion of full GRS, for various reasons including that it would have an "undesirable coercive effect".²⁵ It commented that there are other areas of law where gender recognition issues would potentially arise, and expressed that comprehensive and inclusive gender recognition legislation would be "beneficial".²⁶ The CFA referred to the United Kingdom's *Gender Recognition Act 2004*, which does not require GRS or any form of surgery as a prerequisite for gender recognition, as a "compelling model" for such legislation.²⁷ Ultimately, however, the CFA left open the questions of whether and how the Government should legislate on gender recognition for transsexual persons.

16. In a delayed response to the judgment from the *W Case*, in January 2014 the Government of Hong Kong set up an Interdepartmental Working Group on Gender Recognition (IWG) to:

... consider legislation and incidental administrative measures that may be required to protect the rights of transsexual persons in all legal contexts, and to make such recommendations for reform as may be appropriate.²⁸

¹⁹ Ibid., ¶ 88

²⁰ United Nations. (2011). *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report*. A/HRC/19/41 ¶ 71-73, 84(h).

²¹ World Health Organization, et al. (2014). *Eliminating forced, coercive and otherwise involuntary sterilization - An interagency statement: Report*. Pg. 7-8, 13.

²² World Professional Association for Transgender Health (WPATH), *Standards of Care* (Seventh edition, 2011) (See n 2); WPATH, *Statement on Medical Necessity* (June 17, 2008).

²³ WPATH, *Statement on Medical Necessity* (June 17, 2008); WPATH, *Identity Recognition Statement* (June 16, 2010); WPATH, *2015 Statement on Identity Recognition* (January 19, 2015)

²⁴ [2013] HKCFA 39.

²⁵ Ibid., ¶ 136-137.

²⁶ Ibid., ¶ 141-146.

²⁷ Ibid., ¶ 138.

²⁸ Ainsworth, M. (2014). *Elaboration on World of Inter-departmental Working Group on Gender Recognition*. Retrieved from: <http://www.legco.gov.hk/yr13-14/english/bc/bc52/papers/bc520429cb2-1417-1-e.pdf>

17. It is unclear to what extent the IWG will consider removing the surgery requirements for official gender recognition for transsexual persons in Hong Kong. In a legislative hearing session, the IWG stated that it "hope[d] to be able to produce an initial report of its work in about two years' time." Notwithstanding the outcome of the initial report (hopefully) next year, and the final report with an undefined time frame, full GRS continue to be a mandatory prerequisite for transsexual persons should they wish to have their gender identity officially recognized.
18. **It is true that GRS is medically necessary and personally desirable for some transsexual persons and thus does not raise CAT concerns for these people, but this is not the case for all transsexual persons. The mandatory nature of the requirement for ALL transsexual persons to undergo full GRS regardless of their medical needs, the essential importance of official gender recognition for transsexual persons, as well as the highly invasive and sterilizing nature of GRS that can cause severe pain or suffering, all interact to constitute a system of coercive medicine and coercive sterilization. Where the needs for official gender recognition coerces some transsexual persons to undergo GRS, this constitutes a form of cruel, inhuman or degrading treatment or even torture that the Government of Hong Kong inflicts upon those persons.**

RECOMMENDED QUESTIONS:

- Is the Government of Hong Kong going to repeal the mandatory surgery requirements for transsexual persons to gain official gender recognition, given that such surgery requirements may raise serious concerns under Article 16 and potentially Article 2 of CAT?
- Further to the above question, what steps are the Government of Hong Kong taking to expedite the introduction of comprehensive legal reform for gender recognition for transsexual persons? And what measures will it take to alleviate the pressures from gender recognition suffered by transsexual persons while awaiting the said legal reform?

Involuntary surgeries on infants and children born with intersex variations

Implicated articles: 16 (and potentially 1 and 2)

19. Perhaps unsettled by atypical genitalia found in any newborn infant, parents and medical staff opt for surgery on intersex infants and children in order to place them in either of the gender binary system where only "male" or "female" can be registered officially on birth certificate and identification documents issued by the Government of Hong Kong.
20. Save for exceptional cases, such surgeries are of cosmetic nature rather than a medical emergency requiring immediate treatment in order to "gender conform" the infants into culturally-accepted sexes. Some has argued for the imposition of such genital-normalizing surgeries by asserting that they would avoid or alleviate future psychological disorders caused by gender nonconformity or gender confusion. In other words, by creating "normalcy" on the person's body to have clearly identifiable genital organs, the surgeries will enhance the psychosocial well-being of the intersex infant or child.
21. However, no evidence has been found to support such kinds of assertions. Moreover, it has been noted in a 2004 report by the **San Francisco Human Rights Commission** that:

Existing data suggest that the long-term consequences of "normalizing" genital surgeries are quite negative. Many intersex adults report dissatisfaction with the sex hormone treatments and/or the surgeries they were subjected to as infants and children. Reported dissatisfaction includes physical appearance, scarring, pain, and diminished or absent sexual function, as well as psychological problems such as depression, poor body image, dissociation, sexual dysfunction, social anxiety, substance abuse, suicidal ideation, shame, self-loathing, difficulty with trust and intimacy, and post-traumatic stress disorder.²⁹

These observations are consistent with our interviews with intersex individuals in Hong Kong (see the box below).

Real-life illustration - Involuntary surgeries carried out on intersex children

In one case we encountered, an infant was born with a micropenis with no urinary tract and no testes, which only developed at around six months of age, at which time, the baby was assigned as a "male" on the birth certificate. Between the ages of eight and thirteen, twenty operations -- without the boy participating in the decision-making process -- were performed (including urinary tract construction and penis enlargement), among other reasons, to further "normalize" the boy into his assigned gender. The lengthy and repeated complex surgeries have resulted in poor health growing up and clinical severe anxiety and depression.

22. Considering the severity, irreversibility and non-emergency nature of genital-normalizing surgeries with life-long effects, the lack of participation on the part of the child is a violation of the rights to be heard as enshrined in the Convention on the Rights of the Child, applicable to Hong Kong.
23. In February 2013, the **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez**, stated in his report to the Human Rights Council that:

Children who are born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization, involuntary genital normalizing surgery, performed without their informed consent, or that of their parents, "in an attempt to fix their sex", leaving them with permanent, irreversible infertility and causing severe mental suffering.

The Special Rapporteur calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery...³⁰ [emphasis added]

24. An interagency statement jointly issued by seven UN agencies also notes that:

[Such surgeries] may be proposed on the basis of weak evidence, without discussing alternative solutions that would retain the ability to procreate. Parents often consent to surgery on behalf of their intersex children, including in circumstances where full information is lacking.

It has been recommended by human rights bodies, professional organizations and ethical bodies that full, free and informed consent should be ensured in connection with medical and surgical treatments for intersex persons and, if possible, **irreversible invasive medical interventions should be postponed until a child is sufficiently mature to make an informed decision, so that they can participate in**

²⁹ de María Arana, M. (2005), *A Human Rights Investigation Into the Medical "Normalization" of Intersex People: Report*. Human Rights Commission. ¶ 20

³⁰ Méndez, J. E. (2013), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Report*. A/HRC/22/53 ¶ 77

decision-making and give full, free and informed consent. It has also been recommended that health-care professionals should be educated and trained about bodily diversity as well as sexual and related biological and physical diversity, and that professionals should properly inform patients and their parents of the consequences of surgical and other medical interventions.³¹ [emphasis added]

25. Despite such wealth of powerful and international outcry, involuntary surgeries on infants and children with intersex variations continue to take place in Hong Kong. Meetings between government departments and a local intersex group appear to show that the Government of Hong Kong is generally insensitive to, or in some departments possibly even unaware of, the existence and the sufferings of intersex infants or the intersex community in general. It would at least appear that the Government is not informed of the torture and ill-treatment concerns about gender-normalizing surgeries performed on intersex infants.
26. **Health authorities in Hong Kong have made available virtually no data for infants born with intersex variations, (conditions which have more recently become known in medicine as Disorders of Sex Development (DSD)). The lack of such vital information is a serious impediment to the formulation of policies to address the torture or ill-treatment arising from gender-normalizing surgeries performed on intersex infants.** The importance of such data collection was noted by the Committee on the Rights with People living with Disabilities, which has urged the German authorities to provide similar information and statistics.³²

RECOMMENDED QUESTIONS:

- Does the Government of Hong Kong compile any statistics relating to infants born with intersex variations, or more recently known in medicine as Disorders of Sex Development (DSD), or statistics relating to the intersex population in society in general? If so, is the Government of Hong Kong going to publish such statistics for policy formulation and for the benefit of the civil society? If not, does the Government of Hong Kong have plans to compile such statistics?
- When will the Government of Hong Kong suspend gender-normalizing surgeries on intersex infants, the surgeries of which could amount to torture or ill-treatment without the informed consent of the patient?
- What efforts are the Government of Hong Kong carrying out to educate and sensitize frontline workers, including government officials, law enforcement officials, healthcare workers, social workers and teachers, as well as the general public, as to the existence of intersex people and their needs?

Ill-treatment of transgender people under law enforcement officials and in detention

Concerning articles: 10, 11, 16 (and potentially 1 and 2)

27. Current practice adopted by law enforcement agencies under the Security Bureau of the Government of Hong Kong disregards the unique and sensitive needs of transgender individuals.
28. The Government of Hong Kong consistently disrespects the gender identity of transgender detainees until such time when they can obtain legal recognition in official documents.³³ In Hong Kong, that means a person has to

³¹ World Health Organization, et al. (2014), *Eliminating forced, coercive and otherwise involuntary sterilization - An interagency statement: Report*. Pg.7

³² List of Issues in relation to the Initial report of Germany, CRPD/C/DEU/Q/1, ¶ 12-13

³³ Apple Daily, (2013, July 31) 紀律部隊「一刀切」處理 (Clear-cut procedures adopted by discipline forces, in Chinese). Retrieved from <http://hk.apple.nextmedia.com/news/art/20130731/18357368>

undergo full gender reassignment surgery (GRS), which preconditions the removal of reproductive organs and reconstruction of organs of the preferred gender (please refer to paragraph 7 for detailed requirement). **This is particularly problematic to transgender detainees who have not undergone, do not desire, or cannot undergo GRS (eg. due to preexisting medical conditions, age)** or those detained transgender visitors to Hong Kong who cannot obtain travel documents consistent with their gender identity from their home country.

29. There also does not appear to be any policy under any law enforcement agencies formulated in dealing with third gender recognized by an increasing number of countries. It is uncharted waters for people who are in Hong Kong from country that recognizes their gender identity that falls out of the binary system in the situation of detention.

» Hong Kong Police

30. In a recent response (the Response) to Legislative Council's questions on police arrangements concerning transgender detainees, the Hong Kong Police (the Police) confirmed that it only acted in accordance with the gender identity shown on official identification documents.³⁴ This Response, revealing for the first time on the Police dealing with transgender detainees, introduces the possibility of requesting a third person to be presented, if such a person is available, when a custodial body search is performed against a transgender person.

» Correctional Services Department

31. The Correctional Services Department (CSD) is responsible for rehabilitation and prison services. Transgender inmates are placed automatically at the gender-segregated Siu Lam Psychiatric Center (SLPC),³⁵ a CSD-run special correctional institution responsible for housing inmates requiring "psychiatric treatment for the criminally insane, dangerous and violent persons in custody" as well as individuals "sentenced under the Mental Health Ordinance and those requiring psychiatric assessment or treatment".
32. **As a matter of context, transgender persons in SLPC under CSD can be particularly vulnerable to humiliation, degradation and other pain or suffering.** The CSD relies on the gender marker on identification documents as a deciding factor when placing transgender inmates to serve in the gender-segregated SLPC, ie. trans women with "male" gender marker are to be placed in the male facility with other males and vice versa. It is not our proposition that all trans women detainees must be placed in female facilities and vice versa, for there can be legitimate reasons not to do so (for example, to protect the transgender detainee from violence from general detainee population).³⁶ However, depending on the facts of each case, detaining a trans woman in a male facility can also effectively bar her from undergoing gender reassignment processes and lead to human rights violations,³⁷ or at least leave the detainee in a timid and anxious position.³⁸ There are also consistent reports that male underwear are given to trans women in detention, and vice versa, which lead to daily humiliation.³⁹ Although the practices described in this paragraph may not be ill-treatment under CAT, they represent a general denial of the gender identity of transgender persons in detention, which set the context for more humiliating practices to occur such as those detailed below.

³⁴ Hong Kong Police, *Definition, Identification and Assessment of Domestic Violence and Sexual Violence*. Retrieved from http://www.legco.gov.hk/yr14-15/english/panels/ws/ws_dv/papers/ws_dv20150209cb2-781-1-e.pdf

³⁵ Transsexual gets jail for soliciting. (2013, July 4). The Standard. Retrieved from http://www.thestandard.com.hk/news_detail.asp?we_cat=4&art_id=135173&sid=39907968&con_type=1&d_str=20130704&fc=7

³⁶ For example, see *Farmer v Brennan*, 511 U.S. 825 (1994), in which the Supreme Court of the United States ruled that a prison official's "deliberate indifference" to a substantial risk of serious harm to a trans woman inmate detained in a male facility amounted to cruel and unusual punishment prohibited in the Eighth Amendment of the Constitution of the United States.

³⁷ *R (on the application of B) v Secretary of State for Justice* [2009] EWHC 2220 (Admin).

³⁸ Winter, S. (2014). Identity Recognition Without a Knife: Towards a Gender Recognition Ordinance for Hong Kong's Transsexual People. *Hong Kong Law Journal*, 44(1), ¶ 115-144. At p. 139, Winter described the case of Ina, a trans woman who had not had surgeries and was detained in a male facility under CSD, and who felt "timid and anxious" when surrounded by male inmates.

³⁹ Reported in a local survey (in 2014, yet to be published) of transgender persons who suffered from abuses under law enforcement agencies.

33. The current Prison Rules⁴⁰ require that male inmates to have their hair buzz cut skin tight while female inmates can keep their hair length to above the shoulders. The CSD opts that maintaining the standard code of hair length is of hygiene consideration but has no reasonable medical or scientific justification. Until mid-2013, trans women serving in the male facility of SLPC consistently reported having had their hair buzz cut skin tight in order to comply with Prison Rules. While the practice might not be as humiliating to those who are not transgender, many trans women consider their hair to be the only bodily part over which they have complete control to express and self-actualize their gender identity, which is otherwise already very fragile in a discriminatory society and especially so in detention settings in a male facility. **Mandatory removal of the hair of trans women in detention in accordance with the "male" standard (if the practice still continues) is thus disastrously humiliating, strips a trans woman of her identity and dignity, inflicts unwarranted and highly disproportionate punishment on trans women in detention, and should at least constitute inhuman or degrading treatment or punishment.**
34. In 2013, one trans woman had a nervous breakdown and refused to eat for three days while in detention after her hair was buzz cut skin tight. The practice of mandatory hair removal appears to have relaxed in relation to transgender persons since then. However, there is no sign of the Prison Rules being amended or any other steps being undertaken to ensure that such ill-treatment or punishment on trans women in detention will not occur again.
35. Furthermore, many transgender detainees are foreign sex workers who have overstayed their visitor permit in Hong Kong, who may not have existing gender confirmation treatment records with local health authorities or that from their home country. For various reasons ranging from financial difficulties to the lack of accessible transgender healthcare services at their home country, many of them are on self-medication for hormone treatment before incarceration. However, transgender detainees in such situations are cut off from medication once in detention, and their applications to see a doctor in order to gain access to hormone treatment are lengthy and can even be prolonged beyond their time in detention. **Refusal of hormone treatment to transgender persons who need such treatment is known to be a cause for depression and suicidality.**

Real-life illustration - De facto refusal of hormone medications for transgender detainee in the CSD

A trans woman was convicted and detained in the male ward of SLPC under the CSD in June 2014. Being out off from medications due to detention, she then made an application to the CSD for access to hormonal medications. In November 2014, the medical officer at the CSD evaluated her case and approved that she required such medications. She was again referred to another psychiatric appointment with the Hospital Authority, a statutory body responsible for administering public health, medical and psychiatric care, for the medications, which will be a further 12 months away (ie. around November 2015). Until then, she would not have access to any hormone medications, and by the time she would have received the medications, it is likely that she would have finished serving her sentence and be removed from Hong Kong.

» Immigration Department

36. Foreign inmates are released to the Immigration Department, which is charged with maintaining control of persons entering and exiting Hong Kong, upon completion of their sentence where they await removal or deportation under detention that may last for a few days to a few weeks. **Our interview with a case worker working with transgender individuals under immigration detention reveals that it is commonplace to place transgender individuals in solitary confinement while awaiting removal or deportation by the Immigration**

⁴⁰ Laws of Hong Kong, Chapter 234A Prison Rules

Department. Since July 2013, there have been over a dozen cases where transgender detainees were placed in solitary confinement and the only time they are allowed out of the cell is the short window of shower time, under the notion of protective custody to shield them from the general detainees, as well as the limitations posed by the gender-binary setup of the detention facilities. **The indiscriminate placement of transgender individuals in solitary confinement may constitute as a form of torture or ill-treatment.**

37. In the face of outdated, ill-derived, or nonexistent policy guidelines, law enforcement officials often mishandle transgender suspects and detainees in situations that can lead to cruel, inhuman or degrading treatment or punishment. Much of this arise from law enforcement officials handling transgender detainees based solely on their gender marker in their identification documents, while at the same time denying their true gender identity.

Real-life illustration - Mistreatment of trans woman at the Immigration Department

In September 2013, a Colombian trans woman was refused entry to Hong Kong because her appearance and gender marker did not match that on her passport.⁴¹ The woman, who was studying in Taiwan where she had started undergoing hormone treatment, intended to travel to Hong Kong to renew her passport. Upon landing in Hong Kong, however, the Immigration Department referred her to the detention area where she was searched by male officers despite repeated request to be searched by female officers. Further, she claimed that the officers sexually harassed her over the 9-hour detention. She claimed that the male officers "touched her penis and breasts with their hands" and mocked her during the body search, and the experience left her "destroyed". Even though the claim was denied by authorities, there is no sign of there being an investigation of any sort over the claims. On the principle of nonrefoulement as she may be subject to violence and/or torture, the woman was allowed temporary stay in Hong Kong as her refugee case was being processed by the UNHCR (as the *1951 Refugee Convention* is not applicable to Hong Kong).

38. Further exacerbating the conditions that transgender detainees face in detention and throughout law enforcement, officers of the inappropriate gender are often assigned to perform gender-segregated procedures on transgender persons. In particular, strip searches are conducted upon admission into prisons or other institutions under the CSD. There are reports that male police officers were assigned to conduct body searches or even strip searches on trans women. Such searches can occur in humiliating and degrading circumstances, and it is worth reiterating that the Committee against Torture had previously expressed concern over possible degrading treatment during body searches on GLBTI detainees.⁴²

39. The **European Court of Human Rights in *Valašinas v Lithuania*** also held that:

...obliging the applicant [being a male prisoner] to strip naked in the presence of a woman and then touching his sexual organs and food with bare hands showed a clear lack of respect for the applicant... [which] amounted to degrading treatment within the meaning of Article 3 of the [European Convention of Human Rights].⁴³

40. In our view, the ruling should apply mutatis mutandis to the cases of trans women being strip searched by male

⁴¹ Lam L, (2013, November 3). Transgender woman: Hong Kong customs officers behaved 'like animals' during body search. *South China Morning Post*. Retrieved from <http://www.scmp.com/news/hong-kong/article/1346238/transgender-woman-hong-kong-customs-officers-behaved-animals-during> ;

Rubashkyn, E. (2014, September 5). Misunderstood and stateless in Hong Kong: A transgender woman's nightmare. *CNN*. Retrieved from <http://edition.cnn.com/2014/09/05/world/transgender-asylum-hong-kong/index.html>

⁴² Concluding Observations of the CAT 2002 on Egypt, CAT/C/CR/29/4, ¶ 5

⁴³ European Court of Human Rights, Third Section, 24 July 2001, Application no. 44558/98, ¶ 117

officers in detention settings. However, the Government of Hong Kong has no clear policy preventing such ill-treatment from happening in detention settings and otherwise.

41. The present situation that has come to light raises serious concerns as to the humiliating situation of transgender detainees and prisoners that could constitute cruel, inhuman or degrading treatment under Art. 16. Some cases, for example, the denial of hormonal medications to transgender detainees, can reach the severity threshold of torture defined in Art. 1. They also raise other serious questions pertaining to CAT, including to what extent the law enforcement agencies, including the Police, the CSD and the Immigration, are sensitive to the needs of GLBTI detainees and what steps they have taken to prevent cruel, inhuman or degrading treatment or punishment during detention and other law enforcement operations as required by Arts. 10, 11 and 16.

RECOMMENDED QUESTIONS:

- What efforts are being undertaken to ensure that officials are well equipped and educated to address the unique issues that transgender persons face during law enforcement operations?
- What are the policies of the Correctional Services Department, Immigration Department and Hong Kong Police in body search and detention of transgender persons? In particular, what has each agency done to ensure that ill-treatment of transgender persons will not occur under their purview, or where applicable, will be discontinued?
- Given that practices such as mandatory hair removal and de facto refusal of hormonal treatment can lead to humiliation, pain and suffering for transgender persons, which can constitute CAT violations under Art. 16 or even reaching the severity threshold under Art. 1, what efforts have the Correctional Services Department and other departments of the Government of Hong Kong undertaken to ensure that transgender persons in detention do not face such ill-treatment?